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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

TAMARA MOORE, et al.,

Plaintiffs,

v.

MARS PETCARE US, INC., et al.,

Defendants.

Case No. 3:16-CV-07001-MMC

DEFENDANTS' NOTICE OF MOTION AND MOTION TO DISMISS PLAINTIFFS' STATE LAW CLAIMS; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Date: July 7, 2017
Time: 9:00 A.M.
Courtroom: 7, 19th Floor
Judge: Hon. Maxine M. Chesney

NOTICE OF MOTION AND MOTION

TO THE COURT, ALL PARTIES, AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on July 7, 2017, at 9:00 AM, or as soon thereafter as this matter may be heard, in Courtroom 7, 19th Floor, of this Court, located at 450 Golden Gate Avenue, San Francisco, California, Defendants Mars Petcare US, Inc.; Royal Canin U.S.A., Inc.; Nestlé Purina PetCare Company; and Hill's Pet Nutrition, Inc. (collectively, the "Manufacturer Defendants") will and hereby do move the Court for an order dismissing with prejudice Counts II through XIII of Plaintiffs' First Amended Complaint.

This Motion is made pursuant to Federal Rules of Civil Procedure 8(a), 9(b), 12(b)(1) and 12(b)(6) on the grounds that:

(a) Plaintiffs fail to plead claims sounding in fraud with sufficient particularity, as required by Federal Rule of Civil Procedure 9(b);

(b) Plaintiffs fail to allege either causation or reliance;

(c) Plaintiffs lack standing to seek injunctive relief;

(d) Plaintiffs lack standing to bring suit for products not purchased;

(e) Plaintiffs fail to state a claim for unjust enrichment; and

(f) The FAC fails to state a claim upon which relief can be granted.

This Motion is based upon this Notice, the accompanying Memorandum of Points and Authorities, the accompanying Request for Judicial Notice, any reply memorandum, the pleadings and files in this action, and such other matters as may be presented at or before the hearing.

Dated: April 3, 2017

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MEMORANDUM OF POINTS AND AUTHORITIES

Currently veterinarians—and only veterinarians—may authorize pet owners to purchase certain pet foods. Plaintiffs do not dispute that these products deliver therapeutic benefits for pets suffering from a wide range of health conditions, ranging from heart disease to renal failure to obesity. And in published guidance, the U.S. Food and Drug Administration (FDA) has identified the veterinarian's supervising role as a key safeguard against pet owner confusion about these products—and one that is crucial to pet safety.

Plaintiffs are 15 dog and cat owners from seven states. *See* First Am. Compl. ("FAC") ¶¶ 80–94. When their pets suffered various maladies, such as kidney stones, renal problems, diabetes, and autoimmune disease, their veterinarians recommended and prescribed a specific pet food for these conditions. *Id.* With the veterinarian's authorization (a "Veterinary Authorization"), each Plaintiff proceeded to purchase a pet food the veterinarian had authorized and which was manufactured by one of Defendants Mars Petcare US, Inc. ("Mars Petcare"), Royal Canin U.S.A., Inc. ("Royal Canin"), Nestlé Purina PetCare Company ("Purina"), or Hill's Pet Nutrition, Inc. ("Hill's") (together, the "Manufacturer Defendants"). *Id.* No Plaintiff claims that the purchased products were ineffective in any respect.

Instead, Plaintiffs claim that the Veterinary Authorization requirement *itself* is deceptive. Plaintiffs bring claims against the Manufacturer Defendants under various statutes from California, Missouri, Florida, New Jersey, North Carolina, Massachusetts and New York, and assert claims of unjust enrichment and/or restitution under California, Florida and North Carolina common law. The Manufacturer Defendants move to dismiss these putative class action claims for five reasons:

First, Plaintiffs' deception theory is unsupported by any *facts* demonstrating that the Veterinary Authorization requirement is a sham. On the contrary, FDA has repeatedly cautioned in its public guidance that consumers might be misled—and their pets endangered—if the pet foods at issue were sold *without* advance consultation with and authorization by a veterinarian. *See infra* pp. 3–10.

Second, Plaintiffs have failed to sufficiently allege the required causation or reliance. None of these Plaintiffs allege that they bought the "Prescription Pet Food" based on marketing and advertising. Instead, each Plaintiff's individual veterinarian recommended and authorized the pet foods to help support each Plaintiff's pet's specific condition. On the face of the complaint, it was each respective veterinarian's independent medical judgment that proximately caused Plaintiffs to purchase these products. *See infra* pp. 10–12.

Third, because Plaintiffs do not allege an intention to buy the products again, they lack standing to pursue injunctive relief. *See infra* pp. 12–13.

Fourth, Plaintiffs collectively purchased only a tiny fraction of the 233 product lines allegedly at issue. Plaintiffs lack standing to pursue claims for the hundreds of different pet foods—recommended for different conditions—which they did not purchase. *See infra* pp. 13–15.

Finally, Plaintiffs cannot bring claims for unjust enrichment because they have an adequate remedy at law, they received the benefit of the bargain, and they did not confer a direct benefit on the Manufacturer Defendants. *See infra* pp. 15–17.

FACTUAL BACKGROUND

Plaintiffs' state law claims all center on the requirement that customers obtain a Veterinary Authorization from a licensed veterinarian before they buy certain types of pet foods ("Prescription Pet Foods"). As Plaintiffs acknowledge, only pet foods that are intended to help support specified health conditions require this authorization. FAC ¶ 56. The Manufacturer Defendants sell many other pet foods that do not require Veterinary Authorization; indeed, according to Plaintiffs, Prescription Pet Foods comprise only 5% of all dog and cat food sales in the United States. FAC ¶ 24.

Plaintiffs claim that requiring pet owners to consult with a veterinarian and obtain a Veterinary Authorization for Prescription Pet Food is by its terms misleading, and standing alone amounts to a misrepresentation that the food is (a) a substance medically necessary to health; (b) a drug, medicine, or other controlled ingredient; (c) a substance that has been evaluated by FDA as a drug; (d) a substance as to which the manufacturer's representations regarding intended uses and

effects have been evaluated by FDA; and/or (e) a substance legally required to be sold by prescription. FAC ¶ 53. Plaintiffs do not allege *any* communication where a Manufacturer Defendant expressly made *any* of the foregoing claims; instead, their claim is that the Veterinary Authorization requirement implicitly communicates such claims to consumers.

There are two conspicuous omissions in the FAC. *First*, Plaintiffs do not allege that the Manufacturer Defendants' products do not work, that any claim made on their labeling is unsubstantiated, or that they did not in fact contain the listed ingredients. Plaintiffs' only claim is that they were misled because they were required to consult with and obtain an authorization from a licensed veterinarian before purchase. *Second*, Plaintiffs omit FDA's directives regarding the Veterinary Authorization requirement. Specifically, despite citing correspondence *to* FDA about its approach to these products, *see* FAC Ex. K, Plaintiffs omit FDA's responsive regulatory guidance on the subject, which has been in place throughout the putative class period. As discussed below, FDA views a veterinarian's authorization and supervision as a critical factor in *preventing* pet owners from being misled about pet foods, such as those at issue, that are intended for use in pets with health conditions.

A. The Decades Old History of Prescription Pet Food

Prescription Pet Food has been sold in the United States for more than fifty years. *See* Ex. 1, April 2016 FDA Compliance Policy Guide, Sec. 690.150 Labeling and Marketing of Dog and Cat Food Diets Intended to Diagnose, Cure, Mitigate, Treat, or Prevent Diseases ("Compliance Policy") at 3.[1] Plaintiffs do not allege that any Manufacturer Defendant has ever sold pet food intended to diagnose, cure, mitigate, treat or prevent diseases *without* a Veterinary Authorization requirement.

B. FDA Oversight and Guidance Relating to Prescription Pet Food

FDA has long been aware of the Veterinary Authorization requirement for dog and cat food products intended for use in pets with health conditions. Ex. 1 at 3. FDA has never suggested that it is deceptive or unlawful in any respect. On the contrary, for many years FDA has supported the

[1] FDA's Compliance Policy was the subject of correspondence cited by Plaintiffs (FAC Ex. K), and is attached to Defendants' Request for Judicial Notice as Exhibit 1.

use of the Veterinary Authorization requirement as a critical way of *preventing* consumer misuse of these specialized products. The requirement is one of the critical factors that the agency considers in exercising "enforcement discretion" not to take action against manufacturers who sell pet foods intended for use to diagnose, cure, mitigate, treat, or prevent diseases, which foods fall within the regulatory purview of the Federal Food, Drug, and Cosmetic Act ("FD&C Act"). *See id.* at 3. FDA has long exercised enforcement discretion to permit the sale of these products provided that, among other things, they are made available to the public only through licensed veterinarians. *Id.*

The policy's formal codification began in September 2012, when FDA issued a Draft Compliance Policy on the subject. *See* Ex. 2 ("2012 Draft Compliance Policy"). The draft policy's purpose was "to communicate FDA's strategy for enforcing the new animal drug provisions of the [FD&C Act] with respect to dog and cat food products that make labeling or marketing claims to diagnose, cure, mitigate, treat, or prevent disease." 77 Fed. Reg. 55480, 55480 (Sept. 10, 2012) (discussing 2012 Draft Compliance Policy).

FDA acknowledged at that time that although most such products historically did not meet all of the FD&C Act's requirements, FDA has "generally exercised enforcement discretion with regard to these requirements . . . when 1) those products provide nutrients in support of the animal's total required daily nutrient needs, 2) when manufacturers restricted label and labeling claims, and 3) ***distributed the products only through licensed veterinarians***." Ex. 2 at 4 (emphasis added).

At the time the 2012 Draft Compliance Policy was issued, FDA also noted that "[w]hen dog and cat food products intended for use to diagnose, cure, mitigate, treat or prevent diseases were first marketed, they were sold through, and used under the direction of, licensed veterinarians." *Id.* at 5. However, "[r]ecently, FDA ha[d] observed an increase in the marketing of such products *directly to pet owners*, including the availability of such products over the internet and in supermarkets or pet stores." *Id.* (emphasis added).[2] Directly contrary to Plaintiffs' deception theory here, FDA did not believe that the "marketing of such products directly to pet owners," *i.e.*, without

[2] The increase in the number of dog and cat foods making claims to diagnose, cure, mitigate, treat or prevent diseases apparently had started as far back as 1988. *See* 77 Fed. Reg. 55480.

the "direction of[] licensed veterinarians," was beneficial to consumers or the animals in their care. *Id.*

Instead, FDA explained that "[t]his shift in marketing directly to pet owners is of concern because many of these products affect physiological processes to extents that may not be tolerated by all animals and/or may not achieve effective treatment." *Id.* FDA specifically warned that "listing a disease or symptom on the label of a product does not provide a pet owner with sufficient information on the effectiveness, possible side effects, and contraindications for use of the product, and that, in the absence of a valid veterinarian-client-patient relationship, pet owners may misuse such a product, resulting in harm to their pets." *Id.* From FDA's perspective, the Veterinary Authorization requirement mitigates these concerns

> because the agency presumes ***the veterinarian will provide direction to the pet owner*** for how to use the product including periodic assessment of the product's effectiveness in both treatment outcome and provision of adequate nutrition for the animal.

Id. (emphasis added).

FDA accordingly issued for public comment[3] a policy of discretionary non-enforcement against pet food manufacturers predicated on a variety of criteria, chief among which was whether "[t]he product is made available to the public ***only through licensed veterinarians*** or through retail or internet sales to individuals purchasing the product ***under the direction of a veterinarian***." *Id.* at 7 (emphasis added). FDA proposed that "[p]riority for enforcement attention should be given to products that . . . . [a]re made directly available to the public circumventing the role of a licensed veterinarian for provision of directions for use, supervision of treatment and evaluation of the treatment outcome." *Id.* at 7–8.

Over three years later, after considering comments from interested parties, FDA published the final Compliance Policy in April 2016. The Compliance Policy reiterates many of the same concerns and objectives articulated in the 2012 Draft Compliance Policy. FDA continued to

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[3] FAC Exhibit K reflects comments submitted by the Pet Food Institute concerning the 2012 Draft Compliance Policy.

observe that dog and cat food diets intended for use in pets with health conditions, but which are not approved as new animal drugs, "are commonly labeled or marketed for use in dogs or cats with diseases or conditions that cannot be accurately diagnosed by pet owners." *Id.* at 5. FDA also reiterated its concern that pet owners would not understand and might misinterpret the information on these labels, including as to the products' "effectiveness, possible side effects, and contraindications for use." *Id.* "These concerns are reduced," FDA explained, "when such dog and cat food diets are marketed only through and used under the direction of a licensed veterinarian." *Id.*

Accordingly, FDA formally confirmed it was "less likely to initiate enforcement action against dog and cat food products intended to be fed as the pet's sole diet that claim to treat or prevent disease when all of the following factors are present:

1. The product is made available to the public only through licensed veterinarians or through retail or internet sales to individuals purchasing the product under the direction of a veterinarian.

2. The product does not present a known safety risk when used as labeled (e.g., when a product labeled for use in dogs or cats with a particular disease would be unsafe in such animals).

3. The product *label* does not include representations that it can be used to treat or prevent disease (e.g., obesity, renal failure).

4. Distribution of labeling and other manufacturer communications that contain representations that the product is intended for treatment or prevention of disease is limited so that it is provided only to veterinary professionals.

5. Electronic resources for the dissemination of labeling information and other manufacturer communications related to the intended use of the product are secured so that they are available only to veterinary professionals.

6. The label and labeling of the product is not false or misleading in other respects (e.g., dog food labeled and promoted for the treatment of cancer with no basis for the claim).

7. The product is not marketed as an alternative to approved new animal drugs.

8. The manufacturer is registered under section 415 of the FD&C Act.

9. The product is manufactured in accordance with CGMPs applicable to animal food (see 21 CFR part 507 subpart B) and other regulations applicable to animal food manufacturing.

10. The product's labeling complies with all food labeling requirements for such products (see 21 CFR part 501).

11. The product contains only ingredients that are GRAS ingredients, approved food additives, or ingredients defined in the 2015 Official Publication of the Association of American Feed Control Officials.

Ex. 1 at 7 (emphasis in original) (footnote omitted).

Plaintiffs do not allege that the Manufacturer Defendants have engaged in any conduct contrary to the factors set forth in the Compliance Policy. Plaintiffs made all of their alleged purchases within three or four years of the filing of the Complaint (FAC ¶¶ 80–94); in other words, all since the issuance of the 2012 Draft Compliance Policy.

STANDARD OF REVIEW

A defendant may move to dismiss an action for failure to allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); FED. R. CIV. P. 12(b)(6). "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. The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal citations omitted). Mere "conclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss." *Adams v. Johnson*, 355 F.3d 1179, 1183 (9th Cir. 2004); *accord Iqbal*, 556 U.S. at 678. The court is not required to "'assume the truth of legal conclusions merely because they are cast in the form of factual allegations.'" *Fayer v. Vaughn*, 649 F.3d 1061, 1064 (9th Cir. 2011) (per curiam) (quoting *W. Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981)).

ARGUMENT

I. Plaintiffs Fail to Sufficiently Plead the Alleged Fraud (Counts II to XIII)

Claims sounding in fraud are subject to the heightened pleading requirements of Federal Rule of Civil Procedure 9(b), which require a plaintiff to "state with particularity the circumstances constituting fraud." *See also Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1124 (9th Cir. 2009). To

satisfy Rule 9(b), "[a] plaintiff must set forth more than the neutral facts necessary to identify the transaction," but must also "set forth what is false or misleading about a statement, and why it is false." *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003) (citation and alteration omitted). Plaintiffs' state law claims are subject to Rule 9(b).[4]

Plaintiffs cannot evade Rule 9(b) by arguing that their claims arise under various consumer protection laws, rather than under common law fraud. As the Ninth Circuit has explained, "[a] plaintiff may allege a unified course of fraudulent conduct and rely entirely on that course of conduct as the basis of [a consumer protection] claim." *Kearns*, 567 F.3d at 1125. Such a claim "is said to be grounded in fraud or to sound in fraud, and the pleading as a whole must satisfy the particularity requirement of Rule 9(b)." *Id.* (internal quotation marks, alteration, and ellipses omitted); *see also Weinstein v. Saturn Corp.*, 2007 WL 735708, at *1 (N.D. Cal. Mar. 7, 2007) (rejecting contention that plaintiff's UCL, CLRA, and FAL claims did not sound in fraud).

Plaintiffs acknowledged at the CMC hearing that their complaint challenges only the *existence* of the Veterinary Authorization requirement. But there is a wide gap between, on the one hand, the allegation that that requirement is "self-imposed," and, on the other, the allegation that it is the object of a "false and misleading marketing scheme." FAC ¶¶ 44, 50. Plaintiffs' deception claims fail because they ignore that FDA has repeatedly embraced the requirement because it reduces the likelihood that consumers will misuse a product and thereby unintentionally harm their pet. *See supra* pp. 3–7. Plaintiffs cannot avoid FDA's guidance simply by omitting it from their

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[4] *See Newton v. Thomason*, 22 F.3d 1455, 1460 (9th Cir. 1994); *Keegan v. Am. Honda Motor Co.*, 838 F. Supp. 2d 929, 957–58 (C.D. Cal. 2012); *Kearns*, 567 F.3d at 1125 (UCL and CLRA); *Elias v. Hewlett-Packard Co.*, 903 F. Supp. 2d 843, 853 (N.D. Cal. 2012) (FAL); *In re Actimmune Mktg. Litig.*, 2009 WL 3740648, at *16 (N.D. Cal. Nov. 6, 2009) (California unjust enrichment); *Blake v. Career Educ. Corp.*, 2009 WL 140742, at *2 (E.D. Mo. Jan. 20, 2009) (Missouri Merchandising Practices Act); *Feiner v. Innovation Ventures LLC*, 2013 WL 2386656, at *4 (S.D. Fla. May 30, 2013) (Florida Deceptive and Unfair Trade Practices Act); *Garcia v. Kashi Co.*, 43 F. Supp. 3d 1359, 1381–82 (S.D. Fla. 2014) (Florida unjust enrichment); *FDIC v. Bathgate*, 27 F.3d 850, 876–77 (3d Cir. 1994) (New Jersey Consumer Fraud Act); *Smith v. Cent. Soya of Athens, Inc.*, 604 F. Supp. 518, 529–30 (E.D.N.C. 1985) (North Carolina Unfair and Deceptive Trade Practices Act); *Pisgah Labs., Inc. v. Mikart, Inc.*, 2015 WL 996609, at *6 (W.D.N.C. Mar. 5, 2015) (North Carolina unjust enrichment).

complaint. Given FDA's willingness to exercise enforcement discretion as to such foods only if they are made available "through" or "under the direction of a veterinarian," Ex. 1 at 7, Plaintiffs need far more than conclusory allegations to satisfy Rule 9(b).

The conclusory allegations that Prescription Pet Food is "made of the same ingredients contained in common pet foods," FAC ¶ 49, or that there "there is no material difference" between them, *id.* ¶ 50, do not move the needle. Plaintiffs do not identify the allegedly interchangeable "common pet foods"; more importantly, Plaintiffs do not allege that the products they purchased were ineffective, or that they lacked the attributes or ingredients referenced on their labels. Far from it. Plaintiff Tamara Moore's dog Pugalicious, for example, "had to undergo surgery to remove kidney stones." *Id.* ¶ 80. When Pugalicious fell ill, Ms. Moore received a prescription for Hill's Prescription Diet u/d (urinary diet) from her veterinarian, who was not affiliated with any entity owned by any of the defendants. *Id.* Ms. Moore does not allege that the Hill's product failed to help support the animal's kidney condition. The same is true for each of the animals listed in the FAC, which suffered from conditions ranging from skin and coat problems, to renal disease, to diabetes, to allergies; in each case, veterinarians were consulted and authorized Prescription Pet Foods. *Id.* ¶¶ 82, 86, 88, 92, 93. Other than complaining that the prices are higher for these products, Plaintiffs allege no facts to explain why requiring a prescription from a veterinarian before allowing animals with health conditions to consume the products is inherently deceptive. To the contrary, FDA's position is that "***in the absence*** of a valid veterinarian-client-patient relationship, pet owners may misuse such a product, resulting in harm to their pets." Ex. 2 at 5 (emphasis added). *See also Vess*, 317 F.3d at 1106–07 (plaintiff alleging that a medical organization fraudulently included a condition in a diagnostic guide for the purpose of increasing drug sales did not satisfy Rule 9(b) because he "fail[ed] to indicate which [diagnostic] criteria [the condition] failed to satisfy and how it failed to satisfy them" and other allegations of deceptive conduct intended to boost drug sales were "unsupported by details").

Given the regulatory backdrop for the allegedly fraudulent Veterinary Authorization requirement, Counts II to XIII must be dismissed for failure to plead how exactly the Manufacturer

Defendants are acting deceptively in light of FDA's policy, or how they could lawfully have bypassed the Veterinary Authorization requirement without violating that policy.

II. Plaintiffs Fail To Plead Reliance and Causation (Counts II, III, IV, VI, VII, IX, X, XII and XIII)

The state consumer protection laws at issue here require Plaintiffs to plead either reliance[5] or causation.[6] "Reliance and causation are twin concepts," and, "[i]n the context of fraud, they are often intertwined." *Stutman*, 731 N.E.2d at 612; *In re Anthem, Inc. Data Breach Litig.*, 162 F. Supp. 3d 953, 996 (N.D. Cal. 2016). In particular, in order "[t]o properly allege causation, a plaintiff must state in his complaint that he has seen the misleading statements of which he complains before he came into possession of the products he purchased." *Goldemberg v. Johnson & Johnson Consumer Cos.*, 8 F. Supp. 3d 467, 480 (S.D.N.Y. 2014). This same requirement applies as well to reliance. *Backhaut*, 74 F. Supp. 3d at 1048–49 ("Nowhere in the Complaint do [p]laintiffs allege that they saw, read, or relied on any representations by [defendant] . . . prior to purchasing [defendant's] devices.").

Plaintiffs fail to satisfy this requirement in two independent respects. *First*, no Plaintiff alleges that he or she saw or read the Manufacturer Defendants' advertising or labeling prior to purchase—much less that the Plaintiff relied on them in making the subject purchase. FAC ¶¶ 80–

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[5] Reliance is necessary to standing under California's UCL, FAL, and CLRA, and is required to show the proximate cause element of North Carolina Unfair and Deceptive Trade Practices Act claims. *See Thomas v. Costco Wholesale Corp.*, 2014 WL 1323192, at *5 (N.D. Cal. Mar. 31, 2014) (UCL); *Backhaut v. Apple, Inc.*, 74 F. Supp. 3d 1033, 1047–49 (N.D. Cal. 2014) (CLRA); *Victor v. R.C. Bigelow, Inc.*, 2014 WL 1028881, at *7 (N.D. Cal. Mar. 14, 2014) (FAL); *Solum v. CertainTeed Corp.*, 147 F. Supp. 3d 404, 411 (E.D.N.C. 2015) (North Carolina Unfair and Deceptive Trade Practices Act).

[6] Causation is an element of New York Consumer Protection Act claims, Florida Deceptive and Unfair Trade Practices Act claims, Missouri Merchandising Practices Act, Massachusetts Consumer Protection Act and New Jersey Consumer Fraud Act claims. *See Stutman v. Chem. Bank*, 731 N.E.2d 608, 612 (N.Y. 2000) (New York Consumer Protection Act); *Gavron v. Weather Shield Mfg., Inc.*, 819 F. Supp. 2d 1297, 1301 (S.D. Fla. 2011) (Florida Deceptive and Unfair Trade Practices Act); *Owen v. GMC*, 533 F.3d 913, 922–23 (8th Cir. 2008) (Missouri Merchandising Practices Act); *Gorbey ex rel. Maddox v. Am. J. of Obstetrics & Gynecology*, 849 F. Supp. 2d 162, 165 (D. Mass. 2012) (Massachusetts Consumer Protection Act); *Mickens v. Ford Motor Co.*, 900 F. Supp. 2d 427, 436–37 (D.N.J. 2012) (New Jersey Consumer Fraud Act).

94. Instead, each of the Plaintiffs allegedly purchased Prescription Pet Food based on the clinical advice of their veterinarian in view of their pets' varying medical conditions. *Id.* Nor do the Plaintiffs explain how they relied upon the Veterinary Authorization to their detriment. This is fatal to Plaintiffs' claims. *See Hall v. Diamond Foods, Inc.*, 2014 WL 3779012, at *2 (N.D. Cal. July 31, 2014) (plaintiff "fail[ed] to allege which of [defendant's] challenged statements he read and relied upon before he purchased [defendant's product]").

Second, the mere existence of the Veterinary Authorization requirement does not establish causation or reliance. The requirement necessarily interposes veterinary consultation—as was the case for each of the Plaintiffs here. FAC ¶¶ 80–94. *See United Food & Commercial Workers Cent. Pa. & Reg'l Health & Welfare Fund v. Amgen, Inc.*, 400 F. App'x 255, 257 (9th Cir. 2010) (chain of causation broken when there are "independent" acts between the manufacturer, an intermediary, and the consumer). The Second Circuit's decision in *UFCW Local 1776 v. Eli Lilly & Co.*, 620 F.3d 121 (2d Cir. 2010), is particularly instructive. In *UFCW*, several third-party payors ("TPPs") sued Eli Lilly alleging that it had misrepresented the efficacy of Zyprexa to physicians. Plaintiffs could not establish proximate causation under such a theory:

> if plaintiffs' factual allegations are correct, the chain of causation runs as follows: Lilly distributes misinformation about Zyprexa, physicians rely upon the misinformation and prescribe Zyprexa, TPPs rely[] on the advice of . . . their Pharmacy and Therapeutics Committees [to] place Zyprexa on their formularies as approved drugs, TPPs fail to negotiate the price of Zyprexa below the level set by Lilly, and TPPs overpay for Zyprexa.

Id. at 134. Thus, plaintiffs' "theory of liability rests on the independent actions of third and even fourth parties." *Id.* (internal quotation marks omitted). In other words, "the TPPs do not allege that *they* relied on Lilly's misrepresentations—[instead,] the misrepresentations . . . were directed through mailings and otherwise at doctors." *Id.* (internal quotation marks omitted).

The same result should obtain here. The FAC itself acknowledges the intervening events of veterinary consultation that preceded purchase. Plaintiffs do not allege (much less with any specificity) that any Manufacturer Defendant marketed its products directly to any of the Plaintiffs; the products were instead sold only upon the advice of and authorization by a veterinarian,

consistent with longstanding FDA policy. Plaintiffs accordingly relied on the advice of their veterinarians, who, in their independent medical judgment, wrote each Plaintiff a Veterinary Authorization for a particular product. Each Plaintiff then decided to purchase the recommended product, and none alleges that the purchase was based on anything other than the veterinarian's recommendation; all but two of the Plaintiffs purchased the products directly from their veterinarian's office. And there is no allegation that the Manufacturer Defendants deceived or misled any veterinarian—indeed, FDA's Compliance Policy makes clear that the purpose of advance consultation with a veterinarian is to ensure that consumers are well informed in the use of these diets to treat pets' health conditions. *Supra* pp. 3–7.

Because Plaintiffs' purchases resulted from their veterinarians' medical judgment, rather than from any misrepresentation, Counts II, III, IV, VI, VII, IX, X, XII and XIII should be dismissed for failure to sufficiently plead reliance or causation.

III. Plaintiffs Lack Standing To Seek Injunctive Relief (All Counts)

To seek injunctive relief, a plaintiff must demonstrate a "real or immediate threat that the plaintiff will be wronged again." *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983). In applying this principle in the consumer products context, a plaintiff must "show a sufficient likelihood that [he or she] will be injured . . . again in a similar way." *Luman v. Theismann*, 647 F. App'x 804, 807 (9th Cir. 2016). Thus, if Plaintiffs here "do not allege that they intend to purchase" Prescription Pet Food products "in the future," they cannot seek injunctive relief. *Id.*; *accord Albert v. Blue Diamond Growers*, 151 F. Supp. 3d 412, 418 (S.D.N.Y. 2015).

Plaintiffs do not claim any intent to purchase Prescription Pet Food products. To the contrary, they affirmatively allege that they will no longer buy such products. FAC ¶ 138. Thus, Plaintiffs cannot seek injunctive relief on any of their claims. *See, e.g.*, *Lanovaz v. Twinings N.A., Inc.*, 2016 WL 4585819, at *4 (N.D. Cal. Sept. 2, 2016) ("[A] plaintiff must intend to purchase a product in the future in order to have standing to seek injunctive relief."); *accord Anderson v. The Hain Celestial Grp., Inc.*, 87 F. Supp. 3d 1226, 1234 (N.D. Cal. 2015).

IV. Plaintiffs Lack Standing for Products Not Purchased (Counts II through XIII)

Plaintiffs claim to represent classes of purchasers of 233 separate Prescription Pet Food products for various conditions: 112 products manufactured by Hill's, 24 by Mars Petcare, 58 by Royal Canin, and 39 by Purina. FAC ¶ 4; FAC Ex. A. Plaintiffs purchased only a handful (18) of these 233 products. FAC ¶¶ 80–94.

For purposes of constitutional standing, plaintiffs need an "injury in fact" as to "*each* claim" that they "seek[] to press." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992); *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006) (emphasis added). Many courts accordingly have held that a plaintiff "cannot expand the scope of his claims to include a product he [or she] did not purchase." *Carrea v. Dreyer's Grand Ice Cream, Inc.*, 2011 WL 159380, at *3 (N.D. Cal. Jan. 10, 2011); *accord Hart v. BHH, LLC*, 2016 WL 2642228, at *4 (S.D.N.Y. May 5, 2016); *Dapeer v. Neutrogena Corp.*, 95 F. Supp. 3d 1366, 1373 (S.D. Fla. 2015) (citing *Wooden v. Bd. of Regents of Univ. Sys. of Ga.*, 247 F.3d 1262, 1288 (11th Cir. 2001)). This application of the standing requirement would necessitate dismissal of nearly all of Plaintiffs' claims, *i.e.*, of those claims that relate to the 215 products that Plaintiffs did not purchase.

The same result obtains under the analysis employed by those courts which have permitted claims for unpurchased products, because these courts still require that the purchased and unpurchased products be "substantially similar" to one another. *E.g.*, *Miller v. Ghirardelli Chocolate Co.*, 912 F. Supp. 2d 861, 869 (N.D. Cal. 2012). The substantial similarity test considers whether (1) the challenged products are of the same kind, (2) they are comprised of largely the same ingredients, and (3) each of the products bears the same mislabeling. *Wilson v. Frito-Lay N.A., Inc.*, 961 F. Supp. 2d 1134, 1141–42 (N.D. Cal. 2013); *Brady v. Basic Research, L.L.C.*, 101 F. Supp. 3d 217, 228 (E.D.N.Y. 2015). Many courts also examine (4) how many unpurchased products are at issue. *E.g.*, *Leonhart v. Nature's Path Foods, Inc.*, 2014 WL 6657809, at *3 (N.D. Cal. Nov. 21, 2014). In *Johnson v. Triple Leaf Tea Inc.*, 2014 WL 4744558 (N.D. Cal. Sept. 23, 2014), where this Court applied the substantial similarity test, all four factors were present. The products were all (1) tea products sold by the same defendant, (2) which contained the same weight-loss-promoting

ingredients, and (3) which bore the same weight-loss-related statements on their respective labels. Moreover, there were only two unpurchased products at issue. *Id.* at *3.

None of the four substantial similarity factors apply here. *First*, whether the challenged products are of the same kind, the FAC concedes that the 233 products at issue are significantly different from one another: the treated conditions include "joint mobility," "skin inflammation," "urinary health," "colitis and diabetes," and "thyroid care." FAC ¶ 52. *Cf. Leonhart*, 2014 WL 6657809, at *3 (no substantial similarity where complaint "list[ed] approximately eighty Unpurchased Products that loosely could be categorized as breakfast foods but that cover a wide spectrum including cold cereals, hot cereals, granolas, pancake mix, bars, toaster pastries, and waffles").

Second, whether the products are comprised of the same ingredients, Plaintiffs' own complaint (FAC Ex. A) indicate that the 233 Prescription Pet Foods are created using different ingredients (chicken, beef, lamb, vegetable, tuna, salmon, etc.), produced in different forms (canned, dry), designed for different animals (cats, dogs), and formulated to manage different conditions (as listed above). Where "the actual composition or appearance of the product is legally significant to the claim at issue, the consumer may only be allowed to pursue claims for products with identical product composition and/or appearance." *Ang v. Bimbo Bakeries USA, Inc.*, 2014 WL 1024182, at *8 (N.D. Cal. Mar. 13, 2014); *see also Dysthe v. Basic Research LLC*, 2011 WL 5868307, at *5 (C.D. Cal. June 13, 2011) (supplements with similar active ingredient but otherwise different compositions not "substantially similar").

Third, and relatedly, each of the individually formulated products are labeled differently, as is evident from the face of the four labels appended to the FAC. *See* Exs. F, G, H and I.

Finally, as to the number of unpurchased products at issue, Plaintiffs seek to group 233 products under a single umbrella, despite having purchased only 18 of them. Courts in this district have found time and again that a single commonality is insufficient to prove substantial similarity—particularly when the pool of unpurchased products is large and diverse. *See, e.g.*, *Wilson*, 961 F. Supp. 2d at 1142 (rejecting attempt to group 85 potato chip varieties); *Leonhart*, 2014 WL 6657809,

at *3 (rejecting attempt to group 80 breakfast foods); *Larsen v. Trader Joe's Co.*, 2012 WL 5458396, at *1 (N.D. Cal. June 14, 2012) (rejecting attempt to group cookies, cheeses, juices, and breakfast rolls, even though all products were commonly marketed as being "All Natural" or "100% Natural").

Accordingly, even were the Court to apply a substantial similarity exception to the rule against standing to pursue claims on unpurchased products, Plaintiffs' claims as to those products do not meet the requirements for the exception and should be dismissed.

V. Plaintiffs Fail to State a Claim for Equitable Relief (Counts II, III, IV, V, VIII, and XI)

Plaintiffs seek equitable relief under California, Florida, and North Carolina law. FAC ¶¶ 134–146, 152–59, 185–92, 208–15. Their request for such relief is unavailing because they (a) have an adequate remedy at law, (b) received the benefit of the bargain, and (c) did not confer a direct benefit on the Manufacturer Defendants.

A. Adequate Remedy at Law (California UCL (Count II), FAL (Count III), CLRA (Count IV), and Unjust Enrichment (Count V))

In California, "[e]quitable remedies exist" only so as to "supply relief where no legal remedy exists, or where the existing legal remedy is inadequate under the circumstances of a particular case." *Pac. Scene, Inc. v. Penasquitos, Inc.*, 758 P.2d 1182, 1184 (Cal. 1988) (*en banc*) (internal quotation marks omitted). Accordingly, "[a] plaintiff seeking equitable relief in California must [first] establish that there is no adequate remedy at law available." *Fonseca v. Goya Foods, Inc.*, 2016 WL 4698942, at *7 (N.D. Cal. Sept. 8, 2016) (first alteration in original) (internal quotation marks omitted); *accord Martin v. Cty. of L.A.*, 59 Cal. Rptr. 2d 303, 307 (Ct. App. 1996).

In *Duttweiler v. Triumph Motorcycles (America) Ltd.*, 2015 WL 4941780 (N.D. Cal. Aug. 19, 2015), the court applied this rule to dismiss plaintiff's UCL and FAL claims. There, as here, plaintiff sought "damages under the CLRA for the exact same conduct that form[ed] the basis of his UCL and FAL claims." *Id.* at *8. Thus, "in order to demonstrate some entitlement to equitable relief, [plaintiff] was required to allege facts suggesting that damages under the CLRA alone would not provide [him] adequate relief"—which plaintiff had failed to do. *Id.*; *see also In re Ford Tailgate Litig.*, 2014 WL 1007066, at *5 (N.D. Cal. Mar. 12, 2014) (dismissing unjust enrichment

claim because the cause of action "relie[d] upon the same factual predicates as [an available] legal cause[] of action"); *Fonseca*, 2016 WL 4698942, at *7–8 (dismissing UCL, FAL, CLRA, and unjust enrichment claims because plaintiff had adequate remedy at law); *Philips v. Ford Motor Co.*, 2015 WL 4111448, at *16–17 (N.D. Cal. July 7, 2015) (dismissing UCL and CLRA claims for injunctive relief).

Plaintiffs have not alleged that the CLRA's legal remedies are inadequate—nor could they. *Fonseca*, 2016 WL 4698942, at *7. Accordingly, as in *Duttweiler*, *In re Ford*, and *Fonseca*, this Court should dismiss Plaintiffs' claims under the UCL (Count II), FAL (Count III), and California doctrine of unjust enrichment (Count V), and Plaintiffs' claim under the CLRA (Count IV) to the extent that it seeks equitable relief.

B. Benefit of the Bargain (California Unjust Enrichment (Count V), Florida Unjust Enrichment (Count VIII), and North Carolina Unjust Enrichment (Count XI))

There can be no unjust enrichment when the plaintiff receives the benefit of his bargain, because "[t]here is no equitable reason for invoking restitution when the plaintiff gets the exchange which he expected." *Peterson v. Cellco P'ship*, 80 Cal. Rptr. 3d 316, 323 (Ct. App. 2008) (internal quotation marks omitted). California, Florida, and North Carolina all apply the benefit-of-the-bargain rule. *Id.*; *Prohias v. Pfizer, Inc.*, 490 F. Supp. 2d 1228, 1236 (S.D. Fla. 2007); *Britt v. Britt*, 359 S.E.2d 467, 471 (N.C. 1987).

In *Prohias*, for example, plaintiffs asserted an unjust enrichment claim against Pfizer for allegedly misleading consumers to believe that Lipitor could reduce heart disease when, in reality, it had only been approved to treat high cholesterol. 490 F. Supp. 2d at 1230. Yet, as the *Prohias* court explained, plaintiffs "purchased a cholesterol reducing drug, and both . . . obtained cholesterol reduction as a result. Therefore, in a general sense, they obtained the benefit of their bargain." *Id.* at 1236. Indeed, although plaintiffs claimed "that they would not have purchased Lipitor but for the misleading advertisements," that "argument is too little too late—they have already received the benefit from taking Lipitor, even if they now claim that they do not want that bargain." *Id.*

So too here, Plaintiffs have received exactly what they paid for: a food formulated to help manage a health condition. Nowhere in the FAC do Plaintiffs allege that the Manufacturer Defendants' products were ineffective. A belated claim that Plaintiffs "would not have" purchased the products recommended by their veterinarians, FAC ¶ 168, is "too little too late": Plaintiffs have already received and retained the benefit of the subject products. Plaintiffs thus fail to state an unjust enrichment claim under California (Count V), Florida (Count VIII), and North Carolina (Count XI) law.

C. No Direct Benefit Conferred (Florida Unjust Enrichment (Count VIII) and North Carolina Unjust Enrichment (Count XI))

Finally, Plaintiffs "must show [that] they directly conferred a benefit on" the Manufacturer Defendants in order to state a claim for unjust enrichment under Florida and North Carolina law. *See Am. Safety Ins. Serv., Inc. v. Griggs*, 959 So. 2d 322, 331 (Fla. Dist. Ct. App. 2007); *Effler v. Pyles*, 380 S.E.2d 149, 152 (N.C. Ct. App. 1989). In applying this rule, courts have dismissed claims where plaintiffs have conferred the benefit at issue (*i.e.*, their money) to a third party, rather than to defendant. *Id.*; *Baker Constr. Co. v. City of Burlington*, 683 S.E.2d 790 (Table), at *6 (N.C. Ct. App. 2009) ("[T]his Court has limited the scope of a claim of unjust enrichment such that the benefit conferred must be conferred directly from plaintiff to defendant, not through a third party."); *Beary v. ING Life Ins. & Annuity*, 520 F. Supp. 2d 356, 373 (D. Conn. 2007) (applying Florida law).

Here, no Plaintiff conferred a benefit directly to any of Hill's, Mars Petcare, Royal Canin, or Purina. Instead, all Plaintiffs purchased products either from a veterinary clinic or third party retailer. FAC ¶¶ 80–94. As such, Plaintiffs' Florida (Count VIII) and North Carolina (Count XI) unjust enrichment claims must be dismissed.

VI. The Court Should Deny Leave To Amend

"[D]ismissal without leave to amend is proper if it is clear that the complaint could not be saved by amendment. A district court's discretion to deny leave to amend is particularly broad where the plaintiff has previously amended." *Salameh v. Tarsadia Hotel*, 726 F.3d 1124, 1133 (9th Cir. 2013) (alterations and internal quotation marks omitted). This is such a case: Plaintiffs requested, and with Defendants' consent took, more than two months at the outset of the case to re-

plead. Both the original complaint and the FAC, however, are plagued by the same fundamental shortcomings: failure to satisfy Rule 9(b), lack of reliance, and lack of standing. There is no reason to believe that further amendment would cure these deficiencies. Accordingly, the Manufacturer Defendants respectfully submit that the Court should deny Plaintiffs leave to amend.

CONCLUSION

For the foregoing reasons, the Court should dismiss Plaintiffs' state law claims with prejudice.

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ATTESTATION PURSUANT TO LR 5-1(i)(3)

I, Jeffrey Faucette, am the ECF User whose identification and password are being used to file this **DEFENDANTS' NOTICE OF MOTION AND MOTION TO DISMISS PLAINTIFFS' STATE LAW CLAIMS; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF**. I hereby attest that concurrence in the filing of this document has been obtained from the other Signatory.

By: /s/ Jeffrey Faucette
Jeffrey Faucette