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United States District Court
For the Northern District of California

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C 09-1597 CW

THERESA HERRINGTON, ANNA HALEY, JOY SARJENT, KIMBERLY FOURNIER and CINDY KING, individually and on behalf of themselves and all others similarly situated,

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS (Docket No. 133)

Plaintiffs,

v.

JOHNSON & JOHNSON CONSUMER COMPANIES, INC.; L'OREAL USA, INC.; KIMBERLY-CLARK CORPORATION; CVS/CAREMARK CORPORATION; and TARGET CORPORATION,

Defendants.

In this action, Plaintiffs Theresa Herrington, Anna Haley, Joy Sarjent, Kimberly Fournier and Cindy King allege that Defendants Johnson & Johnson Consumer Companies, Inc.; L'Oreal USA, Inc.; Kimberly-Clark Corporation; CVS Pharmacy, Inc., erroneously sued as CVS/Caremark Corporation; and Target Corporation knowingly manufactured and sold bath products for children that contain probable carcinogens and other unsafe substances. Defendants move to dismiss Plaintiffs' Second Amended Complaint (2AC) for lack of subject matter jurisdiction and for failure to state a claim. Plaintiffs oppose the motion. The motion was taken under submission on the papers. Having considered all the papers

1 submitted by the parties, the Court GRANTS Defendants' Motion to
2 Dismiss.

3 BACKGROUND

4 Plaintiffs filed this putative class action on behalf of
5 themselves and all similarly situated persons who have purchased
6 Defendants' allegedly defective children's bath products.

7 According to Plaintiffs' 2AC, Defendants engaged in unlawful
8 conduct "related to their formulation, manufacturing, distribution
9 and/or sale of cosmetics containing 1,4-dioxane, formaldehyde
10 and/or other ingredients that have not been proven safe"

11 2AC ¶ 2. Specifically, Plaintiffs allege that Defendants failed to
12 disclose that their products contain probable carcinogens, other
13 unsafe contaminants and ingredients that have not been shown to be
14 safe. Plaintiffs further contend that Defendants deceived
15 consumers by affirmatively misrepresenting the safety of their
16 products. Plaintiffs aver that "Defendants were in a superior if
17 not exclusive position to know the true state of facts about the
18 safety defects in their bath and personal care products intended
19 for use on babies and children" 2AC ¶ 22.

20 Plaintiffs aver that they purchased Defendants' goods for use
21 on their young children. Plaintiffs contend that, had "Defendants
22 disclosed the contaminants in their children's cosmetics and the
23 fact that all ingredients were not proven safe," they would not
24 have purchased the products. 2AC ¶¶ 40-44.

25 To support their allegations that Defendants' products contain
26 unsafe ingredients, Plaintiffs cite a press release and a report
27 entitled "No More Toxic Tub," both of which were published by the
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1 Campaign for Safe Cosmetics. In the report, the Campaign states
2 that it detected 1,4-dioxane and formaldehyde in Defendants'
3 products. Defs.' Request for Judicial Notice (RJN),¹ Ex. A 6-11.
4 Citing other unrelated studies, Plaintiffs contend that children
5 are more susceptible to chemical toxicity than adults.

6 The 2AC contains eleven causes of action, which are asserted
7 by varying Plaintiffs and against differing Defendants. Herrington
8 and Haley bring claims for violations of California's false
9 advertising statute, Cal. Bus. & Prof. Code §§ 17500, et seq.;
10 California's Unfair Competition Law (UCL), Cal. Bus. & Prof. Code
11 §§ 17200, et seq.; and California's Consumer Legal Remedies Act
12 (CLRA), Cal. Civ. Code §§ 1750, et seq. Herrington and Haley
13 assert their FAL and UCL claims against all Defendants. With
14 regard to those under the CLRA, Herrington asserts claims against
15 Johnson & Johnson and L'Oreal, and Haley asserts claims against
16 Johnson & Johnson, Kimberly Clark, CVS and Target. Fournier, King
17 and Sarjent bring claims for violations of thirty-five states' and
18 the District of Columbia's unfair and deceptive trade practices
19 acts, against Johnson & Johnson and Kimberly-Clark. Haley, Sarjent
20 and Fournier bring claims for breach of implied warranties: Haley
21 asserts her claims against CVS and Target, Sarjent and Fournier
22 bring theirs against Johnson & Johnson, and Sarjent, independently,
23 asserts claims against Kimberly Clark. Finally, against all
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26 ¹ Defendants ask the Court to take judicial notice of various
27 documents, including the Campaign's report. Plaintiffs do not
28 oppose Defendants' request. The Court takes judicial notice of
these documents to the extent that it is not subject to reasonable
dispute that the statements made in these documents were made by
the entities responsible for their publication. Fed. R. Evid. 201.

1 Defendants, all Plaintiffs bring claims for intentional
2 misrepresentation; negligent misrepresentation; fraudulent omission
3 and suppression; unjust enrichment; breach of express warranties;
4 and violation of the Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301,
5 et seq. Plaintiffs intend to move for certification of a nation-
6 wide class and various subclasses.

7 DISCUSSION

8 I. Dismissal under Federal Rule 12(b)(1)

9 Subject matter jurisdiction is a threshold issue which goes to
10 the power of the court to hear the case. Federal subject matter
11 jurisdiction must exist at the time the action is commenced.

12 Morongo Band of Mission Indians v. Cal. State Bd. of Equalization,
13 858 F.2d 1376, 1380 (9th Cir. 1988). A federal court is presumed
14 to lack subject matter jurisdiction until the contrary
15 affirmatively appears. Stock W., Inc. v. Confederated Tribes, 873
16 F.2d 1221, 1225 (9th Cir. 1989).

17 Dismissal is appropriate under Rule 12(b)(1) when the district
18 court lacks subject matter jurisdiction over the claim. Fed. R.
19 Civ. P. 12(b)(1). A Rule 12(b)(1) motion may either attack the
20 sufficiency of the pleadings to establish federal jurisdiction, or
21 allege an actual lack of jurisdiction which exists despite the
22 formal sufficiency of the complaint. Thornhill Publ'g Co. v. Gen.
23 Tel. & Elecs. Corp., 594 F.2d 730, 733 (9th Cir. 1979); Roberts v.
24 Corrothers, 812 F.2d 1173, 1177 (9th Cir. 1987). Because
25 challenges to standing implicate a federal court's subject matter
26 jurisdiction under Article III of the United States Constitution,
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1 they are properly raised in a motion to dismiss under Rule
2 12(b)(1). White v. Lee, 227 F.3d 1214, 1242 (9th Cir. 2000).

3 To establish standing, a plaintiff must show: "(1) he or she
4 has suffered an injury in fact that is concrete and particularized,
5 and actual or imminent; (2) the injury is fairly traceable to the
6 challenged conduct; and (3) the injury is likely to be redressed by
7 a favorable court decision." Salmon Spawning & Recovery Alliance
8 v. Gutierrez, 545 F.3d 1220, 1225 (9th Cir. 2008). A concrete
9 injury is one that is "'distinct and palpable . . . as opposed to
10 merely abstract.'" Schmier v. U.S. Court of Appeals for 9th
11 Circuit, 279 F.3d 817, 821 (9th Cir. 2002) (quoting Whitmore v.
12 Arkansas, 495 U.S. 149, 155 (1990)). The "injury must have
13 actually occurred or must occur imminently; hypothetical,
14 speculative or other 'possible future' injuries do not count in the
15 standings calculus." Schmier, 279 F.3d at 821 (citing Whitmore,
16 495 U.S. at 155).

17 Defendants argue that Plaintiffs do not have standing to sue
18 because they cannot show that they have suffered a concrete, actual
19 injury-in-fact. Plaintiffs respond that they plead two injuries
20 sufficient to confer standing: "(1) risk of harm to their children
21 resulting from their exposure to carcinogenic baby bath products;
22 and (2) economic harm resulting from the purchase of these
23 contaminated, defective bath products." Opp'n at 10.

24 With regard to their allegations that Defendants have exposed
25 their children to a risk of harm, Plaintiffs analogize their action
26 to environmental hazard cases. They argue that a credible threat
27 of future harm suffices as an injury-in-fact, citing Central Delta
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1 Water Agency v. United States, 306 F.3d 938 (9th Cir. 2002).
2 There, the individual plaintiff landowners complained that a
3 federal agency's operating plan was "highly likely to cause the
4 salinity of the water" from a reservoir to exceed acceptable
5 levels, which would hamper their ability to irrigate their crops.
6 Id. at 947. Even though the injury had not yet occurred, the court
7 concluded that the landowners had suffered an injury-in-fact
8 because they faced a "significant risk that the crops they had
9 planted will not survive as a result of the" agency's decisions.
10 Id. at 948. Summarizing its holding, the court stated that "a
11 credible threat of harm is sufficient to constitute actual injury
12 for standing purposes" Id. at 950; see also Covington v.
13 Jefferson County, 358 F.3d 626, 639 (9th Cir. 2004).

14 Plaintiffs do not cite controlling authority that the "risk of
15 harm" injury employed to establish standing in environmental cases
16 applies equally to product liability actions. At least two out-of-
17 circuit cases are instructive on the nature of the increased risk
18 of harm necessary to create an injury-in-fact. In Sutton v. St.
19 Jude Medical S.C., Inc., a product liability case, the Sixth
20 Circuit concluded that a plaintiff had standing when he alleged
21 that the implantation of a medical device exposed him to "a
22 substantially greater risk" of harm. 419 F.3d 568, 570-75 (6th
23 Cir. 2005). In Public Citizen, Inc. v. National Highway Traffic
24 Safety Administration, the D.C. Circuit, addressing a petitioner's
25 standing to challenge agency action, expressed doubts about finding
26 that any increased risk of harm inflicted an injury-in-fact. 489
27 F.3d 1279, 1293-96 (D.C. Cir. 2007). The court recognized that,
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1 under its precedent, standing was appropriate in such cases "when
2 there was at least both (i) a substantially increased risk of harm
3 and (ii) a substantial probability of harm with that increase taken
4 into account." Id. at 1295. These cases and Central Delta suggest
5 that, to the extent that an increased risk of harm could constitute
6 an injury-in-fact in a product liability case such as this one,
7 Plaintiffs must plead a credible or substantial threat to their
8 health or that of their children to establish their standing to
9 bring suit.

10 Plaintiffs have not alleged such a threat. In essence, they
11 complain that (1) 1,4-dioxane and formaldehyde are probable human
12 carcinogens; (2) "scientists believe there is no safe level of
13 exposure to a carcinogen," 2AC ¶ 68; (3) children are generally
14 more vulnerable to toxic exposure than adults; and (4) 1,4-dioxane
15 and formaldehyde have been detected in Defendants' products.
16 However, Plaintiffs do not allege that 1,4-dioxane and formaldehyde
17 are in fact carcinogenic for humans. Nor do they plead that the
18 amounts of the substances in Defendants' products have caused harm
19 or create a credible or substantial risk of harm.² This contrasts
20 with the showing in Central Delta, in which the landowners cited
21 the defendant agency's own reports, which predicted that "the
22 majority of the months during which the standard would be exceeded
23 are projected to be peak-irrigation months during plaintiffs'
24 growing seasons." Central Delta, 306 F.3d at 948. The plaintiffs
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27 ² Indeed, in a July, 2007 statement on 1,4-dioxane, the U.S.
28 Food and Drug Administration (FDA) stated that the "1,4-dioxane
levels we have seen in our monitoring of cosmetics do not present a
hazard to consumers." RJN, Ex. B.

1 also cited reports showing "the negative effects of increased
2 salinity on the various crops that they grow" and themselves
3 reported that "their harvests were damaged in the past due to high
4 salinity in the water." Id. Here, Plaintiffs do not plead facts
5 to suggest that a palpable risk exists. They only allege that 1,4-
6 dioxane and formaldehyde may be carcinogenic for humans, that there
7 could be no safe levels for exposure to carcinogens and that
8 Defendants' products contain some amount of these substances.
9 Indeed, as Plaintiffs plead, the Consumer Product Safety Commission
10 (CPSC) has stated that, although the presence of 1,4-dioxane "is
11 cause for concern," the CPSC is merely continuing "to monitor its
12 use in consumer products." 2AC ¶ 64. The risk Plaintiffs plead is
13 too attenuated and not sufficiently imminent to confer Article III
14 standing.

15 This case is analogous to Koronthaly v. L'Oreal USA, Inc.,
16 2008 WL 2938045 (D.N.J.), aff'd 2010 WL 1169958 (3d Cir. 2010),
17 which was dismissed on standing grounds. There, the plaintiff was
18 a regular user of the defendants' lipstick, which, according to
19 another report by the Campaign, contained lead. 2008 WL 2938045,
20 at *1. The plaintiff alleged that she had been injured "by mere
21 exposure to lead-containing lipstick and by her increased risk of
22 being poisoned by lead." Id. However, she did not complain of any
23 current injuries. The district court concluded, and the Third
24 Circuit affirmed, that the plaintiff's allegations of future injury
25 were "too remote and abstract to qualify as a concrete and
26 particularized injury." Id. at *5.

1 Plaintiffs' allegations are also similar to those in Levinson
2 v. Johnson & Johnson Consumer Companies, Inc., 2010 WL 421091
3 (D.N.J.), and Crouch v. Johnson & Johnson Consumer Companies, Inc.,
4 2010 WL 1530152 (D.N.J.). In these cases, the district court
5 dismissed a part of the plaintiffs' actions based on their lack of
6 an injury-in-fact. Levinson, 2010 WL 421091, at *4; Crouch, 2010
7 WL 1530152. at *4-*5. The Levinson and Crouch plaintiffs alleged
8 that Johnson & Johnson's Baby Shampoo contained, among other
9 substances, 1,4-dioxane and formaldehyde. Levinson, 2010 WL
10 421091, at *1; Crouch, 2010 WL 1530152, at *1-*2. The plaintiffs
11 had alleged, as do Plaintiffs here, that the substances were toxic
12 and could cause health problems. Levinson, 2010 WL 421091, at *1;
13 Crouch, 2010 WL 1530152, at *1. The court dismissed the
14 plaintiffs' claims on standing grounds, concluding that, with
15 regard to allegations concerning the 1,4-dioxane and
16 formaldehyde, "any potential injury is too remote, hypothetical
17 and/or conjectural to establishing standing in this matter."
18 Levinson, 2010 WL 421091, at *4; Crouch, 2010 WL 1530152, at *5.³
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22 ³ In these cases, the plaintiffs also plead that the
23 defendants' products contained methylene chloride, a substance that
24 the FDA has banned for use as an ingredient in cosmetics. See 21
25 C.F.R. § 700.19. Initially, the court allowed claims based on
26 methylene chloride to go forward. Levinson, 2010 WL 421091, at *4;
27 Crouch, 2010 WL 1530152, at *5. However, in subsequent orders, the
28 court dismissed the plaintiffs' actions in their entirety. Because
the plaintiffs did not allege that the defendants used methylene
chloride as an ingredient, the court concluded that the defendants
did not run afoul of the FDA ban; thus, the court concluded, the
plaintiffs lacked standing to sue. Levinson v. Johnson & Johnson,
2010 WL 3024847, at *3-*4 (D.N.J.); Crouch v. Johnson & Johnson,
2010 WL 3024692, at *3-*4 (D.N.J.).

1 As plead, the 2AC does not establish a credible risk of harm
2 that could suffice as a concrete, imminent injury; the threat of
3 which Plaintiffs complain is too speculative and uncertain to
4 confer Article III standing.

5 Plaintiffs also assert that they experienced an economic
6 injury, in that they unknowingly purchased products containing
7 potential carcinogens and that "they would have never purchased
8 these products had they known of the presence of these
9 contaminants." Opp'n at 13. However, Plaintiffs do not plead a
10 distinct risk of harm from a defect in Defendants' products that
11 would make such an economic injury cognizable. Because they fail
12 to do so, their reliance on Cole v. General Motors Corporation, 484
13 F.3d 717 (5th Cir. 2007), is misplaced. In Cole, the plaintiffs
14 complained that they suffered economic injury because they had
15 purchased an automobile with a safety module that the manufacturer
16 later discovered to be defective. Id. at 718-19. As relevant
17 here, the court characterized the plaintiffs' injuries as
18 purchasing a defective product and "actual economic harm (e.g.,
19 overpayment, loss in value, or loss of usefulness) emanating from
20 the loss of their benefit of the bargain." Id. at 724. As
21 explained above, Plaintiffs have not plead facts to show that
22 Defendants' products are defective or otherwise unfit for use. Nor
23 have Plaintiffs alleged that they overpaid or otherwise did not
24 enjoy the benefit of their bargain.⁴ Plaintiffs purchased
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27 ⁴ It is not even clear whether Plaintiffs could assert a
28 benefit-of-the-bargain injury against Defendants. Citing Rivera v.
Wyeth-Ayerst, 283 F.3d 315 (5th Cir. 2002), the Cole court noted

(continued...)

1 Defendants' bath products for children and they do not plead that
2 the products failed to perform.

3 Neither of the other cases cited by Plaintiffs support their
4 economic injury theory. The plaintiffs in In re Mattel, Inc. Toy
5 Lead Paint Products Liability Litigation alleged that manufacturers
6 produced toys with unsafe levels of lead. 588 F. Supp. 2d 1111,
7 1114 (C.D. Cal. 2008). The toys were subject to recalls ordered by
8 the CPSC. Id. Here, however, Plaintiffs do not allege that the
9 levels of the substances in Defendants' products were unsafe. The
10 CPSC, with regard to Defendants' products, is merely monitoring the
11 presence of 1,4-dioxane. Plaintiffs also cite Keilholtz v. Lennox
12 Hearth Products Inc., No. 08-0836 CW, which is currently before
13 this Court. In its order on class certification, the Court
14 concluded that the Keilholtz plaintiffs had standing because they
15 had paid for a fireplace that they could not use; the single pane
16 of glass on the front of the fireplace had been alleged to reach
17 temperatures of 475 degrees, which would cause third degree burns
18 to skin. 2010 WL 668067, at *1 (N.D. Cal.). In contrast,
19 Plaintiffs have not plead facts that tend to show such a threat of
20 physical harm. And, unlike in Keilholtz, Plaintiffs have not
21 alleged the loss of value of a durable good that they still own.
22 Plaintiffs complain about a consumable good that they used to their
23 benefit; they do not even allege that they can return the products
24 of which they complain.
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27 ⁴(...continued)
28 that a plaintiff cannot assert benefit-of-the-bargain damages
absent a contract with a manufacturer. 484 F.3d at 722.

1 Indeed, Plaintiffs allege less than what was at issue in other
2 cases where courts concluded that the plaintiffs lacked a
3 cognizable injury. In other cases, the products complained of were
4 subject to recalls or were reported to have caused injury,
5 suggesting a cognizable risk of harm to the plaintiffs. See, e.g.,
6 Rivera, 283 F.3d at 316-17; Degelman v. Advanced Med. Optics, Inc.,
7 2010 WL 55874 (N.D. Cal.); Whitson v. Bumbo, 2009 WL 1515597 (N.D.
8 Cal.). Here, as noted above, Plaintiffs have not plead that such a
9 threat of harm currently exists.

10 Accordingly, Plaintiffs have not plead an injury-in-fact
11 sufficient to confer Article III standing. They do not allege
12 facts that tend to show an imminent threat of future harm or actual
13 economic damage. The Court therefore lacks subject matter
14 jurisdiction over Plaintiffs' claims. Plaintiffs' complaint is
15 dismissed with leave to amend to plead facts that support their
16 standing to bring suit.

17 II. Dismissal under Rule 12(b)(6)

18 Even though Plaintiffs have not established standing, to
19 provide guidance for any amended pleading, the Court nevertheless
20 evaluates whether they have stated claims.

21 A complaint must contain a "short and plain statement of the
22 claim showing that the pleader is entitled to relief." Fed. R.
23 Civ. P. 8(a). Dismissal under Rule 12(b)(6) for failure to state a
24 claim is appropriate only when the complaint does not give the
25 defendant fair notice of a legally cognizable claim and the grounds
26 on which it rests. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555
27 (2007). In considering whether the complaint is sufficient to
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1 state a claim, the court will take all material allegations as true
2 and construe them in the light most favorable to the plaintiff. NL
3 Indus., Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986).

4 However, this principle is inapplicable to legal conclusions;
5 "threadbare recitals of the elements of a cause of action,
6 supported by mere conclusory statements," are not taken as true.
7 Ashcroft v. Iqbal, ___ U.S. ___, 129 S. Ct. 1937, 1949-50 (2009)
8 (citing Twombly, 550 U.S. at 555).

9 A. Damages

10 Defendants assert that Plaintiffs have not plead facts
11 suggesting that they suffered cognizable damage. Thus, to the
12 extent that damage is required, Defendants contend that Plaintiffs'
13 claims must be dismissed. Plaintiffs respond that they have
14 alleged economic damage by "having paid for Defendants' Defective
15 Products, which they would not have purchased had Defendants not
16 engaged in the wrongful conduct" Opp'n at 18. Plaintiffs'
17 argument concerning economic damage is similar to that asserted to
18 establish an injury-in-fact. Accordingly, Plaintiffs' claims
19 requiring a showing of damage fail for the same reasons.

20 B. Herrington and Haley's Claims under the UCL's Fraudulent
21 Prong, the FAL and the CLRA

22 California's UCL prohibits any "fraudulent business act or
23 practice." Cal. Bus. & Prof. Code § 17200. The FAL proscribes
24 "unfair, deceptive, untrue or misleading advertising." Id.
25 § 17500. The CLRA makes illegal "unfair methods of competition and
26 unfair or deceptive acts or practices undertaken by any person in a
27 transaction intended to result or which results in the sale or
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1 lease of goods or services to any consumer." Cal. Civ. Code
2 § 1770(a).

3 Defendants contend that Herrington and Haley have failed to
4 plead, as required by Federal Rule of Civil Procedure 9(b), "the
5 who, what, when, where, and how of the alleged fraud." Vess v.
6 Ciba-Geigy Corp. USA, 317 F.3d 1097, 1106 (9th Cir. 2003) (citation
7 and internal quotation marks omitted). Herrington and Haley
8 respond that Rule 9(b) does not apply to these claims because they
9 "are not fraud claims, and do not have the same elements as a fraud
10 claim." Opp'n at 27. This argument is unavailing. The gravamen
11 of their claims is that Defendants made affirmative
12 misrepresentations or failed to disclose material facts about their
13 children's bath products. See, e.g., Opp'n at 25-26 (discussing
14 allegations that Defendants failed to disclose material facts).
15 These allegations are similar to those in Kearns v. Ford Motor Co.,
16 in which the Ninth Circuit held that Rule 9(b) applied to a
17 plaintiff's claims under the CLRA and UCL because they were
18 grounded in fraud. 567 F.3d 1120, 1125-26 (9th Cir. 2009). There,
19 the plaintiff plead that Ford's "marketing materials and
20 representations led him to believe that CPO vehicles were inspected
21 by specially trained technicians and that the CPO inspections were
22 more rigorous and therefore more safe." Id. at 1125. He alleged
23 that "he was exposed to these representations through (1) Ford's
24 televised national marketing campaign; (2) sales materials found at
25 the dealership where he bought his vehicle; and (3) sales personnel
26 working at the dealership where he bought his vehicle." Id. at
27 1125-26. The court held that these averments charged "a unified
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1 course of fraudulent conduct," requiring the plaintiff to plead
 2 with particularity. Id. at 1125. Applying Rule 9(b), the court
 3 held the plaintiff's complaint insufficient, stating that

4 Kearns fails to allege in any of his complaints the
 5 particular circumstances surrounding such
 6 representations. Nowhere in the TAC does Kearns specify
 7 what the television advertisements or other sales
 8 material specifically stated. Nor did Kearns specify
 9 when he was exposed to them or which ones he found
 10 material. Kearns also failed to specify which sales
 11 material he relied upon in making his decision to buy a
 12 CPO vehicle. Kearns does allege that he was specifically
 13 told "CPO vehicles were the best used vehicles available
 14 as they were individually hand-picked and rigorously
 15 inspected used vehicles with a Ford-backed extended
 16 warranty." Kearns does not, however, specify who made
 17 this statement or when this statement was made. Kearns
 18 failed to articulate the who, what, when, where, and how
 19 of the misconduct alleged. The pleading of these neutral
 20 facts fails to give Ford the opportunity to respond to
 21 the alleged misconduct. Accordingly, these pleadings do
 22 not satisfy the requirement of Rule 9(b) that "a party
 23 must state with particularity the circumstances
 24 constituting fraud"

25 Id. at 1126. Based on their allegations, Herrington and Haley's
 26 UCL, FAL and CLRA claims sound in fraud and are therefore subject
 27 to the scrutiny of Rule 9(b).⁵

28 As an initial matter, Herrington and Haley do not plead facts
 to suggest that the misrepresentations of which they complain were
 false. They make no allegations that suggest that Defendants'
 statements, such as "hypoallergenic" and "dermatologist and allergy
 tested," were in fact not true.

⁵ Plaintiffs cite In re Mattel, which is distinguishable. There, the court held that the plaintiffs' claims were not subject to Rule 9(b), explaining that their "complaint neither specifically alleges fraud nor alleges facts that necessarily constitute fraud." 588 F. Supp. 2d at 1118. Here, Plaintiffs plead causes of action for common law fraud and make allegations that suggest a course of fraudulent conduct.

1 Herrington and Haley appear to concede this point and instead
2 contend that Defendants' statements were misleading, which could
3 state a cognizable claim under the UCL, FAL and CLRA. See, e.g.,
4 Morgan v. AT&T Wireless Svcs., Inc., 177 Cal. App. 4th 1235, 1255
5 (2009) ("A perfectly true statement couched in such a manner that
6 it is likely to mislead or deceive the consumer, such as by failure
7 to disclose other relevant information, is actionable under the
8 UCL.") (citation and internal quotation marks omitted). Although
9 allegations of misleading statements could state claims under these
10 statutes, Herrington and Haley have not alleged facts that suggest
11 Defendants deceived them with regard to a cognizable harm.

12 Even if Herrington and Haley alleged false or misleading
13 statements, they do not plead the circumstances in which they were
14 exposed to these statements. Nor do they plead upon which of these
15 misrepresentations they relied in making their purchase of
16 products. Herrington and Haley argue that, because they purchased
17 Defendants' products, they saw "at least the representations made
18 on the product labeling itself." Opp'n at 26 n.23. Although
19 Herrington and Haley's purchase of the products suggests that they
20 saw the products' labels, this is nevertheless insufficient because
21 they do not plead upon which representations they relied when
22 making their purchases. Further, this argument does not account
23 for the challenged statements that do not appear on labeling.
24 Thus, to the extent that these claims rest on affirmative
25 misrepresentations, Herrington and Haley have failed to plead with
26 sufficient particularity.
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1 Herrington and Haley cite In re Tobacco II Cases, 46 Cal. 4th
2 298 (2009), to argue that they are not required to allege which
3 representations they specifically saw. There, addressing the
4 allegations necessary to plead reliance to establish standing to
5 bring a UCL claim, the California Supreme Court stated that "where
6 . . . a plaintiff alleges exposure to a long-term advertising
7 campaign, the plaintiff is not required to plead with an
8 unrealistic degree of specificity that the plaintiff relied on
9 particular advertisements or statements." Id. at 328; see also
10 Morgan, 177 Cal. App. 4th at 1257-58. However, Plaintiffs have not
11 plead that they viewed any of Defendants' advertising, let alone a
12 "long-term advertising campaign" by Defendants. Even if they did,
13 In re Tobacco II merely provides that to establish UCL standing,
14 reliance need not be proved through exposure to particular
15 advertisements; the case does not stand for, nor could it, a
16 general relaxation of the pleading requirements under Rule 9(b).
17 See, e.g., In re Actimmune Mktg. Litig., 2009 WL 3740648, at *13
18 (N.D. Cal.).

19 As for alleged non-disclosures, a modified pleading standard
20 applies "on account of the reduced ability in an omission suit 'to
21 specify the time, place, and specific content' relative to a claim
22 involving affirmative misrepresentations." In re Apple & AT&TM
23 Antitrust Litig., 596 F. Supp. 2d 1288, 1310 (N.D. Cal. 2008)
24 (quoting Falk v. Gen. Motors Corp., 496 F. Supp. 2d 1088, 1099
25 (N.D. Cal. 2007)). Herrington and Haley's primary complaint is
26 that Defendants did not disclose information concerning the
27 presence of 1,4-dioxane and formaldehyde. See, e.g., 1AC ¶¶ 32,
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1 198. Their failure to plead the time and place of these omissions
2 will not defeat their claims. And reliance on these non-
3 disclosures could be presumed if their allegations suggested that
4 the omitted facts were material. See, e.g., Blackie v. Barrack,
5 524 F.2d 891, 906 (9th Cir. 1975). However, Herrington and Haley
6 have not made such allegations. Although they plead that they
7 would not have purchased Defendants' products had they known of the
8 presence of 1,4-dioxane and formaldehyde, a fact is material if a
9 reasonable person "would attach importance to its existence or
10 nonexistence in determining" whether to purchase the product.
11 Morgan, 177 Cal. App. 4th at 1258 (citation and internal quotation
12 marks omitted). Because Herrington and Haley have not averred
13 facts that show that the levels of these substances caused them or
14 their children harm, under the objective test for materiality, the
15 alleged non-disclosures are not actionable.

16 Accordingly, even if Herrington and Haley had Article III
17 standing, their claims under the UCL's fraud prong, the FAL and the
18 CLRA would be subject to dismissal for failure to comply with Rule
19 9(b). In any amended complaint, they must plead affirmative
20 misrepresentations with particularity and aver how the statements
21 were false or misleading. In addition, they must plead facts
22 suggesting that the alleged non-disclosures were material.

23
24 C. Herrington and Haley's UCL Claims for Unlawful and Unfair
Business Practices

25 California's UCL prohibits any unlawful or unfair business act
26 or practice. Cal. Bus. & Prof. Code § 17200. The UCL incorporates
27 other laws and treats violations of those laws as unlawful business
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1 practices independently actionable under state law. Chabner v.
2 United of Omaha Life Ins. Co., 225 F.3d 1042, 1048 (9th Cir. 2000).
3 Violation of almost any federal, state or local law may serve as
4 the basis for a UCL claim. Saunders v. Superior Court, 27 Cal.
5 App. 4th 832, 838-39 (1994). In addition, a business practice may
6 be "unfair . . . in violation of the UCL even if the practice does
7 not violate any law." Olszewski v. Scripps Health, 30 Cal. 4th
8 798, 827 (2003).

9 1. Unlawful Business Practices

10 Herrington and Haley plead that Defendants sold "adulterated"
11 and "misbranded" cosmetics in violation of the Federal Food, Drug,
12 and Cosmetic Act (FDCA), 21 U.S.C. § 331(a); California's Sherman
13 Food, Drug, and Cosmetic Law, Cal. Health & Saf. Code §§ 111710,
14 111775; and the California Safe Cosmetics Act of 2005 (CSCA).

15 Herrington and Haley have not plead facts suggesting that
16 Defendants have introduced adulterated cosmetics into commerce.
17 Under the FDCA and the Sherman Law, a cosmetic is adulterated if
18 "it bears or contains any poisonous or deleterious substance which
19 may render it injurious to users under the conditions of use
20 prescribed in the labeling thereof" 21 U.S.C. § 361(a);
21 Cal. Health & Saf. Code § 111670. As discussed in greater detail
22 above, Plaintiffs have not alleged that the levels of 1,4 dioxane
23 and formaldehyde in Defendants' products create a cognizable risk
24 of injury to their children.

25 Nor have Herrington and Haley alleged facts to suggest that
26 Defendants' cosmetics are misbranded. Under the FDCA and the
27 Sherman Law a cosmetic may be misbranded if "its labeling is false
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1 or misleading in any particular." 21 U.S.C. § 362(a); Cal. Health
2 & Saf. Code § 111730. A cosmetic may also be misbranded if
3 information required by the FDCA or the Sherman Law "is not
4 prominently placed" on the cosmetic's label with
5 "conspicuousness . . . as to render it likely to be read and
6 understood by the ordinary individual under customary conditions of
7 purchase and use." 21 U.S.C. § 362(c); Cal. Health & Saf. Code
8 § 111745. The fact that Defendants' products may contain the
9 substances of which Herrington and Haley complain does not, by
10 itself, render the products' labels false or misleading. In
11 addition, Herrington and Haley's allegations do not suggest that
12 the products are misbranded. A cosmetic is misbranded if the
13 cosmetic contains an ingredient that has not been "adequately
14 substantiated for safety" and a warning does not appear on its
15 "principal display panel." 21 C.F.R. § 740.10. The required
16 language is: "Warning - The safety of this product has not been
17 determined." Id. FDCA defines an "ingredient" as "any single
18 chemical entity or mixture used as a component in the manufacture
19 of a cosmetic product." Id. § 700.3(e). Herrington and Haley do
20 not plead that Defendants use 1,4-dioxane or formaldehyde as
21 components in the manufacture of their products; instead, they
22 plead that these substances may be byproducts of other substances.
23 1AC ¶¶ 26, 84. Indeed, the FDA, which is the agency charged with
24 administering the FDCA, states that 1,4-dioxane "is not used as a
25 cosmetic ingredient," but rather is "a contaminant that may occur
26 in trace amounts in certain cosmetics." RJN, Ex. B. To the extent
27 that these are ingredients, they appear to be "incidental
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1 ingredients," which need not be disclosed. 21 C.F.R. § 701.3(1).
2 Such ingredients may be substances "that have no technical or
3 functional effect in the cosmetic but are present by reason of
4 having been incorporated into the cosmetic as an ingredient of
5 another cosmetic ingredient." Id. § 701.3(1)(1).

6 Finally, Herrington and Haley have not alleged facts
7 suggesting a violation of the CSCA, which requires "the
8 manufacturer of any cosmetic product subject to regulation by the
9 federal Food and Drug Administration that is sold in this state" to
10 provide the California Division of Environmental and Occupational
11 Disease Control with "a complete and accurate list of its cosmetic
12 products that . . . are sold in the state and that contain any
13 ingredient that is a chemical identified as causing cancer or
14 reproductive toxicity" Cal. Health & Saf. Code
15 § 111792(a). The CSCA incorporates the definitions of "ingredient"
16 and "incidental ingredient" from the federal regulations discussed
17 above. Id. § 111791.5(d). Because the substances at issue do not
18 constitute ingredients, they do not fall within the scope of the
19 CSCA. Thus, Herrington and Haley have not alleged a failure by
20 Defendants to comply with the CSCA's reporting requirement.

21 Accordingly, even if Herrington and Haley had Article III
22 standing, their claims under the UCL's unlawful prong would be
23 subject to dismissal. They have not plead an underlying cognizable
24 violation of state or federal law.

25 2. Unfair Business Practices

26 In consumer actions, "a practice is unfair if (1) the consumer
27 injury is substantial, (2) the injury is not outweighed by any
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1 countervailing benefits to consumers or competition, and (3) the
2 injury is one that consumers themselves could not reasonably have
3 avoided." Morgan, 177 Cal. App. 4th at 1254-55 (citation omitted).

4 Herrington and Haley make the general allegation that
5 Defendants "engaged in 'unfair' business acts or practices in that
6 Defendants' conduct outweighs any business justification, motive or
7 reason, particularly considering the available legal alternatives
8 that exist in the marketplace." 1AC ¶ 187. However, Herrington
9 and Haley have not alleged facts suggesting that consumers have
10 suffered an injury based on Defendants' conduct. Thus, for the
11 same reasons they lack Article III standing, Herrington and Haley
12 do not state a claim under the unfairness prong of the UCL.

13 Accordingly, even if Herrington and Haley had Article III
14 standing, their claims under the UCL's unfairness prong would be
15 subject to dismissal. They have not plead a substantial injury to
16 consumers.

17 D. Claims under Other States' Unfair Competition Laws

18 Sarjent, Fournier and King bring claims under the consumer
19 statutes of thirty-five states and the District of Columbia against
20 Johnson & Johnson and Kimberly Clark. They maintain that they
21 state such claims for the same reasons that Herrington and Haley
22 state claims under California's UCL. However, as explained above,
23 Herrington and Haley fail to state such claims.

24 Accordingly, even if they had Article III standing, Sarjent,
25 Fournier and King's claims against Johnson & Johnson and Kimberly
26 Clark would be dismissed.

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1 E. Claims for Intentional Misrepresentation, Negligent
2 Misrepresentation and Fraudulent Concealment

3 Plaintiffs have not alleged under which jurisdiction's laws
4 these claims arise. For the purposes of this motion, the Court
5 applies California law. Plaintiffs do not dispute that these
6 claims must satisfy the heightened pleading requirements of Rule
7 9(b).

8 1. Intentional Misrepresentation

9 Under California law, a claim for intentional
10 misrepresentation has seven elements: "(1) the defendant
11 represented to the plaintiff that an important fact was true;
12 (2) that representation was false; (3) the defendant knew that the
13 representation was false when the defendant made it, or the
14 defendant made the representation recklessly and without regard for
15 its truth; (4) the defendant intended that the plaintiff rely on
16 the representation; (5) the plaintiff reasonably relied on the
17 representation; (6) the plaintiff was harmed; and (7) the
18 plaintiff's reliance on the defendant's representation was a
19 substantial factor in causing that harm to the plaintiff."
20 Manderville v. PCG & S Group, Inc., 146 Cal. App. 4th 1486, 1498
21 (2007).

22 As stated above, Plaintiffs fail to plead their fraud
23 allegations with sufficient particularity. They do not allege how
24 Defendants' statements were false. And, although they allege
25 several representations were misleading, Plaintiffs do not plead
26 the circumstances in which they observed them. Indeed, they do not
27 even allege that they saw and relied on the statements of which
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1 they complain, aside from their suggestion that they saw and relied
2 on those appearing on the labels of the products they purchased.
3 Without such allegations, Plaintiffs' claims fail because they have
4 not plead reliance on these alleged intentional misrepresentations.

5 Accordingly, even if they had Article III standing,
6 Plaintiffs' intentional misrepresentation claims would be
7 dismissed. Plaintiffs must plead how the statements were false or
8 misleading and the circumstances in which they were exposed to the
9 alleged misrepresentations upon which they relied.

10 2. Negligent Misrepresentation

11 To state a claim for negligent misrepresentation under
12 California law, a plaintiff must plead "(1) misrepresentation of a
13 past or existing material fact, (2) without reasonable ground for
14 believing it to be true, (3) with intent to induce another's
15 reliance on the misrepresentation, (4) ignorance of the truth and
16 justifiable reliance on the misrepresentation by the party to whom
17 it was directed, and (5) resulting damage." Glenn K. Jackson, Inc.
18 v. Roe, 273 F.3d 1192, 1200 n.2 (9th Cir. 2001).

19 Plaintiffs' negligent misrepresentation claims fail for the
20 same reasons as their claims for intentional misrepresentation.
21 They have not plead how the statements are false or misleading and
22 the circumstances in which they were exposed to the alleged
23 misrepresentations upon which they relied. Accordingly, even if
24 they had Article III standing, Plaintiffs' negligent
25 misrepresentation claims would be dismissed.
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1 3. Fraudulent Concealment

2 To state a claim for fraudulent concealment under California
3 law, a plaintiff must plead that "(1) the defendant must have
4 concealed or suppressed a material fact, (2) the defendant must
5 have been under a duty to disclose the fact to the plaintiff,
6 (3) the defendant must have intentionally concealed or suppressed
7 the fact with the intent to defraud the plaintiff, (4) the
8 plaintiff must have been unaware of the fact and would not have
9 acted as he did if he had known of the concealed or suppressed
10 fact, and (5) as a result of the concealment or suppression of the
11 fact, the plaintiff must have sustained damage." Hahn v. Mirda,
12 147 Cal. App. 4th 740, 748 (2007) (quoting Marketing W., Inc. v.
13 Sanyo Fisher (USA) Corp., 6 Cal. App. 4th 603, 612-13 (1992)).

14 Plaintiffs assert that Defendants had a duty to disclose
15 because they had exclusive knowledge of material facts that were
16 not known to Plaintiffs. However, as noted above, Plaintiffs have
17 not made factual allegations to suggest that these withheld facts
18 were material.

19 Further, Plaintiffs argue that 21 C.F.R. § 740.10
20 independently imposes a duty to disclose. This argument fails
21 because, as discussed above, Plaintiffs have not alleged facts
22 suggesting that 1,4-dioxane and formaldehyde are ingredients as
23 defined by 21 C.F.R. § 700.3(e). Even if they were ingredients,
24 they appear to be incidental ingredients, which need not be
25 disclosed. See 21 C.F.R. 701.3(1).

26 Accordingly, even if they had Article III standing,
27 Plaintiffs' fraudulent concealment claims would be dismissed.
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1 Plaintiffs must plead facts to suggest materiality and that 1,4-
2 dioxane and formaldehyde are cosmetic ingredients that must be
3 disclosed.

4 F. Breach of Warranty Claims

5 1. Express and Implied Warranty Claims

6 Plaintiffs plead their express and implied warranty claims
7 under the laws of various states and the District of Columbia.
8 However, they allege that these jurisdictions, including
9 California, have adopted the Uniform Commercial Code sections that
10 apply to such claims. See UCC §§ 2-313 (express warranties) and 2-
11 314 (implied warranty of merchantability). Because the laws appear
12 materially similar, the Court applies California law for the
13 purposes of this motion.

14 Under California law, courts consider three steps to analyze a
15 claim for breach of an express warranty.

16 First, the court determines whether the seller's
17 statement amounts to an affirmation of fact or promise
18 relating to the goods sold. Second, the court determines
19 if the affirmation or promise was part of the basis of
20 the bargain. Finally, if the seller made a promise
relating to the goods and that promise was part of the
basis of the bargain, the court must determine if the
seller breached the warranty.

21 McDonnell Douglas Corp. v. Thiokol Corp., 124 F.3d 1173, 1176 (9th
22 Cir. 1997) (citing Keith v. Buchanan, 173 Cal. App. 3d 13 (1985)).
23 Also, in California, consumer goods sold at retail are accompanied
24 by an implied warranty by the manufacturer and the merchant that
25 the goods are merchantable. Cal. Civ. Code § 1792.

26 Plaintiffs contend that Defendants' advertisements and other
27 affirmations of fact on their product labeling constitute express
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1 warranties. However, Plaintiffs have not plead facts to suggest
2 that these alleged warranties were breached. Plaintiffs'
3 allegations do not show that Defendants' products were unsafe or
4 otherwise unfit for use.

5 Accordingly, even if they had Article III standing,
6 Plaintiffs' claims for breach of express warranties and Haley,
7 Sarjent and Fournier's claims for breach of implied warranties
8 fail. In any amended pleading, Plaintiffs must plead facts to
9 suggest that Defendants' products did not perform as warranted or
10 that they were otherwise unmerchantable.

11 2. Magnuson-Moss Warranty Act Claims

12 Violations of the Magnuson-Moss Warranty Act (MMWA) can rest
13 on breaches of warranties created under state law. Birdsong v.
14 Apple, Inc., 590 F.3d 955, 958 n.2 (9th Cir. 2009); Clemens v.
15 DaimlerChrysler Corp., 534 F.3d 1017, 1022 (9th Cir. 2008).

16 Plaintiffs do not argue that their MMWA claims rest on bases other
17 than their state law warranty claims. Because those claims fail,
18 their MMWA claims must be dismissed for the same reasons.

19 G. Unjust Enrichment Claims

20 Plaintiffs have not indicated under which jurisdiction's law
21 they bring their unjust enrichment claims. For the purposes of
22 this motion, the Court applies California law.

23 California courts appear to be split as to whether there is an
24 independent cause of action for unjust enrichment. Baggett v.
25 Hewlett-Packard Co., 582 F. Supp. 2d 1261, 1270-71 (C.D. Cal. 2007)
26 (applying California law). One view is that unjust enrichment is
27 not a cause of action, or even a remedy, but rather a general
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1 principle, underlying various legal doctrines and remedies.
2 McBride v. Boughton, 123 Cal. App. 4th 379, 387 (2004). In
3 McBride, the court construed a "purported" unjust enrichment claim
4 as a cause of action seeking restitution. Id. There are at least
5 two potential bases for a cause of action seeking restitution:
6 (1) an alternative to breach of contract damages when the parties
7 had a contract which was procured by fraud or is unenforceable for
8 some reason; and (2) where the defendant obtained a benefit from
9 the plaintiff by fraud, duress, conversion, or similar conduct and
10 the plaintiff chooses not to sue in tort but to seek restitution on
11 a quasi-contract theory. Id. at 388. In the latter case, the law
12 implies a contract, or quasi-contract, without regard to the
13 parties' intent, to avoid unjust enrichment. Id.

14 Another view is that a cause of action for unjust enrichment
15 exists and its elements are receipt of a benefit and unjust
16 retention of the benefit at the expense of another. Lectrodryer v.
17 SeoulBank, 77 Cal. App. 4th 723, 726 (2000); First Nationwide Sav.
18 v. Perry, 11 Cal. App. 4th 1657, 1662-63 (1992).

19 In addition to their lack of Article III standing, Plaintiffs
20 have not sufficiently plead a predicate cause of action that would
21 support a restitutionary remedy. In any amended complaint,
22 Plaintiffs must plead a cause of action for which they would be
23 entitled to restitution.

24 CONCLUSION

25 For the foregoing reasons, the Court GRANTS Defendants' Motion
26 to Dismiss. (Docket No. 133.) The Court's holding is summarized
27 as follows:
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1. Plaintiffs have not plead a cognizable injury-in-fact and therefore lack Article III standing to bring any of their claims. The Court dismisses their complaint for lack of subject matter jurisdiction. Plaintiffs are granted leave to amend if they can plead facts that would establish their standing.

2. In addition, the following claims are dismissed with leave to amend to cure the identified deficiencies:
 - a. Herrington and Haley’s claims under the UCL’s fraudulent prong, the FAL and the CLRA based on misrepresentations fail because they have not plead in accordance with Rule 9(b). In any amended complaint, they must plead with particularity, including the circumstances in which they were exposed to the alleged misrepresentations and why the statements were in fact false or misleading. In addition, they must plead facts suggesting that the challenged non-disclosures were material.

 - b. Herrington and Haley’s claims under the unlawful and unfair prongs of the UCL fail. For their claims under the unlawful prong, they must plead facts suggesting violations of state or federal law. To plead a claim under the unfair prong, they must allege a cognizable injury to consumers.

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- c. Sarjent, Fournier and King's claims under the consumer statutes of thirty-five states and the District of Columbia fail for the same reasons that Herrington and Haley's UCL claims fail.
- d. Plaintiffs' claims for intentional and negligent misrepresentation fail because they have not been plead in accordance with Rule 9(b). Plaintiffs must plead with specificity, including how the statements were false and misleading and the circumstances in which they were exposed to the alleged misrepresentations upon which they relied.
- e. Plaintiffs' claims for fraudulent concealment fail because they have not plead facts suggesting that the non-disclosures were material or that Defendants had an independent duty to disclose the allegedly withheld information.
- f. Plaintiffs' claims for breach of express warranties and Haley, Sarjent and Fournier's claims for breach of implied warranties are dismissed because they have not alleged a cognizable breach thereof. Plaintiffs must make factual allegations that tend to show that Defendants' products did not perform as warranted or were otherwise unfit for use.

United States District Court
For the Northern District of California

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Because Plaintiffs have not stated a state law warranty claim, their MMWA claims fail.

g. Plaintiffs' claims for unjust enrichment fail because they have not stated a predicate claim warranting such relief.

Plaintiffs are granted fourteen days from the date of this Order to file an amended complaint addressing the above-mentioned deficiencies. If Plaintiffs do so, Defendants may file a motion to dismiss three weeks thereafter, with Plaintiffs' opposition due two weeks following and Defendants' reply due one week after that. The motion shall be taken under submission on the papers. Plaintiffs' failure to file an amended complaint in accordance with this Order will result in the dismissal of their claims.

If this case has not been dismissed, a case management conference will be held on November 23, 2010 at 2:00 p.m.

IT IS SO ORDERED.

Dated: September 1, 2010



CLAUDIA WILKEN
United States District Judge