UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 15-16173

JENNIFER DAVIDSON,

Plaintiff-Appellant,

v.

KIMBERLY-CLARK CORPORATION, ET AL.,

Defendants-Appellees

Appeal from the Northern District of California
Case No.: 14-CV-01783 (PJH)
Hon. Judge Phyllis J. Hamilton, Presiding

PLAINTIFF-APPELLANT'S REPLY BRIEF

ADAM J. GUTRIDE (State Bar No. 181446)
SETH A. SAFIER (State Bar No. 197427)
KRISTEN G. SIMPLICIO (State Bar No. 263291)
GUTRIDE SAFIER LLP
100 Pine Street, Suite 1250
San Francisco, CA 94111
Telephone: (415) 639-9090
Facsimile: (415) 449-6469
Attorneys for Plaintiff-Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

I. INTRODUCTION

As they did in the district court, Defendants fail to address the actual theory of Plaintiff's case. Plaintiff alleges that Defendants' "flushable" label misleads reasonable consumers because Defendants' wipes fail adequately to disperse (i.e. break apart) after flushing, creating a heightened risk of household clogs and damage to the municipal sewer system. Defendants attempt to shift the focus onto whether Plaintiff herself experienced clogged pipes. Their argument can be summed up as, "The wipes flushed; therefore, they were 'flushable.'" Although Defendants successfully distracted the district court with this argument, it cannot support dismissal.

The propriety of Plaintiff's pleading does not depend on whether the wipes are *capable* of being flushed or even whether they *did* flush, but whether consumers are being misled into believing that flushing them is an intelligent thing to do. Because Plaintiff has alleged that consumers understand "flushable" to mean "suitable for flushing," and that these wipes are not suitable for flushing because they do not disperse, the "flushable" representation is likely to mislead. The damage that Plaintiff sustained is economic: at a minimum, she paid a higher price than the product would have commanded with a non-misleading label.

Defendants argue that it is unreasonable to infer that their flushable label is misleading because Plaintiff did not plead specific instances of damage attributable

to their wipes. In fact, Plaintiff did plead, through news stories and customer complaints, multiple instances of Defendants' wipes causing or contributing to clogged pipes and sewer systems. But regardless, her theory of liability is complete even without such pleading, because her theory focuses on non-dispersibility and suitability for flushing. She pleads in detail why it is not appropriate to flush non-dispersible products; they tangle with other debris in the waste stream and cause blockages—unlike toilet paper, which dissolves in seconds. She also pleads, and Defendants do not dispute, that their wipes do not disperse. It takes hours for the wipes to even begin to break down, by which time they will have interacted with other items in pipes or the sewage system. The Court must reasonably infer from the allegation of non-dispersability that Defendants' wipes will increase the risk of causing clogs and thus that Plaintiff has a reasonable basis to allege that Defendants' label is likely to mislead.[1]

Additionally, Defendants' arguments do nothing to rebut Plaintiff's Article III standing to seek injunctive relief. Plaintiff alleged a plausible threat to her

---

[1] The only time Defendants mention Plaintiff's actual theory of liability is to argue, falsely, that it is new on appeal. They contend that "Davidson does not allege a single example of Scott wipes causing damage anywhere. So, on appeal Davidson tries to make this case about 'dispersion' rather than damage." Answering Br. 16. Yet Plaintiff's theory of liability has *always* been based on non-dispersability (e.g. ER 75-80, 83-91 ¶¶ 18, 20-25, 35, 39, 40, 42-44, 46, 49-51, 53, 58); it is not something Plaintiff has "trie[d] to make this case about" just "on appeal."

ability to rely on Defendants' labels, as she continues to shop for products that are truly flushable. She also alleged a plausible threat to her statutory right to receive truthful information from Defendants about their products. Either threatened injury is sufficient to confer standing to seek injunctive relief, and this Court should reverse the district court's dismissal on that ground as well.

II. ARGUMENT

A. Defendants' Focus on Damage to Pipes Is Misplaced Because Plaintiff Adequately Pleaded Her Theory of Liability Under *Iqbal-Twombly*.

Instead of addressing Plaintiff's theory of liability, Defendants argue about damage to pipes and plumbing. They contend (and the district court held) that Plaintiff cannot plead why the designation "flushable" is misleading because she cannot plead that Defendants' wipes personally caused her any problems with her plumbing or allege any other specific instances of their wipes damaging pipes or sewer systems. Answering Br. at 21; ER 29-31. But this is a straw-man argument. Even if Plaintiff had not included any allegations of damage either to her pipes or any other pipes attributable to Defendants' wipes, she still adequately pleaded every cause of action in her complaint.

Plaintiff alleges that Defendants' wipes are not suitable for flushing based on the following chain of logic: wipes are not suitable for disposal down a toilet unless they disperse, i.e., break apart, upon flushing (the major premise);

Defendants' wipes fail to disperse upon flushing (the minor premise); therefore, Defendants' wipes are not suitable for disposal down a toilet (the logical conclusion). "[A] 'reasonable' inference is one that is supported by a chain of logic." *United States v. Del Toro-Barboza*, 673 F.3d 1136, 1144 (9th Cir. 2012). Plaintiff supports each of her premises with detailed factual allegations, which Defendants do not dispute. She pleads that non-dispersible wipes should not be flushed because they create a substantial risk of clogging pipes and damaging sewer and septic systems, as they tangle with each other and other debris to form long ropes and clumps that get caught in pipes and pumps, causing clogs. Op. Br. at 21-22 (citing ER 83-91).[2] She pleads numerous news stories of wastewater treatment facilities documenting the clogs and damage caused by flushing non-dispersible "flushable" wipes, some of which specifically name—or display photos of—Defendants' Wipes, with captions such as "no brand actually breaks apart in sewer." ER 86-89 ¶¶ 49-51; Ex. A to Safier Decl. in Support of Plaintiff-Appellant's Mot. to Supp. Record. *Id.*[3] Plaintiff pleads the experiences of

---

[2] The district court concluded that the presence of other debris in the sewers was a ground for dismissal, which Plaintiff rebutted in her Opening Brief. Op. Br. at 25-26. Defendants make no attempt to support the district court's reasoning, tacitly conceding the district court erred.

[3] Defendants suggest that Plaintiff is mischaracterizing the articles, e.g., Answering Br. at 23-25, but this is not the case. Paradoxically, Defendants suggest that the Court should not accept Plaintiff's purported "mischaracterization" of the articles

numerous other consumers who attributed clogs and clumps due to "flushable" wipes' inability to disperse upon flushing, again including specific mention of Defendants' Cottonelle Wipes. E.g. ER 90-91 ¶ 58 ("[I]t was disgustingly obvious that the *Cottonelle wipes were the culprit*. They do not break down like toilet paper or even close."); ("[J]ust had to pay over 300.00 today, from using *cottonelle flushable cleansing cloths*!!!") (emphases added). Plaintiff also pleads that all of Defendants' Wipes fail to disperse upon flushing, based upon her own personal observations, Defendants' manufacturing process, and Defendants' own admissions and testing procedures. *Id.* at 20-21 (citing ER 80-84).[4] Finally, Plaintiff pleads that reasonable consumers understand the word flushable to mean "suitable" to be flushed and that the law bars representations that are likely to mislead such consumers, neither of which Defendants dispute. Accordingly, Plaintiff has pleaded a plausible claim that Defendants misrepresented their products as "flushable" under *Iqbal-Twombly,* regardless of whether she alleged

---

referenced in the complaint while simultaneously opposing Plaintiff's motion to supplement the record on appeal with those very articles. Plaintiff wholeheartedly desires the Court to grant its motion, read the articles, and judge for itself whether the articles support Plaintiff's theory of liability.

[4] In their Answering Brief, Defendants never contend that Plaintiff failed to adequately plead that their specific products are non-dispersible, and therefore tacitly conceded this point as well.

any specific instances of Defendants' wipes causing damage. *See United States v. Corinthian Colleges*, 655 F.3d 984, 991 (9th Cir. 2011) (citing *Ashcroft v. Iqbal,* 556 U.S. 662 (2009)) (holding that a claim is plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged").

Downplaying the specific references to their wipes throughout the complaint, Defendants argue that "references to wipes in general do not explain with specific facts why the particular Product Davidson bought was mislabeled as flushable or make it more than merely possible that the particular Product she bought is not suitable for disposal by flushing." Answering Br. at 16; *see also id.* at 25. Defendants' argument defies basic principles of logic. Deductive reasoning is a useful and powerful tool precisely because it allows one to draw specific conclusions about things based on general observations of similar things with shared characteristics.[5] Here that common, shared characteristic is non-dispersibility upon flushing. All of the news articles, consumer complaints, and other generalized references to "flushable" wipes Plaintiff included in the complaint attribute the wipes' unsuitability for flushing to the wipes' failure to

[5] Hence if Plaintiff were to allege that all men are mortal and that Socrates is a man, the Court could reasonably infer that Socrates is mortal even though Plaintiff never specifically pleaded that Socrates was dead.

disperse, which, as discussed above, creates a well-documented risk of causing clogs and damage.[6] The Court must accept these facts as true. Further, because Plaintiff pleads detailed facts that Defendants' wipes *specifically* do not disperse upon flushing—which the Court must also accept as true—deductive reasoning compels the conclusion that Defendants' wipes are not suitable for disposal down a toilet because they will act in the same manner as other non-dispersible wipes. Accordingly, contrary to Defendants' argument, *Iqbal-Twombly* not only *permits* the Court to draw the conclusion that Defendants are liable for the misconduct alleged, but *requires* it. *See Catholic League for Religious & Civil Rights v. City & Cty. of San Francisco*, 567 F.3d 595, 599 (9th Cir. 2009) *on reh'g en banc*, 624

---

[6] *See* ER 75, 83-91 ¶¶ 18, 42-47, 49-51, 58; *see also*, Ex. A to Safier Decl. in Support of Plaintiff-Appellant's Mot. to Supp. Record. (ECF No. 22) (all emphases added) at 1 ("There's ***no*** safe brand for disposables, ***none of them break down.***"); *id.* at 3 ("The issue is that even the supposedly flushable wipes ***don't break up quickly*** in the water in the sewers. . . . The wipes can literally form ropes that fill sewer lines for tens of feet or clog city equipment at the treatment plant."); *id.* at 5 (stating that flushable wipes "are clogging up the sewers like nothing sewer workers have seen before . . . . [because] [t]hese wipes ***don't break down*** the way toilet paper does"); *id.* at 13 (stating flushable wipes are "causing major problems for sewer and sanitation plants . . . . because the wipes ***don't dissolve the way they claim***"); *id.* at 17 ("When most people hear flushable wipe, they assume the wipes will ***break apart*** once inside the toilet. But that's where most ***would be wrong***."); *id.* at 23 ("To prove their point they dyed several kinds of wipes and sent them through the sewer for a mile to see how they would ***break up. They didn't.*** Those labeled flushable, engineer Frank Dick said, had 'a little rips and tears but ***still they were intact***."); *id.* at 28 ("'Disposable' or 'flushable' wipes and other products ***don't breakdown*** in the sewer.").

F.3d 1043 (9th Cir. 2010) (on a 12(b)(6) motion to dismiss, the Court "*must* accept the allegations in the complaint as true, *and draw all reasonable inferences in favor of the plaintiff*") (emphases added).

Defendants also argue that the district court's "analysis of Davidson's claims properly beg[an] with whether she alleged that she experienced 'problems in her plumbing or water treatment plant" because Davidson "alleged that reasonable consumers understand the word 'flushable' to mean 'suitable for disposal down a toilet,'" and therefore "the word 'flushable' is likely to deceive Davidson and other consumers only if the Product is not flushable in that sense." Answering Br. at 21. Defendants' conclusion does not follow logically from their premise. Given that Plaintiff's claims are about Defendants misrepresenting that their products are suitable for disposal down a toilet, the logical place to start is by asking whether Plaintiff has adequately pleaded that Defendants' products are not, in fact, suitable for disposal down a toilet. If they are not, then Plaintiff has pleaded a valid claim regardless of whether the wipes actually damaged or clogged her pipes or sewage treatment system. The fact that Plaintiff was lucky, and did not suffer any damage to her household pipes (likely due to her limited use of the product) and that she does not know if the wipes she flushed actually clogged her sewage plant does not, as Defendants seem to think, mean that their "flushable" representation is not misleading.

Finally, Defendants' argument ignores the fact that Plaintiff was injured at the point she *purchased* the wipes, not when she used them. *See Pulaski and Middleman LLC v. Google, Inc.*, 802 F.3d 979, 989 (9th Cir. 2015) ("[I]n calculating restitution under the UCL and FAL, the focus is on the difference between what was paid and what a reasonable consumer would have paid *at the time of purchase* without the fraudulent or omitted information.") (emphasis added). The injury for which Plaintiff seeks recompense is not damage caused to her plumbing, but the amount she overpaid for a misleadingly labeled product. *See id.* ("Where plaintiffs are 'deceived by misrepresentations into making a purchase, the economic harm is the same: the consumer has purchased a product that he or she paid more for than he or she otherwise might have been willing to pay if the product had been labeled accurately.'") (quoting *Kwikset Corp. v. Superior Court*, 51 Cal. 4th 310, 329 (2011)). She therefore had a complete cause of action for false advertising at the time of purchase, *before* she attempted to flush the wipes. A fortiori, whether those wipes damaged her pipes or the sewage treatment system is irrelevant.

B. Plaintiff Adequately Pleaded Damages.

The district court held in its second order of dismissal that: "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." ER 16 (emphasis added). Defendants attempt to run away from the holding by characterizing it as a "finding that Davidson failed to properly plead a misrepresentation[, which] precluded the possibility that she had suffered damages." Answering Br. at 31-32. If the district court intended what Defendants assert, it erred for the reasons stated in the preceding section; Plaintiff properly alleges that the label is likely to mislead. And if the district court intended what it said, it still erred, because, as it recognized in its first order, the premium Plaintiff paid for the wipes is sufficient damage. *See* Cal. Bus & Prof. Code § 17203 (requiring only lost money or property); Cal. Civ. Code § 1780(a) (permitting suit to recover "any damage"); *see also Hinojos v. Kohl's Corp.*, 718 F.3d 1098, 1108 (9th Cir. 2013) ("[A]ny plaintiff who has standing under the UCL's and FAL's 'lost money or property' requirement will, *a fortiori*, have suffered 'any damage' for purposes of establishing CLRA standing."); *Kwikset*, 51 Cal. 4th at 317 (2011) ("[P]laintiffs who can truthfully allege they were deceived by a product's label into spending money to purchase the product, and would not have purchased it otherwise, have 'lost money or property.'"). Notably, Defendants cite *no case* to support the district court's conclusion that a plaintiff needs to plead anything other than economic injury to have sufficient damages to bring a claim.

Defendants contend that Plaintiff's position on damages "improperly equates allegations sufficient to establish [Article III] standing to sue with the allegations required to state a claim for fraud or misrepresentation." Answering Br. at 32. But here, it is not an improper equation. Because Plaintiff's causes of action allow for the recovery of solely economic damages, the same monetary injury that provides her with Article III standing provides her with damages to sustain her claim. *See In re Century Aluminum Co. Sec. Litig.*, 729 F.3d 1104, 1109 (9th Cir. 2013) (holding that Plaintiff's allegations that he was misled into purchasing stocks at inflated prices would support an award of money damages and Article III standing). Defendants' cases do not hold to the contrary.

C. The District Court Erred By Requiring Plaintiff to Plead "How She Came to Believe" the Wipes Were Not Flushable.

Defendants accuse Plaintiff of "mischaracterizing the court's statement" that Plaintiff was required to plead "how she came to believe" that the wipes she purchased were not flushable. Yet, at the hearing on the second motion to dismiss, Defendants interpreted the district court's holding in the *exact same manner* as Plaintiff presented it in this appeal, stating "Your Honor told Plaintiff in her last order that Plaintiff had to amend the complaint *to state how Plaintiff discovered* that the wipes were not, in fact, suitable for flushing." SER 10 (emphasis added). But Rule 9b does not require a plaintiff to prove how she "came to believe" or how she "discovered" that a certain representation is false. It requires her to plead only

why it is false or misleading, which she did by pleading that Defendants' wipes are not dispersible and thus not suitable for disposal down a toilet. *See In re GlenFed, Inc.*, 42 F.3d 1541, 1548 (9th Cir. 1994) (en banc) ("To allege fraud with particularity ... plaintiff must set forth what is false or misleading about a statement, and why it is false."). In any event, she *did* allege how she "came to believe" that the representation was false and misleading, by explaining that she noticed that the wipes—unlike toilet paper—were sturdy and thick and did not disperse in her toilet, and that she then conducted online research. ER 89 ¶ 53.[7]

D. The District Court Erred When It Granted Defendants' Motion to Strike.

Defendants argue that "the district court's ruling striking [news article] allegations in the original Complaint was correct." Answering Br. at 36. But Defendants continue to misunderstand the purpose of Plaintiff's allegations relating to the news stories, and as such, offer no argument to support the district court's decision. Plaintiff did not include the articles in an effort to plead that Defendants' wipes were specifically the cause of the blockages and damage the articles describe.[8] Plaintiff included the articles to support her allegations that non-

---

[7] There is no dispute that Plaintiff sued within the applicable limitations period.

[8] The news articles in the Amended Complaint do contain specific references to Defendants' wipes, as discussed above.

dispersible wipes are not suitable for disposal down a toilet because of the damage they can cause. Such allegations are material to her theory of liability that, because Defendants' wipes are non-dispersible, they too are unsuitable for disposal down a toilet and thus, labeling them as "flushable" is misleading to reasonable consumers. Accordingly, the district court erred in striking these allegations. *See Fantasy, Inc. v. Fogerty*, 984 F.2d 1524, 1527 (9th Cir. 1993) *rev'd on other grounds by Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994) (An allegation is "immaterial" only if it "has no essential or important relationship to the claim for relief or the defenses being pled").

E. The District Court Erred By Denying Leave to Amend.

Defendants contend that Plaintiff's arguments regarding leave to amend are based on the false premise that "the basis on which the district court dismissed her Amended Complaint was different than the basis on which it dismissed the original Complaint." Answering Br. at 38. According to Defendants, "when the court noted that Davidson's original Complaint failed to allege how she came to believe the Product was not flushable, the court was pointing out the lack of any allegations of specific facts showing that a misrepresentation had been made." Answering Br. at 38. To support this conclusion, Defendants point to the next sentence of the order where the district court stated that Plaintiff "[did] not allege that she was unable to flush the product down the toilet, or that the product caused any problems with her

pipes." Answering Br. at 34. Defendants' reading of the order is not only inconsistent with their argument in the district court, *see supra*, section C (quoting SER 10); it is illogical. The two sentences together mean that the district court wanted more information about how Plaintiff "came to believe" that the wipes were not flushable, since she had apparently suffered no problems flushing them, not that the district court wanted more information about why the labels were misleading. Although the district court's request was not supported by law, Plaintiff complied with it and supplied detailed information about how she came to believe that the wipes were not flushable. *See, supra*, section C. Only after that amendment did the district court come up with a new, equally unsupportable reason for dismissal: that Plaintiff had failed to allege a "misrepresentation."

Defendants also argue that Plaintiff's proposed allegations relating to the Plumbing Code do not justify amendment because that code makes it illegal to flush only items that are "capable of causing damage," and that "there are no allegations in either complaint that any Kimberly-Clark product has ever damaged a drainage system or public sewer in California." Answering Br. at 39. But, again, Defendants' focus on allegations of damage caused specifically by their products misses the point. Plaintiff adequately pleaded that Defendants' wipes do not disperse upon flushing, a point Defendants do not refute. In light of the detailed allegations that non-dispersible items are "capable of causing damage" to the sewer

systems, it is reasonable to infer—and the Court *must* infer for purposes of this appeal—that Defendants' wipes are capable of causing damage to the sewer system and thus, are illegal to flush under the Plumbing Code. The district court erred by denying leave to amend.[9]

F. Plaintiff's Allegations Regarding Threatened Injuries Are Not Speculative.

Defendants argue that Plaintiff "did not allege a realistic threat of future harm" regarding either her inability to rely on Defendants' labels in the future, or the invasion of her statutory right to receive truthful information from Defendants about their products, and thus cannot establish Article III standing to seek an injunction. Answering Brief at 41. Defendants misconstrue Plaintiff's allegations regarding her reliance-based injury and fail to understand her statutory rights argument. Plaintiff has sufficiently alleged facts to support each theory of

---

[9] Defendants contend that the district court properly found that the plumbing code was not "unavailable" to Plaintiff's counsel before filing the Amended Complaint. Answering Br. at 39 n.12. However, counsel first learned of the plumbing code on or about December 24, 2014 after reviewing documents produced in another flushable wipes lawsuit. ER 60. The plumbing code is not included in code books provided to lawyers, indexed on Westlaw, or cited in any cases. ER 61, 70-71. Accordingly, Plaintiff's failure to plead the existence of the plumbing code is excusable. *Cf. Lemoge v. United States*, 587 F.3d 1188, 1192 (9th Cir. 2009) (holding that "the determination of whether neglect is excusable is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission") (internal citations omitted).

threatened injury for purposes of Article III standing to seek injunctive relief, either of which is sufficient for this Court to reverse.

1. Defendants Misconstrue Plaintiff's Allegations Regarding Her Inability to Rely on Defendants' Labels.

Defendants contend that Plaintiff's allegations regarding her inability to rely in the future on Defendants' labels "asserts only a possible future injury and a hypothetical chain of events predicated on speculation that Kimberly-Clark 'may' redesign its products." Answering Br. at 42. In fact, Plaintiff alleges that as of *right now* she continues to visit "stores such as Safeway, where Defendants' 'flushable' wipes are sold;" "desire[s] to purchase wipes that are suitable for disposal in a household toilet;" and is continually "presented with Defendants' packaging;" but with "no way of determining whether the representation 'flushable' is in fact true." ER 90 ¶ 57. These facts establish that, as of *right now* and into the foreseeable future, Plaintiff will continue to be injured through exposure to labels on which she cannot rely relating to a product she continues to desire to purchase. Her threatened future injury is in no way hypothetical or conjectural, but is ongoing, actual, and imminent. *See Ries v. Arizona Beverages USA LLC*, 287 F.R.D. 523, 533 (N.D. Cal. 2012) ("Should 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.") (emphasis added); *Weidenhamer v. Expedia, Inc.*, No. C14-1239RAJ, 2015 WL 1292978, at *5 (W.D. Wash. Mar. 23, 2015)

("Imagine that Mr. Weidenhamer purchases air travel from Expedia in the future, and confronts the same deceptive pop-up ad. He is entitled to rely on the statements made in that ad, even if he previously learned that some of those statements were false or deceptive."); *Richardson v. L'Oreal USA, Inc.*, 991 F. Supp. 2d. 181, 194-195 (D.D.C. 2013) ("[Plaintiffs] will be harmed—without an injunction—by not being able to rely on the 'salon-only' label with any confidence."). Indeed, her inability to rely on Defendants' labels represents precisely the "continuing, present, adverse effects" accompanying her previous injury—being duped into buying the "flushable" wipes in the first place—that the Supreme Court has identified is sufficient to confer Article III standing to seek injunctive relief. *See O'Shea v. Littleton*, 414 U.S. 488, 495-96 (1974).

Ignoring these allegations, Defendants focus on Plaintiff's additional allegation that Defendants may change their products in the future. They then use that allegation to argue that Plaintiff's future injury is only speculation that "she will be uncertain about whether a hypothetical future product with a hypothetical label is mislabeled." Answering Br. at 43. But Defendants are incorrect that the future injury Plaintiff alleges depends upon Defendants changing their product. Rather, Plaintiff's allegations about possible redesigns simply explain why Plaintiff continues to shop for flushable wipes and to be exposed to Defendants' misleading labels, despite her previous experience that Defendants' wipes are not

flushable. Plaintiff knows that technology advances, and that Defendants might change the product such that she would buy it; thus, she continues to shop. But her injury exists whether or not Defendants make changes to their product. If Plaintiff went to the store today she could not rely on the label being accurate without buying the wipes and testing them. Without an injunction, she is helpless.

Next, Defendants unsuccessfully attempt to distinguish the *L'Oreal* case. Defendants contend that in *L'Oreal*, "the plaintiff's allegations had [] 'provide[d] concrete indications that [plaintiffs were] likely to be harmed in the future, rising above mere speculation about possible future purchases.'" Answering Br. at 44 (quoting *L'Oreal*, 991 F. Supp. 2d at 192). Here, Plaintiff has similarly provided concrete indications that she is likely to continue to be harmed. She alleges that she currently continues to shop for and be exposed to Defendants' labels on which she cannot rely. These are all facts that the Court must accept as true. Accordingly, Plaintiff does not offer "mere speculation about possible future purchases." *L'Oreal*, 991 F. Supp. 2d at 192.

Defendants also downplay Plaintiff's federalism and comity arguments by arguing that state policy objectives and *Erie* cannot trump Article III. Answering Br. at 45-46. But Plaintiff does not contend that principles of federalism or comity trump Article III. Rather, she contends that these doctrines should guide the Court's interpretation of how Article III applies. Where it is possible to have an

interpretation of the standing requirements that also promotes federal-state comity and the "twin aims" of *Erie* by ensuring that the outcome of litigation will not depend on whether the Defendant can successfully remove the case to federal court, that is the preferred interpretation. Defendants' arguments do not counter Plaintiff's position.[10]

District courts in this circuit are split on how to interpret Article III's standing requirements in the context of requests for injunctive relief in false labeling consumer class actions. *See Dean v. Colgate-Palmolive Co.*, No. EDCV

---

[10] Defendants assert that Plaintiff waived her argument based on *Erie v. Tompkins* by not raising it below. That is incorrect. Although Plaintiff did not cite *Erie* below, she did contend that the district court should not hold Plaintiff lacked Article III standing to seek an injunction because doing so "would undermine state public policy and allow Defendants' removal of this case to require plaintiffs to forfeit those rights." District Court ECF No. 18 at 13. Plaintiff also requested, based on that argument, that the district court sever the request for injunctive relief and remand it to state court where it could proceed so she would not be denied her state law rights. *Id.* Plaintiff's citation to *Erie* on appeal is simply additional authority to support an argument she made below. Expanding upon and adding additional support to an argument made below is permitted. *See Nicholson v. Hyannis Air Serv., Inc.*, 580 F.3d 1116, 1124 (9th Cir. 2009) (rejecting that an argument was waived because "Nicholson's argument simply provides additional legal support for a contention that Nicholson indisputably raised below"). Moreover, even had Plaintiff waived this argument, the Court would have discretion to address it because it is a "pure question of law that does not depend on the factual record developed below." *Emmert Indus. Corp. v. Artisan Associates, Inc.*, 497 F.3d 982, 986 (9th Cir. 2007).

15-0107 JGB, 2015 WL 3999313, at *8 (C.D. Cal. June 17, 2015). Some district courts have rigidly held that plaintiffs do not have standing to seek injunctive relief absent allegations that the plaintiff will buy the exact same product again in the future and that inability to rely on labels in the future is not sufficient. *See, e.g., Rahman v. Mott's, LLP*, 2014 U.S. Dist. LEXIS 147102, *18 (N.D. Cal. Oct. 15, 2014) (on which Defendants rely in their Answering Brief). Other district courts have adopted a less rigid approach and held that the inability to rely on labels in the future is a sufficient injury and the Plaintiff need not allege she will buy the exact same product again. *E.g., Ries*, 287 F.R.D. at 533. This is because the test for injunctive relief standing is whether the plaintiff alleged "a sufficient likelihood that [she] will again be wronged in a *similar way*." *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983) (emphasis added). What constitutes a "similar" injury is open for interpretation, as this Court has acknowledged by admonishing district courts to "be careful not to employ too narrow or technical an approach . . . [and] reject the temptation to parse too finely" when determining whether or not an injury is "similar." *Armstrong v. Davis*, 275 F.3d 849, 867 (9th Cir. 2001), *abrogated on other grounds by Johnson v. California*, 543 U.S. 499 (2005).

So where, as here, there is at least some flexibility in applying a constitutional doctrine, Plaintiff contends that it should be applied in a way most consistent with principles of comity and promoting the "twin aims" of *Erie*.

Specifically, the Court should hold that Plaintiff's continuing inability to rely on Defendants' labels into the future is sufficiently similar to her injury of being duped out of money by relying on the label in the past, such that she has Article III standing to seek an injunction. Otherwise, defendants will be able to effectively eliminate requests for injunctive relief in false labeling class actions by removing them to federal court under CAFA.[11] That would deny millions of consumers injunctive relief to which they would be entitled were their cases allowed to proceed in state court. Defendants offer no support for why this Court should adopt such an extreme interpretation of Article III. Although it may be true that "a plaintiff whose cause of action is perfectly viable in state court under state law may nonetheless be foreclosed from litigating the same cause of action in federal court," *Lee v. Am. Nat'l Ins. Co.*, 260 F.3d 997, 1001-02 (9th Cir. 2001), *Erie* and comity stand for the proposition that such an outcome is never preferred. *See In re Cty. of Orange*, 784 F.3d 520, 531 (9th Cir. 2015) (holding that "Erie's federalism principle directs . . . federal courts [to] adjudicate state-created rights in a manner

[11] *See Weidenhamer*, 2015 WL 1292978, at *5 (noting that Defendants' interpretation of standing requirements "would make federal courts powerless to enjoin false advertising, at least when a duped consumer points it out.").

that closely resembles the way in which a state court would adjudicate that same right.").[12]

2. Defendants' Invasion of Plaintiff's Statutory Right to Receive Truthful Advertising and Labeling Materials Provides Article III Standing.

Because Plaintiff has a right under state law to receive truthful information in labeling, and because Defendants' ongoing conduct will continue to impinge on that right, she has Article III standing under the "statutory rights" doctrine to seek an injunction. Defendants mount three attacks on the statutory rights analysis. None are availing.

---

[12] As an alternative to permitting the injunctive relief claims to proceed in federal court, this Court could hold, as explained in the Opening Brief, that the district court erred by denying Plaintiff's request to remand the injunctive relief claim to state court. Defendants argue that it would be "nonsensical to remand only the injunction portion of Davidson's claims because her alleged future injury does not involve resulting economic harm and the statutes under which Davidson sues all have an economic harm requirement." Answering Br at 48 n.18. But Defendants' argument is misguided. Plaintiff need not allege a "future injury" to seek an injunction under the UCL in state court; she has standing due to her previous loss of money. Cal. Bus. & Prof. Code § 17204; *Clayworth v. Pfizer, Inc*., 49 Cal. 4th 758, 789 (2010). The fact that the remand would be of only the request for injunctive relief would not alter her standing to seek an injunction in state court.

(a) Plaintiff Has A Right Under The UCL, FAL and CLRA To Receive Truthful Information, Which Defendants Continue To Violate.

Defendants begin by arguing that Plaintiff "exaggerates the scope of the statutes under which she sues." Answering Br. at 49. According to Defendants, because the statutes "expressly require that a private citizen must suffer the loss of 'money or property' as a result of false advertising to bring the claim," and Plaintiff does not allege "that she will rely on the advertising and suffer a loss of money or property" *in the future*, the "statutes under which she sues cannot be 'understood as granting persons in the plaintiff's position a right to judicial relief.'" Answering Br. at 50 (quoting *Fulfillment Servs. Inc. v. United Parcel Serv., Inc.*, 528 F.3d 614, 619 (9th Cir. 2008)). This argument is misguided.

Under California law, anyone who has "*suffered* an injury in fact and has lost money or property" has statutory standing to seek an injunction against future advertising. Cal. Bus. & Prof. Code § 17204 (emphasis added); *see Clayworth v. Pfizer, Inc*., 49 Cal. 4th 758, 789, (2010) ("If a party has standing under section 17204 . . . it may seek injunctive relief under section 17203."). Plaintiff lost money when she bought Defendants' wipes in reliance on the false label. *See Kwikset*, 51 Cal. 4th at 317. The California statutes do not require *future* loss of money or property to seek an injunction. Thus, Plaintiff *does* have "a right to judicial relief" to prevent the future invasion of her right to truthful advertising, so the threatened

invasion of her rights is sufficient to create Article III standing. *See, e.g., Robins v. Spokeo, Inc.*, 742 F.3d 409, 412 (9th Cir. 2014) *cert. granted*, 135 S. Ct. 1892, (2015) ("The scope of the cause of action determines the scope of the implied statutory right….When, as here, the statutory cause of action does not require proof of actual damages, a plaintiff can suffer a violation of the statutory right without suffering actual damages."); *Edwards v. First Am. Corp.,* 610 F.3d 514, 517–18 (9th Cir. 2010) ("Because the statutory text does not limit liability to instances in which a plaintiff is overcharged, we hold that Plaintiff has established an injury sufficient to satisfy Article III."); *see also Warth v. Seldin,* 422 U.S. 490, 500 (1975) ("Essentially, the standing question in such cases is whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief.").

Defendants cite *Fraley* for the proposition that violating a state statutory right cannot satisfy Article III without some other "sufficient injury under Article III," such as (future) "resulting economic harm," but this argument is disingenuous at best. Answering Br. at 53. *Fraley* recognized "that 'the actual or threatened injury required by Article III may exist *solely* by virtue of statutes creating legal rights, the invasion of which creates standing.'" *Fraley v. Facebook, Inc.*, 830 F. Supp. 2d 785, 796 (N.D. Cal. 2011) (emphasis added, alterations omitted). And this Court has definitively held that "the absence of pecuniary loss is *no bar* to

Article III standing, if the plaintiff has alleged a violation of the rights conferred by statute." *Tourgeman v. Collins Fin. Servs., Inc.*, 755 F.3d 1109, 1115 (9th Cir. 2014) (emphasis added). Thus, Plaintiff's allegations that Defendants threaten to violate her state statutory rights is sufficient by itself to confer Article III standing to seek injunctive relief even in the absence of threatened economic harm.

Although the *Fraley* court did examine economic harm, the court's reason for doing so does not apply here. In *Fraley*, the underlying statute prohibited the unauthorized use of another's likeness *only if* that use resulted in damages. *Fraley*, 830 F. Supp. 2d at 796-97; *see also* Cal. Civ. Code § 3344. By contrast here, as discussed above, the UCL, CLRA, and FAL broadly prohibit false advertising regardless of whether that advertising causes harm. Thus, the scope of the "statutory right" here is not dependent on pecuniary loss as it was in *Fraley*.

(b) Plaintiff Has Alleged A Particularized Injury.

Defendants' second argument is that "Davidson's alleged injury is not particular to her." Answering Br. at 50. In this argument, Defendants conflate the particularity requirement with whether Plaintiff's injury is "unique." *See* Answering Br. at 51 (arguing that Plaintiff's injury "does not distinguish her from any other shopper who is exposed to false advertising generally"). To show a particularized injury, Plaintiff need not allege unique harm but only that she is "among the injured" and that the statute protects against "individual, rather than

collective harm." *Tourgeman*, 755 F.3d at 1115. As the Court explained in *Tourgeman*, "The personal interest in not being 'the object of a misrepresentation made unlawful [by statute]' assuredly is an 'individual, rather than a collective, harm." *Id* (alteration in original, citation omitted). Were Defendants correct about the plaintiff needing to suffer an injury distinct from anyone else, the statutory rights doctrine could never provide standing in class action cases, which is contrary to precedent. *E.g.*, *Tourgeman*, 755 F.3d at 1112, 115-16 (FDCPA class action); *Edwards*, 610 F.3d at 515, 517 (RESPA class action); *Fulfillment Servs. Inc.*, 528 F.3d at 618, 619 (Motor Carrier Act class action).

Although Plaintiff has not suffered a unique injury, she has alleged a *particularized* injury to *her* statutory rights to receive truthful information. That is, Plaintiff has alleged that she continues to shop for truly flushable wipes and wants to know whether Defendants' wipes are actually flushable. ER 90 ¶ 57. She will continue to be exposed to Defendants' false advertising in direct contravention of *her* statutory right to receive truthful information from Defendants. ER 90 ¶ 57.

(c) Enforcing Plaintiff's Statutory Rights In Federal Court Does Not Violate Article III.

Defendants' third argument is that "[w]hatever Davidson's rights under state law, her claims in federal court must satisfy Article III." Answering Br. at 54. Plaintiff agrees, but the argument begs the question. Plaintiff's position is that the threatened invasion of her rights under state law is *precisely* the injury that satisfies

Article III and allows her injunctive relief claims to be heard in federal court. Plaintiff need not allege anything else. The cases Defendants cite are inapposite because they do not address Plaintiff's argument. Defendants' cases stand for the unremarkable proposition that, absent a threatened Article III injury in fact, plaintiffs cannot seek an injunction in federal court even if they could do so in state court. But those cases do not hold that the threatened invasion of a state statutory right is insufficient injury in fact under Article III.

III. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that this Court reverse the district court's orders dismissing her claims and remand the case for further proceedings.

Respectfully submitted this 1st day of April, 2016.

GUTRIDE SAFIER LLP

/s/ Seth A. Safier

Adam Gutride
Seth A. Safier
Kristen Simplicio
Attorneys for Plaintiff-Appellant

CERTIFICATION RE WORD COUNT

Pursuant to the Federal Rules of Appellate Procedure, Rule 32(a)(7)(c), I hereby certify that the foregoing brief of Plaintiffs-Appellants complies with the word count limitation of Rule 32(a)(7)(b). There are 6,743 words in the brief according to the word count function of Microsoft Word 2010, the word-processing program used to prepare the brief.

Respectfully submitted this 1st day of April, 2016.

GUTRIDE SAFIER LLP

/s/ Seth A. Safier
Adam Gutride
Seth A. Safier
Attorneys for Plaintiff-Appellant

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the Appellant's Reply Brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system on April 1, 2016. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Seth A. Safier
Seth A. Safier