

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

MATTHEW SINATRO, et al.,
Plaintiffs,
v.
BARILLA AMERICA, INC.,
Defendant.

Case No. [22-cv-03460-DMR](#)

**ORDER ON MOTION TO DISMISS
FIRST AMENDED COMPLAINT**

Re: Dkt. No. 15

Plaintiffs Matthew Sinatro and Jessica Prost filed this putative class action against Defendant Barilla America, Inc. (“Barilla”) alleging false, misleading, and deceptive marketing practices with respect to the labeling of certain of its Barilla-brand pastas. Barilla moves pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) to dismiss the amended complaint. [Docket No. 15.] This motion is appropriate for determination without oral argument. Civ. L.R. 7-1(b). For the following reasons, the motion is granted in part and denied in part.

I. BACKGROUND

Plaintiffs make the following allegations in the amended complaint, all of which are taken as true for purposes of the motion to dismiss.¹ Barilla is a corporation headquartered in Illinois. It originated as a bread and pasta shop in Parma, Italy in the nineteenth century. [Docket No. 11 (First Am. Compl, “FAC”) ¶¶ 11, 14.]

At issue in the FAC is the labeling of certain Barilla-brand pastas as “ITALY’S #1 BRAND OF PASTA®.” See FAC ¶ 2. Plaintiffs allege that “authentic Italian products, including pastas, hold a certain prestige and [are] generally viewed as a higher quality product,” and that

¹ When reviewing a motion to dismiss for failure to state a claim, the court must “accept as true all of the factual allegations contained in the complaint.” *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (per curiam) (citation omitted).

1 “the general ‘Italianness’ of a product influences consumers[’] overall evaluation of a product.”
 2 *Id.* at ¶ 12 (citation omitted). According to Plaintiffs, “consumers willingly pay more for Italian
 3 sounding and/or looking products.” *Id.* (citation omitted). Further, they allege, “Italian pasta is
 4 one of the best and most sought after products in the global market,” and “Italian durum wheat is
 5 among some of the ‘best varieties[’]” of wheat. *Id.* at ¶ 13. However, Italy’s production of
 6 durum wheat does not meet worldwide demand. Accordingly, Plaintiffs allege, many companies,
 7 including Barilla, “have scrambled to manufacture, market, and sell purportedly authentic ‘Italian-
 8 made’ pastas, using durum wheat that is not sourced in Italy, in an effort to gain market share and
 9 increase sales.” *Id.*

10 Plaintiffs allege that “[i]n an effort to increase profits and to obtain an unfair competitive
 11 advantage . . . [Barilla] falsely and misleadingly labels certain of its Barilla® brand pastas as
 12 ‘ITALY’S #1 BRAND OF PASTA®,’ deliberately leading reasonable consumers, including
 13 Plaintiffs, to believe that the Products are made in Italy” from ingredients “sourced in Italy.” *Id.* at
 14 ¶¶ 2, 22 (emphasis removed) (the “Challenged Representation”). They further allege that Barilla
 15 reinforces this representation about the origin of the products by replicating the green, white, and
 16 red colors of Italy’s flag surrounding the representation, “further perpetuating the notion that the
 17 Products are authentic pastas from Italy.” *Id.* at ¶ 2. According to Plaintiffs, “contrary to this
 18 labeling, the Products are not made in Italy” and are not manufactured from ingredients from Italy.
 19 *Id.* at ¶ 3. Rather, the products are manufactured in Barilla’s plants in Iowa and New York using
 20 ingredients sourced from countries other than Italy. *Id.* at ¶¶ 3, 14, 25. The FAC includes
 21 examples of the packaging and labeling of several types of Barilla-brand pastas. *Id.* at ¶ 2; Ex. 1.
 22 The front of the packaging of each product contains Barilla’s red and white brand logo, the name
 23 of the product, and the Challenged Representation.

24 According to Plaintiffs, Barilla “deliberately designed and executed a decades long
 25 marketing campaign to identify the Barilla® brand, company, and Products at issue in this case, as
 26 authentic, genuine Italian pastas—made from ingredients sources [sic] in Italy (like durum wheat),
 27 and manufactured in Italy.” FAC ¶ 16. This campaign included websites, a Barilla Historical
 28 Archive, a Barilla Pasta Museum, and Barilla Academy, which Plaintiffs allege were “all designed

1 to promote the brand and company’s Italian identity” and “convince consumers that Barilla®
2 brand pastas . . . come from Italian ingredients, [are] processed and manufactured in Italian
3 factories, and then exported for sale to various countries,” including the United States. *Id.*

4 Plaintiffs further allege that “[n]othing on the Products’ labeling or packaging would lead
5 reasonable consumers to believe that the Challenged Representation—that the Products are made
6 in Italy, their ingredients are sourced in Italy, and the finished Products are manufactured in
7 Italy—is not true.” *Id.* at ¶ 22. Specifically, Plaintiffs allege that there is no “clear, unambiguous,
8 and conspicuously displayed statement, reasonably proximate to the Challenged Representation,
9 that reasonable consumers are likely to notice, read, and understand to mean that . . . the
10 Challenged Representation is indeed false as the Products’ ingredients are not sourced in Italy and
11 the Products themselves are not assembled or manufactured in Italy.” *Id.*

12 Plaintiff Sinatro purchased a box of the Classic Barilla Blue Box Pasta (Angel Hair) for
13 approximately \$2.00 at a grocery store in San Francisco, California in the winter of 2021. FAC ¶
14 8. The Challenged Representation on the label led him to believe “that the Product was made in
15 Italy—to wit, the Products’ ingredients are from Italy and the Products are manufactured in Italy.”
16 *Id.* Sinatro did not review the side or back panels of the product and did not notice any statements
17 on the packaging that contradicted the Challenged Representation or otherwise indicated that the
18 pasta was not made or manufactured in Italy and/or that its ingredients were not from Italy.

19 Plaintiffs allege that Sinatro “would not have purchased the Product, or would not have overpaid a
20 premium for the Product’s purported Italian origin, had he known that the Challenged
21 Representation was false.” *Id.* Further, they allege that Sinatro “is not personally familiar with
22 the location from which the Products’ ingredients are sourced or the location where the Products
23 are manufactured as he does not possess any personal knowledge regarding where the Products are
24 made,” and therefore “has no way of determining whether the Challenged Representation on the
25 Products is true.” *Id.*

26 Plaintiff Prost purchased two boxes of the Classic Barilla Blue Box Pasta (Spaghetti) for
27 approximately \$2.00 per box at a grocery store in Los Angeles, California in the fall of 2021. *Id.*
28 at ¶ 9. The Challenged Representation on the label led Prost to believe “that the Product was

1 made in Italy—to wit, the Products’ ingredients are from Italy and the Products are manufactured
 2 in Italy.” *Id.* When she made the purchase, Prost did not review the side or back panels of the
 3 product and did not notice any statements on the packaging that contradicted the Challenged
 4 Representation or otherwise indicated that the pasta was not made or manufactured in Italy and/or
 5 that its ingredients were not from Italy. Plaintiffs allege that Prost “would not have purchased the
 6 Product, or would not have overpaid a premium for the Product’s purported Italian origin, had she
 7 known that the Challenged Representation was false.” *Id.* Prost “is not personally familiar with
 8 the location from which the Products’ ingredients are sourced or the location where the Products
 9 are manufactured as she does not possess any personal knowledge regarding where the Products
 10 are made,” and therefore “has no way of determining whether the Challenged Representation on
 11 the Products is true.” *Id.*

12 Based on these allegations, Plaintiffs assert the following claims for relief: 1) violation of
 13 the Unfair Competition Law (“UCL”), California Business & Professions Code section 17200 et
 14 seq.; 2) violation of the False Advertising Law (“FAL”), California Business & Professions Code
 15 section 17500 et seq.; 3) violation of the Consumers Legal Remedies Act (“CLRA”), California
 16 Civil Code section 1750 et seq.; 4) breach of warranty; and 5) unjust enrichment/restitution.

17 In addition to the particular products Sinatro and Prost purchased (the “purchased
 18 products”), Plaintiffs’ claims also challenge the packaging for 52 additional Barilla-brand pastas
 19 across several sub-brands: Classic Blue Box, Collezione Artisanal, Gluten Free, Veggie, and
 20 Whole Grain. FAC ¶ 4. According to Plaintiffs, these additional products also contain the
 21 Challenged Representation on the front labels of the packaging. *Id.*

22 Plaintiffs seek to represent a nationwide class of allegedly similarly situated persons,
 23 defined as:

24 All residents of the United States who, within the applicable statute
 25 of limitations periods, purchased the Products, containing the
 26 Challenged Representation on the Products’ front packaging, for
 purposes other than resale[.]

27 FAC ¶ 31. They also seek to represent the following California subclass:

28 All residents of California who, within four years prior to the filing of
 this Complaint, purchased the Products, containing the Challenged

Representation on the Products' front packaging, for purposes other than resale[.]

Id. Plaintiffs bring claims one through three on behalf of themselves and the California subclass. They bring claims four and five on behalf of themselves, the nationwide class, and the California subclass.

Barilla now moves to dismiss the FAC.

II. LEGAL STANDARDS

Barilla moves to dismiss the FAC pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).

A. Rule 12(b)(1)

The question of standing is “an essential and unchanging part of the case-or-controversy requirement of Article III [of the U.S. Constitution].” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Because standing is a jurisdictional issue, it is properly addressed under a Rule 12(b)(1) motion. *Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1174 (9th Cir. 2004). A court will dismiss a party’s claim for lack of subject matter jurisdiction “only when the claim is so insubstantial, implausible, foreclosed by prior decisions of th[e Supreme] Court, or otherwise completely devoid of merit as not to involve a federal controversy.” *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 89 (1998) (citation and quotation marks omitted); *see* Fed. R. Civ. P. 12(b)(1). To satisfy Article III’s standing requirements, a plaintiff must show “(1) it has suffered an ‘injury in fact’ that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.” *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000).

“Where standing is raised in connection with a motion to dismiss, the court is to accept as true all material allegations of the complaint, and . . . construe the complaint in favor of the complaining party.” *In re Facebook, Inc. Internet Tracking Litigation*, 956 F.3d 589, 597 (9th Cir. 2020) (quotations omitted).

B. Rule 12(b)(6)

1 A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of the claims alleged in
 2 the complaint. *See Parks Sch. of Bus., Inc. v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995).
 3 When reviewing a motion to dismiss for failure to state a claim, the court must “accept as true all
 4 of the factual allegations contained in the complaint,” *Erickson*, 551 U.S. at 94 (2007) (citation
 5 omitted), and may dismiss a claim “only where there is no cognizable legal theory” or there is an
 6 absence of “sufficient factual matter to state a facially plausible claim to relief.” *Shroyer v. New*
 7 *Cingular Wireless Servs., Inc.*, 622 F.3d 1035, 1041 (9th Cir. 2010) (citing *Ashcroft v. Iqbal*, 556
 8 U.S. 662, 677-78 (2009); *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001)) (quotation marks
 9 omitted). A claim has facial plausibility when a plaintiff “pleads factual content that allows the
 10 court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”
 11 *Iqbal*, 556 U.S. at 678 (citation omitted). In other words, the facts alleged must demonstrate
 12 “more than labels and conclusions, and a formulaic recitation of the elements of a cause of action
 13 will not do.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 554, 555 (2007) (citing *Papasan v. Allain*, 478
 14 U.S. 265, 286 (1986)); *see Lee v. City of L.A.*, 250 F.3d 668, 679 (9th Cir. 2001), overruled on
 15 other grounds by *Galbraith v. Cty. of Santa Clara*, 307 F.3d 1119 (9th Cir. 2002).

16 As a general rule, a court may not consider “any material beyond the pleadings” when
 17 ruling on a Rule 12(b)(6) motion. *Lee*, 250 F.3d at 688 (citation and quotation marks omitted).
 18 However, “a court may take judicial notice of ‘matters of public record,’” *id.* at 689 (citing *Mack*
 19 *v. S. Bay Beer Distrib.*, 798 F.2d 1279, 1282 (9th Cir. 1986)), and may also consider “documents
 20 whose contents are alleged in a complaint and whose authenticity no party questions, but which
 21 are not physically attached to the pleading,” without converting a motion to dismiss under Rule
 22 12(b)(6) into a motion for summary judgment. *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir.
 23 1994), *overruled on other grounds by Galbraith*, 307 F.3d at 1125-26. The court need not accept
 24 as true allegations that contradict facts which may be judicially noticed. *See Mullis v. U.S. Bankr.*
 25 *Court*, 828 F.2d 1385, 1388 (9th Cir. 1987).

III. REQUEST FOR JUDICIAL NOTICE

26 Barilla submitted a request for judicial notice along with its motion to dismiss. [Docket
 27
 28

1 Nos. 15-8 (Request for Judicial Notice, “RJN”); 15-1 (Swanholt Decl., Aug. 19, 2022) Exs. A-F.]
 2 It asks the court to take judicial notice of six exhibits, including what it contends are true and
 3 correct copies of front and side-nutrition labels for Barilla-brand pastas as well as documents
 4 related to Barilla’s trademark, “Italy’s #1 Brand of Pasta.”²

5 **A. Legal Standard**

6 A district court generally may not consider any material beyond the pleadings in ruling on
 7 a Rule 12(b)(6) motion. *Branch*, 14 F.3d at 453. If “matters outside the pleading are presented to
 8 and not excluded by the court,” the court must treat the motion as a Rule 56 motion for summary
 9 judgment. *See* Fed. R. Civ. P. 12(d). “A court may, however, consider certain materials—
 10 documents attached to the complaint, documents incorporated by reference in the complaint, or
 11 matters of judicial notice—without converting the motion to dismiss into a motion for summary
 12 judgment.” *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003). “Both of these procedures
 13 permit district courts to consider materials outside a complaint, but each does so for different
 14 reasons and in different ways.” *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 998 (9th Cir.
 15 2018). The Ninth Circuit has cautioned courts about the appropriate use of judicial notice and the
 16 incorporation by reference doctrine when ruling on Rule 12(b)(6) motions:

17 The overuse and improper application of judicial notice and the

18
 19 ² Barilla’s RJN consisted of a three-page brief that it filed in addition to its 16-page motion to
 20 dismiss. Plaintiffs filed a six-page opposition to the RJN, in addition to their 26-page opposition
 21 to the motion to dismiss (which violates Local Rule 7-3(a), which provides that any opposition to
 22 a motion may not exceed 25 pages of text). Additionally, Barilla filed a three-page reply to
 23 Plaintiffs’ opposition to the RJN (Docket No. 26-1) in addition to its 14-page reply. These
 submissions resulted in the parties’ submissions going beyond the page limits for the opposition
 and reply briefs. The court will consider Barilla’s separately-filed RJN and Plaintiffs’ separately-
 filed opposition thereto, but in future motions the parties must include any argument supporting or
 opposing requests for judicial notice within the main briefs and within the allotted page limits.

24 The court also notes that Civil Local Rule 3-4(c)(2) states that text “must be double-spaced
 25 with no more than 28 lines per page, except for the identification of counsel, title of the case,
 26 footnotes, and quotations,” and that text must be “in a standard, proportionally spaced font.” In
 27 addition to being oversized, Plaintiffs’ opposition brief contains lengthy single-spaced blocks of
 28 texts and/or footnotes on many pages that appear designed to overcome Civil Local Rule 3-
 4(c)(2)’s requirement for double spacing. Additionally, Plaintiffs’ brief appears to violate the
 requirement that font be “proportionally spaced” by decreasing the spacing between letters and
 characters. Future failure to comply with the Local Rules may result in sanctions or the court’s
 striking of the offending submission.

1 incorporation-by-reference doctrine . . . can lead to unintended and
2 harmful results. Defendants face an alluring temptation to pile on
3 numerous documents to their motions to dismiss to undermine the
4 complaint, and hopefully dismiss the case at an early stage. Yet the
5 unscrupulous use of extrinsic documents to resolve competing
6 theories against the complaint risks premature dismissals of plausible
7 claims that may turn out to be valid after discovery. . . . If defendants
8 are permitted to present their own version of the facts at the pleading
9 stage—and district courts accept those facts as uncontroverted and
10 true—it becomes near impossible for even the most aggrieved
11 plaintiff to demonstrate a sufficiently “plausible” claim for relief.
12 Such undermining of the usual pleading burdens is not the purpose of
13 judicial notice or the incorporation-by-reference doctrine.

14 *Id.* (internal citations omitted).

15 Federal Rule of Evidence 201 governs judicial notice. Under Rule 201, a court may take
16 judicial notice of “an adjudicative fact if it is ‘not subject to reasonable dispute.’” *Id.* at 999
17 (quoting Fed. R. Evid. 201(b)). A fact is “not subject to reasonable dispute” if it is “generally
18 known,” or “can be accurately and readily determined from sources whose accuracy cannot
19 reasonably be questioned.” Fed. R. Evid. 201(b). While a court may take judicial notice of
20 matters of public record without converting a motion to dismiss into a motion for summary
21 judgment, it may not take judicial notice of disputed facts stated in public records. *Lee*, 250 F.3d
22 at 690. “Just because [a] document itself is susceptible to judicial notice does not mean that every
23 assertion of fact within that document is judicially noticeable for its truth.” *Khoja*, 899 F.3d at
24 999. If a court takes judicial notice of a document, it must identify the specific fact or facts it is
25 noticing from the document. *Id.*

26 In contrast, the incorporation by reference doctrine is “a judicially-created doctrine that
27 treats certain documents as though they are part of the complaint itself.” *Id.* at 1002. This is to
28 prevent “plaintiffs from selecting only portions of documents that support their claims, while
omitting portions that weaken—or doom—their claims.” *Id.* Incorporation by reference is
appropriate “if the plaintiff refers extensively to the document or the document forms the basis of
the plaintiff’s claim.” *Id.* at 1002 (quoting *Ritchie*, 342 F.3d at 907). However, if a document
“merely creates a defense to the well-pled allegations in the complaint, then that document did not
necessarily form the basis of the complaint.” *Id.* Further, “the mere mention of the existence of a
document is insufficient to incorporate the contents of a document.” *Id.* (quoting *Coto Settlement*

1 v. *Eisenberg*, 593 F.3d 1031, 1038 (9th Cir. 2010)). The Ninth Circuit has instructed that “the
2 doctrine is not a tool for defendants to short-circuit the resolution of a well-pleaded claim.” *Id.*
3 Thus, “while a court “may assume [an incorporated document’s] contents are true for purposes of
4 a motion to dismiss under Rule 12(b)(6) . . . it is improper to assume the truth of an incorporated
5 document if such assumptions only serve to dispute facts stated in a well-pleaded complaint.” *Id.*;
6 *see also id.* at 1014 (“The incorporation-by-reference doctrine does not override the fundamental
7 rule that courts must interpret the allegations and factual disputes in favor of the plaintiff at the
8 pleading stage.”).

9 **B. Exhibits A and B**

10 According to Barilla’s RJN, Exhibit A contains “true and correct copies of images of the
11 front and side-nutrition labels” for the two products Plaintiffs allegedly purchased, Classic Barilla
12 Blue Box Pasta (Angel Hair) and Classic Barilla Blue Box Pasta (Spaghetti). Swanholt Decl. ¶ 3,
13 Ex. A; *see* FAC ¶¶ 8, 9. Counsel states that these images were “taken from a website Plaintiffs
14 used to attach product images to their FAC,” foodservicedirect.com. Swanholt Decl. ¶ 3.

15 Barilla contends that Exhibit B contains “true and correct copies of the front and side-
16 nutrition labels” for four other products: Barilla Whole Grain Pasta (Penne); Barilla Veggie Pasta
17 (Spaghetti); Barilla Gluten Free Pasta (Penne); and Barilla Collezione Artisanal Pasta (Penne). *Id.*
18 at ¶ 4, Ex. B. According to counsel, these copies were “taken from a similar grocery store website
19 as used by Plaintiffs to attach product images to their FAC,” fredmeyer.com. Swanholt Decl. ¶ 4.

20 Exhibit A consists of two pages of what appear to be multiple screenshots of product
21 images that have been cut and pasted into a standalone document. The images are identified by
22 typed captions and links to webpages. Several of the product images contain type that is illegible,
23 and two of the images are labeled, “Side—Nutrition Label—Close Screenshot.” Similarly,
24 Exhibit B consists of four pages of what appear to be screenshots of product images that have been
25 cut and pasted into a standalone document with typed captions and webpages. As with Exhibit B,
26 multiple images are labeled “Side—Nutrition Label Close Screenshot.” Many of the images
27 contain type that is illegible.

28 Barilla argues that Exhibits A and B are judicially noticeable under Federal Rule of

1 Evidence 201(b)(2) because they “consist of information available on publicly available websites.”
2 RJN 3. It notes that the documents “contain images concerning products specifically alleged to be
3 purchased by Plaintiffs and/or referenced in the FAC.” *Id.* According to Barilla, Plaintiffs
4 attached images of the front labels of the products at issue as Exhibit 1 to the FAC, and “Exhibits
5 A and B merely provide the complete picture.” *Id.*

6 Plaintiffs oppose the request to take judicial notice of Exhibits A and B. They agree that
7 the court may take judicial notice of websites when the authenticity of the websites is not in
8 dispute. Opp’n to RJN 3 (citing *Threshold Enterprises Ltd. v. Pressed Juicery, Inc.*, 445 F. Supp.
9 3d 139, 146 (N.D. Cal. 2020) (“In general, websites and their contents may be judicially
10 noticed.”)). However, they dispute the authenticity of the Exhibits, noting that they are not true
11 and accurate copies of webpages. Instead, Plaintiffs argue that Exhibits A and B consist of
12 “altered, zoomed-in versions of the webpages” that in many instances are barely legible. They
13 object based on Federal Rules of Evidence 1001-1003, which govern the admissibility of
14 duplicates of an original writing or photograph. *Id.* at 4-5.

15 The court declines to take judicial notice of Exhibits A and B. Rather than asking the court
16 to take judicial notice of Barilla’s actual product labels or of complete copies of webpages
17 depicting the labels, Barilla submitted exhibits that contain images purportedly cut and pasted
18 from third party websites, accompanied by typed captions that do not appear to have been part of
19 the original webpages. *Compare Dinan v. Sandisk LLC*, No. 18-CV-05420-BLF, 2019 WL
20 2327923, at *2 (N.D. Cal. May 31, 2019) (in product labeling case, taking judicial notice of the
21 actual packaging for the product the plaintiff purchased); *Zeiger v. WellPet LLC*, 304 F. Supp. 3d
22 837, 845 n.1 (N.D. Cal. 2018) (same). Defense counsel does not explain how Exhibits A and B
23 were created, stating only that his associate “accessed the foregoing website[s] and downloaded
24 the product labels on August 18, 2022.” *Id.* at ¶¶ 3, 4. He does not explain how the images were
25 selected, how the “close screenshots” were created, who added the captions and other type, or
26 otherwise describe the creation of the exhibits. In sum, Exhibits A and B lack foundation. *See*
27 Fed. R. Evid. 901(a) (“[t]o satisfy the requirement of authenticating or identifying an item of
28 evidence, the proponent must produce evidence sufficient to support a finding that the item is what

1 the proponent claims it is.”). Given the lack of foundation of Exhibits A and B and Plaintiffs’
2 authenticity objection, judicial notice is not appropriate.

3 Barilla also appears to ask the court to consider Exhibits A and B pursuant to the
4 incorporation by reference doctrine. RJN 3-4. This is inappropriate given the parties’ dispute
5 about the authenticity of the exhibits and the images therein. *See Coto Settlement*, 593 F.3d at
6 1038 (incorporation by reference may be used where the complaint necessarily relies upon a
7 document or the contents of the document are alleged in a complaint, the document’s authenticity
8 is not in question and there are no disputed issues as to the document’s relevance.”).

9 **C. Exhibits C-F**

10 Exhibits C through F “contain excerpts of the file history for the “Italy’s #1 Brand of
11 Pasta” trademark. RJN 4. Barilla argues that these materials “come[] directly from the United
12 States Patent and Trademark register and [are] judicially noticeable.” *Id.* (citing *Stone Brewing*
13 *Co., LLC v. MillerCoors LLC*, 445 F. Supp. 3d 1113, 1127 (S.D. Cal. 2020) (in trademark
14 infringement case, noting that courts may “take judicial notice of ‘records and reports of
15 administrative bodies,’ file histories, and application materials” and granting unopposed request
16 for judicial notice of United States Patent Trademark Office documents)). Barilla does not explain
17 the significance or relevance of these materials in its RJN or how they bear on Plaintiffs’ claims
18 for false, misleading, and deceptive marketing practices. Accordingly, the court denies the request
19 to take judicial notice of Exhibits C through F as moot.

20 **IV. DISCUSSION**

21 Barilla argues that the FAC fails to state a claim under Rule 12(b)(6). It also asserts that
22 Plaintiffs lack Article III standing to pursue their claims. As Article III standing is a jurisdictional
23 issue, the court must first address that argument before reaching the merits of any 12(b)(6)
24 challenges to the sufficiency of pleading. *See Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83,
25 94-95 (1998).

26 **A. Standing**

27 **1. Economic Injury**

28 Barilla argues that Plaintiffs lack Article III standing because they do not allege a plausible

1 economic injury. Mot. 17.

2 Federal courts are courts of limited jurisdiction. Under Article III of the United States
3 Constitution, federal courts are limited to deciding “cases” and “controversies.” *See Bova v. City*
4 *of Medford*, 564 F.3d 1093, 1095 (9th Cir. 2009). Article III standing “is a necessary component
5 of subject matter jurisdiction.” *In re Palmdale Hills Prop., LLC*, 654 F.3d 868, 873 (9th Cir.
6 2011). Article III standing requires three elements: “[t]he plaintiff must have (1) suffered an
7 injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is
8 likely to be redressed by a favorable judicial decision.” *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338
9 (2016) (citing *Lujan*, 504 U.S. at 560-61). “To establish injury in fact, a plaintiff must show that
10 he or she suffered ‘an invasion of a legally protected interest’ that is ‘concrete and particularized’
11 and ‘actual or imminent, not conjectural or hypothetical.’” *Spokeo*, 578 U.S. at 339 (citing *Lujan*,
12 504 U.S. at 560). While a concrete injury need not be tangible, “it must actually exist”; that is, it
13 must be “real, and not abstract.” *Id.* at 340 (quotation marks and citation omitted). “No concrete
14 harm, no standing.” *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2200 (2021).

15 According to Barilla, Plaintiffs “do not plead any viable theory of overpayment or price
16 premium” due to the Challenged Representation “because they do not plausibly allege they would
17 have purchased a cheaper alternative, or that the Purchased Products’ market value would have
18 been less” had the products not displayed the Challenged Representation. Mot. 18. In support,
19 Barilla cites *McGee v. S-L Snacks National*, 982 F.3d 700, 706 (9th Cir. 2020). *See* Mot. 17-18.
20 *McGee* is inapposite since it addressed standing in a case where the plaintiff did not allege that the
21 defendant’s labeling was misleading. *McGee*, 982 F.3d at 705-08. The Ninth Circuit held that “a
22 plaintiff might successfully plead an economic injury by alleging that she bargained for a product
23 worth a given value but received a product worth less than that value,” or “by showing that she
24 paid more for a product than she otherwise would have due to a defendant’s false representations
25 about the product.” *Id.* at 705-06. However, the plaintiff in *McGee* had not alleged that the
26 defendant made “any representations about [the product’s] safety” or “false representations—or
27 actionable non-disclosures—about [the product],” nor had she plausibly alleged that she had
28 suffered physical injuries or had a substantial risk of disease as a result of consuming the product.

1 *Id.* at 706-10. The Ninth Circuit concluded that the plaintiff had not plausibly alleged any
2 economic injury. *Id.*

3 Unlike the plaintiff in *McGee*, Plaintiffs here expressly allege that they “would not have
4 purchased the Product[s], or would not have overpaid a premium for the Product[s]’ purported
5 Italian origin, had [they] known that the Challenged Representation was false” and the products
6 were actually made in the United States, using ingredients from countries other than Italy. FAC ¶¶
7 8, 9. A “quintessential injury-in-fact” can occur when a plaintiff alleges that they “spent money
8 that, absent defendants’ actions, they would not have spent.” *Maya v. Centex Corp.*, 658 F.3d
9 1060, 1069 (9th Cir. 2011). That is precisely what Plaintiffs allege here. Their allegations are
10 sufficient to establish an economic injury for purposes of constitutional standing.³ *See, e.g.*,
11 *Barnes v. Nat. Organics, Inc.*, No. EDCV22314JGBPLAX, 2022 WL 4283779, at *4 (C.D. Cal.
12 Sept. 13, 2022) (holding that allegation that “the inclusion, or risk of inclusion, of Heavy Metals
13 was not disclosed on [vitamins]’ the label, and if it had been, she would not have paid for the
14 [vitamins]” was sufficient to support standing); *Zeiger*, 304 F. Supp. 3d at 846 (holding that
15 allegations that plaintiffs would not have purchased dog food if the presence of lead, arsenic, and
16 BPA in the product had been disclosed were sufficient to establish economic injury).⁴

17 2. Risk of Future Harm

18 Plaintiffs seek injunctive relief in connection with their UCL, FAL, CLRA, and breach of
19 warranty claims. Barilla argues that Plaintiffs lack standing to seek injunctive relief because they

20 _____
21 ³ Plaintiffs’ allegations are also sufficient to establish standing under the California statutes at
22 issue. *See Davidson v. Kimberly-Clark Corp.*, 889 F.3d 956, 965 (9th Cir. 2018) (“Under
23 California law, the economic injury of paying a premium for a falsely advertised product is
24 sufficient harm to maintain a cause of action.”).

25 ⁴ Barilla also cites *In re Johnson & Johnson Talcum Powder Prod. Mktg., Sales Pracs. & Liab.*
26 *Litig.*, 903 F.3d 278, 285 (3d Cir. 2018). In that case, the plaintiff in a putative class action
27 alleged that the use of the defendant’s product, baby powder, could lead to an increased risk of
28 ovarian cancer. *Id.* at 281. The Third Circuit affirmed the dismissal of the action for failure to
sufficiently allege an economic injury for purposes of Article III standing. The case is
distinguishable because the plaintiff did not plead that she “failed to receive the economic benefit
of her bargain” and instead argued that “she [was] not required to offer any economic theory of
injury at the pleading stage.” *Id.* at 281, 287. Here, Plaintiffs have offered a theory of injury that
the Ninth Circuit recognizes: that they would not have purchased Barilla’s products, or would not
have overpaid a premium for those products, had they known the true origin of the products.

1 “cannot plausibly allege they will be misled by the Products in the future” now that they know that
2 they are made in the United States. Mot. 18-19.

3 “A plaintiff must demonstrate constitutional standing separately for each form of relief
4 sought.” *Davidson*, 889 F.3d at 967 (citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.,*
5 *Inc.*, 528 U.S. 167, 185 (2000)). A plaintiff seeking injunctive relief must demonstrate a “real or
6 immediate threat that they will be wronged again—a likelihood of substantial and immediate
7 irreparable injury.” *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1982) (quotation omitted).
8 “[T]he injury or threat of injury must be both ‘real and immediate,’ not ‘conjectural’ or
9 ‘hypothetical.’” *Id.* at 102 (citations omitted). “A plaintiff threatened with future injury has
10 standing to sue ‘if the threatened injury is certainly impending, or there is a substantial risk the
11 harm will occur.’” *In re Zappos.com, Inc.*, 888 F.3d 1020, 1024 (9th Cir. 2018) (quotation marks
12 omitted) (quoting *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014) (quoting *Clapper*
13 *v. Amnesty Int’l*, 568 U.S. 398, 409, 414 n.5 (2013))).

14 Barilla argues that Plaintiffs are not threatened with any future injury since they “cannot be
15 deceived by the allegedly misleading labeling after the first encounter with the Purchased
16 Products.” Mot. 19. Barilla notes Plaintiffs’ allegations that they are “not personally familiar”
17 with where Barilla manufactures the products or sources the products’ ingredients and therefore
18 have “no way of determining whether the Challenged Representation on the Products is true,” and
19 that Plaintiffs are “unable to rely on the truth of the Challenged Representation on the Products’
20 labels.” *Id.*; see FAC ¶¶ 8, 9. However, Barilla argues that these allegations “def[y] credulity”
21 since Plaintiffs are now “clearly on notice” that the products are made in the United States. Mot.
22 19. In response, Plaintiffs argue that their allegations are sufficient to confer standing to pursue
23 injunctive relief under *Davidson*. Opp’n 12-13.

24 In *Davidson*, the plaintiff brought FAL, CLRA, UCL, and fraud claims against the
25 manufacturer of pre-moistened wipes. The manufacturer labeled and marketed the wipes as
26 “flushable,” meaning “suitable for being flushed [down a toilet],” and the plaintiff paid a premium
27 for the “flushable” wipes, as compared to non-flushable wipes. 998 F.3d at 961, 964. The
28 plaintiff later learned that the products were not truly “flushable.” *Id.* at 962. The district court

1 dismissed the injunctive relief claim, finding that the plaintiff lacked standing because she had no
2 intention of purchasing the same product in the future and therefore had no risk of future injury.
3 *Id.* at 963, 967.

4 The Ninth Circuit reversed, finding that the plaintiff had “properly alleged that she faces a
5 threat of imminent or actual harm by not being able to rely on [the defendant’s] labels in the
6 future, and that this harm is sufficient to confer standing to seek injunctive relief.” *Id.* at 967. The
7 court recognized that its decision resolved a district court split regarding the extent to which “a
8 previously deceived consumer who brings a false advertising claim can allege that her inability to
9 rely on the advertising in the future is an injury sufficient to grant her Article III standing to seek
10 injunctive relief,” resolving the split “in favor of plaintiffs seeking injunctive relief.” *Id.* at 967-
11 69. *Davidson* held that plaintiffs have standing to pursue injunctive relief in at least two
12 circumstances:

13 In some cases, the threat of future harm may be the consumer’s
14 plausible allegations that she will be unable to rely on the product’s
15 advertising or labeling in the future, and so will not purchase the
16 product although she would like to. In other cases, the threat of future
17 harm may be the consumer’s plausible allegations that she might
18 purchase the product in the future, despite the fact it was once marred
19 by false advertising or labeling, as she may reasonably, but
20 incorrectly, assume the product was improved.

21 *Id.* at 969-70 (citations omitted). The plaintiff in *Davidson* alleged that she continued to desire to
22 purchase wipes suitable for disposal in a toilet, would purchase “truly flushable wipes”
23 manufactured by the defendant if it were possible, and was continually presented with the
24 defendant’s flushable wipes packaging, but had “no way of determining whether the
25 representation ‘flushable’ [was] in fact true.” *Id.* at 970-71. The Ninth Circuit found these
26 allegations sufficient for standing purposes:

27 We therefore hold that Davidson’s allegation that she has no way of
28 determining whether the representation “flushable” is in fact true
when she regularly visits stores . . . where Defendants’ “flushable”
wipes are sold constitutes a threatened injury [that is] certainly
impending, thereby establishing Article III standing to assert a claim
for injunctive relief.

Id. at 972 (citation and internal quotation marks omitted).

1 Here, Plaintiffs contend that they have sufficiently alleged an imminent or actual threat of
2 future harm from being deceived by the Challenged Representation, pointing to their allegations
3 that they continue to see the products available for purchase and desire to purchase them again if
4 the “Challenged Representation was in fact true,” that is, if the products were made or
5 manufactured in Italy using ingredients from Italy. Opp’n 13-14 (citing FAC ¶¶ 8, 9).

6 Plaintiffs’ reliance on *Davidson* is misplaced. In *Davidson*, the Ninth Court concluded that
7 the plaintiff “face[d] the similar injury of being unable to rely on [the defendant’s] representations
8 of its product in deciding whether or not she should purchase the product in the future” absent
9 injunctive relief. 998 F.3d at 971-72. Unlike the plaintiff in *Davidson*, Plaintiffs cannot
10 reasonably claim that they will be deceived by the challenged representation now that they know
11 where the products are manufactured. This case is different from those challenging
12 representations about product formulations or characteristics like “natural” and “naturally derived”
13 or “flushable,” where the plaintiffs alleged that they could not rely on the defendant’s
14 representations in the future. See, e.g., *Shank v. Presidio Brands, Inc.*, No. 17-CV-00232-DMR,
15 2018 WL 1948830, at *3-5 (N.D. Cal. Apr. 25, 2018) (allegations that plaintiff would like to
16 purchase challenged products in the future if they were reformulated to no longer contain
17 unnatural, synthetic, or non-naturally derived ingredients, but would be hesitant to rely on the
18 labels in the future because he had no way of knowing whether the reformulation actually would
19 not contain such ingredients were sufficient to confer standing to seek injunctive relief “because
20 [plaintiff] alleges that he will not be able to trust [defendant’s] claims about” the products);
21 *Stewart v. Kodiak Cakes, LLC*, 537 F. Supp. 3d 1103, 1127 (S.D. Cal. 2021) (holding that
22 plaintiffs established Article III standing for injunctive relief based on theory of misleading “non-
23 GMO” marketing statements; “[u]nlike the other alleged forms of deception, Plaintiffs cannot
24 check the undisputed serving size, net weight, nutrition facts, or ingredient list on the products to
25 determine if the at-issue ingredients are genetically modified.”); *Davidson*, 998 F.3d at 970-71
26 (plaintiff “has no way of determining whether the representation ‘flushable’ is in fact true when
27 she regularly visits stores.”).

28 In contrast, Plaintiffs cannot plausibly allege that they remain unaware that the products

1 are manufactured in the United States from ingredients that are not from Italy or that they
 2 reasonably would be misled if they encounter the Challenged Representation in the future. In a
 3 similar vein, Plaintiffs allege that they remain interested in purchasing the products if the
 4 Challenged Representation are true—that is, if Barilla starts producing the pasta products in Italy
 5 instead of the United States. This allegation holds no water because it is implausible to expect
 6 such facts to come to pass. Accordingly, Plaintiffs have not established a “real and immediate
 7 threat of repeated injury” sufficient to establish Article III standing to assert their claim for
 8 injunctive relief. *See Lyons*, 461 U.S. at 102. Their claim for injunctive relief is accordingly
 9 dismissed.

10 3. Causation

11 Barilla next argues that Plaintiffs cannot establish Article III standing because they have
 12 not alleged causation; i.e., that Barilla’s use of the Challenged Representation caused any injury.
 13 Mot. 19.

14 In order to establish “a causal connection between the injury and the conduct complained
 15 of—the injury has to be fairly . . . trace[able] to the challenged action of the defendant, and not . . .
 16 th[e] result [of] the independent action of some third party not before the court.” *Lujan*, 504 U.S.
 17 at 560 (internal quotation marks and citation omitted). Here, Plaintiffs allege that they would not
 18 have purchased the products, or that they “would not have overpaid a premium” for the products’
 19 “purported Italian origin,” had they known that the Challenged Representation on the products’
 20 labels was false. FAC ¶¶ 8, 9. Put another way, Plaintiffs allege that the Challenged
 21 Representation caused them to purchase the products and/or pay a premium for the products. *See*
 22 *id.* at ¶ 28 (“based on Defendant’s material misrepresentations and omissions, reasonable
 23 consumers, including Plaintiffs, purchased the Products to their detriment.”).

24 Barilla argues that these allegations are insufficient because “the FAC does not identify
 25 any basis for [the allegation that Plaintiffs paid a premium], or any cheaper surrogate products on
 26 the market.” Mot. 20. However, the sole case it cites in support, *Naimi v. Starbucks Corp.*, 798 F.
 27 App’x 67, 70 (9th Cir. 2019), held that “[t]he bare recitation of the word ‘premium’ does not
 28 adequately allege a cognizable injury” under New York law. The court in *Naimi* observed that

1 “[u]nder New York law, a plaintiff’s allegation that she would not have purchased a product but
2 for a deceptive act, standing alone, is not a cognizable injury because it conflates the deceptive act
3 with the injury.” *Id.* The court did not analyze the sufficiency of the allegation under either Ninth
4 Circuit or California law. Barilla offers no authority supporting its position that Plaintiffs must do
5 more than allege that they purchased the products and/or paid a premium for the products due to
6 the Challenged Representation to establish causation. The court concludes that the FAC
7 adequately alleges causation for purposes of Article III.

8 **4. Standing to Allege a Nationwide Class**

9 Next, Barilla argues that Plaintiffs lack standing to represent a nationwide class of
10 individuals who purchased its products, and that “any claims relating to putative class members
11 outside of California must be dismissed.” Mot. 20 (citing *Mazza v. American Honda Motor Co.*,
12 666 F.3d 581 (9th Cir. 2012)).

13 In *Mazza*, the plaintiffs brought a putative class action on behalf of car owners and lessees,
14 and the district court certified a nationwide class of consumers pursuing claims under California
15 consumer protection statutes. 666 F.3d at 585. The Ninth Circuit vacated the class certification
16 order, holding that the district court erroneously concluded that California law applied to the entire
17 nationwide class. *Id.* The court performed an extensive choice-of-law analysis comparing how
18 various states’ consumer protection laws applied to the facts of the plaintiffs’ claims, *see id.* at
19 589-94, and concluded that “[u]nder the facts and circumstances of [the] case,” California’s
20 choice-of-law rules dictated that “each class member’s consumer protection claim should be
21 governed by the consumer protection laws of the jurisdiction in which the transaction took place.”
22 *Id.* at 594.

23 Here, Plaintiffs’ UCL, FAL, and CLRA are brought on behalf of the California subclass
24 only. *See* FAC 35, 41, 43. Only the breach of warranty and unjust enrichment/restitution claims
25 are brought on behalf of the nationwide class. Barilla does not address those claims, nor does it
26 perform a choice of law analysis or otherwise develop its argument in any detail. In any event, the
27 Ninth Circuit in *Mazza* declined to set a strict rule against certifying nationwide consumer classes
28 under California law, instead noting that its holding was based on “the facts and circumstances of

1 [that] case” and declining to express a “view whether on remand it would be correct . . . to certify
 2 a class with members more broadly [than only California residents] but with subclasses for class
 3 members in different states, with different jury instruction for materially different bodies of state
 4 law.” 666 F.3d at 594. Under these circumstances, the court concludes that it is premature to
 5 dismiss the nationwide class allegations at the pleading stage and finds that the issue is more
 6 properly addressed at the class certification stage. Accordingly, the court denies Barilla’s motion
 7 to dismiss the nationwide class claims.

8 **5. Standing to Challenge Products Plaintiffs Did Not Purchase**

9 Barilla argues that Plaintiffs lack standing to pursue claims to the extent that they include
 10 products they did not personally purchase. It notes that Sinatro allegedly bought one box of
 11 Classic Barilla Blue Box Pasta (Angel Hair) and Prost allegedly purchased two boxes of Classic
 12 Barilla Blue Box Pasta (Spaghetti), but their claims seek to encompass an additional 52 products
 13 that they did not purchase. Mot. 20-21.

14 The majority of courts that have considered the question “hold that a plaintiff may have
 15 standing to assert claims for unnamed class members based on products he or she did not purchase
 16 so long as the products and alleged misrepresentations are substantially similar.” *Miller v.*
 17 *Ghirardelli Chocolate Co.*, 912 F. Supp. 2d 861, 869 (N.D. Cal. 2012); *see also Astiana v.*
 18 *Dreyer’s Grand Ice Cream, Inc.*, Nos. C-11-2910 EMC, C-11-3164 EMC, 2012 WL 2990766, at
 19 *11 (N.D. Cal. July 20, 2012) (observing that the “critical inquiry seems to be whether there is
 20 sufficient similarity between the products purchased and not purchased.”). For example, in
 21 *Dreyer’s*, the court found that the plaintiffs had alleged sufficient similarity between the purchased
 22 and unpurchased products at issue in the lawsuit:

23 Plaintiffs are challenging the same kind of food products (*i.e.*, ice
 24 cream) as well as the same labels for all of the products—*i.e.*, “All
 25 Natural Flavors” for the Dreyer’s/Edy’s products and “All Natural Ice
 26 Cream” for the Haagen–Dazs products. That the different ice creams
 27 may ultimately have different ingredients is not dispositive as
 28 Plaintiffs are challenging the same basic mislabeling practice across
 different product flavors. Indeed, many of the ingredients are the
 same—*i.e.*, 21 out of 59 ice creams contain propylene glycol
 monostearate; 43 out of 59 contain potassium carbonate; and all 59
 appear to contain glycerin, mono and diglycerides, tetrasodium
 pyrophosphate, and xanthan gum.

1 2012 WL 2990766, at *13.

2 Barilla appears to agree that the “substantial similarity” approach applies in this case. *See*
3 Mot. 20. The court concludes that Plaintiffs have sufficiently pleaded the requisite level of
4 similarity. As in *Dreyer’s*, Plaintiffs challenge “the same basic mislabeling practice” across the
5 Barilla products named in the FAC, including those that they purchased and those that they did
6 not. Specifically, Plaintiffs challenge Barilla’s use of the Challenged Representation on the front
7 of the packaging of each of the challenged products. *See* FAC ¶ 4, Ex. 1. They allege that all of
8 the products at issue are sold under the same brand name, Barilla, and are dry pastas that are made
9 from largely the same ingredients or types of ingredients, “milled in the same or similar manner,
10 and manufactured into the finished Products in the same or similar manner.” Plaintiffs further
11 allege that the Challenged Representation appears prominently and conspicuously “on the primary
12 display panel of the front label and/or packaging,” along with the colors of Italy’s national flag.
13 *Id.* at ¶ 29(b)-(d), (f), (g). The court finds that Plaintiffs have pleaded that all of the challenged
14 products are sufficiently similar for them to proceed with their claims. *See, e.g., Bush v. Rust-*
15 *Oleum Corp.*, No. 20-CV-03268-LB, 2021 WL 24842, at *6 (N.D. Cal. Jan. 4, 2021) (“the
16 plaintiff has standing to contest the 13 products that he did not purchase because the front-label
17 representations about ‘non-toxic’ and ‘earth friendly’ are substantially similar[].”).

18 **B. Sufficiency of the FAC**

19 Barilla argues that Plaintiffs’ claims are deficient in several ways. First, it argues that the
20 products’ packaging is not materially deceptive to a reasonable consumer. It also argues that
21 Plaintiffs have not stated a claim for breach of warranty; that Plaintiffs’ claims are grounded in
22 fraud and do not satisfy Rule 9(b)’s heightened pleading standard; that Plaintiffs’ claims are
23 preempted by federal trademark law; and that Plaintiffs have an adequate remedy at law and
24 therefore cannot recover in equity.

25 **1. Reasonable Consumer Standard**

26 Barilla argues that Plaintiffs’ UCL, FAL, and CLRA claims must be dismissed because
27 they have not plausibly alleged that the Challenged Representation would mislead a reasonable
28 consumer. Mot. 13.

1 False advertising claims under the CLRA, FAL, and the fraudulent prong of the UCL are
2 governed by the reasonable consumer standard. *Williams v. Gerber Prods. Co.*, 552 F.3d 934, 938
3 (9th Cir. 2008); *Freeman v. Time, Inc.*, 68 F.3d 285, 289 (9th Cir. 1995) (courts must evaluate
4 whether a label is misleading “from the vantage of a reasonable consumer” (quotation omitted)).
5 Under the reasonable consumer standard, a plaintiff must show that members of the public are
6 likely to be deceived. *Id.* (citation omitted). “This requires more than a mere possibility that [a
7 defendant’s] label might conceivably be misunderstood by some few consumers viewing it in an
8 unreasonable manner.” *Ebner v. Fresh, Inc.*, 838 F.3d 958, 965 (9th Cir. 2016) (quotation
9 omitted). “Rather, the reasonable consumer standard requires a probability that a significant
10 portion of the general consuming public or of targeted consumers, acting reasonably in the
11 circumstances, could be misled.” *Id.* (quotation omitted). “[T]he primary evidence in a false
12 advertising case is the advertising itself.” *Williams*, 552 F.3d at 938 (quoting *Brockey v. Moore*,
13 107 Cal. App. 4th 86, 100 (2003)). The question of whether a business practice is deceptive is
14 generally a question of fact not amenable to determination on a motion to dismiss. *Williams*, 552
15 F.3d at 938. Dismissal is appropriate where it is “impossible for the plaintiff to prove that a
16 reasonable consumer was likely to be deceived.” *Id.* at 939.

17 According to Barilla, the statement, “ITALY’S #1 BRAND OF PASTA” is its registered
18 trademark, and “its utility is to exclusively identify Barilla (not Italy) as the source of the product.”
19 Mot. 14. It contends that Plaintiffs’ allegations that the Challenged Representation would lead
20 reasonable consumers to believe that Barilla’s pastas were manufactured in Italy are
21 “implausible,” citing *Hodges v. King’s Hawaiian Bakery W., Inc.*, No. 21-CV-04541-PJH, 2021
22 WL 5178826, at *6 (N.D. Cal. Nov. 8, 2021), in which the court held that “[t]he mere use of a
23 geographic reference, including a reference to the company’s historical origin, does not convey a
24 representation about a product’s current origin.” Barilla contends that it is not misleading to
25 invoke the company’s Italian roots “through generalized representations of the brand as a whole.”
26 Mot. 14.

27 Barilla’s argument is not persuasive. As Plaintiffs note, Barilla asks the court to assume
28 that consumers would solely perceive the Challenged Representation to mean that the products at

1 issue are part of the Barilla brand, and not that they are made in Italy from Italian ingredients. In
2 other words, Barilla asks the court to decide as a matter of law that the Challenged Representation
3 can mean only one thing. However, Plaintiffs have alleged that the Challenged Representation
4 appears with the colors of the Italian flag, and that this imagery further reinforces the notion that
5 the products “are authentic pastas from Italy.” See FAC ¶ 2. The Challenged Representation is
6 also part of the products’ packaging in the context of an alleged marketing campaign that
7 emphasizes the company’s Italian identity, including a website “that markets the Barilla® brand
8 and company as undeniably Italian, dedicated to the manufacturing, marketing, and selling of
9 Italian-made pastas.” See *id.* at ¶¶ 16, 18-20. Viewed in this context, the FAC plausibly alleges
10 that the Challenged Representation supports a reasonable inference that the products were made in
11 Italy from Italian ingredients, and “a probability that a significant portion of the general
12 consuming public or of targeted consumers, acting reasonably in the circumstances, could be
13 misled” by the Challenged Representation. See *Ebner v. Fresh, Inc.*, 838 F.3d 958, 965 (9th Cir.
14 2016); see, e.g., *de Dios Rodriguez v. Ole Mexican Foods Inc.*, No. EDCV202324JGBSPX, 2021
15 WL 1731604, at *3-5 (C.D. Cal. Apr. 22, 2021) (denying motion to dismiss UCL, FAL, and
16 CLRA claims based on allegation that representations on product’s labels were likely to lead
17 reasonable consumers to mistakenly believe that they were made in Mexico, including “(a) the
18 phrase ‘El Sabor de Mexico!’ or ‘A Taste of Mexico!’; (b) a Mexican flag on the front and center
19 of the packaging; (c) the brand name ‘La Banderita’ (or “the flag”); (d) a circular logo with the
20 Mexican flag and the word ‘Authentic’; and (e) Spanish words and phrases, such as
21 ‘Sabrosísimas’ or ‘Tortillas de Maiz.’”).

22 The primary case Barilla relies on is distinguishable. In *Hodges*, the court dismissed a
23 putative class action at the pleading stage that challenged the labels on King’s Hawaiian’s Original
24 Hawaiian Sweet Rolls Product. The plaintiffs alleged that “the phrase ‘EST. 1950 HILO,
25 HAWAII’ inside a three-point crown evocative of a pineapple’s crown on the front of the
26 Product’s packaging convey[ed] the impression that the sweet rolls are currently made in Hawaii.”
27 2021 WL 5178826, at *1. They also noted the company’s use of the term “mainland” and
28 “Aloha” in connection with its description of the company shipping policy on its website as well

1 as “the King’s Hawaiian Macy’s Thanksgiving Day Parade float,” named “The Aloha Spirit.” *Id.*
 2 at *2. The court held that the plaintiffs had failed to show that members of the public were likely
 3 to be deceived by the packaging and marketing, concluding that “defendant’s reference on its label
 4 to its Hawaiian founding does not lead a reasonable consumer to believe that the Product is still
 5 made in Hawaii.” *Id.* at *6. Unlike the Challenged Representation at issue in this case, the labels
 6 at issue in *Hodges* did not explicitly connect their origin to the present day. Nor did the labels
 7 exist against the backdrop of a long-standing marketing strategy expressly connected to a
 8 particular geographic location.

9 Barilla also argues that no reasonable consumer could be deceived by the Challenged
 10 Representation since all 54 products at issue “are conspicuously marked ‘Made in the USA’ with
 11 the location of Barilla’s headquarters in Illinois.” Mot. 15. Setting aside the fact that this
 12 argument rests on materials outside the FAC that are not properly before the court, this argument
 13 is unavailing, as the Ninth Circuit has held that reasonable consumers should not be “expected to
 14 look beyond misleading representations on the front of the box to discover the truth . . . in small
 15 print on the side of the box.” *Williams*, 552 F.3d at 939; *see also Balsler v. Hain Celestial Grp.,*
 16 *Inc.*, 640 Fed. Appx. 694, 696 (9th Cir. 2016) (“an ingredient list does not correct, as a matter of
 17 law, misrepresentations on the product’s label. Rather, the likely impact of such a list on a
 18 reasonable consumer is a factual issue, not determinable on the pleadings.”).

19 2. Breach of Warranty Claim

20 Barilla moves to dismiss the breach of warranty claim, arguing that “product labels ‘do not
 21 constitute warranties against a product defect.’” Mot. 16 (quoting *Astiana*, 2012 WL 2990766, at
 22 *9). However, Plaintiffs do not allege any product defects in this case; rather, they allege that
 23 Barilla’s product labeling is misleading. Moreover, the cited case, *Astiana*, analyzed breach of
 24 warranty claims under the Magnuson Moss Warranty Act, which is not at issue in this case.

25 Barilla also argues that “[c]ourts have consistently found . . . that product labels that were,
 26 at most, product descriptions were not actionable warranties.” Mot. 16 (citing *Campen v. Frito-*
 27 *Lay N. Am., Inc.*, No. 12-1586 SC, 2013 WL 1320468, at *15 (N.D. Cal. Apr. 1, 2013)).
 28 However, the issue in *Campen* was whether the plaintiffs had adequately stated claims under the

1 Magnuson Moss Warranty Act and California’s Song–Beverly Consumer Warranty Act. Plaintiffs
 2 do not bring claims under those statutes. Instead, they bring a claim for common law breach of
 3 warranty. FAC ¶¶ 107-109. Barilla’s motion does not address the sufficiency of Plaintiff’s
 4 common law warranty claim. Accordingly, its motion to dismiss the breach of warranty claim is
 5 denied.

6 3. Rule 9(b)

7 In order to recover under fraud-based claims, a “party must state with particularity the
 8 circumstances constituting fraud or mistake.” Fed. R. Civ. P. 9(b); *Davidson*, 873 F.3d at 1110
 9 (“[b]ecause [the plaintiff’s] common law fraud, CLRA, FAL, and UCL causes of action are all
 10 grounded in fraud, the FAC must satisfy the traditional plausibility standard of Rules 8(a) and
 11 12(b)(6), as well as the heightened pleading requirements of Rule 9(b).”); *In re Clorox Consumer*
 12 *Litig.*, 894 F. Supp. 2d 1224, 1234 (N.D. Cal. 2012) (analyzing UCL, CLRA, and FAL claims
 13 under Rule 9(b) standard). Allegations of fraud must be stated with “specificity including an
 14 account of the ‘time, place, and specific content of the false representations as well as the
 15 identities of the parties to the misrepresentations.” *Swartz v. KPMG LLP*, 476 F.3d 756, 764 (9th
 16 Cir. 2007) (quoting *Edwards v. Marin Park, Inc.*, 356 F.3d 1058, 1066 (9th Cir. 2004)); *see also*
 17 *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003) (averments of fraud must
 18 include “the who, what, when, where, and how” of the misconduct charged). “To allege fraud
 19 with particularity, a plaintiff must set forth *more* than the neutral facts necessary to identify the
 20 transaction. The plaintiff must set forth what is false or misleading about a statement, and why it
 21 is false.” *In re Glenfed, Inc. Sec. Litig.*, 42 F.3d 1541, 1548 (9th Cir. 1994) (emphasis in original).
 22 To comply with Rule 9(b), fraud allegations must be specific enough to give defendants notice of
 23 the particular misconduct that is alleged to constitute the fraud so that they can defend against the
 24 claim. *Bly-McGee v. Cal.*, 236 F.3d 1014, 1019 (9th Cir. 2001). Sinatro does not dispute that
 25 Rule 9(b) applies to his claims.

26 The central allegation in this case is that Barilla’s packaging contains the statement
 27 “ITALY’S #1 BRAND OF PASTA” that leads reasonable consumers to believe that Barilla’s
 28 products are made and/or manufactured in Italy using ingredients from Italy, and that this

1 representation is false because the products are actually made in the United States using
2 ingredients that are not from Italy. Plaintiffs further allege that Barilla knew or should have
3 known that the Challenged Representation was false and misleading, and that it “intentionally and
4 deliberately used the Challenged Representation, alongside its massive marketing campaign and
5 brand strategy,” to cause Plaintiffs and other consumers to buy the products believing that the
6 products were made in Italy using Italian ingredients. *See* FAC ¶¶ 16-17, 25, 27.

7 Barilla argues that the FAC does not satisfy the requirements of Rule 9(b) since Plaintiffs
8 “only offer cursory allegations that ‘Defendant knew, or should have known, that the [Challenged
9 Representation] was false, misleading, deceptive, and unlawful,” without any “specific allegations
10 supporting those legal conclusions.” Mot. 22. According to Barilla, the purpose of its trademark
11 “ITALY’S #1 BRAND OF PASTA” “is to exclusively identify Barilla to consumers as the entity
12 that made the products.” *Id.* This is a variation on the argument, discussed above, that the
13 Challenged Representation can have only one meaning—the one offered by Barilla. However,
14 Barilla’s argument goes to the merits of whether Plaintiffs ultimately will be able to prove that the
15 representations made in the packaging and marketing of the products were false or misleading.
16 Such issues are not appropriate for resolution on a motion to dismiss. *See Williams*, 552 F.3d at
17 938-39. While Barilla does not otherwise specify any other alleged deficiencies in the FAC with
18 respect to Rule 9(b)’s heightened pleading requirements, it also argues that Plaintiffs cannot plead
19 that they were “defrauded” by labels on products they never saw or purchased. Mot. 22. As
20 discussed above, Plaintiffs have sufficiently pleaded that all of the challenged products are
21 sufficiently similar for them to proceed with their claims.

22 4. Preemption

23 Barilla next argues that Plaintiffs’ claims attack use of its registered trademark “ITALY’S
24 #1 BRAND OF PASTA.” It contends that its mark is incontestable under the Lanham Act and
25 that Plaintiffs’ suit is “an end-run to attempt to cancel the Registered Trademark and must be
26 dismissed under the doctrine of federal preemption.” Mot. 23. Barilla offers no authority for this
27 argument and minimal analysis. The court cannot analyze an argument that counsel fails to
28 develop. Accordingly, the motion to dismiss the FAC on the basis of preemption is denied.

5. Plaintiffs' Claims for Equitable Relief

1 Finally, Barilla argues that Plaintiffs have affirmatively made requests for damages in
 2 connection with the first four claims for relief. Plaintiffs also seek equitable relief, including
 3 restitution and disgorgement. *See* Prayer for Relief, FAC ¶ 119. Barilla moves to dismiss
 4 Plaintiffs' claims for equitable relief on the ground that they cannot show a lack of an adequate
 5 remedy at law under *Sonner v. Premier Nutrition Corp.*, 971 F.3d 834, 837 (9th Cir. 2020). Mot.
 6 23-24.

7 The plaintiff in *Sonner* brought a putative class action against a company that marketed
 8 and sold a dietary supplement and requested damages and equitable restitution claims for false or
 9 misleading advertising under the UCL and CLRA. On the eve of trial, the plaintiff amended the
 10 complaint to drop her damages claim, choosing to proceed with only state law equitable claims for
 11 restitution and equitable relief. 971 F.3d at 837-38. The court then dismissed the claim for
 12 restitution on the ground that an adequate remedy at law—damages—was available and denied the
 13 plaintiff's request to amend the complaint to reallege the damages claim. *Id.* at 838. The Ninth
 14 Circuit affirmed the dismissal, holding that “federal courts must apply equitable principles derived
 15 from federal common law to claims for equitable restitution under” the UCL and CLRA.
 16 Accordingly, it held, a plaintiff “must establish that she lacks an adequate remedy at law before
 17 securing equitable restitution for past harm under the UCL and CLRA.” *Id.* at 844. *See*
 18 *IntegrityMessageBoards.com v. Facebook, Inc.*, No. 18-CV-05286-PJH, 2020 WL 6544411, at *5-
 19 6 (N.D. Cal. Nov. 6, 2020) (dismissing requests for restitution and disgorgement with prejudice
 20 based on the plaintiff's failure to show that it lacks an adequate legal remedy for past harm).

21 Plaintiffs argue that *Sonner* does not preclude claims for injunctive relief since monetary
 22 damages for past harm do not provide an adequate legal remedy for the future harm that only
 23 injunctive relief can remedy. Opp'n 25 (citing *Zeiger v. WellPet LLC*, 526 F. Supp. 3d 652, 687
 24 (N.D. Cal. 2021) (noting that “California's consumer protection laws permit courts to issue
 25 injunctions that serve different purposes and remedy different harms than retrospective monetary
 26 damages” and denying motion to dismiss claim for injunctive relief)). As discussed above,
 27 Plaintiffs lack Article III standing to seek injunctive relief.
 28

1 As to the claims for restitution and disgorgement, Plaintiffs argue that Barilla’s argument
2 is premature and that the court should allow the claims to go forward because they are pled in the
3 alternative. Opp’n 26. Moreover, the FAC alleges that “no adequate remedy at law exists” in
4 light of varying statutes of limitation, since the limitations period for UCL claims is four years,
5 which is one year longer than the statutes of limitation for the FAL and CLRA. FAC ¶ 30(a).
6 Therefore, Plaintiffs allege, putative class members who purchased products more than three years
7 prior to the filing of the complaint will be barred from recovery if they are not permitted to obtain
8 equitable relief under the UCL. *Id.* The FAC further alleges that the limitations periods for
9 breach of warranty and unjust enrichment/restitution claims vary between two and six years. *Id.*

10 Courts in the Ninth Circuit have split on the issue of “how exacting of a standard *Sonner*
11 imposes on plaintiffs who plead claims for equitable and legal remedies at the pleading stage.”
12 *Jeong v. Nexo Fin. LLC*, No. 21-CV-02392-BLF, 2022 WL 174236, at *27 (N.D. Cal. Jan. 19,
13 2022) (collecting cases). Some courts reject the proposition that plaintiffs are “not required to
14 make a binding election of remedies at” an early stage of litigation, holding that “this is not an
15 election of remedies issue. The question is not whether or when Plaintiffs are required to choose
16 between two available inconsistent remedies, it is whether equitable remedies are available to
17 Plaintiffs at all.” *In re MacBook Keyboard Litig.*, No. 5:18-CV-02813-EJD, 2020 WL 6047253, at
18 *2 (N.D. Cal. Oct. 13, 2020) (dismissing claims for equitable relief for failure to allege that
19 plaintiffs lack an adequate remedy at law). Others hold that “*Sonner* has limited applicability to
20 the pleading stage because it pertained to circumstances in which a plaintiff dropped all damages
21 claims on the eve of trial.” *Jeong*, 2022 WL 174236, at *27; *see Nacarino v. Chobani, LLC*, No.
22 20-CV-07437-EMC, 2022 WL 344966, at *9 (N.D. Cal. Feb. 4, 2022) (finding that “*Sonner*
23 teaches that a plaintiff, on the eve of trial, cannot create an inadequacy of a legal remedy by
24 eliminating its availability by taking volitional action” and that Rule 8 permits pleading “relief in
25 the alternative or different types of relief” and holding that “[t]he issue of Plaintiff’s entitlement to
26 seek the equitable remedy of restitution may be revisited at a later stage”). This court agrees with
27 the reasoning of courts holding that *Sonner* does not impose strict requirements at the pleading
28 stage, *see Jeong*, 2022 WL 174236, at *27, because plaintiffs “may allege claims in the alternative

United States District Court
Northern District of California

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

at the pleading stage,” and because in this case, Plaintiffs explain that statutes of limitation may preclude damages for certain periods of time, and equitable relief would be the only available remedy for certain timespans. *Freeman v. Indochino Apparel, Inc.*, 443 F. Supp. 3d 1107, 1114 (N.D. Cal. 2020) (“The equitable remedies afforded by the UCL and CLRA are expressly stated to be in addition to other available remedies at law.”). At any rate, the court may reassess the issue of available remedies at a later stage of the case. Barilla’s motion to deny Plaintiffs’ claims for equitable relief is denied.

V. CONCLUSION

For the foregoing reasons, Barilla’s motion to dismiss is granted in part and denied in part. Plaintiffs’ claim for injunctive relief is dismissed with leave to amend. Any second amended complaint must be filed within 14 days of the date of this order. The court will hold an initial case management conference on November 2, 2022 at 1:30 p.m. via Zoom. The parties should file an updated CMC statement by October 26, 2022 *only if* there are new material developments beyond what is contained in Docket No. 28.

IT IS SO ORDERED.

Dated: October 17, 2022

