CA No. 14-15670

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KATIE KANE, *et al.*,

Plaintiffs-Appellants,

v.

CHOBANI, INC.,

Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of California, San Jose Division
No. CV 12-2425-LHK
(Honorable Lucy H. Koh)

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF APPELLEE, URGING AFFIRMANCE

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BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF APPELLEE, URGING AFFIRMANCE

INTERESTS OF *AMICUS CURIAE*

The Washington Legal Foundation (WLF) is a public interest law firm and policy center headquartered in Washington, D.C., with supporters in all 50 States, including many in California.[1] WLF devotes a substantial portion of its resources to defending free enterprise, individual rights, a limited and accountable government, and the rule of law. WLF has regularly appeared in this and other federal courts to support reasonable limitations on tort suits to recover damages from food manufacturers for allegedly inaccurate product labeling. *See*, *e.g.*, *Young v. Johnson & Johnson*, 525 Fed. Appx. 170 (3d Cir. 2013).

WLF is concerned that, if this Court upholds Appellants' liability theory, California tort law will return to the pre-Proposition 64 days when plaintiffs were permitted to assert claims under the unfair competition law (UCL), Cal. Bus. & Prof. Code § 17200, without being required to demonstrate that they relied on a business's misleading statements. The district court determined that Appellants lacked statutory standing because they did not plausibly allege that they relied on

[1] Pursuant to Fed.R.App.P. 29(c)(5), WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, contributed monetarily to the preparation and submission of this brief. All parties have consented to the filing of this brief.

any of the product labeling that they allege to be misleading. That determination was well-supported by the materials before the district court. WLF believes that if individuals such as Appellants—who have not plausibly alleged that they were misled by Appellee Chobani, Inc.'s use of the terms "evaporated cane juice" and "only natural ingredients"—wish to restrict food manufacturers' use of those terms in connection with food products, they should petition the Food and Drug Administration (FDA) to regulate such use, not file tort suits that produce little other than fees for plaintiffs' lawyers.

WLF's brief focuses primarily on Appellants' challenge to Chobani's use of the term "natural ingredients," as well as their assertion that they need not allege reliance on alleged misstatements in order to proceed under the UCL's "unlawful" prong. Chobani's opening brief convincingly demonstrates that Appellants have not adequately alleged reliance on the allegedly misleading "evaporated cane juice" labeling, and thus WLF's brief focuses less on that issue.

STATEMENT OF THE CASE

The facts of this case are set out in detail in the brief of Appellee. WLF wishes to highlight several facts of particular relevance to the issues on which this brief focuses.

Appellants are three California consumers who allege they purchased six

flavors of Chobani yogurt after carefully examining the product labeling to ensure that the products met their health-conscious dietary needs. They allege that they concluded, based on the labeling, that the yogurt contained no added sugar and no artificial coloring, and that they would not have purchased the yogurt if they believed it contained either added sugar or artificial coloring. TAC179-193, ER215-220. Although they read on the product labels that the yogurt contained "evaporated cane juice," they contend that they did not interpret that term to mean that the yogurt contained added sugar. *Id.* Although they also read on the product labels that the yogurt contained "fruit and vegetable juice concentrate (for color)" and "turmeric (for color)," they contend that they concluded (based on use of the label term "only natural ingredients") that the yogurt's coloring derived solely from the coloring contained in its principal food ingredients (*e.g.*, red coloring imparted by strawberries contained in strawberry yogurt), not from other ingredients added to supply color (*e.g.*, red beet juice). *Id.* They contend that Chobani's use of the terms "evaporated cane juice" and "only natural ingredients" was misleading and that they would not have purchased Chobani yogurt had they been aware that it contained added sugar and color additives. *Id.*

Appellants allege six causes of action based on the supposedly false and misleading labeling, including causes of action under all three prongs (the

unlawful, unfair, and fraud prongs) of the UCL, the False Advertising Law (FAL), Cal. Bus. & Prof. Code § 17500 *et seq.*, and the Consumers Legal Remedies Act (CLRA), Cal. Civil Code § 1750 *et seq.* TAC207-264, ER223-231.

Appellants have had four opportunities to plead their allegations. Following the third opportunity—Appellants' Second Amended Complaint (SAC)—the district court granted Chobani's motion to dismiss under Fed.R.Civ.P. 12(b), but provided leave to amend the UCL, FAL, and CLRA claims. ER47-80, 25-44. The court explained that in order to establish statutory standing under the UCL, FAL, and CLRA, Appellants were required to allege that they relied on Chobani's purported misrepresentations and suffered "economic injury" as a result. ER34. The court concluded that the SAC insufficiently pleaded reliance with respect to the "evaporated cane juice" and "only natural ingredients" claims—whether judged under Rule 8 pleading standards or the more demanding standards of Rule 9(b)—because the allegations of reliance were neither plausible nor specific. ER37, 42.

Appellants' Third Amended Complaint (TAC) added a new claim with respect to the "only natural ingredients" labeling. They asserted for the first time that the fruit and vegetable juice concentrates added for coloring were "highly processed unnatural substances far removed from the fruits or vegetables they were

supposedly derived from and in fact were more akin to synthetic dyes like coal tar dyes." TAC161, ER210. They alleged, "Representing such dyes as natural is false and misleading" because "natural ingredients are ingredients that occur naturally in nature and are not synthetic or highly processed." TAC161, 164, ER210-11. Appellants included no further explanation regarding their basis for characterizing the juice concentrate as "highly processed" or why they alleged it was "akin to synthetic dyes like coal tar dyes."

In its order granting Chobani's motion to dismiss the TAC with prejudice, ER1-24, the district court concluded that Appellants had failed to correct deficiencies in their reliance allegations. In particular, noting that Appellants alleged they had carefully read the Chobani labels, the court concluded that because the labels "clearly disclosed the presence of fruit or vegetable juice concentrate in the yogurts for color, it is not plausible that Plaintiffs believed that the Yogurts did not contain added fruit for coloring purposes," and thus Appellants had not plausibly alleged that they relied on the "only natural ingredients" labeling as a basis for believing otherwise. ER21.

The court further concluded that the newly minted "highly processed" allegations were insufficient to correct the SAC's pleading deficiency because the TAC provided insufficient detail regarding the allegations. The court held that the

allegations—that the added fruit and vegetable juice concentrate was so "highly processed" that it was more akin to "coal tar dye" than to natural fruit and vegetable juice—were "merely conclusory" and thus failed to meet either the Rule 8 or Rule 9(b) pleading standards. ER21. The court explained:

> While Plaintiffs contend . . . that "natural ingredients are ingredients that occur naturally in nature and are not synthetic or highly processed," *see* TAC ¶ 164, Plaintiffs do not provide any other factual allegations nor provide any basis to support their claim that the color additives which Defendant uses in its yogurts are in fact "highly processed unnatural substances." . . . Simply put, Plaintiffs do not allege how they thought these juices were processed, nor provide any explanation as to how Defendant "highly processed" the juices in such a way as to render them "unnatural," or how the processing fell short of Defendant's labeling representations.

ER21-22.

The court also rejected Appellants' request to reconsider its previous ruling that they needed to plead reliance in order to state a claim under the UCL's "unlawful" prong. ER13. Appellants claimed that the false statements on Chobani's yogurts rendered the yogurts "misbranded" and thus illegal to sell; they further claimed that their allegation that they would not have purchased the yogurts had they known that all sales were illegal was sufficient to state a claim under the UCL's "unlawful" prong, without regard to whether they relied on an assurance of legality. The district court rejected that claim, explaining, "Plaintiffs' 'illegal

product' theory would eviscerate the enhanced standing requirements imposed by Proposition 64." ER40.

Finally, recognizing that the TAC was Appellants' fourth opportunity to state a claim, the district court determined that dismissal of the TAC should be *with* prejudice. ER19-20, 23-24. It concluded that "if Plaintiffs had a legitimate basis" to assert viable claims, they "would already have articulated [them] in a meaningful way." ER19, 23.

SUMMARY OF ARGUMENT

Appellants' "only natural ingredients" claim fails to state a claim for relief that is "plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). WLF notes initially that what is meant by the term "natural ingredients" is sufficiently indeterminate that there is significant question whether consumers could *ever* demonstrate that they: (1) acted reasonably in assigning a precise meaning to the term when used on a food label; and (2) suffered a monetary loss after relying on that precise meaning. But even if some consumers could claim to have purchased a product in reliance on an understanding that a product labeled "only natural ingredients" does not contain color additives, Appellants are not among them. Appellants allege that before purchasing Chobani yogurt they carefully read the *entire* ingredients list, a list that explicitly discloses (in language

conforming precisely to FDA regulations) that the yogurt contains color additives. In light of Appellants' admission that they read the disclosure, the TAC does not plausibly allege that the "only natural ingredients" label caused them to believe that the yogurt did not contain color additives and to make purchases in reliance on that belief.

The pre-2004 UCL contained no standing requirement; individuals could file lawsuits for relief from unfair competition without regard to whether they had been harmed by the violation. Following adoption of Proposition 64 by California voters in 2004, a private person has standing to sue under the UCL only if he or she "has suffered injury in fact and has lost money or property as a result of such unfair competition." Calif. Bus. & Prof. Code § 17204. The California Supreme Court concluded that the statutory phrase "as a result of" limits UCL standing—in cases based on alleged misrepresentations—to plaintiffs who actually relied on the misrepresentation. *In re Tobacco II Cases*, 46 Cal. 4th 298, 326 (2009) (stating that "there is no doubt that reliance is the causal mechanism of fraud."). Because Appellants have not plausibly alleged that they purchased yogurt in reliance on a label-induced belief that the yogurt did not contain color additives, they lack standing under California law.

Appellant's new challenge to the "only natural ingredients" labeling suffers

from a more basic deficiency: it fails to provide *any* information regarding why Appellants contend that the color additives do not qualify as "natural ingredients," and certainly does not state with "particularity the circumstances constituting fraud" (as is required by Rule 9(b)). Appellants do not plausibly contend that they understand "natural ingredients" to be limited to foods that have undergone *no* processing. Appellants must realize that fruit or vegetable juice concentrate is not obtained by simply ladling it out of naturally-occurring streams; rather, fruits or vegetables must be processed in order to produce juice.

Appellants allege, however, that some magic line has been crossed in this case, such that the fruit and vegetable juice concentrate at issue here has been processed too much to continue to be classified as a "natural ingredient." But the TAC fails to explain how and why Appellants conclude that the magic line has been crossed. Chobani cannot determine from the TAC what processing is alleged to have occurred and why such processing is inconsistent with an "only natural ingredients" claim. Accordingly, the trial court correctly determined that the TAC's "highly processed" allegations failed to meet Rule 9(b)'s heightened pleading requirements.

Appellants contend that even if their reliance allegations were deficient, they nonetheless have stated a cause of action under the UCL's "unlawful" prong

because they allege: (1) Chobani yogurt was "misbranded" and thus could not lawfully be sold in California; and (2) they would not have purchased Chobani yogurt had they known that its sale was illegal. Appellants' Br. 40-50. That contention misinterprets California law, which requires plaintiffs pursuing a claim under the UCL's "unlawful" prong to allege reliance whenever, as here, the illegality claim is grounded in fraud. Any other rule would eviscerate Proposition 64's enhanced standing requirements. Appellants cannot meet the reliance requirement by alleging that they would not have purchased yogurt had they known that its sale was illegal. *Id.* at 50-53. California law mandates that UCL plaintiffs must allege that they relied on some misleading statement uttered by the defendant, yet Appellants point to no such statement.

Finally, Appellants contend that the district court abused its discretion in dismissing the TAC with prejudice. But the court did so only after Appellants had been given every opportunity to properly plead their case. The court also provided Appellants with ample feedback on the deficiencies of their complaint, but Appellants did not remedy those defects. Given the district court's protracted involvement with this case, dismissal *with prejudice* was the most logical, efficient, and effective means for it to fulfill its gatekeeping role. Faithfully exercising that role was not an abuse of discretion.

ARGUMENT

I. THE DISTRICT COURT FAITHFULLY APPLIED THE PROPER PLEADING STANDARDS IMPOSED BY RULES 8(a) AND 9(b)

Appellants do not dispute that to have standing under the FAL, the CLRA, and the UCL's fraud prong, they must allege that they relied on the defendant's purported misrepresentation, suffering an economic injury as a result. *See, e.g.*, *Durrell v. Sharp Healthcare*, 183 Cal. App. 4th 1350, 1367 (2010); *In re Tobacco II Cases*, 46 Cal. 4th at 326.

In dismissing the TAC, the district court held that Appellants' allegations of reliance were both implausible under Rule 8(a) and lacked sufficient particularity under the heightened pleading requirements of Rule 9(b). *See* ER19. Appellants contend that because Rule 12(b)(6) requires that Appellants' factual allegations of reliance be accepted as true and construed in the light most favorable to them, the district court employed improper legal standards under Rule 8(a). Appellants further contend that Rule 9(b) does not apply to allegations of reliance because reliance is not a "circumstance of the fraud" but concerns only Appellants' "state of mind," which need not be pleaded with particularity. Neither of those contentions has merit.

A. Rule 8(a) Required District Court Dismissal

Rule 8(a) requires a complaint to include "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed.R.Civ.P. 8(a). The only exception is that, pursuant to Rule 9(b), in all averments of fraud or mistake, the circumstances constituting fraud or mistake must be stated with particularity. Fed.R.Civ.P. 9(b). Thus, while Rule 8(a) eliminated the requirement that a claimant "set out in detail the facts upon which he bases his claim," *Conley v. Gibson*, 355 U.S. 41, 47 (1957), Rule 9(b) resurrected that heightened pleading requirement for all claims sounding in fraud.

Even standing alone, Rule 8(a) "still requires a 'showing,' rather than a blanket assertion, of entitlement to relief." *Twombly*, 550 U.S. at 556 n.3. At a minimum, that "showing" must include "enough facts to state a claim to relief that is plausible on its face." *Id.* at 570. This plausibility standard requires "more than a sheer possibility that a defendant has acted unlawfully"; a complaint is plausible only "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Although a court accepts factual allegations as true under Rule 12(b), a 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).

As *Twombly* and *Iqbal* make clear, Rule 8(a)'s notice pleading requirement is not toothless. Consistent with the district court's role as gatekeeper, "determining whether a complaint states a plausible claim is context-specific, requiring the reviewing court to draw on its experience and common sense." *Iqbal*, 556 U.S. at 663-64. Rule 8(a) "does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions" and requires "more than a sheer possibility that a defendant has acted unlawfully." *Id.* at 678-69. Rule 8(a) is intended to weed out complaints that are based on "labels and conclusions" and that fail to "raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555.

Twombly and *Iqbal* stand for a proposition that would seem "self-evident to anyone who is not a lawyer"—that "plaintiffs ought to at least know what their case was about before filing it." Richard J. Pockner, *Why the Iqbal and Twombly Decisions are Steps in the Right Direction*, The Federal Lawyer, May 2010, at 38. Where, as here, a plaintiff is unable or unwilling to take that elemental step when filing a complaint, the action does not belong before the court.

Appellants' claims of reliance and the allegations supporting them cannot be squared with the plausibility threshold set forth in *Twombly* and *Iqbal*. Appellants

allege that they are sophisticated consumers who routinely scour the ingredient lists and nutritional labels of the food products they buy, to "avoid and/or minimize added sugar" in their diets. ER184; ER216-218. Based on their specialized knowledge, Appellants assert throughout the TAC that both "fruit juice concentrate" and "dried cane syrup" are commonly known and recognized names for added sugars. ER171; ER174; ER186-188; ER194; ER204. Appellants simultaneously insist that Chobani's express disclosure of "evaporated cane juice" and "fruit and vegetable juice concentrate" somehow deceived Appellants into believing that Chobani's yogurt contained *no* added sweeteners. ER175; ER196. That contradiction defies common sense.

Appellants' claim that they "did not recognize the term [evaporated cane juice] as being sugar," ER191, and thus "did not realize that there was added sugar in the . . . yogurt," ER196, is implausible. As Judge Koh rightly concluded, it simply beggars belief that these well informed, sugar-conscious plaintiffs would so readily have recognized "dried cane syrup" and "fruit juice concentrate" as added sweeteners, but that "evaporated cane juice" and "fruit and vegetable juice concentrate" deceived them. Even at the pleadings stage, courts are not obliged to accept as true conflicting allegations that make no sense, or that render a claim incoherent, or that are contradicted by statements in the complaint itself. *See, e.g.*,

DPWN Holdings (USA), Inc. v. United Air Lines, Inc., 747 F.3d 145, 151-52 (2d Cir. 2014).

Contrary to Appellants' assertions, the district judge did not reject any facts alleged in the TAC; rather, she rejected the legal conclusions that Appellants attached to those facts. That is exactly what *Twombly* and *Iqbal* require. Even in response to two motions to dismiss, Appellants never adequately explained what they believed evaporated cane juice to be, if not a form of sugar. Having closely scrutinized Chobani's ingredient disclosures, Appellants' allegation that those disclosures led them to believe the products contained no added sugars is implausible.

B. Rule 9(b) Required District Court Dismissal

Not only are Appellants' legal claims implausible, they were not alleged with sufficient particularity under Rule 9(b), which requires all claims sounding in fraud or mistake to "state with particularity the circumstances constituting the fraud." Fed.R.Civ.P. 9(b). To satisfy this heightened pleading standard, it is not enough to allege conclusory facts supporting a plausible inference of wrongdoing. Instead, all allegations of fraud must contain "an account of the time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentations." *Swartz v. KPMG LLP*, 476 F.3d 756, 764 (9th Cir. 2007).

Not only must Appellants "set forth what is false or misleading about a statement," but also "*why* it is false." *In re Glenfeld, Inc. Sec. Litig.*, 42 F.3d 1541, 1548 (9th Cir. 1994) (emphasis added).

As the district court rightly concluded, ER13-24, even after four attempts, Appellants failed to plead reliance with the particularized detail that Rule 9(b) demands. Appellants do not seriously contend that the TAC's reliance allegations satisfy Rule 9(b)'s heightened pleading requirements. Rather, Appellants argue that Rule 9(b) does not govern allegations of reliance because reliance is not a "circumstance of the fraud" but rather concerns only Appellants' "state of mind," which need not be pleaded with particularity. Appellants' inventive but strained attempt to untangle their allegations of reliance from their allegations of fraud has no basis in law.

In this Court, as in every other circuit, "[f]raud arises from the plaintiffs' reliance." *Concha v. London*, 62 F.3d 1493, 1503 (9th Cir, 1995), *cert. denied*, 517 U.S. 1183 (1996). A plaintiff who does not rely on a misrepresentation cannot possibly have been injured by it. WLF is aware of no federal appeals court that holds otherwise. Accordingly, "[t]he reliance element is subject to the pleading requirements of Rule 9(b) because it is one of the 'circumstances constituting the fraud.'" *In re Countrywide Fin. Corp. Sec. Litig.*, 588 F. Supp. 2d 1132, 1198

(C.D. Cal. 2008). Because "reliance is the causal mechanism of fraud," Appellants must "demonstrate actual reliance on the allegedly deceptive or misleading statements, in accordance with well-settled principles regarding the element of reliance in ordinary fraud actions." *Kwikset Corp. v. Superior Court*, 51 Cal. 4th 310, 326-27 (2011).

Appellants attempt to rely on the California courts' relaxed pleading standards for reliance in an effort to circumvent Rule 9(b)'s particularity requirement. *See* Appellants' Br. 29-30. But in federal court, the procedural practices of California state courts are irrelevant. The Federal Rules of Civil Procedure govern, regardless of "whether the substantive law at issue is state or federal." *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1102-05 (9th Cir. 2003).

Rule 9(b) exists in part "to protect those whose reputation would be harmed as a result of being subject to fraud charges" and "to prohibit Plaintiffs from unilaterally imposing upon the court, the parties and society the enormous social and economic costs absent some factual basis." *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125 (9th Cir. 2009). Both of those important interests are manifestly at stake in this appeal. The district court's dismissal was fully consistent with Rule 9(b)'s underlying purpose.

II. APPELLANTS FAILED TO PLEAD A LEGALLY ADEQUATE "ONLY NATURAL INGREDIENTS" CLAIM

With their adoption of Proposition 64 in 2004, California voters substantially tightened "standing" requirements for individuals seeking to assert unfair competition claims. The district court correctly determined that the TAC did not adequately allege that Appellants possess standing to assert an unfair competition claim based on Chobani's use of the phrase "only natural ingredients" on its product labels.

The UCL prohibits "unfair competition," which is defined as "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising." Cal. Bus. & Prof. Code § 17200. Prior to 2004, California law imposed no limitations on the right of private parties to file suit alleging that others were engaged in unfair competition. *See* Cal. Bus. & Prof. Code § 17204 (2003) ("Actions for relief under this chapter shall be prosecuted . . . by any person acting for the interests of itself, its members, or the general public.") The California Supreme Court repeatedly held that all individuals possessed standing to file a UCL action. *See, e.g.*, *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.*, 17 Cal. 4th 553, 561 (1998).

News stories of small businesses being victimized by plaintiffs' lawyers who

filed serial UCL lawsuits in which no plaintiffs had suffered an injury turned public opinion against the UCL and led voters to adopt Proposition 64. As explained by the California Supreme Court:

> The voters found and declared that the UCL's broad grant of standing had encouraged "frivolous unfair competition lawsuits that clog our courts, cost taxpayers and threaten the survival of small businesses." . . . The former law, the voters determined, had been "misused by some private attorneys who" "file frivolous lawsuits as a means of generating attorneys' fees without creating a corresponding public benefit." . . . "The intent of California voters in enacting" Proposition 64 was to limit such abuses by "prohibiting private attorneys from filing lawsuits for unfair competition where they have no client who has been injured in fact."

Californians for Disability Rights v. Mervyn's, LLC, 39 Cal. 4th 223, 228 (2006) (citations omitted).[2]

Proposition 64 amended § 17204 to impose a strict standing requirement. It limits private UCL suits to those filed "by a person who has suffered injury in fact and has lost money or property *as a result of* the unfair competition." Cal. Bus. & Prof. Code § 17204 (emphasis added). Standing under § 17204 is "substantially

[2] There exist striking parallels between the spate of UCL lawsuits that preceded adoption of Proposition 64 and the current deluge of UCL lawsuits filed against food manufacturers based on allegedly false labeling on food products. Hundreds of such suits are pending in California federal and state courts, many of them filed by a small group of law firms. By WLF's count, at least 35 of the pending suits raise "evaporated cane juice" claims, and at least 86 raise "natural" claims.

narrower than federal standing" under Art. III, § 2 of the U.S. Constitution. *Kwikset*, 51 Cal. 4th at 324.

Of particular relevance here, California courts hold that the phrase "as a result of" (as used in § 17204) limits UCL standing, in cases involving alleged misrepresentations, to plaintiffs who relied on the misrepresentation. *Id*. at 326; *In re Tobacco II Cases*, 46 Cal. 4th at 326. Because Appellants' claims are based on alleged misrepresentations included in Chobani's product labeling, they lack standing in the absence of plausible allegations that they purchased yogurt in reliance on the alleged misrepresentations.

A. The Complaint Confirms That Appellants Knew Chobani Yogurt Contains Color Additives

Chobani yogurt labels state that the yogurt contains "only natural ingredients." Appellants contend that color additives (even when composed of natural fruit and vegetable juices) are not "natural ingredients" and thus that the inclusion of color additives in the yogurt falsifies the "only natural ingredients" claim.

WLF notes initially that Appellants' narrow definition of "natural ingredients"—one that excludes naturally occurring ingredients if they are added to food solely for the purpose of providing color—is idiosyncratic. Polling suggests

that "natural" food ingredients are frequently understood to mean ingredients derived from natural (*i.e.*, not synthetic) sources. Many consumer groups, such as Consumer Reports, contend that "natural" conveys *no* fixed meaning when associated with food. FDA has steadfastly refused to adopt definitions for the terms "all natural" and "natural ingredients."[3] WLF questions the ability of any consumer—in light of the highly indeterminate meaning of the word "natural"—to demonstrate that he or she detrimentally relied on an allegedly misleading "only natural ingredients" label.

But even if some consumers could claim to have purchased a product in

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[3] Appellants' assertion that their definition of "natural" ingredients is consistent with a definition adopted by FDA, Appellants' Br. 33-35, is incorrect. Indeed, in the Federal Register notice cited by Appellants to support their assertion, FDA stated explicitly that it would "not establish a definition for 'natural' at this time." 58 Fed. Reg. 2302, 2407 (1993). It reiterated that hands-off position most recently in a January 6, 2014 letter to three federal judges; the judges had asked (in connection with pending litigation) whether bioengineered ingredients may be labeled "Natural." Courts have repeatedly recognized that FDA has declined to regulate use of "natural." *See, e.g.*, *Holk v. Snapple Beverage Corp.*, 575 F.3d 329 (3d Cir. 2009). FDA has defined use of the word "natural" only in connection with flavoring. *See* 21 C.F.R. § 101.22(a)(3) (defining "natural flavor"). It has not defined "natural color." FDA defines all color additives as "artificial coloring," 21 C.F.R. § 101.22(a)(4), and prescribes how such ingredients are to be disclosed in a food product's ingredients list. 21 C.F.R. § 101.22(k). Chobani's disclosure statement ("fruit and vegetable juice concentrate (for color)") complies fully with that regulation. Chobani contends that its yogurt contains "only natural ingredients"; it does not characterize the products themselves as something one could find in nature.

reliance on an understanding that a product labeled "only natural ingredients" does not contain color additives, Appellants are not among them. Appellants allege that they were not casual shoppers who read only a few words on the front of Chobani yogurt packaging. Rather, they allege that they carefully read the *entire* ingredients list before purchasing the yogurt. TAC187-192, ER216-19. The ingredients list stated explicitly that Chobani yogurt contains "fruit and vegetable juice concentrate (for color)." TAC28, ER170. That statement, which Appellants allege they read, is an explicit confirmation that Chobani yogurt contains color additives. In light of Appellants' admission that they read the statement carefully, the TAC does not plausibly allege that the "only natural ingredients" label caused them to purchase yogurt in reliance on a belief that the yogurt did not contain color additives.

Appellants contend that the district court erred by questioning, in connection with a motion to dismiss, whether it was reasonable for them to have relied on the "only natural ingredients" label to conclude that the yogurt contained no color additives. Appellants' Br. 36-37. But the complaint was not deficient merely because of the unreasonableness of their reliance. Rather, the complaint also failed to state a claim because its assertion that Appellants actually relied was not plausible; it is not plausible that plaintiffs who allege that they carefully read a

product label that states explicitly that the product contains color additives purchased the product in reliance on an understanding that the product did *not* contain color additives.

B. Appellants' New "Highly Processed" Claim Fails to Provide Sufficient Details to Plead a Plausible Cause of Action

In response to dismissal of the SAC, Appellants sought to bolster their "only natural ingredients" claim by including in the TAC an assertion that Chobani's color additives were "highly processed." Even if fruit and vegetable juice concentrate would otherwise qualify as a "natural ingredient," the TAC alleged, the juice concentrate that Chobani added to its yogurt for coloring was so "highly processed" that it was more akin to synthetic "coal tar dyes" than to the fruits and vegetables from which they were derived. TAC161, ER210. It further alleged that representing the "highly processed" juices as "natural ingredients" was false because "natural ingredients are ingredients that occur naturally in nature and are not synthetic or highly processed." TAC164, ER211.

The "highly processed" claim fails to state a cause of action because the TAC fails to provide any information regarding why Appellants contend that the processed fruit and vegetable juice concentrates used as color additives do not qualify as "natural ingredients," nor does it state with "particularity the

circumstances constituting fraud" (as Rule 9(b) requires). To meet the Rule 9(b) standard, a complaint must "identify the who, what, when, where, and how of the misconduct charged, as well as what is false or misleading about the purportedly fraudulent statement, and why it is false." *Salameh v. Tarsadia Hotel*, 726 F.3d 1124, 1133 (9th Cir. 2013). The TAC's "highly processed" allegations do not begin to answer the question posed by *Salameh*.

Appellants do not plausibly contend that they understand "natural ingredients" to be limited to foods that have undergone *no* processing. Appellants' Br. 34 (conceding that ingredients that have been "minimally processed" can still quality as "natural"). Unless at least some processed food qualifies as "natural," no packaged food would ever be so labeled because virtually every ingredient contained in packaged food is, of necessity, processed to some degree. Indeed, fruit and vegetable juices are by definition processed foods, because some processing is required to remove the juice from the fruit or vegetable. Appellants must realize fruit or vegetable juice concentrate is not obtained by simply ladling it out of naturally-occurring streams; "lemonade springs" may exist in song,[4] but they are not found in nature.

Appellants allege, however, that some magic line has been crossed in this

[4] *See* "Big Rock Candy Mountain" (traditional American folk song).

case, such that the fruit and vegetable juice concentrate at issue here has been processed too much to continue to be classified as a "natural ingredient." To support that allegation, Appellants are required under Rule 9(b) to "identify the who, what, when, where, and how of the misconduct charged, as well as what is false or misleading about the purportedly fraudulent statement, and why it is false." *Salameh*, 726 F.3d at 1133. They have failed to do so; they have not alleged what sort of processing occurred, why that degree of processing is inconsistent with an "only natural ingredients" claim, and what about the chemical composition of the juice concentrate makes it more akin to "coal tar dye" than to the fruit and vegetable juice from which it was derived. In the absence of these essential details, Chobani cannot realistically prepare a defense to the fraud claim.

III. APPELLANTS' "UNLAWFUL" CLAIM FAILS BECAUSE THEY HAVE NOT ADEQUATELY ALLEGED RELIANCE

Appellants argue alternatively that the misleading nature of Chobani's labels caused them to be "misbranded" under both federal and California law, and that the sale of "misbranded" food is an illegal act. Appellants' Br. 40-50 (citing 21 U.S.C. § 331 and Cal. Health & Saf. Code § 110760). They contend that because the sale of Chobani yogurt was illegal, the TAC establishes their standing to assert a cause of action under the UCL's "unlawful" prong, without regard to whether they can

adequately allege reliance. TAC 209, ER223.

Appellants are mistaken. California law limits standing to file UCL lawsuits to those who demonstrate that they have "suffered injury in fact and ha[ve] lost money or property as a result of the unfair competition." Cal. Bus. & Prof. Code § 17204. Regardless of whether Appellants are proceeding under the UCL's unlawful prong or its fraud prong, the gravamen of their complaint is that Chobani misled consumers by including false statements on its product labels. This Court has made clear that, under those circumstances, § 17204 requires a private plaintiff to demonstrate reliance on the allegedly false statements in order to establish standing:

> Because the plaintiffs' UCL claim sounds in fraud, they are required to prove "actual reliance on the allegedly deceptive or misleading statements," *Kwikset*, 51 Cal. 4th [at 326] (quoting *In re Tobacco II Cases*, 46 Cal. 4th [at 306]), and that "the misrepresentation was an immediate cause of [their] injury-producing conduct," *In re Tobacco II Cases*, 46 Cal. 4th [at 326].

Sateriale v. R.J. Reynolds Tobacco Co., 697 F.3d 777, 793 (9th Cir. 2012).

Appellants contend alternatively that they have adequately alleged reliance in connection with their "illegality" theory: they allege that they would not have purchased Chobani yogurt had they known that its sale was illegal, and thus that they were injured "as a result of" Chobani's illegal sales. Appellants' Br. 44-47.

But because the gravamen of their UCL "unlawful prong" cause of action is that the Chobani labeling was false and misleading, Appellants are required to demonstrate that they relied on *something said by Chobani* in order to establish reliance. Appellants make no such allegation.

Indeed, Appellants have not even adequately alleged that they were *injured* by their purchase of yogurt whose sale by Chobani was allegedly illegal. Nothing in the TAC indicates that the yogurt they purchased was any less valuable because Chobani allegedly acted illegally in selling it to them.[5] They received the benefit of their bargain. Case law cited by Appellants in support of their injury argument, Appellants' Br. 44-50, is inapposite. For example, *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013 (9th Cir. 2011), on which Appellants heavily rely, held that only the named plaintiff need establish standing in a class action asserting unfair competition claims. But standing of the named plaintiff was not at issue; indeed, the Court explicitly noted that the defendants "d[id] not assert that no named plaintiff has standing." *Id.* at 1021.

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[5] Chobani's brief explains why an additional argument made by Appellants—that it was illegal for Appellants to *possess* misbranded yogurt—is frivolous. In any event, there is no indication that Appellants sought to hold on to the yogurt they purchased. Rather, they purchased the yogurt to eat it, which they apparently did with complete satisfaction (*e.g.*, after initially eating Chobani yogurt, they purchased more).

Finally, as the district court observed, accepting Appellants' illegality theory "would eviscerate the enhanced standing requirements imposed by Proposition 64." ER40. Under Appellants' theory, a plaintiff could eliminate any need to demonstrate reliance by alleging, for example, that the defendant's business license lapsed temporarily due to the delinquent filing of a license application, thereby depriving the defendant of its legal right to sell products. Resourceful plaintiffs' attorneys would have little difficulty developing a wide variety of arguments regarding why a defendant's product sales violated some law—*e.g.*, that a retailer's clothing sales violated international human rights laws because the clothing was manufactured overseas under oppressive labor conditions, or that a manufacturer was not authorized to sell merchandise in California because the wages it paid to its employees were not in compliance with wage-and-hour regulations. Those reliance-free lawsuits plagued California courts prior to the passage of Proposition 64; adoption of Appellants' illegality theory would revive the very sorts of oppressive litigation that voters abolished.

IV. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY DISMISSING APPELLANTS' CLAIMS WITH PREJUDICE

Appellants filed their suit in May 2012. Four complaints and two and a half years later, Appellants have not made it past the pleading stage. Having carefully

decided that allowing Appellants "essentially a fifth bite at the apple" would be futile, the district court dismissed Appellants' claims with prejudice, concluding that if Appellants had a plausible basis for relief, they "would already have articulated it in a meaningful way in one of their four complaints." ER20. Appellants argue that, by dismissing Appellants claims with prejudice, the district court abused its discretion. Not so.

"Although a district court should grant the plaintiff leave to amend if the complaint can possibly be cured by additional factual allegations, [d]ismissal without leave to amend is proper if it is clear that the complaint could not be saved by amendment." *Zixiang Li v. Kerry*, 710 F.3d 995, 998 (9th Cir. 2013). A district court does not abuse its "particularly broad" discretion to determine whether to allow leave to amend when it has previously granted a plaintiff leave to amend its complaint. *See Chodos v. W. Publ'g Co.*, 292 F.3d 992, 1003 (9th Cir. 2002).

Appellants did not proceed *pro se* below, but rather were represented by very experienced and capable counsel. The fact that Appellants did not correct the pleading deficiencies the district court identified is "a strong indication" that Appellants had no additional facts to plead. *In re Vantive Corp. Secs. Litig.*, 283 F.3d 1079, 1098 (9th Cir. 2002).

The district court dismissed the TAC with prejudice only after Appellants

had been given every opportunity to properly plead their case, but failed to do so. ER19-20. The district court also provided Appellants with ample feedback on the fatal deficiencies of the SAC, but Appellants did not—because they could not—remedy those defects.

"Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried," *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring), Appellants refuse to accept a final dismissal of their claims. But Chobani "should not be required to respond to a continually moving target." *Merritt v. Countrywide Financial Corp.*, 759 F.3d 1023 (9th Cir. 2014). Where, as here, a district judge carefully analyzes the plaintiffs' allegations and concludes that there are no plausible allegations of reliance, that should end the matter. The intolerable alternative is to allow claims to proceed to discovery where a court has no reasonable basis to believe that the claim has merit.

As the Supreme Court has recognized, allowing frivolous lawsuits to proceed past the pleadings stage imposes significant and unwarranted costs on defendants. *Twombly*, 550 U.S. at 557-60. That is why the Supreme Court's "plausibility" requirement emphasizes the importance of district courts applying their "judicial experience"—along with their "common sense"—in disposing of

baseless complaints at the proper time: *before* a plaintiff launches intrusive and burdensome discovery. *Id.*

In recent years, WLF has seen a remarkable growth in the number of consumer class actions directed at food labels. Such litigation is especially common in the Northern District of California, which has justly earned the nickname "The Food Court." Federal courts permit such suits to continue beyond the pleading stage all too often, based on nothing more than idle speculation that the defendant may have engaged in some wrongdoing. *See*, *e.g.*, William H. Dance, *Federal Courts in California Split Over Standing to Sue for "Unlawful" Food Labeling*, WLF Legal Opinion Letter, Mar. 14, 2014. Permitting suits of this nature to proceed past the pleadings stage can have significant costs, which must be justified by something more than a plaintiff lawyer's bare assertions of harm.

Prior to filing suit, one should at least be able to write and file a plausible description of a course of events that demonstrates a right to relief from the courts. Considering the enormous cost of defending a lawsuit and the overcrowded nature of the courts' dockets, this is not too much to demand from a complaint. Given Judge Koh's protracted involvement with this case, dismissal *with prejudice* was the most logical, efficient, and effective means for her to fulfill her gatekeeping duty. Faithfully performing that duty was not an abuse of discretion.

CONCLUSION

The Court should affirm the decision below.

Respectfully submitted,

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Dated: November 15, 2014

CERTIFICATE OF COMPLIANCE

I am an attorney for *amicus curiae* Washington Legal Foundation. Pursuant to Fed.R.App.P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, I hereby certify:

1. This brief complies with the type-volume limitation of Fed.R.App.P. 32(a)(7)(B) because: this brief contains 6,994 words, excluding the parts of the brief exempted by Fed.R.App.P. 32(a)(7)(B)(iii).

2.This brief complies with the typeface requirements of Fed.R.App.P. 32(a)(5) and the type style requirements of Fed.R.App.P. 32(a)(6) because: this brief has been prepared in a proportionately spaced typeface using WordPerfect X5 Times New Roman.

/s/ Richard A. Samp
Richard A. Samp

Attorney for Washington Legal Foundation

Dated: November 15, 2014

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of November, 2014, I electronically filed the foregoing brief of *amicus curiae* Washington Legal Foundation with the Clerk of the Court for the U.S. Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Richard A. Samp
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