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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

JANINE SUGAWARA, individually and on behalf of all others similarly situated, *Plaintiff,* vs. **PEPSICO, INC.,** a North Carolina corporation; and **DOES 1** through **10,** inclusive, *Defendants.*	**Case No. 2:08-CV-01335-MCE (JFM)** **PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR RECONSIDERATION OF THE MAY 21, 2009 MEMORANDUM AND ORDER GRANTING DEFENDANTS' MOTION TO DISMISS PURSUANT TO FED. R. CIV. P. 59(e)** **MOTION HEARING:** **DATE: AUGUST 13, 2009** **TIME: 2:00 P.M.** **PLACE: COURTROOM NO. 7** **HON. MORRISON C. ENGLAND, JR.** ***Class Action*** ***Jury Trial Requested***

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I. INTRODUCTION

Plaintiff Janine Sugawara respectfully requests reconsideration of the Court's Memorandum and Order ("Order") of May 21, 2009 granting the motion by Defendant PepsiCo, Inc. to dismiss Plaintiff's First Amended Complaint with prejudice and without leave to amend. Plaintiff makes this motion pursuant to Rule 59(e) of the Federal Rules of Civil Procedure ("Fed. R. Civ. P.") on the ground that there exists a "need to correct [a] clear or manifest error in law" and to "prevent manifest injustice." *School Dist. No. 1J v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993).

As set forth below, the Court has relied on flawed and questionable authority to support its finding that Plaintiff has failed to state a claim under California's Unfair Competition Law ("UCL), Bus. & Prof. Code § 17200 et seq., False Advertising Law ("FAL"), California Bus. & Prof. Code § 17500 et seq., and Consumer Legal Remedies Act ("CLRA") Civil Code §1770 et seq.

Additionally, the Court's denial of leave to amend on the basis of "concepts of personal responsibility and common sense"[1] has imposed a pleading burden upon Plaintiff that is unsupported by competent authority.

For the reasons set forth below, Plaintiff contends that she has stated viable claims for relief under the UCL, FAL and CLRA, and requests that the Court amend its Order to permit her to proceed on those causes of action and to amend any deficiencies in her other causes of action so they might be fully heard and decided upon their merits after the parties have had an opportunity to conduct discovery and investigate his claims.

II. PROCEDURAL HISTORY

This action was originally filled on June 9, 2008 (Docket, No. 1). With a motion to dismiss the Complaint pending (Docket, No. 7), Plaintiff filed a First Amended Complaint ("FAC") on September 23, 2008 (Docket, No. 14).

Defendant filed a motion to dismiss the FAC on January 28, 2009 (Docket, No.

[1] Order at 12.

23), which Plaintiff opposed (Docket, No. 28), and pursuant to a Minute Order entered on April 21, 2009 (Docket, No. 30), the Court took the motion to dismiss under submission without oral argument.

On May 21, 2009, the Court's Order granting Defendant's motion without leave to amend was entered (Docket, No. 32).

III. FACTUAL ALLEGATIONS IN FIRST AMENDED COMPLAINT

The following allegations are reproduced as alleged from the FAC.

Defendant PepsiCo manufactures, markets, and promotes Cap'n Crunch Crunchberries (the "Product").

In addition to the use of the word "berries" in the Product name, the Product's principal display panel ("PDP") - the portion of the Product box designed to face consumers as they shop in a market aisle - features the Product's namesake, "Cap'n Crunch" thrusting a spoonful of "Crunchberries" at the prospective buyer.

The Crunchberries are pieces of cereal in bright fruit colors, shaped to resemble berries. Close inspection reveals that the Crunchberries on the PDP are not really berries, but the colorful Crunchberries, combined with the "berry" in the Product name, conveys only one message: that Cap'n Crunch is not all sugar and starch – it contains redeeming fruit.

This message is supplemented and reinforced by marketing which represents, in a matter-of-fact manner: "Crunch Berries is a combination of Crunch biscuits *and colorful red, purple, teal and green berries* (Emphasis added).

There can be no other reason for the emphasis on berries than to lead consumers to believe the Product is made with real fruit content. Neither PepsiCo nor Quaker is a novice when it comes to marketing.

In truth, however, the Product contains no actual berries of any kind. If the consumer takes the box from the shelf and examines the fine print of the ingredient list, he or she will discover that the only fruit content is a touch of strawberry fruit concentrate – twelfth in order on the ingredient list, just after partially hydrogenated

soybean oil and "natural and artificial flavors," and just before malic acid.

Natural flavoring provides no nutritional value.[2] The rest of the ingredients are: corn flour, sugar, oat flour, brown sugar, coconut oil, salt, sodium citrate, nonfat dry milk, whey, niacinamide, reduced iron, zinc oxide, yellow 5, red 40, mono and diglycerides, yellow 6, blue 1, thiamin mononitrate, pyridoxine hydrochloride, BHT, riboflavin and folic acid. [True and correct representations of the Product labeling and marketing copy are attached to the FAC and incorporated by reference herein.]

Plaintiff contends that Defendant's marketing of the Product in this manner is deceptive and likely to mislead and deceive a "reasonable consumer" such as herself in violation of California statutes and common law causes of action that parallel, and do not conflict with, the labeling requirements established by the Federal Food, Drug, and Cosmetic Act ("FDCA").[3] See California's Sherman Food, Drug, and Cosmetic Law.[4]

During the past four years, Plaintiff, at various times purchased the Product, in large part because she had been exposed to advertising and representations of PepsiCo and Quaker as set forth above. She was misled by the packaging and marketing, which by design and intent convey the message that the Product contains real fruit. She trusted the Quaker label because of the company's long history of producing other wholesome breakfast cereals

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[2] 21 CFR § 101.22(a)(3). "The term natural flavor or natural flavoring means the essential oil…or fermentation products thereof, whose significant function in food is flavoring rather than nutritional."

[3] Codified at 21 U.S.C. §§ 301, et seq., with implementing regulations found at 21 C.F.R. §§ 1.1, et seq.

[4] Cal. Health and Safety Code §§ 109875 et seq. (The FDCA labeling regulations also have been incorporated into California law by reference. California Section 110100 of the California Health and Safety Code provides: "All food labeling regulations and any amendments to those regulations adopted pursuant to the federal act, in effect on January 1, 1993, or adopted on or after that date shall be the food labeling regulations of this state.")

However, Plaintiff has since learned that many popular foods and beverages are marketed as if they are made with fruit, but actually contain little or no fruit at all. The Strategic Alliance for Healthy Food and Activity Environments (hereinafter "Strategic Alliance") has published the results of a study examining the ingredients of widely advertised foods with references to fruit on the packaging. [A true and correct copy of the study, annotated to highlight references to the Product, is attached to the FAC and incorporated by reference.]

The study concluded, among other things, that despite advertising and packaging that suggests the presence of fruit, more than half of the food products studied – including the Product - contain no fruit at all. The study concluded that there is reason to be concerned that current packaging labels and advertising are misleading consumers about the nutritional value of some of the most popular foods and snacks.

Plaintiff relied on PepsiCo's marketing representations. Had she known that "Cap'n Crunch® with Crunchberries" contained no fruit, she would not have purchased it. In doing so, was deprived of the benefit of her bargain; the deceptive representations described above cost her money because she received a Product of less value than she paid for it. FAC, ¶¶ 8 – 19.

IV. ARGUMENT

A. This Motion to Reconsider Is Proper Pursuant to Fed. R. Civ. P. 59(e).

The Ninth Circuit has determined that motions to reconsider should be treated as motions to alter or amend under Fed. R. Civ. P. 59(e). *Sierra On-Line, Inc. v. Phoenix Software, Inc.,* 739 F.2d 1415, 1419 (9th Cir. 1984). A court is justified in reconsidering a prior order when it "(1) is presented with newly discovered evidence, (2) committed clear error or the initial decision was manifestly unjust, or (3) if there is an intervening change in controlling law." *School Dist. No. 1J v. ACandS, Inc., 5* F.3d 1255, 1263 (9th Cir. 1993).

Rule 59(e) applies only to motions to alter or amend "a judgment," which is defined in Fed. R. Civ. P. 54 as "any order from which an appeal lies." Fed. R. Civ. P.

54. "A 'judgment' for purposes of the Federal Rules of Civil Procedure would appear to be equivalent to a 'final decision' as that term is used in 28 U.S.C. § 1291." *Bankers Trust Co. v. Mallis,* 435 U.S. 381, 384 n.2 (1978).

Plaintiff respectfully contends that, in dismissing the FAC with prejudice and without leave to amend, the Court committed clear errors of law, and that if the Order is not amended, Plaintiff and members of the putative class will suffer a manifestly unjust result.

The Order, entered May 21, 2009, qualifies as a final decision or judgment pursuant to Fed. R. Civ. P. 54, so this motion is appropriate procedurally. Furthermore, it is timely, having been filed within the ten-day deadline set in Fed. R. Civ. P. 59(e). *See also,* Fed. R. Civ. P. 6(a).

B. The Order Relies Upon Flawed and Questionable Authority to Determine the Validity of Plaintiff's Claims.

The Court initiates its analysis of Plaintiff's UCL, FAL and CLRA causes of action by faithfully tracking the reasoning employed by the Ninth Circuit in *Williams v. Gerber Products Co.,* 523 F.3d 934 (9th Cir. 2008), a decision the Court characterizes as "[t]he leading Ninth Circuit case in this area."[5]

As the Order correctly states, causes of action for violations of the UCL, FAL and CLRA "'"are governed by the "reasonable consumer" test.'"[6] The Order then defines that standard as presented in *Williams,* and quotes *Williams* again for the proposition that the "'[p]rimary evidence in a false advertising case is the advertising itself.'"[7] The Order acknowledges the assertion in *Williams* that, "'whether a business practice is

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[5] Order at 6.

[6] Order at 6, quoting *Williams v. Gerber Products Co.,* 523 F.3d 934, 938 (9th Cir. 2008).

[7] Order at 6, quoting *Williams,* 552 F.3d at 938, which quotes *Brockey v. Moore,* 107 Cal.App.4th 86, 100 (Cal.App. 2003).

deceptive will usually be a question of fact not appropriate for decision on demurrer.'"[8] At that point, however, the Court sets *Williams* aside.

Williams pauses briefly to elaborate on the reasons underlying the difficulty of determining deceptive business practices on demurrers,[9] citing the following authority:

> *Linear Technology Corp. v. Applied Materials, Inc.,* 152 Cal.App.4th 115, 134-35 (Cal.App. 2007) ("Whether a practice is deceptive, fraudulent, or unfair is generally a question of fact which requires 'consideration and weighing of evidence from both sides' and which usually cannot be made on demurrer." (quoting *McKell v. Washington Mutual, Inc.,* 142 Cal.App.4th 1457, 1472 (Cal.App. 2006))); *Committee on Children's Television,* 35 Cal.3d at 197 (finding demurrer inappropriate in case where parents alleged deceptive advertising of sugar cereals).

Williams, 552 F.3d at 938.

The Order, however, bypasses the above and picks up on the sentence in *Williams* that follows the omitted authority: "However, '[d]ecisions granting motions to dismiss claims under the Unfair Competition Law have occasionally been upheld.'"[10] The omission and subsequent selection from *Williams* are noteworthy, given the Court's next statement in the Order: "This Court believes that the instant case falls into that 'rare' category of cases in which dismissal is appropriate."[11]

The Court then moves on to distinguish Plaintiff's facts from those in *Williams*. In doing so, the Court reaches certain conclusions without reference law, apparently basing those conclusions on its own review of the Product packaging:[12]

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[8] Order at 6, quoting *Williams,* 552 F.3d at 938.

[9] Or, for purposes of the case at hand, motions to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), in which, likes demurrers, the case is in the initial stages and the court's determination is restricted to those matters contained in the pleading, or which can be judicially noticed.

[10] Order at 6, quoting *Williams,* 552 F.3d at 938.

[11] Order at 6.

[12] As did the District Court in *Williams v. Gerber Products Company,* 439 F.Supp.2d 1112 (S.D. Cal. 2006). *See Williams,* 552 F.3d at 938.

> This Court is not aware of, nor has Plaintiff alleged the existence of, any actual fruit referred to as a "crunchberry." Furthermore, the "Crunchberries" depicted on the PDP are round, crunchy, brightly colored cereal balls, and the PDP clearly states both that the Product contains "sweetened corn & oat cereal" and that the cereal is "enlarged to show texture." *Thus, a reasonable consumer would not be deceived into believing that the Product in the instant case contained a fruit that does not exist. …*
> In this case, there is no reference to fruit on the PDP unless one believes that a "Crunchberry" is some form of produce. Indeed, even though Plaintiff claims that the brightly-colored cereal balls are shaped to resemble berries, she acknowledges that "[c]lose inspection reveals that Crunchberries on the PDP are not really berries." Opposition, 2:11. *Accordingly, it is entirely unlikely that members of the public would be deceived in the manner described by Plaintiff.*[13]

The Order then concurs with the Central District's decision in *McKinniss, et al. v. Kellogg USA,* No. CV 07-2611, 2007 WL 4766060 (C.D. Cal. Sept. 19, 2007): "Thus, because the instant facts are distinguishable from those in *Williams,* and are, to the contrary, more on par with those alleged in *McKinniss,* this Court now holds that Plaintiff has failed to state UCL, FAL, or CLRA claims as a matter of law."[14]

The Court is well within its discretion to distinguish the facts in Plaintiff's case from those in *Williams*. However, it errs when it relies upon *McKinniss* to find "that Plaintiff has failed to state UCL, FAL, or CLRA claims as a matter of law." In reaching that very same conclusion, the *McKinniss* Court relied solely on the Southern District decision that the Ninth Circuit reversed in *Williams*:

> A reasonable consumer, even on the most cursory review of the Froot Loops box, could not, as a matter of law, be misled into believing that the cereal contains actual fruit. "Where a consumer can readily and accurately determine the nutritional value and ingredients of a product, and the product packaging does not affirmatively mislead the consumer by means of specific representations, no reasonable consumer would be ... deceived by depictions of fruit and fruit-like substances on the primary packaging

[13] Order at 7-8 (emphasis added throughout).

[14] Order at 8.

> label." *Williams,* 439 F.Supp.2d at 1116. Thus, the Court finds the characteristics of the Froot Loops box challenged by Plaintiffs are not deceptive as a matter of law.

McKinniss, 2007 WL 4766060 at **4-5.

In reversing the Southern District decision relied upon in *McKinniss*, the Ninth Circuit found that it "could plausibly be proven that a reasonable consumer would be deceived by the Snacks packaging." *Williams* at 940.

The Court's determination that Plaintiff has, "as a matter of law," failed to state a claim for her UCL, FAL and CLRA claims rests solely on a Central District finding grounded in reversed law. Plaintiff has adequately pleaded her causes of actions for violations of the UCL, FAL and CLRA, and she has provided sufficient facts to state a plausible claim under the standard established in *Bell Atlantic Corp. v. Twombly,* 127 S.Ct. 1955 (2007) and applied in *Williams*.

The Court has assumed the role of the "reasonable consumer" and decided at this early stage of litigation that "it is entirely unlikely that members of the public would be deceived in the manner described by Plaintiff." However, the reasonable consumer standard is not a narrow construct. "[A] reasonable consumer may be unwary or trusting," *Lavie v. Procter & Gamble Co.,* 105 Cal.App.4th 496 506 (2003), and is not required" to investigate the merits of advertising claims." Id. at 504. "[A] reasonable consumer need not be exceptionally acute and sophisticated." Id. at 509.

As noted in *Williams,* whether or not Defendant's representations rise to the level of unfair, deceptive, or unlawful business practices as defined by the UCL, FAL and CLRA is largely a question of fact that should be determined only after the parties have had the opportunity to complete discovery and present evidence. Plaintiff respectfully requests that the Order be amended to allow her to proceed on those causes of action and have them fully heard.

C. The Order Imposes on Plaintiff a New and Unfounded Pleading Burden.

The Court's use of questionable case law is compounded by perhaps the most striking statement in the entire Order, found in its conclusion. Noting that "[u]nder

normal circumstances" the Court would grant leave to amend, the Order states:

> In this case, however, it is simply impossible for Plaintiff to file an amended complaint stating a claim based upon these facts. *The survival of the instant claim would require this Court to ignore all concepts of personal responsibility and common sense. The Court has no intention of allowing that to happen.*[15]

As admirable as those sentiments might be, Plaintiff can find no legal basis for shifting the responsibility for unfair, deceptive or unlawful business practices from the advertiser to the consumer.

Given decades of warnings and general knowledge about the serious health risks associated with cigarette smoking, it is difficult to imagine a consumer group more appropriate than smokers for the application of such a standard. However, in *Altria Group, Inc. v. Good*, __U.S.__, 129 S.Ct. 538 (Dec. 16, 2008), the Supreme Court recently held that the Federal Cigarette Labeling and Advertising Act does not preempt a claim for deceptive advertising of "light" cigarettes under the Maine Unfair Trade Practices Act, a statute similar to the UCL, and has permitted the smokers to proceed.

As California's Supreme recently stated in a decision addressing standing and reliance in UCL class actions, "[t]he substantive right extended to the public by the UCL is the '"'right to *protection from* fraud, deceit and unlawful conduct'"' (*Prata v. Superior Court* (2001) 91 Cal.App.4th 1128, 1137), and the focus of the statute is on the *defendant's conduct.*" *In Re Tobacco II Cases,* __Cal.4th__ (May 18, 2009) Slip op. at 11 (emphasis added). This serves "the statute's larger purpose of protecting the general public against unscrupulous business practices." Id., citing *Fletcher v. Security Pacific National Bank,* 23 Cal.3d 442, 453 (1979).

The UCL and FAL are California's primary false advertising laws. Since a UCL violation is by definition an act of unfair competition, a violation of the FAL "necessarily

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[15] Order at 12 (emphasis added).

violates" the UCL. *Committee on Children's Television, Inc. v. General Foods Corp.,* 35 Cal.3d 197, 210 (1983). "Unfair competition" is defined by the UCL as any "unlawful, unfair or fraudulent business practice and unfair, deceptive, untrue or misleading advertising ...." Bus. & Prof. Code 17200. To state a claim, a plaintiff need not plead and prove the elements of a tort; they are required only to show only that "members of the public are likely to be deceived." *Chern v. Bank of America,* 15 Cal.3d 866, 876 (1976), *see also Committee on Children's Television, Inc. v. General Foods Corp.,* supra, 35 Cal. 3d at p. 211.). The reasonable consumer standard applied to those causes of action also is used in evaluating claims under the CLRA. *Williams,* 552 F.3d at 938.

A UCL claim can be based on false representations to the public, as well as """"those which may be accurate on some level, but will nonetheless tend to mislead or deceive. …A perfectly true statement couched in such a manner that it is likely to mislead or deceive the consumer, such as by failure to disclose other relevant information, is actionable under'" the UCL.' [Citation.]" *Linear Technology Corp. v. Applied Materials, Inc.* (2007) 152 Cal.App.4th 115, 134 [61 Cal. Rptr. 3d 221].)

> While a plaintiff must show that the misrepresentation was an immediate cause of the injury-producing conduct, the plaintiff need not demonstrate it was the only cause. "'It is not . . . necessary that [the plaintiff's] reliance upon the truth of the fraudulent misrepresentation be the sole or even the predominant or decisive factor influencing his conduct. . . . It is enough that the representation has played a substantial part, and so had been a substantial factor, in influencing his decision.' [Citation.] [¶] Moreover, a presumption, or at least an inference, of reliance arises wherever there is a showing that a misrepresentation was material. [Citations.] A misrepresentation is judged to be 'material' if 'a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question' [citations], and as such materiality is generally a question of fact unless the 'fact misrepresented is so obviously unimportant that the jury could not reasonably find that a reasonable man would have been influenced by it.' [Citation.]" (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 976-977.) Nor does a plaintiff need to demonstrate individualized reliance on specific misrepresentations to satisfy the reliance requirement. ....

In Re Tobacco II Cases, Slip op. at 31-32.

Common sense and personal responsibility do not factor into the analysis, and for good reason. Common sense is not necessarily common, and both concepts are variable over time, and among individuals and groups. What passes for common sense to the "exceptionally acute and sophisticated" reasonable consumer might not be readily apparent to reasonable consumer who is less so.

Plaintiff respectfully requests that the Order be amended to remove the application of this standard, and that she be permitted to proceed on her UCL, FAL and CLRA causes of action, and granted leave to cure any deficiencies that might exist among her other causes of action.

V. CONCLUSION

In light of the foregoing, Plaintiff respectfully requests that the Court amend its Order and permit Plaintiff to proceed with her case so that his claims can be judged on their merits.

HEWELL LAW FIRM

DATED: June 1, 2009

/s/ Harold M. Hewell
By: Harold M. Hewell
Attorney for Plaintiff