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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

MARY P. SWEARINGEN and JOSHUA
OGDEN, individually and on behalf of all
others similarly situated,

No. C 13-3544 RS

**ORDER DENYING MOTION TO
DISMISS**

Plaintiffs,

v.

YUCATAN FOODS, L.P.,

Defendant.

_____ /

I. INTRODUCTION

This putative class action complaint challenges use of the term “evaporated cane juice” by Yucatan Foods, L.P. (“Yucatan”) on the labels of several of its products, all of which are alleged to carry identically misleading labels in violation of California’s Sherman Law and Unfair Competition Law. Yucatan moves to dismiss on the grounds that (1) plaintiffs cannot plead federal jurisdiction based on class action status; (2) plaintiffs’ claims are preempted by federal law; (3) the subject matter falls within the primary jurisdiction of the Food and Drug Administration (“FDA”); (4) plaintiffs lack standing to sue; and (5) plaintiffs fail to state a plausible claim under the UCL. For the reasons explained below, Yucatan’s motion to dismiss is denied.

1 II. BACKGROUND

2 Plaintiffs allege Yucatan has sold various misbranded products in violation of California's
3 Sherman Food, Drug, and Cosmetics Law, Cal. Health & Safety Code §§ 109875, *et seq.* ("Sherman
4 Law"), which incorporates the requirements of the federal Food, Drug and Cosmetics Act
5 ("FDCA").¹ They advance a claim for relief under the Unfair Competition Law, Cal. Bus. & Prof.
6 Code §§ 17200, *et seq.* ("UCL"). During the putative class period of July 31, 2009 to the present,
7 plaintiffs purchased three of these products in San Francisco: Authentic Guacamole, Spicy
8 Guacamole and Ranch Guacamole. Plaintiffs seek to represent a class of consumers in the United
9 States who purchased these and other products carrying identical references to "evaporated cane
10 juice" on their labels during the class period.² According to plaintiffs, the purchased products and
11 class products alike are misbranded in the same way and are sold in violation of the Sherman Law
12 because they are improperly labeled with the term "evaporated cane juice," instead of describing the
13 ingredient by its proper name, "sugar" or "dried cane syrup." Plaintiffs allege they paid a "premium
14 price" for these products "that fail to comply with mandatory labeling requirements and standards
15 established by law such that the products are misbranded and rendered unfit for sale." (Compl.
16 ¶ 30.) According to plaintiffs, "the products are worthless due to their illegality and thus the
17 unjustified premium paid for these products equaled their purchase price." (*Id.*)

18 The Sherman Law makes it unlawful to sell or offer for sale any food that is "misbranded,"
19 § 110760, a term defined solely in reference to the federal regulations: "Any food is misbranded if
20 its labeling does not conform with the requirements for nutrition labeling as set forth in [21 U.S.C.
21 Sec. 343(q)] and the regulations adopted pursuant thereto." § 110665. The Sherman Law further
22 provides, "Any food fabricated from two or more ingredients is misbranded unless it bears a label
23

24 ¹ The Nutrition Labeling and Education Act of 1990 ("NLEA"), Pub. L. No. 101-535, amended the
25 FDCA to set forth "uniform national standards for the nutritional claims and the required nutrient
26 information displayed on food labels." H.R. Rep. No. 101538, at *13 (1990), reprinted in 1990
U.S.C.C.A.N. 3336, 3342. Any reference to the FDCA in this order includes the NLEA
amendments.

27 ² Plaintiff alleges defendant sells a number of products with identical ECJ labels, including
28 Authentic Guacamole, Mild Guacamole, Spicy Guacamole, Ranch Guacamole, Hummus
Guacamole, and 2 oz. Singles Guacamole and the Guacamole Twinpack, all sold under the Yucatan
Brand.

1 clearly stating the common or usual name of each ingredient” § 110725(a). These two
 2 sections mirror the federal provision that a food is misbranded “[u]nless its label bears (1) the
 3 common or usual name of the food, if any there be, and (2) in case it is fabricated from two or more
 4 ingredients, the common or usual name of each such ingredient” 21 U.S.C. § 343(i).

5 Section 110725 instructs the state department to “take into consideration” the current federal
 6 regulations in adopting any state regulations pursuant to that section, but it is not limited thereto.
 7 § 110725(c). Nevertheless, plaintiffs do not cite to any independent state labeling regulations to
 8 allege that Yucatan’s use of the term “evaporated cane juice” is “unlawful” to support their UCL
 9 claim. Instead, plaintiffs’ claim relies solely on the federal regulations issued pursuant to the
 10 Nutrition Labeling and Education Act of 1990 (“NLEA”), 21 U.S.C. § 343-1. Plaintiffs point to 21
 11 C.F.R. §§ 101.3, (prohibiting manufacturers from referring to foods by anything other than their
 12 common and usual names), 102.5 (same), and § 101.4 (prohibiting manufacturers from referring to
 13 ingredients by anything other than their common and usual names) to define what they allege is
 14 “unlawful” labeling activity by Yucatan. In particular, plaintiffs cite the federal regulation
 15 governing the term “sugar”: “For purposes of ingredient labeling, the term sugar shall refer to
 16 sucrose, which is obtained from sugar cane or sugar beets” 21 C.F.R. § 101.4(b)(20). In
 17 contrast, “juice” is defined as “the aqueous liquid expressed or extracted from one or more fruits or
 18 vegetables, purees of the edible portions of one or more fruits or vegetables, or any concentrates of
 19 such liquid or puree.” 21 CFR 120.1(a). Finally, the term “cane sirup” (or “cane syrup”)³ is
 20 defined as “the liquid food derived by concentration and heat treatment of the juice of sugar cane.”
 21 21 C.F.R. § 168.130(a).

22 Although the FDA regulations do not specifically address the term “evaporated cane juice,”
 23 the agency did publish draft guidance in 2009, observing:

24 Over the past few years the term “evaporated cane juice” has started to appear as
 25 an ingredient on food labels, most commonly to declare the presence of sweeteners
 26 derived from sugar cane syrup. However, FDA’s current policy is that sweeteners
 27 derived from sugar cane syrup should not be declared as ‘evaporated cane juice’
 because that term falsely suggests that the sweeteners are juice.

28 ³ “Alternatively, the word ‘sirup’ may be spelled ‘syrup.’” 21 C.F.R. § 168.130(c).

1 FDA, Draft Guidance for Industry, 2009 WL 3288507, at *1 (Oct. 1, 2005) (“2009 Draft
2 Guidance”). The 2009 Draft Guidance concludes:

3 The intent of this draft guidance is to advise the regulated industry of FDA’s
4 view that the term “evaporated cane juice” is not the common or usual name of any
5 type of sweetener, including dried cane syrup. Because cane syrup has a standard of
6 identity defined by regulation in 21 CFR 168.130, the common or usual name for the
7 solid or dried form of cane syrup is “dried cane syrup.”

8 Sweeteners derived from sugar cane syrup should not be listed in the ingredient
9 declaration by names which suggest that the ingredients are juice, such as
10 “evaporated cane juice.” FDA considers such representations to be false and
11 misleading under section 403(a)(1) of the Act (21 U.S.C. 343(a)(1)) because they fail
12 to reveal the basic nature of the food and its characterizing properties (i.e., that the
13 ingredients are sugars or syrups) as required by 21 CFR 102.5.

14 2009 WL 3288507, *2–3. The FDA has not issued final guidance on this point, but it has issued
15 several warning letters to producers cautioning against the use of the term “evaporated cane juice.”
16 (See, e.g., Plaintiff’s RJN, Exh. C–F.) Some of these warning letters were issued after the draft
17 guidance was published. (See, e.g., Plaintiff’s RJN, Exh. E, F.)

18 III. LEGAL STANDARDS

19 A complaint must contain “a short and plain statement of the claim showing that the pleader
20 is entitled to relief.” Fed. R. Civ. P. 8(a)(2). While “detailed factual allegations are not required,” a
21 complaint must include sufficient facts to “state a claim to relief that is plausible on its face.”
22 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 US 544, 570
23 (2007)). A claim is facially plausible “when the plaintiff pleads factual content that allows the court
24 to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* A
25 motion to dismiss a complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure tests the
26 legal sufficiency of the claims alleged in the complaint. See *Parks Sch. of Bus. v. Symington*, 51
27 F.3d 1480, 1484 (9th Cir. 1995). Dismissal under Rule 12(b)(6) may be based either on the “lack of
28 a cognizable legal theory” or on “the absence of sufficient facts alleged under a cognizable legal
theory.” *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990). When evaluating
such a motion, the court must accept all material allegations in the complaint as true, even if
doubtful, and construe them in the light most favorable to the non-moving party. *Twombly*, 550 US

1 at 570. “[C]onclusory allegations of law and unwarranted inferences,” however, “are insufficient to
 2 defeat a motion to dismiss for failure to state a claim.” *Epstein v. Wash. Energy Co.*, 83 F.3d 1136,
 3 1140 (9th Cir. 1996); *see also Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 US at 555 (“[t]hreadbare
 4 recitals of the elements of the cause of action, supported by mere conclusory statements,” are not
 5 taken as true).

6 IV. DISCUSSION

7 A. Federal Jurisdiction

8 As an initial matter, Yucatan argues plaintiffs fail to plead a claim invoking federal
 9 jurisdiction. Plaintiffs assert federal jurisdiction pursuant to the Class Action Fairness Act (CAFA),
 10 which vests the district courts with jurisdiction over class actions in which the amount in
 11 controversy exceeds \$5 million so long as there is minimal diversity between the parties. 28 U.S.C.
 12 § 1332(d)(2). Nevertheless, Yucatan argues the so-called “home state” exception should apply,
 13 under which the court “shall” decline jurisdiction when both the primary defendants and two thirds
 14 of the proposed plaintiff class members are citizens of the forum state. 28 U.S.C. § 1332(d)(4).

15 Ordinarily, the party seeking to invoke federal diversity jurisdiction must bear the burden of
 16 establishing that the court may properly exercise such jurisdiction. *Kohler v. Inter-Tel Techs.*, 244
 17 F.3d 1167, 1170 n.3 (9th Cir. 2001). However, the “home state” provision of subdivision (d)(4) is
 18 an exception to jurisdiction under CAFA and therefore not part of the prima facie case for
 19 establishing minimal diversity jurisdiction. *Serrano v. 180 Connect, Inc.*, 478 F.3d 1018, 1023 (9th
 20 Cir. 2007). “[A]lthough the removing party bears the initial burden of establishing federal
 21 jurisdiction under § 1332(d)(2), once federal jurisdiction has been established under that provision,
 22 the objecting party bears the burden of proof as to the applicability of any express statutory
 23 exception under §§ 1332(d)(4)(A) and (B).” *Serrano*, 478 F.3d at 1024.

24 On its face, plaintiffs’ complaint meets the jurisdictional requirements of § 1332(d)(2).
 25 Defendant is a Delaware corporation with its headquarters in Los Angeles, California. Plaintiffs
 26 assert claims on behalf of over 100 members of a proposed class of consumers throughout the
 27 United States, including class members from states other than Delaware or California and an amount
 28

1 in controversy in excess of \$5 million in the aggregate. These assertions, unchallenged by Yucatan,
2 are sufficient to establish a prima facie case for minimal diversity jurisdiction under CAFA.

3 The burden then shifts to Yucatan, which argues the “home state” exception applies despite
4 plaintiffs’ allegations regarding a nationwide class of consumers. Yucatan points to a California
5 appellate decision reversing the trial court’s certification of a nationwide UCL consumer class on
6 the ground that the UCL was not intended to regulate conduct unconnected to California. *Norwest*
7 *Mortgage, Inc. v. Superior Court*, 72 Cal. App. 4th 214, 222–23 (1999); *but see Nat’l Notary Ass’n*
8 *v. U.S. Notary*, D038278, 2002 WL 1265555, *4 (Cal. Ct. App. June 7, 2002) (distinguishing
9 *Norwest* on the grounds that the class in *National Notary* sought injunctive, not monetary, relief to
10 enforce compliance by the resident defendant for conduct directed from its California headquarters).
11 Whatever the merits of this argument as to the ultimate propriety of a nationwide class, resolution of
12 this question will require “detailed choice-of-law analysis” not appropriate at the pleadings stage.
13 *Clancy v. Bromley Tea Co.*, No. 12-cv-03003, 2013 WL 4081632, *7 (N.D. Cal. Aug. 9, 2013)
14 (denying judgment on the pleadings). “[S]uch a fact-heavy inquiry should occur during the class
15 certification stage, after discovery.” *Id.* Recent cases from this district have rejected such
16 arguments at the pleadings stage and allowed the complaint to proceed based on CAFA jurisdiction.
17 *See, e.g., Werdebaugh v. Blue Diamond Growers*, 2013 WL 5487236 (N.D. Cal. Oct. 2, 2013)
18 (denying motion to strike nationwide class claims).

19 **B. Preemption**

20 Pursuant to the Supremacy Clause, federal law preempts state law when: “(1) Congress
21 enacts a statute that explicitly pre-empts state law; (2) state law actually conflicts with federal law;
22 or (3) federal law occupies a legislative field to such an extent it is reasonable to conclude that
23 Congress left no room for state regulation in that field.” *Chae v. SLM Corp.*, 593 F.3d 936, 941 (9th
24 Cir. 2010). There is a presumption against preemption “unless that [is] the clear and manifest
25 purpose of Congress,” *United States v. Locke*, 529 U.S. 89, 107 (2000). This presumption is
26 heightened where “federal law is said to bar state action in fields of traditional state regulation.”
27 *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655
28 (1995). In light of the historical “primacy of state regulation of matters of health and safety,”

1 *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996), courts can assume that “state and local regulation
 2 related to [such] matters . . . can normally coexist with federal regulations.” *Hillsborough County v.*
 3 *Automated Med. Labs., Inc.*, 471 U.S. 707, 718 (1985). Where Congress does provide for express
 4 preemption, the presumption against preemption requires courts to read the clause narrowly.
 5 *Medtronic*, 518 U.S. at 485.

6 Yucatan first argues the FDCA explicitly preempts plaintiffs’ UCL claim. The NLEA states
 7 that it “shall not be construed to preempt any provision of State law, unless such provision is
 8 expressly preempted under [21 U.S.C. § 343-1(a)] of the [FDCA].” Pub. L. No. 101-535, § 6(c)(1).
 9 It does contain two express preemption provisions relating to sections 343(q) and (r). Section 343-
 10 1(a)(4) expressly preempts any state or local “requirement for nutrition labeling of food that is not
 11 identical to the requirement of section 343(q).” Section 343-1(a)(5), in turn, preempts state or local
 12 governments from imposing any requirement on nutrient content claims made by a food purveyor
 13 “in the label or labeling of food that is not identical to the requirement of section 343(r).” Where a
 14 requirement imposed by state law effectively parallels or mirrors the relevant sections of the NLEA,
 15 courts have repeatedly refused to find preemption. *See, e.g., N.Y. State Rest. Ass’n v. N.Y. Bd. of*
 16 *Health*, 556 F.3d 114, 123 (2d Cir. 2009); *Chavez v. Blue Key Natural Beverage Co.*, 268 F.R.D.
 17 365, 370 (N.D. Cal. 2010). This means that plaintiffs’ claims need not fail on preemption grounds if
 18 the requirements they seek to impose are either identical to those imposed by the FDCA and the
 19 NLEA amendments or do not involve claims or labeling information of the sort described in section
 20 343(r)(1) or 343(q).

21 In the more common nutrient content claim under the UCL, plaintiffs allege some aspect of
 22 the defendant’s label is misleading or deceptive. Here, plaintiffs limit their claim to the “unlawful”
 23 prong of the UCL in an effort to simplify the case “by dispensing with questions of ‘reliance’ or the
 24 ‘reasonable consumer standard.’” Plaintiffs assert a theory of liability that rests solely on
 25 defendant’s alleged failure to comply with the nutritional labeling requirements of the FDCA as
 26 incorporated into California state law by the state’s Sherman Law. Because the claim rises or falls
 27 on defendant’s compliance with the FDCA, the express preemption clause of section 343-1 does not
 28 apply.

1 In the alternative, Yucatan argues the FDCA impliedly preempts any private action seeking
2 to enforce food labeling regulations. While it is true there is no private enforcement under the
3 NLEA, “[n]umerous courts in this District have rejected the same preemption arguments in similar
4 food misbranding cases where the requirements under the Sherman Law (asserted here through the
5 UCL) are identical to the requirements imposed under the FDCA.” *Ang v. Bimbo Bakeries USA,*
6 *Inc.*, No. 13-cv-01196, 2013 WL 5407039, *11 (N.D. Cal. Sept. 25, 2013). Although the claims in
7 *Ang* were not limited, as here, to the “unlawful” prong of the UCL, the analysis is equally applicable
8 here to plaintiffs’ more narrow claim.

9 C. Primary Jurisdiction

10 The primary jurisdiction doctrine applies when there is: “(1) [a] need to resolve an issue that
11 (2) has been placed by Congress within the jurisdiction of an administrative body having regulatory
12 authority (3) pursuant to a statute that subjects an industry or activity to a comprehensive regulatory
13 authority that (4) requires expertise or uniformity in administration.” *Clark v. Time Warner*, 523
14 F.3d 1110, 1115 (9th Cir. 2008). “In practice, this means that the court either stays proceedings or
15 dismisses the case without prejudice, so that the parties may seek an administrative ruling.” *Id.* at
16 1115. The doctrine of primary jurisdiction may only be properly invoked “in a limited set of
17 circumstances”; it “is not designed to ‘secure expert advice’ from agencies every time a court is
18 presented with an issue conceivably within the agency’s ambit.” *Id.* at 1114 (internal quotations
19 omitted). “It is to be used only if a claim requires resolution of an issue of first impression, or of a
20 particularly complicated issue that Congress has committed to a regulatory agency.” *Id.* (internal
21 quotations omitted).

22 Yucatan argues that primary jurisdiction should apply because the FDA does not currently
23 have a final position on the issue of “evaporated cane juice” labeling and is in the process of
24 developing one. The FDA’s 2009 Draft Guidance on the use of the term “evaporated cane juice”
25 specified the document was “nonbinding,” “do[es] not establish legally enforceable
26 responsibilities,” and was circulated for the purpose of soliciting comments only. 2009 WL
27 3288507, at *1; *see also* 74 Fed. Reg. 51610–01 (Oct. 7, 2009) (explaining that draft guidance
28 documents do not “create or confer any rights for or on any person and does not operate to bind

1 FDA or the public”). Courts in this district have divided on whether the lack of formal guidance
 2 concerning “evaporated can juice” warrants application of primary jurisdiction. *Compare Samat v.*
 3 *Proctor & Gamble Co.*, 12–CV–01891, 2013 WL 3124647, *8 (June 18, 2013) (finding existing
 4 guidance requiring use of “[t]he common or usual name of a food” sufficient) *with Hood v.*
 5 *Wholesoy & Co.*, No. 12–cv–5550, 2013 WL 3553979, *5 (July 12, 2013) (finding the FDA’s
 6 position unsettled and “[t]hus, determination of Plaintiff’s claim would require the Court to decide
 7 an issue committed to the FDA’s expertise without a clear indication of how FDA would view the
 8 issue”).

9 Although the FDA has not issued any final guidance directly addressing the term
 10 “evaporated cane juice,” it has provided guidance in the form of regulations concerning the terms
 11 “sugar,” “juice,” and “cane syrup” such that the issue presented here is hardly one of “first
 12 impression” necessitating its commitment to the agency. The fact that the FDA has not yet finalized
 13 the draft guidance issued more than four years ago, and that it continues to issue warning letters
 14 consistent with that position, further suggests the agency does not view the issue as unsettled.⁴ In
 15 sum, the question presented here does not require dismissing or staying this litigation pending final
 16 agency resolution of this question.

17 **D. Standing**

18 Yucatan next argues plaintiffs lack standing to assert a claim for relief under the UCL. As
 19 the party seeking to invoke the Court’s jurisdiction, plaintiffs bear the burden of establishing
 20 constitutional standing and therefore subject matter jurisdiction over their claim. *See Kokkonen v.*
 21 *Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994). “For purposes of ruling on a motion
 22 to dismiss for want of standing, both the trial and reviewing courts must accept as true all material
 23 allegations of the complaint and must construe the complaint in favor of the complaining party.”
 24 *Warth v. Seldin*, 422 U.S. 490, 501 (1975).

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 27 ⁴ According to the FDA July 2012 Regulatory Procedures Manual, “The agency position is that
 28 Warning Letters are issued only for violations of regulatory significance.” FDA, Regulatory
 Procedures Manual, 4-1—Warning Letters (July 2012).

1 To satisfy the United States Constitution’s standing requirement, “a plaintiff must show (1)
2 it has suffered an ‘injury in fact’ that is (a) concrete and particularized and (b) actual or imminent,
3 not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the
4 defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by
5 a favorable decision.” *Friends of the Earth, Inc. v. Laidlaw Env’tl. Servs. (TOC) Inc.*, 528 U.S. 167,
6 180–81 (2000). Here, plaintiffs allege putative class members paid a premium price for Yucatan’s
7 products labeled as containing “evaporated cane juice” and were thereby damaged “in that they
8 purchased misbranded and worthless products that were illegal to sell or possess based on
9 Defendant’s illegal labeling of the products.” (Compl. ¶¶ 31, 32.) This is enough at least as to those
10 products actually purchased by plaintiffs. Yucatan’s counterarguments regarding the nature and
11 degree of plaintiffs’ injury, and whether their labels were accurate or not, go to the merits of
12 plaintiffs’ claim, not standing.

13 As to those class products which plaintiffs themselves did not purchase, that issue was
14 considered at length in a recent case from this district. *See Clancy*, 2013 WL 4081632, *3–6. The
15 Supreme Court has noted “there is tension in [its] prior cases” regarding whether differences among
16 class members “is a matter of Article III standing at all or whether it goes to the propriety of class
17 certification pursuant to Federal Rule of Civil Procedure 23(a).” *Gratz v. Bollinger*, 539 U.S. 244,
18 263 & n.15 (2003). Defendants do not cite any Ninth Circuit decisions directly addressing this
19 question.

20 As *Clancy* recounts, decisions from within this District have split into three groups: (1) a
21 strict position in which claims relating to products not purchased must be dismissed for lack of
22 standing; (2) a middle ground in which the inquiry is whether there is sufficient similarity between
23 the products which were purchased and those which were not; and (3) a third group finding standing
24 to be satisfied so long as the named plaintiff has individual standing to bring claims regarding the
25 purchased products and reserving the question of whether a proposed class can bring claims related
26 to other products until the class certification stage. *Clancy*, at *4. *Clancy* adopts the third position.

27 It is not necessary here to parse the distinction between the second and third approach
28 outlined in *Clancy* because plaintiffs challenge only the propriety of the term “evaporated cane

1 juice,” a term indisputably present in the ingredient list of each of the class products. Plaintiffs’
 2 claim rises or falls on whether the challenged term violates the FDA’s food labeling regulations and
 3 therefore renders the class products “unlawful” under the UCL.

4 Nevertheless, Yucatan argues for the most restrictive view of standing, for three reasons:

5 First, if there are regionality questions by products being purchased, that will be a
 6 factor determining whether a class action is appropriate at all Secondly,
 7 expanding class action cases to include numerous products not purchased by
 8 Plaintiffs would artificially expand the scope of a case, which will not be redressed
 9 until much later at the class certification stage, something that is not always
 10 financially viable for small companies such as Yucatan Foods. Third, complying
 with this requirement is hardly difficult, since plaintiffs that have in fact purchased
 the other products should not be hard to identify, if indeed the heart of the case has
 merit.

11 (Reply at 9.) None of these arguments rebut plaintiffs’ satisfaction of the case and controversy
 12 requirement of Article III nor implicate the traditional prudential concerns of standing. The first
 13 argument suggests plaintiffs may have a more difficult path to class certification—a consideration
 14 best left to the certification stage. The second concern, though well-taken, can be addressed through
 15 careful case management and the supervision of discovery. The third suggests that the issue is not
 16 one that would otherwise evade review, but that is no reason to foreclose claims asserted on behalf
 17 of other purported class members at this juncture.

18 As in *Clancy*, it is not necessary to determine, at this point, that plaintiffs cannot represent a
 19 class who purchased any different products than did the plaintiffs. *Clancy*, *5. Importantly, as
 20 *Clancy* observed, plaintiffs here do not claim themselves to have standing to assert claims related to
 21 products they did not purchase, only that they may be potential representatives of a class of people
 22 who have such standing. *Id.* *6. Whether such a class may be certified, and whether these plaintiffs
 23 are determined to be adequate representatives, are questions for another day. On the facts as alleged
 24 in this case, the course adopted by *Clancy* seems appropriate, allowing plaintiffs to plead claims
 25 regarding unpurchased products on behalf of purported class members.

26 E. Plausibility

27 Plaintiffs rest their claim on the “unlawful” prong of the UCL, which defines unfair
 28 competition as “any unlawful, unfair or fraudulent business act or practice” Cal. Bus. & Prof.

1 Code § 17200. As explained by the state appellate court, “[T]here are three varieties of unfair
2 competition: practices which are unlawful, unfair or fraudulent.” *In re Tobacco II Cases*, 46 Cal.
3 4th 298, 311 (2009). “By proscribing ‘any unlawful’ business practice, section 17200 borrows
4 violations of other laws and treats them as unlawful practices that the unfair competition law makes
5 independently actionable.” *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.*,
6 20 Cal. 4th 163, 180 (1999) (internal quotations and citations omitted).

7 Yucatan argues plaintiffs fail to state a plausible claim for relief because they fail to plead
8 deception of the reasonable consumer or liability under the UCL. However, a plaintiff proceeding
9 under the “unlawful” prong need only plead facts to show it is plausible the defendant broke the law
10 because the legislature has already determined the conduct to be “unfair” by virtue of legislative
11 prohibition. *See, e.g., Morgan v. Wallaby*, No. 13-296, 2013 WL 5514563, *8–9 (N.D. Cal. Oct. 4,
12 2013) (denying motion to dismiss as to unlawful prong of the UCL but granting as to unfair prong);
13 *Gitson v. Trader Joe’s Co.*, No. 13-1333, 2013 WL 5513711, *8–10 (N.D. Cal. Oct. 4, 2013)
14 (same). Plaintiffs, therefore, need not allege deception to proceed with this claim.

15 Because plaintiffs’ claim does not turn on a judicial finding of whether the term “evaporated
16 cane juice” is misleading, but only on whether it is contrary to federal law and regulations,
17 Yucatan’s argument that any possible deception is mitigated by the presence of “sugar” on the
18 products’ nutrition facts panels is beside the point on this motion. Yucatan further argues plaintiffs
19 fail to plead liability under the UCL because the complaint offers no “allegations to suggest that
20 ECJ should be equated to plain ‘sugar’ or that ECJ’s use in the marketplace for roughly two decades
21 has not established ‘ECJ’ as a common or usual name.” Plaintiffs’ allegations that “evaporated cane
22 juice” is not a juice as defined by federal regulations nor the common or usual name for sugar are
23 sufficient to state a plausible claim that Yucatan’s use of the term “evaporated cane juice” violates
24 the federal regulations adopted by California pursuant to the Sherman Law.

25 To state a claim under the UCL, a plaintiff must also allege that he or she “has suffered
26 injury in fact and has lost money or property as a result of the unfair competition.” Cal. Bus. &
27 Prof. Code § 17204. Although Yucatan does not explicitly address this requirement, its arguments
28 concerning standing could fairly be read to apply to this requirement. As above, plaintiffs’

1 allegations that they paid a premium price for the products and that Yucatan’s unlawful use of the
2 term “evaporated cane juice” rendered them “worthless” is sufficient to state the requisite injury in
3 fact and monetary loss required by § 17204. Yucatan’s motion to dismiss for failure to state a
4 plausible claim is denied.

5 VI. CONCLUSION

6 The motion to dismiss is denied.

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8 IT IS SO ORDERED.

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10 Dated: 2/7/14



11 RICHARD SEEBORG
12 UNITED STATES DISTRICT JUDGE
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