APPENDIX

APPENDIX A

889 F.3d 956

UNITED STATES COURT OF APPEALS, NINTH CIRCUIT

Jennifer DAVIDSON, an individual on behalf of herself, the general public and those similarly situated, Plaintiff-Appellant,

v.

KIMBERLY–CLARK CORPORATION; Kimberly–Clark Worldwide, Inc.; Kimberly–Clark Global Sales, LLC, Defendants-Appellees.

No. 15-16173

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Argued and Submitted May 18, 2017—San Francisco, California

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Filed October 20, 2017

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Amended May 9, 2018

ORDER AND AMENDED OPINION

MURGUIA, Circuit Judge:

ORDER

The opinion and concurrence filed October 20, 2017, and appearing at 873 F.3d 1103, is hereby amended. An amended opinion and concurrence is filed herewith. Judges Berzon and Murguia have

voted to deny the petition for rehearing en banc, and Judge McCalla so recommends.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing en banc is **DENIED** (Doc. 57).

No further petitions for rehearing or rehearing en banc will be entertained in this case.

OPINION

Under California's consumer protection laws, a consumer who pays extra for a falsely labeled or advertised product may recover the premium she paid for that product. California law also permits that consumer to seek a court order requiring the manufacturer of the product to halt its false advertising. California has decided that its consumers have a right, while shopping in a store selling consumer goods, to rely upon the statements made on a product's packaging. Today, we hold that misled consumers may properly allege a threat of imminent or actual harm sufficient to confer standing to seek injunctive relief. A consumer's inability to rely on a representation made on a package, even if the consumer knows or believes the same representation was false in the past, is an ongoing injury that may justify an order barring the false advertising.

In this case, Jennifer Davidson paid extra for wipes labeled as "flushable" because she believed that flushable wipes would be better for the environment,

and more sanitary, than non-flushable wipes. Davidson alleges that the wipes she purchased, which were manufactured and marketed by Kimberly–Clark Corporation, were not, in fact, flushable. Davidson seeks to recover the premium she paid for the allegedly flushable wipes, as well as an order requiring Kimberly–Clark to stop marketing their wipes as "flushable." Davidson has plausibly alleged that Kimberly–Clark engaged in false advertising. Davidson has also plausibly alleged that she will suffer further harm in the absence of an injunction. We therefore reverse the district court and remand this case for further proceedings.

I. BACKGROUND

A. Factual Allegations[1]

Defendants-appellees Kimberly–Clark Corporation, Kimberly–Clark Worldwide, Inc., and Kimberly–Clark Global Sales, LLC (collectively "Kimberly–Clark") manufacture and market four types of premoistened wipes: Cottonelle Wipes, Scott Wipes, Huggies Wipes, and Kotex Wipes. Each of the four products is marketed and sold as "flushable." Kimberly–Clark charges a premium for these flushable wipes, as compared to toilet paper or wipes that are not marketed as "flushable." Each of the four flushable wipes products contains a statement on the package (or on the website associated with the product)

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[1] The following allegations are taken from the operative first amended complaint ("FAC"). At this stage of the proceedings, we must "accept as true all well-pleaded allegations of material fact, and construe them in the light most favorable to the non-moving party." *Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998 (9th Cir. 2010).

stating, in various ways, that the product "breaks up after flushing."

In 2013, Davidson was shopping at a Safeway in San Francisco when she came across Scott Wipes. Davidson saw the word "flushable" on the Scott Wipes package and noticed that the Scott Wipes were more expensive than wipes that did not have the word "flushable" on the package. According to Davidson, flushable ordinarily means "*suitable* for disposal down a toilet," not simply "*capable* of passing from a toilet to the pipes after one flushes." Davidson maintains that this ordinary meaning of flushable is understood by reasonable consumers, who expect a flushable product to be suitable for disposal down a toilet. Consistent with that understanding, the Merriam-Webster dictionary defines flushable as "suitable for disposal by flushing down a toilet," and a nonprofit organization of water quality professionals states that a flushable item must completely disperse within five minutes of flushing. In other words, "truly flushable products, such as toilet paper, ... disperse within seconds or minutes."

Davidson was concerned about products that were not suitable for flushing because she remembered hearing stories about people flushing items that should not be flushed, which then caused problems with home plumbing systems and municipal wastewater treatment facilities. Davidson did not want to cause such damage to her plumbing or to San Francisco's wastewater treatment facilities. Davidson reviewed the front and back of the Scott Wipes package and did not see anything indicating that the wipes were not suitable for flushing. Believing it would be easier and more sanitary to flush wipes than

to throw them in the garbage, Davidson purchased the Scott Wipes.

Once Davidson began using the Scott Wipes, she noticed that each wipe felt sturdy and thick, unlike toilet paper. Davidson also noticed that the wipes did not disperse in the toilet bowl like toilet paper. After using the wipes several times, Davidson became concerned that the wipes were not truly flushable, so she stopped using the Scott Wipes altogether. Davidson investigated the matter further and learned that flushable wipes caused widespread damage to home plumbing and municipal sewer systems. This research "further[ed] her concerns that the [Scott] Wipes were not in fact appropriate for disposal by flushing down a toilet."

Davidson has never again purchased flushable wipes. Yet Davidson "continues to desire to purchase wipes that are suitable for disposal in a household toilet," and "would purchase truly flushable wipes manufactured by [Kimberly–Clark] if it were possible to determine prior to purchase if the wipes were suitable to be flushed." Davidson regularly visits stores that sell Kimberly–Clark's flushable wipes but is unable to determine, based on the packaging, whether the wipes are truly flushable. Davidson would not have purchased the Scott Wipes, or would have paid less for the Scott Wipes, had Kimberly–Clark not "misrepresented (by omission and commission) the true nature of their Flushable Wipes."

In addition to her experience with the Scott Wipes she purchased, Davidson alleges more broadly that all four flushable wipes products Kimberly–Clark manu-

factured and marketed "are not in fact flushable, because the wipes are not suitable for disposal by flushing down a household toilet." Kimberly–Clark manufactures these products with strong fibers that do not efficiently disperse when placed in a toilet. Kimberly–Clark's own testing demonstrates that the flushable wipes products break down in water at a significantly lower rate than toilet paper. Numerous news stories describe how flushable wipes have clogged municipal sewage systems, thereby requiring costly repairs. Consumers who have purchased some of the Kimberly–Clark flushable wipes products have lodged complaints on Kimberly–Clark's website that the flushable wipes damaged their septic tanks or plumbing.

Based on these allegations, Davidson brought four California state law causes of action against Kimberly–Clark, including for common law fraud and for violations of the Consumer Legal Remedies Act ("CLRA"), California Civil Code § 1750, *et seq.*, False Advertising Law ("FAL"), California Business & Professions Code § 17500, *et seq.*, and Unfair Competition Law ("UCL"), California Business & Professions Code § 17200, *et seq*. Davidson sought restitution, injunctive relief, and actual, punitive, and statutory damages on her CLRA claim; restitution and injunctive relief on her FAL and UCL claims; and compensatory and punitive damages on her common law fraud claim. Davidson sought to certify a class of all persons who purchased Cottonelle Wipes, Scott Wipes, Huggies Wipes, and Kotex Wipes in California between March 13, 2010 and the filing of the FAC on September 5, 2014.

B. Procedural History

Davidson initially filed this case in state court, but Kimberly–Clark removed it to federal court pursuant to the Class Action Fairness Act, 28 U.S.C. § 1332(d)(2). The district court denied in part and granted in part Kimberly–Clark's motion to dismiss the original complaint. In response, Davidson filed the operative FAC. Kimberly–Clark moved to dismiss the FAC, and the district court granted the motion, this time with prejudice. First, the district court granted Kimberly–Clark's Federal Rule of Civil Procedure ("Rule") 12(b)(1) motion to dismiss Davidson's injunctive relief claims, finding that Davidson lacked standing to seek injunctive relief because she was unlikely to purchase Kimberly–Clark's flushable wipes in the future. Second, the district court granted Kimberly–Clark's motion to dismiss the FAC pursuant to Rules 9(b) and 12(b)(6), concluding that Davidson had failed to adequately allege why the representation "flushable" on the package was false. Finally, the district court concluded that Davidson "failed to allege damage under the UCL/FAL/CLRA or common law fraud" causes of action, because Davidson had not alleged that she suffered any harm due to her use of the Scott Wipes.

Davidson filed a motion for reconsideration under Rules 59(e) and 60(b), which the district court denied. First, the district court rejected Davidson's argument that it should have remanded the injunctive relief claims to state court. Second, the district court rejected Davidson's argument that it should have dismissed the FAC without prejudice so that Davidson could file a second amended complaint curing the al-

leged defects in the FAC. Third, the district court rejected Davidson's argument that the district court erred by ruling that Davidson had not adequately pled damages. Davidson timely appealed.

Davidson appeals six of the district court's rulings. First, Davidson argues that the district court erred by dismissing the FAC pursuant to Rule 9(b) for failure to adequately allege why the representation "flushable" was false. Second, Davidson argues that the district court erred by dismissing the FAC pursuant to Rule 12(b)(6) on the basis that Davidson had not suffered any damages. Third, Davidson argues that the district court erred by dismissing the original complaint pursuant to Rule 12(b) (6) for failing to plead how she came to believe the wipes were not flushable. Fourth, Davidson argues that the district court abused its discretion in striking, pursuant to Rule 12(f), references to newspaper reports in the original complaint. Fifth, Davidson argues that the district court abused its discretion by denying Davidson leave to amend her FAC. Finally, Davidson argues that the district court erred by dismissing her injunctive relief claims pursuant to Rule 12(b)(1) for lack of standing.

II. STANDARD OF REVIEW

We review de novo dismissals Rule 9(b) for failure to plead fraud with particularity. *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1124 (9th Cir. 2009). We review de novo dismissals under Rule 12(b) (6) for failure to state a claim upon which relief can be granted. *Crowley v. Nevada ex. rel. Nev. Sec'y of State*, 678 F.3d 730, 736 (9th Cir. 2012). A district court's decision granting a motion to strike allegations in a complaint

pursuant to Rule 12(f) is reviewed for abuse of discretion. *Nurse v. United States*, 226 F.3d 996, 1000 (9th Cir. 2000). Similarly, a district court's decision dismissing a complaint with prejudice, which thereby denies the plaintiff an opportunity to amend her complaint, is reviewed for abuse of discretion. *Zucco Partners, LLC v. Digimarc Corp.*, 552 F.3d 981, 989 (9th Cir. 2009). Finally, we review de novo dismissals under Rule 12(b)(1) for lack of subject-matter jurisdiction. *Novak v. United States*, 795 F.3d 1012, 1017 (9th Cir. 2015).

III. DISCUSSION

A. Theory of Fraud

The district court dismissed the FAC pursuant to Rule 9(b) because it concluded that Davidson failed to adequately allege "why" the representation that the wipes were flushable was false. Davidson argues that the district court overlooked the FAC's "numerous, detailed factual allegations establishing that Defendants' wipes fail to disperse and therefore cause clogs and problems with sewer and septic systems." Kimberly–Clark argues that Davidson must allege that she experienced problems with her home plumbing or the relevant water treatment plant —allegations that are indisputably lacking in the FAC.

Because Davidson's common law fraud, CLRA, FAL, and UCL causes of action are all grounded in fraud, the FAC must satisfy the traditional plausibility standard of Rules 8(a) and 12(b)(6), as well as the heightened pleading requirements of Rule 9(b). *Kearns*, 567 F.3d at 1125 ("[W]e have specifically ruled that Rule 9(b)'s heightened pleading standards apply to claims for violations of the CLRA and UCL.");

Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1103–04 (9th Cir. 2003) (explaining that even "[i]n cases where fraud is not a necessary element of a claim, a plaintiff may choose nonetheless to allege in the complaint that the defendant has engaged in fraudulent conduct," and in such cases, Rule 9(b)'s heightened pleading requirement must be met). "In alleging fraud ... under party must state with particularity the circumstances constituting fraud." Fed. R. Civ. P. 9(b). To properly plead fraud with particularity under Rule 9(b), "a pleading must identify the who, what, when, where, and how of the misconduct charged, as well as what is false or misleading about the purportedly fraudulent statement, and why it is false." *Cafasso, U.S. ex rel. v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1055 (9th Cir. 2011) (internal quotation marks and alterations omitted); *Vess*, 317 F.3d at 1106 ("The plaintiff must set forth what is false or misleading about a statement, and why it is false." (quoting *Decker v. GlenFed, Inc.*, 42 F.3d 1541, 1548 (9th Cir. 1994))).

Assuming the truth of the allegations and construing them, as we must, in the light most favorable to Davidson, *Daniels-Hall*, 629 F.3d at 998, we hold that the FAC adequately alleged why the term "flushable" is false.[2] Davidson's theory of fraud is simple: "Unlike truly flushable products, such as toilet paper,

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[2] Davidson argues that to survive Rule 12(b)(6), she need only plead enough facts to plausibly demonstrate that a reasonable consumer may be misled. Her observation is correct. *See Williams v. Gerber Products Co.*, 552 F.3d 934, 938 (9th Cir. 2008) (concluding that UCL, CLRA, and FAL claims are governed by the "reasonable consumer standard," under which a plaintiff

which disperse and disintegrate within seconds or minutes, [Kimberly–Clark's flushable wipes] take hours to break down" or disperse, creating a risk that the wipes will damage plumbing systems, septic tanks, and municipal wastewater treatment facilities. Davidson alleged that flushable means "suitable for being flushed," which requires an item to be capable of dispersing within a short amount of time. This definition of flushable is supported by multiple allegations in the FAC, including dictionary definitions and Kimberly–Clark's own statement on its website that its flushable wipes "are flushable due to patented technology that allows them to lose strength and *break up when moving through the system after flushing*." In contrast to truly flushable or dispersible products, Davidson alleged, Kimberly–Clark's flushable wipes "take hours to begin to break down."

Importantly, Davidson alleged that the actual wipes she purchased failed to "disperse and disintegrate within seconds or minutes." For example, Davidson alleged that after using the wipes, she "noticed that each individual wipe felt very sturdy and thick, unlike toilet paper" and that "[s]he also noticed that the wipes did not break up in the toilet bowl like toilet paper but rather remained in one piece." Her personal

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need only "show that members of the public are likely to be deceived" (internal quotation marks omitted)). The district court, however, did not dismiss the FAC only under Rule 12(b)(6), but also under Rule 9(b). Under Rule 9(b), Davidson was required not simply to adequately plead that reasonable consumers are likely to be deceived by Kimberly–Clark's use of the designation "flushable," but also *why* the designation "flushable" is false. *See Kearns*, 567 F.3d at 1125.

experience is supported by additional allegations, including Kimberly–Clark's own testing of the wipes.

Kimberly–Clark argues that Davidson was required to allege damage to her pipes or her sewage system because "suitable for flushing" means that the wipes "would not cause problems in her plumbing or at the water treatment plant." But Kimberly–Clark justifies this theory by taking a single allegation in the FAC out of context. The FAC admittedly contains many allegations about how Kimberly–Clark's flushable wipes and other wipes marketed as "flushable" can cause damage to pipes and sewage systems. But these allegations are extraneous and do not detract from Davidson's basic theory of fraud: that "truly flushable products ... disperse and disintegrate within seconds or minutes," and Kimberly–Clark's flushable wipes do not "disperse and disintegrate within seconds or minutes." Since "[d]ismissal is proper only where there is no cognizable legal theory or an absence of sufficient facts alleged to support a cognizable legal theory," *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001), and since Davidson alleged a cognizable legal theory, dismissal was not appropriate in this case. *See Deutsch v. Flannery*, 823 F.2d 1361, 1365 (9th Cir. 1987) ("[A] pleading satisfies the particularity requirement [of Rule 9(b)] if it identifies the circumstances constituting fraud so that the defendant can prepare an adequate answer from the allegations." (internal quotation marks omitted)).

For these reasons, we hold that the FAC adequately alleged that Kimberly–Clark's use of the word "flushable" was false because the Scott Wipes Davidson purchased did not disperse as a truly flushable product would have.

B. Harm

The district court also dismissed Davidson's FAC in part because Davidson had not alleged that she suffered any damages. When Davidson questioned this conclusion in her motion for reconsideration, the district court clarified that Davidson "had not pled facts showing that her use of the wipes damaged her plumping, pipes, or septic system."

However, Davidson was not required to allege damage to her plumbing or pipes. Under California law, the economic injury of paying a premium for a falsely advertised product is sufficient harm to maintain a cause of action. *See, e.g.*, Cal. Bus. & Prof. Code § 17203 (requiring that an individual plead that she lost "money or property" because of the alleged deceptive conduct); Cal. Civ. Code § 1780(a) (stating that a plaintiff asserting a cause of action under the CLRA need only plead that she suffered "any damage"); *Hinojos v. Kohl's Corp.*, 718 F.3d 1098, 1104 (9th Cir. 2013) ("The lost money or property requirement therefore requires a plaintiff to demonstrate some form of economic injury as a result of his transactions with the defendant." (internal quotation marks omitted)). Thus, a consumer's allegation that "she would not have bought the product but for the misrepresentation ... is sufficient to allege causation ... [and] to allege economic injury." *Kwikset Corp. v. Superior Court*, 51 Cal.4th 310, 120 Cal.Rptr.3d 741, 246 P.3d 877, 890 (2011).

To properly plead an economic injury, a consumer must allege that she was exposed to false information about the product purchased, which caused the product to be sold at a higher price, and that she "would

not have purchased the goods in question absent this misrepresentation." *Hinojos*, 718 F.3d at 1105. Davidson did that here. Davidson alleged that "[h]ad [Kimberly–Clark] not misrepresented (by omission and commission) the true nature of their Flushable Wipes, [she] would not have purchased [Kimberly–Clark's] product or, at a very minimum, she would have paid less for the product," and that "[Kimberly–Clark] charge[d] a premium price for flushable wipes." Because Davidson only needed to allege an economic injury to state a claim for relief, and because Davidson alleges that she paid a premium price for the Scott Wipes, Davidson has properly alleged that she was injured by Kimberly–Clark's allegedly false advertising.

C. Dismissal of the Original Complaint

The district court stated in its order dismissing the original complaint that "plaintiff has not alleged facts showing how she came to believe that the [Scott Wipes] were not flushable." Davidson argues that this requirement "does not exist in law." According to Kimberly–Clark, the statement simply reflected the district court's observation that Davidson had not alleged facts about her own experience.

Davidson was required to "identify the who, what, when, where, and how of the misconduct charged, as well as what is false or misleading about the purportedly fraudulent statement, and why it is false." *Cafasso*, 637 F.3d at 1055 (internal quotation marks and alterations omitted). To the extent the district court dismissed the original complaint because Davidson failed to allege facts "showing how she came to believe that the [Scott Wipes] were not 'flushable,' " the district court erred. We are aware of no authority that

specifically requires a plaintiff bringing a consumer fraud claim to allege how she "came to believe" that the product was misrepresented when, as in this case, all the Rule 9(b) considerations have been met.

D. Article III Standing for Injunctive Relief

Finally, we address the most challenging issue in this case: whether Davidson has standing to seek injunctive relief.[3] The district court concluded that Davidson lacked standing to assert a claim for injunctive relief, because Davidson "has no intention of purchasing the same Kimberly–Clark product in the future." Davidson argues that she has alleged a cognizable injury that establishes Article III standing to seek injunctive relief because (1) she will be unable to rely on the label "flushable" when deciding in the future whether to purchase Kimberly–Clark's wipes, and (2) Kimberly–Clark's false advertising threatens to invade her statutory right, created by the UCL, CLRA, and FAL, to receive truthful information from Kimberly–Clark about its wipes. We hold that Davidson properly alleged that she faces a threat of imminent or actual harm by not being able to rely on Kimberly–Clark's labels in the future, and that this harm is sufficient to confer standing to seek injunctive relief. We therefore do not reach Davidson's alternative statutory standing argument.

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[3] We do not address the district court's order granting the motion to strike allegations in the original complaint, as that complaint was replaced by the FAC, and we conclude that the FAC is sufficient as is to survive the heightened pleading requirements of Rule 9(b). Similarly, we do not address the district court's order denying leave to amend the FAC, as we conclude that the FAC is adequate as it stands.

Article III of the U.S. Constitution authorizes the judiciary to adjudicate only "cases" and "controversies." The doctrine of standing is "an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). The three well-known "irreducible constitutional minim[a] of standing" are injury-in-fact, causation, and redressability. *Id.* at 560–61, 112 S.Ct. 2130. A plaintiff bears the burden of demonstrating that her injury-in-fact is "concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 149, 130 S.Ct. 2743, 177 L.Ed.2d 461 (2010).

A plaintiff must demonstrate constitutional standing separately for each form of relief requested. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC) Inc.*, 528 U.S. 167, 185, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000). For injunctive relief, which is a prospective remedy, the threat of injury must be "actual and imminent, not conjectural or hypothetical." *Summers v. Earth Island Inst.*, 555 U.S. 488, 493, 129 S.Ct. 1142, 173 L.Ed.2d 1 (2009). In other words, the "threatened injury must be *certainly impending* to constitute injury in fact" and "allegations of *possible* future injury are not sufficient." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409, 133 S.Ct. 1138, 185 L.Ed.2d 264 (2013) (internal quotation marks and alteration omitted). Past wrongs, though insufficient by themselves to grant standing, are "evidence bearing on whether there is a real and immediate threat of repeated injury." *City of Los Angeles v. Lyons*, 461 U.S.

95, 102, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983) (internal quotation marks omitted). Where standing is premised entirely on the threat of repeated injury, a plaintiff must show "a sufficient likelihood that he will again be wronged in a similar way." *Id.* at 111, 103 S.Ct. 1660. In determining whether an injury is similar, we "must be careful not to employ too narrow or technical an approach. Rather, we must examine the questions realistically: we must reject the temptation to parse too finely, and consider instead the context of the inquiry." *Armstrong v. Davis*, 275 F.3d 849, 867 (9th Cir. 2001), *abrogated on other grounds by Johnson v. California*, 543 U.S. 499, 125 S.Ct. 1141, 160 L.Ed.2d 949 (2005).

It is an open question in this circuit to what extent a previously deceived consumer who brings a false advertising claim can allege that her inability to rely on the advertising in the future is an injury sufficient to grant her Article III standing to seek injunctive relief. With no guidance from our court, district courts applying California law have split dramatically on this issue. *See Pinon v. Tristar Prods., Inc.*, No. 1:16-cv-00331-DAD-SAB, 2016 WL 4548766, at *4 (E.D. Cal. Sept. 1, 2016) ("The Ninth Circuit has not addressed the specific question ... [and] district courts within this circuit are divided about whether a plaintiff seeking to bring injunctive relief claims over deceptive labeling can establish Article III standing once they are already aware of an alleged misrepresentation."); *see also Russell v. Kohl's Dep't Stores, Inc*., No. ED CV 15-1143 RGK, 2015 WL 12781206, at *5 (C.D. Cal. Oct. 6, 2015) (describing the "split among the district courts in the Ninth Circuit as to whether a plaintiff

lacks Article III standing to seek injunctive relief under the UCL and FAL when the plaintiff has knowledge of the defendant's alleged misconduct").

Courts concluding that such a plaintiff lacks standing to seek injunctive relief generally reason that "plaintiffs who are already aware of the deceptive nature of an advertisement are not likely to be misled into buying the relevant product in the future and, therefore, are not capable of being harmed again in the same way." *Pinon*, 2016 WL 4548766 at *4. For example, in *Machlan v. Procter & Gamble Company*, the plaintiff alleged that the defendant deceptively marketed its wipes as flushable, even though the wipes did not disperse like toilet paper and clogged pipes and sewage systems—facts nearly identical to those here. 77 F.Supp.3d 954, 957 (N.D. Cal. 2015). The district court in *Machlan* concluded that the plaintiff lacked Article III standing for injunctive relief because the plaintiff had alleged that the use of the term "flushable" was deceptive, so the plaintiff could not be deceived again, even if he purchased the same wipes in the future. *Id.* at 960 ("[W]hen the alleged unfair practice is deception, the previously-deceived-but-now-enlightened plaintiff simply does not have standing under Article III to ask a federal court to grant an injunction.").[4] Multiple district courts

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[4] Interestingly, the *Machlan* court remanded the portions of the plaintiff's claims that sought injunctive relief, and then proceeded in federal court on some of the claims seeking monetary damages. *Id.* at 960–62, 964–65. The court reasoned that injunctive relief is an important remedy in California's consumer protection statutes and that allowing a defendant to undermine

have held similarly. *See Pinon*, 2016 WL 4548766 at *4 (collecting cases).

Other district courts in this circuit have concluded that a plaintiff has standing to seek an injunction against a product's misleading representation, even though the plaintiff already knows or has reason to believe that the representation is false. *See id.* (collecting cases). These courts generally reason that the plaintiff faces an actual and imminent threat of future injury because the plaintiff may be unable to rely on the defendant's representations in the future, or because the plaintiff may again purchase the mislabeled product.

For example, in *Ries v. Arizona Beverages USA LLC*, the plaintiffs alleged that the defendants engaged in false advertising by marketing their "AriZona Iced Tea" beverages as "All Natural" and "100% Natural" even though the product contained the non-natural ingredients high fructose corn syrup and citric acid. 287 F.R.D. 523, 527 (N.D. Cal. 2012). The defendants argued that the plaintiffs were not threatened by future harm because the plaintiffs became aware of the contents of the drink and could no longer be deceived. *Id.* at 533. The district court rejected this argument, reasoning that "[s]hould plaintiffs encounter the denomination 'All Natural' on an AriZona beverage at the grocery store today, they could not rely on

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those statutes through removal to federal court "is an unnecessary affront to federal and state comity." *Id.* at 961. Here, Davidson similarly argues that the district court erred by denying her request to remand the injunctive relief "claim" to state court. Because we conclude that Davidson's alleged future injury justifies Article III standing for injunctive relief, we need not reach this issue.

that representation with any confidence." *Id.* The district court in *Ries* also explained that "the record is devoid of any grounds to discount plaintiffs' stated intent to purchase [the product] in the future." *Id.*; *see also Weidenhamer v. Expedia, Inc.*, No. C14-1239RAJ, 2015 WL 1292978, at *5 (W.D. Wash. Mar. 23, 2015) (explaining that the plaintiff "is entitled to rely on the statements made in [the] ad, even if he previously learned that some of those statements were false or deceptive," and that the plaintiff had adequately alleged that he likely would continue to be an Expedia customer); *Richardson v. L'Oreal USA, Inc.*, 991 F.Supp.2d 181, 194–95 (D.D.C. 2013) (finding that "the named plaintiffs, knowledgeable about the misrepresentations, are likely to suffer future harm in the absence of an injunction," because they will be unable "to rely on the [misleading] label with any confidence" and "will have no way of knowing" whether defendants "boost[ed] the label's veracity").

We resolve this district court split in favor of plaintiffs seeking injunctive relief. We hold that a previously deceived consumer may have standing to seek an injunction against false advertising or labeling, even though the consumer now knows or suspects that the advertising was false at the time of the original purchase, because the consumer may suffer an "actual and imminent, not conjectural or hypothetical" threat of future harm. *Summers*, 555 U.S. at 493, 129 S.Ct. 1142. Knowledge that the advertisement or label was false in the past does not equate to knowledge that it

will remain false in the future.[5] In some cases, the threat of future harm may be the consumer's plausible

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5 Several other circuits have considered whether a previously deceived consumer has standing to seek injunctive relief and have held they do not. *See Conrad v. Boiron, Inc.*, 869 F.3d 536 (7th Cir. 2017) (holding that a consumer who brought a putative class action against the manufacturer of a homeopathic flu remedy could not seek injunctive relief); *Nicosia v. Amazon.com, Inc.*, 834 F.3d 220 (2d Cir. 2016) (holding that a consumer who purchased a weight-loss product from an online retailer lacked standing to pursue injunctive relief); *McNair v. Synapse Grp. Inc.*, 672 F.3d 213 (3d Cir. 2012) (holding that former customers lacked standing to pursue injunctive relief in a putative class action against a marketer of magazine subscriptions). These cases, however, are factually distinguishable from the present case. In none of these cases did the plaintiffs sufficiently allege their intention to repurchase the product at issue as Davidson does here.

In *McNair*, the court determined there was no reasonable likelihood that the former customers would be injured by the marketer's techniques in the future because the former customers did not allege that they intended to subscribe to magazines through the marketer again—they alleged only that they "may, one day, become Synapse [magazine marketer] customers once more because 'Synapse's offers are compelling propositions ....'" 672 F.3d at 224–25.

In *Nicosia*, the plaintiff had purchased a diet product on Amazon.com that contained sibutramine, a controlled substance that had previously been removed from the market. 834 F.3d at 226. The court held that the plaintiff could not establish a likelihood of future or continuing harm for the purposes of injunctive relief because the plaintiff did not show that he was likely to be subjected to further sales by Amazon of products containing sibutramine given that Amazon had ceased selling the diet product and the plaintiff did not allege "that he intends to use Amazon in the future to buy any products, let alone food or drug products generally or weight loss products in particular." *Id.* at 239.

allegations that she will be unable to rely on the product's advertising or labeling in the future, and so will not purchase the product although she would like to. *See, e.g.*, *Ries*, 287 F.R.D. at 533; *Lilly v. Jamba Juice Co.*, No. 13-cv-02998-JST, 2015 WL 1248027, at *4 (N.D. Cal. Mar. 18, 2015) ("[U]nless the manufacturer or seller has been enjoined from making the same representation, [the] consumer ... won't know whether it makes sense to spend her money on the product."). In other cases, the threat of future harm may be the consumer's plausible allegations that she might purchase the product in the future, despite the fact it was once marred by false advertising or labeling, as she may reasonably, but incorrectly, assume the product was improved. *See, e.g.*, *L'Oreal*, 991 F.Supp.2d at 194–95. Either way, we share one district court's sentiment that we are "not persuaded that injunctive relief is *never* available for a consumer who learns after purchasing a product that the label is false." *Duran v. Creek*, 2016 WL 1191685, at *7 (N.D. Cal. Mar. 28, 2016) (emphasis added).

We observe—although our conclusion is not based on this consideration—that our holding alleviates the anomalies the opposite conclusion would create. As the *Machlan* court aptly recognized, "[a]llowing a de-

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Finally, in *Conrad*, the court held that an injunction would not redress the consumer's potential injury because the injury was already redressed by the merchant's refund program for the deceptive product, and no other injury justifying injunctive relief was pled. 869 F.3d at 542–43.

Unlike the cases cited above, here, Davidson sufficiently alleges that she would purchase truly flushable wipes manufactured by Kimberly–Clark.

fendant to undermine California's consumer protection statutes and defeat injunctive relief simply by removing a case from state court is an unnecessary affront to federal and state comity [and] ... an unwarranted federal intrusion into California's interests and laws." 77 F.Supp.3d at 961; *see also Henderson v. Gruma Corp.*, 2011 WL 1362188, at *8 (C.D. Cal. Apr. 11, 2011) ("[T]o prevent [plaintiffs] from bringing suit on behalf of a class in federal court would surely thwart the objective of California's consumer protection laws."). This is because "the primary form of relief available under the UCL to protect consumers from unfair business practices is an injunction," *In re Tobacco II*, 46 Cal.4th 298, 93 Cal.Rptr.3d 559, 207 P.3d 20, 34 (2009)—a principle the California Supreme Court recently reaffirmed.[6] *See McGill v. Citibank, N.A.*, 216 Cal.Rptr.3d 627, 393 P.3d 85, 90, 93

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[6] At the same time, we note that the risks to plaintiffs in cases such as this are occasionally overstated based on the mistaken impression that the only remedy for an improper removal is dismissal without prejudice. As a general rule, if the district court is confronted with an Article III standing problem in a removed case—whether the claims at issue are state or federal—the proper course is to remand for adjudication in state court. *See* 28 U.S.C. § 1447(c); *Polo v. Innoventions Int'l, LLC*, 833 F.3d 1193, 1196 (9th Cir. 2016). We do not resolve here whether severance and remand, as opposed to dismissal, is the appropriate option where standing is lacking for only some claims or forms of relief. *See Lee v. Am. Nat'l Ins. Co.*, 260 F.3d 997, 1006–07. But it bears noting that the end result is likely the same in any event: In prevailing on a motion to dismiss only as to some claims for lack of standing, a defendant is also making the case against the removal of those claims once they are refiled in state court unaccompanied by the claims over which the district court *did* have jurisdiction. *See* 28 U.S.C. § 1447(a). A "perpetual loop" of removal to federal court and dismissal for lack of standing should not occur. *Cf. Machlan*, 77 F.Supp.3d at 961.

(2017) (explaining that "public injunctive relief under the UCL, the CLRA, and the false advertising law is relief that has the primary purpose and effect of prohibiting unlawful acts that threaten future injury to the general public," and that "public injunctive relief remains a remedy to private plaintiffs" under the UCL, FAL, and CLRA (internal quotation marks omitted)).

Since we hold that a previously deceived plaintiff may have standing to seek injunctive relief, we must turn our attention to whether Davidson adequately alleged that she faces an imminent or actual threat of future harm caused by Kimberly–Clark's allegedly false advertising. Davidson alleged that she "continues to desire to purchase wipes that are suitable for disposal in a household toilet"; "would purchase truly flushable wipes manufactured by [Kimberly–Clark] if it were possible"; "regularly visits stores ... where [Kimberly–Clark's] 'flushable' wipes are sold"; and is continually presented with Kimberly–Clark's flushable wipes packaging but has "no way of determining whether the representation 'flushable' is in fact true."

We are required at this stage of the proceedings to presume the truth of Davidson's allegations and to construe all of the allegations in her favor. *Daniels-Hall*, 629 F.3d at 998. Though we recognize it is a close question, based on the FAC's allegations, we hold that Davidson adequately alleged that she faces an imminent or actual threat of future harm due to Kimberly–Clark's false advertising. Davidson has alleged that she desires to purchase Kimberly–Clark's flushable wipes. Her desire is based on her belief that "it would be easier and more sanitary to flush the wipes than to dispose of them in the garbage." As in

Ries, the FAC is "devoid of any grounds to discount [Davidson's] stated intent to purchase [the wipes] in the future." 287 F.R.D. at 533.

Davidson has also sufficiently alleged an injury that is "concrete and particularized." *See Spokeo, Inc. v. Robins*, — U.S. —, 136 S.Ct. 1540, 1548, 194 L.Ed.2d 635 (2016), *as revised* (May 24, 2016) (quoting *Lujan*, 504 U.S. at 560, 112 S.Ct. 2130). The alleged injury is particular to Davidson because it would affect her, as a direct consumer of Kimberly–Clark's wipe products, in a personal and individual way. *See id*. At this motion to dismiss stage, based on Davidson's allegations that she would purchase truly flushable wipes manufactured by Kimberly–Clark if it were possible, her injury is concrete—it is real and not merely abstract. *See id*. Indeed, " '[c]oncrete' is not ... necessarily synonymous with 'tangible.' " *Id*. at 1549. Davidson's alleged harm is her inability to rely on the validity of the information advertised on Kimberly–Clark's wipes despite her desire to purchase truly flushable wipes. This court recognizes a history of lawsuits based on similar informational injuries. *See id*. (stating that in considering whether a harm is concrete, it is instructive to consider whether the harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in American courts); *Wilderness Soc., Inc. v. Rey*, 622 F.3d 1251, 1258 (9th Cir. 2010) (discussing the history of informational injury serving as an injury-in-fact sufficient for standing).

As necessary where standing for prospective injunctive relief is premised entirely on the threat of repeated injury,[7] Davidson has also shown "a sufficient likelihood that [s]he will again be wronged in a similar way." *Lyons*, 461 U.S. at 111, 103 S.Ct. 1660. Despite now knowing that the "flushable" labeling was false at the time of purchase, "[s]hould [Davidson] encounter the denomination ['flushable'] on a [Kimberly–Clark wipes package] at the grocery store today, [she] could not rely on that representation with any confidence." *Ries*, 287 F.R.D. at 533. In other words, Davidson faces the similar injury of being unable to rely on Kimberly–Clark's representations of its product in deciding whether or not she should purchase the product in the future. *See Lyons*, 461 U.S. at 111, 103 S.Ct. 1660; *see also Armstrong*, 275 F.3d at 867.

Finally, Davidson meets the redressability prong of standing because a favorable ruling would likely provide redress for her alleged injury. *See Monsanto*

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[7] Although courts in this circuit occasionally imply otherwise, *see, e.g.*, *Pinon v. Tristar Prods., Inc.*, No 1:16-cv-00331-DAD-SAB, 2016 WL 4548766, at *4 (E.D. Cal. Sept. 1, 2016); *Anderson v. The Hain Celestial Grp., Inc.*, 87 F.Supp.3d 1226, 1234 (N.D. Cal. 2015), there is no reason prospective injunctive relief must always be premised on a realistic threat of a similar injury recurring. A sufficiently concrete prospective injury is sufficient. *See, e.g.*, *Chapman v. Pier 1 Imports (U.S.) Inc.*, 631 F.3d 939, 951 (9th Cir. 2011) (en banc) ("Had the prospect of future injury been more concrete, the absence of a past injury ... would not have precluded Article III standing."). in the cases cited in *Hodgers-Durgin* was thus not at issue. It is therefore far from clear that *Hodgers-Durgin's* disapproval of those cases is controlling precedent. *See Alcoa, Inc. v. Bonneville Power Admin.,* 698 F.3d 774, 796–97 (9th Cir. 2012) (Tashima, J., concurring); *id.* at 804 n.4 (Bea, J., concurring in part and dissenting in part); *Miranda B. v. Kitzhaber,* 328 F.3d 1181, 1186 (9th Cir. 2003) (per curiam).

Co., 561 U.S. at 149, 130 S.Ct. 2743. The injunction Davidson seeks would prohibit Kimberly–Clark from using the term "flushable" on their wipes until the product is truly flushable. This injunctive relief would likely redress Davidson's injury by requiring that Kimberly–Clark only make truthful representations on their wipe products upon which Davidson could reasonably rely.

We therefore hold that Davidson's allegation that she has "no way of 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. *See Clapper*, 568 U.S. at 409, 133 S.Ct. 1138.

IV. CONCLUSION

We hold that the FAC adequately alleges that Kimberly–Clark's use of the word "flushable" was false because the Scott Wipes that Davidson purchased did not adequately disperse as a truly flushable product would have. The district court erred in concluding that Davidson failed to allege harm and how she came to believe the wipes were not flushable. Finally, because Davidson's allegations sufficiently identified a certainly impending risk of her being subjected to Kimberly–Clark's allegedly false advertising, Davidson had standing to pursue injunctive relief. We therefore **REVERSE** and **REMAND.**

BERZON, Circuit Judge, concurring:

I concur in the majority opinion with the following observations:

As to prospective relief, the majority opinion rests on the proposition that we are required to perform a separate standing analysis for each "form of relief," and concludes that Davidson has separately established standing for her requests for restitution and for an injunction. There is case law supporting both points, as the opinion states.

I write separately to note that duplicating the standing analysis in this way does not give effect to the "case or controversy" requirement of Article III. Instead, it appears to be an artifact of the discredited practice of conflating the prerequisites for injunctive relief with the Article III prerequisites for entry into federal court. Although we said in *Hodgers-Durgin v. de la Vina*, 199 F.3d 1037, 1040 n.1 (9th Cir. 1999) (en banc), purporting to overrule earlier precedents, [8]

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[8] *See Smith v. City of Fontana*, 818 F.2d 1411, 1423 (9th Cir. 1987) (holding that standing for a damages claim satisfies Article III standing with respect to other forms of relief "involv[ing] the same operative facts and legal theory"); *Giles v. Ackerman*, 746 F.2d 614, 619 (9th Cir. 1984) (treating the presence of a related damages claim as satisfying Article III standing, thereby allowing the court to consider "whether relief in addition to damages is appropriate"); *Gonzales v. City of Peoria*, 722 F.2d 468, 481 (9th Cir. 1983) (concluding that the presence of a damages claim "present[ed] a case in controversy as to injunctive relief").

I note that only equitable relief was sought in *Hodgers-Durgin,* 199 F.3d at 1040. The question presented in the cases cited in *Hodgers-Durgin* was thus not at issue. It is therefore far from

that *City of Los Angeles v. Lyons*, 461 U.S. 95, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983), requires this result, in my view it does not.

The present case well illustrates the problem. Davidson seeks restitution for the premium she paid for a falsely labeled product, and no one doubts that she has standing in federal court to do so. Under California law, if Davidson prevails on her false advertising claim and is entitled to restitution, she is equally entitled to an injunction. *See* Cal. Bus. & Prof. Code §§ 17202–03; *see also Kwikset Corp. v. Superior Court*, 51 Cal.4th 310, 120 Cal.Rptr.3d 741, 246 P.3d 877, 894–95 (2011). No further showing, equitable or otherwise, is needed to trigger her right to injunctive relief. It follows that we have a single dispute—a single case, a single controversy—giving rise to multiple forms of relief.

It is mechanically possible, in this case, to define Davidson's "case or controversy" differently, and to assign the requirements of injury, causation, and redressability separately to each remedy she seeks. But it turns Article III on its head to let the remedies drive the analysis, where state law clearly envisions those remedies as the product of a single adjudication of a single issue. *See Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal.4th 1134, 131 Cal.Rptr.2d 29, 63 P.3d 937, 943 (2003). And proceeding in that way undermines, substantively, the enforcement of state laws in

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clear that *Hodgers-Durgin*'s disapproval of those cases is controlling precedent. *See Alcoa, Inc. v. Bonneville Power Admin.*, 698 F.3d 774, 796–97 (9th Cir. 2012) (Tashima, J., concurring); *id*. at 804 n.4 (Bea, J., concurring in part and dissenting in part); *Miranda B. v. Kitzhaber*, 328 F.3d 1181, 1186 (9th Cir. 2003) (per curiam).

federal court, as it adds new elements to the entitlement to state-law relief. *Cf. Erie R. Co. v. Tompkins,* 304 U.S. 64, 78, 58 S.Ct. 817, 82 L.Ed. 1188 (1938) ("Congress has no power to declare substantive rules of common law applicable in a state .... And no clause in the Constitution purports to confer such a power upon the federal courts.").

It was in recognition of this anomaly that the district court in *Machlan v. Procter & Gamble Co.* remanded only the injunctive aspect of that similar false advertising case to state court. 77 F.Supp.3d 954, 960–61 (N.D. Cal. 2015). Such an approach may not be entirely consonant with the California law here at issue.[9] But the impetus to sever the forms of relief over which the court lacks jurisdiction springs from the same problem I have identified—that a defendant

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[9] One ordinarily thinks of severing separate *claims* joined in a single action, not separate forms of relief flowing from a single claim. *See* Fed. R. Civ. P. 21. But severing and remanding discrete forms of relief is no less anomalous than separately analyzing forms of relief for the purposes of Article III standing. And as remand is required if the district court lacks jurisdiction over a removed case, 28 U.S.C. § 1447(c), the *Machlan* approach makes a certain amount of sense. *See Lee v. Am. Nat'l Ins. Co.*, 260 F.3d 997, 1007 n.8 (9th Cir. 2001).

In any event, as the main opinion notes, the *Machlan* approach is considerably more efficient than the likely alternative —dismissing the "claim" for injunctive relief without prejudice, only to have that "claim" refiled in state court absent the request for restitution that justified removal. *See* 28 U.S.C. § 1441(a); *Polo v. Innoventions Int'l, LLC*, 833 F.3d 1193, 1196 (9th Cir. 2016); *Lee*, 260 F.3d at 1006–07 (observing that the result of partial dismissal of a removed case for lack of Article III standing is not the end of litigation on the dismissed claims, but renewed litigation in state court).

should not be able to strip a plaintiff of remedies dictated by state law by removing to federal court a case over which there surely *is* Article III jurisdiction over the liability issues. *Cf. Larson v. Valente*, 456 U.S. 228, 238–39, 102 S.Ct. 1673, 72 L.Ed.2d 33 (1982) ("The essence of the standing inquiry is whether the parties seeking to invoke the court's jurisdiction have alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues ...." (internal quotation marks omitted)).

Federal courts have a history of improperly elevating the prerequisites for relief to the status of jurisdictional hurdles. *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, — U.S. —, 134 S.Ct. 1377, 1387– 88 & n.4, 188 L.Ed.2d 392 (2014). Notably, although *Lyons* is now widely credited as the origin of the rule that injunctive relief always requires its own standing inquiry, *see, e.g.*, *Summers v. Earth Island Inst.,* 555 U.S. 488, 493, 129 S.Ct. 1142, 173 L.Ed.2d 1 (2009); *Hodgers-Durgin*, 199 F.3d at 1040 n.1, that case, as I read it, did *not* make that jurisdiction/remedy mistake. Rather, *after* determining that there was no independent standing to seek injunctive relief, *Lyons* separately noted that there was also a pending request for damages. *Lyons*, 461 U.S. at 111, 103 S.Ct. 1660. The Court then inquired into whether the *nonjurisdictional* requirements for equitable prospective relief were met, and concluded they were not. *Id.* at 111–12, 103 S.Ct. 1660. In my view, this aspect of *Lyons* recognized that there *was* a case or controversy regarding liability issues because of the damages claim, but precluded injunctive relief on nonjurisdictional grounds specific to the equitable requirements

for such relief— the absence of a likelihood of irreparable harm. *Id.* Were this not what *Lyons* meant, the entire discussion of the equitable principles governing prospective relief would have been superfluous.

Conflating the elements of relief with the elements of standing is of little consequence in most cases following *Lyons*. Where the availability of injunctive relief is governed by federal common law, the common-law prerequisites for injunctive relief must eventually be satisfied, and largely mirror the standing prerequisites. *See, e.g.*, *Monsanto Co. v. Geertson Seed Farms,* 561 U.S. 139, 153–56, 130 S.Ct. 2743, 177 L.Ed.2d 461 (2010); *Adarand Constructors, Inc. v. Pena,* 515 U.S. 200, 210–12, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995). Furthermore, although later Supreme Court cases have cited *Lyons* for the proposition that standing is relief-specific, none has actually found a lack of standing to pursue a particular form of relief where there was otherwise Article III standing over the same claim advanced by the same party.[10] As a result, the

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[10] *See Summers v. Earth Island Inst.*, 555 U.S. 488, 493, 129 S.Ct. 1142, 173 L.Ed.2d 1 (2009) (applying *Lyons* to a claim involving only injunctive relief); *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 733–34, 128 S.Ct. 2759, 171 L.Ed.2d 737 (2008) (applying *Lyons* to claims only for injunctive and declaratory relief, and conducting a single standing analysis); *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 184–88, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000) (conducting a separate standing analysis for civil penalties, but concluding that deterrence of ongoing harm suffices for constitutional standing); *Adarand*, 515 U.S. at 210–12, 115 S.Ct. 2097 (applying *Lyons* to claims only for injunctive and declaratory relief, and conducting a single standing analysis); *see also Town of Chester, N.Y. v. Laroe Estates*, — U.S. —, 137 S.Ct. 1645, 1650, 198 L.Ed.2d 64

Supreme Court has had no occasion to consider the logic of relief-specific standing. But in a state-law case such as this, adhering to the proper scope of the standing inquiry is uniquely important. For here, collapsing the standing and relief inquiries threatens to impose substantive limits on the availability of relief under state law in the service of constitutional interests that aren't actually under threat.

Despite these concerns, I nonetheless concur fully in the majority opinion. The Supreme Court has read *Lyons* as requiring a separate standing analysis with regard to prospective injunctive relief, even when a party otherwise has standing to advance a claim. And, as the majority opinion explains, assuming a separate standing analysis is necessary despite the state prescription of effectively automatic prospective relief, that requirement is met here.

(2017) (invoking *Lyons* in support of the proposition that a plaintiff intervenor must show standing to seek relief of its own, distinct form that sought by the original plaintiff); *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 350–53, 126 S.Ct. 1854, 164 L.Ed.2d 589 (2006) (invoking *Lyons* in support of the proposition that standing is *claim*-specific).

APPENDIX B

873 F.3d 1103

**United States Court of Appeals,
Ninth Circuit**

Jennifer DAVIDSON, an individual on behalf of herself, the general public and those similarly situated, Plaintiff-Appellant,

v.

KIMBERLY–CLARK CORPORATION; Kimberly–Clark Worldwide, Inc.; Kimberly–Clark Global Sales, LLC, Defendants-Appellees

No. 15-16173

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Argued and Submitted May 18, 2017—San Francisco, California

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Filed October 20, 2017

OPINION

MURGUIA, Circuit Judge:

Under California's consumer protection laws, a consumer who pays extra for a falsely labeled or advertised product may recover the premium she paid for that product. California law also permits that consumer to seek a court order requiring the manufacturer of the product to halt its false advertising. California has decided that its consumers have a right, while shopping in a store selling consumer goods, to

rely upon the statements made on a product's packaging. Today, we hold that California consumers who can seek in California state court an order requiring the manufacturer of an allegedly falsely advertised product to cease the false advertising may also seek such an order in federal court. A consumer's inability to rely in the future upon a representation made on a package, even if the consumer knew or continued to believe the same representation was false in the past, is an ongoing injury that may justify an order barring the false advertising.

In this case, Jennifer Davidson paid extra for wipes labeled as "flushable" because she believed that flushable wipes would be better for the environment, and more sanitary, than non-flushable wipes. Davidson alleges that the wipes she purchased, which were manufactured and marketed by Kimberly–Clark Corporation, were not, in fact, flushable. Davidson seeks to recover the premium she paid for the allegedly flushable wipes, as well as an order requiring Kimberly–Clark to stop marketing their wipes as "flushable." Davidson has plausibly alleged that Kimberly–Clark engaged in false advertising. Davidson has also plausibly alleged that she will suffer further harm in the absence of an injunction. We therefore reverse the district court and remand this case for further proceedings.

I. BACKGROUND

A. Factual Allegations[1]

Defendants-appellees Kimberly–Clark Corporation, Kimberly–Clark Worldwide, Inc., and Kimberly–Clark Global Sales, LLC (collectively "Kimberly–Clark") manufacture and market four types of premoistened wipes: Cottonelle Wipes, Scott Wipes, Huggies Wipes, and Kotex Wipes. Each of the four products are marketed and sold as "flushable." Kimberly–Clark charges a premium for these flushable wipes, as compared to toilet paper or wipes that are not marketed as "flushable." Each of the four flushable wipes products contains a statement on the package (or on the website associated with the product) stating, in various ways, that the product "breaks up after flushing."

In 2013, Davidson was shopping at a Safeway in San Francisco when she came across Scott Wipes. Davidson saw the word "flushable" on the Scott Wipes package and noticed that the Scott Wipes were more expensive than wipes that did not have the word "flushable" on the package. According to Davidson, flushable ordinarily means "*suitable* for disposal down a toilet," not simply "*capable* of passing from a toilet to the pipes after one flushes." Davidson maintains that this ordinary meaning of flushable is understood by reasonable consumers, who expect a flushable

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[1] The following allegations are taken from the operative first amended complaint ("FAC"). At this stage of the proceedings, we must "accept as true all well-pleaded allegations of material fact, and construe them in the light most favorable to the non-moving party." *Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998 (9th Cir. 2010).

product to be suitable for disposal down a toilet. Consistent with that understanding, the Merriam-Webster dictionary defines flushable as "suitable for disposal by flushing down a toilet," and a nonprofit organization of water quality professionals states that a flushable item must completely disperse within five minutes of flushing. In other words, "truly flushable products, such as toilet paper, ... disperse within seconds or minutes."

Davidson was concerned about products that were not suitable for flushing because she remembered hearing stories about people flushing items that should not be flushed, which then caused problems with home plumbing systems and municipal wastewater treatment facilities. Davidson did not want to cause such damage to her plumbing or to San Francisco's wastewater treatment facilities. Davidson reviewed the front and back of the Scott Wipes package and did not see anything indicating that the wipes were not suitable for flushing. Believing it would be easier and more sanitary to flush wipes than to throw them in the garbage, Davidson purchased the Scott Wipes.

Once Davidson began using the Scott Wipes, she noticed that each wipe felt sturdy and thick, unlike toilet paper. Davidson also noticed that the wipes did not disperse in the toilet bowl like toilet paper. After using the wipes several times, Davidson became concerned that the wipes were not truly flushable, so she stopped using the Scott Wipes altogether. Davidson investigated the matter further and learned that flushable wipes caused widespread damage to home plumbing and municipal sewer systems. This research "further[ed] her concerns that the [Scott]

Wipes were not in fact appropriate for disposal by flushing down a toilet."

Davidson has never again purchased flushable wipes. Yet Davidson "continues to desire to purchase wipes that are suitable for disposal in a household toilet," and "would purchase truly flushable wipes manufactured by [Kimberly–Clark] if it were possible to determine prior to purchase if the wipes were suitable to be flushed." Davidson regularly visits stores that sell Kimberly–Clark's flushable wipes but is unable to determine, based on the packaging, whether the wipes are truly flushable. Davidson would not have purchased the Scott Wipes, or would have paid less for the Scott Wipes, had Kimberly–Clark not "misrepresented (by omission and commission) the true nature of their Flushable Wipes."

In addition to her experience with the Scott Wipes she purchased, Davidson alleges more broadly that all four flushable wipes products Kimberly–Clark manufactured and marketed "are not in fact flushable, because the wipes are not suitable for disposal by flushing down a household toilet." Kimberly–Clark manufactures these products with strong fibers that do not efficiently disperse when placed in a toilet. Kimberly–Clark's own testing demonstrates that the flushable wipes products break down in water at a significantly lower rate than toilet paper. Numerous news stories describe how flushable wipes have clogged municipal sewage systems, thereby requiring costly repairs. Consumers who have purchased some of the Kimberly–Clark flushable wipes products have lodged complaints on Kimberly–Clark's website that the flushable wipes damaged their septic tanks or plumbing.

Based on these allegations, Davidson brought four California state law causes of action against Kimberly–Clark, including for common law fraud and for violations of the Consumer Legal Remedies Act ("CLRA"), California Civil Code § 1750, *et seq.*, False Advertising Law ("FAL"), California Business & Professions Code § 17500, *et seq.*, and Unfair Competition Law ("UCL"), California Business & Professions Code § 17200, *et seq*. Davidson sought restitution, injunctive relief, and actual, punitive, and statutory damages on her CLRA claim; restitution and injunctive relief on her FAL and UCL claims; and compensatory and punitive damages on her common law fraud claim. Davidson sought to certify a class of all persons who purchased Cottonelle Wipes, Scott Wipes, Huggies Wipes, and Kotex Wipes in California between March 13, 2010 and the filing of the FAC on September 5, 2014.

B. Procedural History

Davidson initially filed this case in state court, but Kimberly–Clark removed it to federal court pursuant to the Class Action Fairness Act, 28 U.S.C. § 1332(d)(2). The district court denied in part and granted in part Kimberly–Clark's motion to dismiss the original complaint. In response, Davidson filed the operative FAC. Kimberly–Clark moved to dismiss the FAC, and the district court granted the motion, this time with prejudice. First, the district court granted Kimberly–Clark's Federal Rule of Civil Procedure ("Rule") 12(b)(1) motion to dismiss Davidson's injunctive relief claims, finding that Davidson lacked standing to seek injunctive relief because she was unlikely to purchase Kimberly–Clark's flushable wipes

in the future. Second, the district court granted Kimberly–Clark's motion to dismiss the FAC pursuant to Rules 9(b) and 12(b)(6), concluding that Davidson had failed to adequately allege why the representation "flushable" on the package was false. Finally, the district court concluded that Davidson "failed to allege damage under the UCL/FAL/CLRA or common law fraud" causes of action, because Davidson had not alleged that she suffered any harm due to her use of the Scott Wipes.

Davidson filed a motion for reconsideration under Rules 59(e) and 60(b), which the district court denied. First, the district court rejected Davidson's argument that it should have remanded the injunctive relief claims to state court. Second, the district court rejected Davidson's argument that it should have dismissed the FAC without prejudice so that Davidson could file a second amended complaint curing the alleged defects in the FAC. Third, the district court rejected Davidson's argument that the district court erred by ruling that Davidson had not adequately pled damages. Davidson timely appealed.

Davidson appeals six of the district court's rulings. First, Davidson argues that the district court erred by dismissing the FAC pursuant to Rule 9(b) for failure to adequately allege why the representation "flushable" was false. Second, Davidson argues that the district court erred by dismissing the FAC pursuant to Rule 12(b)(6) on the basis that Davidson had not suffered any damages. Third, Davidson argues that the district court erred by dismissing the original complaint pursuant to Rule 12(b) (6) for failing to plead how she came to believe the wipes were not flushable. Fourth, Davidson argues that the district court

abused its discretion in striking, pursuant to Rule 12(f), references to newspaper reports in the original complaint. Fifth, Davidson argues that the district court abused its discretion by denying Davidson leave to amend her FAC. Finally, Davidson argues that the district court erred by dismissing her injunctive relief claims pursuant to Rule 12(b)(1) for lack of standing.

II. STANDARD OF REVIEW

We review de novo dismissals under Rule 9(b) for failure to plead fraud with particularity. *Kearns v. Ford Motor Co*., 567 F.3d 1120, 1124 (9th Cir. 2009). We review de novo dismissals under Rule 12(b) (6) for failure to state a claim upon which relief can be granted. *Crowley v. Nevada ex. rel. Nev. Sec'y of State*, 678 F.3d 730, 736 (9th Cir. 2012). A district court's decision granting a motion to strike allegations in a complaint pursuant to Rule 12(f) is reviewed for abuse of discretion. *Nurse v. United States*, 226 F.3d 996, 1000 (9th Cir. 2000). Similarly, a district court's decision dismissing a complaint with prejudice, which thereby denies the plaintiff an opportunity to amend her complaint, is reviewed for abuse of discretion. *Zucco Partners, LLC v. Digimarc Corp.*, 552 F.3d 981, 989 (9th Cir. 2009). Finally, we review de novo dismissals under Rule 12(b)(1) for lack of subject-matter jurisdiction. *Novak v. United States*, 795 F.3d 1012, 1017 (9th Cir. 2015).

III. DISCUSSION

A. Theory of Fraud

The district court dismissed the FAC pursuant to Rule 9(b) because it concluded that Davidson failed to adequately allege "why" the representation that the wipes were flushable was false. Davidson argues that

the district court overlooked the FAC's "numerous, detailed factual allegations establishing that Defendants' wipes fail to disperse and therefore cause clogs and problems with sewer and septic systems." Kimberly–Clark argues that Davidson must allege that she experienced problems with her home plumbing or the relevant water treatment plant —allegations that are indisputably lacking in the FAC.

Because Davidson's common law fraud, CLRA, FAL, and UCL causes of action are all grounded in fraud, the FAC must satisfy the traditional plausibility standard of Rules 8(a) and 12(b)(6), as well as the heightened pleading requirements of Rule 9(b). *Kearns*, 567 F.3d at 1125 ("[W]e have specifically ruled that Rule 9(b)'s heightened pleading standards apply to claims for violations of the CLRA and UCL."); *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1103–04 (9th Cir. 2003) (explaining that even "[i]n cases where fraud is not a necessary element of a claim, a plaintiff may choose nonetheless to allege in the complaint that the defendant has engaged in fraudulent conduct," and in such cases, Rule 9(b)'s heightened pleading requirement must be met). "In alleging fraud ... a party must state with particularity the circumstances constituting fraud." Fed. R. Civ. P. 9(b). To properly plead fraud with particularity under Rule 9(b), "a pleading must identify the who, what, when, where, and how of the misconduct charged, as well as what is false or misleading about the purportedly fraudulent statement, and why it is false." *Cafasso, U.S. ex rel. v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1055 (9th Cir. 2011) (internal quotation marks and alterations omitted); *Vess*, 317 F.3d at 1106 ("The plaintiff must set forth what is false or misleading

about a statement, and why it is false." (quoting *Decker v. GlenFed, Inc.*, 42 F.3d 1541, 1548 (9th Cir. 1994))).

Assuming the truth of the allegations and construing them, as we must, in the light most favorable to Davidson, *Daniels-Hall*, 629 F.3d at 998, we hold that the FAC adequately alleged why the term "flushable" is false. [2] Davidson's theory of fraud is simple: "Unlike truly flushable products, such as toilet paper, which disperse and disintegrate within seconds or minutes, [Kimberly–Clark's flushable wipes] take hours to break down" or disperse, creating a risk that the wipes will damage plumbing systems, septic tanks, and municipal wastewater treatment facilities. Davidson alleged that flushable means "suitable for being flushed," which requires an item to be capable of dispersing within a short amount of time. This definition of flushable is supported by multiple allegations in the FAC, including dictionary definitions and Kimberly–Clark's own statement on its website that its flushable wipes "are flushable due to patented

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[2] Davidson argues that to survive Rule 12(b)(6), she need only plead enough facts to plausibly demonstrate that a reasonable consumer may be misled. Her observation is correct. *See Williams v. Gerber Products Co.*, 552 F.3d 934, 938 (9th Cir. 2008) (finding that UCL, CLRA, and FAL claims are governed by the "reasonable consumer standard," under which a plaintiff need only "show that members of the public are likely to be deceived" (internal quotation marks omitted)). The district court, however, did not dismiss the FAC only under Rule 12(b)(6), but also under Rule 9(b). Under Rule 9(b), Davidson was required not simply to adequately plead that reasonable consumers are likely to be deceived by Kimberly–Clark's use of the designation "flushable," but also *why* the designation "flushable" is false. *See Kearns*, 567 F.3d at 1125.

technology that allows them to lose strength and *break up when moving through the system after flushing*." In contrast to truly flushable or dispersible products, Davidson alleged, Kimberly–Clark's flushable wipes "take hours to begin to break down."

Importantly, Davidson alleged that the actual wipes she purchased failed to "disperse and disintegrate within seconds or minutes." For example, Davidson alleged that after using the wipes, she "noticed that each individual wipe felt very sturdy and thick, unlike toilet paper" and that "[s]he also noticed that the wipes did not break up in the toilet bowl like toilet paper but rather remained in one piece." Her personal experience is supported by additional allegations, including Kimberly–Clark's own testing of the wipes.

Kimberly–Clark argues that Davidson was required to allege damage to her pipes or her sewage system because "suitable for flushing" means that the wipes "would not cause problems in her plumbing or at the water treatment plant." But Kimberly–Clark justifies this theory by taking a single allegation in the FAC out of context. The FAC admittedly contains many allegations about how Kimberly–Clark's flushable wipes and other wipes marketed as "flushable" can cause damage to pipes and sewage systems. But these allegations are extraneous and do not detract from Davidson's basic theory of fraud: that "truly flushable products ... disperse and disintegrate within seconds or minutes," and Kimberly–Clark's flushable wipes do not "disperse and disintegrate within seconds or minutes." Since "[d]ismissal is proper only where there is no cognizable legal theory or an absence of sufficient facts alleged to support a cognizable legal theory," *Navarro v. Block*, 250 F.3d 729, 732 (9th

Cir. 2001), and since Davidson alleged a cognizable legal theory, dismissal was not appropriate in this case. *See Deutsch v. Flannery*, 823 F.2d 1361, 1365 (9th Cir. 1987) ("[A] pleading satisfies the particularity requirement [of Rule 9(b)] if it identifies the circumstances constituting fraud so that the defendant can prepare an adequate answer from the allegations." (internal quotation marks omitted)).

For these reasons, we hold that the FAC adequately alleged that Kimberly–Clark's use of the word "flushable" was false because the Scott Wipes Davidson purchased did not disperse as a truly flushable product would have.

B. Harm

The district court also dismissed Davidson's FAC in part because Davidson had not alleged that she suffered any damages. When Davidson questioned this conclusion in her motion for reconsideration, the district court clarified that Davidson "had not pled facts showing that her use of the wipes damaged her plumping, pipes, or septic system."

However, Davidson was not required to allege damage to her plumbing or pipes. Under California law, the economic injury of paying a premium for a falsely advertised product is sufficient harm to maintain a cause of action. *See, e.g.*, Cal. Bus. & Prof. Code § 17203 (requiring that an individual plead that she lost "money or property" because of the alleged deceptive conduct); Cal. Civ. Code § 1780(a) (stating that a plaintiff asserting a cause of action under the CLRA need only plead that she suffered "any damage"); *Hinojos v. Kohl's Corp.*, 718 F.3d 1098, 1104 (9th Cir.

2013) ("The lost money or property requirement therefore requires a plaintiff to demonstrate some form of economic injury as a result of his transactions with the defendant." (internal quotation marks omitted)). Thus, a consumer's allegation that "she would not have bought the product but for the misrepresentation ... is sufficient to allege causation ... [and] to allege economic injury." *Kwikset Corp. v. Superior Court*, 51 Cal.4th 310, 120 Cal.Rptr.3d 741, 246 P.3d 877, 890 (2011).

To properly plead an economic injury, a consumer must allege that she was exposed to false information about the product purchased, which caused the product to be sold at a higher price, and that she "would not have purchased the goods in question absent this misrepresentation." *Hinojos*, 718 F.3d at 1105. Davidson did that here. Davidson alleged that "[h]ad [Kimberly–Clark] not misrepresented (by omission and commission) the true nature of their Flushable Wipes, [she] would not have purchased [Kimberly–Clark's] product or, at a very minimum, she would have paid less for the product," and that "[Kimberly–Clark] charge[d] a premium price for flushable wipes." Because Davidson only needed to allege an economic injury to state a claim for relief, and because Davidson alleges that she paid a premium price for the Scott Wipes, Davidson has properly alleged that she was injured by Kimberly–Clark's allegedly false advertising.

C. Dismissal of the Original Complaint

The district court stated in its order dismissing the original complaint that "plaintiff has not alleged facts showing how she came to believe that the [Scott Wipes] were not flushable." Davidson argues that this

requirement "does not exist in law." According to Kimberly–Clark, the statement simply reflected the district court's observation that Davidson had not alleged facts about her own experience.

Davidson was required to "identify the who, what, when, where, and how of the misconduct charged, as well as what is false or misleading about the purportedly fraudulent statement, and why it is false." *Cafasso*, 637 F.3d at 1055 (internal quotation marks and alterations omitted). To the extent the district court dismissed the original complaint because Davidson failed to allege facts "showing how she came to believe that the [Scott Wipes] were not 'flushable,' " the district court erred. We are aware of no authority that specifically requires a plaintiff bringing a consumer fraud claim to allege how she "came to believe" that the product was misrepresented when, as in this case, all the Rule 9(b) considerations have been met.

D. Article III Standing for Injunctive Relief

Finally, we address the most challenging issue in this case: whether Davidson has standing to seek injunctive relief.[3] The district court concluded that Davidson lacked standing to assert a claim for injunctive relief, because Davidson "has no intention of purchasing the same Kimberly–Clark product in the future."

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[3] We do not address the district court's order granting the motion to strike allegations in the original complaint, as that complaint was replaced by the FAC, and we conclude that the FAC is sufficient as is to survive the heightened pleading requirements of Rule 9(b). Similarly, we do not address the district court's order denying leave to amend the FAC, as we conclude that the FAC is adequate as it stands.

Davidson argues that she has alleged a cognizable injury that establishes Article III standing to seek injunctive relief because (1) she will be unable to rely on the label "flushable" when deciding in the future whether to purchase Kimberly–Clark's wipes, and (2) Kimberly–Clark's false advertising threatens to invade her statutory right, created by the UCL, CLRA, and FAL, to receive truthful information from Kimberly–Clark about its wipes. We hold that Davidson properly alleged that she faces a threat of imminent or actual harm by not being able to rely on Kimberly–Clark's labels in the future, and that this harm is sufficient to confer standing to seek injunctive relief. We therefore do not reach Davidson's alternative statutory standing argument.

Article III of the U.S. Constitution authorizes the judiciary to adjudicate only "cases" and "controversies." The doctrine of standing is "an essential and unchanging part of the case-or-controversy requirement of Article III." Lujan v. Defs. of Wildlife, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). The three well-known "irreducible constitutional minim[a] of standing" are injury-in-fact, causation, and redressability. *Id.* at 560–61, 112 S.Ct. 2130. A plaintiff bears the burden of demonstrating that her injury-in-fact is "concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling." Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139, 149, 130 S.Ct. 2743, 177 L.Ed.2d 461 (2010).

A plaintiff must demonstrate constitutional standing separately for each form of relief requested. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC) Inc.*, 528 U.S. 167, 185, 120 S.Ct. 693, 145

L.Ed.2d 610 (2000). For injunctive relief, which is a prospective remedy, the threat of injury must be "actual and imminent, not conjectural or hypothetical." *Summers v. Earth Island Inst.*, 555 U.S. 488, 493, 129 S.Ct. 1142, 173 L.Ed.2d 1 (2009). In other words, the "threatened injury must be certainly impending to constitute injury in fact" and "allegations of *possible* future injury are not sufficient." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409, 133 S.Ct. 1138, 185 L.Ed.2d 264 (2013) (internal quotation marks and alteration omitted). Past wrongs, though insufficient by themselves to grant standing, are "evidence bearing on whether there is a real and immediate threat of repeated injury." *City of Los Angeles v. Lyons*, 461 U.S. 95, 102, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983) (internal quotation marks omitted). Where standing is premised entirely on the threat of repeated injury, a plaintiff must show "a sufficient likelihood that he will again be wronged in a similar way." *Id.* at 111, 103 S.Ct. 1660. In determining whether an injury is similar, we "must be careful not to employ too narrow or technical an approach. Rather, we must examine the questions realistically: we must reject the temptation to parse too finely, and consider instead the context of the inquiry." *Armstrong v. Davis*, 275 F.3d 849, 867 (9th Cir. 2001), *abrogated on other grounds by Johnson v. California*, 543 U.S. 499, 125 S.Ct. 1141, 160 L.Ed.2d 949 (2005).

It is an open question in this circuit to what extent a previously deceived consumer who brings a false advertising claim can allege that her inability to rely on the advertising in the future is an injury sufficient to grant her Article III standing to seek injunctive relief.

With no guidance from our court, district courts applying California law have split dramatically on this issue. *See Pinon v. Tristar Prods., Inc.*, No. 1:16-cv-00331-DAD-SAB, 2016 WL 4548766, at *4 (E.D. Cal. Sept. 1, 2016) ("The Ninth Circuit has not addressed the specific question ... [and] district courts within this circuit are divided about whether a plaintiff seeking to bring injunctive relief claims over deceptive labeling can establish Article III standing once they are already aware of an alleged misrepresentation."); *see also Russell v. Kohl's Dep't Stores, Inc*., No. ED CV 15-1143 RGK (SPx), 2015 WL 12781206, at *5 (C.D. Cal. Oct. 6, 2015) (describing the "split among the district courts in the Ninth Circuit as to whether a plaintiff lacks Article III standing to seek injunctive relief under the UCL and FAL when the plaintiff has knowledge of the defendant's alleged misconduct").

Courts concluding that such a plaintiff lacks standing to seek injunctive relief generally reason that "plaintiffs who are already aware of the deceptive nature of an advertisement are not likely to be misled into buying the relevant product in the future and, therefore, are not capable of being harmed again in the same way." *Pinon*, 2016 WL 4548766 at *4. For example, in *Machlan v. Procter & Gamble Company*, the plaintiff alleged that the defendant deceptively marketed its wipes as flushable, even though the wipes did not disperse like toilet paper and clogged pipes and sewage systems—facts nearly identical to those here. 77 F.Supp.3d 954, 957 (N.D. Cal. 2015). The district court in *Machlan* concluded that the plaintiff lacked Article III standing for injunctive relief because the plaintiff had alleged that the use of the term "flushable" was deceptive, so the plaintiff

could not be deceived again, even if he purchased the same wipes in the future. *Id.* at 960 ("[W]hen the alleged unfair practice is deception, the previously-deceived-but-now-enlightened plaintiff simply does not have standing under Article III to ask a federal court to grant an injunction.").[4] Multiple district courts have held similarly. *See Pinon*, 2016 WL 4548766 at *4 (collecting cases).

Other district courts in this circuit have concluded that a plaintiff has standing to seek an injunction against a product's misleading representation, even though the plaintiff already knows or has reason to believe that the representation is false. *See id.* (collecting cases). These courts generally reason that the plaintiff faces an actual and imminent threat of future injury because the plaintiff may be unable to rely on the defendant's representations in the future, or because the plaintiff may again purchase the mislabeled product.

For example, in *Ries v. Arizona Beverages USA LLC*, the plaintiffs alleged that the defendants en-

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[4] Interestingly, the *Machlan* court remanded the portions of the plaintiff's claims that sought injunctive relief, and then proceeded in federal court on some of the claims seeking monetary damages. *Id.* at 960–62, 964–65. The court reasoned that injunctive relief is an important remedy in California's consumer protection statutes and that allowing a defendant to undermine those statutes through removal to federal court "is an unnecessary affront to federal and state comity." *Id.* at 961. Here, Davidson similarly argues that the district court erred by denying her request to remand the injunctive relief "claim" to state court. Because we conclude that Davidson's alleged future injury justifies Article III standing for injunctive relief, we need not reach this issue.

gaged in false advertising by marketing their "AriZona Iced Tea" beverages as "All Natural" and "100% Natural" even though the product contained the non-natural ingredients high fructose corn syrup and citric acid. 287 F.R.D. 523, 527 (N.D. Cal. 2012). The defendants argued that the plaintiffs were not threatened by future harm because the plaintiffs became aware of the contents of the drink and could no longer be deceived. *Id.* at 533. The district court rejected this argument, reasoning that "[s]hould plaintiffs encounter the denomination 'All Natural' on an AriZona beverage at the grocery store today, they could not rely on that representation with any confidence." *Id.* The district court in *Ries* also explained that "the record is devoid of any grounds to discount plaintiffs' stated intent to purchase [the product] in the future." *Id.*; *see also Weidenhamer v. Expedia, Inc.*, No. C14-1239RAJ, 2015 WL 1292978, at *5 (W.D. Wash. Mar. 23, 2015) (explaining that the plaintiff "is entitled to rely on the statements made in [the] ad, even if he previously learned that some of those statements were false or deceptive," and that the plaintiff had adequately alleged that he likely would continue to be an Expedia customer); *Richardson v. L'Oreal USA, Inc.*, 991 F.Supp.2d 181, 194–95 (D.D.C. 2013) (finding that "the named plaintiffs, knowledgeable about the misrepresentations, are likely to suffer future harm in the absence of an injunction," because they will be unable "to rely on the [misleading] label with any confidence" and "will have no way of knowing" whether defendants "boost[ed] the label's veracity").

Today, we resolve this district court split in favor of plaintiffs seeking injunctive relief. We hold that a previously deceived consumer may have standing to

seek an injunction against false advertising or labeling, even though the consumer now knows or suspects that the advertising was false at the time of the original purchase, because the consumer may suffer an "actual and imminent, not conjectural or hypothetical" threat of future harm. *Summers*, 555 U.S. at 493, 129 S.Ct. 1142. Knowledge that the advertisement or label was false in the past does not equate to knowledge that it will remain false in the future. In some cases, the threat of future harm may be the consumer's plausible allegations that she will be unable to rely on the product's advertising or labeling in the future, and so will not purchase the product although she would like to. *See, e.g.*, *Ries*, 287 F.R.D. at 533; *Lilly v. Jamba Juice Co.*, No. 13-cv-02998-JT, 2015 WL 1248027, at *4 (N.D. Cal. Mar. 18, 2015) ("[U]nless the manufacturer or seller has been enjoined from making the same representation, [the] consumer ... won't know whether it makes sense to spend her money on the product."). In other cases, the threat of future harm may be the consumer's plausible allegations that she might purchase the product in the future, despite the fact it was once marred by false advertising or labeling, as she may reasonably, but incorrectly, assume the product was improved. *See, e.g.*, *L'Oreal*, 991 F.Supp.2d at 194–95. Either way, we share one district court's sentiment that we are "not persuaded that injunctive relief is *never* available for a consumer who learns after purchasing a product that the label is false." *Duran v. Creek*, 2016 WL 1191685, at *7 (N.D. Cal. Mar. 28, 2016) (emphasis added).

We observe—although our conclusion is not based on this consideration—that our holding alleviates the

anomalies the opposite conclusion would create. As the *Machlan* court aptly recognized, "[a]llowing a defendant to undermine California's consumer protection statutes and defeat injunctive relief simply by removing a case from state court is an unnecessary affront to federal and state comity [and] ... an unwarranted federal intrusion into California's interests and laws." 77 F.Supp.3d at 961; *see also Henderson v. Gruma Corp.*, 2011 WL 1362188, at *8 (C.D. Cal. Apr. 11, 2011) ("[T]o prevent [plaintiffs] from bringing suit on behalf of a class in federal court would surely thwart the objective of California's consumer protection laws."). This is because "the primary form of relief available under the UCL to protect consumers from unfair business practices is an injunction," *In re Tobacco II*, 46 Cal.4th 298, 93 Cal.Rptr.3d 559, 207 P.3d 20, 34 (2009)—a principle that the California Supreme Court recently reaffirmed. *See McGill v. Citibank, N.A.*, 216 Cal.Rptr.3d 627, 393 P.3d 85, 90, 93 (Cal. 2017) (explaining that "public injunctive relief under the UCL, the CLRA, and the false advertising law is relief that has the primary purpose and effect of prohibiting unlawful acts that threaten future injury to the general public," and that "public injunctive relief remains a remedy to private plaintiffs" under the UCL, FAL, and CLRA (internal quotation marks omitted)).

Were injunctive relief unavailable to a consumer who learns after purchasing a product that the product's label is false, California's consumer protection laws would be effectively gutted, as defendants could remove any such case. *Machlan*, 77 F.Supp.3d at 961. As the district court in *Machlan* explained, by finding that these plaintiffs fail to allege Article III standing

for injunctive relief, we risk creating a "perpetual loop" of plaintiffs filing their state law consumer protection claims in California state court, defendants removing the case to federal court, and the federal court dismissing the injunctive relief claims for failure to meet Article III's standing requirements. *Id*. On our Article III standing analysis, fully supported for the reasons we have explained by established standing principles, this "perpetual loop" will not occur.

Since we hold that a previously deceived plaintiff may have standing to seek injunctive relief, we must turn our attention to whether Davidson adequately alleged that she faces an imminent or actual threat of future harm caused by Kimberly–Clark's allegedly false advertising. Davidson alleged that she "continues to desire to purchase wipes that are suitable for disposal in a household toilet"; "would purchase truly flushable wipes manufactured by [Kimberly–Clark] if it were possible"; "regularly visits stores ... where [Kimberly–Clark's] 'flushable' wipes are sold"; and is continually presented with Kimberly–Clark's flushable wipes packaging but has "no way of determining whether the representation 'flushable' is in fact true."

We are required at this stage of the proceedings to presume the truth of Davidson's allegations and to construe all of the allegations in her favor. *Daniels-Hall*, 629 F.3d at 998. Though we recognize it is a close question, based on the FAC's allegations, we hold that Davidson adequately alleged that she faces an imminent or actual threat of future harm due to Kimberly–Clark's false advertising. Davidson has alleged that she desires to purchase Kimberly–Clark's flushable wipes. Her desire is based on her belief that "it would be easier and more sanitary to flush the

wipes than to dispose of them in the garbage." As in *Ries*, the FAC is "devoid of any grounds to discount [Davidson's] stated intent to purchase [the wipes] in the future." 287 F.R.D. at 533. And "[s]hould [Davidson] encounter the denomination ['flushable'] on a [Kimberly–Clark wipes package] at the grocery store today, [she] could not rely on that representation with any confidence." *Id.* We therefore hold that Davidson's allegation that she has "no way of 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. *See Clapper*, 568 U.S. at 409, 133 S.Ct. 1138.

IV. CONCLUSION

We hold that the FAC adequately alleges that Kimberly–Clark's use of the word "flushable" was false because the Scott Wipes that Davidson purchased did not adequately disperse as a truly flushable product would have. The district court erred in concluding that Davidson failed to allege harm and how she came to believe the wipes were not flushable. Finally, because Davidson's allegations sufficiently identified a certainly impending risk of her being subjected to Kimberly–Clark's allegedly false advertising, Davidson had standing to pursue injunctive relief. We therefore **REVERSE** and **REMAND.**

BERZON, Circuit Judge, concurring:

I concur in the majority opinion with the following caveat:

As to prospective relief, the majority opinion rests on the proposition that we are required to perform a separate standing analysis for each "form of relief," and concludes that Davidson's claims for restitution and for an injunction each qualify as having established standing. There is case law supporting both points, as the opinion states.

I write separately to note that duplicating the standing analysis in this way does not give effect to the "case or controversy" requirement of Article III. Instead, it appears to be an artifact of the discredited practice of conflating the prerequisites for injunctive relief with the Article III prerequisites for entry into federal court. Although we held in *Hodgers-Durgin v. de la Vina*, 199 F.3d 1037, 1040 n.1 (9th Cir. 1999) (en banc), overruling earlier precedents,[1] that *City of Los Angeles v. Lyons*, 461 U.S. 95, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983), requires this result, in my view it does not.

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[1] *See Smith v. City of Fontana*, 818 F.2d 1411, 1423 (9th Cir. 1987) (holding that a damages claim satisfies Article III standing with respect to other forms of relief "involv[ing] the same operative facts and legal theory"); *Giles v. Ackerman*, 746 F.2d 614, 619 (9th Cir. 1984) (treating the presence of a related damages claim as satisfying Article III standing, thereby allowing the court to consider "whether relief in addition to damages is appropriate"); *Gonzales v. City of Peoria*, 722 F.2d 468, 481 (9th Cir. 1983) (concluding that the presence of a damages claim "present[ed] a case in controversy as to injunctive relief").

Davidson seeks restitution for the premium she paid for a falsely labeled product, and no one doubts that she has standing in federal court to do so. Under California law, if Davidson prevails on her false advertising claim and is entitled to restitution, she is equally entitled to an injunction. *See* Cal. Bus. & Prof. Code §§ 17202–03; *see also Kwikset Corp. v. Superior Court*, 51 Cal.4th 310, 120 Cal.Rptr.3d 741, 246 P.3d 877, 894–95 (2011). No additional showing, equitable or otherwise, is needed to trigger her right to injunctive relief. It follows that we have a single dispute—a single case, a single controversy —giving rise to multiple forms of relief.

It is mechanically possible, in this case, to define Davidson's "case or controversy" differently, and to assign the requirements of injury, causation, and redressability separately to each remedy she seeks. But it turns Article III on its head to let the remedies drive the analysis, where state law clearly envisions those remedies as the product of a single adjudication of a single issue. *See Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal.4th 1134, 131 Cal.Rptr.2d 29, 63 P.3d 937, 943 (2003). And proceeding in that way fundamentally undermines, substantively, the enforcement of state laws in federal court. *Cf. Erie R. Co. v. Tompkins*, 304 U.S. 64, 78, 58 S.Ct. 817, 82 L.Ed. 1188 (1938) ("Congress has no power to declare substantive rules of common law applicable in a state .... And no clause in the Constitution purports to confer such a power upon the federal courts.").

It was in recognition of this anomaly that the district court in *Machlan v. Procter & Gamble Co.* remanded only the prospective relief aspect of that similar false advertising case to state court. 77 F.Supp.3d

954, 960–61 (N.D. Cal. 2015). I doubt that is an acceptable option. But the impetus to do that springs from the same problem I have identified—that a defendant should not be able to strip a plaintiff of remedies dictated by state law by removing to federal court a case over which there surely *is* Article III jurisdiction over the liability issues. *Cf. Larson v. Valente*, 456 U.S. 228, 238–39, 102 S.Ct. 1673, 72 L.Ed.2d 33 (1982) ("The essence of the standing inquiry is whether the parties seeking to invoke the court's jurisdiction have alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues ...." (internal quotation marks omitted)).

Federal courts have a history of improperly elevating the prerequisites for relief to the status of jurisdictional hurdles. *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, — U.S. —, 134 S.Ct. 1377, 1387–88 & n.4, 188 L.Ed.2d 392 (2014). Notably, although *Lyons* is now widely credited as the origin of the rule that injunctive relief always requires its own standing inquiry, *see, e.g.*, *Hodgers-Durgin*, 199 F.3d at 1040 n.1, that case, as I read it, did *not* make that jurisdiction/remedy mistake. Rather, *after* determining that there was no independent standing to seek injunctive relief, *Lyons* separately noted that there was also a pending request for damages. *Lyons*, 461 U.S. at 111, 103 S.Ct. 1660. The Court then inquired into whether the *nonjurisdictional* requirements for equitable prospective relief were met, and concluded they were not. *Id.* at 111–12, 103 S.Ct. 1660. In my view, this aspect of *Lyons* recognized that there *was* a case or controversy regarding liability issues because of the damages claim, but precluded injunctive relief

on nonjurisdictional grounds specific to the equitable requirements for such relief—the absence of irreparable harm. *Id.* Were this not what *Lyons* meant, the entire discussion of the equitable principles governing prospective relief would have been superfluous.

Conflating the elements of relief with the elements of standing is of little consequence in most cases following *Lyons*. Where the availability of injunctive relief is governed by federal common law, the common-law prerequisites for injunctive relief must eventually be satisfied, and largely mirror the standing prerequisites. *See also, e.g.*, *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 184–88, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000) (conducting a separate standing analysis of civil penalties, but concluding that deterrence of ongoing harm suffices for constitutional standing). But collapsing the inquiries becomes problematic when it imposes *substantive* limits on the availability of relief under state law, in the service of constitutional interests that aren't actually under threat.

I nonetheless concur fully in the majority opinion. *Hodgers-Durgin* is binding law, and it does require a separate standing analysis with regard to prospective relief. As the majority opinion well explains, as long as a separate standing analysis is necessary despite the state prescription of more or less automatic prospective relief, that requirement is met here.

APPENDIX C

76 F.Supp.3d 964

**United States District Court,
N.D. California**

Jennifer DAVIDSON, Plaintiff,

v.

KIMBERLY-CLARK CORPORATION, et al.,
Defendants.

No. C 14–1783 PJH

|

Signed December 19, 2014

ORDER GRANTING MOTION TO DISMISS

PHYLLIS J. HAMILTON, United States District Judge

Defendants' motion pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) for an order dismissing the first amended complaint came on for hearing on November 12, 2014. Plaintiff appeared by her counsel Adam Gutride, and defendants appeared by their counsel Amy Lally. Having read the parties' papers and carefully considered their arguments and the relevant legal authority, the court hereby GRANTS the motion as follows.

BACKGROUND

Plaintiff Jennifer Davidson alleges that defendants Kimberly–Clark Corporation, Kimberly–Clark Worldwide, Inc.; and Kimberly–Clark Global Sales

LLC ("Kimberly–Clark" or "defendants") falsely advertised that four cleansing cloths/"wipes" they manufacture and sell are "flushable." First Amended Complaint ("FAC") ¶¶ 17, 19–25, 31–38. The four products at issue are Kleenex® Cottonelle® Fresh Care Flushable Wipes & Cleansing Cloths, Scott Naturals® Flushable Moist Wipes, Huggies® Pull–Ups® Flushable Moist Wipes, and U by Kotex® Refresh flushable wipes. FAC ¶ 17.

Plaintiff asserts that "[r]easonable consumers understand the word 'flushable' to mean suitable for disposal down a toilet." FAC ¶ 18. Plaintiff asserts that the four Kimberly–Clark products are not in fact "flushable" under that definition. *Id.* She believes that after the wipes are flushed down a toilet, they fail to "disperse," with the result that they may clog municipal sewer systems and septic systems, and/or damage pipes and sewage pumps. *See* FAC ¶¶ 18, 39. Indeed, she claims that the defendants' flushable wipes are designed so as to "not break down easily when submersed in water." FAC ¶ 40.

At some point in 2013, plaintiff purchased one of the products at issue—Scott Naturals® Flushable Moist Wipes (also referred to as Scott Naturals®> Flushable Cleansing Cloths)—which at the time she believed had been "specially designed to be suitable for flushing down toilets ... [without] caus [ing] problems in her plumbing or at the water treatment plant." FAC ¶ 52.

She does not allege that her use of the wipes caused plumbing problems. Instead, she simply asserts that after "several uses of the wipes," she "began

to become concerned that they were not truly flushable, [and] so stopped flushing the wipes and stopped using the product altogether." FAC ¶ 53. She has not purchased any of defendants' "flushable" products since that time, FAC ¶ 55 (and indeed bought the Scott Naturals® product on only the one occasion "[i]n 2013").

Plaintiff asserts that she would not have purchased the Scott Naturals® wipes had defendants not misrepresented "the true nature" of their "flushable" products—or, at a minimum, would have paid less for the Scott Naturals® product because she would not have obtained the benefit of being able to flush it, FAC ¶ 56 (even though she did flush it).

Plaintiff filed the original complaint in this case on March 13, 2014 in the Superior Court of California, County of San Francisco, as a proposed class action. Plaintiff asserts violations of the Consumer Legal Remedies Act ("CLRA"), Cal. Civ.Code § 1750 et seq., and the False Advertising Act ("FAL"), Cal. Bus. & Prof.Code § 17500 et seq.; common law fraud, deceit and/ or misrepresentation; and unlawful, unfair, and deceptive trade practices, in violation of Cal. Bus. & Prof.Code § 17200 et seq. ("UCL").

Plaintiff claims that the four products at issue are deceptively advertised as "flushable," FAC ¶¶ 35–38; that they are all manufactured "using the same proprietary paper blend, for which [d]efendants own the patent," FAC ¶ 40; and that they were all subjected to the same "flawed" tests used for setting the "guidelines" for determining whether a product is "flushable," FAC ¶¶ 41–47. She asserts that wipes that are

not truly "flushable" are the cause of numerous problems at municipal sewage treatment facilities. FAC ¶¶ 48–51.

Defendants removed the case on April 17, 2014, asserting jurisdiction under the Class Action Fairness Act, 28 U.S.C. § 1332(d)(2)(A). They subsequently moved to dismiss the complaint and strike certain allegations in the complaint. On August 8, 2014, the court issued an order granting the motion in part and denying it in part.

The court denied the motion to dismiss the statutory UCL/ FAL/CLRA causes of action for lack of subject matter jurisdiction (failure to allege Article III and statutory standing), with the exception of the claim for prospective injunctive relief, for which the court found plaintiff had no standing.

The court granted the motion to dismiss the statutory claims for failure to allege fraud with particularity as to affirmative misrepresentations, with leave to amend, to plead facts showing that defendants made false statements, and that she relied on the alleged misrepresentations. The court denied the motion to dismiss the statutory claims for failure to state a claim of fraudulent omissions, finding that it was unclear whether plaintiff's claim was that the alleged omission of information explaining the meaning of "flushable" was actionable because it was contrary to an affirmative representation made by defendants, or that it was actionable because defendants had a duty to disclose to her (and/or the public) that the wipes might not completely disperse by the time they arrived at the wastewater treatment plant.

The court granted the motion to strike as irrelevant the allegations regarding sewage/septic systems and municipal wastewater treatment plants in locations other than the city where plaintiff lives (San Francisco, California). The court denied the motion to strike allegations regarding products plaintiff did not purchase and advertising she did not view, on the ground that those allegations might possibly be relevant to the question whether plaintiff can assert UCL/FAL/CLRA claims on behalf of a proposed class as to such products or advertising.

Plaintiff filed the FAC on September 5, 2014, alleging the same four causes of action as in the original complaint. Under the CLRA claim, plaintiff seeks restitution, injunctive relief, actual damages, punitive damages, and statutory damages, on her behalf and on behalf of the other members of the proposed class. Under the UCL/FAL claims, plaintiff seeks restitution and injunctive relief, on her own behalf and on behalf of the other members of the proposed class. Under the fraud claim, plaintiff seeks compensatory damages and punitive damages, on her own behalf and on behalf of the other members of the proposed class. On all four causes of action, plaintiff seeks on her own behalf and on behalf of the other members of the proposed class "and the general public," attorney's fees under the CLRA and California Code of Civil Procedure § 1021.5, plus costs of suit.

Defendants now seek an order dismissing the FAC for lack of subject matter jurisdiction and failure to state a claim, and striking certain allegations in the FAC.

DISCUSSION

A. Motion to Dismiss for Lack of Subject Matter Jurisdiction

1. Legal standard

Federal courts can adjudicate only those cases which the Constitution and Congress authorize them to adjudicate —those involving diversity of citizenship or a federal question, or those to which the United States is a party. *Kokkonen v. Guardian Life Ins. Co. of America,* 511 U.S. 375, 380–81, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994). The court is under a continuing obligation to ensure that it has subject matter jurisdiction. *See* Fed. R. Civ. P. 12(h) (3). A defendant may raise the defense of lack of subject matter jurisdiction by motion pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. The plaintiff always bears the burden of establishing subject matter jurisdiction. *Kokkonen,* 511 U.S. at 377, 114 S.Ct. 1673.

Standing is "an essential and unchanging part of the case-or-controversy requirement of Article III" of the United States Constitution. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). To establish a "case or controversy" within the meaning of Article III, a plaintiff must, at an "irreducible minimum," show an "injury in fact" which is concrete and not conjectural, as well as actual or imminent; a causal causation between the injury and defendant's conduct or omissions; and a likelihood that the injury will be redressed by a favorable decision. *Monsanto Co. v. Geertson Seed Farms,* 561 U.S. 139, 149, 130 S.Ct. 2743, 177 L.Ed.2d 461 (2010); *Lujan,* 504 U.S. at 560–61, 112 S.Ct. 2130.

Standing is not subject to waiver, and must be considered by the court even if the parties fail to raise it. *See United States v. Hays,* 515 U.S. 737, 742, 115 S.Ct. 2431, 132 L.Ed.2d 635 (1995).

2. Defendants' Motion

In the prior order, the court found that plaintiff lacked standing to seek prospective injunctive relief because she failed to allege facts showing she intended to purchase the product at issue in the future—and more importantly, actually indicated that she would not purchase any of defendants' "flushable" products in the future. Aug. 8, 2014 Order, at 6–9. Although the court did not specify that the dismissal of the claims for prospective injunctive relief was with prejudice, it seemed clear to the court that any amendment would be futile. Nevertheless, the FAC again seeks prospective injunctive relief. Defendants argue that the court should dismiss the injunctive relief claims for the same reason as stated in the prior order.

The court finds that the FAC fails to allege sufficient facts to show standing to seek injunctive relief. In a new section of the FAC, plaintiff alleges that she "continues to desire to purchase wipes that are suitable for disposal in a household toilet" and that she "would purchase truly flushable wipes manufactured by [d]efendants if it were possible to determine prior to purchase if the wipes were suitable to be flushed." *See* FAC ¶ 57. She claims that she "regularly visits stores such as Safeway," where defendants' "flushable" wipes are sold, but has been "unable to determine the flushability of the wipes on the shelves." *Id.* She "knows that the design and construction of the [f]lushable [w]ipes may change over time, as [d]efendants

use different technology or respond to pressure from legislatures, government agencies, competitors, or environmental organizations," but as long as defendants use "flushable" to describe wipes that are not in her opinion, flushable, she will continue to have no way of knowing whether the representation "flushable" is true or not. *Id.*

Based on these "new" allegations, plaintiff asserts in her opposition to the motion that as long as defendants continue to deny her accurate information about products she wishes to purchase, the ongoing "injury in fact" is sufficient to confer standing. Plaintiff contends that even if she does not have statutory standing because she has not alleged a likelihood of future loss of money or property, she has adequately alleged Article III standing based on a continuing constitutional "injury in fact" based on a "credible threat that defendants' ongoing violations of California's consumer protection laws" will cause her injury.

Plaintiff claims that courts in this district have granted injunctive relief "in identical circumstances." In support, she cites three "food" cases—*Ries v. Arizona Beverages USA LLC,* 287 F.R.D. 523, 533 (N.D.Cal.2012); *Henderson v. Gruma Corp.,* 2011 WL 1362188 at *8 (C.D.Cal. Apr. 11, 2011); and *Brazil v. Dole Packaged Foods, LLC.,* 2014 WL 2466559 (N.D.Cal. May 30, 2014). She does not explain, however, how those cases are "identical" to the present case.

The court finds that the motion must be GRANTED. As stated in the prior order, plaintiff lacks standing to assert a claim for prospective injunctive relief, as she has indicated she has no intention of

purchasing the same Kimberley–Clark product in the future. Thus, leave to amend would be futile. Plaintiff alleges that the product at issue is not "flushable," and that she wishes to purchase a product that is truly "flushable." Given that she has concluded that the "flushable" wipes at issue in this case are not truly "flushable," any such product that she would be willing to purchase would necessarily be a product with a different design and construction, not the product at issue here. *See* FAC ¶¶ 53, 54, 57. Just as the court found with regard to the original complaint, plaintiff wants to purchase *different* wipes, not the same wipes again.

Moreover, the threat of future harm alleged in the FAC is that Kimberly–Clark *might* redesign its product in the future, and that plaintiff *might* not know that the product has been redesigned to be more "flushable," and that she *might* not purchase it. *See* FAC ¶ 57. This is exactly the type of conjectural or hypothetical injury for which a plaintiff does not have standing. *See, e.g., Mayfield v. U.S.,* 599 F.3d 964, 970 (9th Cir.2010); *Profant v. Have Trunk Will Travel,* 2011 WL 6034370 at *5 (C.D.Cal. Nov. 29, 2011).

Unlike the plaintiffs in the cases cited by plaintiff in her opposition, plaintiff is not likely to purchase the Scott Wipes if the "flushable" label is simply removed, given that she stopped using the wipes after she made the determination that they were not "flushable." The allegations in the FAC make clear that plaintiff does not want a non-"flushable" wipe, and that she would not have purchased the Scott wipes had she known they were not "flushable" under her definition. Thus, even if Kimberly–Clark removed the "flushable" label and even if it charged less for the product, plaintiff

would still not buy it because she believes it is not flushable.

Courts have found in *Ries* and other "food" cases that the product might still be purchased by the plaintiff if properly labeled. However, where a plaintiff has no intention of purchasing the product in the future, a majority of district courts have held that the plaintiff has no standing to seek prospective injunctive relief, and some have also held that a plaintiff who is aware of allegedly misleading advertising has no standing to seek prospective injunctive relief. *See, e.g., Rahman v. Mott's LLP,* 2014 WL 5282106 at *5–6 (N.D.Cal. Oct. 15, 2014) (discussing issue and citing cases); *In re ConAgra Foods, Inc.,* 2014 WL 4104405 at *27–29, 302 F.R.D. 537 (C.D.Cal. Aug. 1, 2014) (same, in context of motion to certify Rule 23(b) (2) class).

In addition, in cases such as this one, involving claims that a product does not work or perform as advertised, where the plaintiff clearly will not purchase the product again, courts have found no risk of future harm and no basis for prospective injunctive relief. *See, e.g., Delarosa v. Boiron,* 2012 WL 8716658 at *5 (C.D.Cal. Dec. 28, 2012) (advertising for homeopathic medication was false because product did not perform as advertised, but plaintiffs would not buy product in future because in their view it did not work); *Castagnola v. Hewlett–Packard Co.,* 2012 WL 2159385 at *5 (N.D.Cal. June 13, 2012) (consumers signed up on website for "membership" with monthly fees for service they thought was free had no standing to seek injunctive relief where they did not want to be signed up for the paid service and had no intention to continue with it).

Here, plaintiff wants to purchase only those wipes that she has determined to be "flushable," and since she has determined that the Scott Wipes are not "flushable" under her definition, she will not purchase them. Were Kimberly–Clark to redesign the product to satisfy plaintiff's definition of "flushable," it would not be the same product (unlike a food product where the "all natural" label is removed, or even where, *e.g.,* high fructose corn syrup is replaced by sugar but the product remains essentially the same). Here, if plaintiff's allegations are accepted as true, the design of the Kimberly–Clark products at issue precludes any of them from being considered "flushable" (under plaintiff's definition), and she will therefore not purchase the wipes. Thus, plaintiff lacks standing to seek prospective injunctive relief as to the products at issue.

B. Motion to Dismiss for Failure to State a Claim

1. Legal Standard

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) tests for the legal sufficiency of the claims alleged in the complaint. *Ileto v. Glock, Inc.,* 349 F.3d 1191, 1199–1200 (9th Cir.2003). Review is limited to the contents of the complaint. *Allarcom Pay Television, Ltd. v. Gen. Instrument Corp.,* 69 F.3d 381, 385 (9th Cir.1995). Federal Rule of Civil Procedure 8 requires that a complaint include a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2).

A complaint may be dismissed under Rule 12(b)(6) for failure to state a claim if the plaintiff fails to state a cognizable legal theory, or has not alleged sufficient facts to support a cognizable legal theory. *Somers v. Apple, Inc.,* 729 F.3d 953, 959 (9th Cir.2013). While

the court is to accept as true all the factual allegations in the complaint, legally conclusory statements, not supported by actual factual allegations, need not be accepted. *Ashcroft v. Iqbal,* 556 U.S. 662, 678–79, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009); *see also In re Gilead Scis. Sec. Litig.,* 536 F.3d 1049, 1055 (9th Cir.2008).

The allegations in the complaint "must be enough to raise a right to relief above the speculative level," and a motion to dismiss should be granted if the complaint does not proffer enough facts to state a claim for relief that is plausible on its face. *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 555, 558–59, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007) (citations and quotations omitted). A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal,* 556 U.S. at 678, 129 S.Ct. 1937 (citation omitted). "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief.' " *Id.* at 679, 129 S.Ct. 1937. In the event dismissal is warranted, it is generally without prejudice, unless it is clear the complaint cannot be saved by any amendment. *See Sparling v. Daou,* 411 F.3d 1006, 1013 (9th Cir.2005).

Although the court generally may not consider material outside the pleadings when resolving a motion to dismiss for failure to state a claim, the court may consider matters that are properly the subject of judicial notice. *Knievel v. ESPN,* 393 F.3d 1068, 1076 (9th Cir.2005); *Lee v. City of Los Angeles,* 250 F.3d 668,

688–89 (9th Cir.2001). Additionally, the court may consider exhibits attached to the complaint, *see Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.,* 896 F.2d 1542, 1555 n. 19 (9th Cir.1989), as well as documents referenced extensively in the complaint and documents that form the basis of a the plaintiff's claims. *See No. 84 Employer–Teamster Jt. Counsel Pension Tr. Fund v. America West Holding Corp.,* 320 F.3d 920, 925 n. 2 (9th Cir.2003).

Finally, in actions alleging fraud, "the circumstances constituting fraud or mistake shall be stated with particularity." Fed. R. Civ. P. 9(b); *Swartz v. KPMG LLP,* 476 F.3d 756, 764 (9th Cir.2007) ("Under Rule 9(b), falsity must be pled with specificity, including an account of the "time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentations."). The plaintiff must do more than simply allege the neutral facts necessary to identify the transaction; he must also explain why the disputed statement was untrue or misleading at the time it was made. *Yourish v. California Amplifier,* 191 F.3d 983, 992–93 (9th Cir.1999). "[A]llegations of fraud must be specific enough to give defendants notice of the particular misconduct which is alleged to constitute the fraud charged "so that they can defend against the charge and not just deny that they have done anything wrong." *Sanford v. MemberWorks, Inc.,* 625 F.3d 550, 558 (9th Cir.2010) (citation and quotation omitted).

2. Defendants' motion

In the order regarding the motion to dismiss the original complaint, the court dismissed the UCL/FAL and CLRA causes of action, finding that plaintiff had

failed to allege facts showing reliance on any alleged misrepresentations. The court found that plaintiff did not allege in the complaint that she had seen any of defendants' advertisements or websites—let alone that she relied on any of them in deciding to make her purchase. The court found that plaintiff had alleged only that she based her decision to purchase the Scott Naturals® wipes on the representation on the package that they were "flushable."

In addition, the court noted, plaintiff alleged no facts showing how she came to believe that the Scott product was not "flushable." She did not allege that she herself experienced any problems flushing the product down the toilet, or that the product caused any blockage or clogging in her pipes. She asserted only that after several uses of the wipes she "began to seriously doubt that they were truly flushable."

In the present motion, defendants again argue that the complaint should be dismissed under Rule 9(b) for failure to allege fraud with particularity, and that the dismissal should be with prejudice because the FAC includes the same deficiencies as the original complaint. Defendants assert that the FAC does not sufficiently plead that the challenged representation—that the wipes were "flushable"—was false. They also contend that because the FAC fails to allege sufficient facts showing that Kimberly–Clark's specific products (as opposed to other products) are not suitable for flushing in municipal sewer systems (like plaintiff's), her economic damages theory fails.

Finally, defendants assert that the FAC fails to state a claim based on alleged fraudulent omissions. In order to state a claim of fraudulent omissions under

the UCL/ FAL, CLRA, or as a claim of common law fraud, a plaintiff must allege facts either showing that the alleged omissions are "contrary to a representation actually made by the defendant, or showing an omission of a fact the defendant was obliged to disclose." *Daugherty v. Am. Honda Motor Co., Inc.,* 144 Cal.App.4th 824, 835, 51 Cal.Rptr.3d 118 (2006); *see also Lovejoy v. AT & T Corp.,* 92 Cal.App.4th 85, 96, 92 Cal.App.4th 1016F, 111 Cal.Rptr.2d 711 (2001).

In the FAC, plaintiff amended her allegation to include the following basis for the fraudulent omissions claim:

> If [d]efendants informed consumers that the Flushable Wipes were not suitable for flushing down a toilet, and that doing so created a substantial risk that the consumers would clog or damage their household plumbing, or clog, damage and increase the costs of municipal sewage treatment systems (which they bear as taxpayer and ratepayers), they would not pay the premium, but rather, would opt to purchase the cheaper items not labeled "flushable."

FAC ¶ 30.

Defendants argue that, assuming that "flushable" is (as plaintiffs argue) reasonably defined as meaning "suitable for flushing down a toilet," the FAC clarifies that the fraudulent omissions claim is premised on defendants' alleged omission of "facts" contrary to the "flushable" representation, specifically the "fact" that flushing the wipes "created a substantial risk that consumers would clog or damage their household

plumbing, or clog, damage and increase the costs of municipal sewage treatment systems (which they bear as taxpayer and ratepayers)" as alleged in FAC ¶ 30.

Defendants contend, therefore, that in order to survive a motion to dismiss under Rule 12(b)(6) and Rule 9, the FAC must allege facts to support the conclusion that Kimberly–Clark's wipes "created a substantial risk that the consumers would clog or damage their household plumbing, or clog, damage and increase the costs of municipal sewage treatment systems." Here, defendants argue, plaintiff has alleged no facts to support this conclusion as to the specific products manufactured by Kimberly–Clark, and it would not be reasonable for the court to infer any facts to support this conclusion in light of judicially noticeable facts to the contrary (citing a statement by a municipal sewer authority in New Jersey, which they have attached to their Request for Judicial Notice ("RJN"), that Kimberly–Clark's "flushable" wipes were the only ones that passed the authority's test of dispersability).

In opposition, plaintiff asserts that the FAC pleads facts sufficient to state a claim for violations of the UCL/ FAL and CLRA, and a claim for common law fraud. Plaintiff argues that the FAC specifically pleads that she viewed the package for Scott Naturals® wipes in a San Francisco Safeway in 2013, where she read, and relied upon, the word "flushable" and noticed that the Scott wipes were more expensive than the wipes that were not labeled "flushable;" and that on the basis of that "misrepresentation," she was led to believe that the product was suitable for disposal down a household toilet, when it was not. She

asserts that her claims and injuries are premised on her reliance on the single word "flushable" on the Scott Naturals® product packaging (as detailed in FAC ¶ 52) and not on any other representations alleged in the FAC.

With regard to defendants' assertion that the FAC fails to allege facts showing that the claim that defendants' wipes were "flushable" was false, plaintiff cites to allegations regarding three U.S. cities and "many other consumers" who found defendants' wipes to be unsuitable for flushing because they clogged household plumbing and municipal treatment systems (citing FAC ¶¶ 49–51, 58). She also points to allegations explaining that proper and immediate dispersing is an essential element of a material's suitability for flushing (citing FAC ¶ 34); describing the "special proprietary paper" used by defendants to manufacture their wipes, which paper is designed to sit in a wet environment for months without breaking apart, and which therefore cannot disperse efficiently when flushed down a toilet (citing FAC ¶ 40); referring to videos on defendants' websites showing that the wipes take hours to disperse (citing FAC ¶ 44[1]); and asserting that plaintiff herself observed that defendants' wipes did not "disperse properly" in the toilet prior to being flushed (citing FAC ¶ 53).

Plaintiff also cites to defendants' alleged use of a "flawed technology"—a "flushability test" that she claims does not really measure whether the wipes are suitable for flushing (citing FAC ¶¶ 41–47). She contends that the test—which was developed by the Association of Nonwoven Fabrics Industry—does not mimic real-world conditions because the water in the tests is agitated more strongly than is the water at the

wastewater treatment plants; because the tests fail to take into account the wipes' propensity for "ragging" or becoming tangled with one another; and because the tests assume that wipes will take significant time to reach wastewater treatment plant, whereas in plaintiff's view the journey may take only "a few minutes."

Finally, plaintiff argues that her omission-based claims are properly pled. She agrees with defendants' position that the new allegations in the FAC clarify that she is proceeding solely under the theory that the alleged omission was contrary to a representation made by the defendants—that their wipes are "flushable." She asserts that as pled in the FAC, there is only one proper definition of the word "flushable"—*i.e.,* "suitable for disposal by flushing down a toilet" (citing FAC ¶¶ 31–35).

Plaintiff concedes that the representation that the wipes were "flushable" might be true if the word were defined as meaning "capable of being flushed," but she argues that the use of this word would still be misleading to a reasonable consumer because that consumer might understand the word to mean "suitable for being flushed." She claims that the wipes are not (in her view) "suitable for being flushed" because of the risk of damage to household plumbing and municipal wastewater treatment systems. She asserts that it was a material omission "to fail to tell her how [d]efendants were defining 'flushable' and that the wipes were not actually suitable for disposal via toilet because of the risk of damage to household plumbing and municipal sewage treatment systems."

The court finds that defendants' motion must be GRANTED. Plaintiff has failed to correct the deficiencies of the original complaint, and the FAC is also deficient in other ways identified by defendants. Assuming for the sake of argument that plaintiff has adequately pled that she relied on the single word "flushable" on the product packaging for the Scott Naturals® wipes that she purchased, the court finds that she has still not alleged facts showing that the representation "flushable" is false or misleading as to the Scott Naturals® product or as to any of the other three Kimberly–Clark products at issue. It is not enough for her to simply claim that it is false—she must allege facts showing *why* it is false. *See Vess v. Ciba–Geigy Corp. USA,* 317 F.3d 1097, 1106 (9th Cir.2003) ("The plaintiff must set forth what is false or misleading about a statement, and why it is false.").

Having personally experienced no problems with her plumbing on account of her use of the Scott Naturals® wipes or any of the products at issue, plaintiff must point to some other specific facts showing that the designation "flushable" is false. Plaintiff has failed to do this. She cites to articles on the Internet that discuss problems with clogs and blockages at wastewater treatment plants in various locations in the United States, but those problems appear to have had a number of causes—including people flushing "non-flushable" wipes or other "non-flushable" materials down the toilet.

Plaintiff asserts that "[m]unicipalities all over the country have experienced numerous problems that have been tied specifically to [d]efendants' [f]lushable [w]ipes." FAC ¶ 48. She bases this allegation on television news reports originating in three local news

markets—Bakersfield CA, Jacksonville FL, and San Antonio TX (though not San Francisco, the city where plaintiff lives)—in which the reporters opined that "flushable" wipes, including those manufactured by Kimberly–Clark and numerous other companies, have caused clogs and blockages in residential plumbing systems and at local sewage treatment plants. *See* FAC ¶¶ 49–51.

However, the FAC also cites news articles stating that problems at municipal wastewater treatment plants are caused by consumers who dispose of non-flushable wipes (and other objects not intended to be flushed, such as diapers, rags, towels, hair, cigarette butts, kitty litter, and doggy waste bags) into sewer systems. *See* FAC ¶ 34. In addition, the FAC acknowledges that issues involving wipes at wastewater treatment plants are caused by wipes interacting with non-flushable items (such as debris) in the water treatment system. *See* FAC ¶¶ 18, 46.

Plaintiff also bases the allegation of falsity on statements by "consumers" who allegedly posted complaints on a Cottonelle® website (which currently cannot be accessed). The comments as quoted by plaintiff are vague and lacking in detail, and also appear to involve allegations of damage to the consumers' septic systems, not municipal sewer systems. *See* FAC ¶ 58. These references do not satisfy plaintiff's obligation to plead with specificity how the "flushable" representation was false and caused the damage. The comments do not specify when the consumer used the product and how many times, how the consumer used the product, and the other "who, what, when, where, and how" of the misconduct that must be alleged in the

complaint. Without those details, plaintiff's statement that the wipes are not "flushable" is nothing more than an unwarranted conclusion.

In short, plaintiff has failed to plead with particularity how Kimberly–Clark's wipes are not flushable. She alleges that she flushed the wipes—thus, the designation "flushable" is literally true—but she does not allege that they caused problems with her plumbing system, or even issues with her sewer system. Such allegations might be relevant to her definition of "flushable" as "suitable for disposal down a toilet," but the references to other people's plumbing issues or to other cities' wastewater treatment systems are not sufficiently detailed to meet the pleading standard. *See In re GlenFed Sec. Litig.,* 42 F.3d 1541, 1548 (9th Cir.1994) (plaintiff required to plead with particularity "why the statement or omission complained of was false or misleading").

Plaintiff also criticizes the tests Kimberly–Clark has performed on its "flushable" wipes (documented in videos on its website), claiming that the tests are worthless because they do not mimic what she calls "real-world conditions." Specifically, she claims that the water is agitated more strongly in the tests than at the wastewater treatment plants; that the tests fail to take into account what she asserts is the wipes' propensity for "ragging" or becoming tangled with one another; and that the tests assume that wipes will take significant time to reach the wastewater treatment plant, whereas in plaintiff's view the journey may take only "a few minutes." If anything, plaintiff's discussion of the tests Kimberly–Clark conducted on its products underscores the fact that it would be impossible for any factfinder to determine whether the

wipes are "flushable" under plaintiff's definition because of the differences and variations among types of wipes, operation of wastewater or septic treatment systems in different locations, and pipes and drainage systems.

Plaintiff's failure to plead facts showing why the designation "flushable" is false as applied to the Kimberly–Clark products at issue means that the complaint must be dismissed under Rule 9(b). *Id.* at 1107–08. She essentially alleges that using the designation "flushable" is false because the wipes are not flushable—in other words, saying that the wipes are "flushable" is false because it is not true. That is simply a circular argument, not an explanation of why the designation is false.

As for the fraudulent omissions claim, plaintiff is required to plead facts showing with particularity that the wipes at issue are not suitable for flushing down a toilet because they create a substantial risk that consumers will clog or damage their plumbing, and that defendants failed to disclose that fact. However, the only allegations plaintiff proffers in support of her conclusory claim that Kimberly–Clark's wipes are not "suitable for flushing" are the general allegations noted above—that news reporters in three cities stated that some wipes (not necessarily flushable wipes and not necessarily Kimberly–Clark wipes) have caused clogs or blockages in their local wastewater systems; and that a few purported consumers posted comments on Kimberly–Clark's website saying the wipes clogged their rural plumbing/septic systems (though they provided no details as to what products they purchased, when or how they used them, or how they claim the clogs were caused by

Kimberly–Clark's wipes). This is not sufficient to plead the fraudulent omission claim with specificity under Rule 9, and is not even sufficient to meet the pleading requirements of Rule 8.

Finally, where—as here—a consumer fails to allege facts showing that he/she experienced any harm resulting from product use, the consumer has failed to allege damage under the UCL/FAL/CLRA or common law fraud. *See Herrington v. Johnson & Johnson Consumer Companies, Inc.,* 2010 WL 3448531 at *8–12 (N.D.Cal. Sept. 1, 2010) (because the plaintiffs did not allege facts showing that the level of particular chemicals in the defendants' products caused them or their children harm, "under the objective test for materiality, the alleged non-disclosures are not actionable").

CONCLUSION

In accordance with the foregoing, defendants' motion to dismiss is GRANTED. The FAC fails to state a claim for relief that is plausible on its face. Because plaintiff was previously been given leave to amend to correct the deficiencies in the complaint, and failed to do so, the court finds that further leave to amend would be futile. Based on this order, the court finds further that the motion to strike certain allegations in the FAC is moot.

IT IS SO ORDERED.

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

JENNIFER DAVIDSON, an individual, on behalf of herself, the general public and those similarly situated, Plaintiff, v. KIMBERLY-CLARK CORPORATION; KIMBERLY-CLARK WORLDWIDE, INC.; and KIMBERLY-CLARK GLOBAL SALES LLC, Defendants.	CASE NO. 14-CV-1783-PJH FIRST AMENDED CLASS ACTION COMPLAINT FOR VIOLATION OF THE CALIFORNIA CONSUMERS LEGAL REMEDIES ACT; FALSE ADVERTISING; FRAUD, DECEIT, AND/OR MISREPRESENTATION; AND UNFAIR BUSINESS PRACTICES

Jennifer Davidson, by and through her counsel, brings this Class Action Complaint against Defendants Kimberly-Clark Corporation, Kimberly-Clark Worldwide, Inc., and Kimberly-Clark Global Sales, LLC on behalf of herself and those similarly situated, for violations of the Consumer Legal Remedies Act, false advertising, fraud, deceit and/or misrepresenta-

tion, and unfair trade practices. The following allegations are based upon information and belief, including the investigation of Plaintiff's counsel, unless stated otherwise.

INTRODUCTION

1. Defendants deceptively market several brands of personal hygiene moistened wipes ("wipes") as "flushable." They charge a premium for these wipes, as compared to both toilet paper and to wipes that are not marketed as "flushable." Despite the label, however, the wipes are not actually flushable, as they are not suitable for disposal by flushing down a toilet. Defendants obtained substantial profits from these deceptive sales. This action seeks to require Defendants to pay restitution and damages to purchasers of the wipes and to remove the word "flushable" from their packaging and marketing.

PARTIES

2. Jennifer Davidson ("Plaintiff") is, and at all times alleged in this Class Action Complaint was, an individual and a resident of San Francisco, California.

3. Defendant Kimberly-Clark Corporation is a corporation incorporated under the laws of the Delaware, having its principal place of business in Neenah, Wisconsin.

4. Defendant Kimberly-Clark Worldwide, Inc. is a corporation incorporated under the laws of the Delaware, having principal places of business in Irving, Texas and Neenah, Wisconsin.

5. Defendant Kimberly-Clark Global Sales, LLC is a corporation incorporated under the laws of the

Delaware, having its principal place of business in Irving, Texas.

6. The Parties identified in paragraphs 3-5 of this Class Action Complaint are collectively referred to hereafter as "Defendants" or "Kimberly-Clark."

7. At all times herein mentioned, each of the Defendants was the agent, servant, representative, officer, director, partner or employee of the other Defendants and, in doing the things herein alleged, was acting within the scope and course of his/her/its authority as such agent, servant, representative, officer, director, partner or employee, and with the permission and consent of each Defendant.

8. At all times herein mentioned, Defendants, and each of them, were members of, and engaged in, a joint venture, partnership and common enterprise, and acting within the course and scope of, and in pursuance of, said joint venture, partnership and common enterprise.

9. At all times herein mentioned, the acts and omissions of Defendants, and each of them, concurred and contributed to the various acts and omissions of each and all of the other Defendants in proximately causing the injuries and damages as herein alleged.

10. At all times herein mentioned, Defendants, and each of them, ratified each and every act or omission complained of herein. At all times herein mentioned, the Defendants, and each of them, aided and abetted the acts and omissions of each and all of the other Defendants in proximately causing the damages, and other injuries, as herein alleged.

JURISDICTION AND VENUE

11. This action is brought by Plaintiff pursuant, *inter alia*, to the California Business and Professions Code, section 17200, *et seq.* Plaintiff and Defendants are "persons" within the meaning of the California Business and Professions Code, section 17201.

12. The injuries, damages and/or harm upon which this action is based, occurred or arose out of activities engaged in by Defendants within, affecting, and emanating from, the State of California.

13. Defendants have engaged, and continue to engage, in substantial and continuous business practices in the State of California, including in San Francisco County.

14. In accordance with California Civil Code Section 1780(d), Plaintiff filed a declaration establishing that, in 2013, she purchased at least one Kimberly-Clark product in San Francisco.

15. Plaintiff accordingly alleges that jurisdiction and venue are proper in this Court.

SUBSTANTIVE ALLEGATIONS

16. Defendants are manufacturers and marketers of consumer product goods, particularly paper products, including toilet paper, tissues, paper towels, feminine hygiene products, diapers, and baby wipes. Their products are widely available for purchase in supermarkets, drug stores, and other retailers. Among their biggest brands are Kleenex, Scott, Huggies, and Kotex. Other brands include Viva, Thick & Thirsty, Poise, Depends, and Cottonelle.

17. Among the products manufactured by Defendants are a variety of pre-moistened cloths (a.k.a. "wipes"). This case focuses on four such pre-moistened cloths manufactured and marketed by Kimberly-Clark. These products are:

a. Kleenex® Cottonelle® Fresh Care Flushable Wipes & Cleansing Cloths ("Cottonelle Wipes")

b. Scott Naturals® Flushable Moist Wipes ("Scott Wipes")

c. Huggies® Pull-Ups® Flushable Moist Wipes ("Huggies Wipes")

d. U by Kotex® Refresh flushable wipes ("Kotex Wipes")

In this Complaint, these products will be collectively referred to as the "Flushable Wipes."

18. Reasonable consumers understand the word "flushable" to mean suitable for disposal down a toilet. Yet none of the Flushable Wipes are safe and appropriate for flushing down a toilet. Unlike truly flushable products, such as toilet paper, which disperse and disintegrate within seconds or minutes, the Flushable Wipes take hours to begin to break down. As a result of the slow dispersement process, the Flushable Wipes, when subjected to ordinary, consumer use, are likely to, and routinely (1) clog household pipes; (2) clog septic tanks and cause damage to septic pumps; and (3) cause blockages and damage to municipal sewage lines and pumps, often due to proclivity of the Flushable Wipes to tangle with each other and with other debris and form large masses or ropes. Because of these likely outcomes, it is false, misleading and deceptive to market the wipes as "flushable."

(1) All of Defendants' Flushable Wipes Are Marketed and Sold as "Flushable."

19. Defendants advertise that their Flushable Wipes are "flushable" in a substantially identical manner.

20. On the front of the Cottonelle Wipes package, Defendants advertise the product as

"FLUSHABLE MOIST WIPES" or as "flushable cleansing cloths."

* * *

One of the packages further represents that the wipes are "SEWER AND SEPTIC SAFE.*" No disclaimer appears to be associated with the asterisk. On the back of the package, Defendants represent that "Cottonelle Fresh Care Flushable Cleansing Cloths break up after flushing." On the backs of some packages of the Cottonelle Wipes, Defendants further state, "For best results, flush only one or two cloths at a time," but this warning does not appear on all packages, such as the smaller, travel size package of wipes.

21. On the website for the Cottonelle Wipes, Defendants inform consumers that the "flushable wipes use a patented dispersible technology, which means that when used as directed they break up after flushing and clear properly maintained toilets, drainlines, sewers, pumps, and septic and municipal treatment systems." *See* https://www.cottonelle.com/products/cottonellefresh-care-flushable-moist-wipes#faqs (last accessed Feb. 6, 2014). The website goes on to claim that the Cottonelle Wipes are "Flushable," "Break up after flushing," and are "Sewer- and septic-safe." *Id*.

22. On the front of the Scott Wipes package, Defendants similarly advertise the product as "Flushable Cleansing Cloths" and represent that each of the wipes "breaks up after flushing."

On the back of the package, Defendants go on to state that "Scott Naturals* Flushable Cleansing Cloths break up after flushing and are sewer and septic system safe. For best results, flush only one or two cleansing cloths at a time." No disclaimer appears to be associated with the asterisk. The back of the package also states that the "flushable" cloths are "Septic Safe" and that each wipe "Breaks up after flushing."

23. On the front of the Huggies Wipes package, Defendants similarly describe the product as "flushable moist wipes."

On the back, Defendants represent that the wipes are "Septic Safe" and that each "Breaks up after flushing," and only advise "For best results, flush only one or two wipes at a time." On the website for the Huggies Wipes, Defendants claim the wipes are "sewer and septic safe and break up after flushing." *See* http://www.pull-ups.com/products (last accessed Sept. 5, 2014).

24. On the front of the Kotex Wipes package, Defendants likewise represent that the product is "flushable."

Defendants provide little additional information on the back, only reiterating that the product is "Flushable!"

25. Defendants do not disclose on the packaging or advertising for any of the Flushable Wipes that the wipes are not suitable for disposal by flushing down a

toilet; are not regarded as flushable by municipal sewage system operators; routinely damage or clog pipes, septic systems, and sewage pumps; and do not disperse, distingrate, or biodgrade like toilet paper.

(2) Defendants Charge a Premium Price For Flushable Wipes.

26. Defendants charge a premium for the wipes labeled as "flushable" compared to other wipes that are not so labeled. For example, a 42-count package of "flushable" Cottenelle Wipes costs $4.99 at a Target in Albany, California, whereas a 40-count package of Wet Ones, a popular brand of wipes not labeled "flushable," costs $2.29.

27. A 51-count package of "flushable" Scott Wipes retails for $6.01 on Amazon.com, also considerably more than the Wet Ones, which sell for $2.28 on that website.

28. Similarly, a 24 count package of "flushable" Kotex Wipes retails for $4.28 on Amazon.com, whereas a 40 count package of Always® Clean Feminine Wipes, a wipe not marketed as "flushable," retails on Amazon.com for $3.27. The Kotex Wipes are also significantly more expensive than the non-flushable Wet Ones.

29. A consumer can buy 420 "flushable" Huggies Wipes for $22.49 on Amazon.com. In contrast, a 448 Huggies Soft Skin Baby Wipes, a product not labeled "flushable" and manufactured by Defendants, sells for $11.97, half the cost of the "flushable" Huggies Wipes. Other baby wipes not labeled "flushable" are similarly much lower priced. For example, a 448 count box of Pampers® Sensitive Wipes sells for $10.97 on Amazon.com. A 350 count package of Seventh Generation®

"Original Soft and Gentle Free & Clear Baby Wipes" sells for $12.99 on Amazon.com.

30. The representation of "flushability" commands a premium because customers perceive that it is more convenient, sanitary, and environmentally responsible to flush a wipe than to throw it in the trash. If Defendants informed consumers that the Flushable Wipes were not suitable for flushing down a toilet, and that doing so created a subsantial risk that the consumers would clog or damage their household plumbing, or clog, damage and increase the costs of municipal sewage treatment systems (which they bear as taxpayer and ratepayers), they would not pay the premium, but rather, would opt to purchase the cheaper items not labeled "flushable."

(3) Reasonable Consumers Understand The Word "Flushable" To Mean "Suitable For Disposal By Flushing Down a Toilet."

31. Many objects and materials theoretically are capable of passing from a toilet to the pipes after one flushes, such as paper towels, newspaper, jewelry, small toys, or cotton swabs, but that does not mean that such objects or materials are "flushable." Rather, the word "flushable" means in reasonable usage not just that the object or material may under optimal conditions pass from the toilet through the household pipes, but that the object or material is *appropriate or suitable* to regularly flush down a toilet without causing damage to the septic or sewage system or the environment.

32. An example is useful. Imagine a child who throws his small toys in the toilet, and says "Look Mommy, my toys will flush!" A reasonable parent will

reprimand the child that toys are not flushable. If the child responds, "But Mommy, they *do* flush," the answer is clear: "Yes, they might flush but they are not *flushable*." That is because reasonable people understand "flushable" to mean *suitable* for flushing.

33. The common understanding of the word "flushable" is borne out by dictionary definitions. Indeed, the Merriam-Webster dictionary gives the following as the sole definition of flushable: "*suitable* for disposal by flushing down a toilet." *See* http://www.merriamwebster.com/dictionary/flushable, last visited August 28, 2014 (emphasis supplied).

34. The common understanding of the word "flushable" is also borne out by usage within the industry. For example, the Water Environment Federation (WEF), a nonprofit association of water quality professionals, has explained that:

> Anything labeled as flushable should start to break apart during the flush and completely disperse within 5 minutes... Our mantra is, 'It's not flushable if it's not dispersible' . . .

See http://news.wef.org/stop-dont-flush-that/ (last accessed August 28, 2014) (internal quotations omitted). WEF further reports that unless wipes disperse like toilet paper, they are "mislabeled" as "flushable" because they are not suitable for disposal by flushing. *Id.* Similar statements have been made by the California Association of Sanitation Agencies, the San Francisco Public Utilities Commission, and the East Bay Municipal Utility District. *See* respectively http://www.casaweb.org/flushable-wipes (last accessed August 29, 2014); http://www.sfexaminer.com/sanfrancisco/flushable-wipes-cause-problematic-backups-at-localsewage-

plants/Content?oid=2514283 (last accessed August 29, 2014); https://www.ebmud.com/water-and-wastewater/pollution-prevention/residential-pollution-prevention (last accessed August 29, 2014).

35. Defendants' own marketing statements also show that they intend consumers to understand the word "flushable" to mean not only that the wipes are *capable* of passing through a toilet but that they are *suitable* for disposal in that way. For example, as described *supra* in paragraphs 20-23, the packages of the Flushable Wipes represent both that they are flushable and that they are "sewer and septic system safe." Defendants also created a Frequently Asked Questions page on their website to assure consumers that the Flushable Wipes are "safe to flush," in which they state:

> The flushability of Kimberly-Clark® products is tested in accordance with trade association guidelines. These guideline tests demonstrate that when used as directed, our wipes clear properly maintained toilets, drainlines, sewers and pumps, and *are compatible with on-site septic and municipal treatment.* Cottonelle® Flushable Cleansing Cloths are flushable due to patented technology that allows them to lose strength and *break up when moving through the system after flushing*. Watch our video to learn more about the tests that Cottonelle® flushable wipes go through to ensure their flushability.

https://www.cottonelle.com/products/cottonelle-fresh-care-flushable-moist-wipes#faqs (last accessed August 29, 2014) (emphasis supplied). A nearly identical statement appears on the webpage for Scott Wipes. *See*

http://www.scottbrand.com/faq#flushablemoistwipes (last accessed August 29, 2014). Further, Defendants state that their "trade association guidelines" measure not only whether the wipes are capable of passing from toilet through household pipes without clogging, but also whether they will complete seven stages of flushing – from the home disposal stage all the way to the municipal treatment stage.

36. Additionally, Defendants advertise the Flushable Wipes as a substitute for toilet paper and market them to be used as part of a bathroom routine (Cottonelle Wipes and Scott Wipes), as part of feminine hygiene (Kotex Wipes), and as part of potty training (Huggies Wipes). Defendants have run an advertising campaign entitled "Let's Talk About Your Bum," consisting of a webpage and various commercials. The campaign tells consumers that "bums deserve the ultimate in fresh and clean," and the commercials encourage consumers to use the Flushable Wipes in their bathroom routines. Defendants ran another commercial that featured a woman holding up both toilet paper and Cottonelle Wipes, while her family debated whether the routine of using both in the bathroom should be called "Southern hospitality," the "clean getaway" or the "freshy fresh." Because Defendants encourage consumers to associate the Flushable Wipes with bathroom routines, the result is that consumers believe that the wipes are flushable like toilet paper, when in fact, they are not suitable for flushing down a toilet.

37. Defendants further contribute to consumer confusion by pricing their Flushable Wipes higher than their other consumer wipes that are not advertised as "flushable." Consumers presented with the

large price discrepancy between the wipes labeled "flushable" and wipes not so labeled are led to believe that the more expensive Flushable Wipes are a special kind of product suitable for flushing, unlike the cheaper products that do not contain that representation, when in fact, neither set of products is suitable for disposal in that manner.

38. Defendants' deceptive conduct has been extremely successful at persuading consumers to purchase the Flushable Wipes. In 2007, Defendants reported to investors that sales for Defendants' Cottonelle and Scott flushable wipes "continued to grow at a strong double-digit rate." *See* http://www.cms.kimberlyclark.com/umbracoimages/UmbracoFileMedia/2007%20Annual%20Report_umbracoFile.pdf (last accessed Feb. 24, 2014). In 2012, the "flushable wipes" market accounted for 14% of the $4 billion a year pre-moistened wipes market, and it is predicted that the market will grow six percent a year for the next few years. *See* http://www.washingtonpost.com/local/trafficandcommuting/flushable-personal-wipes-cloggingsewer-systems-utilities-say/2013/09/06/9efac4e6-157a-11e3-a2ec-b47e45e6f8ef_story.html (last accessed August 28, 2014). As of 2014, sales were still expected to grow. *See* http://www.contracostatimes.com/news/ci_24156213/popular-bathroom-wipes-blamed-sewer-clogs (last accessed Feb. 24, 2014).

(4) Defendants' Wipes Are Not Suitable For Disposal By Flushing Down a Toilet.

39. Defendants' Flushable Wipes are not in fact flushable, because the wipes are not suitable for disposal by flushing down a household toilet.

(4)(1) All of Defendants' Wipes Are Manufactured to Remain Durable in Wet Conditions Rather Than to Disperse and Degrade.

40. The Flushable Wipes are all manufactured using the same proprietary paper blend, for which Defendants own the patent. To manufacture the paper, Defendants use an "air-laid" process, which creates strong knots of fibers that will not break down easily when submersed in water. Unlike toilet paper, which is a dry paper product designed to fall apart in water, all of the Flushable Wipes are sold as pre-moistened products, and thus, the paper used to make them is designed to withstand months of soaking in a wet environment. Defendants make the paper so strong, in fact, that it cannot efficiently disperse when placed in the water in a toilet.

(4)(2) All Defendants' Wipes Are Subject to the Same Flawed "Flushability" Test That Does Not Test Whether the Wipes Are Suitable For Disposal By Flushing Down a Toilet.

41. Defendants represent that all their Flushable Wipes "are labeled as flushable meet or exceed the current industry guidelines for assessing the flushability of non-woven products." *See* http://www.kimberly-clark.com/safetoflush/faq/SafeToFlushFAQ.pdf (last accessed September 4, 2014). These guidelines, however, do not adequately measure the Wipes' suitability for disposal by flushing down the toilet. The guidelines were created by the Association of the Nonwoven Fabrics Industry (the "INDA"), a lobbying association for manufacturers of flushable wipes, including Defendants, which fights aggressively against governmental efforts to regulate the sale of flushable wipes or use of

the word "flushable." The INDA guidelines encourage manufacturers of flushable wipes to conduct a series of seven tests before labeling their products as "flushable." But a closer look at those tests reveals flaws in their design and demonstrates that merely passing these self-serving guidelines does not mean the wipes are flushable.

42. For example, Defendants note that their Flushable Wipes pass test "FG502" known as the "Slosh Box Disintegration Test." According to Defendants' website, the test "[a]ssesses the potential for a product to disintegrate (or break up) when it is subjected to mechanical agitation in water." *See* http://www.kimberly-clark.com/safetoflush/ faq/SafeToFlushFAQ.pdf (last accessed September 4, 2014). To conduct the test, the test material is placed in a box of water. Testers then agitate the water, often by simulating the swirl of a toilet flush or the movement of water in a pipe, and see how long it takes for the test material to disintegrate. Defendants and INDA have agreed that the standard for "passing" this test is not that the product performs like toilet paper or disintegrates during a flush. Rather, the test only requires that after **three hours of agitation** in the slosh box, more than **25%** of the wipe passes through a 12.5 milimeter (roughly a half inch) sieve **80%** of the time. *See* http://www.njwea.org/pdf/2013-guidelines-for-assessing-the-flushability-of-disposablenonwoven-product.pdf (last accessed Feb. 24, 2014) (emphasis supplied). In other words, the test is still *passed even if after more than* ***three hours*** *of agitation*, *nearly* ***three-quarters*** *of the material is* ***unable*** *to pass through the pipe.*

43. When subject to the Slosh Box Disintegration Test, a typical piece of toilet paper begins to break down as soon as the water in the slosh box begins to move, and is completely disintegrated within in a few seconds. *See* http://www.consumerreports.org/cro/video-hub/home-garden/bed--bath/are-flushable-wipes-flushble/16935265001/22783507001/ (last accessed Feb. 21, 2014). Thus, when flushed down a toilet, toilet paper will likely break into particles within seconds after flushing. (Id.) In comparison, the Flushable Wipes do not even begin to disintegrate immediately after flushing. (Id.) Rather, Defendants' own website reveals that the Wipes ***begin*** to break down ***35 minutes*** after flushing, and take ***hours*** to completely disperse. *See* http://www.kimberly-clark.com/newsroom/media_resources/safetoflush.aspx?print=true (last accessed Feb. 21, 2014). This extremely slow disintegration time means that wipes are likely to get clogged in the pipes during flushing.

44. While Defendants represent that the wipes' rate of disintegration roughly mimics the amount of time it takes for a wipe to reach the sewage treatment plant, wipes can reach a sewage treatment pump in much less time, sometimes as quickly as a few minutes. *See* http://www.washingtonpost.com/local/trafficandcommuting/flushable-personal-wipes-cloggingsewer-systems-utilities-say/2013/09/06/9efac4e6-157a-11e3-a2ec-b47e45e6f8ef_story.html (last accessed August 28, 2014). Further, the moist lotion used in manufacturing certain wipes results in them traveling faster through sewer pipes than ordinary products. *See* http://www.woai.com/arti-

cles/woai-local-news-119078/disposable-wipes-causing-nightmare-forsan-11718265/ (last accessed August 28, 2014).

45. Nearly all the INDA-designed tests are further flawed as they do not similuate real-world conditions. For example, sewer systems typically move sewage to the plant via gravity. *See* http://www.washingtonpost.com/local/trafficandcommuting/flushable-personal-wipes-clogging-sewer-systems-utilities-say/2013/09/06/9efac4e6-157a-11e3-a2ec-b47e45e6f8ef_story.html (last accessed August 28, 2014). Thus, the flowing water in municipal systems is not as hard on the wipes as the mechanically agitated water in some of Defendants' tests, meaning that they will not break down as quickly in real-world pipes as they do in Defendants' lab simulated tests. (Id.) Both the Slosh Box test described in Paragraph 42 and Test FG505, the "Aerobic Biodisintegration" test, assess the wipes' abilities to disintegrate under constantly agitated water. *See* http://www.njwea.org/pdf/2013-guidelines-for-assessing-theflushability-of-disposable-nonwoven-product.pdf (last accessed Feb. 24, 2014). Since the Flushable Wipes are unlikely to be subjected to the same agitating water as they are subjected to in Defendants' lab, the tests are not reliable predictors of whether the Flushable Wipes are suitable for flushing down a toilet. The result is that many of the Flushable Wipes arrive at the sewage treatment plant intact or insufficiently broken down.

46. The tests used by Defendants are further flawed in that they fail to take into account the wipes' propensity for "ragging." After being flushed down the toilet, some brands of flushable wipes have a propen-

sity to tangle amongst one another and with other debris and form long ropes that can fill sewer lines for tens of feet. *See* http://www.hsconnect.com/page/content.detail/id/590706/Concerns-on-wipes-no-laughing-matter.html?nav=5005 (last accessed Feb. 24, 2014). The tests used by Defendants however, assume that their Wipes are passing through sewage pipes and pumps one at a time, instead of in clumps of rags and ropes. Because Defendants only test one or two Wipes at a time and do not evaluate the Wipes performance when subjected to real world conditions, such as the presence of other "flushable" wipes and other debris in the sewer, their tests do not take into consideration the risk that their Wipes might tangle with these other items. The bigger the mass of wipes, the slower the disintegration time. *See* http://www.washingtonpost.com/local/trafficandcommuting/flushable-personal-wipes-cloggingsewer-systems-utilities-say/2013/09/06/9efac4e6-157a-11e3-a2ec-b47e45e6f8ef_story.html (last accessed August 28, 2014).

47. The test FG507, the Municipal Pump Test, which evaluates the wipes' "compatibility" with municipal pumping systems, is flawed for the same reason. To conduct that test, Defendants feed one wipe into the pump every ten seconds. *See* http://www.kimberlyclark.com/newsroom/media_resources/safetoflush.aspx (last accessed Feb. 24, 2014). There is no reasonable basis for Defendants' assumption that in the real world, ten seconds will pass between the arrival of each new wipe from all households at the pump. Even if ten seconds was the "average" interval in the real world for arrival of each new wipe, the laws of probability require that the interval will often be much shorter, and that frequently multiple wipes will

arrive simultaneously. In addition, the test does not account for the fact that prior to arriving at the pump, many wipes will likely entangle with other wipes and debris. Thus, the test is a poor predictor of the wipes "compatability" with municipal pumping systems.

(4)(3) Municipalities' Reports Show That Defendants' Flushable Wipes Are Not Suitable For Flushing

48. Municipalities all over the country have experienced numerous problems that have been tied specifically to Defendants' Flushable Wipes.

49. For example, in Bakersfield, California, the city found that none of the brands of "flushable" wipes tested, including Defendants' Cottonelle Wipes, actually broke apart in the sewer; instead, they ended up as giant clogs at the treatment plant.

* * *

See http://www.turnto23.com/news/local-news/bakersfield-sewer-systems-keep-getting-clogged because-of-flushable-bathroom-wipes-092413 (last accessed August 28, 2014). As a result of the Flushable Wipes failure to flush and clear pipes, crews of three or four workers in Bakersfield must regularly visit the city's 52 sewage lift stations to cut up the balls of wipes that clog the lift stations. If they do not, there is a risk that back flow damage will spill inside homes. The city has documented one of the clogs:

* * *

Id.

50. In Jacksonville Beach, Florida, in response to city official concerns, a news outlet broadcasted a

"Consumer Alert" to explain that while Cottonelle and Scott Wipes are advertised as being able to be flushed, "there is little truth in the advertisements." *See* http://www.news4jax.com/news/officials-flushable-wipes-clog-pipes/-/475880/23740904/- /t5h2vrz/-/index.html (last accessed August 28, 2014).

* * *

Rather, the reporters explained, Defendants' Flushable Wipes do not break apart after being flushed and clog pipes and pumps. The reporters quoted city estimates that because of the time and money expended in dealing with clogs, consumers pay higher plumbing repair costs and higher taxes. The city released a photo that demonstrates the extent to which wipes, such as Defendants,' have clogged the pumps:

* * *

Id.

51. In San Antonio, Texas, the San Antonio Water System has said that flushable wipes, including specifically the Flushable Wipes made by Defendants, are clogging up sewers in ways in which sewer workers have never seen before. See http://www.woai.com/articles/woailocal-news-119078/disposable-wipes-causing-nightmare-for-san-11718265/ (last accessed August 28, 2014). Sewer workers are responding to dozens of clogs, and to repair, they retreive large "rope like mass[es]" from the pipes. *Id.*

PLAINTIFF'S EXPERIENCE

52. In 2013, Plaintiff desired to purchase moist wipes for household use. While shopping for wipes at a Safeway store located at 2020 Market Street, San

Francisco, California, Plaintiff came across Defendants' Scott Naturals® Flushable Moist Wipes. Seeing that the wipes had the word "Flushable" on the front of the package and that the product was more expensive than other wipes that did not have that word, she believed that the product had been specially designed to be suitable for flushing down toilets. Plaintiff was concerned that products not suitable for flushing down the toilet could cause problems in her plumbing or at the water treatment plant. Several years prior to her purchase, Plaintiff had visited San Francisco's sewage treatment plant as part of a school trip, and she learned there that people frequently flush things that should not be flushed, which causes many problems with the wastewater treatment. Because she did not wish to cause unnecessary damage to her plumbing, nor to city property or the environment, Plaintiff reviewed both the front and back of the package. She did not see anything that led her to believe that the wipes were not in fact suitable for flushing. Because she believed it would be easier and more sanitary to flush the wipes than to dispose of them in the garbage, she decided to pay the higher price, and purchased the Scott Wipes for a few dollars.

53. Plaintiff began using the wipes. She noticed that each individual wipe felt very sturdy and thick, unlike toilet paper. She also noticed that the wipes did not break up in the toilet bowl like toilet paper but rather remained in one piece. After several uses of the wipes, she began to become concerned that they were not truly flushable, so she stopped flushing the wipes and stopped using the product altogether.

54. A few months later, Plaintiff investigated the matter further and learned of the widespread damage

caused to consumers' home plumbing and to municipal sewer systems as a result of consumers flushing the Flushable Wipes. This research further increased her concerns that the Wipes were not in fact appropriate for disposal by flushing down a toilet.

55. Plaintiff has not subsequently purchased any of Defendants' Flushable Wipes.

56. Had Defendants not misrepresented (by omission and commission) the true nature of their Flushable Wipes, Plaintiff would not have purchased Defendants' product or, at a very minimum, she would have paid less for the product since she would not be obtaining the benefit of being able to flush it.

57. Plaintiff continues to desire to purchase wipes that are suitable for disposal in a household toilet. She would purchase truly flushable wipes manufactured by Defendants if it were possible to determine prior to purchase if the wipes were suitable to be flushed. Indeed, she regularly visits stores such as Safeway, where Defendants' "flushable" wipes" are sold, but has been unable to determine the flushability of the wipes currently on the shelves. Without purchasing and opening a package, Plaintiff cannot feel the thickness of the paper or see if it degrades in her toilet. Plaintiff knows that the design and construction of the Flushable Wipes may change over time, as Defendants use different technology or respond to pressure from legislators, government agencies, competitors or environmental organizations. But as long as Defendants may use the word "Flushable" to describe non-flushable wipes, then when presented with Defendants' packaging on any given day, Plaintiff continues to have no

way of determining whether the representation "flushable" is in fact true.

OTHER CONSUMERS HAVE BEEN SIMILARLY DECEIVED

58. Numerous consumers have complained that Defendants' Wipes are falsely labeled as "flushable" because they are not suitable for disposal by flushing down a household toilet. For example on Defendants' own website, numerous consumers have complained of damage caused by the wipes to their household plumbing:

> sugah - August 15, 2014
> just had to pay over 300.00 today , from using cottonelle flushable cleansing cloths!!! had to have a plumber first and then a septic tank cleaned, just 2 of us living here and have previously only had to have tank cleaned yearly, we were told and shown the cloths that had caused the blockage !! of course we will never use them again. this are very false statements on you package. they are not sewer and septic safe..just ask anyone who has just experienced what we have today, I will make sure all my friend know about this... you should be called out on this, we are retired, and this is not in the budget !!!
>
> Richard - June 24, 2013
>
> A few months after flushing the wipes down my toilets and into my septic system it clogged the underground filter. I had the 1000 gallon storage tank pumped and it was disgustingly obvious that the Cottonelle wipes were the culprit. They do not break down like toilet paper or even close. Do not use them if you are on a septic system. If you read

> Kimberly Clark's claim for septic systems you will see that it is written to confuse the consumer. It focuses on "flushability" which only gets these things down the toilet but not through a septic system.
>
> Kenneth - June 1, 2013
> I tried a free sample and it did breakdown like toilet paper. I purchased this nice package (36 or 42 ?? nothing on wrapping indicating count). Being on a septic I checked to ensure it was also going to break down. No matter how hard I mashed and put in jar with water, heavy agitation it would not break apart. This is not suitable for a septic!!!
>
> tlkflat - April 24, 2013
> DO NOT use with the newer rural waste water treatment systems like a JET system. They will clog the booster pump and then tangle in the air pump spinner, VERY costly repair.
>
> Doug - March 18, 2013
> Flushable Wipes are NOT flushable. Sure, they'll flush. Then they will clog your pipes ... always. It may not be today or tomorrow, but they will clog. At my bed and breakfast I have to have the plumbers out at least 4 times a year to clear our lines. It is ALWAYS flushable wipes. BAD PRODUCT.

See https://www.cottonelle.com/products/cottonelle-fresh-care-flushable-moist-wipes/review (last accessed September 3, 2014).

CLASS ALLEGATIONS

59. Plaintiff brings this action against Defendants on behalf of herself and all others similarly situated, as a class action pursuant to Rule 23 of the Federal

Rules of Civil Procedure. Plaintiff seeks to represent a group of similarly situated persons (the "Class"), defined as follows:

> All persons who, between March 13, 2010 and the present, purchased, in California, any of the following products: Cottonelle® Fresh Care Flushable Wipes & Cleansing Cloths, Scott Naturals® Flushable Moist Wipes, Huggies® Pull-Ups® Flushable Moist Wipes, and U by Kotex® Refresh flushable wipes.

60. This action has been brought and may properly be maintained as a class action against Defendants pursuant to Rule 23, as there is a well-defined community of interest in the litigation and the proposed class is easily ascertainable.

61. Numerosity: Plaintiff does not know the exact size of the class, but it is estimated that it is composed of more than 100 persons. The persons in the class are so numerous that the joinder of all such persons is impracticable and the disposition of their claims in a class action rather than in individual actions will benefit the parties and the courts.

62. Common Questions Predominate: This action involves common questions of law and fact to the potential class because each class member's claim derives from the deceptive, unlawful and/or unfair statements and omissions that led Defendants' customers to believe that the Non-Flushable Wipes were flushable. The common questions of law and fact predominate over individual questions, as proof of a common or single set of facts will establish the right of each member of the Class to recover. Among the questions of law and fact common to the class are:

a) Whether reasonable consumers understand the word "flushable" to mean "suitable for flushing down a toilet;"

b) Whether Defendants' Flushable Wipes are suitable for flushing down a toilet;

c) Whether Defendants unfairly, unlawfully and/or deceptively failed to inform class members that their Flushable Wipes were not flushable;

d) Whether Defendants' advertising and marketing regarding their Flushable Wipes sold to class members was likely to deceive class members or was unfair;

e) Whether Defendants engaged in the alleged conduct knowingly, recklessly, or negligently;

f) The amount of revenues and profits Defendants received and/or the amount of monies or other obligations lost by class members as a result of such wrongdoing;

g) Whether class members are entitled to injunctive and other equitable relief and, if so, what is the nature of such relief; and

h) Whether class members are entitled to payment of actual, incidental, consequential, exemplary and/or statutory damages plus interest thereon, and if so, what is the nature of such relief.

63. Typicality: Plaintiff's claims are typical of the class because, in 2013, she purchased one of the Flushable Wipes, namely Defendants' Scott® Naturals Flushable Moist Wipes, in reliance on Defendants' misrepresentations and omissions that they were

flushable. Thus, Plaintiff and class members sustained the same injuries and damages arising out of Defendants' conduct in violation of the law. The injuries and damages of each class member were caused directly by Defendants' wrongful conduct in violation of law as alleged.

64. Adequacy: Plaintiff will fairly and adequately protect the interests of all class members because it is in her best interests to prosecute the claims alleged herein to obtain full compensation due to her for the unfair and illegal conduct of which she complains. Plaintiff also has no interests that are in conflict with or antagonistic to the interests of class members. Plaintiff has retained highly competent and experienced class action attorneys to represent her interests and the interests of the class. By prevailing on her own claim, Plaintiff will establish Defendants' liability to all class members. Plaintiff and her counsel have the necessary financial resources to adequately and vigorously litigate this class action, and Plaintiff and counsel are aware of their fiduciary responsibilities to the class members and are determined to diligently discharge those duties by vigorously seeking the maximum possible recovery for class members.

65. Superiority: There is no plain, speedy, or adequate remedy other than by maintenance of this class action. The prosecution of individual remedies by members of the class will tend to establish inconsistent standards of conduct for the Defendants and result in the impairment of class members' rights and the disposition of their interests through actions to which they were not parties. Class action treatment will permit a large number of similarly situated per-

sons to prosecute their common claims in a single forum simultaneously, efficiently, and without the unnecessary duplication of effort and expense that numerous individual actions world engender. Furthermore, as the damages suffered by each individual member of the class may be relatively small, the expenses and burden of individual litigation would make it difficult or impossible for individual members of the class to redress the wrongs done to them, while an important public interest will be served by addressing the matter as a class action.

66. Nexus to California. The State of California has a special interest in regulating the affairs of corporations that do business here. Defendants have more customers here than in any other state. Accordingly, there is a substantial nexus between Defendants' unlawful behavior and California such that the California courts should take cognizance of this action on behalf of a class of individuals who reside anywhere in the United States.

67. Plaintiff is unaware of any difficulties that are likely to be encountered in the management of this action that would preclude its maintenance as a class action.

CAUSES OF ACTION

PLAINTIFF'S FIRST CAUSE OF ACTION

(Violation of the Consumers Legal Remedies Act, California Civil Code § 1750, *et seq.*) On Behalf of Herself and the Class

68. Plaintiff realleges and incorporates the paragraphs of this Class Action Complaint as if set forth herein.

69. This cause of action is brought pursuant to the California Consumers Legal Remedies Act, California Civil Code § 1750, *et seq*. ("CLRA").

70. Defendants' actions, representations and conduct have violated, and continue to violate the CLRA, because they extend to transactions that are intended to result, or which have resulted, in the sale or lease of goods or services to consumers.

71. Plaintiff and other class members are "consumers" as that term is defined by the CLRA in California Civil Code § 1761(d).

72. The Flushable Wipes that Plaintiff (and others similarly situated class members) purchased from Defendants were "goods" within the meaning of California Civil Code § 1761(a).

73. By engaging in the actions, representations and conduct set forth in this Class Action Complaint, Defendants have violated, and continue to violate §§ 1770(a)(2), 1770(a)(5), § 1770(a)(7), 1770(a)(8), and 1770(a)(9) of the CLRA. In violation of California Civil Code §1770(a)(2), Defendants' acts and practices constitute improper representations regarding the source, sponsorship, approval, or certification of the Flushable Wipes. In violation of California Civil Code §1770(a)(5), Defendants' acts and practices constitute improper representations that the Flushable Wipes have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities, which they do not have. In violation of California Civil Code §1770(a)(7), Defendants' acts and practices constitute improper representations that the Flushable Wipes are of a particular standard, quality, or grade, when they are of another. In violation of California Civil Code

§1770(a)(8), Defendants have disparaged the goods, services, or business of another by false or misleading representation of fact. In violation of California Civil Code §1770(a)(9), Defendants have advertised the Flushable Wipes with intent not to sell them as advertised. Specifically, in violation of sections 1770 (a)(2), (a)(5), (a)(7) and (a)(9), Defendants' acts and practices led customers to falsely believe that that their Flushable Wipes were suitable for flushing down a toilet. In violation of section 1770(a)(8), Defendants falsely or deceptively market and advertise that, unlike products not specifically denominated as flushable, its Flushable Wipes are suitable for flushing down a toilet, when in fact none of the products are suitable for flushing.

74. Plaintiff requests that this Court enjoin Defendants from continuing to employ the unlawful methods, acts and practices alleged herein pursuant to California Civil Code § 1780(a)(2). If Defendants are not restrained from engaging in these types of practices in the future, Plaintiff and the other members of the Class will continue to suffer harm.

75. More than thirty days prior to the filing of this First Amended Class Action Complaint, Plaintiff gave notice and demand that Defendants correct, repair, replace or otherwise rectify the unlawful, unfair, false and/or deceptive practices complained of herein. Defendants failed to do so in that, among other things, they failed to identify similarly situated customers, notify them of their right to correction, repair, replacement or other remedy; and provide that remedy. Accordingly, Plaintiff seeks, pursuant to California Civil Code § 1780(a)(3), on behalf of herself and those similarly situated class members, compensatory damages,

punitive damages and restitution of any ill-gotten gains due to Defendants' acts and practices.

76. Plaintiff also requests that this Court award her her costs and reasonable attorneys' fees pursuant to California Civil Code § 1780(d).

PLAINTIFF'S SECOND CAUSE OF ACTION
(False Advertising, Business and Professions Code § 17500, et seq. ("FAL"))
On Behalf Of Herself and the Class

77. Plaintiff realleges and incorporates by reference the paragraphs of this Class Action Complaint as if set forth herein.

78. Beginning at an exact date unknown to Plaintiff, but within three (3) years preceding the filing of the Class Action Complaint, Defendants made untrue, false, deceptive and/or misleading statements in connection with the advertising and marketing of their Flushable Wipes.

79. Defendants made representations and statements (by omission and commission) that led reasonable customers to believe that they were purchasing products that were suitable for flushing. Defendants deceptively failed to inform Plaintiff, and those similarly situated, that their Flushable Wipes were not suitable for disposal by flushing down a toilet, and that the Flushable wipes are not regarded as flushable by municipal sewage systems; routinely damage or clog pipes, septic systems, and sewage pumps; and do not disperse, disintegrate, or biodegrade like toilet paper.

80. Plaintiff and those similarly situated relied to their detriment on Defendants' false, misleading and

deceptive advertising and marketing practices, including each of the misrepresentations and omissions set forth in paragraphs 20-25, 30, 35-36, and 52, above. Had Plaintiff and those similarly situated been adequately informed and not intentionally deceived by Defendants, they would have acted differently by, without limitation, refraining from purchasing Defendants' Flushable Wipes or paying less for them.

81. Defendants' acts and omissions are likely to deceive the general public.

82. Defendants engaged in these false, misleading and deceptive advertising and marketing practices to increase their profits. Accordingly, Defendants have engaged in false advertising, as defined and prohibited by section 17500, *et seq.* of the California Business and Professions Code.

83. The aforementioned practices, which Defendants used, and continue to use, to their significant financial gain, also constitute unlawful competition and provide an unlawful advantage over Defendants' competitors as well as injury to the general public.

84. Plaintiff seeks, on behalf of herself and those similarly situated, full restitution of monies, as necessary and according to proof, to restore any and all monies acquired by Defendants from Plaintiff, the general public, or those similarly situated by means of the false, misleading and deceptive advertising and marketing practices complained of herein, plus interest thereon.

85. Plaintiff seeks, on behalf of herself and those similarly situated, an injunction to prohibit Defendants from continuing to engage in the false, mislead-

ing and deceptive advertising and marketing practices complained of herein. The acts complained of herein occurred, at least in part, within three (3) years preceding the filing of the Class Action Complaint.

86. Plaintiff and those similarly situated are further entitled to and do seek both a declaration that the above-described practices constitute false, misleading and deceptive advertising, and injunctive relief restraining Defendants from engaging in any such advertising and marketing practices in the future. Such misconduct by Defendants, unless and until enjoined and restrained by order of this Court, will continue to cause injury in fact to Plaintiff and the general public and the loss of money and property in that the Defendants will continue to violate the laws of California, unless specifically ordered to comply with the same. This expectation of future violations will require current and future customers to repeatedly and continuously seek legal redress in order to recover monies paid to Defendants to which Defendants are not entitled. Plaintiff, those similarly situated and/or other consumers nationwide have no other adequate remedy at law to ensure future compliance with the California Business and Professions Code alleged to have been violated herein.

87. As a direct and proximate result of such actions, Plaintiff and the other members of the Class have suffered, and continue to suffer, injury in fact and have lost money and/or property as a result of such false, deceptive and misleading advertising in an amount which will be proven at trial, but which is in excess of the jurisdictional minimum of this Court.

PLAINTIFF'S THIRD CAUSE OF ACTION
(Fraud, Deceit and/or Misrepresentation) On Behalf of Herself and the Class

88. Plaintiff realleges and incorporates by reference the paragraphs of this Class Action Complaint as if set forth herein.

89. In 2013, Defendants fraudulently and deceptively led Plaintiff to believe that Defendants' Flushable Wipes were suitable for flushing down a toilet. Defendants also failed to inform Plaintiff that Defendants' Flushable Wipes were not suitable for disposal by flushing down a toilet; are not regarded as flushable by municipal sewage system operators; routinely damage or clog pipes, septic systems, and sewage pumps; and do not disperse, distingrate, or biodgrade like toilet paper.

90. These omissions were material at the time they were made. They concerned material facts that were essential to the analysis undertaken by Plaintiff as to whether to purchase Defendants' Flushable Wipes.

91. Defendants made identical misrepresentations and omissions to members of the Class regarding Defendants' Flushable Wipes.

92. In not so informing Plaintiff and the members of the Class, Defendants breached their duty to her and the Class members. Defendants also gained financially from, and as a result of, their breach.

93. Plaintiff and those similarly situated relied to their detriment on Defendants' fraudulent omissions. Had Plaintiff and those similarly situated been adequately informed and not intentionally deceived by

Defendants, they would have acted differently by, without limitation, not purchasing (or paying less for) Defendants' Flushable Wipes.

94. Defendants had a duty to inform class members at the time of their purchase that the Flushable Wipes were not suitable for flushing down a toilet; are not regarded as flushable by municipal sewage system operators; routinely damage or clog pipes, septic systems, and sewage pumps; and do not disperse, distingrate, or biodgrade like toilet paper. Defendants omitted to provide this information to class members. Class members relied to their detriment on Defendants' omissions. These omissions were material to the decisions of the class members to purchase the Flushable Wipes. In making these omissions, Defendants breached their duty to class members. Defendants also gained financially from, and as a result of, their breach.

95. By and through such fraud, deceit, misrepresentations and/or omissions, Defendants intended to induce Plaintiff and those similarly situated to alter their position to their detriment. Specifically, Defendants fraudulently and deceptively induced Plaintiff and those similarly situated to, without limitation, purchase their Flushable Wipes.

96. Plaintiff and those similarly situated justifiably and reasonably relied on Defendants' omissions, and, accordingly, were damaged by the Defendants.

97. As a direct and proximate result of Defendants' misrepresentations, Plaintiff and those similarly situated have suffered damages, including, without limitation, the amount they paid for the Flushable Wipes.

98. Defendants' conduct as described herein was willful and malicious and was designed to maximize Defendants' profits even though Defendants knew that it would cause loss and harm to Plaintiff and those similarly situated.

PLAINTIFF'S FOURTH CAUSE OF ACTION
(Unfair, Unlawful and Deceptive Trade Practices, Business and Professions Code § 17200, *et seq.*) On Behalf of Herself and the Class

99. Plaintiff realleges and incorporates by reference the paragraphs of this Class Action Complaint as if set forth herein.

100. Within four (4) years preceding the filing of the Class Action Complaint, and at all times mentioned herein, Defendants have engaged, and continue to engage, in unfair, unlawful and deceptive trade practices in California by engaging in the unfair, deceptive and unlawful business practices described in this Class Action Complaint. In particular, Defendants have engaged, and continue to engage, in unfair, unlawful and deceptive trade practices by, without limitation, the following:

a. deceptively representing to Plaintiff, and those similarly situated, that the Flushable Wipes are suitable for flushing down a toilet;

b. failing to inform Plaintiff, and those similarly situated, that the Flushable Wipes: are not suitable for disposal by flushing down a toilet; are not regarded as flushable by municipal sewage systems; routinely damage or clog pipes, septic systems, and sewage pumps; and do not disperse, distingrate, or biodgrade like toilet paper.

c. engaging in fraud, deceit, and misrepresentation as described herein;

d. violating the CLRA as described herein; and

e. violating the FAL as described herein.

101. Plaintiff and those similarly situated relied to their detriment on Defendants' unfair, deceptive and unlawful business practices. Had Plaintiff and those similarly situated been adequately informed and not deceived by Defendants, they would have acted differently by not purchasing (or paying less for) Defendants' Flushable Wipes.

102. Defendants' acts and omissions are likely to deceive the general public.

103. Defendants engaged in these unfair practices to increase their profits. Accordingly, Defendants have engaged in unlawful trade practices, as defined and prohibited by section 17200, *et seq.* of the California Business and Professions Code.

104. The aforementioned practices, which Defendants have used to their significant financial gain, also constitute unlawful competition and provide an unlawful advantage over Defendants' competitors as well as injury to the general public.

105. Plaintiff seeks, on behalf of those similarly situated, full restitution of monies, as necessary and according to proof, to restore any and all monies acquired by Defendants from Plaintiff, the general public, or those similarly situated by means of the unfair and/or deceptive trade practices complained of herein, plus interest thereon.

106. Plaintiff seeks, on behalf of those similarly situated, an injunction to prohibit Defendants from continuing to engage in the unfair trade practices complained of herein.

107. The acts complained of herein occurred, at least in part, within four (4) years preceding the filing of this Class Action Complaint.

108. Plaintiff and those similarly situated are further entitled to and do seek both a declaration that the above-described trade practices are unfair, unlawful and/or fraudulent, and injunctive relief restraining Defendants from engaging in any of such deceptive, unfair and/or unlawful trade practices in the future. Such misconduct by Defendants, unless and until enjoined and restrained by order of this Court, will continue to cause injury in fact to Plaintiff and the general public and the loss of money and property in that Defendants will continue to violate the laws of California, unless specifically ordered to comply with the same. This expectation of future violations will require current and future customers to repeatedly and continuously seek legal redress in order to recover monies paid to Defendants to which Defendants are not entitled. Plaintiff, those similarly situated and/or other consumers nationwide have no other adequate remedy at law to ensure future compliance with the California Business and Professions Code alleged to have been violated herein.

109. As a direct and proximate result of such actions, Plaintiff and the other members of the Class have suffered and continue to suffer injury in fact and have lost money and/or property as a result of such deceptive, unfair and/or unlawful trade practices and

unfair competition in an amount which will be proven at trial, but which is in excess of the jurisdictional minimum of this Court. Among other things, Plaintiff and the class lost the amount they paid for the Flushable Wipes.

110. As a direct and proximate result of such actions, Defendants have enjoyed, and continue to enjoy, significant financial gain in an amount which will be proven at trial, but which is in excess of the jurisdictional minimum of this Court.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for judgment as follows:

A. On Cause of Action Number 1 against Defendants and in favor of Plaintiff and the other members of the Class for:

1. restitution and injunctive relief pursuant to California Civil Code section 1780;

2. actual damages, the amount of which is to be determined at trial;

3. punitive damages, the amount of which is to be determined at trial; and

4. statutory damages as provided by Civil Code section 1780(b), the amount of which is to be determined at trial.

B. On Causes of Action Numbers 2 and 4 against Defendants and in favor of Plaintiff and the other members of the Class for:

1. restitution pursuant to, without limitation, the California Business & Professions Code §§ 17200, *et seq.* and 17500, *et seq.*; and

2. injunctive relief pursuant to, without limitation, the California Business & Professions Code §§ 17200, *et seq*. and 17500, *et seq*.

C. On Cause of Action Number 3 against Defendants and in favor of Plaintiff and the other members of the Class:

1. an award of compensatory damages, the amount of which is to be determined at trial; and

2. an award of punitive damages, the amount of which is to be determined at trial.

D. On all causes of action against Defendants and in favor of Plaintiff, class members and the general public for:

1. reasonable attorneys' fees according to proof pursuant to, without limitation, the California Legal Remedies Act and California Code of Civil Procedure § 1021.5;

2. costs of suit incurred; and

3. such further relief as this Court may deem just and proper.

JURY TRIAL DEMANDED

Plaintiff hereby demands a trial by jury.

Dated: September 5, 2014