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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA

10
11 IN RE QUAKER OATS MAPLE &
12 BROWN SUGAR INSTANT
OATMEAL LITIGATION

MASTER FILE NO. 2:16-cv-1442

**DEFENDANT'S NOTICE OF
MOTION AND MOTION TO
DISMISS PLAINTIFFS'
CONSOLIDATED CLASS ACTION
COMPLAINT AND MEMORANDUM
OF POINTS AND AUTHORITIES**

Hearing:

Date: October 16, 2017

Time: 1:30 p.m.

Courtroom: 6A

Judge: Hon. Philip S. Gutierrez

NOTICE OF MOTION AND MOTION TO DISMISS

TO THE COURT AND ALL PARTIES AND COUNSEL OF RECORD:

PLEASE TAKE NOTICE THAT on Monday, October 16, 2017 at 1:30 p.m., or as soon thereafter as may be heard by the Honorable Philip S. Gutierrez, in Courtroom 6A of this Court, Defendant Quaker Oats Company (“Quaker”) will and hereby does move this Court pursuant to Rules 8(a), 9(b), 12(b)(1), and 12(b)(6) of the Federal Rules of Civil Procedure, for an order dismissing with prejudice all of the claims contained in the Consolidated Class Action Complaint.

Defendant brings this motion on the grounds that (i) Plaintiffs’ claims are preempted by the federal Food, Drug, and Cosmetic Act and accompanying federal regulations governing the labeling of flavors in food products; (ii) Plaintiffs fail to state a claim as to any of their causes of action because they have not plausibly pleaded that a reasonable consumer would be deceived by, or would reasonably or justifiably rely on, the challenged label statements and images in the manner alleged; (iii) Plaintiffs lack standing to bring claims for injunctive relief; and (iv) Plaintiffs lack standing to challenge the labeling of products they did not purchase, and have failed to plead their claims with respect to those products with particularity, as required under Federal Rule of Civil Procedure 9(b). For the reasons set forth in greater detail in the accompanying Memorandum of Points and Authorities, the Complaint should be dismissed in its entirety, with prejudice, because amendment would be futile.

This Motion is based on this Notice of Motion, the attached Memorandum of Points and Authorities, Defendant’s Request for Judicial Notice, and the Declarations of Kristin Walters and Jason Meltzer filed concurrently herewith, and on such other written and oral arguments as may be presented to the Court. This motion is made following the conference of counsel pursuant to L.R. 7-3, which took place on July 26, 2017, in addition to multiple prior discussions regarding the arguments raised in Defendant’s motion to dismiss and the filing of a consolidated amended complaint during the preceding year.

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 Plaintiffs bring this action to challenge Quaker’s purported “misbranding and
3 false advertising” of its Quaker Oats Maple and Brown Sugar flavored instant oatmeal
4 products. Plaintiffs’ claims are based on their assertion that Quaker made “statements
5 representing the Products as containing maple syrup or maple sugar.” Compl. ¶ 1.
6 The problem is that Quaker Oats Company has done no such thing. Plaintiffs have not
7 pointed to a single instance in which Quaker labeled its Instant Oatmeal products as
8 containing maple syrup or maple sugar. Instead, Plaintiffs contend that the use of the
9 flavor *name* “Maple & Brown Sugar”—a staple of Quaker’s product line for over 45
10 years—and the background depiction of a pitcher of syrup deceives reasonable
11 consumers into believing that maple syrup and maple sugar are ingredients in their
12 instant oatmeal.

13 Plaintiffs’ efforts to manufacture a class action on this theory suffer from two
14 core and incurable defects. First, Plaintiffs have disregarded federal regulations that
15 expressly authorize the use of words and images on food labels to depict a
16 “characterizing flavor” like maple & brown sugar. Because Quaker’s labels comply
17 with these regulations, Plaintiffs’ claims are preempted by federal law. Second,
18 Plaintiffs have shut their eyes to fact that the “Maple & Brown Sugar” flavor name
19 found on Quaker’s Instant Oatmeal products appears at every instance accompanied by
20 the words “Naturally and Artificially Flavored”—at no less than four separate
21 locations on a standard package. With clear and multiple disclosures on the package,
22 no truly reasonable consumer could be misled by the “Maple & Brown Sugar” labels.

23 Indeed, another court in this District recently dismissed a parallel case against
24 Trader Joe’s (brought by the same Plaintiffs’ counsel as here) challenging Maple &
25 Brown Sugar flavor labeling on oatmeal products, holding that: (1) the FDA has
26 explicitly confirmed that its regulations allow the use of flavor terms like “maple” on a
27 food label, where the food lacks any maple syrup, as long as the food contains maple
28 flavoring; and (2) the term “maple” is *not* synonymous with “maple syrup.” *Stiles v.*

1 *Trader Joe's Co.*, No. 16-cv-04318, 2017 WL 3084267, at *4 (C.D. Cal. Apr. 4, 2017).
2 Accordingly, the court held that where the maple flavored product packages do not
3 state “maple syrup” or “maple sugar” in the ingredients list, and instead include natural
4 or artificial flavor disclosures, it is “impossible” to prove that a reasonable consumer is
5 likely to be deceived. *Id.* at 5.

6 The law simply does not allow for Plaintiffs’ selective reading of the relevant
7 regulatory scheme and the facts. Plaintiffs’ claims should be dismissed with prejudice
8 because they fail as preempted and as a matter of pleading.

9 **FACTUAL BACKGROUND**

10 Quaker Oats have been a staple of the breakfast table for over 130 years. In
11 1970, Quaker introduced “Maple & Brown Sugar” as the company’s first flavored
12 instant oatmeal. Forty-five years later, Quaker’s Maple & Brown Sugar Flavored
13 Instant Oatmeal products remain among the company’s most popular.

14 The front panel of the packaging of the classic recipe Maple & Brown Sugar
15 Flavored Instant Oatmeal features a depiction of the company’s iconic Quaker mascot,
16 with **QUAKER** in large, bold letters, with “Est 1877” below. A large brown rectangle
17 reads “**INSTANT OATMEAL**” and “Maple & Brown Sugar” in white letters. Beneath
18 “Maple & Brown Sugar,” printed in all caps is “**NATURALLY AND ARTIFICIALLY**
19 **FLAVORED.**” A similar brown rectangle, again containing the words “Maple &
20 Brown Sugar” with “**NATURALLY & ARTIFICIALLY FLAVORED**” below, also
21 appears on the top, bottom, and side panel of a standard box.¹ The front panel of the
22 package also prominently depicts a bowl of oatmeal topped with fresh strawberries and
23 blueberries. In the background and off to the side appears a glass pitcher containing
24 syrup next to a blurry image of oats. In the lower right corner of the front panel is
25 printed “**SERVING SUGGESTION**” and “**ENLARGED IMAGE.**” On the side panel,

26 _____
27 ¹ Concurrently with this motion, Quaker has filed a Request for Judicial Notice
28 asking the Court to take judicial notice of a complete color copy of a Quaker “Classic
Recipe” Maple & Brown Sugar Flavored Instant Oatmeal package. *See* Exhibit A to
the Declaration of Kristin Walters filed concurrently herewith in support of
Defendant’s Request for Judicial Notice (“Walters Decl.”).

1 the ingredients list does not list maple syrup or maple sugar. It does, however, list
2 “natural and artificial flavor.” An excerpt from the packaging of Quaker’s “Classic
3 Recipe” Maple & Brown Sugar Flavored Instant Oatmeal is below:



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11 The packaging of other Maple & Brown Sugar Flavored Instant Oatmeal varieties
12 carries a similar disclosure. Two examples are below.



1 Plaintiffs assert that Quaker has made “false, misleading, and deceptive
2 representations” that its Maple & Brown Sugar Flavored Instant Oatmeal products
3 “contai[n] maple syrup when they do not.” Compl. ¶¶ 4-5. They do not allege,
4 however, that the words “maple syrup” or “maple sugar” appear anywhere on the
5 labels of these products. Instead, they claim that they relied on the flavor name of the
6 product—“Quaker Instant Oatmeal, Maple and Brown Sugar,” along with “images of a
7 glass pitcher of maple syrup,” to conclude that the product contained maple sugar
8 and/or maple syrup. Compl. ¶¶ 21, 26.

9 Plaintiffs challenge the labeling of six Quaker products: (1) Quaker Oats Maple
10 & Brown Sugar Flavored Instant Oatmeal (Classic Recipe), (2) Quaker Oats Maple &
11 Brown Sugar Flavored High Fiber Instant Oatmeal, (3) Quaker Oats Maple & Brown
12 Sugar Flavored Gluten Free Instant Oatmeal, (4) Quaker Oats Maple & Brown Sugar
13 Flavored Lower Sugar Instant Oatmeal, (5) Quaker Oats Maple & Brown Sugar
14 Flavored Weight Control Instant Oatmeal, and (6) Quaker Oats Maple & Brown Sugar
15 Flavored Organic Instant Oatmeal (collectively, the “challenged products”). Compl.
16 ¶ 30. Five of the six named Plaintiffs allege that they purchased only “Quaker Instant
17 Oatmeal Maple & Brown Sugar.” Compl. ¶¶ 10-12, 14-15. The sixth Plaintiff, Mario
18 Aliano, claims to have purchased two of the challenged products, Maple & Brown
19 Sugar Flavored Lower Sugar Instant Oatmeal and Maple & Brown Sugar Flavored
20 Organic Instant Oatmeal. Compl. ¶ 13.²

21 California Plaintiffs Eisenlord and Phung bring claims under California’s Unfair
22 Competition Law, Bus. & Prof. Code § 17200 *et seq.*, False Advertising Law, Civil
23 Code § 17500 *et seq.*, and Consumer Legal Remedies Act, Civil Code § 1750 *et seq.*,
24 and for breach of express warranty under California law, on behalf of a California
25

26 ² In his amended complaint filed in federal court in Illinois (since voluntarily
27 dismissed in favor of this action), Aliano previously asserted that he purchased only
28 “Quaker Instant Oatmeal Maple & Brown Sugar,” the same product as the other five
Plaintiffs. *See Aliano v. Quaker Oats Co.*, No. 16-cv-3087 (N.D. Ill.), ECF No. 6 ¶ 26.

1 putative class of purchasers.³ Compl. ¶¶ 38-79. Illinois Plaintiffs Aliano and Saenz
 2 bring claims under the Illinois Deceptive Practices and Consumer Fraud Act, 815 ILCS
 3 505/2, on behalf of an Illinois putative class of purchasers. Compl. ¶ 80-89. New
 4 Jersey Plaintiff Gates brings claims under the New Jersey Consumer Fraud Act,
 5 N.J.S.A. § 56:8-2, on behalf of a New Jersey putative class of purchasers. Compl.
 6 ¶ 90-94. Massachusetts Plaintiff Perkins brings claims for violations of
 7 Massachusetts’s false advertising law, M.G.L. c. 266, § 91, unfair and deceptive
 8 conduct law, M.G.L. c. 93A, § 2, and breach of express warranty law, M.G.L. c. 106,
 9 § 2-313, on behalf of a Massachusetts putative class of purchasers. Compl. ¶ 95-117.
 10 And all Plaintiffs bring a claim for unjust enrichment on behalf of the various putative
 11 classes. Compl. ¶ 118-23. Plaintiffs seek damages, restitution, disgorgement,
 12 injunctive relief, and attorneys’ fees and costs (among other remedies).

13 LEGAL STANDARD

14 A complaint must be dismissed under Rule 12(b)(6) of the Federal Rules of
 15 Civil Procedure unless it “contain[s] sufficient factual matter, accepted as true, to ‘state
 16 a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678
 17 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Although the
 18 Court must accept factual allegations as true, this tenet is “inapplicable to legal
 19 conclusions.” *Id.* After stripping the “conclusory statements” in the complaint, the
 20 remaining factual allegations must “raise a right to relief above the speculative level.”
 21 *Twombly*, 550 U.S. at 555 (quotations omitted); *see also* Fed. R. Civ. P. 8(a).

22 All of Plaintiffs’ claims are subject to the heightened pleading standard of
 23 Federal Rule of Civil Procedure 9(b) because the complaint is “grounded in fraud.”
 24 *See Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1124-25 (9th Cir. 2009); *Carlson v.*
 25 *Gillette Co.*, No. 14-cv-14201, 2015 WL 6453147, at *4 (D. Mass. Oct. 23, 2015)
 26 (“The Rule 9(b) pleading requirement applies both to general claims of fraud and also
 27

28 ³ Eisenlord and Phung also purport to bring their California breach of warranty claim
 as “a private attorney general.” Compl. ¶ 79.

1 to associated claims where the core allegations effectively charge fraud.” (quotation
 2 omitted)). Indeed, Plaintiffs allege that Quaker “knew” that its labeling claims were
 3 false, deceptive, and likely to mislead reasonable consumers, Compl. ¶¶ 59, 68, 93, 97,
 4 and that the company “induced Plaintiffs . . . to purchase the Products” through “false,
 5 misleading, and deceptive representations.” Compl. ¶ 5. Rule 9(b) requires that the
 6 allegations be “specific enough to give defendants notice of the particular
 7 misconduct,” including “‘the who, what, when, where, and how’ of the misconduct
 8 charged.” *Kearns*, 567 F.3d at 1124 (quoting *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d
 9 1097, 1106 (9th Cir. 2003)).

10 ARGUMENT

11 I. PLAINTIFFS’ CLAIMS ARE PREEMPTED BY THE FEDERAL FOOD, 12 DRUG, AND COSMETIC ACT

13 Plaintiffs’ claims here are squarely preempted by the federal Food, Drug, and
 14 Cosmetic Act (“FDCA”). The FDCA preempts any state law claim that would impose
 15 labeling requirements “not identical” to the requirements imposed by the Food and
 16 Drug Administration (“FDA”). For decades, FDA regulations have permitted the use
 17 of words and images depicting a “characterizing flavor” on food labels, even when the
 18 product does not contain the ingredient, provided that the label appropriately notes the
 19 use of natural and artificial flavors. Quaker’s Maple & Brown Sugar Flavored Instant
 20 Oatmeal products comply with federal regulations, and Plaintiffs’ request to ban
 21 Quaker from using “Maple” as part of the flavor name or from depicting a pitcher of
 22 syrup on the product label would directly conflict with federal law. Their claims are
 23 therefore preempted in their entirety.

24 A. The FDCA Preempts Claims Imposing Requirements “Not Identical” To 25 Federal Labeling Requirements.

26 The Supremacy Clause of the United States Constitution grants Congress the
 27 power to preempt state law. *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363,
 28 372 (2000). In evaluating a statute’s preemptive effect, courts are instructed that “the

1 purpose of Congress is the ultimate touchstone in every pre-emption case.” *Altria*
2 *Grp., Inc. v. Good*, 555 U.S. 70, 76 (2008) (internal citations omitted).

3 Enacted in 1938, the FDCA, 21 U.S.C. § 301 *et seq.*, “presents a comprehensive
4 regulatory scheme of branding and labeling of food products.” *Fraker v. KFC Corp.*,
5 No. 06-cv-01284, 2007 WL 1296571, at *4 (S.D. Cal. Apr. 30, 2007). In 1990,
6 Congress passed the Nutritional Labeling and Education Act (“NLEA”), amending the
7 FDCA in order “to establish uniform food labeling requirements.” *Reid v. Johnson &*
8 *Johnson*, 780 F.3d 952, 959 (9th Cir. 2015). Critical to that effort is the NLEA’s
9 express preemption provision, under which no state “may directly or indirectly
10 establish . . . any requirement for the labeling of food . . . that is not identical to the
11 requirement” of relevant federal regulations. 21 U.S.C. §§ 343-1(a)(2), (a)(3); *see also*
12 *Dvora v. Gen. Mills, Inc.*, No. 11-cv-1074, 2011 WL 1897349, at *3 (C.D. Cal. May
13 16, 2011) (“Section 343-1(a) expressly preempts state regulation of . . . specified topics
14 ‘that is not identical’ to the requirements in the FDCA in certain categories.”). “It is
15 easy to see why Congress would not want to allow states to impose disclosure
16 requirements of their own on packaged food products, most of which are sold
17 nationwide. Manufacturers might have to print 50 different labels, driving consumers
18 who buy food products in more than one state crazy.” *Turek v. Gen. Mills, Inc.*, 662
19 F.3d 423, 426 (7th Cir. 2011).

20 The preclusive effect of the express preemption provision extends “beyond
21 positive enactments, such as statutes and regulations, to embrace common-law duties.”
22 *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 443 (2005). Claims like those at issue
23 here, asserting violations of state consumer protection statutes and related causes of
24 action, thus fall within the purview of the express preemption provision where the suit
25 would impose labeling requirements “not identical” to those established by federal
26 regulations. *See Dvora*, 2011 WL 1897349, at *5-6 (holding preempted claims that
27 would result in requirements not identical to FDA regulations); *Red v. Kroger Co.*, No.
28 10-cv-01025, 2010 WL 4262037, at *7 (C.D. Cal. Sept. 2, 2010) (same).

1 **B. Plaintiffs’ Claims Seek To Impose Requirements “Not Identical” To**
 2 **Federal Regulations Governing Food Flavoring.**

3 Among the categories covered by the express preemption provision are FDCA
 4 labeling requirements for food flavoring. *See* 21 U.S.C. §§ 343-1(a)(2), (a)(3); 21
 5 U.S.C. §§ 343(i)(2), (k). Plaintiffs in this case seek to impose requirements on the
 6 challenged products that directly conflict with those federal requirements. Plaintiffs’
 7 claims must therefore be dismissed with prejudice as preempted.

8 “The FDA, through the FDCA and its accompanying regulations, has
 9 implemented a comprehensive scheme governing the labeling of flavors and flavorings
 10 in food products.” *Dvora*, 2011 WL 1897349, at *4. For example, the FDCA itself
 11 requires that a food label bear the “the common or usual name of each . . . ingredient
 12 . . . [except that] spices, *flavorings*, and colors . . . may be designated as spices,
 13 *flavorings*, and colorings *without naming each*.” 21 U.S.C. § 343(i)(2) (emphases
 14 added).

15 Detailed regulations promulgated by the FDA provide still more guidance on the
 16 labeling of flavor in food products. Specifically, 21 C.F.R. § 101.22(i) permits the
 17 label of food and beverage products to describe and depict the “characterizing flavor”
 18 of the product:

19 If the label, labeling, or advertising of a food makes any direct or indirect
 20 representations with respect to the *primary recognizable flavor(s)*, *by*
 21 *word, vignette, e.g., depiction of a fruit, or other means*, or if for any other
 22 reason the manufacturer or distributor of a food wishes to designate the
 23 type of flavor in the food other than through the statement of ingredients,
such flavor shall be considered the characterizing flavor and shall be
declared in the following way:

24 21 C.F.R. § 101.22(i) (emphases added). The regulation continues by describing in
 25 detail the appropriate means through which the label must designate the
 26 “characterizing flavor” as natural and/or artificial as appropriate.

27 Indeed, the regulations expressly permit declaration of a “characterizing flavor”
 28 even where the product does not contain *any* of the ingredient that the flavor

1 resembles. *See* 21 C.F.R. § 101.22(i)(1)(i) (even if “the food is one that is commonly
2 expected to contain a characterizing food ingredient” and the “the food contains no
3 such ingredient” but “contains natural flavor derived from such ingredient,” the name
4 of the characterizing flavor may appear accompanied by natural flavor labeling); 21
5 C.F.R. § 101.22(i)(1)(ii) (where the natural flavor is not derived from the product
6 whose flavor is simulated, product must be labeled “artificially flavored”); 21 C.F.R.
7 § 101.22(i)(2) (where the product contains artificial flavor, the name of the
8 characterizing flavor must be accompanied by “artificially flavored” labeling). The
9 flavor disclosures “shall immediately and conspicuously precede or follow” the name
10 of the characterizing flavor. 21 C.F.R. § 101.22(i)(3).

11 In September 2016, the FDA explicitly confirmed that its “[c]urrent regulations
12 allow use of terms like ‘maple,’ ‘maple-flavored,’ or ‘artificially maple flavored’ on
13 the food label without having any maple syrup in the product, as long as it contains
14 maple flavoring.” Exhibit 1 at 3, Food & Drug Admin., September 21, 2016
15 *Consumer Update*, available at [https://www.fda.gov/ForConsumers/ConsumerUpdates](https://www.fda.gov/ForConsumers/ConsumerUpdates/ucm521518.htm)
16 [/ucm521518.htm](https://www.fda.gov/ForConsumers/ConsumerUpdates/ucm521518.htm), hereinafter “FDA Consumer Update.”⁴ The FDA also confirmed
17 that “if the name of the food is accompanied by terms such as ‘artificial flavors,’ or
18 ‘natural and artificial flavors,’ it is a signal that the original source of the flavor may
19 not have been used in the food.” *Id.* at 4.

20 Plaintiffs’ lawsuit here “seek[s] to enjoin exactly what federal law expressly
21 permits.” *Kroger*, 2010 WL 4262037, at *6. First, Plaintiffs seek to prohibit Quaker
22 from labeling its instant oatmeal products with the flavor name “Maple & Brown
23 Sugar” based on the assertion that the product does not contain maple syrup or maple
24 sugar. Compl. ¶ 21 (“The labeling prominently states in bold type that the Products
25 are ‘Quaker Instant Oatmeal, Maple & Brown Sugar.’”); ¶ 22 (“These representations
26 convey . . . that the Products contain maple syrup.”); ¶ 49 (“Plaintiffs reasonably relied

27 ⁴ Exhibits 1 and 2 are attached to the Declaration of Jason R. Meltzer filed
28 concurrently herewith in support of Defendant’s Request for Judicial Notice (“Meltzer
Decl.”).

1 on and were deceived by Defendant’s representations”); ¶ 99 (“The injunctive relief
2 would include an order directing Defendant to cease its false and misleading
3 labeling.”). But federal law expressly permits Quaker to use the words “Maple &
4 Brown Sugar” to describe “the primary recognizable flavor(s)” of the product, 21
5 C.F.R. § 101.22(i)—even if the products “contain[] no such ingredient.” 21 C.F.R.
6 § 101.22(i)(1)(i). Second, Plaintiffs object to the use of an image of a pitcher of syrup
7 on the packaging—Compl. ¶ 21 (“The Products’ packaging also prominently includes
8 images of a glass pitcher of maple syrup”)—in the face of federal regulations expressly
9 authorizing the depiction of a “characterizing flavor” through “word, vignette, e.g.,
10 depiction of a fruit, or other means.” 21 C.F.R. § 101.22(i). Indeed, the FDA’s recent
11 guidance depicts a cereal box for a hypothetical product named “Maple Flakes,” which
12 does not include maple syrup as an ingredient but nonetheless depicts a picture of a
13 maple leaf on the front of the package, explaining that such representations are lawful
14 under “current” characterizing flavor regulations. *See* Meltzer Decl., Exhibit 1, at 3.
15 Third, Plaintiffs seek to require Quaker to “publish corrective advertising,” presumably
16 stating that the Products do not contain maple syrup or sugar. Compl. ¶¶ 99, 109.
17 Section § 101.22(i), however, does not require any such affirmative declaration. It
18 requires only that characterizing flavors are appropriately labeled as “naturally” and
19 “artificially” flavored. Quaker has done exactly that on each of the challenged
20 products.

21 Plaintiffs’ true grievance is with the FDA’s regulations, which Quaker has
22 followed to the letter. But the FDA recently and explicitly rejected that grievance. In
23 fact, despite relying on it in their initial complaints, Plaintiffs have conspicuously
24 omitted any reference to a letter from the Vermont Maple Sugar Makers’ Association
25 raising identical claims to those alleged here and urging the FDA to “take enforcement
26 action,” including with respect to many of the very same labels challenged here. *See*
27 Feb. 15, 2016 Letter from Vermont Maple Sugar Makers’ Association to the Food and
28 Drug Administration, *available at* <https://consumermediallc.files.wordpress.com>

1 /2016/02/fdamaple.pdf (expressly challenging as misbranded the labels on Quaker
2 Oats Maple & Brown Sugar Flavored Instant Oatmeal and Quaker Oats Maple &
3 Brown Sugar Flavored High Fiber Instant Oatmeal). *Compare generally* Compl., with
4 ECF No. 1, ¶ 27 (quoting the Vermont Maple Sugar Makers’ Association Letter). The
5 FDA expressly rejected these claims. Meltzer Decl., Exhibit 2, at 5 (July 26, 2016
6 letter from the Food and Drug Administration to the Vermont Maple Sugar Makers’
7 Association explaining the process that “under FDA’s regulations, the term ‘maple’ is
8 not synonymous with ‘maple syrup’”).

9 Because their lawsuit seeks to impose novel labeling requirements that are “not
10 identical” to federal regulations, Plaintiffs’ effort is preempted. 21 U.S.C. §§ 343-
11 1(a)(2), (3) (expressly preempting requirements not identical to those imposed by 21
12 U.S.C. §§ 343(i), (k), and accompanying regulations). *See also Carrea v. Dreyer’s*
13 *Grand Ice Cream, Inc.*, 475 F. App’x 113 (9th Cir. 2012) (affirming dismissal of
14 regulated 0g trans fat claims on preemption grounds); *Young v. Johnson & Johnson*,
15 525 F. App’x 179, 183 (3d Cir. 2013) (same); *Bronson v. Johnson & Johnson, Inc.*, 12-
16 cv-04184, 2013 WL 1629191, at *4-5 (N.D. Cal. Apr. 16, 2013) (rejecting challenge to
17 antioxidant label regarding vitamin C as preempted); *Gustavson v. Wrigley Sales Co.*,
18 961 F. Supp. 2d 1100, 1123 (N.D. Cal. 2013) (sugar-free claims preempted); *Salazar v.*
19 *Honest Tea, Inc.*, 74 F. Supp. 3d 1304, 1318 (E.D. Cal. 2014) (antioxidant claims
20 preempted).

21 Indeed, courts in this District and Circuit repeatedly have upheld the FDCA in
22 cases presenting *nearly identical* claims. In *Dvora*, the plaintiff challenged the
23 labeling of General Mills’s “Total Blueberry Pomegranate” cereal as false and
24 misleading based on the lack of actual blueberries or pomegranates in the product.
25 2011 WL 1897349, at *1 (causes of action included violations of the CLRA and UCL,
26 and breach of express warranty). The plaintiff objected to the fact that “the words
27 ‘BLUEBERRY’ and ‘POMEGRANATE’ are displayed boldly in large font on the box
28 cover” and to “pictures of clusters that, Plaintiff allege[d], ‘resemble blueberries and/or

1 pomegranate seeds.” *Id.* General Mills noted that the cereal label stated “Naturally
2 and Artificially Flavored” (as Quaker’s labels do here) just beneath the reference to
3 blueberry and pomegranate, and argued that the plaintiff’s claims were preempted by
4 the FDCA and NLEA. The court agreed, observing that “Section 101.22(i) permits a
5 manufacturer to use the name and image of a fruit on a product’s packaging to describe
6 the characterizing flavor of the product even where the product does not contain any of
7 that fruit, or contains no fruit at all.” *Id.* at *4. Based on the regulations, the court
8 concluded that “it is impossible to see how Plaintiff’s lawsuit does not seek to impose
9 limitations on Defendant’s manner of packaging its products that are different from
10 what federal regulations currently require/permit.” *Id.* at *6. The claims were
11 dismissed as preempted. *Id.*

12 *Dvora* is not unique. Numerous courts have found similar flavor claims
13 preempted. *See, e.g., Henry v. Gerber Prods. Co.*, No. 15-cv-02201, 2016 WL
14 1589900, at *6-7 (D. Or. Apr. 18, 2016) (dismissing claims challenging banana images
15 and “Banana” flavor labeling on Puffs products not containing any banana as
16 preempted by the “characterizing flavor” regulation); *Bell v. Campbell Soup Co.*, 65 F.
17 Supp. 3d 1328, 1332 (N.D. Fla. 2014) (dismissing as preempted claims challenging
18 depictions of pomegranates and blueberries and “Pomegranate Blueberry” flavor
19 labeling on juice products); *Samet v. Procter & Gamble Co.*, No. 5:12-cv-1891, 2013
20 WL 3124647, at *6 (N.D. Cal. June 18, 2013) (dismissing as preempted challenge to
21 depictions of strawberries, blueberries, and raspberries not contained in snack products
22 and “Mixed Berry” flavor labeling where the labels included the words “artificially
23 flavored”).

24 Because Plaintiffs’ claims in this case similarly seek to impose labeling
25 requirements on Quaker that are “not identical” to requirements imposed by federal
26 law with respect to food flavoring, the claims are likewise preempted and should be
27 dismissed in their entirety.

28 Plaintiff Perkins’ reliance on the so-called Massachusetts Maple Law (*see*

1 Compl. ¶ 103), does not rescue his claim from preemption. The Massachusetts statute
2 provides, *inter alia*, that “[t]he use of the words ‘maple’ or ‘maple syrup’, shall not be
3 used in the labelling or branding of any food product which does not contain any
4 maple syrup in its ingredients.” M.G.L. c. 128, § 36C. That part of the statute directly
5 conflicts with federal labeling regulations to the extent it purports to prohibit “maple”
6 flavor labeling. Accordingly, claims that rely on that part of the statute to prohibit
7 “maple” flavor labeling are expressly preempted.

8 Although the NLEA includes express “savings” clauses that permit certain state
9 law requirements “applicable to maple syrup” that are “not identical” to federal
10 regulations, 21 U.S.C. §§ 343-1(a)(1)-(3), these provisions do not apply to federal law
11 and regulations governing “maple” flavor labeling; they were implemented to enable
12 states (like Vermont) to set standards for what can be sold as maple syrup. On their
13 face, the savings clauses under 21 U.S.C. §§ 343-1(a)(1) and (3) permit states to set
14 forth “a reasonable definition and standard of identity, a reasonable standard of quality,
15 or reasonable standards of fill of container” for maple syrup under 21 U.S.C. § 341,
16 § 343(g), and § 343(h)(1). *See* 21 U.S.C. §§ 343-1(a)(1) & (3). The savings clause in
17 21 U.S.C. § 343-1(a)(2) also permits state law requirements that govern “imitation”
18 maple syrup under 21 U.S.C. § 343(c). The challenged products at issue here are
19 flavored oatmeals; they do not purport to be maple syrup. As a result, these savings
20 clauses have no application here, and all of Plaintiffs’ claims are preempted.

21 **II. PLAINTIFFS FAIL TO STATE A PLAUSIBLE CLAIM OF DECEPTION** 22 **OR REASONABLE RELIANCE**

23 Plaintiffs’ claims are preempted by the clear terms of the FDCA and federal
24 regulations, and that alone ends the case with prejudice. Nonetheless, even if
25 Plaintiffs’ claims were not preempted, the claims cannot survive Rule 12(b)(6).
26 Plaintiffs allege that the labeling of Quaker’s instant oatmeal products is false and
27 misleading because Quaker represented that “the products contained maple syrup”
28 when “the products did not contain any maple syrup.” Compl. ¶¶ 49, 50. But

1 Plaintiffs’ allegations and the label of Quaker Maple & Brown Sugar Flavored Instant
2 Oatmeal (Classic Recipe) make clear that Quaker’s labels do not make any such
3 representation. Instead, the labels truthfully and accurately describe the oatmeal’s
4 flavoring and ingredients. Plaintiffs’ failure to state a plausible claim for breach of
5 warranty, or violations of any of the statutes at issue in the Complaint—the CLRA,
6 FAL, UCL, Illinois Consumer Fraud Act, New Jersey Consumer Fraud Act,
7 Massachusetts false advertising law, or the Massachusetts unfair and deceptive
8 practices law—requires dismissal as a matter of law.

9 **A. Plaintiffs’ Claims Fail Because No Reasonable Consumer Would Be Misled**
10 **By The Product Label.**

11 In order to state a claim under the UCL, the FAL, or the CLRA, a plaintiff must
12 allege that statements or other representations appearing on defendants’ product labels
13 are likely to deceive a reasonable consumer. *Pelayo v. Nestle USA, Inc.*, 989 F. Supp.
14 2d 973, 977-78 (C.D. Cal. 2013) (citing *Williams v. Gerber Prods. Co.*, 552 F.3d 934,
15 938 (9th Cir. 2008); *Freeman v. Time, Inc.*, 68 F.3d 285, 289 (9th Cir. 1995)).
16 “‘Likely to deceive’ implies more than a mere possibility that the advertisement might
17 conceivably be misunderstood by some few consumers viewing it in an unreasonable
18 manner.” *Stiles*, 2017 WL 3084267, at *3 (quoting *Lavie v. Procter & Gamble Co.*,
19 105 Cal. App. 4th 496, 508 (2003)). Instead, it “requires a probability that a
20 significant portion of the general consuming public or of targeted consumers, acting
21 reasonably under the circumstances, could be misled.” *Pelayo*, 989 F. Supp. 2d at 977-
22 78 (quoting *Lavie*, 105 Cal. App. 4th at 508). The same principles apply under Illinois,
23 New Jersey, and Massachusetts law. *Ibarrola v. Kind, LLC*, 83 F. Supp. 3d 751, 754
24 (N.D. Ill. 2015) (“Ibarrola has not plausibly alleged that a reasonable consumer would
25 be deceived by Kind’s statements.”); *N.J. Citizen Action v. Schering-Plough Corp.*,
26 367 N.J. Super. 8, 13 (App. Div. 2003) (“As our Supreme Court has held, ‘[t]o
27 constitute consumer fraud . . . the business practice in question must be misleading and
28 stand outside the norm of reasonable business practice in that it will victimize the

1 average consumer.” (quoting *Turf Lawnmower Repair, Inc. v. Bergen Record Corp.*,
2 139 N.J. 392, 416 (1995)); *Carlson*, 2015 WL 6453147, at *4 (“An affirmative act may
3 be deceptive when it has the capacity to mislead consumers, acting reasonably under
4 the circumstances, to act differently from the way they otherwise would have acted
5 (i.e., to entice a reasonable consumer to purchase the product).” (quotation omitted)).

6 Regardless of the general rule that a court must accept as true the allegations
7 contained within Plaintiffs’ complaint in ruling on a 12(b)(6) motion, a “court [is not]
8 required to accept as true allegations that are merely conclusory, unwarranted
9 deductions of fact, or unreasonable inferences.” *Spewell v. Golden State Warriors*,
10 266 F.3d 979, 988 (9th Cir. 2001). Where the court can determine, upon review of the
11 packaging at issue, that a reasonable consumer would not be deceived by them,
12 dismissal is appropriate under *Iqbal*. See *Ebner v. Fresh, Inc.*, 838 F.3d 958, 965-66
13 (9th Cir. 2016) (affirming dismissal of claims regarding omission of disclosures on
14 packaging of lip product); *Stiles*, 2017 WL 3084267, at *4 (dismissing claims
15 challenging “Maple & Brown Sugar” flavor labeling on oatmeal products based on
16 alleged lack of actual maple syrup or maple sugar); *Workman v. Plum, Inc.*, 141 F.
17 Supp. 3d 1032, 1036 (N.D. Cal. 2015) (dismissing claims based on depiction of fruits
18 on label of toddler puree pouches and fruit bars); *Pelayo*, 989 F. Supp. 2d at 978 (“[I]n
19 certain instances, the Court can properly make this determination [of whether a
20 business practice is deceptive] and resolve such claims based on its review of the
21 product packaging.”); *Hairston v. S. Beach Beverage Co., Inc.*, No. 12-cv-1429, 2012
22 WL 1893818, at *4 (C.D. Cal. May 18, 2012) (same); *Carlson*, 2015 WL 6453147, at
23 *6 (“Considered objectively, and with the aid of common sense, the use of the disputed
24 label does not constitute a ‘deceptive act[] or practice []’ within the meaning of
25 Chapter 93A.”) (alterations in original).

26 A review of the labels at issue here and the Plaintiffs’ own allegations make
27 clear that no reasonable consumer is likely to be deceived by Quaker’s labels. Despite
28 Plaintiffs’ insistence throughout their complaint that Quaker’s packaging is “false,

1 misleading, and deceptive,” Compl. ¶ 4; *see also* ¶¶ 25, 28, 44, 48, 59, Plaintiffs have
2 not identified *any* statements by Quaker, on the package or elsewhere, representing
3 that that its oatmeal contains maple syrup or maple sugar. In fact, the label
4 demonstrates that precisely the opposite is true. The words “NATURALLY AND
5 ARTIFICIALLY FLAVORED” appear immediately below the “Maple & Brown
6 Sugar” statement in the name of the product. Walters Decl., Exhibit A. And
7 “SERVING SUGGESTION” is printed next to the label’s image of the bowl of
8 oatmeal—topped with fresh blueberries and strawberries, items that not even Plaintiffs
9 allege they believed to be in the product—in the background of which is the pitcher of
10 syrup referenced by the Plaintiffs. The words “Contains Maple Syrup” or “Made With
11 Maple Sugar” appear *nowhere* on the label. In fact, the words “Maple Syrup” and
12 “Maple Sugar” are never even mentioned. Instead, a review of the entire product label
13 reveals that “NATURALLY AND ARTIFICIALLY FLAVORED” accompanies the
14 words “Maple & Brown Sugar” at each and every location at which they appear on the
15 package—at least four different locations on a standard Classic Recipe 10-count
16 package. Walters Decl., Exhibit A. The ingredients list includes “natural and artificial
17 flavors.” It does not include “maple syrup.” It does not include “maple sugar.” In
18 short, to come away with the impression that the challenged products contain maple
19 syrup or maple sugar, a consumer would have to disregard the flavor name, the flavor
20 disclosure printed *immediately beneath* the flavor name in multiple locations on the
21 package, and the serving suggestion language next to the picture of a pitcher of syrup
22 along with other toppings not found in the product, *and* entirely ignore the product’s
23 ingredients list. No reasonable consumer can be presumed to have such selective
24 vision.

25 Very recently, a court in this District held that the mere use of the term “maple”
26 would *not* deceive a reasonable consumer into believing that certain cereal and oatmeal
27 products contained maple syrup or sugar because “neither of the [p]roducts’ names
28 advertises ‘maple syrup’ or ‘maple sugar.’” *Stiles*, 2017 WL 3084267, at *4. The

1 court also relied on FDA guidance in which the agency “explained that ‘the term
2 ‘maple’ is not synonymous with maple syrup.” *Id.* at *5 (quoting July 26, 2016 FDA
3 letter, Meltzer Decl., Exhibit 2 at 5) (alterations omitted). Moreover, the court
4 explained, a subsequent September 2016 FDA consumer update reaffirmed that
5 “[c]urrent regulations allow the use of the terms like ‘maple’ . . . without having any
6 maple syrup in the product, as long as it contains maple flavoring.” *Id.* (quoting FDA
7 Consumer Update, Meltzer Decl., Exhibit 1 at 3). Thus, the court dismissed plaintiffs’
8 CLRA, FAL, UCL, California breach of express warranty, and unjust enrichment
9 claims *with prejudice*. *Id.* at *4-6. The same result is appropriate here.

10 If further confirmation were necessary, a series of other decisions by federal
11 district courts in this Circuit have also dismissed similar claims on plausibility
12 grounds, finding that reasonable consumers would not be deceived by flavor names
13 and depictions accompanied by appropriate natural or artificial flavor disclosures. *See,*
14 *e.g., Dvora*, 2011 WL 1897349, at *7-8 (where cereal box plainly stated that Blueberry
15 Pomegranate cereal was “flavored” and there was no statement that cereal was made
16 with actual fruit, no reasonable consumers would be deceived); *McKinniss v. Gen.*
17 *Mills, Inc.*, No. 07-cv-2521, 2007 WL 4762172, at *3-4 (C.D. Cal. Sept. 18, 2007)
18 (consumers would not be deceived about the fruit content of Berry Kix, Fruity
19 Cheerios, Trix Yogurt, and Yoplait Go-Gurt based on the product or flavor names and
20 images of fruit where the labels read “Natural Fruit Flavors,” “Naturally and
21 Artificially Flavored,” and/or “Flavored with Real Fruit Juice,” and truthfully
22 disclosed the product ingredients); *McKinnis v. Kellogg USA*, No. 07-cv-2611, 2007
23 WL 4766060, at *4 (C.D. Cal. Sept. 19, 2007) (no reasonable consumer would be
24 deceived by the labels of Froot Loops where the label read “NATURAL FRUIT
25 FLAVORS” and the ingredients list did not include fruit); *McKinniss v. Sunny Delight*
26 *Beverages Co.*, No. 07-cv-02034, 2007 WL 4766525, at *4 (C.D. Cal. Sept. 4, 2007)
27 (no reasonable consumer would conclude that SunnyD contained significant quantities
28 of fruit juice when the label identified the product as fruit “flavored” and the

1 nutritional label revealed the exact fruit content); *Shaker v. Nature's Path Foods, Inc.*,
2 No. 13-cv-1138, 2013 WL 6729802, at *4-6 (C.D. Cal. Dec. 16, 2013) (images of
3 strawberries on cereal accompanied by "serving suggestion" language would not
4 mislead a reasonable consumer into believing the cereal contained organic
5 strawberries).

6 Even a cursory review of the pleadings and the labels challenged by Plaintiffs
7 reveals that Quaker has not represented that the challenged products contain maple
8 syrup or maple sugar, but instead has clearly stated that the product is naturally and
9 artificially flavored. No reasonable consumer would plausibly be deceived, and
10 Plaintiffs' claims should be dismissed with prejudice.

11 **B. Plaintiffs Have Not Alleged Any Warranty Or Reasonable Reliance.**

12 Plaintiffs' remaining causes of action fail for similar reasons. First, the
13 California Plaintiffs have failed to adequately plead their claim for breach of express
14 warranty. "To plead an action for breach of express warranty under California law, a
15 plaintiff must allege: (1) the exact terms of the warranty; (2) reasonable reliance
16 thereon; and (3) a breach of warranty which proximately caused plaintiff's injury."
17 *Baltazar v. Apple, Inc.*, No. 10-cv-3231, 2011 WL 588209, at *2 (N.D. Cal. Feb. 10,
18 2011). "Such a claim must describe the exact terms of the warranty," in addition to
19 alleging that the buyer reasonably relied on the warranty's terms. *Stearns v. Select*
20 *Comfort Retail Corp.*, No. 08-cv-2746, 2009 WL 1635931, at *4 (N.D. Cal. June 5,
21 2009). Plaintiffs have done neither.

22 As an initial matter, Plaintiffs have not set forth any representations that might
23 serve as the basis for an express warranty because they have not identified any
24 statement by Quaker representing that the product contains maple sugar or maple
25 syrup. See *Dvora*, 2011 WL 1897349, at *9 (dismissing breach of warranty claim
26 because characterizing flavor label does not "serve as the basis for an express
27 warranty"); *Gen. Mills*, 2007 WL 4762172, at *5 (dismissing breach of warranty claim
28 because defendant "truthfully disclosed the ingredients" in its products and did not

1 make any affirmations or promises that they contained real fruit or fruit juice);
2 *Kellogg*, 2007 WL 4766060, at *5 (dismissing breach of warranty claim where
3 defendant represented that the cereal contained “natural fruit flavors,” not actual fruit).
4 As explained above, under federal law, the “Maple & Brown Sugar” label is
5 considered a disclosure of the products’ “characterizing flavor,” and thus it cannot be
6 considered a warranty that the product contains any particular ingredients. Indeed, to
7 the extent it can be considered to be a warranty at all (and it cannot), it warrants only that
8 the product tastes like “Maple & Brown Sugar.” Plaintiffs do not allege that their
9 oatmeal did not taste like Maple and Brown Sugar. As a result, their breach of
10 warranty claims must fail.

11 Plaintiffs also cannot show “reasonable reliance” on any purported warranty
12 representing that the product contains maple syrup or maple sugar for the reasons
13 discussed at length above—flavor disclosures accompany every mention of “Maple &
14 Brown Sugar,” the product label never includes the words “maple syrup” or “maple
15 sugar,” the ingredients list does not include maple syrup or maple sugar, and the
16 background image of a pitcher of syrup is accompanied by the phrase “SERVING
17 SUGGESTION.” *See Stiles*, 2017 WL 3084267, at *5 (“Plaintiffs cannot establish that
18 the warranty was breached because the label would not lead a reasonable consumer to
19 believe that the Products contain maple syrup or maple sugar”); FDA Consumer
20 Update, Meltzer Decl., Exhibit 1 at 3 (“[I]f the name of the food is accompanied by
21 terms such as ‘artificial flavors’ or ‘natural and artificial flavors,’ it is a signal that the
22 original source of the flavor may not have been used in the food.”).

23 Plaintiff Perkins’s claim for breach of warranty under Massachusetts law fails
24 for the same reasons. Under Massachusetts law, an express warranty may be created
25 by an “affirmation of fact or promise made by the seller to the buyer” or a “description
26 of the goods which is made part of the basis of the bargain.” M.G.L. c. 106, § 2-313.
27 To state a claim, moreover, a plaintiff must also have reasonably relied on that
28 warranty. *Provanzano v. MTD Prods. Co.*, 215 F. Supp. 3d 134, 137 (D. Mass. 2016)

1 (“There are no facts in the record indicating that plaintiff relied on any specific
2 warranties.”). As with the California breach of warranty claim, Plaintiffs have not
3 identified any affirmation or description made by Quaker that the Products contain
4 maple syrup or maple sugar. Nor have they shown that they reasonably relied on any
5 putative representation to that effect.

6 **C. Plaintiffs’ Unjust Enrichment Claim Fails.**

7 Plaintiffs’ unjust enrichment claim fails for the same reasons as Plaintiffs’ other
8 equitable and purported contractual claims. There simply is no plausible or non-
9 preempted basis for a claim of “entic[ement] . . . through false or misleading labeling”
10 and resulting “unjust enrich[ment].” *Astiana v. Hain Celestial Group, Inc.*, 783 F.3d
11 753, 762 (9th Cir. 2015); *see also Stiles*, 2017 WL 3084267, at *6 (“There being no
12 actionable wrong, there is no basis for the relief.”) (quotation omitted); *Gubala v. CVS*
13 *Pharmacy, Inc.*, No. 14-cv-9039, 2015 WL 3777627, at *7 (N.D. Ill. June 16, 2015)
14 (dismissing unjust enrichment claim premised on the same allegations as consumer
15 fraud claims); *Kellogg*, 2007 WL 4766060, at *6 (same).

16 **III. PLAINTIFFS LACK STANDING TO BRING CLAIMS FOR**
17 **INJUNCTIVE RELIEF**

18 Plaintiffs’ claims for injunctive relief also fail on the separate and independent
19 ground of standing. Plaintiffs’ standing to seek injunctive relief depends on whether
20 they are “likely to suffer future injury” from the challenged conduct. *City of Los*
21 *Angeles v. Lyons*, 461 U.S. 95, 105 (1983). Thus, Plaintiffs must establish a “a
22 sufficient likelihood that [they] will again be wronged in a similar way.” *Id.* at 111.
23 They have failed to do so here. Plaintiffs do not allege any intention to purchase the
24 challenged products in the future. As a result, they have failed to establish any, let
25 alone a sufficient, likelihood that they will be wronged by Quaker’s labeling practices
26 in the future. *See Delarosa v. Boiron, Inc.*, No. 10-cv-1569, 2012 WL 8716658, at *4
27 (C.D. Cal. Dec. 28, 2012) (“Plaintiff cannot seek injunctive relief, even if Boiron is
28

1 still using the same packaging and advertising, because any loss to her ‘has already
2 occurred’ and there is no likelihood of future harm to her.”).

3 Moreover, even if Plaintiffs had alleged a future intention to purchase the
4 challenged products (and they have not), that would not be enough. “Such ‘some day’
5 intentions—without any description of concrete plans, or indeed even any specification
6 of when the some day will be—do not support a finding of . . . ‘actual or imminent’
7 injury.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 (1992). A “[t]hreatened
8 injury must be certainly impending to constitute injury in fact.” *Clapper v. Amnesty*
9 *Int’l USA*, 568 U.S. 398, 410-11 (2013) (quotation omitted). Moreover, since
10 Plaintiffs are now aware that the challenged labels do not represent that the products
11 actually contain maple syrup or maple sugar, they cannot show that “there is an actual
12 and immediate threat that [they] will be wronged again *in the same way by*
13 *Defendant.*” *Campion v. Old Republic Home Prot. Co.*, 861 F. Supp. 2d 1139, 1150
14 (S.D. Cal. 2012) (emphasis added); *see also Nguyen v. Medora Holdings, LLC*, No.
15 5:14-cv-00618, 2015 WL 4932836, at *7 (N.D. Cal. Aug. 18, 2015) (“The court gives
16 Plaintiffs more credit than to understand that they are at risk of being duped again by a
17 label they now understand does not indicate a lack of GMO ingredients.”) (collecting
18 cases); *Camasta v. Jos. A. Bank Clothiers, Inc.*, 761 F.3d 732, 741 (7th Cir. 2014)
19 (“Since Camasta is now aware of JAB’s sales practices, he is not likely to be harmed
20 by the practices in the future.”); *McNair v. Synapse Grp. Inc.*, 672 F.3d 213, 225 &
21 n.15 (3d Cir. 2012) (dismissing injunctive relief claims for lack of standing and
22 declining to “presume [plaintiffs] will be fooled again and again” because “the law
23 accords people the dignity of assuming that they act rationally, in light of the
24 information they possess”). Plaintiffs’ claims for injunctive relief must be dismissed.

25 **IV. PLAINTIFFS LACK STANDING AS TO UNPURCHASED PRODUCTS**

26 Plaintiffs also lack standing as to unpurchased products. To satisfy Article III, a
27 plaintiff must demonstrate that he has a “‘personal stake . . . as to warrant *his*
28 invocation of federal-court jurisdiction,”” *Summers v. Earth Island Inst.*, 555 U.S. 488,

1 493 (2009) (emphasis added) (citation omitted), and he must do so “for *each claim* he
2 seeks to press,” *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 335 (2006) (emphasis
3 added). Although Plaintiffs purport to bring claims concerning six Maple & Brown
4 Sugar flavored products, at best, they allege that they purchased just three of those
5 products.⁵ Compl. ¶¶ 1 n.1, 10-15. Because Plaintiffs cannot claim to have been
6 personally injured by labels on products they did not purchase, Plaintiffs lack standing
7 to bring claims as to the remaining products. *See Cuno*, 547 U.S. at 353 (“Plaintiffs
8 failed to establish Article III injury with respect to their *state* taxes, and even if they
9 did do so with respect to their *municipal* taxes, that injury does not entitle them to seek
10 a remedy as to the state taxes.”). As the Supreme Court has repeatedly held, “standing
11 is not dispensed in gross” and “a plaintiff who has been subject to injurious conduct of
12 one kind [does not] possess by virtue of that injury the necessary stake in litigating
13 conduct of another kind, although similar, to which he has not been subject.” *Lewis v.*
14 *Casey*, 518 U.S. 343, 358 n.6 (1996) (citing *Blum v. Yaretsky*, 457 U.S. 991, 999
15 (1982)).

16 Plaintiffs’ allegations on behalf of a putative class cannot change this result.
17 While “there is authority going both ways” in the district courts of the Ninth Circuit,
18 *see Colucci v. Zoneperfect Nutrition Co.*, No. 12-cv-2907, 2012 WL 6737800, at *4
19 (N.D. Cal. Dec. 28, 2012), the Supreme Court has long held that bringing a case as a
20 class action “adds nothing” to the standing inquiry, *Simon v. E. Ky. Welfare Rights*
21 *Org.*, 426 U.S. 26, 40 n.20 (1976) (citation omitted). Thus, named plaintiffs, just as
22 any other plaintiff, must show that they were “*personally . . . injured*, not that injury
23 has been suffered by other, unidentified members of the class to which they belong and
24 which they purport to represent.” *Id.* The Supreme Court recently reaffirmed this

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26 ⁵ Mr. Aliano’s allegations that he purchased the Lower Sugar and Organic Instant
27 Oatmeal products conflict with his original complaint, which stated that he had
28 purchased “Quaker Instant Oatmeal Maple & Brown Sugar,” the same product as all
the other Plaintiffs. *See Aliano v. Quaker Oats Co.*, No. 16-cv-3087 (N.D. Ill.), ECF
No. 6 ¶ 26.

1 principle in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 n.6 (2016). These
 2 precedents require dismissal of the claims against the unpurchased products.⁶

3 In any event, Plaintiffs have failed to establish “sufficient similarity between the
 4 products purchased and not purchased,” because they have not alleged any *facts*
 5 showing that the unpurchased products are “of the same kind,” are “comprised of
 6 largely the same ingredients,” and “bear[] the same alleged mislabeling” as the
 7 purchased product. *Colucci*, 2012 WL 6737800, at *4. Plaintiffs’ Complaint merely
 8 alleges in conclusory fashion that the Products’ packaging “states in bold type that the
 9 Products are ‘Quaker Instant Oatmeal, Maple & Brown Sugar,’ and includes “images
 10 of a glass pitcher of maple syrup.” Compl. ¶ 21. Plaintiffs, however, fail to allege
 11 whether the depictions of a pitcher of syrup on the label are identical (and they are
 12 not); whether the flavor disclosures under “Maple & Brown Sugar” are identical (and
 13 they are not); or whether the ingredients are identical (and they are not). This is
 14 insufficient to pass muster even under the more lenient standard for standing followed
 15 by some district courts in this Circuit, as well as Rule 9(b) requirements. *See Leonhart*
 16 *v. Nature’s Path Foods, Inc.*, No. 13-cv-00492, 2014 WL 6657809, at *4 (N.D. Cal.
 17 Nov. 21, 2014) (dismissing claims pertaining to unpurchased products where plaintiffs
 18 failed to set forth the products’ ingredients and specific packaging); *Wilson v. Frito-*
 19 *Lay N. Am.*, 961 F. Supp. 2d 1134, 1141-42 (N.D. Cal. 2014) (finding no standing to
 20 challenge unpurchased products where the court would have to “assume that each of
 21 these subtly different Products is like all the others”).

22 **V. DISMISSAL WITH PREJUDICE IS APPROPRIATE**

23 This Court should dismiss all of Plaintiffs’ claims *with prejudice*. Plaintiffs

24 ⁶ *Larsen v. Trader Joe’s Co.*, No. 11-cv-05188, 2012 WL 5458396, at *4-5 (N.D.
 25 Cal. Jun. 14, 2012) (dismissing plaintiffs’ claims relating to products they did not
 26 purchase for lack of Article III standing); *Carrea v. Dreyer’s Grand Ice Cream, Inc.*,
 27 No. 10-cv-01044, 2011 WL 159380, at *3 (N.D. Cal. Jan. 10, 2011) (consumer who
 28 purchased defendant’s Drumstick ice cream product did not have standing to challenge
 the label on defendant’s Dibs products); *Johns v. Bayer Corp.*, No. 09-cv-1935, 2010
 WL 476688, at *5 (S.D. Cal. Feb. 9, 2010) (plaintiff “cannot expand the scope of his
 claims to include a product he did not purchase or advertisements relating to a product
 that he did not rely upon”).

1 filed initial complaints more than a year ago, and they have already amended once.
2 Moreover, “[a] Court does not need to grant leave to amend in cases where the Court
3 determines that permitting a plaintiff to amend would be an exercise in futility.”
4 *Hairston*, 2012 WL 1893818, at *3. As set forth above, Plaintiffs’ claims are
5 preempted by federal regulations governing the labeling of flavors. No amendment
6 that Plaintiffs could file would alter federal regulations that expressly permit the use of
7 the flavor name “Maple & Brown Sugar” or the depiction of a pitcher of syrup to
8 describe the products’ characterizing flavor. And because the label of Quaker’s Maple
9 & Brown Sugar Flavored Instant Oatmeal Product clearly shows that Quaker has not
10 made any statement claiming that the product contains maple syrup or maple sugar,
11 Plaintiffs will be unable to amend their complaint to plausibly allege that a reasonable
12 consumer would be deceived by the label. *See Stiles*, 2017 WL 3084267, at *6
13 (“[D]ismissal with prejudice is proper because amendment of the FAC would be futile.
14 As discussed above, Plaintiffs’ central claim—that the word ‘maple,’ together with the
15 Products’ packaging would likely deceive a reasonable consumer—fails as a matter of
16 law.”). Under these circumstances, amendment would be “an exercise in futility.”
17 Dismissal with prejudice is appropriate.

18 CONCLUSION

19 For the foregoing reasons, Quaker respectfully requests that this Court dismiss
20 the complaint in its entirety with prejudice.

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