

**UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF
CALIFORNIA**

Barton v. The Procter & Gamble Company

No. 3:24-CV-01332-GPC-SBC (S.D. Cal. Aug. 8, 2025) · No. 3:24-CV-01332-GPC-SBC · Decided August 8,
2025

OPINION

1 2 3 4 5 6 7 8 UNITED STATES DISTRICT COURT 9 SOUTHERN DISTRICT OF
CALIFORNIA 10 11 ALLISON BARTON and JANA Case No.: 3:24-CV-01332-GPC-SBC
MORENO, individually and on behalf of 12 others similarly situated, ORDER GRANTING IN
PART AND 13 DENYING IN PART MOTION TO Plaintiffs, DISMISS 14 v. 15 [ECF No. 33]
THE PROCTER & GAMBLE 16 COMPANY, a Delaware company, 17 Defendant.

18 19 This class action suit involves a number of consumer protection claims against 20
Defendant for allegedly misleading consumers regarding the safety of its tampon 21 products.
Presently before the Court is Defendant’s motion to dismiss the complaint. ECF 22 No. 33.
Plaintiffs filed an opposition, and Defendant filed a reply. ECF Nos. 35, 36. 23 Based on the
reasons below, the Court DENIES Defendant’s motion to dismiss.

24 /// 25 /// 26 27 1 BACKGROUND 2 Plaintiffs Allison Barton and Jana Moreno (collectively,
“Plaintiffs”) have sued 3 Defendant The Procter & Gamble Company (“Defendant”) for allegedly
violating 4 California consumer protection law regarding its Tampax Pearl tampons and Tampax 5
Radiant tampons (collectively the “Products”). ECF No. 30, Second Amended Complaint 6
(“Complaint” or “SAC”) ¶ 2.

Plaintiffs allege that Defendant’s Product labels misled 7 consumers into believing Products are
free of lead. SAC ¶¶ 4-5. 8 A. Lead in tampons 9 According to Plaintiffs, the World Health
Organization states that “[t]here is no 10 level of exposure to lead that is known to be without
harmful effects” and that 11 “[e]xposure to lead “can affect multiple body systems and is
particularly harmful to young 12 children and women of child-bearing age.” SAC ¶¶ 8, 25.

Citing to an article published in 13 a scientific toxicology journal, Plaintiffs allege that lead
accumulates in the body, which 14 can lead to “severe health risks and toxicity, including
inhibiting neurological function, 15 anemia, kidney damage, seizures, and in extreme cases, coma
and death.” Id. ¶ 16.

The 16 Complaint also alleges that the ordinary and expected use of the Products would expose 17
consumers to more than the Maximum Allowable Dose Level (“MADL”) of 0.5 18 micrograms of
lead per day for reproductive toxicity, as established by California’s 19 Proposition 65. Id. ¶ 7. 20

Plaintiffs allege that scientific testing of Defendant's Products by an independent 21 and accredited laboratory showed that the Products contained a substantial amount of 22 lead.

Id. ¶¶ 26, 35. In July 2024, this laboratory used Inductively Coupled Plasma – Mass 23 Spectrometry ("ICP-MS"), a method recognized for precision in measuring heavy metal 24 presence, to test homogenous samples of a variety of Defendant's Products. Id. ¶¶ 27-32. 25 Plaintiffs allege that based on the daily average use of tampons, consumers are exposed 26 to lead in excess of the MADL, regardless of what size Product they use.

Id. ¶¶ 46-47. 27 1 / / / 2 B. Alleged misrepresentations 3 According to Plaintiffs, the Products contain the following prominent messaging 4 ("Representations") on their boxes: (i) "#1 U.S. GYNECOLOGIST RECOMMENDED 5 TAMPON BRAND"; (ii) "FREE OF PERFUME"; (iii) "FREE OF ELEMENTAL 6 CHLORINE BLEACHING"; (iv) "TAMPON FREE OF DYES"; and (v) "CLINICALLY 7 TESTED GENTLE TO SKIN." Id. ¶ 3.

8 Plaintiffs allege that these Representations lead reasonable consumers to believe 9 that the Products are safe to use, including that "they are free from potentially harmful 10 elements and ingredients." Id. ¶ 62. According to Plaintiff, these Representations mislead 11 a reasonable consumer because the tampons contain lead, which Defendant fails to 12 disclose.

Id. ¶ 63. 13 Plaintiffs allege that these Representations violate California's consumer 14 advertising law. Id. ¶ 170. Plaintiffs assert that Defendant knew, or should have known, 15 that the Products contained lead and either willfully or intentionally failed to disclose this 16 fact to consumers. Id. ¶ 172. 17 C. Plaintiffs' injury and causes of action 18 Plaintiffs Barton bought Tampax Pearl products in light, regular, and super sizes 19 on numerous occasions.

Id. ¶ 87. Plaintiff Moreno bought Tampax Radiant products in 20 the regular size on numerous occasions. Id. ¶ 103. They purchased these Products without 21 knowing that the Products contained lead, but would not have bought them if they had 22 known of the true contents. Id. ¶¶ 12, 69, 73, 97, 112. They relied on the Representations 23 in believing the Products were free from harmful ingredients such as lead.

Id. ¶¶ 94, 109. 24 Since consumers were "deprived of making the informed choice between the Products 25 and other menstrual products [that do not contain lead]," Plaintiffs allege that they and 26 27 1 other consumers have suffered economic injury based on the purchase price of the 2 Products. Id. ¶¶ 12, 72. 3 Plaintiffs continue to suffer harm because they cannot rely on the labeling of the 4 Products and are unable to determine whether to buy them in the future, even though they 5 would like to purchase them if they do not contain lead.

Id. ¶¶ 100, 115. Unless 6 Defendant is enjoined from failing to disclose the presence of lead in the future, Plaintiffs 7 will not be able to determine if there is lead or not in the Products. Id. ¶¶ 101, 116. Thus, 8 Plaintiffs allege that the legal remedies are inadequate to prevent future injuries. Id.

¶¶ 9 102, 117. 10 Plaintiffs seek to represent a Class against Defendant for violations of state 11 consumer protection law: (1) Unfair Competition Law (“UCL”), California Business & 12 Professions Code sections 17200 et seq.; (2) False Advertising Law (“FAL”), California 13 Business & Professions Code sections 17500 et seq.; and (3) Consumers Legal Remedies 14 Act (“CLRA”), California Civil Code sections 1750 et seq.

Id. at 22-28. 15 PROCEDURAL HISTORY 16 On July 29, 2024, Plaintiff Barton filed the original complaint. ECF No. 1. On 17 September 4, 2024, Plaintiff Barton filed the First Amended Complaint, joining Plaintiff 18 Moreno. ECF No. 10.

On September 20, 2024, Defendant filed a motion to dismiss. ECF 19 No. 15. On October 18, 2024, Plaintiffs filed a response in opposition to the motion. ECF 20 No. 20. On November 1, 2024, Defendant filed a reply in support of its motion to 21 dismiss. ECF No. 21. 22 On February 13, 2025, this Court granted in part and denied in part Defendant’s 23 motion to dismiss, and granted Plaintiffs leave to amend.

ECF No. 29. On March 10, 24 2025, Plaintiffs filed a Second Amended Complaint. ECF No. 30. On April 7, 2025, 25 Defendant filed a motion to dismiss Plaintiffs’ SAC. ECF No. 33. On May 2, 2025, 26 Plaintiffs filed a response in opposition to the motion. ECF No. 35.

On May 16, 2025, 27 1 Defendant filed a reply in support of its motion to dismiss. ECF No. 36. The Court now 2 considers Defendant’s Motion to Dismiss. 3 LEGAL STANDARD 4 A. Federal Rule of Civil Procedure 12(b)(6) 5 Rule 12(b)(6) allows a court to dismiss a complaint for “failure to state a claim 6 upon which relief can be granted.” Fed. R. Civ. P. 12(b)(6).

Dismissal under Rule 7 12(b)(6) is appropriate where the complaint lacks a cognizable legal theory or sufficient 8 facts to support a cognizable legal theory. See Election Integrity Project California, Inc. 9 v. Weber, 113 F.4th 1072, 1081 (9th Cir. 2024); Navarro v. Block, 250 F.3d 729, 732 (9th 10 Cir. 2001).

To survive a motion to dismiss, the complaint must contain a “short and plain 11 statement showing that the pleader is entitled to relief,” Fed. R. Civ. P. 8(a)(2), backed by 12 sufficient facts that make the claim “plausible on its face,” Ashcroft v. Iqbal, 556 U.S. 13 662, 678, (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 547 (2007)). 14 Plausibility requires “more than a sheer possibility that a defendant has acted unlawfully.” 15 Iqbal, 556 U.S. at 678.

Rather, it requires enough factual content for the court to “draw 16 the reasonable inference that the defendant is liable for the misconduct alleged.” Id. 17 (citing Twombly, 550 U.S. at 556). In reviewing the plausibility of a complaint, courts 18 must “accept factual allegations in the complaint as true, and construe them in the light 19 most favorable to the non-moving party.” Dent v. Nat’l Football League, 968 F.3d 1126, 20 1130 (9th Cir.

2020). But courts do not accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences. *Coronavirus 22 Rep. v. Apple, Inc.*, 85 F.4th 948, 954 (9th Cir. 2023). Ultimately, the court must be able to “draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 556 U.S. at 663.

25 B. Federal Rule of Civil Procedure 9(b) 26 27 1 Claims sounding in fraud are subject to the heightened pleading requirements of 2 Federal Rule of Civil Procedure 9(b), which requires a plaintiff bringing such a claim to 3 “state with particularity the circumstances constituting fraud or mistake.” Fed. R. Civ. P. 4 9(b).

The Ninth Circuit has held that a claim is “grounded in fraud” for the purposes of 5 Rule 9(b) where “the Plaintiffs [] allege[s] a unified course of fraudulent conduct and 6 rel[ies] entirely on that course of conduct as the basis of a claim.” *Vess v. Ciba-Geigy 7 Corp. USA*, 317 F.3d 1097, 1103–04 (9th Cir. 2003).

To properly plead fraud with 8 particularity under Rule 9(b), “a pleading must identify the who, what, when, where, and 9 how of the misconduct charged.” *Davidson v. Kimberly-Clark Corp.*, 889 F.3d 956, 964 10 (9th Cir. 2018).

In addition, the allegation “must set forth what is false or misleading 11 about a statement, and why it is false.” *Id.* The purpose of Rule 9(b) is to require that 12 allegations be “specific enough to give defendants notice of the particular misconduct 13 which is alleged... so that they can defend against the charge and not just deny that they 14 have done anything wrong.” *Whiteside v. Kimberly Clark Corp.*, 108 F.4th 771, 785 (9th 15 Cir.

2024). 16 Here, Plaintiffs’ SAC claims rely entirely on the same course of alleged fraudulent 17 conduct: Defendant’s misrepresentations lead consumers to believe the Products are safe 18 when in fact they contain lead. SAC ¶¶ 55-56.

Accordingly, Plaintiffs’ claims are 19 subject to Rule 9(b)’s heightened pleading requirement. See, e.g., *Loh v. Future Motion, 20 Inc.*, 2022 WL 2668380, at *5 (N.D. Cal. July 11, 2022) (“each claim is subject to the 21 requirements of Rule 9(b),” including claims for CLRA and unjust enrichment). 22 DISCUSSION 23 A. UCL, FAL and CLRA 24 The UCL prohibits business practices that are “unlawful, unfair or fraudulent,” Cal. 25 Bus. & Prof. § 17200; the FAL prohibits the dissemination of any advertising “which is 26 untrue or misleading,” Cal. Bus. & Prof.

Code § 17500; and the CLRA proscribes 27 1 specific acts and practices in the sale of goods or services to be unlawful, including 2 making affirmative misrepresentations or omissions regarding the “standard, quality or 3 grade” of a particular good or service, Cal. Civ. Code § 1770(a). 4 Here, Plaintiffs’ UCL, FAL and CLRA claims are premised on a theory of 5 affirmative

misrepresentation on the tampon labeling, which misleads consumers to believe that the tampons are free of any “potentially harmful elements,” including lead.

SAC ¶ 62. To plausibly allege a UCL, FAL or CLRA claim based upon misrepresentation, Plaintiffs “must allege that they relied on a misrepresentation and suffered injury as a result.” *Mirkin v. Wasserman*, 5 Cal. 4th 1082, 1092 (1993). Claims under these statutes are governed by the “reasonable consumer” standard, which means that Plaintiffs must “show that members of the public are likely to be deceived” by the defendant’s marketing claims.

Whiteside, 108 F.4th at 777 (quoting *Williams v. Gerber Prods. Co.*, 552 F.3d 934, 938 (9th Cir. 2008)). These claims can be false, or true but must be “either actually misleading... or [have] a capacity, likelihood, or tendency to deceive or confuse the public.” *Salazar v. Walmart, Inc.*, 83 Cal. App. 5th 561, 566 (Cal. Ct. App. 2022). Product labels should not be “read in the abstract,” *Andrade-Heymsfield v. NextFoods, Inc.*, 2023 WL 2576770, at *3 (S.D.

Cal. Mar. 20, 2023), but in the context of the entire packaging messaging. Specifically, the complaint alleges that the packaging representations mislead the consumer to believe that the tampons are safe to use and free of harmful elements. SAC ¶ 21 4. This is so because the tampons contain a substantial amount of lead which exposes consumers to amounts of lead that exceed the California Proposition 65 Maximum Allowable Dose Level (“MADL”) for reproductive toxicity of 0.5 micrograms of lead per day.

Id. at ¶ 7. As a threshold matter, Defendant challenges the testing that Plaintiffs rely on to show that the Products contain lead. Defendant also argues that Plaintiffs have not plausibly alleged the health risks of lead in the Products, and that no reasonable consumer would understand the specific and truthful Representations to relate to lead.

ECF No. 33, 3 Motion to Dismiss SAC (“Mot.”) at 9-10. The Court addresses these issues in turn. 1. Testing allegations Defendant claims that Plaintiffs’ testing allegations are insufficient because they have not provided testing results for the products that they actually bought. Mot. at 8. Defendant points out that the SAC only alleges that “testing was conducted on a homogenous sample of each of Defendant’s light, regular, super, super plus and ultra size tampons” (SAC ¶ 29), and that it “does not provide any details regarding how many tampons were tested or, if more than one tampon per size was tested, where there was any variation in test results.” Mot. at 8.

Defendant also points out that Plaintiffs do not allege that they purchased a product from the same lot that was tested. *Id.* The Court finds that Plaintiffs are not required to test the products that they had actually purchased. See, e.g., *Rodriguez v. Mondelez Glob. LLC*, 703 F. Supp. 3d 1191, 15 1205 (S.D. Cal. 2023); *Solis v. Coty, Inc.*, 2023 WL 2394640, at *11 (S.D.

Cal. Mar. 7, 16 2023). Because Plaintiffs allege that the Products and Representations were uniform 17 during the putative Class period and that the entire Product lines contain lead, see SAC ¶¶ 18 2 (n.1), 54, 69, Plaintiffs plausibly allege that the Products uniformly contain lead. Not 19 only are Plaintiffs not required to test their own products, they are also not required to 20 allege that their specific purchases contained lead or that their purchases came from the 21 same lot that was tested.

See *Grausz v. Hershey Co.*, 691 F. Supp. 3d 1178, 1188 (S.D. 22 Cal. 2023) (plaintiff does not need to offer a “formulaic recitation that the specific unit of 23 product she purchased” contains heavy metals); *Castillo v. Prime Hydration LLC*, 2024 24 WL 4133815, at *2 (N.D. Cal. Sept. 9, 2024) (“At this stage, however, Castillo does not 25 need to allege that her specific purchases contained PFAS as she alleges that testing 26 showed substantial levels of PFAS in the product.”).

27 1 Defendant also argues that Plaintiffs have not pled any facts to explain why the 2 Court should assume, or extrapolate, that the tampons they personally bought would have 3 the same results/content as those tampons that were tested. Defendant latches onto one 4 part of the prior order, in which the Court stated, “Plaintiffs rely on extrapolation from 5 the super-size Products without any explanation as to why extrapolation is appropriate.” 6 Prior Order at 14.

By “extrapolation,” the Court was pointing out the leap of inference 7 Plaintiffs made in the earlier Complaint: making conclusions about the light and regular 8 sized Products based only on testing of super-sized Products. By extrapolation, the Court 9 was not referring to any relationship between the tested tampons and the actually 10 purchased tampons. Instead, the Court directed Plaintiffs to demonstrate that all sizes of 11 the Products included in the Complaint were tested to contain lead.

The Court finds now 12 that Plaintiffs have successfully demonstrated that all sizes of the Products have been 13 tested to contain lead and have elaborated on the testing with sufficient detail. See SAC 14 ¶¶ 27-28.

As the Court stated in its prior order, extrapolation of test results can be 15 applied broadly where supported by factual allegations. Cf. *Onaka v. Shisheido Americas 16 Corp.*, 2023 WL 2663877, at *5 (S.D.N.Y. March 28, 2023). At the pleading stage, the 17 Court will accept the level of testing that was conducted to apply the test results across all 18 sizes of the subject Products.

19 The Court also finds that the additional details regarding the laboratory and the 20 testing are adequate. In the SAC, Plaintiffs have alleged the “testing methodology 21 followed” (Inductively Couple Plasma—Mass Spectrometry), the “specific time of the 22 testing” (the month/year the Products were tested), and “the qualifications of the testers” 23 (the “independent laboratory” has multiple accreditations, including ISO/IEC 17025:2017 24 and the FDA Laboratory Accreditation for Analysis of Foods (LAAF)).

Trammel v. KLN 25 Enters., Inc., 2024 WL 4194794, at *5 (S.D. Cal. Sept. 12, 2024); SAC ¶¶ 26-34. This is sufficient at this stage of the proceedings. Challenging the validity of Plaintiffs' scientific testing can happen later with discovery and expert analysis. See Bowen v. 2 Energizer Holdings, Inc., 2024 WL 4352496, at *10 (9th Cir. Oct. 1, 2024) ("a plaintiff typically need not support her allegations with evidence at the pleading stage").

4 Plaintiffs' testing allegations on the testing satisfy the demands of Rule 9(b). 5 2. Representations Regarding the Safety of the Products 6 Plaintiffs have alleged that Defendant's Representations are likely to mislead 7 reasonable consumers. Specifically, Plaintiffs challenge the following statements, see 8 SAC ¶ 61: (i) "#1 GYNECOLOGIST RECOMMENDED TAMPON BRAND; (ii) 9 "FREE OF PERFUME"; (iii) "FREE OF ELEMENTAL CHLORINE BLEACHING"; 10 (iv) "TAMPON FREE OF DYES"; and (v) "CLINICALLY TESTED GENTLE TO 11 SKIN." Plaintiffs allege that these Representations mislead reasonable consumers to 12 believe that the Products are free from potentially harmful elements and ingredients, 13 including lead.

Id. ¶ 62. 14 Defendant argues that "since Plaintiffs' theory of deception is that the tampons' 15 packaging leads reasonable consumers to believe that the products are 'safe,' Plaintiffs 16 have failed to identify any misrepresentation at all..." Mot. at 10. This is because 17 "Plaintiffs do not plausibly allege that the alleged lead in the tampons poses a health 18 risk." Id. 19 Defendant points to the Court's prior order that recognized that Plaintiffs had 20 failed to allege an "unreasonable safety hazard" because there was no allegation that the 21 tampons "even release lead." Prior Order at 22.

Even if the lead could leach from 22 tampons and enter the bloodstream, Defendant argues that Plaintiffs fail to plausibly 23 allege that the specific level of lead in the tampons renders them unsafe. Mot. at 10. 24 According to Defendant, Plaintiffs are attempting to show that the Products are unsafe by 25 alleging that the tampons expose consumers to amounts of lead that exceed the California 26 27 1 Proposition 65 Maximum Allowable Dose Level ("MADL") for reproductive toxicity.

2 Id. at 11. 3 Plaintiffs respond that "Defendant's argument that Plaintiffs must show that the 4 amount of lead in the Products is unsafe or harmful is based on caselaw addressing an 5 omission claim, which Plaintiffs do not allege." Opposition at 11. Plaintiffs clarify that 6 they are not alleging that Plaintiffs bought unsafe tampons, but that Plaintiffs do not want 7 to purchase tampons containing lead and would not have bought the Products had they 8 known the truth.

9 The Court's prior order finding that Plaintiffs had failed to allege an "unreasonable 10 safety hazard" was made in the service of analyzing Plaintiff's fraudulent omission claim 11 which has now been abandoned. Initially, Plaintiffs were proceeding on an omission 12 theory that alleged that there was a duty to disclose because the lead in the tampons 13 created an "unreasonable

safety hazard.” Meanwhile, under their current 14 misrepresentation claim, Plaintiffs are not required to prove that the Products create an 15 “unreasonable safety hazard.” Instead, Plaintiffs must merely show that they were misled 16 by affirmative packaging claims into believing that the tampons were free of amounts of 17 lead which could affect their safety.

Cf. *Rodriguez*, 703 F. Supp. 3d at 1210-11 (plaintiff 18 failed to sufficiently plead lead created “unreasonable safety hazard” but sufficiently 19 alleged messaging on labels conveyed that products do not contain unsafe levels of toxic 20 heavy metals). 21 In its Reply, Defendant reframes the issue of the potential risk of harm as one 22 relating to the “materiality” element of a fraudulent misrepresentation claim.

Defendant 23 asserts that Plaintiffs fails to “show a material misrepresentation.” Reply at 5 (emphasis 24 in original). Materiality is a necessary element of a misrepresentation claim. See *Arroyo v. Chattem, Inc.*, 926 F. Supp. 2d 1070, 1078 (N.D. Cal. 2012) (“materiality and reliance 26 are required for fraud claims based on affirmative misrepresentation”).

However, 27 1 materiality is generally a question of fact “for the jury, unless the misrepresented fact is 2 so obviously unimportant that the jury could not reasonably find that a reasonable 3 [person] would have been influenced by it.” *Zeiger v. WellPet LLC*, 526 F. Supp. 3d 652, 4 682 (N.D. Cal. 2021). Presence of heavy metals in products has been held to be a 5 reasonably material concern.

See e.g., *In re Trader Joe's Co. Dark Chocolate Litig.*, 726 6 F. Supp. 3d 1150, 1172 (S.D. Cal. 2024) (finding plaintiffs plausibly alleged economic 7 injuries based on presence of heavy metals in products). And “even assuming a 8 reasonable consumer would only be misled... if [lead] were at a particularly high level, 9 determining what that level would be for a reasonable consumer is not amenable to 10 resolution on a motion to dismiss.” *Id.* at 1168 (emphasis added); see also *Rodriguez*, 11 703 F. Supp. 3d at 1205 (“What constitutes an ‘unsafe level’ of lead or cadmium is a 12 question of fact not appropriately resolved on a motion to dismiss.”).

13 Although materiality is a question of fact and plaintiffs do not need to allege the 14 actual level of lead that would present a risk of harm, they must allege more than the 15 mere presence of lead. Just because lead was detected in the tampons does not by itself 16 show that the representations regarding the safety of the product are untrue or misleading.

17 Cf. *Loeb v. Champion Petfoods USA Inc.*, 359 F. Supp. 3d 597, 605 (E.D. Wis. 2019) 18 (plaintiff must offer some evidence of potential harm to establish a form of genuine 19 deception; otherwise, every manufacturer would be required to disclose that their 20 products contain heavy metals or be barred from making any assertion of quality about 21 the products); *Arroyo*, 926 F. Supp. 2d at 1079 (rejecting claim that any amount of 22 hexavalent chromium “would impact safety so much as to affect a purchasing decision”).

23 Thus, in the context of a material misrepresentation, the plaintiff must still sufficiently 24
allege that the amount of lead in the product created some potential risk of harm. 25 Otherwise,
the plaintiff could not plead that these representations were false or 26 misleading; consumers
cannot be misled by completely safe products. 27 1 In the instant case, Plaintiffs allege that the
“ordinary and expected use of the 2 Products exposes consumers to amounts of lead” that exceed
the MADL.

SAC ¶ 7. 3 These alleged levels of lead are supported by Plaintiffs’ testing, which the Court found
to 4 be adequate, see *supra*. And Plaintiffs further allege that lead, through vaginal 5 absorption,
can have particularly harmful effects on the body. *Id.* ¶¶ 18-25. Specifically, 6 that “if the lead to
the Products passes through the vaginal epithelium... [it] can be 7 absorbed directly into the
bloodstream.” SAC ¶ 24.

8 The Court acknowledges that such allegations have been held to be insufficient for 9 some
courts evaluating misrepresentation claims that involve heavy metals in products. 10 See, e.g.,
Krystofiak v. BellRing Brands, Inc., 737 F. Supp. 3d 782, 801 (N.D. Cal. 2024) 11 (“[t]he
complaint does not actually allege the level associated with these harms [of 12 lead]”); *In re Hain*
Celestial Heavy Metals Baby Food Litig., 2024 WL 5239510, at *12 13 (E.D.N.Y.

Dec. 27, 2024) (“without plausibly alleging what concentration of various 14 heavy metals in
baby food products would actually be unsafe... Plaintiffs have failed to 15 allege why the levels
of these naturally-occurring heavy metals (other than arsenic)... 16 would be material to the
reasonable consumer”); *Hayden v. Bob’s Red Mill Nat. Foods, Inc.*, 2024 WL 1643696, at *8
(N.D Cal. Apr.

16, 2024) (plaintiffs “fail[] to plausibly 18 allege that the levels of the cadmium in the Products
render them unhealthy”). These 19 courts have required plaintiffs to plead the actual level of the
heavy metal that 20 corresponds to the alleged harm posed by the heavy metal.

The Court finds that this 21 would veer too close to a question of fact that would be inappropriate
to require at this 22 procedural stage. See *Rodriguez*, 703 F. Supp. 2d at 1205. 23 Plaintiffs here
have pled enough to allege that there is a sufficient amount of lead 24 in the Products that presents
a potential risk of harm. This should be enough. Their 25 allegation is partly based on the fact that
the tested levels of lead exceed the MADL.

It is 26 true that the Court has previously held that the MADL cannot serve as a proxy for an 27 1
“unreasonable safety hazard.” See Prior Order at 23. However, here, the Proposition 65 2 MADL
“provides guidance as to a reasonable consumer’s purchasing decisions.” 3 *Sciortino v. Pepsico,*
Inc. 108 F. Supp.3d 780, 794 (N.D. Cal. 2015). A level of lead 4 exceeding the MADL would be
material to a reasonable consumer.

And more importantly, by alleging a level of lead that exceeds the MADL, Plaintiffs sufficiently allege that there is more than a de minimis quantity of lead which could affect a reasonable consumer's purchasing decision.

The Court does not view the MADL as a proxy for safety, but rather as a helpful measure that supports the allegation that there are more than trace amounts of lead. The Plaintiffs then allege that these trace amounts of lead present a potential health risk – not because they exceed the MADL but because the lead can be absorbed quickly and into the bloodstream due to the unique nature of these Products.

Furthermore, the FDA is currently studying the health risks posed by lead in tampons. The Court's prior order took note that the FDA announced in December 2024 that it had completed a literature review of the available evidence on contaminants in tampons and their related health effects and found that none of the reviewed studies address how much, if any, of the contaminants identified are released from the tampon or absorbed through the vagina.

ECF No. 28. At the same time, none of the reports indicated that lead was not released or absorbed. As a result, the FDA announced that an internal bench laboratory study was underway to determine if metals from tampon materials are released or absorbed in the body. Id. At this time, the allegations of the harm to consumers are the subject of ongoing studies.

With the current lack of scientific consensus, the Court is faced with two possibilities: the Products contain levels of lead that pose a potential health risk, or they do not. Given that the Court must view the SAC in the light most favorable to Plaintiffs, it cannot impose an interpretation of the Representations that is "no more plausible than the well-pled allegations offered in the SAC." *Souter v. Edgewell Pers.*

Care Co., 2023 WL 5011747, at *3 (9th Cir. Aug. 7, 2023) ("At the motion to dismiss stage, it was improper for the district court to select between competing plausible interpretations of an ambiguous term."). The SAC offers well-pled allegations that one possibility (harmful levels of lead) is just as plausible, if not more, than the alternate possibility (safe levels of lead).

And ultimately, determining whether or not the Representations are actually false or misleading to a reasonable consumer is not for the Court to decide, because this is usually "a question of fact not appropriate for decision on demurrer." *Williams v. Gerber Prods. Co.*, 552 F.3d 934, 938 (9th Cir. 2008); *Chase v. Hobby Lobby Stores, Inc.*, 2018 WL 786743, at *5 (S.D.

Cal. Feb. 8, 2018) ("given the factual inquiry required to adequately assess the merits of the reasonable consumer standard, the court cannot find at the motion to dismiss stage that [defendant's] advertising scheme would not mislead a reasonable consumer") (citation omitted). Viewing the allegations in the light most favorable to the Plaintiffs, the Court finds

15 that the allegations are sufficiently plausible to conclude that the Products contain an 16 amount of lead so as to potentially harm consumers.

Plaintiffs have therefore plausibly 17 alleged that the Representations are misleading based on the undisclosed lead in the 18 Products. 19 3. False or misleading 20 Next, Defendant asserts that the Representations are not misleading because they 21 are both “true” and “specific.” Reply at 7 (quoting *Miller v. Philips N. Am. LLC*, 2025 22 WL 582160, at *2 (N.D.

Cal. Feb. 20, 2025)). Additionally, citing numerous cases and 23 the Federal Trade Commission’s Green Guides (“Green Guides”), Defendant asserts that 24 “free of” claims “cannot support affirmative misrepresentation claims based on different 25 contaminants.” Mot. at 15. 26 a. True and Specific 27 1 Defendant attempts to show that the Representations cannot be misleading because 2 they are true and discrete.

But, without determining now whether the Representations are 3 actually true, even discrete and true claims may be misleading. See *Rodriguez*, 703 F. 4 Supp. 3d at 1211-12 (finding that true and specific claims were plausibly alleged to be 5 misleading, when the context projected a misleading belief that the Products did not 6 contain heavy metals); *Salazar*, 83 Cal. App.

5th at 566 (finding that defendant’s packing 7 was misleading, even if it “may not have any false statements”); see also *Sebastian v. 8 Kimberly-Clark Corp.*, No. 17-cv-442-WQH-JMA, 2017 WL 6497675, at *5 (S.D. Cal. 9 Dec. 18, 2017) (discrete and true statements of “simple formula” and “gentle” are not 10 mere puffery and were plausibly alleged misrepresentations in the context of synthetic 11 preservatives within baby wipes).

12 As the Court has already found, the Representations here contain a myriad of 13 claims which, when read in context, are conceptually related to the idea that the Products 14 are free from harmful substances, like lead. Prior Order at 20-21 (citing *Trader Joe s*, 15 2024 WL 1319725, at *1, 8 (defendant’s statements about the quality of the products, like 16 “quality ingredients” and “colors derived only from naturally available products,” could 17 mislead a reasonable consumer to think that there would be no heavy metals in the 18 products)); see *Lam v. Gen.*

Mills, Inc., 859 F. Supp. 2d 1097, 1104-05 (N.D. Cal. 2012) 19 (label statements “[t]aken together” could mislead reasonable consumers about the type 20 and quantity of fruit in the products); cf. *Miller v. Philips N. Am. LLC*, 2025 WL 582160 21 at *2 (N.D. Cal. Feb. 20, 2025) (plaintiffs only challenged “a singular representation” that 22 products were “BPA Free” in order to conclude that the products do not contain any 23 harmful plastic byproducts).

24 b. FTC’s Green Guides 25 As support for its position on “free-of” claims, Defendant offers the Federal Trade 26 Commission’s (“FTC”) Green Guides, which “set forth the Federal Trade Commission’s 27 1 current views about environmental claims.” 16 C.F.R. § 260.1(a).

The Green Guides are expressly intended to “help marketers avoid making environmental marketing claims that are unfair or deceptive,” and they “apply to claims about the environmental attributes of a product.” 16 C.F.R. § 260.1.

The Green Guides state that a “free-of or does-not-contain claim is appropriate” and not deceptive if a background-level substance was not “added intentionally” and does not cause material harm. 16 C.F.R. § 260.9. But Plaintiffs have not averred any allegations pertaining to environmental marketing.

As such, the FTC’s Green Guides are irrelevant here. Plaintiffs do not bring any claims about the environmental marketing of the Products. The Representations “are voluntary advertising statements” implying the health and safety of the Products, that Defendant makes to “appeal to consumers and increase sales of the Products.” SAC ¶¶ 12 57-59.

The Court finds that the Green Guides do not apply and are not relevant here. In *Whiteside v. Kimberly Clark Corp.*, 108 F.4th 771 (9th Cir. 2024), the Ninth Circuit viewed the “plant-based” and “natural” labels on baby wipes made by Kimberly Clark and analyzed how these labels fared under the Green Guides’ warning that unqualified representations like “made with renewable materials” are likely to mislead a reasonable consumer to believe the product is made entirely with renewable materials.

See *Whiteside*, 108 F.4th at 784. The claims there dealt with environmental marketing and concerns, and the Ninth Circuit explicitly said as much. See *id.* at 784-85. Here, Plaintiffs make no reference to the environmental qualities of Defendant’s products or the Representations. Except for perhaps the “chlorine-free” statement, all the other Representations, individually and collectively, are health-related marketing claims, attesting to the effects on skin, the lack of harsh ingredients, or the approval of gynecologists.

SAC ¶ 3. Plaintiffs do not need to allege that they are not pursuing an environmental claim in order to get out of the auspices of the Green Guides. The burden is on the Defendant, as the movant, to show how the claims are environmental in nature and do fall under the purview of the Green Guides. And to the extent that Defendant suggests that *Whiteside* goes further than environmental claims, that is plainly wrong: nothing in *Whiteside* even suggests that the Green Guides should apply to consumer protection claims in general, and the Court will not venture to do so.

Even though the Green Guides are binding as “codified” law, see Cal. Bus. & Prof. Code § 17580.5, they have binding force only where they actually apply. For two further reasons, the Court refuses to apply the Green Guides.

First, Defendant cites no reason as to why one agency’s (FTC) guidelines or rules should apply with the same force in a domain regulated by a different federal agency (here, the FDA). While

it is a bedrock principle of administrative law that agencies generally must follow their own rules and procedures, see *Alcaraz v. INS*, 384 F.3d 1150, 1162 (9th Cir.

2004), there is no corresponding principle that these rules and guidelines should apply with the same force to a device explicitly governed by another agency. See 21 C.F.R. §§ 884.5460, 884.5470 (tampons regulated by the FDA as Class II medical devices). Defendant provides no principled reason — or case law — to assume that the rules and guidelines of the FTC would apply here at all.

Secondly, even if the Green Guides were relevant and applicable, Defendant does not explicate how the Court should apply them here, in its analysis of actionable misrepresentation for a consumer protection lawsuit. Defendant seemingly assumes that if statements meet certain characteristics laid out by the FTC (involving background-level substances, not intentionally added, not causing material harm), then the statements would be conclusively not misleading.

If so, this would override, and make superfluous, the reasonable consumer standard. There would be no need to apply the reasonable consumer standard if there is an automatic conclusion that reasonable consumers are not misled when they fit certain standards under the Green Guides. But the Court does not see why or how it could refrain from operating under the well-understood reasonable consumer standard without a clear directive from a higher court.

And to do otherwise would rub against the explicit no-preemption clause in the Green Guides. See 260.1(b) (“These guides do not preempt federal, state, or local laws.”). B. Unlawful and unfair prongs of UCL claim Defendant argues that Plaintiffs fail to state a claim under the UCL’s unfair or unlawful prongs. The UCL prohibits “any [1] unlawful, [2] unfair or [3] fraudulent business act or practice.” Cal. Bus. & Prof.

Code § 17200. The “unfair” prong of the UCL creates a cause of action for a business practice that is unfair even if not proscribed by some other law. *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1143 (2003). California courts are still divided on which “unfair” standard to apply to consumer suits. See *Nazemi v. Specialized Loan Serv., LLC*, 637 F. Supp. 3d 856, 864 (C.D.

Cal. Oct. 31, 2022) (citing *Graham v. Bank of America, N.A.*, 226 Cal. App. 4th 594, 612 (2014) (“the appellate courts split regarding the definition of ‘unfair’ business practices in consumer action”); *Hodsdon v. Mars, Inc.*, 891 F.3d 857, 866 (9th Cir. 2018) (internal quotation marks and citations omitted) (proper test for whether an action violates the unfair prong is “currently in flux among California courts”).

The Ninth Circuit has identified the following three tests that California courts have considered in addressing the “unfair” prong in a consumer case: “(1) whether the challenged

conduct is ‘tethered to any underlying constitutional, statutory or regulatory 21 provision, or that it threatens an incipient violation of an antitrust law, or violates the 22 policy or spirit of an antitrust law, [the “Tethering test”]; (2) whether the practice is 23 ‘immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers, 24 [the “Immoral test”]; or (3) whether the practice's impact on the victim outweighs “the 25 26 27 1 reasons, justifications and motives of the alleged wrongdoer [the “Balancing test”].” Doe 2 v. CVS Pharm., 982 F.3d 1204, 1214-15 (9th Cir.

2020)1 (internal citations omitted). 3 In the SAC, Plaintiffs allege that Defendant’s conduct is unfair because it 4 intentionally made the Representations to increase sales of the Products with the 5 improper motive to derive financial gain at the expense of truthfulness; the utility of 6 Defendant’s conduct in labeling the Products with Representations is outweighed by the 7 harm to consumers; and Defendant’s conduct is injurious to competition because it 8 prevents consumers from making an informed choice.

See SAC ¶¶ 115-28. 9 Defendant argues that Plaintiffs only offer a “formulaic recitation” and “sparse 10 allegations.” Mot. at 19. Defendant states that conclusory allegations which merely 11 recite the elements of the “immoral” and “balancing” tests under this prong are not 12 enough. Id. 13 The Court agrees, and finds these allegations are too conclusory and insufficient to 14 plausibly allege a UCL claim under the “unfair” prong.

Plaintiffs’ added allegations in 15 the SAC simply restate and recite the “unfair” tests, without adding new facts that would 16 support those allegations. See *Wright v. Charles Schwab & Co. Inc.*, 2020 WL 6822887, 17 at *5 (N.D. Cal. Nov. 20, 2020) (“The plaintiffs’ recitation of the legal standard and 18 conclusory allegations of a UCL violation do not state an ‘unfair’ UCL claim.”).

The 19 Court GRANTS the motion to dismiss the UCL claim premised on the “unfair” prong. 20 21 22 23 1 The Court applies *Doe* because it is the most recent Ninth Circuit opinion on the unfair 24 prong of the UCL concerning consumers. See *Epperson v. Genl Motors, LLC*, -- F. Supp. 3d --, 2023 WL 8628327, at *6 (S.D. Cal. Dec. 13, 2023) (recognizing different 25 approaches adopted by the California courts of appeal as well as the Ninth Circuit and 26 ultimately applying *Doe* “[g]iven that it is the most recently published Ninth Circuit opinion on the matter”).

27 1 As to the unlawful prong, Plaintiffs allege that Defendant violated Civil Code §§ 2 1572, 1573, 1709, 1710, 1711 and 1770. See SAC ¶¶ 153-55. Plaintiffs are entitled to 3 proceed with the UCL under the unlawful prong based upon an alleged violation of the 4 CLRA (Civil Code § 1770) since the affirmative misrepresentation claim is moving 5 forward, see *supra*.

Accordingly, the Court DENIES the motion as to the alleged CLRA 6 violation. 7 C. Equitable claims 8 Plaintiffs seek disgorgement and injunctive relief under the UCL, SAC ¶¶ 159-66; 9 restitution, disgorgement, and injunctive relief under the FAL, SAC ¶¶ 178-85; and 10 damages

and injunctive relief under the CLRA, SAC ¶¶ 206-07. Defendant moves to 11 dismiss the equitable claims under the UCL, FAL, and the CLRA, arguing that Plaintiffs 12 have an adequate remedy at law, and therefore dismissal of equitable claims is required 13 by *Sonner v. Premier Nutrition Corp.*, 971 F.3d 834 (9th Cir.

2020). Mot. at 20-21. 14 Plaintiffs oppose, arguing that there is a current intra-circuit split in the Ninth Circuit for 15 how to apply *Sonner* and that numerous courts have allowed Plaintiffs to plead both 16 equitable and legal remedies at the pleading stage. See Opposition at 21-22. Plaintiffs 17 argue that they have pled sufficiently and specifically as to why legal remedies would be 18 inadequate.

Id. at 22-23. 19 The Court, in its Prior Order, acknowledged the intra-circuit split on whether 20 *Sonner* applied at the pleading stage and on how “exact[ing] of a standard” *Sonner* 21 imposed on plaintiffs pleading claims for equitable and legal claims. *Jeong v. Nexo Fin. 22 LLC*, 2022 WL 174236, at *27 (N.D. Cal. Jan. 19, 2022) (citing *Byton N. Am. Co. v. 23 Breitfeld*, 2020 WL 3802700, at *9 (C.D.

Cal. Apr. 28, 2020)). After surveying the 24 jurisprudence, the Court found that *Sonner* did not necessarily preclude a plaintiff from 25 pleading equitable remedies in the alternative, and that allowing claims to move forward 26 27 1 would also be consistent with Federal Rule of Civil Procedure 8, which allows for 2 pleading in the alternative. Prior Order at 25.

3 However, the Court went on to find that Plaintiffs in the FAC pled “no allegations 4 that the legal remedies are inadequate for the restitution or disgorgement that they seek 5 under the UCL and FAL.” Id. Plaintiffs are required to plead inadequate legal remedies 6 “[a]t a minimum.” Id. Based on this, the Court dismissed those equitable claims with 7 leave to amend for Plaintiffs to “expressly allege facts to support a claim that their 8 remedies at law are inadequate.” Id. at 26.

9 In their amended Complaint, Plaintiffs now allege that their legal remedy is 10 inadequate because (1) disgorgement “serves as a deterrent for future, unlawful 11 conduct,” (2) equitable relief extends beyond recovery of legal damages, since 12 disgorgement permits recovery of interest, (3) disgorgement “can be readily measured as 13 a sum certain according to Defendant’s financial records while legal damages are 14 generally subject to complex and costly expert valuation,” and (4) the reach of equitable 15 relief may extend beyond that of legal damages, which under the CLRA are limited by 16 statute to persons who purchase for personal, family, or household purposes.

SAC ¶¶ 17 159-167. Defendant attacks these allegations, arguing that “an alleged difference in the 18 amounts Plaintiffs may seek as damages and restitution does not make damages 19 inadequate” and that “a remedy is not inadequate simply because it is more difficult to 20 calculate or obtain.”

Mot. at 21 (citation omitted). 21 At this stage, the Court does not need to evaluate the truthfulness of Plaintiffs' 22 allegations, but rather, assuming their truth, must test their legal sufficiency.

See *Iqbal*, 23 556 U.S. at 678. Viewing Plaintiffs' allegations in the light most favorable to them, the 24 Court finds that they have sufficiently pled that "'restitution under the CLRA or UCL 25 would be more certain, prompt, or efficient' than the monetary damages [they] seek[], but 26 27 1 may ultimately not attain." *Coleman*, 554 F. Supp. 3d at 1065 (quoting *Anderson v. 2 Apple Inc.*, 500 F. Supp. 3d 993, 1008-09 (N.D.

Cal. 2020)). 3 Although some district courts have interpreted *Sonner* to require that plaintiffs 4 plead more than just a difference between the expected recovery of their legal and 5 equitable claims, see *Ketayi v. Health Enrollment Grp.*, 2021 WL 2864481, at *10 (S.D. 6 Cal. July 8, 2021), other courts in the circuit have allowed plaintiffs to plead both legal 7 and equitable claims in the same or similar circumstances.

See, e.g., *Coleman v. 8 Mondelez Int'l Inc.*, 554 F. Supp. 3d 1055, 1065 (C.D. Cal. 2021); *Jeong*, 2022 WL 9 174236, at *27; *Krause-Pettai v. Unilever United States, Inc.*, 2021 WL 1597931, at *4 10 (S.D. Cal. Apr. 23, 2021). 11 *Guzman v. Polaris Indus. Inc.*, 49 F.4th 1308, 1310 (9th Cir. 2022) does not 12 foreclose the Court's conclusion that Plaintiffs can plead equitable relief under the UCL 13 and FAL.

Guzman was concerned with the question of a district court's equitable 14 jurisdiction to hear a plaintiff's UCL claim if the plaintiff had a time-barred CLRA claim. 15 The Ninth Circuit concluded that the plaintiff's "failure to have timely pursued his CLRA 16 claim cannot confer equitable jurisdiction on a federal court to entertain his UCL claim." 17 *Guzman*, 49 F.4th at 1312.

The holding in *Guzman* has no relevant bearing to whether 18 Plaintiffs, if having sufficiently pled inadequate legal remedy, can bring their equitable 19 claims alongside their legal ones. In other words, it is still an open question in this circuit 20 of how *Sonner* applies at the pleading stage — and with how much force — to a plaintiff 21 who pleads that legal remedy is inadequate and pleads equitable relief in the alternative.

22 Furthermore, as Plaintiffs notes, *Guzman* addressed a motion of summary judgment, and 23 Plaintiffs are only seeking to "plead equitable and legal claims in the alternative, not to 24 prove an entitlement to both types of relief as a matter of law." *Opposition* at 23. 25 *Guzman* does not require that this Court dismiss Plaintiffs' equitable claims at this stage.

26 27 1 || See *Carroll v. Myriad Genetics, Inc.*, 2022 WL 16860013, at *6 (N.D. Cal. Nov. 9, 2 2022). 3 As for injunctive relief, the Court previously found that Plaintiffs had sufficiently 4 || pled that legal remedy was inadequate. See Prior Order at 29; FAC J 109. No changes 5 been made in the SAC in this regard. See SAC 4[§] 99-103; 114-16 and FAC □□□ 108- 6 As such, the Court finds, as it did before, that Plaintiffs have satisfied the pleading 7 || standard for injunctive relief.

8 The Court therefore DENIES Defendant's Motion to dismiss Plaintiffs' equitable 9 || claims. 10
CONCLUSION 11 Based on the reasoning above, the Court GRANTS the Motion as to the UCL
claim 12 || premised on the unfair prong with prejudice, and DENIES the Motion as to the rest of
the 13 |/claims. 14 IT IS SO ORDERED. 15 16 Dated: August 8, 2025 2 V7 Hon. at the Cae 18
United States District Judge 19 20 21 22 23 24 25 26 27 24 28 3:24-CV-01332-GPC-SBC