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United States District Court  
Northern District of California

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

ANTHONY J. BUSH,  
Plaintiff,  
v.  
MONDELEZ INTERNATIONAL, INC., et  
al.,  
Defendants.

Case No. [16-cv-02460-RS](#)

**ORDER GRANTING MOTION TO  
DISMISS**

**I. INTRODUCTION**

Plaintiff Anthony Bush avers that food manufacturer Mondelez International Inc. (“Mondelez”) under-fills certain travel-size snack products. Bush does not dispute that the snack product labels accurately disclose the number of cookies or crackers included in each container. He argues, rather, that the containers include empty space at the top, so the container size misrepresents the volume of included snack. Mondelez moves to dismiss on several grounds, including that Bush fails to state a plausible claim for relief. For the reasons that follow, Mondelez’s motion is granted. Pursuant to Civil Local Rule 7-1(b), the motion is suitable for disposition without oral argument and the hearing set for October 13, 2016 is vacated.

**II. BACKGROUND**

Bush contends that, over the last three years, he has purchased Mini Chips Ahoy!, Mini Oreo, Golden Oreo Mini, Nutter Butter Bites, Mini Nilla Wafers, Ritz Bits, and Teddy Grahams (“Go-Pak products”), only to be disappointed each time by the actual quantity of included snack. He alleges that Go-Pak products, sold in opaque containers, contain empty space (known as “slack-fill”), so there is a difference between the actual capacity of the containers and the volume of product contained therein. Bush does not deny that Go-Pak product labels accurately disclose

1 the product's net weight, the number of cookies or crackers per serving and the number of  
 2 servings per container.<sup>1</sup> Instead, he argues that the container size leads consumers to believe that  
 3 there will be more snack food than there actually is. Bush avers he relied upon the Go-Pak  
 4 "packaging" in making his purchase decisions and claims he would not have purchased the  
 5 products had he known the containers were not "adequately filled." Compl. ¶¶ 9, 31. In his  
 6 Amended Complaint, he seeks to represent a nationwide class of consumers and asserts six claims  
 7 for relief: (1) violation of California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code  
 8 § 17200; (2) violation of California's False Advertising Law ("FAL"); *id.* § 17500; (3) violation of  
 9 California's Consumers Legal Remedies Act ("CLRA"), Cal. Civ. Code § 1750; (4) breach of  
 10 implied warranty of merchantability; (5) unjust enrichment; (6) negligent misrepresentation; and  
 11 (7) fraud.

12 Mondelez moves to dismiss on the basis that: (i) Bush's claims are implausible and (ii)  
 13 preempted; (iii) Bush fails to plead his claims with particularity; (iv) Bush fails to state a claim for  
 14 breach of implied warranty of merchantability; and (v) Bush's negligent misrepresentation claim is  
 15 barred by the economic loss doctrine. Mondelez argues that, if the Amended Complaint is not  
 16 dismissed, the nationwide class allegations should be stricken.

### 17 III. LEGAL STANDARD

18 A complaint must contain "a short and plain statement of the claim showing that the  
 19 pleader is entitled to relief." Fed. R. Civ. P. 8(a). While "detailed factual allegations" are not

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21 <sup>1</sup> The complaint includes only a partial image of the Go Pak product labels. *See* Compl. ¶ 1. A  
 22 plaintiff, however, cannot "surviv[e] a Rule 12(b)(6) motion by deliberately omitting references to  
 23 documents upon which their claims are based." *Parrino v. FHP, Inc.*, 146 F.3d 699, 706 (9th Cir.  
 24 1998), as amended (July 28, 1998) (superseded by statute on other grounds). Mondelez has  
 25 provided a more complete image of the labels in the Declaration of Sandra Hanian. A court may  
 26 consider evidence on which the complaint "necessarily relies" if: (1) the complaint refers to the  
 27 document; (2) the document is central to the plaintiff's claim; and (3) no party questions the  
 28 authenticity of the copy attached to the 12(b)(6) motion. *Marder v. Lopez*, 450 F.3d 445, 448 (9th  
 Cir. 2006). Here, the product labels are central to Bush's claim and Bush does not challenge the  
 authenticity of the images in the Hanian declaration. Bush argues that Mondelez must establish  
 that those images reflect packaging identical to the products that Plaintiff and others purchased  
 throughout the class period. The images, however, are considered only to establish that Go-Pak  
 labels disclose the number of cookies or crackers per container, a fact that Bush does not dispute.

1 required, a complaint must have sufficient factual allegations to “state a claim to relief that is  
2 plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atl. v. Twombly*,  
3 550 U.S. 544, 570 (2007)). A claim is facially plausible “when the pleaded factual content allows  
4 the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”  
5 *Id.* This standard asks for “more than a sheer possibility that a defendant acted unlawfully.” *Id.*  
6 The determination is a context-specific task requiring the court “to draw on its judicial experience  
7 and common sense.” *Id.* at 679. In alleging fraud, a plaintiff “must state with particularity the  
8 circumstances constituting fraud.” Fed. R. Civ. P. 9(b). “To satisfy Rule 9(b), a pleading must  
9 identify the who, what, when, where, and how of the misconduct charged, as well as what is false  
10 or misleading about [the purportedly fraudulent] statement, and why it is false.” *Cafasso, U.S. ex*  
11 *rel. v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1055 (9th Cir. 2011) (internal quotations and  
12 citations omitted).

13 A motion to dismiss a complaint under Rule 12(b)(6) of the Federal Rules of Civil  
14 Procedure tests the legal sufficiency of the claims alleged in the complaint. *See Parks Sch. of*  
15 *Bus., Inc. v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995). Dismissal under Rule 12(b)(6) may  
16 be based either on the “lack of a cognizable legal theory” or on “the absence of sufficient facts  
17 alleged under a cognizable legal theory.” *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699  
18 (9th Cir. 1990). When evaluating such a motion, the court must accept all material allegations in  
19 the complaint as true, even if doubtful, and construe them in the light most favorable to the non-  
20 moving party. *Twombly*, 550 U.S. at 570. “[C]onclusory allegations of law and unwarranted  
21 inferences,” however, “are insufficient to defeat a motion to dismiss for failure to state a claim.”  
22 *Epstein v. Wash. Energy Co.*, 83 F.3d 1136, 1140 (9th Cir. 1996).

#### 23 IV. DISCUSSION

24 Bush alleges that Go-Pak containers are misleading because consumers expect more  
25 cookies or crackers than are actually included. He also avers that Go-Pak packaging is unlawful  
26 because it violates the FDA’s regulation against nonfunctional slack-fill, 21 C.F.R. § 100.100. He  
27 fails to plead a claim based on either theory of liability.

1                                   **1. Consumer Deception**

2                   Bush’s claim that the reasonable consumer would be deceived as to the amount of snack in  
3 a Go-Pak product is not plausible. Consumer deception claims are governed by the “reasonable  
4 consumer” test. *Williams v. Gerber Prods. Co.*, 552 F.3d 934, 938 (9th Cir. 2008). Under this  
5 standard, a plaintiff must “show that ‘members of the public are likely to be deceived.’” *Id.*  
6 (citation omitted); *Freeman v. Time, Inc.*, 68 F.3d 285, 289 (9th Cir. 1995). This requires more  
7 than a mere possibility that Go Pak product “might conceivably be misunderstood by some few  
8 consumers viewing it in an unreasonable manner.” *Lavie v. Procter & Gamble Co.*, 105  
9 Cal.App.4th 496, 508 (2003). Rather, the reasonable consumer standard requires a probability  
10 “that a significant portion of the general consuming public or of targeted consumers, acting  
11 reasonably in the circumstances, could be misled.” *Id.*

12                   The Ninth Circuit recently affirmed the dismissal of a slack-fill lawsuit on the ground that  
13 the plaintiff failed to state a plausible claim for consumer deception. *See Ebner v. Fresh, Inc.*, No.  
14 13-56644, 2016 WL 5389307 (9th Cir. Sept. 27, 2016). There, the plaintiff alleged that the  
15 defendant deceived consumers about the amount of product in its lip balm. She claimed the tube  
16 was deceptive because it contained a weighted metallic bottom (which made the box feel heavier),  
17 was wrapped in oversized packaging, and used a mechanism that allows only 75% of the product  
18 to advance up the tube. The Ninth Circuit concluded that the plaintiff had not, and could not,  
19 allege facts to state a plausible claim of consumer deception. It noted that “an accurate net weight  
20 label is affixed to every [] tube and its accompanying cardboard box” and concluded that, “the  
21 reasonable consumer [] understands that some additional weight at the bottom of the tube—not  
22 consisting of product—may be required to keep the tube upright.” *Id.* at \*6. It further reasoned  
23 that “elaborate packaging and the weighty feel of the tube is commonplace and . . . [b]ecause of  
24 the widespread nature of this practice, no reasonable consumer expects the weight or overall size  
25 of the packaging to reflect directly the quantity of product contained therein.” *Id.*

26                   Here, as in *Ebner*, it is undisputed that the Go-Pak product labels disclose the net weight of  
27 included product, as well as the number of cookies or crackers per container. Opaque containers

1 with slack-fill at the top are common in the snack market. “Targeted consumers” thus expect  
 2 some slack-fill. *Lavie*, 129 Cal.Rptr.2d at 495. No reasonable consumer expects the overall size  
 3 of the packaging to reflect precisely the quantity of product contained therein. Moreover, “any  
 4 potential ambiguity could be resolved by the back panel of the products.” *Workman v. Plum Inc.*,  
 5 141 F. Supp. 3d 1032, 1035 (N.D. Cal. 2015) (dismissing deception claims as implausible where  
 6 ingredient list disclosed predominance of ingredients); *see also Hawkins v. UGI Corp.*, No. 14-  
 7 08461, 2016 WL2595990 (C.D. Cal. May 4, 2016) (“regardless of consumers’ inability to visually  
 8 observe the level of product remaining in a cylinder . . . Plaintiffs here cannot plausibly allege that  
 9 Defendants’ admittedly accurate net weight labels [] are fraudulent, deceptive, or misleading”).

10 Bush relies on *Williams*. In *Williams*, parents of small children brought a class action  
 11 against Gerber based on the allegedly deceptive packaging of its Fruit Juice Snacks, a food  
 12 product for toddlers. 552 F.3d at 936. The two most prominent ingredients of Fruit Juice Snacks  
 13 were sugar and corn syrup, and the only fruit or juice content was white grape juice from  
 14 concentrate. *Id.* Nevertheless, the product: (1) was named “Fruit Juice Snacks”; (2) had images of  
 15 fruits such as oranges, peaches, strawberries, and cherries on the box; (3) stated that it was made  
 16 with “fruit juice and other natural ingredients”; and (4) stated that it was “one of a variety of  
 17 nutritious Gerber Graduates foods and juices that have been specifically designed to help toddlers  
 18 grow up strong and healthy.” *Id.* at 936, 939. The Ninth Circuit concluded that these features on  
 19 the packaging would lead a reasonable consumer to believe falsely that the product contained the  
 20 pictured fruits and that all of the ingredients were natural. In light of such deceptive packaging,  
 21 the court declined to allow Gerber to use the ingredient list as a “shield for liability for the  
 22 deception[.]” *Id.* at 939. A reasonable consumer, the court explained, is not “expected to look  
 23 beyond misleading representations on the front of the box to discover the truth from the ingredient  
 24 list in small print on the side of the box.” *Id.* In *Ebner*, the Ninth Circuit explained that, “[s]tated  
 25 straightforwardly, *Williams* stands for the proposition that, *if* the defendant commits an act of  
 26 deception, the presence of fine print revealing the truth is insufficient to dispel that deception.”  
 27 *Ebner*, at \*5.

1 Here, like in *Ebner* and unlike in *Williams*, there is no deceptive act to be dispelled. The  
 2 Go-Pak product’s weight label and nutrition facts panel do not contradict other representations on  
 3 or inferences from Mondelez’s packaging. Apart from the accurate weight label and serving size  
 4 statement, “there are no other words, pictures, or diagrams adorning the packaging, as there were  
 5 in *Williams*, from which any inference could be drawn or on which any reasonable belief could be  
 6 based about how much [ ] product” is included. *Ebner*, at \*6. In the absence of other indications  
 7 of snack quantity on the package, it is not plausible that “a significant portion of the general  
 8 consuming public or of targeted consumers, acting reasonably in the circumstances, could be  
 9 misled” into thinking the container would be packed to the brim with snack. *Id.* (citing *Lavie*, 129  
 10 Cal.Rptr.2d at 495). Accordingly, Bush fails to state a plausible claim of consumer deception  
 11 based on Go-Pak product packaging.

## 12 **2. Unlawful Packaging**

13 Bush alleges that the Go-Pak product packaging violates an FDA regulation prohibiting  
 14 nonfunctional slack-fill, 21 C.F.R. § 100.100.<sup>2</sup> On that basis, he further alleges that Mondelez  
 15 misrepresented Go-Pak products as “legal for sale.” Comp. ¶ 63, 81, 89, 93.

16 To the extent Bush intended to bring a claim for unlawful packaging under the “unlawful”  
 17 prong of the UCL, he fails to do so explicitly.<sup>3</sup> In any event, his allegations are “[t]hreadbare  
 18 recitals of the elements of a cause of action, supported by mere conclusory statements.” *Ashcroft*,  
 19 556 U.S. at 678. After reciting the six circumstances in which slack-fill is functional and not  
 20 misleading, under 21 C.F.R. § 100.100(a)(1)-(6), Bush alleges tersely that “none of these  
 21 circumstances apply here.” *Id.* at ¶ 5. His allegations are insufficient to support a claim of

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 23 <sup>2</sup> He also avers that Go-Pak product packaging violates “California law against misbranding,”  
 24 Comp. ¶ 10, but does not provide any further specificity regarding the “California law” or the  
 alleged violation.

25 <sup>3</sup> In support of his UCL claim, Bush alleges: “the misrepresentations by Defendants detailed above  
 26 constitutes an *unfair and fraudulent business practice* within the meaning of California Business  
 27 & Professions Code § 17200.” Compl. ¶ 54 (emphasis added). Bush never alleges an “unfair  
 business practice” but does aver that he “suffered injury in fact and [ ] lost money as a result of  
 Defendants’ unlawful slack-fill.” *Id.* ¶ 58.



1 unlawful packaging. *See Victor v. R.C. Bigelow, Inc.*, No. 13-02976, 2014 WL 1028881, at \*16  
 2 (N.D. Cal. Mar. 14, 2014) (finding that a complaint consisting of “a litany of FDA regulations and  
 3 federal statutes, and no factual allegation about how [the defendant’s] actions . . . are either  
 4 unlawful or fraudulent aside from conclusory statements . . . do[es] not suffice for Rule 8’s  
 5 ‘plausibility’ standard, let alone Rule 9’s ‘particularity’ standard for pleading”); *Park v. Welch*  
 6 *Foods, Inc.*, No. 12-06449, 2013 WL 5405318, at \*5 (N.D. Cal. Sept. 26, 2013) (dismissing  
 7 amended complaint that provided “little more than a long summary of the FDCA and its food  
 8 labeling regulations, a formulaic recitation of how these regulations apply to Defendants’  
 9 products, and conclusory allegations regarding Defendants’ ‘unlawfulness’”). Moreover, even  
 10 claims based on unlawful misrepresentations require a showing of reasonable reliance under the  
 11 UCL. *See Kwikset Corp. v. Superior Court*, 246 P.3d 877, 888 & n.9 (2011). As explained above,  
 12 Bush has not pleaded adequately reasonable reliance on the Go-Pak product packaging.

13 Because Bush’s unlawful packaging claim fails, his related claim that Mondelez  
 14 misrepresented Go-Pak products as “legal for sale” fails too. Notably, the Ninth Circuit recently  
 15 rejected the argument that allegedly deceptive labeling renders food products “illegal to sell, to  
 16 receive, and to possess under California law.” *Brazil v. Dole*, No. 14-17480, 2016 WL 5539863,  
 17 at \*2 (9th Cir. Sept. 30, 2016) (unpublished). Bush alleges that “reasonable consumers . . .  
 18 attached importance to whether Defendant’s Products were [] not legally salable, or capable of  
 19 legal possession[.]” Comp. ¶ 12. To the extent Bush suggests that the Go-Pak products “subject  
 20 him to risk of fine or prosecution if he is found in possession of that [] product” there is no  
 21 “support for this outlandish theory in the decisions of the California courts.” *Brazil*, 2016 WL  
 22 5539863 at \*2.

## 23 V. CONCLUSION

24 For the foregoing reasons, Mondelez’s motion is granted and Bush’s claims are dismissed.  
 25 Although it is not immediately obvious how his case could be saved by amendment, Bush is given  
 26 leave to amend if, in good faith, he is able to file a viable complaint. Any amended complaint shall  
 27 be filed within 20 days of this order.  
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**IT IS SO ORDERED.**

Dated: October 7, 2016

  
RICHARD SEEBORG  
United States District Judge

United States District Court  
Northern District of California