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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

KATRINA AND BENJAMIN NECAISE, individually and on behalf of all those similarly situated,

Plaintiffs,

v.

GENERAL MILLS, INC., a Delaware corporation,

Defendant.

Case No. 3:24-cv-00367-TWR-VET

DEFENDANT GENERAL MILLS, INC.'S NOTICE OF MOTION AND MOTION TO DISMISS AMENDED COMPLAINT

Judge: Hon. Todd W. Robinson
Hearing Date: September 5, 2024
Hearing Time: 1:30 p.m.

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on September 5, 2024 at 1:30 p.m., before the Honorable Todd W. Robinson, United States District Court for the Southern District of California, 333 West Broadway, San Diego, CA 92101, Courtroom 14A, Defendant General Mills, Inc. ("General Mills"), through its undersigned counsel, will and hereby does move this Court for an order to dismiss Plaintiffs Katrina and Benjamin Necaise's Amended Complaint with prejudice, pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).

This Motion is made on the following grounds:

1. Plaintiffs lack Article III standing to pursue their claims and to seek injunctive relief;
2. Plaintiffs' claims are expressly preempted by federal law;
3. Plaintiffs have failed to establish that General Mills had a legal duty to disclose the potential trace presence of chlormequat in the challenged products; and
4. Plaintiffs' claim for breach of implied warranty fails for the additional reason that Plaintiffs cannot allege that the challenged products were not fit for their ordinary purpose.

Prior to filing this motion, counsel for the Parties met and conferred in a good faith attempt to resolve these issues without involving the Court. The Parties did not reach agreement that would obviate the need for this motion.

This motion is based upon this Notice of Motion and Motion, the concurrently filed Memorandum of Points and Authorities, Request for Judicial Notice, Declaration of Charles Sipos, all records and papers on file in this action, and any other matters that may be presented to this Court at the hearing or otherwise.

Dated: May 17, 2024

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By: */s/ Charles C. Sipos*

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GENERAL MILLS, INC., a Delaware corporation,

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Case No. 3:24-cv-00367-TWR-VET

DEFENDANT GENERAL MILLS, INC.'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS MOTION TO DISMISS

Judge: Hon. Todd W. Robinson
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I. INTRODUCTION

Plaintiffs Benjamin and Katrina Necaise insist they were deceived about the safety of Defendant General Mills' well-known and nutritious Cheerios line of cereals. The premise of the supposed deception? That General Mills failed to disclose on Cheerios' labels that it might contain residual amounts of the pesticide chlormequat, albeit at infinitesimal levels that are orders of magnitude below the regulatory threshold the Environmental Protection Agency ("EPA") has deemed safe.[1] This central theory of liability in the Amended Complaint ignores Congress' comprehensive statutory scheme to regulate pesticides like chlormequat. Properly applied, this regime mandates dismissal of the Amended Complaint on multiple grounds.

First, Plaintiffs' allegations of "safety" concerns premised on trace amounts of chlormequat are, in light of governing agency determinations, too conjectural and speculative to support Article III standing. The EPA has, after comprehensive scientific assessment and review, determined that oats (the principal ingredient in the Cheerios products at issue) are permitted to have residual levels of chlormequat at up to 40 parts per million ("ppm"). Yet, the "tests" of Cheerios that the Amended Complaint cites, both the third-party tests and Plaintiffs' independent tests, report chlormequat levels in Cheerios that are a tiny fraction of this amount—sometimes as little as .03 ppm. Plaintiffs' speculation that Cheerios are nonetheless harmful is not enough to give rise to the concrete injury Article III requires. And because the Cheerios that Plaintiffs purchased provided exactly what was offered, there is no economic injury that would give rise to standing, either.

Second, the relevant labeling standard in the federal Food, Drug and Cosmetics Act ("FDCA"), 21 U.S.C. § 343, *et. seq.*, imposes no requirement that labels of foods

[1] Despite its function as a "plant regulator," chlormequat is referred to as a "pesticide" in accordance with EPA's statutory definition of the term. *See* 7 U.S.C. § 136(u)(2) (defining pesticide as inclusive of plant regulators).

like Cheerios disclose the potential presence of trace pesticides. 21 U.S.C. § 343(i)(2). Congress determined this labeling standard must be followed nationwide and uniformly, and so enacted an express preemption provision that bars any labeling requirements "not identical" to the federal requirement. 21 U.S.C. § 343-1(a)(2). Plaintiffs' demand that Cheerios' labeling bear some disclosure about residual pesticides, which federal law undoubtedly does not require, is, therefore, expressly preempted.

Third, Plaintiffs' Amended Complaint fails to meet the exacting legal standards required to show that General Mills had any legal duty, under the auspices of California consumer protection law, to label Cheerios as potentially containing trace levels of chlormequat. The standard for pure omission claims, like the one Plaintiffs assert here, are narrow and exacting under binding Ninth Circuit law. To meet this standard, Plaintiffs must plausibly allege that consuming Cheerios presents an "unreasonable safety hazard," or that Cheerios' "central function" is so impaired that it no longer serves any purpose as food. The Amended Complaint does not remotely approach these standards: Plaintiffs concede that they have consumed Cheerios "for years" without incident and the Amended Complaint otherwise disclaims any form of personal injury. Moreover, a recent body of Rule 12 case law from within this District and elsewhere, in cases likewise challenging the presence of trace substances in food as part of the agricultural process, confirms that dismissal is warranted on these grounds as well.

For all these reasons, the Amended Complaint should be dismissed with prejudice.

II. STATEMENT OF FACTS

A. General Mills Manufactures And Accurately Labels Cheerios Cereals.

General Mills manufactures the product in suit, Cheerios brand cereals. Am. Compl. ¶ 16. Cheerios have been manufactured for decades and are well-known to

consumers as a nutritious and beneficial food. *Id.* ¶ 18. There is nothing on the label of Cheerios cereals alleged to be misleading, or non-compliant with governing regulations. Instead, the Amended Complaint contends that certain third-party "testing" detected the presence of trace amounts, as little as 40 parts *per billion*, of the pesticide chlormequat in certain brands of Cheerios which were then "confirmed through additional testing" conducted at the direction of counsel. *Id.* ¶ 20. The Amended Complaint thus asserts that Cheerios' labels are misleading because they "do not list chlormequat in the ingredient section, nor do they warn about the inclusion or potential inclusion of chlormequat in the Products." *Id.* ¶ 23.

As the Amended Complaint and EPA regulations both reflect, chlormequat is used as a "regulator" to manage plant growth in oats and thereby assist in the harvesting process. *Id.* ¶ 21; *see also* EPA, Chlormequat Chloride; Pesticide Tolerances, 85 Fed. Reg. 31383 (May 26, 2020) (establishing regulatory thresholds for the "safe" levels of residual chlormequat in oats). Whole grain oats are the principal ingredient in the challenged Cheerios products. *See* Declaration of Charles Sipos ("Sipos Decl.") Ex. A. As explained below, however, the Amended Complaint disregards the governing federal regime for chlormequat's use, for food labeling, and agency conclusions that confirm chlormequat's safe usage.

B. The EPA and FDA Expressly Permit Trace Chlormequat In Oats as "Safe" And Do Not Require Label Disclosures.

Chlormequat is subject to a comprehensive body of statutes and regulations, implemented through the coordinated efforts of the EPA and the Food and Drug Administration ("FDA"). *See generally* 21 U.S.C. § 346a. The FDA expressly permits foods to contain trace amounts of pesticides, and only deems such foods "adulterated" if the "residual" amount of pesticide in the food exceeds levels the agency considers "unsafe." *See* 21 U.S.C. § 342(a)(2)(B). To give effect to this provision, the FDA works in conjunction with the EPA, who, in turn, sets the permitted "residual levels" for more than 500 chemicals that may be present in trace

amounts in foods. *See* 40 C.F.R. Part 180, Subpart B.

The EPA's established residual level for chlormequat in oats is 40 ppm. *See* 40 C.F.R. § 180.698 (tolerances for chlormequat residue). The EPA's establishment of a "safe" level means that "the Administrator has determined that there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information." 21 U.S.C. § 346a(b)(2)(A)(i), (ii); *see also* Chlormequat Chloride; Pesticide Tolerances, 85 Fed. Reg. at 31385 ("Upon consideration of the validity, completeness, and reliability of the available data as well as other factors the FFDCA requires EPA to consider, EPA has determined that this chlormequat chloride tolerance is safe.").

The FDA's statutory responsibilities under the FDCA extend further to implementation of national requirements for food labeling. *See generally* 21 U.S.C. § 343. The FDCA speaks directly to the issue of food labeling for the presence of residual pesticides. *See Id.* § 343(l).

The FDCA only requires such labeling, under Section 343(l), for residual pesticides present in "raw agricultural commodities." *Id*. The requirement is limited: It applies only to "raw agricultural commodities" where the pesticide has been "applied after harvest," and then requires labeling declaring "the presence of such chemical" only on the "shipping container" of the commodity. *Id*. Once the agricultural commodity is "removed from the shipping container" and "displayed for sale at retail out of such container," the labeling requirement no longer applies. *Id*.

Packaged cereals like Cheerios cereals are, of course, not "raw agricultural commodities." *See* 21 U.S.C. § 321(r) ("The term 'raw agricultural commodity' means any food in its raw or natural state"); *see also* Am. Compl. ¶¶ 17–18; Sipos Decl. Ex. A. Cheerios are, instead, a "food fabricated from two or more ingredients," and so subject to the requirements of a different labeling standard imposed by 21

U.S.C. § 343(i)(2). Under Section 343(i)(2), the relevant labeling requirement simply calls for disclosure of "the common or usual name of each such ingredient" in the food and imposes no requirement as to the labeling of trace pesticides. *Id*. As the Amended Complaint acknowledges, Cheerios' labels comply in full with Section 343(i)(2), by disclosing each ingredient in the product. *See* Am. Compl. ¶ 23 (referring to Cheerios' ingredient labeling); *see also* Sipos Decl. Ex. A.

Published FDA policy corroborates the labeling distinction drawn between Section 343(l) and Section 343(i)(2). The FDA maintains a Compliance Policy Guide ("CPG") directed to residual pesticides and the labeling of food. *See* Sipos Decl. Ex. B (FDA, "CPG Sec. 562.700 Labeling of Food Bearing Residues of Pesticide Chemicals") (Reissued Feb. 1, 1989) ("Pesticide Labeling Policy"). The Pesticide Labeling Policy states that there is no labeling obligation to disclose the presence of trace pesticides in foods like Cheerios: "Pesticide residues resulting from preharvest application to raw agricultural commodities have never been considered ingredients subject to the label declaration required by [§ 343(i)(2)] of the [FDCA]." *Id*.

C. Overview of the Amended Complaint's Allegations.

Against this statutory backdrop, the Amended Complaint challenges the safety of Cheerios cereals due to the alleged presence of chlormequat and demands imposition of new labeling requirements to disclose its presence. Am. Compl. ¶¶ 22–23, 58. As to the safety of chlormequat, the Amended Complaint purports to rely on the "testing" and assertions of the Environmental Working Group ("EWG"), confirmed by "additional testing" conducted at the direction of Plaintiffs' counsel. *Id.* ¶¶ 20, 24. The EWG has purported to establish a "health benchmark" of .03 ppm for trace chlormequat. *Id.* ¶ 24. This "benchmark" is nearly 3,000 times less than the 40 ppm that the EPA and FDA have deemed safe. *See* 40 C.F.R. § 180.698. Both the EWG testing and the confirmatory testing relied on in the Amended Complaint, purportedly show that some Cheerios contain trace chlormequat in levels that vary

from between .03 ppm to .10 ppm. *Id.* at ¶ 20. Notably, there is still no allegation that the Cheerios the Plaintiffs actually purchased contained chlormequat at all, much less that chlormequat was present in unlawful or unsafe levels. *Id*. In other words, the additional testing by Plaintiffs' counsel does not change the fact that no testing was done on the products that Plaintiffs in fact purchased.

As to the Plaintiffs, the Amended Complaint does not allege they suffered any physical harm, or even any risk of such harm, from eating Cheerios. Am. Compl. ¶ 30. Indeed, the only "injury" alleged is claimed economic harm from Plaintiffs (now) unwanted Cheerios purchases. *Id.* ¶ 31 ("Plaintiff suffered economic injury…"). The Amended Complaint does not point to any misleading statement on the labels of Cheerios, and instead proceeds purely on the theory that that the potential presence of trace chlormequat was misleadingly omitted from the products' labels. *Id.* ¶¶ 21, 27, 28.

Based on these allegations, the Amended Complaint asserts three causes of action: (1) violation of the California Legal Remedies Act ("CLRA"); (2) unjust enrichment; and (3) breach of implied warranty. *Id*. ¶¶ 51–71. The Amended Complaint seeks certification of both a California class, for injunctive relief under Fed. R. Civ. P. 23(b)(2) and damages under 23(b)(3). *Id*. ¶¶ 33–50.

III. LEGAL STANDARD

A. Rule 12(b)(1)

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(1) challenges the Court's subject-matter jurisdiction over the action, including plaintiff's standing. Fed. R. Civ. P. 12(b)(1). Once a defendant moves to dismiss for lack of subject matter jurisdiction, the plaintiff has the burden of establishing the court's jurisdiction. *Chandler v. State Farm Mut. Auto. Ins. Co.*, 598 F.3d 1115, 1122 (9th Cir. 2010). "It is appropriate to address the question of standing in deciding a motion to dismiss because '[t]he elements of standing are 'an indispensable part of the

plaintiff's case,' and accordingly must be supported at each stage of litigation in the same manner as any other essential element of the case.'" *Warren v. Fox Fam. Worldwide, Inc*., 328 F.3d 1136, 1140 (9th Cir. 2003) (citations omitted) (affirming Rule 12 dismissal for lack of standing).

B. Rule 12(b)(6)

Dismissal under Rule 12(b)(6) is proper where there is either "the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). A sufficient complaint "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* Determining whether a complaint states a plausible claim for relief is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 679. The court need not "assume the truth of legal conclusions merely because they are cast in the form of factual allegations." *Warren*, 328 F.3d at 1139 (citation omitted.) Dismissal with prejudice is proper if amendment would be futile. *See Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv. Inc*., 911 F.2d 242, 246–47 (9th Cir. 1990) (per curiam).

IV. ARGUMENT

A. Plaintiffs Do Not Plausibly Allege Any Article III Injury.

Plaintiffs' Amended Complaint should be dismissed in its entirety because Plaintiffs do not, and cannot, plausibly allege they suffered an injury sufficient to confer Article III standing. To establish Article III standing, a plaintiff must demonstrate (1) that she has suffered an injury-in-fact that is concrete, particularized, and actual or imminent, (2) that the injury is fairly traceable to the adverse challenged conduct, and (3) that the injury suffered is redressable by a favorable ruling. *Lujan v.*

Defs. of Wildlife, 504 U.S. 555, 560–61 (1992); *see also McGee v. S-L Snacks Nat'l*, 982 F.3d 700, 706 (9th Cir. 2020). The injury cannot be "speculative." *Lujan*, 504 U.S. at 564 n.2. Unsurprisingly, Plaintiffs, who claim to have purchased Cheerios regularly for many years (Am. Compl. ¶ 25), do not allege any physical injury from their repeated consumption of the product. Instead, Plaintiffs allege that they "would not have purchased the Products had their labels accurately disclosed the presence of chlormequat in the Cheerios." *Id.* ¶ 27. In other words, the only alleged injury is a hypothetical economic harm.

To plausibly plead economic harm, it is not enough for Plaintiffs to "simply characterize [their] purchasing decision as an economic injury." *In re Johnson & Johnson Talcum Powder Prods. Mktg., Sales Pracs. & Liab. Litig.*, 903 F.3d 278, 281 (3d Cir. 2018) (cited with approval by *McGee*, 982 F.3d at 706). Instead, to plead an economic injury, a plaintiff "must show that she did not receive a benefit for which she actually bargained." *McGee*, 982 F.3d at 706.

The Ninth Circuit has thus firmly established that some bare allegation that a product may be harmful, or that it could contain some potentially harmful substance, is insufficient to give rise to an economic injury where no such harm has accrued. *Id.*; *accord Bowen v. Energizer Holdings, Inc.*, No. CV 21-4356, 2023 WL 1786731, at *7 (C.D. Cal. Jan. 5, 2023) ("[W]here a complaint does not plausibly allege that a product is defective or unsafe, courts will find that its purchase did not constitute an economic injury.") (citing *Birdsong v. Apple, Inc.*, 590 F.3d 955, 961 (9th Cir. 2009). There is, in fact, wide agreement among the Circuit Courts that the presence of some unwanted substance that does not affect the character of the product is inadequate to give rise to an Article III economic injury. *See In re: Recalled Abbott Infant Formula Prods. Litig*, 97 F.4th 525, 531 (7th Cir. 2024) ("Plaintiffs have no economic injury because the products they purchased were not rendered valueless; they received the infant formula for which they bargained."); *Wallace v. ConAgra Foods, Inc.*, 747

F.3d 1025, 1029 (8th Cir. 2014); *In re Johnson & Johnson*, 903 F.3d at 281; *Doss v. Gen. Mills Inc.*, 816 F. App'x 312, 314 (11th Cir. 2020) (per curiam) (holding that alleged presence of trace pesticide in Cheerios cereal, unaccompanied by any allegation of harm to plaintiff, insufficient to confer Article III standing). This body of law is fatal to Article III standing here in multiple ways.

First, the Amended Complaint does not allege that the Cheerios Plaintiffs themselves purchased contained *any* trace chlormequat. Instead, the Amended Complaint merely refers to third-party testing suggesting that certain samples of Cheerios have "tested positive for the presence of chlormequat" and then states that these results have been confirmed by testing of "a number of Cheerios Products" under the direction of Plaintiffs' counsel, without any further detail. Am. Compl. ¶ 20. But alluding to the potential for a substance to be present, without any allegation that *Plaintiffs*' Cheerios contained that substance, is inadequate to confer standing. The analysis in *Doss v. General Mills* is instructive. The plaintiff in that case relied on third-party EWG testing that purported to reveal the presence of a trace pesticide in Cheerios cereals (glyphosate). 816 F. App'x at 314. But—as is true here—because the complaint failed to allege that the plaintiff herself purchased Cheerios that contained trace glyphosate, she lacked standing to proceed *Id.* ("[Plaintiff] has not alleged that she purchased *any* boxes of Cheerios that contained any glyphosate…") (affirming Article III standing dismissal) (emphasis added); *accord Pels v. Keurig Dr. Pepper*, No. 19-cv-03052, 2019 WL 5813422, at *5 (N.D. Cal. Nov. 7, 2019) ("[P]laintiff has failed to plead a particularized injury by failing to plead the water he purchased contained violative arsenic levels."); *In re: Recalled Abbott Infant Formula Prods. Litig*, 97 F.4th at 530 ("Plaintiffs do not claim that the specific product they bought was contaminated….The potential risk of contamination is not enough to confer standing."). Accordingly, Plaintiffs have pled no facts to suggest they've suffered any Article III injury, even if their (legally inadequate) theory that

purchasing Cheerios with trace chlormequat would provide the requisite harm.

Second, where a plaintiff fails to plausibly allege that some potentially harmful substance in a product she bought resulted in any harm to the plaintiff herself, courts routinely hold that there is no "economic injury" that flows from purchasing that product. *See e.g.*, *Boysen v. Walgreen Co*., No. C 11-06262, 2012 WL 2953069, at *4 (N.D. Cal. July 19, 2012) (adopting MDL court's reasoning in a similar case and dismissing complaint because the plaintiff "[was] unable to show that any actual harm resulted from consumption of the [] products [containing lead and arsenic,] [demonstrating that] their allegation of 'economic' injury lacks substance"); *Herrington v. Johnson & Johnson Consumer Cos.*, No. C 09-1597, 2010 WL 3448531, at *4 (N.D. Cal. Sept. 1, 2010) (holding plaintiff did not suffer an economic injury where plaintiff did "not plead facts to show that Defendants' products [which allegedly contained contaminants] [were] defective or otherwise unfit for use").

In short, there is no economic injury in these types of trace substances cases because the plaintiffs received what they paid for. *See In re Gerber Prods. Co. Heavy Metals Baby Food Litig*., No. 21-cv-269, 2022 WL 10197651, at *8 (E.D. Va. Oct. 17, 2022) (finding no economic injury for purchase of baby food with trace amounts of heavy metals where plaintiffs "paid for safe and healthy food for their children and apparently received just that—the benefit of their bargain"). Indeed, "[t]o state a concrete and particularized injury, a plaintiff must do more than allege she did not receive the benefit she *thought* she was obtaining." *Id.* "The plaintiff must show that she did not receive a benefit for which she actually *bargained*." *McGee*, 982 F.3d at 706; *see also Herrington*, 2010 WL 3448531, at *5 (no standing where "[p]laintiffs complain about a consumable good that they used to their benefit").

In other words, allegations of hypothetical economic harm do not constitute a legally cognizable injury that confers standing where, as here, Plaintiffs do not credibly contend the Cheerios were worthless or unfit for ingestion. Once again, the

analysis in *Doss* is on point, where the Court explicitly rejected the Plaintiffs' contention that the EWG "benchmark" for pesticide safety was adequate to plead harm. 816 F. App'x at 314 (rejecting EWG benchmark as inadequate to show anything more than a "conjectural or hypothetical" injury). The implausibility of Plaintiffs' reliance on the EWG safety "benchmark" is further discredited by informed federal agency determinations to the contrary. The EPA and FDA have affirmatively deemed chlormequat "safe" in amounts thousands of times greater than the levels EWG detected. *Compare* Am. Compl. ¶ 20 (between .04 and .01 ppm detected by EWG) *with* 40 C.F.R. § 180.698 (40 ppm deemed "safe" by EPA for residual chlormequat). Thus, the Cheerios Plaintiffs purchased were safe, healthful, and worth exactly the amount paid.

Third, Plaintiffs' alleged injury in the form of a "price premium" they paid for Cheerios, Am. Compl. ¶ 28, fails because they do not plausibly allege any such premium exists. Plaintiffs allege no facts to support their claim of a purported price premium, dooming this theory. "The bare recitation of the word 'premium' does not adequately allege a cognizable injury." *Naimi v. Starbucks Corp.*, 798 F. App'x 67, 70 (9th Cir. 2019). Instead, Plaintiffs must allege factual details to support their claim that they paid a price premium. *Id*. Other courts in the 9th Circuit have similarly concluded that conclusory allegations of a price premium, without supporting well-pleaded facts, fail to satisfactorily allege standing. *See Babaian v. Dunkin' Brands Grp., Inc*., LACV 17-4890, 2018 WL 11445614, at *8 (C.D. Cal. Feb. 16, 2018) ("Plaintiff does not sufficiently allege facts supporting a plausible inference of a price premium."); *Horti v. Nestlé HealthCare Nutrition, Inc*., No. 21-cv-09812, 2022 WL 2441560, at *8 (N.D. Cal. July 5, 2022) ("Plaintiffs announce that they have suffered injury based on their payment of a 'premium price' for a product that did not work as advertised and that they would not have paid for had they known the truth, but this is insufficient to adequately allege a cognizable injury."); *accord Kimca v. Sprout*

Foods, Inc., CA No. 21-12977, 2022 WL 1213488, at *8 (D.N.J. Apr. 25, 2022) ("Plaintiffs do not identify any other comparable, cheaper, or safer products to show that they, in fact, paid a premium for the Baby Food Products.") (dismissing complaint on Article III grounds based on plaintiffs failure to allege that any price premium paid for foods alleged to misleadingly omit presence of trace heavy metals).

Here, Plaintiffs assert, in a single-sentence conclusory allegation, that they paid "a premium for the Products relative to key competitors' products, or relative to the average price charged in the marketplace." Am. Compl. ¶ 28. However, they fail to offer any facts whatsoever in support of this claim. For example, they fail to allege the average price of the supposed non-premium products or the purported price difference between the premium and non-premium products. Without factual allegations to support a "price premium," Plaintiffs' speculation that the Cheerios are worth less than what they paid is not a legally cognizable economic injury.

B. Plaintiffs' Claims Are Preempted.

The Amended Complaint repeatedly insists General Mills must disclose the presence of chlormequat on Cheerios' labels, suggesting it should appear on the product's list of ingredients. Am. Compl. ¶¶ 23, 27, 28, 29, Prayer for Relief ¶ E. This demand seeks to impose a "requirement" for food labeling "not identical" to the federal labeling requirements for Cheerios. *See* 21 U.S.C. § 343-1(a)(2). Accordingly, Plaintiffs' claims are expressly preempted. *Id.*

Congress passed NLEA in 1990 to "establish a national uniform labeling standard and avoid a patchwork of different state standards." *Corbett v. PharmaCare U.S., Inc.*, 567 F. Supp. 3d 1172, 1189 (S.D. Cal. 2021) (citation omitted). To accomplish Congress' goal of national uniformity, the NLEA contains an express preemption provision, explicitly preempting any state labeling requirements "not identical" to federal labeling requirements. *See* 21 U.S.C. § 341-1(a)(2). NLEA preemption bars any non-identical labeling requirement, whether imposed via state

statute or through litigation-based labeling efforts like the Amended Complaint here. *Nacarino v. Kashi Co.*, 77 F.4th 1201, 1204 (9th Cir. 2023) ("[NLEA] expressly preempts all state statutes and law that directly or indirectly establish any requirement for the labeling of food that is not identical to the federal requirements set forth by statute and Food and Drug Administration (FDA) regulations.") (internal citation omitted).

The term "not identical" in NLEA is defined broadly to mean any requirement "concerning the…labeling of food…(i) [] not imposed by or contained in the applicable provision; or (ii) [that] differ from those specifically imposed by or contained in the applicable provision." 21 C.F.R. § 100.1(c)(4); *accord Corbett*, 567 F. Supp. 3d at 1189 (citing pertinent regulation). Here, the FDCA's labeling provisions and related guidance confirm that Plaintiffs' demand that Cheerios' labels identify the alleged trace presence of chlormequat is expressly preempted.

First, a plain reading of the statute reveals the FDCA imposes no labeling requirement whatsoever to disclose the presence of trace pesticides on foods like Cheerios. Rather, the relevant statutory provision requires only that the label state the "common or usual name of each [] ingredient" in the food. *See* 21 U.S.C. § 343(i)(2). Cheerios' labels do so. Sipos Decl. Ex. A. And section 343(i)(2) falls within the NLEA's express preemption provision. See 21 U.S.C. 343-1(a)(2). Accordingly, Plaintiffs' insistence that General Mills must disclose chlormequat's presence in Cheerios is preempted. *See Yu v. Dr Pepper Snapple Grp., Inc.*, No. 18-cv-06664, 2019 WL 2515919, at *4 (N.D. Cal. Jun. 18, 2019) (holding that any claim by plaintiff to require affirmative labeling of trace pesticides would be preempted) ("Plaintiff is required to amend the complaint to specify that Plaintiff is not pleading that Defendants must label the products-in-question as containing trace amounts of pesticide."); *Nemphos v. Nestle Waters N. Am., Inc.*, 775 F.3d 616, 624 (4th Cir. 2015) (NLEA preemption dismissal; complaint demanding disclosure of the presence

of fluoride in bottled water "not identical" to federal requirement); *Mills v. Giant of Md., LLC*, 441 F. Supp. 2d 104, 106–08 (D.D.C. 2006) (NLEA preemption dismissal; complaint demanding disclosure of risk of lactose in milk).

Second, Congress' decision not to require disclosure of trace pesticides in foods like Cheerios was not inadvertent. Section 343(l) of the FDCA does require the disclosure of the presence of pesticides, but only for "raw agricultural commodities," and then only under limited specified conditions. *See* 21 U.S.C. § 343(l). So, the FDCA plainly reflects Congress' choice to require labeling of pesticides for some foods in some circumstances, and to not require it in others. This deliberate distinction in the statute further confirms that preemption applies to Plaintiffs' claims. *Nacarino*, 77 F.4th at 1204 (affirming NLEA preemption dismissal where plaintiff demanded labeling for protein content that differed from what FDA regulations permitted).

Third, the FDA's own interpretation of the FDCA reflects that there is no labeling requirement to disclose trace pesticides in foods like Cheerios. The FDA's Pesticide Labeling Policy confirms that: "Pesticide residues resulting from preharvest application to raw agricultural commodities have never been considered ingredients subject to the label declaration required by [§ 343(i)(2)] of the FDCA." Sipos Decl. Ex. B; *id.* ("Policy: Residues of pesticide chemicals that are applied either pre-harvest or post-harvest to raw agricultural commodities which are the 'produce of the soil' *are exempt from the labeling requirements of sections* [343(i)2] …. of the Act.") (emphases added).

When a federal agency, like the FDA, interprets its own regulations, that interpretation is afforded deference. *See Nacarino*, 77 F.4th at 1212 ("We may properly resort to an agency's interpretations and opinions for guidance, as they constitute a body of experience and informed judgment.") (internal quotation marks and citations omitted) (deferring to statement on FDA website as to interpretation of

protein labeling regulations). FDA Compliance Policy Guides in particular—like the Pesticide Labeling Policy—are often afforded deference where, as here, they reflect a reasonable interpretation of the statute at issue. *Forcellati v. Hyland's, Inc.*, CV 12-1983, 2015 WL 9685557, at *3 (C.D. Cal. Jan. 12, 2015) (deferring to FDA Compliance Policy Guide to determine requirements for testing of homeopathic drugs); *Herazo v. Whole Foods Mkt., Inc.*, No. 14-61909-CIV, 2015 WL 4514510, at *4 (S.D. Fla. July 24, 2015) (deferring to FDA Compliance Policy Guide for marketing of homeopathic drugs). The Amended Complaint and the sources it relies on confirm that chlormequat is a pre-harvest regulator. *See* Am. Compl. ¶ 21; *see also* Sipos Decl. Ex. C at 5. So, the alleged trace chlormequat in Cheerios is exactly the kind of "[p]esticide residues resulting from preharvest application," Sipos Decl. Ex. B, the FDA has interpreted the FDCA to exempt from any labeling requirement in multi-ingredient foods like Cheerios. *Id.*

Thus, Plaintiffs' Amended Complaint must be dismissed in full as preempted.[2]

C. Plaintiffs Fail to Allege General Mills Had Any Legal Duty To Disclose the Presence of Trace Chlormequat.

Plaintiffs' Amended Complaint is based on a pure omission theory, asserting that General Mills had some affirmative duty to disclose the potential presence of trace chlormequat in Cheerios cereals. Am. Compl. ¶¶ 27, 28. But the Amended

[2] In addition to its complete NLEA preemption defense, General Mills is entitled to safe harbor from liability given that its non-labeling of the potential presence of chlormequat is permitted by federal law. CLRA claims, are barred where legislation provides a "safe harbor" from liability by permitting certain conduct. *Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co.*, 20 Cal. 4th 163, 182 (1999); *see also Alvarez v. Chevron Corp.*, 656 F.3d 925, 933–34 (9th Cir.2011) (applying safe harbor to a CLRA claim); *Ebner v. Fresh Inc.*, No. SACV 13-00477, 2013 WL 9760035, at *4–6 (C.D. Cal. Sept. 11, 2013) (applying safe harbor to UCL, CLRA, and FAL claims), *aff'd*, 818 F.3d 799, *withdrawn and superseded on denial of reh'g en banc*, 838 F.3d 958, and *aff'd*, 838 F.3d 958 (9th Cir. 2016). Here, federal law permits chlormequat at levels thousands of times *higher* than the EWG testing and the confirmatory testing conducted at direction of counsel which Plaintiffs rely on. *See* Section IV(c), *infra*. And federal law likewise allows foods to be labeled without disclosing the potential presence of trace pesticides like chlormequat. *Id*. Thus, the conduct Plaintiffs claimed is fraudulent and deceptive is permitted by federal law. Accordingly, Plaintiffs' claims are barred by the safe harbor doctrine.

Complaint fails to allege any facts to remotely support a duty to disclose here, when measured against the exacting standard imposed by binding Ninth Circuit precedent. To maintain an omission claim under California law, a plaintiff must show that the defendant omitted information that constitutes an "unreasonable safety hazard" or that impairs the product's "central function." *Hodsdon v. Mars, Inc.*, 891 F.3d 857, 861, 864 (9th Cir. 2018). If these standards are not met, the complaint must be dismissed. *Id.* (affirming Rule 12 dismissal of CLRA claim in food labeling case based on omission theory).

Applying *Hodsdon*, there is a growing body of Rule 12 law that holds that the alleged presence of some trace substance in food present as part of the agricultural process, does not satisfy either the "unreasonable safety hazard" or "central function" tests. *See Rodriquez v. Mondelēz Glob. LLC*, No. 23-cv-00057, 2023 WL 8115773, at *10 (S.D. Cal. Nov. 22, 2023) (Rule 12 dismissal of omissions claim based on purportedly harmful presence of trace heavy metals in food for failure to plausibly allege satisfaction of *Hodsdon* standards); *Grausz v. Hershey Co.*, No. 23-cv-00028, 2023 WL 6206449, at *9–10 (S.D. Cal. Sept. 11, 2023) (same); *Hayden v. Bob's Red Mill Nat. Foods*, No. 23-cv-03862, 2024 WL 1643696, at *9–10 (N.D. Cal. Apr. 16, 2024) (same). The Amended Complaint here fails for the same reasons.

First, Plaintiffs do not plausibly allege that trace amounts of chlormequat in Cheerios, at levels that are a tiny fraction of the amount federal agencies have deemed "safe," pose an "unreasonable safety hazard" as required by *Hodsdon*. An "unreasonable" safety hazard is a heightened and rare showing that requires evidence the plaintiff suffered, or was placed at serious risk of suffering, real and immediate harm. *See Miller v. Ford Motor Co.*, 620 F. Supp. 3d 1045, 1069–70 (E.D. Cal. 2022) ("unreasonable safety hazard" established where defect caused plaintiffs' cars to "[shake] violently…and eventually [catch] on fire"). Here, Plaintiffs do not allege *any* harm they have suffered through the consumption of Cheerios. To the contrary

they affirmatively allege that they have purchased it "for many years," and suffered no health effects whatsoever. Am. Compl. ¶ 25. Indeed, the only injury they claim is an "economic" one. *Id.* ¶¶ 30, 31.

Nor does the bare reference to the EWG "benchmark" give rise to an "unreasonable safety hazard." In cases involving trace heavy metals in foods, where there is some allegation of some latent health hazard that may accrue, courts have nonetheless consistently held that no "unreasonable" safety hazard is present in those foods. *Hayden*, 2024 WL 1643696, at *9–10; *Grausz*, 2023 WL 6206449, at *10 (allegation that "no amount of lead is known to be safe" insufficient to raise an "unreasonable safety hazard"); *Rodriquez*, 2023 WL 8115773, at *10 (purported health harms of heavy metals insufficient to establish "unreasonable safety hazard"). And here, any inference of a safety risk of *any* kind, much less an "unreasonable" one, is affirmatively discredited by the fact that the EPA and FDA have deemed a residual level of 40 ppm to be "safe" in oats, Sipos Decl. Ex. C at 9, which is an amount orders of magnitude *higher* than the .03 to .10 ppm that EWG claimed to detect, purportedly "confirmed through additional testing of a number of Cheerios Products conducted at the direction of" Plaintiffs' counsel. Am. Compl. ¶ 20.

Second, Plaintiffs also fail to allege that trace chlormequat deprives Cheerios of its "central function." *Hodsdon*, 891 F.3d at 864. The "central function" standard requires plausible allegations that the purported defect renders the product "incapable of use by any consumer." *Id.*; *Knowles v. Arris Int'l PLC*, No. 17-CV-01834, 2019 WL 3934781, at *16 (N.D. Cal. Aug. 20, 2019), *aff'd*, 847 F. App'x 512 (9th Cir. 2021) (same). It is self-evident that Cheerios still functions as food, notwithstanding the potential presence of chlormequat at fractions of levels that the EPA and FDA affirmatively permit in oats. There are no allegations that Cheerios lack all nutrition, or failed to deliver the ingredients and nutrients present on the label. The "central function" test is thus not satisfied. *In re Plum Baby Food Litig.*, No. 21-CV-00913,

2024 WL 1354447, at *6 (N.D. Cal. Mar. 28, 2024) ("Even if consumers find the presence of these trace contaminants to be of material concern, the Baby Food continues to function as food if it contains these contaminants."), *appeal filed sub nom. Gulkarov v. Plum, Pbc*, No. 24-2766 (9th Cir. May 1, 2024); *Hayden*, 2024 WL 1643696 at *10 ("Plaintiff has not plausibly pled that the Products have ceased to function as a food, or even more specifically as flaxseed.").

Last, because Plaintiffs have not plausibly alleged any duty to disclose under the CLRA, their accompanying common law claims for unjust enrichment and breach of implied warranty necessarily fail as well. *See*, *e.g.*, *Girard v. Toyota Motor Sales, U.S.A., Inc.*, 316 F. App'x. 561, 563 (9th Cir. 2008) (explaining that an unjust enrichment claim based on the same facts as consumer protection claims "must fail" along with the failed consumer protection claim); *Yu v. Dr Pepper Snapple Grp.*, No. 18-cv-06664, 2020 WL 5910071, at *7 (N.D. Cal. Oct. 6, 2020) (unjust enrichment and breach of implied warranty claims fail when consumer protection claim fails).

D. Plaintiffs' Breach of Implied Warranty Claim Fails.

Plaintiffs' breach of the implied warranty of merchantability claim also separately fails because they have not, and cannot, plead facts demonstrating the most basic element of that claim: that the products were not fit for human consumption. The implied warranty of merchantability does *not* "impose a general requirement that goods precisely fulfill the expectation of the buyer." *Viggiano v. Hansen Nat. Corp.*, 944 F. Supp. 2d 877, 896 (C.D. Cal. 2013); *Stearns v. Select Comfort Retail Corp.*, No. 08-2746, 2009 WL 1635931, at *8 (N.D. Cal. June 5, 2009). Instead, "there must be a fundamental defect that renders the product unfit for its ordinary purpose." *Id.*; *see also Pershing Pac. W., LLC v. Ferretti Grp., USA, Inc.*, No. 10-cv-1345, 2013 WL 275676, at *7 (S.D. Cal. Jan. 24, 2013).

A food product is fit for its ordinary purpose if it is fit for consumption. *See, e.g.*, *Thomas v. Costco Wholesale Corp.*, No. 12-cv-02908, 2014 WL 5872808, at *3

(N.D. Cal. Nov. 12, 2014) (dismissing breach of implied warranty claim explaining that for food, an implied warranty claim requires that the product was unsafe to consume); *Liou v. Organifi, LLC*, 491 F. Supp. 3d 740, 749 (S.D. Cal. 2020) (dismissing claim for breach of implied warranty of merchantability where the purchased product's "ordinary use, as the Product's name suggests, is a juice, and there is no indication that Plaintiff received anything other than a juice"). As the court explained in *Hayden*, the failure to allege facts to show that a food fails to perform its "central function" necessarily means no implied warranty has been breached.

Plaintiffs, as explained above, have not alleged that the Cheerios contain chlormequat in amounts rendering them unsafe for human consumption—the ordinary purpose of food. In fact, Plaintiffs allegations suggest the exact opposition as Plaintiffs allege to have consumed Cheerios "regularly" and "for many years" without incident. Am. Compl. ¶ 25. Plaintiffs cannot now, after consuming the products for years with no health effects, credibly allege that the Products were unfit for consumption. Because Plaintiffs failed to, and cannot plausibly, allege that the Products are unfit for consumption, the implied warranty claim must be dismissed. *See Viggiano*, 944 F. Supp. 2d at 896; *Bohac v. Gen. Mills, Inc.*, No. 12-cv-05280, 2014 WL 1266848, at *10 (N.D. Cal. Mar. 26, 2014).

E. Plaintiffs Are Not Entitled to Injunctive Relief.

Plaintiffs lacks Article III standing for injunctive relief because they have not plausibly alleged threatened future harm. *See Lanovaz v. Twinings N. Am., Inc*., 726 F. App'x 590, 591 (9th Cir. 2018). To have standing to seek injunctive relief, a plaintiff must "show that he faces a real or immediate threat that he will again be wronged in a similar way." *Mayfield v. United States*, 599 F.3d 964, 970 (9th Cir. 2010). Speculation about future harm is insufficient. *Id*. Where "a plaintiff vaguely alleges that he 'may' purchase the product in the future, the Ninth Circuit and district courts have found this 'some day intention' insufficient to satisfy Article III

standing" for injunctive relief. *Rodriguez v. Just Brands USA, Inc.*, No. 20-CV-04829, 2021 WL 1985031, at *4 (C.D. Cal. May 18, 2021) (collecting cases).

Here, Plaintiffs' allegations of vague desire to purchase the Cheerios in the future fail to demonstrate "[a] firm intention to purchase the product in the future," and so do not "cross the line from an insufficient *possible* future injury to an actionable *certainly* impending injury." *Id.* (citation omitted). Far from a concrete plan, Plaintiffs simply allege "they would like to" purchase Cheerios some unknown time in the future—without offering any details as to when or under what circumstances they intend to do so. Am. Compl. ¶ 48. It is thus "conjectural or hypothetical" that they would "again be wronged in a similar way." *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009); *Mayfield*, 599 F.3d at 970. Plaintiffs' injunctive relief claim therefore must be dismissed.

V. CONCLUSION

For the foregoing reasons, General Mills respectfully requests that this Court grant its Motion to Dismiss and dismiss the Amended Complaint in its entirety with prejudice.

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