

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JENNIFER MAREK, et al.,
Plaintiffs,
v.
MOLSON COORS BEVERAGE
COMPANY, et al.,
Defendants.

Case No. [21-cv-07174-WHO](#)

ORDER ON MOTIONS TO DISMISS

Re: Dkt. Nos. 20, 21

Plaintiffs filed this putative class action against two defendants, Molson Coors Beverage Company (MCBC) and Molson Coors Beverage Company USA LLC (MCBC USA), challenging defendants’ allegedly deceptive and unlawful practices in labeling and marketing the “fortified” alcoholic Vizzy Hard Seltzer product with beneficial health statements, including “antioxidant Vitamin C” from a “superfruit.” First Amended Complaint (“FAC,” Dkt. No. 13) ¶¶ 1-5. They allege that defendants violated various California consumer protection statutes and common law by adding in and promoting Vitamin C in their alcoholic beverage.

MCBC is primarily a holding company that conducts no business in California, so defendants’ motion to dismiss is granted for lack of personal jurisdiction. Dkt. No. 20. Otherwise, plaintiffs’ claims are plausible and not preempted; the remainder of defendants’ motion is denied.

BACKGROUND

Plaintiffs contend that the uniform and consistent labeling and marketing of Vizzy products as being made “with Antioxidant Vitamin C from acerola superfruit” falsely and misleadingly implies that the carbonated alcoholic beverages are healthy for consumers or healthier than the other alcoholic seltzers on the market that do not advertise any nutrient content.

1 FAC ¶¶ 17-20, 22. Plaintiffs also assert that the Vizzy drinks are illegally fortified by defendants’
 2 addition of the acerola powder to all Vizzy flavors for the purpose of adding Vitamin C to the
 3 product. *Id.* ¶¶ 17-18, 43. They allege that defendants’ representations, made to convey that
 4 Vizzy is healthy or healthier than other hard seltzers, are false or misleading because: (i) Vitamin
 5 C in the amount added to Vizzy does not provide significant health benefits; (ii) isolated
 6 antioxidants, as in the added powder-based Vitamin C in Vizzy, do not provide the same health
 7 benefits as antioxidants from a diet rich in fruits and vegetables; (iii) most consumers have
 8 adequate Vitamin C intake, meaning the added Vitamin C in Vizzy, will “likely pass through the
 9 body,” and (iv) alcohol consumption interferes with nutrient absorption and alcohol prevents the
 10 body from using nutrients by altering the transport, metabolism, and storage of nutrients. FAC ¶¶
 11 31-35.

12 Both defendants move to dismiss, arguing that the state law claims are preempted by
 13 federal law or are subject to the primary jurisdiction of the Food and Drug Administration, and
 14 that the consumer protection claims are not and cannot be sufficiently alleged, the unjust
 15 enrichment claim fails, and plaintiffs lack standing to seek injunctive relief. MCBC also moves to
 16 dismiss for lack of personal jurisdiction.

17 DISCUSSION

18 I. MOTION TO DISMISS MOLSON COORS BEVERAGE COMPANY

19 A. Legal Standard

20 Under Federal Rule of Civil Procedure 12(b)(2), a defendant may move to dismiss for lack
 21 of personal jurisdiction. The plaintiff then bears the burden of demonstrating that jurisdiction
 22 exists. *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 800 (9th Cir. 2004). The
 23 plaintiff “need only demonstrate facts that if true would support jurisdiction over the defendant.”
 24 *Ballard v. Savage*, 65 F.3d 1495, 1498 (9th Cir. 1995). “Although the plaintiff cannot simply rest
 25 on the bare allegations of its complaint, uncontroverted allegations in the complaint must be taken
 26 as true.” *Schwarzenegger*, 374 F.3d at 800 (citations omitted). “Conflicts between [the] parties
 27 over statements contained in affidavits must be resolved in the plaintiff’s favor.” *Id.* “

28 “California’s long-arm statute allows courts to exercise personal jurisdiction over

1 defendants to the extent permitted by the Due Process Clause of the United States Constitution.”
2 *Core-Vent Corp. v. Novel Indus. AB*, 11 F.3d 1482, 1484 (9th Cir. 1993); CAL. CIV. PROC. CODE §
3 410.10. “Because California’s long-arm jurisdictional statute is coextensive with federal due
4 process requirements, the jurisdictional analyses under state law and federal due process are the
5 same.” *Schwarzenegger*, 374 F.3d at 800–01.

6 “There are two types of personal jurisdiction: general and specific.” *Fields v. Sedgwick*
7 *Associated Risks, Ltd.*, 796 F.2d 299, 301 (9th Cir. 1986). “[G]eneral jurisdiction permits a
8 defendant to be haled into court in the forum state to answer for any of its activities anywhere in
9 the world.” *Schwarzenegger*, 374 F.3d at 801. It exists where a nonresident defendant’s activities
10 within a state are “substantial” or “continuous and systematic.” *Data Disc.*, 557 F.2d at 1287.
11 Such contracts must “be of the sort that approximate physical presence.” *Bancroft & Masters, Inc.*
12 *v. Augusta Nat’l Inc.*, 223 F.3d 1082, 1086 (9th Cir. 2000).

13 Specific jurisdiction arises when a defendant’s specific contacts with the forum give rise or
14 relate to the claim in question. *Helicopteros Nacionales de Colombia S.A. v. Hall*, 466 U.S. 408,
15 414–16 (1984). “A court exercises specific jurisdiction where the cause of action arises out of or
16 has a substantial connection to the defendant’s contacts with the forum.” *Glencore Grain*
17 *Rotterdam BV v. Shivnath Rai Harnarain Co.*, 284 F.3d 1114, 1123 (9th Cir. 2002). The Ninth
18 Circuit employs a three-part test to determine whether there is specific jurisdiction over a
19 defendant: (1) the non-resident defendant must purposefully direct his activities or consummate
20 some transaction with the forum or resident thereof; or perform some act by which he purposefully
21 avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits
22 and protections of its laws; (2) the claim must be one which arises out of or relates to the
23 defendant’s forum-related activities; and (3) the exercise of jurisdiction must comport with fair
24 play and substantial justice, i.e., it must be reasonable. *Schwarzenegger*, 374 F.3d at 802.

25 The first prong of that test may be satisfied by “purposeful availment of the privilege of
26 doing business in the forum; by purposeful direction of activities at the forum; or by some
27 combination thereof.” *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L’Antisemitisme*, 433 F.3d
28 1199, 1206 (9th Cir. 2006) (citation and internal quotation marks omitted). The second prong

1 does not necessarily require a “a strict causal relationship between the defendant’s in-state
2 activity” and the claim, but it does require “an affiliation between the forum and the underlying
3 controversy, principally, an activity or an occurrence that takes place in the forum State and is
4 therefore subject to the State’s regulation.” *Ford Motor Co. v. Montana Eighth Jud. Dist. Ct.*, 141
5 S. Ct. 1017, 1025–26, (2021) (internal quotation marks, citations, and alteration omitted).

6 The plaintiff bears the burden of satisfying the first two prongs of the test.
7 *Schwarzenegger*, 374 F.3d at 802. “If the plaintiff succeeds in satisfying both of the first two
8 prongs, the burden then shifts to the defendant to “present a compelling case” that the exercise of
9 jurisdiction would not be reasonable.” *Id.* If the plaintiff cannot satisfy either of the first two
10 prongs, personal jurisdiction is not established in the forum state. *Id.*

11 **B. Application**

12 MBMC moves to dismiss for lack of jurisdiction, relying primarily on the declaration of
13 Roxanne Stetler, the Vice President, Controller and Chief Accounting Officer, for MCBC who
14 declares that:

15 MCBC has not conducted and presently does not conduct any general
16 business operations in the State of California. MCBC does not have
17 any offices, facilities, telephone listings or mailing addresses in
18 California, and it does not engage in any direct advertising or sales of
19 products to California residents. MCBC also does not employ any
20 officers, employees, or agents who transact business in California on
21 its behalf. At all times relevant to this action, and through the present
22 time, any operations conducted using the trade name “MillerCoors”
23 or “Molson Coors” in California have been and are conducted only
24 by and through MCBC’s direct or indirect subsidiary entities and not
25 by or through MCBC.

26 Declaration of Roxanne Stetler (Dkt. No. 20-1) ¶ 5. Stetler also states that MCBC “is principally a
27 holding company” and has not employed any corporate directors or officers located in or working
28 out of California, and that no corporate activities of MCBC were or are directed, controlled, and
coordinated from California, but were instead made from corporate headquarters or corporate
offices in Colorado, Illinois, or Wisconsin. *Id.* ¶¶ 6-7. Finally, she says that Molson Coors USA
“is responsible for the manufacturing, distribution and advertising for the hard seltzer brand
VIZZY. Molson Coors [USA] maintains its own separate accounting, books, and records. It has
separate bank accounts and maintains separate assets from MCBC.” *Id.* ¶ 8. Based on these

1 assertions, MCBC argues that plaintiffs cannot allege general or specific jurisdiction over MCBC
2 for the claims plaintiffs make regarding Vizzy. Dkt. No 20.

3 Plaintiffs respond by pointing to evidence that MCBC distributes Vizzy in California,
4 noting that Vizzy’s packaging identifies “Molson Coors Beverage Company” as the distributor
5 and not MCBC USA. But plaintiffs do not address or dispute Stetler’s assertion that MCBC USA
6 has lawfully registered the fictitious name of Molson Coors Beverage Company to use in
7 California, consistent with California law, and it is MCBC USA that manufactures, advertises, and
8 distributes Vizzy in California. Stetler Decl. ¶¶ 5, 8.

9 Plaintiffs also rely on MCBC’s Form-10Q, filed with the Securities and Exchange
10 Commission, where MCBC states (referring to it and its subsidiaries) that “we have been brewing
11 beverages” and “we produce some of the most beloved and iconic beer brands every made,” and
12 that “we” is defined in the 10Q “unless otherwise noted” as “including Molson Coors Beverage
13 Company.” Pls Request for Judicial Notice, Ex. B at 10, 27. These generalities ignore the
14 disclosure that MCBC is “principally a holding company.” *Id.* The statements in the 10Q are
15 fully consistent with Stetler’s declaration that MCBC is “primarily” a holding company and that it
16 is MCBC USA who “is responsible for the manufacturing, distribution and advertising for the hard
17 seltzer brand VIZZY.” Stettler Decl. ¶¶ 6, 8.

18 Finally, plaintiffs note that MCBC is registered to do business in California, disclosing its
19 type of business as “manufacturing and distribution,” and that MCBC and MCBC USA share
20 numerous officers and offices. Pls RJN, Ex. C; Oppo. to MCBC MTD at 2. MCBC notes that
21 simply being registered with the State of California is insufficient for general jurisdiction. It also
22 argues that plaintiffs cannot establish specific jurisdiction based on this fact; their claims do not
23 arise from the fact that MCBC is registered with the State of California.

24 I agree. Plaintiffs provide no caselaw to support the proposition that simply because a
25 corporation has a registered agent for service in a state (here MCBC in California), that is
26 sufficient in and of itself to expose it to general or specific jurisdiction. *But see AM Tr. v. UBS*
27 *AG*, 681 Fed. Appx. 587, 588–89 (9th Cir. 2017) (unpublished) (“California does not require
28 corporations to consent to general personal jurisdiction in that state when they designate an agent

1 for service of process or register to do business.”). Even if registration in California could satisfy
2 the “purposeful availment” prong for specific jurisdiction, there are still no allegations that
3 plaintiffs’ claim “arise out of or relate to” MCBC’s California activities because it is undisputed
4 that MCBC conducts and directs no activities in California.

5 As a backup, plaintiffs ask that they be allowed jurisdictional discovery to test whether
6 MCBC distributes Vizzy in California or “was otherwise involved in the decision making
7 regarding the production and labelling” of Vizzy. Pls. Oppo. to MCBC MTD at 3. There is no
8 justification for that discovery. Plaintiffs have not countered MCBC’s evidence in the Stetler
9 declaration or otherwise adduced evidence that could contradict or call it into question.

10 On this record, the motion is GRANTED and MCBC is DISMISSED for lack of
11 jurisdiction. That dismissal is WITHOUT PREJUDICE if further information comes to light that
12 contradicts the Stetler declarations.

13 **II. MOTION TO DISMISS CLAIMS**

14 **A. Legal Standard**

15 Under Federal Rule of Civil Procedure 12(b)(6), a district court must dismiss a complaint
16 if it fails to state a claim upon which relief can be granted. To survive a Rule 12(b)(6) motion to
17 dismiss, the plaintiff must allege “enough facts to state a claim to relief that is plausible on its
18 face.” *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is facially plausible
19 when the plaintiff pleads facts that “allow the court to draw the reasonable inference that the
20 defendant is liable for the misconduct alleged.” *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)
21 (citation omitted). There must be “more than a sheer possibility that a defendant has acted
22 unlawfully.” *Id.* While courts do not require “heightened fact pleading of specifics,” a plaintiff
23 must allege facts sufficient to “raise a right to relief above the speculative level.” *See Twombly*,
24 550 U.S. at 555, 570.

25 In deciding whether the plaintiff has stated a claim upon which relief can be granted, the
26 Court accepts the plaintiff’s allegations as true and draws all reasonable inferences in favor of the
27 plaintiff. *See Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987). However, the court
28 is not required to accept as true “allegations that are merely conclusory, unwarranted deductions of

1 fact, or unreasonable inferences.” *See In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir.
2 2008).

3 **B. Preemption**

4 Defendants’ primary argument on their motion to dismiss is that federal law permits them
5 to include fruit juice in Vizzy and because that juice contains an appreciate amount of Vitamin C
6 (at least 20% of the recommended daily value) they are allowed to truthfully disclose the presence
7 of “antioxidant Vitamin C” on the product’s label, packing, and marketing. Given the asserted
8 blessing of their conduct under federal law, defendants contend the state law claims are preempted
9 or otherwise fail as a matter of law.

10 Both sides agree that hard seltzers like Vizzy are regulated by the Food and Drug
11 Administration (FDA) under the Food, Drug, and Cosmetic Act (“FDCA”) as modified by the
12 Nutrition Labeling and Education Act (“NELA”). Both sides also agree that under the FDCA, as
13 amended by NELA, states cannot impose any labeling requirement that is not identical to the
14 federal requirements, under 21 U.S.C. §§ 343(q), 343(r), and 343-1(a)(5). *Greenberg v. Target*
15 *Corp.*, 985 F.3d 650, 655 (9th Cir. Jan. 13, 2021) (“To avoid a patchwork quilt of conflicting state
16 labeling laws, the FDCA includes a preemption provision that establishes a national and uniform
17 standard for certain labeling statements. The statute preempts any state law that establishes ‘any
18 requirement respecting any claim of the type described in section 343(r)(1) of this title made in the
19 label or labeling of food that is not identical to the requirement of section 343(r) of this title.’ 21
20 U.S.C. § 343-1(a)(5).”).¹

21 Plaintiffs argue that their state law claims – all based on assertions that defendants’
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23 ¹ Defendants do not dispute that if plaintiffs are merely attempting to hold them to federal
24 standards under the FDCA, the state law claims asserting violation of California’s Sherman Food
25 Drug & Cosmetic Law (“Sherman Law,” Cal. Health & Saf. Code §110100 *et seq.*) that expressly
26 incorporate the FDCA standards are not preempted. *See, e.g., Lanovaz v. Twinings N. Am., Inc.*,
27 No. C-12-02646-RMW, 2013 WL 675929, at *3 (N.D. Cal. Feb. 25, 2013) (“NELA contemplates
28 state enactment and enforcement of labeling requirements as long as they are identical to or
parallel NLEA requirements. Although Congress intended to preempt non-identical requirements
in the field of food labeling, the purpose of the NLEA is not to preclude all state regulation of
nutritional labeling, but to prevent State and local governments from adopting inconsistent
requirements with respect to the labeling of nutrients.”).

1 fortification of Vizzy is illegal under federal law and their use of the statement “with Antioxidant
2 Vitamin C from acerola superfruit” on Vizzy labels and marketing is false and misleading – are
3 not preempted because they simply seek to enforce the federal standards. They contend that
4 defendants are illegally fortifying Vizzy with Vitamin C under the FDA’s “Fortification Policy”
5 21 C.F.R. § 104.20² and that defendants’ marketing implies a health benefit that is false and
6 misleading in violation of 21 U.S.C. § 343(a)(1).³ *See, e.g., Becerra v. Dr Pepper/Seven Up, Inc.*,
7 No. 17-CV-05921-WHO, 2018 WL 1569697, at *4 (N.D. Cal. Mar. 30, 2018) (“the state laws
8 under which plaintiff brings suit—California’s UCL, FAL, CLRA, and Sherman Law—impose
9 identical requirements to Section 343(a) in that they also prohibit false and misleading
10 advertising”); *see also Questions and Answers on FDA’s Fortification Policy; Guidance for*
11 *Industry* (“Guidance”) at 7 (“Under our fortification policy, we do not consider it appropriate to
12 add vitamins and minerals to alcoholic beverages.”).⁴

13 _____
14 ² The “fundamental objective” of the Fortification Policy is:

15 to establish a uniform set of principles that will serve as a model for the rational addition of
16 nutrients to foods. The achievement and maintenance of a desirable level of nutritional
17 quality in the nation’s food supply is an important public health objective. The addition of
18 nutrients to specific foods can be an effective way of maintaining and improving the
19 overall nutritional quality of the food supply. However, random fortification of foods could
20 result in over- or underfortification in consumer diets and create nutrient imbalances in the
21 food supply. It could also result in deceptive or misleading claims for certain foods. The
22 Food and Drug Administration does not encourage indiscriminate addition of nutrients to
23 foods, nor does it consider it appropriate to fortify fresh produce; meat, poultry, or fish
24 products; sugars; or snack foods such as candies and carbonated beverages.

21 C.F.R. § 104.20(a). Foods may be fortified in order to “correct a dietary insufficiency
21 recognized by the scientific community,” to restore nutrients to a level representative of the food
22 prior to storage, handling, and processing, “to balance the vitamin, mineral, and protein” content
23 of a food, and “nutrient(s) may appropriately be added to a food that replaces traditional food in
24 the diet to avoid nutritional inferiority.” 21 C.F.R. § 104.20(b)-(e). Finally, the Policy provides
“(h) Any claims or statements in the labeling of food about the addition of a vitamin, mineral, or
protein to a food shall be made only if the claim or statement is not false or misleading and
otherwise complies with the act and any applicable regulations.” 21 C.F.R. § 104.20(h).

25 ³ 21 U.S.C § 343(a)(1) “A food shall be deemed to be misbranded-- (a) False or misleading label
26 If (1) its labeling is false or misleading in any particular, or (2) in the case of a food to which
27 section 350 of this title applies, its advertising is false or misleading in a material respect or its
28 labeling is in violation of section 350(b)(2) of this title.”

⁴ Available at <https://www.fda.gov/regulatory-information/search-fda-guidance-documents/guidance-industry-questions-and-answers-fdas-fortification-policy>

1 Defendants argue, first, that plaintiffs cannot bring a state law claim to “privately enforce
2 alleged violations of the FDCA.” MTD at 8. I have rejected that argument, as have a number of
3 other judges in this District. *See Morgan v. Wallaby Yogurt Co., Inc.*, No. 13-CV-00296-WHO,
4 2013 WL 5514563, at *6 (N.D. Cal. Oct. 4, 2013) (collecting cases).⁵

5 On the merits, defendants dispute whether the Fortification Policy applies to Vizzy. They
6 contend that Vizzy is not fortified because the Vitamin C comes from fruit juice (the dried powder
7 of the acerola fruit) and there is nothing in the Policy or other FDA regulations that prevents a
8 manufacturer from adding juice to an alcoholic product and then (as otherwise required) disclosing
9 the nutrient content from that addition. Plaintiffs respond that the addition of the Vitamin C as a
10 powder or a juice, for whatever reason (*e.g.*, for taste, stability, other manufacturing needs), is an
11 impermissible fortification regardless of defendants’ reason or intent. *Pls. Oppo. MTD* at 9 fn.3.
12 If intent is relevant, they assert that defendants’ intent in adding the acerola powder is *for* the
13 addition of Vitamin C – as demonstrated by the fact that defendants add the powder to every
14 flavor of Vizzy – that they then emblazoned on all Vizzy marketing. *FAC* ¶ 43.

15 At this juncture, plaintiffs have adequately alleged impermissible fortification. Whether
16 and to what extent purpose and intent is relevant to determining whether defendants have violated
17 the Fortification Policy, and what defendants’ purpose and intent is for adding the acerola
18 powder/juice to Vizzy, are better determined on a full evidentiary record. Similarly, whether
19 plaintiffs are correct that adding acerola juice or powder falls within the definition of fortification
20 or whether defendants are right that impermissible fortification occurs only by adding “distinct”
21 vitamins (like ascorbic acid to provide Vitamin C), is better determined on a full evidentiary
22 record showing how and why the acerola juice or powder is added to Vizzy.⁶

23 Defendants also argue that the Fortification Policy is not binding on Vizzy. Initially,
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25 ⁵ The premarket approval cases defendants rely on are inapposite. *See MTD* at 8-9; *Reply ISO*
26 *MTD* at 3.

27 ⁶ Defendants rely on the definition of fortification or enrichment as the “addition of discrete
28 nutrients such as vitamins, minerals, or proteins to foods.” *Reply ISO MTD* at 7 (citing 45 FR
6314).

1 defendants contend that the Policy is not binding because the challenged statement does not
 2 describe the addition of vitamin with terms such as “added or “plus” but instead accurately
 3 indicates the product is “with antioxidant Vitamin C.” *See* 21 C.F.R. § 101.54(e)(ii).⁷ Plaintiffs
 4 argue that “with” is synonymous with the terms identified in the regulation – “more,” “fortified,”
 5 “enriched,” “added,” “extra,” and “plus” – and used by defendants for the same reason, to indicate
 6 the addition or inclusion of “antioxidant Vitamin C” specifically. *See Vassigh v. Bai Brands LLC*,
 7 No. 14-CV-05127-HSG, 2015 WL 4238886, at *7 (N.D. Cal. July 13, 2015) (“The Court agrees
 8 with the latter opinions that statements may violate Section 101.54(g) without using the exact
 9 words identified in the regulation. A defendant cannot escape liability simply because it uses a
 10 synonym—such as “great source” or “excellent source”—instead of the defined term “good
 11 source.” The touchstone inquiry is whether the statement either expressly or implicitly
 12 characterizes the level of a nutrient in the product.”); *see also* 21 C.F.R. § 101.13(b) (“A claim that
 13 expressly or implicitly characterizes the level of a nutrient of the type required to be in nutrition
 14 labeling [] may not be made on the label or in labeling of foods unless the claim is made in
 15 accordance with this regulation and with the applicable regulations” and covers “(4) Reasonable
 16 variations in the spelling of the terms defined in part 101 and their synonyms are permitted
 17 provided these variations are not misleading (e.g., “hi” or “lo”).”

18 Plaintiffs have plausibly alleged that the Fortification Policy applies to Vizzy under 21
 19 C.F.R. § 101.54(e). Defendants may argue on summary judgment that given the structure of the

21 ⁷ 21 C.F.R. § 101.54 provides: “(a) [] a claim about the level of a nutrient in a food in relation to
 22 the Reference Daily Intake (RDI) established for that nutrient in § 101.9(c)(8)(iv) or Daily
 23 Reference Value (DRV) established for that nutrient in § 101.9(c)(9), (excluding total
 carbohydrates) may only be made on the label or in labeling of the food” with respect to “More”
 claims under (e):

(1) A relative claim using the terms “more,” “fortified,” “enriched,” “added,” “extra,” and
 “plus” may be used on the label or in labeling of foods to describe the level of protein,
 vitamins, minerals, dietary fiber, or potassium, except as limited by § 101.13(j)(1)(i) []
 provided that:

- (i) The food contains at least 10 percent more of the RDI for vitamins or minerals
 or of the DRV for protein, dietary fiber, or potassium (expressed as a percent of the
 Daily Value) per reference amount customarily consumed than an appropriate
 reference food; and
 (ii) Where the claim is based on a nutrient that has been added to the food, that
 fortification is in accordance with the policy on fortification of foods in § 104.20 of
 this chapter.

1 applicable regulations, their use or addition of acerola powder does not violate federal law.

2 Defendants also contend that they cannot be liable for a false or misleading claim because
3 their “antioxidant” statement is expressly permitted under 21 C.F.R. § 101.54(g) given the amount
4 of Vitamin C from the acerola powder that is present in Vizzy.⁸ That Vizzy may have an
5 otherwise allowable antioxidant nutrient content claim does not also mean Vizzy is not in
6 violation of the Fortification Policy if Vizzy was in fact fortified in violation of the Fortification
7 Policy. Plaintiffs also argue that subsection (g) is not applicable because Vizzy’s statement “with
8 Antioxidant Vitamin C from acerola superfruit” does not attempt to characterize the level of
9 antioxidant as “high” or an “excellent source” that are the terms that are governed by that
10 subsection. Again, this possible defense is likewise better determined on a full factual record.
11 While the antioxidant claim might be permissible for some *types* of products, the FDA Guidance
12 notes that fortification could still be misleading when applied to a fortified alcoholic beverage,
13 making it actionable under 21 U.S.C § 343(a)(1) or § 343(r).

14 Finally, defendants assert that the Policy cannot be binding on Vizzy because alcoholic
15 beverages are not called out in the regulation itself (although carbonated beverages are) and
16 alcoholic drinks are only mentioned in the FDA’s Guidance. This argument simply reinforces
17 plaintiffs’ point that even if not binding – a matter not definitively resolved at this juncture
18 because there are questions of fact concerning why acerola powder was added to the Vizzy
19 product – the FDA’s Guidance supports plaintiffs’ contention that a fortified alcoholic beverage
20 creates a false and misleading health message.

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⁸ 21 C.F.R. § 101.54 (g) “Nutrient content claims using the term ‘antioxidant.’ A nutrient content
24 claim that characterizes the level of antioxidant nutrients present in a food may be used on the
label or in the labeling of that food when:

- 25 (1) An RDI has been established for each of the nutrients;
26 (2) The nutrients that are the subject of the claim have recognized antioxidant activity; that
is, when there exists scientific evidence that, following absorption from the gastrointestinal
27 tract, the substance participates in physiological, biochemical, or cellular processes that
inactivate free radicals or prevent free radical-initiated chemical reactions;
28 (3) The level of each nutrient that is the subject of the claim is sufficient to qualify for the
§ 101.54(b), (c), or (e) claim (*e.g.*, to bear the claim “high in antioxidant vitamin C,” the
product must contain 20 percent or more of the RDI for vitamin C).

C. Primary Jurisdiction

Defendants assert that this case, if not preempted, is subject to the primary jurisdiction of the FDA and should be dismissed or stayed.⁹ Defendants rely heavily on the fact that plaintiffs’ FAC appears to cite, almost verbatim, the contents of a letter sent by the Center for Science in the Public Interest (“CPSI”) to the FDA encouraging it to take enforcement action to stop alcoholic beverage manufacturers from making fortification claims (specifically including defendants’ claims about Vizzy). The CPSI letter argues that those claims create false and misleading messages of healthfulness given that alcoholic beverages are “empty calories” and alcohol is associated with serious health conditions as well as anti-nutrient properties. *See* Defs. RJN (Dkt. No. 29), Ex. A. Defendants argue that plaintiffs’ case cannot proceed because the FDA has apparently refused to take an action on the CPSI letter, relying on an “admission” made by different counsel in a different case against these same defendants regarding the fortification of Vizzy. *See* Defendants Request for Judicial Notice ISO Reply (Dkt. No. 29-1), Ex. B (Second Amended Class Complaint in *Williams, et al. v. Molson Coors Beverage Company USA LLC*, 21-cv-50207 (N.D. Ill.), ¶ 41 (asserting the “FDA has declined to take enforcement action against the Product”).

If defendants’ argument is construed as one of primary jurisdiction (rather than preemption, which I rejected above), it fails because defendants seek to dismiss or stay this case while admitting that the FDA is not acting at this time. Even if there were indications that the FDA might be considering *enforcement* against manufacturers of fortified alcoholic drinks – and defendants present none – that would not justify abstention under primary jurisdiction unless there was some reason to expect that the agency action and the court action would substantially overlap or that identified agency expertise weighs in favor of allowing the agency to take enforcement action first. No such reasons have been shown. Similarly, absent evidence that the FDA is actively engaged in *rulemaking* that could impact whether or not Vizzy is accurately viewed as a

⁹ The primary jurisdiction doctrine “allows courts to stay proceedings or to dismiss a complaint without prejudice pending the resolution of an issue within the special competence of an administrative agency.” *Clark v. Time Warner Cable*, 523 F.3d 1110, 1114 (9th Cir. 2008). Application of the primary jurisdiction doctrine “is a matter of the court’s discretion.” *Chacanaca v. Quaker Oats Co.*, 752 F. Supp. 2d 1111, 1124 (N.D. Cal. 2010).

1 fortified product or whether the challenged statement can be seen as false or misleading, there are
2 no efficiencies to be gained by dismissing or staying this case under the primary jurisdiction
3 doctrine. That is especially true where, as here, the agency has already issued its regulation as
4 well as substantial guidance to assist manufacturers and courts. *See Gustavson v. Wrigley Sales*
5 *Co.*, 961 F. Supp. 2d 1100, 1128 (N.D. Cal. 2013) (staying one claim in light of” indications from
6 agency and “the substantial possibility that the FDA may soon change its breath mint serving
7 requirements” but declining to stay remaining claims where FDA had already issued extensive
8 regulations on the larger subject at issue).

9 **D. Safe Harbor**

10 In California, unfair competition claims are subject to the safe harbor doctrine, which
11 precludes plaintiff [] from bringing claims based on ‘actions the Legislature permits.’” *Ebner v.*
12 *Fresh, Inc.*, 838 F.3d 958, 963 (9th Cir. 2016) (citing *Cel-Tech Commc’ns, Inc. v. L.A. Cellular*
13 *Tel. Co.*, 20 Cal. 4th 163, 184 (1999)). “To fall within the safe harbor, the challenged conduct
14 must be affirmatively permitted by statute—the doctrine does not immunize from liability conduct
15 that is merely not unlawful.” *Id.* This includes not only California statutes, but also federal
16 statutes and regulations. *See Davis v. HSBC Bank Nevada, N.A.*, 691 F.3d 1152, 1164 (9th Cir.
17 2012).

18 Defendants argue that they are protected within the safe harbor because they are required
19 to disclose Vizzy’s ingredients under federal law. They contend that their truthful disclosure falls
20 within the UCL’s “safe harbor” and that plaintiffs consumer protection claims must therefore be
21 dismissed. But while manufacturers may generally be permitted to disclose antioxidant statements
22 under 21 C.F.R. § 101.54(g), that does not necessarily bring a manufacturer of carbonated
23 alcoholic beverages within the UCL’s safe harbor against claims of illegality (based on separate
24 regulatory provisions) or insulate it from claims of fraudulent or unfair conduct (for voluntarily
25 including a statement on its packaging and marketing). Providing a safe harbor for the alleged
26 conduct is, assuming the truth of plaintiffs’ allegations, arguably contrary to the FDA guidance.
27 *See* Guidance at 7. The conduct alleged by plaintiffs is not protected by the UCL’s safe harbor
28 provision.

E. UCL – Unlawful Conduct

Having determined that plaintiffs have adequately alleged an unlawful claim based on the Fortification Policy under the identical requirements of California’s Sherman Law – at least at of this juncture – the UCL unlawful prong claim survives.

F. Reasonable Consumer/Materiality

Each of the California consumer protection statutes invoked by plaintiffs, including the fraudulent and unfair prongs of the UCL, require that the challenged statement be material to a reasonable consumer. Defendants argue that no reasonable consumer could be misled into thinking that drinking hard seltzer is “healthy” as a matter of law because the dangers of consuming alcohol are generally known and the Vizzy packaging included the required Surgeon General’s warning regarding dangers of consuming alcohol.¹⁰ They also contend that by merely disclosing that Vizzy contains “antioxidant Vitamin C” they are not conveying specific health messages to reasonable consumers.

This argument ignores the FDA’s own guidance that fortification of alcoholic beverages could be false and misleading. It also ignores the disputes of fact about how reasonable consumers would interpret the phrase “with Antioxidant Vitamin C from acerola superfruit.” As plaintiffs point out, that statement is prominent on all of the Vizzy packaging and featured prominently in marketing materials to distinguish Vizzy from its competitors. FAC ¶¶ 17-20, 60, 65.¹¹ This is not one of the rare cases where challenged statements can be determined not to have misled reasonable consumers as a matter of law. *See Chong v. Nestle Water N. Am., Inc.*, No. 20-56373, 2021 WL 4938128, at *1 (9th Cir. Oct. 22, 2021) (affirming district court’s determination

¹⁰ 27 U.S.C. § 215 “GOVERNMENT WARNING: (1) According to the Surgeon General, women should not drink alcoholic beverages during pregnancy because of the risk of birth defects. (2) Consumption of alcoholic beverages impairs your ability to drive a car or operate machinery, and may cause health problems.”

¹¹ Defendants argue that the use of “superfruit” is mere puffery because there is no defined health benefit associated with superfruit. Reply ISO MTD at 12. However, plaintiffs allege is an “industry term to denote nutrient-dense fruits, synonymous with healthy.” FAC ¶ 36. Whether or not that is the case is a matter for proof. Moreover, plaintiffs challenge the use of superfruit in conjunction with both the whole statement in which it appears and as a descriptor of the source of the antioxidant. *See, e.g.*, FAC ¶ 5, 17.

1 spring water label indicated water was sourced from a particular mountain).¹²

2 **G. UCL – Fraudulent or Unfair Conduct**

3 Defendants complain generally that plaintiffs fail to satisfy Rule 9(b)'s particularity
4 requirement for the fraud and unfair conduct-based claims. Under FRCP 9(b), to state a claim for
5 fraud, a party must plead with "particularity the circumstances constituting the fraud," and the
6 allegations must "be specific enough to give defendants notice of the particular misconduct . . . so
7 that they can defend against the charge and not just deny that they have done anything wrong."
8 *See Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1124 (9th Cir. 2009) (citation omitted).
9 "Averments of fraud must be accompanied by the who, what, when, where, and how of the
10 misconduct charged." *Vess v. Ciba-Geigy Corp.*, 317 F.3d 1097, 1106 (9th Cir. 2003) (citation
11 omitted).

12 Plaintiffs have clearly identified the who (defendants), the what (the statement,
13 prominently displayed on all Vizzy packing and marketing), the when (FAC ¶¶ 67, 73) and the
14 why (FAC ¶¶ 68-69, 74-75). That is sufficient to satisfy Rule 9.

15 **H. Unjust Enrichment**

16 Defendants argue that the unjust enrichment claim must be dismissed with prejudice
17 because there is no stand-alone unjust enrichment cause of action under California law. That
18 argument, as well as the argument that unjust enrichment claims must be dismissed as duplicative
19 of other claims, has been rejected by the Ninth Circuit. *Astiana v. Hain Celestial Group, Inc.*, 783
20 F.3d 753, 762-63 (9th Cir. 2015) (courts may construe an unjust enrichment claim as a quasi-
21 contract claim seeking restitution and that claim should not be dismissed as superfluous).

22 Defendants also contend that the unjust enrichment claim should be dismissed because
23 plaintiffs allege no "actionable deception." However, plaintiffs have pleaded that the "antioxidant
24 Vitamin C" statement was false and misleading because, among other allegations, the addition of
25

26 ¹² The inappropriateness of determining these issues as a matter of law are highlighted by
27 defendants' Reply where they attempt to undermine the assertions in plaintiffs' FAC as to why the
28 challenged statement is false or misleading by citing information from the National Institutes of
Health and attempting to distinguish scientific studies plaintiffs rely on. *See* Reply ISO MTD at
10-11. These disputes cannot be resolved at this juncture.

1 Vitamin C to Vizzy does not result in antioxidant benefits and the addition of Vitamin C to
2 alcoholic drinks is false and misleading because alcohol inhibits nutrient absorption. FAC ¶¶ 34-
3 35.

4 Finally, defendants assert that the claim must be dismissed because plaintiffs do not allege
5 that they did not receive the benefit of the bargain. *Tae Youn Shim v. Lawler*, 17-CV-04920-
6 EMC, 2019 WL 2996443, at *20 (N.D. Cal. July 9, 2019) (dismissing unjust enrichment claim
7 based on plaintiffs' failure to allege they did not receive the benefit of their contractual bargain).
8 Plaintiffs expressly allege that "the Products are worth less than what Plaintiffs and members of
9 the Class paid for them." FAC ¶¶ 76, 79. That is sufficient.

10 **I. Injunctive Relief**

11 Defendants contend that plaintiffs, by virtue of filing this suit, know that drinking alcoholic
12 beverages like Vizzy is not healthy, even with the addition of Vitamin C. Therefore, defendants
13 move to dismiss plaintiffs' request for injunctive relief for lack of standing because there is no
14 possibility in the future that these plaintiffs will be misled. However, as plaintiffs have pleaded
15 that they might purchase defendants' products in the future (if they are either reformulated to
16 remove the nutrients and labeled without the unlawful and misleading nutrient claims) or might
17 purchase but pay less for the products, that is sufficient to confer standing at this juncture. *See*
18 *Davidson v. Kimberly-Clark Corp.*, 889 F.3d 956, 969-70 (9th Cir. 2018) ("In some cases, the
19 threat of future harm may be the consumer's plausible allegations that she will be unable to rely on
20 the product's advertising or labeling in the future, and so will not purchase the product although
21 she would like to. [] In other cases, the threat of future harm may be the consumer's plausible
22 allegations that she might purchase the product in the future, despite the fact it was once marred by
23 false advertising or labeling, as she may reasonably, but incorrectly, assume the product was
24 improved.").

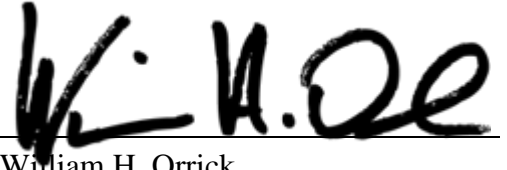
25 **CONCLUSION**

26 For the foregoing reasons, MCBC's motion to dismiss for lack of personal jurisdiction is
27
28

1 GRANTED without prejudice. Defendants' motion to dismiss the claims is DENIED.

2 **IT IS SO ORDERED.**

3 Dated: January 14, 2022

A handwritten signature in black ink, appearing to read "W. H. Orrick", written over a horizontal line.

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6 William H. Orrick
United States District Judge

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United States District Court
Northern District of California