

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

LeGrand v. Abbott Laboratories

No. 22-cv-05815-TSH (N.D. Cal. July 28, 2025) · No. 22-cv-05815-TSH · Decided July 28, 2025

SUMMARY

The United States District Court for the Northern District of California denied Abbott Laboratories’ motion to dismiss a putative class action under Federal Rule of Civil Procedure 12(h)(3). The court held that Condalisa LeGrand established Article III standing based on her testimony and declaration concerning purchases of Abbott’s Ensure products, despite the absence of receipts. The court also held that she had standing to seek injunctive relief based on an alleged future threat of harm from false or misleading labeling.

CASE DETAILS

COURT	United States District Court for the Northern District of California
WRITING FOR THE COURT	Thomas S. Hixson
JURISDICTION	United States District Court for the Northern District of California
DECIDED	July 28, 2025
DOCKET	22-cv-05815-TSH
DISPOSITION	dismissed
PROCEDURAL POSTURE	Plaintiff brought a putative consumer class action alleging that statements on Abbott's Ensure product labels were false and misleading. Abbott moved to dismiss under Federal Rule of Civil Procedure 12(h)(3), arguing that Plaintiff lacked Article III standing and standing to seek injunctive relief. The court denied the motion.
STANDARD OF REVIEW	For a factual jurisdictional attack, the court may consider extrinsic evidence and need not presume the truthfulness of the complaint's allegations. The party asserting federal jurisdiction must establish standing by a preponderance of the evidence. Dismissal without leave to amend is appropriate only when the jurisdictional defect cannot be cured by amendment.
PRECEDENTIAL VALUE	unpublished district court order

TOPICS

standing

subject matter jurisdiction

injunctions

class actions

consumer protection

PRACTICE AREAS

consumer protection

civil procedure

constitutional law

class actions

remedies

QUESTIONS PRESENTED

1. Whether LeGrand established Article III standing to pursue her consumer-protection claims despite lacking documentary receipts for the alleged Ensure purchases.
2. Whether LeGrand established standing to seek injunctive relief by showing an actual and imminent threat of future harm from Abbott's labeling.

HOLDINGS

1. LeGrand established Article III standing because, by a preponderance of the evidence, her testimony and declaration showed that she purchased the challenged Ensure products during the proposed class period, thereby establishing an injury in fact traceable to the alleged labeling and redressable by judicial relief. Receipts were not required to establish standing.
2. LeGrand had standing to seek injunctive relief because the evidence showed a sufficient actual and imminent threat of future harm: she would be unable to rely on Ensure's labeling in the future despite wanting to purchase the product and could reasonably be deceived by the labeling.

KEY QUOTATIONS

“To establish Article III standing, a plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision.” (at 5)

“For injunctive relief, which is a prospective remedy, the threat of injury must be actual and imminent, not conjectural or hypothetical.” (at 10)

“a previously deceived consumer may have standing to seek an injunction against false advertising or labeling, even though the consumer now knows or suspects that the advertising was false at the time of the original purchase, because the consumer may suffer an actual and imminent, not conjectural or hypothetical threat of future harm.” (at 10-11)

FACTUAL BACKGROUND

LeGrand, a California resident, alleged that Abbott's Ensure products were marketed with false or misleading representations, including that the products were "Doctor Recommended" and provided "Complete, Balanced Nutrition." She testified that she purchased Ensure products for herself repeatedly over many years, including during the proposed class period, but lacked receipts because she made purchases at multiple stores, often paid cash, and discarded receipts. After learning about the products' added-sugar content, she stopped consuming Ensure for herself, although she later purchased products for her then-husband using his money. The court found

that her testimony and declaration established her purchases and that she could reasonably be deceived by the labeling in the future.

PROCEDURAL HISTORY

LeGrand filed the initial putative class action complaint on October 6, 2022, later filed an amended complaint, and filed the operative Second Amended Complaint on December 11, 2024. She subsequently moved for class certification. Abbott filed the Rule 12(h)(3) motion at issue on July 2, 2025, and the court decided the motion without oral argument, denying it on July 28, 2025.

DISPOSITION

dismissed

CASES CITED

- Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994)
- Chandler v. State Farm Mut. Auto. Ins. Co., 598 F.3d 1115, 1122 (9th Cir. 2010)
- Wood v. City of San Diego, 678 F.3d 1075, 1082 (9th Cir. 2012)
- Arbaugh v. Y&H Corp., 546 U.S. 500, 506 (2006)
- Iten v. Los Angeles, 81 F.4th 979, 985 (9th Cir. 2023)
- Caselman v. Pier 1 Imports (U.S.), Inc., No. 14-CV-02383-LHK, 2015 WL 106063, at *2 (N.D. Cal. Jan. 7, 2015)
- Safe Air for Everyone v. Meyer, 373 F.3d 1035, 1039 (9th Cir. 2004)
- Warth v. Seldin, 422 U.S. 490, 501 (1975)
- Gordon v. United States, 739 F. App'x 408, 411 (9th Cir. 2018)
- Friends of the Earth v. Sanderson Farms, Inc., 992 F.3d 939, 944 (9th Cir. 2021)
- Eminence Cap., LLC v. Aspeon, Inc., 316 F.3d 1048, 1052 (9th Cir. 2003)
- NEI Contracting & Eng'g, Inc. v. Hanson Aggregates Pac. Sw., Inc., 926 F.3d 528, 532 (9th Cir. 2019)
- Spokeo, Inc. v. Robins, 578 U.S. 330, 338 (2016)
- Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992)
- In re ConAgra Foods, Inc., 90 F. Supp. 3d 919, 968 (C.D. Cal. 2015)
- Gerlinger v. Amazon.com Inc., Borders Grp., Inc., 526 F.3d 1253, 1255-56 (9th Cir. 2008)
- Bargetto v. Walgreen Co., No. 22-CV-02639-TLT, 2024 WL 3493260, at *1-3, *7 (N.D. Cal. June 14, 2024)
- Sud v. Costco Wholesale Corp., No. 15-CV-03783-JSW, 2016 WL 192569, at *3 (N.D. Cal. Jan. 15, 2016)
- Gonzalez v. Chattem, Inc., No. 23-CV-00102-HSG, 2023 WL 8101923, at *4 (N.D. Cal. Nov. 21, 2023)
- Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc., 528 U.S. 167, 185 (2000)
- Davidson v. Kimberly-Clark Corp., 889 F.3d 956, 967, 969-70 (9th Cir. 2018)
- Cabrera v. Bayer Healthcare LLC, No. LA CV17-08525 JAK (JPRX), 2024 WL 1699357, at *6 (C.D. Cal. Feb. 23, 2024)

OPINION

1 2 3 4 UNITED STATES DISTRICT COURT 5 NORTHERN DISTRICT OF CALIFORNIA 6 7
CONDALISA LEGRAND, Case No. 22-cv-05815-TSH 8 Plaintiff, ORDER DENYING
DEFENDANT’S 9 v. MOTION TO DISMISS PURSUANT TO RULE 12(h)(3) 10 ABBOTT
LABORATORIES, Re: Dkt. No. 172 11 Defendant. 12 13 I. INTRODUCTION 14 Condalisa
LeGrand brings this putative class action against Abbott Laboratories 15 (“Abbott”), alleging
certain statements on the labels of Abbott’s Ensure® nutrition drinks are false 16 and misleading.

ECF No. 116 (Second Amended Complaint). Pending before the Court is 17 Abbott’s Motion to
Dismiss pursuant to Federal Rule of Civil Procedure 12(h)(3).¹ ECF No. 172 18 (“Mot.”). Abbott
argues that dismissal is warranted because LeGrand lacks Article III standing, 19 and LeGrand
does not have standing to pursue injunctive relief. *Id.* The Court finds this matter 20 suitable for
disposition without oral argument and VACATES the August 7, 2025, hearing.

See 21 Civ. L.R. 7-1(b). For the reasons stated below, the Court DENIES the motion.² 22 II.
BACKGROUND 23 A. Factual Background 24 Abbott is an Illinois corporation that
manufactures, markets, and distributes several 25 26 1 For precision’s sake, citations herein are to
the unredacted version of Abbott’s Motion to Dismiss (ECF No. 173-4). 27 1 different “nutrition”
shakes and drinks under its Ensure brand.

Second Amended Complaint 2 (“SAC”) ¶¶ 1, 9 (ECF No. 116); Answer ¶¶ 1, 9 (ECF No. 156).
LeGrand is a California resident 3 who purchased Ensure products on multiple occasions. SAC ¶¶
8, 107. 4 In this putative class action, LeGrand alleges that certain statements on the labels of
Ensure 5 products are false and misleading. *Id.* ¶¶ 2, 46, 66, 77, 80, 104. 6 B. Factual Support For
Jurisdiction 7 In her motion for class certification, currently pending before the Court, LeGrand
moves to 8 certify a class of persons who purchased certain Ensure products in California from
October 6, 9 2018, to the time the class is notified (the “Class Period”).

Motion for Class Certification (“Mot. 10 Cert.”) at 1 (ECF No. 137-3). LeGrand’s proposed class
involves three Ensure products (the 11 “Challenged Products”): Ensure Original Nutrition Shake;
Ensure Plus Nutrition Shake; and 12 Ensure Complete Nutrition Shake. *Id.* LeGrand is a
California resident who purchased Ensure 13 Original on multiple occasions during the Class
Period.

SAC ¶¶ 8, 107. LeGrand also purchased 14 Ensure Plus during the Class Period. Mot. Cert. at
13:7–15 (citing Declaration of Condalisa 15 LeGrand (“LeGrand Decl.”) ¶ 2 (ECF No. 136-4)). In
purchasing the products, LeGrand was 16 exposed to and relied on Abbott’s label representations,
such as that the products were “Doctor 17 Recommended” and “nutrition shake[s].” SAC ¶ 108.

18 LeGrand first learned about Ensure in 1994, when she purchased Ensure Plus for her 19
grandfather who was terminally ill. Declaration of Jack Fitzgerald in Support of LeGrand’s 20

Opposition, Ex. 1 (“LeGrand Dep. Tr.”), at 18:16–25, 19:1–3 (ECF No. 177-1). LeGrand began 21 purchasing Ensure for herself in the late 1990’s. Id. at 21:10–22. LeGrand first purchased Ensure 22 at Walgreens and usually purchased Ensure Plus.

Id. at 11:24–25, 22:16–23:6, 94:20–23. 23 LeGrand consistently purchased Ensure products for her own use between the late 1990’s and 24 early 2022. Id. at 23:8–15, 228:13–229:11. Overall, LeGrand made over 500 Ensure purchases 25 since the late 1990’s and more than 100 Ensure purchases since 2019. Id. at 29:15–18, 43:20–23, 26 48:11–49:16. 27 During the Class Period, LeGrand purchased the Challenged Products multiple times a 1 depending on various factors.

Id. at 29:12–30:22, 32:2–13; LeGrand Decl. ¶ 2. Most often, 2 LeGrand purchased Ensure Plus, but Ensure Original represented one out of every twenty or thirty 3 purchases. LeGrand Dep. Tr. at 56:7–16, 57:2–13. LeGrand also purchased Equate³ when Ensure 4 was not available. Id. at 96:3–21, 116:3–9. But LeGrand did not purchase Ensure Complete at all. 5 Declaration of Tracie L. Bryant in Support of Abbott’s Motion (“Bryant Decl.”), Ex. A (LeGrand 6 Deposition), at 12:24–13:1 (ECF No. 173-3).

On average, LeGrand consumed Ensure three times 7 a day during the times she used Ensure within the Class Period. LeGrand Dep. Tr. at 32:2–13, 8 33:9–34:11. During this time, LeGrand usually purchased the Challenged Products at Walgreens 9 or Walmart stores in Richmond or Oakland, California, but also made purchases at other Walmart 10 stores and possibly at CVS, Safeway, and Raley’s.

Id. at 49:19–50:3, 291:15–20; SAC ¶ 107; 11 LeGrand Decl. ¶ 2; Bryant Decl., Ex. A, at 360:25–361:9, 406:5–12. LeGrand made both in- 12 person purchases and online purchases for in-store pickup and typically purchased with cash. 13 LeGrand Dep. Tr. at 50:23–51:12, 184:7–22, 186:20–187:7. She occasionally used a debit card to 14 purchase the Challenged Products but did not use a credit card.

Id. at 185:8–13, 186:20–187:25. 15 LeGrand purchased and consumed the Challenged Products because she needed calories 16 and nutrition and because it was recommended for her grandfather as a healthy option. Id. at 17 42:20–43:3. LeGrand recalls seeing the statements, “#1 Doctor Recommended” and “Complete, 18 Balanced Nutrition,” on the Challenged products when she purchased them and thought Ensure 19 “was always advertised as a meal replacement, something that is complete, balanced, and 20 nutritious.” Id. at 70:13–71:3, 98:9–99:16, 322:11–18.

21 In 2022, after speaking with counsel and doing her own research, LeGrand learned that the 22 Challenged Products were harmful and not healthy because of their added sugars. Id. at 155:7– 23 157:14, 162:19–25. LeGrand “felt defrauded” because she had “purchased Ensure thinking that it 24 was a healthy and nutritious alternative for [her] meal replacement-wise, and that’s not what [she] 25 got.” Id. at 142:13–25, 193:19–24.

The last time that LeGrand purchased the Challenged 26 27 3 Equate is “a brand manufactured and marketed by Walmart.” Mot. at 7:14–18; see also 1 Products for herself was around January or February 2022. Id. at 228:13–229:11; see also 2 LeGrand Decl. ¶ 2 (averring that Ensure purchases for herself stopped April 2022). By 2022, 3 LeGrand had stopped consuming all nutritional shakes.

LeGrand Dep. Tr. at 35:12–22. Because 4 LeGrand is “not a nutritionist or a medical provider,” she does not understand the meaning of the 5 levels of sugar in the Challenged Products, even though the amount of sugar is displayed on the 6 nutrition facts panel on the Ensure bottle. Id. at 207:22–208:1, 212:2–19. 7 Between 2022 and 2024, LeGrand served as a conduit for her then husband—she used his 8 money to buy Ensure and Equate products for him but did not consume the products herself during 9 this time.

Id. at 35:23–36:11, 46:21–47:4, 143:1–144:7, 281:20–23. In 2024, LeGrand stopped 10 buying these products for her husband when they divorced. Id. at 37:8–13. 11 During discovery, LeGrand produced receipts from the Walmart in Solano County 12 illustrating 39 online purchases made between January 2020 and October 2023. Id. at 291:15– 13 292:6; see Abbott’s Reply in Support of Motion to Dismiss (“Reply”) at 3 n.1 (ECF No. 180) 14 (citing Mot., Ex. 6 (Walmart Receipts Compilation) (ECF No. 172-7)).

The receipts that were 15 produced show that LeGrand purchased Equate but not Ensure products. Mot., Ex. 6; LeGrand 16 Dep. Tr. at 276:2–9. During that time, LeGrand purchased the Challenged Products at other 17 Walmart stores which involved in-person purchases and paper receipts. LeGrand Dep. Tr. at 18 291:15–25, 292:1–6. LeGrand does not keep paper receipts after a purchase clears her account, 19 and she deletes emailed receipts once she verifies that her online order is completed.

Id. at 292:1– 20 6, 364:22–365:9. Although LeGrand searched, she did not locate any other paper or emailed 21 receipts showing her purchases of the Challenged Products. Bryant Decl., Ex. A, at 188:17– 22 190:11; 302:9–303:7. 23 C. Procedural Background⁴ 24 On October 6, 2022, LeGrand filed the initial complaint in this matter, seeking to bring a 25 class action.

Compl. ¶¶ 1 n.1, 124 (ECF No. 1). In her complaint, LeGrand’s proposed class 26 27 4 The Court discusses only the procedural history that is pertinent to Abbott’s Motion to Dismiss. 1 included persons who purchased any of the following six Ensure brand nutrition drinks for 2 personal or household use during the Class Period: Ensure Original Nutrition Shake; Ensure 3 Complete Nutrition Shake; Ensure Compact Therapeutic Nutrition Shake; Ensure Clear Nutrition 4 Drink; Ensure Original Nutrition Powder; and Ensure Enlive Advanced Nutrition Shake.

Id. On 5 March 10, 2023, LeGrand filed her first amended complaint. ECF No. 37. 6 LeGrand filed her operative Second Amended Complaint (“SAC”) on December 11, 2024. 7 ECF No. 116.

In her SAC, LeGrand added the Ensure Plus Nutrition Shake to the list of 8 challenged products and added two paragraphs pertaining to Ensure Plus. SAC ¶¶ 1 n.1, 16–17. 9 In her SAC, LeGrand brought the following causes of action on behalf of the California subclass: 10 violation of California’s Unfair Competition Law (“UCL”) (Cal.

Bus. & Prof. Code §§ 17200 et 11 seq.); violation of California’s False Advertising Law (“FAL”) (Cal. Bus. & Prof. Code §§ 17500 12 et seq.); violation of California’s Consumers Legal Remedies Act (“CLRA”) (Cal. Civ. Code §§ 13 1750 et seq.); Breach of Express Warranties (Cal. Com. Code § 2313(1)); and Breach of Implied 14 Warranty of Merchantability (Cal. Com.

Code § 2314). Id. ¶¶ 132–79. LeGrand brought the 15 following causes of action on behalf of all class members: Unjust Enrichment; Negligent 16 Misrepresentation; and Intentional Misrepresentation. Id. ¶¶ 180–200. LeGrand seeks, inter alia, 17 damages and injunctive relief. Id. ¶ 201. 18 On January 23, 2025, LeGrand filed a motion for class certification which is currently 19 pending before the Court.

ECF No. 137-3 (“Mot. Cert.”). LeGrand moves to certify the following 20 class: 21 [A]ll persons who purchased Ensure Original Nutrition Shake, Ensure Plus Nutrition Shake, or Ensure Complete Nutrition Shake (‘Ensure’) 22 in the State of California from October 6, 2018, to the time the Class is notified (the ‘Class Period’). 23 24 Id. at 1.

On April 24, 2025, Abbott filed an opposition. ECF No. 162-15 (“Opp., Mot. 25 Cert.”). On June 20, 2025, LeGrand filed a reply. ECF No. 168. 26 On July 2, 2025, Abbott filed its instant Motion to Dismiss pursuant to Rule 12(h)(3) 27 arguing that dismissal is warranted because LeGrand does not have Article III standing. ECF No. 1 23, 2025, Abbott filed a Reply.

ECF No. 180 (“Reply”). 2 III. LEGAL STANDARD 3 “Federal courts are courts of limited jurisdiction. They possess only that power authorized 4 by Constitution and statute, which is not to be expanded by judicial decree.” *Kokkonen v. 5 Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (citations omitted).

Accordingly, “[i]t is 6 to be presumed that a cause lies outside this limited jurisdiction, and the burden of establishing the 7 contrary rests upon the party asserting jurisdiction.” Id. (cleaned up); accord *Chandler v. State 8 Farm Mut. Auto. Ins. Co.*, 598 F.3d 1115, 1122 (9th Cir. 2010). 9 Federal Rule of Civil Procedure 12(b)(1) authorizes a party to move to dismiss a lawsuit 10 for lack of subject matter jurisdiction. “If the court determines at any time that it lacks subject- 11 matter jurisdiction, the court must dismiss the action.” Fed.

R. Civ. Pro. 12(h)(3). As such, “the 12 deadline for making a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction is 13 prolonged by Rule 12(h)(3).” *Wood v. City of San Diego*, 678 F.3d 1075, 1082 (9th Cir. 2012); 14 see also *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 506 (2006)

(explaining that a party or a court may inquire into federal subject matter jurisdiction at any stage in the litigation).

Moreover, lack of Article III standing is properly raised in a Rule 12(b)(1) motion. *Iten v. Los Angeles*, 81 F.4th 979, 17 985 (9th Cir. 2023). Thus, challenges to Article III standing are properly raised in a Rule 12(h)(3) motion. *Id.*; see *Caselman v. Pier 1 Imports (U.S.), Inc.*, No. 14-CV-02383-LHK, 2015 WL 19 106063, at *2 (N.D. Cal. Jan. 7, 2015).

The party asserting federal subject matter jurisdiction must establish standing by a preponderance of the evidence. *Leite v. Crane Co.*, 749 F.3d 1117, 21 1121 (9th Cir. 2014). A jurisdictional challenge may be facial or factual. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). Where the attack is facial, the court determines whether the allegations contained in the complaint are sufficient on their face to invoke federal jurisdiction, accepting all material allegations in the complaint as true and construing them in favor of the party asserting jurisdiction.

Warth v. Seldin, 422 U.S. 490, 501 (1975). Where the attack is factual, however, “the court need not presume the truthfulness of the plaintiff’s allegations.” *Safe Air for 1 jurisdiction*, a court may review extrinsic evidence beyond the complaint without converting a motion to dismiss into one for summary judgment. *Id.*; see *Gordon v. United States*, 739, F. App'x 3 408, 411 (9th Cir.

2018) (explaining that a court “may review any evidence, such as affidavits and testimony, to resolve factual disputes concerning the existence of jurisdiction”) (cleaned up). To overcome a factual challenge, a plaintiff must “support their jurisdictional allegations with competent proof.” *Friends of the Earth v. Sanderson Farms, Inc.*, 992 F.3d 939, 944 (9th Cir.

7 2021) (cleaned up). Further, dismissal of a complaint without leave to amend should only be granted where the jurisdictional defect cannot be cured by amendment. *Eminence Cap., LLC v. 9 Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003). IV. DISCUSSION *Abbott* argues that the Court should dismiss LeGrand’s claims for lack of jurisdiction because (1) LeGrand cannot establish Article III standing; and (2) LeGrand cannot establish that a threat of future harm exists as required for her claim for injunctive relief.

Mot. at 1:13–26. LeGrand contends that the uncontroverted evidence demonstrates that LeGrand purchased Ensure for decades and that she stopped purchasing Ensure for herself once she was aware of Abbott’s false advertising of the product. Opp. at 1:2–4, 16:11–13. Where there is a single named class representative, a court must determine that the representative has Article III standing prior to certifying the class.

See *NEI Contracting & Eng'g, Inc. v. Hanson Aggregates Pac. Sw., Inc.*, 926 F.3d 528, 532 (9th Cir. 2019) (“Standing is the threshold issue in any suit. If the individual plaintiff lacks standing, the court need never reach the class action issue.”) (cleaned up). “If none of the named

plaintiffs purporting to represent a class 22 establishes the requisite of a case or controversy with the defendants, none may seek relief on 23 behalf of himself or any other member of the class.” Id. (cleaned up).

24 Here, Abbott launches a factual jurisdictional attack against the lone named class 25 representative, LeGrand. Mot. at 5:1–14; see generally Mot. Cert. Thus, the Court must 26 determine whether LeGrand has Article III standing prior to ruling on LeGrand’s motion for class 27 certification. 1 has established Article III standing, and that LeGrand has standing to pursue claims for injunctive 2 relief.

Accordingly, dismissal is not warranted. 3 A. Article III Standing 4 Abbott argues that LeGrand lacks Article III standing “because she has no evidence that 5 she purchased Ensure products and therefore could not have been injured in the course of any such 6 alleged purchases.” Mot. at 5:26–28. LeGrand contends that the uncontested evidence shows that 7 LeGrand “is a bona fide purchaser with standing.” Opp. at 9:5–23.

8 “To establish Article III standing, a plaintiff must have (1) suffered an injury in fact, (2) 9 that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be 10 redressed by a favorable judicial decision.” NEI, 926 F.3d at 532 (citing *Spokeo, Inc. v. Robins*, 11 578 U.S. 330, 338 (2016)) (internal quotation marks omitted).

The familiar injury-in-fact 12 requirement mandates that a plaintiff show they “suffered an invasion of a legally protected 13 interest that is concrete and particularized and actual or imminent, not conjectural or 14 hypothetical.” Id. (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)) (cleaned up). 15 Here, the Court finds that LeGrand has established by a preponderance of the evidence that 16 she has Article III standing to pursue her claims.

Abbott argues that LeGrand cannot demonstrate 17 that she suffered an injury-in-fact because the preponderance of the evidence—including the 18 absence of documentary evidence proving Ensure purchases, LeGrand’s receipts showing 19 purchases of Equate, and “LeGrand’s ever-changing allegations regarding her supposed 20 purchases”—“shows LeGrand did not make any purchases of Ensure products at all.” Mot. at 21 5:26–10:6.

LeGrand contends that her testimony and Declaration together provide “ample 22 evidence” of her Ensure purchases. Opp. at 9:5–15. The Court agrees—not only does Abbott 23 repeatedly mischaracterize LeGrand’s testimony, but its arguments also fail to pump up its 24 deflated motion. 25 Most importantly, despite its repeated assertions, Abbott cannot establish that LeGrand did 26 not purchase Ensure during the relevant Class Period.

See, e.g., Reply at 4:6–7 (“No receipts 27 reflect Ensure purchases because she never actually purchased Ensure.”) (emphasis added). 1 produced by LeGrand show that she purchased Equate

products and not Ensure. Mot. at 7:12–18. 2 But these receipts are from the time between January 2020 and October 2023. Mot., Ex. 6.

In 3 comparison, the proposed Class Period is “from October 6, 2018, to the time the Class is notified.” 4 Mot. Cert. at 1. Even if Abbott could show—and it has not—that LeGrand did not purchase 5 Ensure between 2020 and 2023, Abbott’s Motion is devoid of evidence showing that LeGrand did 6 not purchase Ensure at all during the Class Period. 7 Abbott hangs its hat on the fact that LeGrand lacks documentary evidence proving the 8 existence of her Ensure purchases.

But Abbott’s argument rests on a false dichotomy: either (1) 9 LeGrand does not have receipts for Ensure purchases because she did not purchase Ensure; or (2) 10 LeGrand has receipts for Ensure purchases because she did purchase Ensure. See Mot. at 8:10–11 11 (“LeGrand’s Walmart receipts would evidence any purchase of Ensure nutrition shakes had she 12 actually made any.”) (emphasis in original).

To the contrary, LeGrand’s proffered evidence 13 supports a third option—LeGrand made the averred purchases despite her lack of receipts. 14 LeGrand consistently avers that she purchased the Challenged Products monthly during the Class 15 Period, purchased from several different stores, used varying methods of payment and purchase 16 options, and discarded receipts after purchases.

See, e.g., LeGrand Dep. Tr. at 23:8–15, 49:19– 17 51:12, 184:7–22, 185:8–13, 186:20–187:25, 228:13–229:11, 291:15–292:6, 364:22–365:9; SAC ¶ 18 107; LeGrand Decl. ¶¶ 2–3. LeGrand further provides details about her purchase locations, 19 Ensure’s labeling and advertising, and cost of Ensure products relevant to their packaging options. 20 See Opp. at 4–8. Abbott offers no evidence that contradicts these statements by LeGrand, nor 21 does it explain how a snapshot of receipts involving a single debit card from a single store (the 22 Solano County Walmart) captures LeGrand’s entire purchase history.

And Abbott wholly ignores 23 LeGrand’s testimony that during the time covered by LeGrand’s receipts, she also made in-store 24 purchases at the Richmond and Oakland Walmart stores and usually paid cash. LeGrand Dep. Tr. 25 at 186:20–187:7, 291:15–25; see also Opp. at 10:20–21 (“Abbott does not dispute Ensure was 26 available at the locations and times Ms. LeGrand testified she purchased it[.]”).

By Abbott’s own 27 proffered evidence, these cash purchases—made at any Walmart store—would not be in 1 (Walmart Website) (ECF No. 172-9)). 2 Moreover, Abbott cites to no legal authority for its proposition that LeGrand’s “own 3 testimony claiming that she purchased Ensure products... is not enough to establish standing by a 4 preponderance of evidence at this stage.” Mot. at 6:5–10.

Indeed, federal courts have held the opposite: receipts are not a prerequisite to a cognizable consumer class action. See, e.g., *In re 6 ConAgra Foods, Inc.*, 90 F. Supp. 3d 919, 968 (C.D. Cal. 2015) (holding that plaintiffs' lack of 7 receipts "does not deprive them of standing" and that "named plaintiffs' failure to produce 8 evidence of the specific price that each paid does not compel the conclusion that they cannot show 9 injury in fact and lack Article III standing").

In short, LeGrand's testimony and Declaration 10 constitute admissible evidence that set forth specific facts that establish her standing. See 11 *Gerlinger v. Amazon.com Inc., Borders Grp., Inc.*, 526 F.3d 1253, 1255–56 (9th Cir. 2008) 12 (explaining that at the post-pleading stage, a plaintiff "must set forth by affidavit or other 13 admissible evidence 'specific facts' as delineated in Federal Rule of Civil Procedure 56(e) as to 14 the existence of such standing"); see also Fed.

R. Civ. P. 56(c)(1) ("A party asserting that a fact 15 cannot be or is genuinely disputed must support the assertion by: (A) citing to particular parts of 16 materials in the record, including depositions... affidavits or declarations... or other 17 materials.").

Therefore, because the preponderance of evidence shows that LeGrand purchased 18 the Challenged Products during the Class Period, LeGrand has established an injury-in-fact 19 sufficient for Article III standing. *Leite*, 749 F.3d at 1121. 20 Further, Abbott's cited cases are inapposite. Abbott claims the cases are on point because 21 they conclude "documentary evidence affirmatively shows that a plaintiff failed to purchase the 22 product at issue at all." Mot. at 9:14–16 (emphasis added).

But here, Abbott does not point to 23 affirmative evidence that LeGrand did not purchase the Challenged Products during the Class 24 Period.⁵ In *Bargetto v. Walgreen Co.*, the plaintiff testified that she purchased, or at least received 25 5 In its Reply, Abbott asserts that LeGrand misinterprets its cited cases as mandating dismissal 26 only where the defendant adduces evidence showing that the plaintiff did not purchase the challenged product, and not where evidence produced by the plaintiff shows a lack of purchase.

27 Reply at 4:8–26. The Court does not understand this to be LeGrand's proposition. The Court 1 for free, defendant's plastic bag product on two specific dates, both from Walgreens; however, 2 defendant's transaction data "showing the units and retail sales by year" did not show that plaintiff 3 purchased its product. No. 22-CV-02639-TLT, 2024 WL 3493260, at *1–3 (N.D.

Cal. June 14, 4 2024). The *Bargetto* court held that the plaintiff did not establish standing to pursue damages 5 because the preponderance of the evidence showed that the plaintiff "did not purchase any plastic 6 bags, but instead, received them for free." *Id.* at *7.

In contrast to the plaintiff in *Bargetto*, 7 LeGrand testified that she purchased Ensure for decades, with more than 100 Ensure purchases 8 since 2019, that she purchased Ensure at multiple

locations, and that she was certain that she 9 purchased the Challenged Products within the Class Period. LeGrand Dep. Tr. at 29:12–30:32, 10 32:2–13, 43:20–23, 48:11–50:3, 291:15–20.

And unlike in Bargetto, Abbott does not proffer 11 evidence of transaction data showing that LeGrand did not purchase Ensure on any of the 12 occasions she avers to. 13 Similarly, in *Sud v. Costco Wholesale Corp. and Gonzalez v. Chattem, Inc.*, the defendants 14 produced affirmative evidence that the plaintiffs had not purchased defendants’ products on any 15 occasion.

See *Sud*, No. 15-CV-03783-JSW, 2016 WL 192569, at *3 (N.D. Cal. Jan. 15, 2016) 16 (submitting plaintiff’s complete purchase history from Costco, the only store where plaintiff 17 allegedly purchased the defendant’s product, showing that plaintiff did not purchase the product); 18 *Gonzalez*, No. 23-CV-00102-HSG, 2023 WL 8101923, at *4 (N.D. Cal. Nov. 21, 2023) 19 (submitting evidence that defendant’s product was not available for purchase at the times the 20 plaintiff allegedly purchased the product).

But here, that is simply not the case. 21 Finally, Abbott’s ad hominin attack deserves short shrift. Abbott asserts that the Court has 22 “every reason to doubt the veracity of [LeGrand’s] bare allegations.” Mot. at 6:18–19. Using an 23 argument repeated from its Opposition to Class Certification, Abbott asserts that LeGrand has 24 “constantly var[ied]” her allegations regarding the type of Ensure products she purchased and the 25 locations where she made purchases.⁶ Mot. at 6:18–7:11; see also Opp., Mot.

Cert. at 24:27– 26 6 To be sure, Abbott points to a single inconsistency regarding the locations where LeGrand 27 purchased Ensure. Mot. at 6:22–27. LeGrand did indicate on one occasion that she is not certain 1 25:16.

However, Abbott mischaracterizes LeGrand’s testimony. Contrary to Abbott’s claim, 2 LeGrand has not stated—in her Complaint or elsewhere—that she “only purchased Ensure 3 Original.” Mot. at 7:3–8 (emphasis added); see SAC ¶ 107. Nor has LeGrand stated that she 4 “only purchased Ensure at Walgreens and Walmart.” Mot. at 6:22–23 (emphasis added); see SAC 5 ¶ 107.

Abbott ignores the fact that LeGrand never stated in her Complaint or Declaration that she 6 did not purchase other Ensure variations or that she did not shop at other stores for Ensure. E.g., 7 Opp. at 2 n.14. Given LeGrand’s nearly thirty-year history with Ensure, it is unreasonable to 8 expect her to recall every detail of every purchase made. LeGrand Dep.

Tr. at 18:13–18. 9 Therefore, Abbott’s attack on LeGrand’s credibility fails. 10 Accordingly, the Court DENIES Abbott’s Motion to Dismiss for lack of Article III 11 standing. 12 B. Standing For Injunctive Relief 13 Abbott argues that even if Article III standing exists for some claims, LeGrand lacks 14 standing to seek injunctive relief because “she cannot establish any threat of future harm to her or 15 that she can be credibly deceived by Abbott.” Mot. at 10:7–9.

LeGrand contends that she did not 16 buy Ensure for herself or consume Ensure after learning about the dangers of sugar present in 17 Ensure. Opp. at 16:7–17. 18 “[A] plaintiff must demonstrate standing separately for each form of relief sought.” 19 *Friends of the Earth, Inc. v. Laidlaw Env’t Servs. (TOC), Inc.*, 528 U.S. 167, 185 (2000). “For 20 injunctive relief, which is a prospective remedy, the threat of injury must be actual and imminent, 21 not conjectural or hypothetical.” *Davidson v. Kimberly-Clark Corp.*, 889 F.3d 956, 967 (9th Cir.

22 2018) (cleaned up). In a consumer class action: 23 a previously deceived consumer may have standing to seek an 24 not online purchases, at Walgreens); *id.* at 94:24–95:7 (indicating she made the majority of 25 purchases in 2019 at Walgreens); SAC ¶ 107 (alleging purchases made at Walgreens within the Class Period); LeGrand Decl. ¶ 2 (averring to purchases at Walgreens within the Class Period); 26 Opp. at 7:5–8 (citing LeGrand Dep.

Tr. at 52:18–23) (indicating at deposition in 2025 that she had not shopped at Walgreens for some time) with Bryant Decl., Ex. A, at 358:15–17 (indicating since 27 October 2018, she “did not believe” that she made purchases at Walgreens). But this one injunction against false advertising or labeling, even though the 1 consumer now knows or suspects that the advertising was false at the time of the original purchase, because the consumer may suffer an 2 actual and imminent, not conjectural or hypothetical threat of future harm.

3 4 *Id.* at 969 (cleaned up). For example, a consumer plaintiff can establish standing for injunctive 5 relief by plausibly alleging “that she will be unable to rely on the product’s advertising or labeling 6 in the future, and so will not purchase the product although she would like to,” or by plausibly 7 alleging “that she might purchase the product in the future, despite the fact it was once marred by 8 false advertising or labeling, as she may reasonably, but incorrectly, assume the product was 9 improved.” *Id.* at 969–70.

10 Here, the Court finds that LeGrand has standing to seek injunctive relief. Abbott argues 11 that “LeGrand faces no threat of future harm because she concededly continued to buy Ensure 12 despite knowing about the alleged dangers of sugar.” Mot. at 10:19–21. Abbott asserts that these 13 continued purchases demonstrate that LeGrand “will continue to buy the product whether or not 14 the label ever changes.”⁷ *Id.* at 11:1–3.

LeGrand responds that “[t]he uncontroverted testimony is 15 that, as a favor, Ms. LeGrand picked up Ensure for her husband, using his money.” Opp. at 16 16:11–12. The Court agrees. LeGrand testified that she stopped consuming Ensure in 2022 after 17 learning that it was not healthy; after this time, she only bought Ensure products for her then 18 husband who ultimately paid for the products.

LeGrand Dep. Tr. at 35:23–36:11, 46:21–47:4, 19 143:1–144:7, 281:20–23. Abbott has not pointed to any evidence that LeGrand purchased the 20 Challenged Products for herself or with her own

money after learning that they were not healthy.⁸ 21 7 Abbott’s arguments contradict those regarding LeGrand’s Article III standing where Abbott 22 argues that LeGrand did not purchase Ensure during the Class Period at all.

Opp. at 10:22–27. In its Reply, Abbott responds that it “has advanced these arguments in the alternative.” Reply at 23 8:10–22. Fair enough. Abbott then asserts that “[i]f the Court credits LeGrand’s bald assertion that she purchased the product at all (as would be necessary to allow any part of this case to 24 continue), the Court must also credit her allegations that she continued to do so after she claims to have learned about the dangers of Ensure.” Id. Not so.

As discussed, the Court disagrees with 25 Abbott’s interpretation of the evidence. 8 In contrast to its Motion, where Abbott argued that LeGrand’s shopping runs for her husband 26 show that “she continued to buy Ensure products until at least July 2024,” Abbott now argues in its Reply that “LeGrand admitted she personally purchased Ensure using joint household funds.” 27 Compare Mot. at 10:18–28 with Reply at 7:18–8:9.

The only evidence Abbott surmises of 1 Nor has Abbott adduced evidence contradicting LeGrand’s testimony that she stopped consuming 2 all nutritional shakes in 2022. Id. at 35:12–22. Therefore, because the preponderance of the 3 evidence shows that LeGrand cannot rely on Ensure labeling in the future despite wanting to 4 purchase Ensure, LeGrand has established a threat of future harm sufficient for standing to pursue 5 injunctive relief.

Davidson, 889 F.3d at 969–70. 6 Abbott’s cited cases do not compel a different result. This case is unlike *Cabrera v. Bayer* 7 Healthcare LLC, “in which the plaintiff’s testimony suggested she did not ‘place significant 8 weight’ on the challenged representation.” Opp. at 16:14–15; Mot. at 11:1–17 (citing *Cabrera*); 9 *Cabrera*, No. LA CV17-08525 JAK (JPRX), 2024 WL 1699357, at *6 (C.D.

Cal. Feb. 23, 2024) 10 (observing “that Plaintiff has continued to purchase similar products that do not have all essential 11 vitamins and does not place significant weight on whether a product provides a ‘complete’ range 12 of vitamins”).

In its Reply, Abbott faults LeGrand for not even attempting to distinguish several 13 of Abbott’s injunctive relief cases. Reply at 9. But these cases were buried in a fourteen-line 14 string site affixed to a one-sentence argument concerning LeGrand’s purported continuing 15 purchases. See Mot. at 11:1–17 (“By continuing to purchase both Ensure and Equate products 16 after supposedly learning of the dangers of added sugars, LeGrand has demonstrated that she will 17 continue to buy the product whether or not the label ever changes, eviscerating any claim to 18 injunctive relief.”).

As discussed, LeGrand did address Abbott’s argument. See Opp. at 16:9–17. 19 Moreover, Abbott’s argument that LeGrand cannot be deceived by Ensure labeling is 20 unpersuasive. Mot. at 10:9; Reply at 10:22–25. LeGrand avers that she does not understand the 21 information on

Ensure's nutrition panel regarding added sugar or how to reconcile the nutrition 22 panel with statements on Ensure labeling.

Opp. at 16:18–17:4 (citing LeGrand Dep. Tr. at 23 207:22–208:1, 212:2–19). Abbott counters that LeGrand's statements are "directly at odds with 24 25 combined household." Reply at 7:18–8:9 (citing Bryant Decl., Ex. A, at 45:6–9). But LeGrand testified that she and her husband maintained "separate accounts" and that "[h]e would give [her] 26 cash every week" for the store, including to buy Ensure for him "[a]t his request." Opp. at 7:1–2 (citing LeGrand Dep.

Tr. at 143:1–144:7). There is no indication that LeGrand considers the 27 "household fund" as something different than her then husband's separate money, along with her 1 her deposition testimony that, in her view as developed over the course of her participation in this 2 || litigation, whether a product is healthy depends upon whether its added sugar content exceeds 4 3 || grams per serving." Reply at 10:10—14 (citing Declaration of Tracie L. Bryant in Support of 4 || Reply, Ex. 12 (LeGrand Deposition), at 242:16—244:2 (ECF No. 180-3)).

But in the testimony 5 cited to by Abbott, LeGrand appears to be comparing different amounts of sugar posed to her. See 6 || Bryant Decl., Ex. 12 at 242:4-24 (answering "yes" that four grams is an "excessive amount of 7 added sugar," after being asked about three grams, and stating "[b]ecause we're going higher in the 8 || grams"). Indeed, the context of the discussion indicates that LeGrand is guessing as to what 9 amount of added sugar would be healthy.

See, e.g., id. at 242:4—10 ("T believe that the higher in 10 || grams you get, the more added sugar it is, which is unhealthy for you. So the lower would be the 11 better."). This is consistent with her testimony that she "does not know the difference between" 12 || different amounts of added sugar and does not "know the meaning" of the levels of sugar in 13 Ensure.

Opp. at 16:21—25 (citing LeGrand Dep. Tr. at 207:22—208:1, 212:2-10). In short, Abbott 14 || has not shown that LeGrand would know from Ensure labeling whether the product's added sugar 3 15 content was healthy. Therefore, because the preponderance of the evidence shows that LeGrand a 16 || could reasonably be deceived in the future by Ensure labeling, she has established standing to 3 17 pursue injunctive relief.

Davidson, 889 F.3d at 970. S 18 Accordingly, the Court DENIES Abbott's Motion to Dismiss LeGrand's claims for 19 injunctive relief. 20 Vv. CONCLUSION 21 For the reasons stated above, the Court DENIES Abbott's Motion to Dismiss pursuant to 22 || Rule 12(h)(3). 23 IT IS SO ORDERED. 24 25 Dated: July 28, 2025 26 TAA. |} THOMAS S. HIXSON 27 United States Magistrate Judge 28