21-56370

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Anthony Moreno,
Plaintiff-Appellant,
v.
Vi-Jon, LLC,
Defendant-Appellee

On Appeal from the United States District Court
for the Southern District of California

No. 20-cv-1446
Hon. Jeffrey T. Miller, Judge

BRIEF FOR THE STATE OF CALIFORNIA AS AMICUS CURIAE IN SUPPORT OF APPELLANT

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INTRODUCTION AND STATEMENT OF INTEREST

The California Attorney General, on behalf of the State of California, submits this brief under Federal Rule of Appellate Procedure 29(a) to assist the Court in analyzing and applying the standards for Article III standing and pleading false advertising claims under California's Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200 *et seq.*, False Advertising Law, *id.* §§ 17500 *et seq.*, and Consumers Legal Remedies Act, Cal. Civ. Code §§ 1750 *et seq*. The Attorney General is vested with the authority to enforce the first two of these statutes, and has an interest in ensuring that all three laws achieve their consumer-protective purposes. Cal. Bus. & Prof. Code §§ 17204, 17536. Accordingly, although California takes no position on the ultimate merits of this case, it has a strong interest in ensuring the appropriate application of its consumer protection laws to promote their enforcement—whether through state actions or by private parties in their critical role as a supplement to the Attorney General's enforcement efforts. This case provides an opportunity to reiterate Article III injury standards in consumer cases, and to reaffirm the principle that factual questions related to false advertising claims generally should not be resolved on the pleadings. This will preserve the ability of private parties and prosecutors, including the Attorney General, to enforce California's core consumer protection laws.

The district court erred in in two ways.

First, it improperly determined that Appellant failed to establish an injury in fact, and therefore lacked standing. Established precedent dictates that Appellant's allegations that he would not have purchased the products at issue absent Appellee's allegedly false representations were sufficient to show Article III injury.

Second, the district court erred in concluding that the case could be resolved on the pleadings. Well-settled law recognizes that false advertising cases are inherently fact-intensive, and therefore should not be dismissed at the pleading stage unless the allegations compel the conclusion as a matter of law that reasonable consumers would not be misled by the challenged conduct. That approach is of significant importance because real-world consumer decision-making is often more hurried, and consumer perception considerably more limited, than might be intuitive—especially for small-dollar purchases. Because evidentiary development can shed light on these matters, courts should be reluctant to dismiss consumer-labeling claims by making assumptions about consumer perception.

The district court's decision should be reversed because it strayed from those principles. The court improperly relied on its own intuitions about consumer perception and its own factual conclusions to resolve questions of fact prematurely on the pleadings.

ARGUMENT

I. ECONOMIC INJURY FROM PURCHASING A DECEPTIVELY ADVERTISED PRODUCT IS A SUFFICIENT ALLEGATION OF INJURY IN FACT FOR ARTICLE III STANDING

Article III requires plaintiffs to plead and prove injury, causation, and redressability. *See Spokeo, Inc. v. Robbins*, 578 U.S. 330, 338 (2016), *as revised* (May 24, 2016). At issue in this case is the injury in fact element. To establish injury, a plaintiff must prove that he or she suffered "an invasion of a legally protected interest" and that the resulting injuries are "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992).

Allegations that a plaintiff purchased a product she would not have absent an alleged misrepresentation suffice to establish an injury in fact for purposes of Article III standing. *See, e.g.*, *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 595 (9th Cir. 2012); *Hinojos v. Kohl's Corp.*, 718 F.3d 1098, 1104, n.3 (9th Cir. 2013), *as amended on denial of reh'g and reh'g en banc* (July 8, 2013). In *Mazza v. American Honda Motor Co.*—where class plaintiffs sued under the Unfair Competition and False Advertising Laws alleging that Honda made misrepresentations about its braking system—this Court held that class members had suffered an "injury in fact" when they alleged that they had been "relieved of their money by Honda's deceptive conduct." 666 F.3d at 587, 595.

This Court applied similar reasoning in *Hinojos v. Kohl's Corp.*, ruling that where "class members paid more for [a product] than they otherwise would have paid, *or bought it when they otherwise would not have done so* they have suffered an Article III injury in fact." *Hinojos*, 718 F.3d at 1104 n.3 (emphasis added) (citation omitted). In that case, the plaintiffs purchased clothing that was falsely advertised as marked down from the regular price. *See id.* at 1102. Because the plaintiffs alleged that the advertised original prices were false, and that they would not have made their purchases absent the misleading advertising, this Court held that the plaintiffs had pled an injury in fact. *See id.* at 1104 n.3 ("There is no difficulty in this case regarding Article III injury in fact . . . .").

Likewise, in a suit arising out of the Central District of California involving nearly identical facts to those in this case, the district court concluded that the plaintiff had alleged an injury in fact where he "would not have bought [the hand sanitizer] but for [the efficacy] misrepresentation." *Mier v. CVS Pharmacy, Inc.*, No. SACV2001979DOCADS, 2021 WL 1559367 at *3 (C.D. Cal. Mar. 22, 2021). Those allegations were adequate to establish economic injury sufficient to confer Article III standing.

Here, Appellant alleged that he relied on Appellee's misleading marketing claims in purchasing Appellee's sanitizer products. ER-28; 45; 53; 54. Appellant also alleged that he would not have purchased the products at all had he known the

truth. ER-28; 43; 44; 45; 56. Therefore, Appellant has sufficiently alleged that he suffered an injury in fact by pleading that he would not have purchased the product absent the alleged misrepresentation. *See Hinojos*, 718 F.3d at 1104 n.3; *see also Maya v. Centex Corp.*, 658 F.3d 1060, 1069 (9th Cir. 2011) ("Allegedly, plaintiffs spent money that, absent defendants' actions, they would not have spent . . . . This is a quintessential injury-in-fact."). Though appellant also alleged that he overpaid, *see* ER-28; 43; 44; 45; 56, he was not required to additionally plead overpayment (or for that matter, the availability of market alternatives) to demonstrate standing, as the district court seemed to suggest. *See Hinojos*, 718 F.3d at 1104 n.3 (noting that a plaintiff can show injury by alleging that he overpaid for a product *or* would not have purchased a misrepresented product had he known the truth); *see also Maya*, 658 F.3d. at 1069 (treating these two types of allegations as distinct economic injuries). Therefore, Appellant's allegations that he would not have made the misrepresented purchases at issue are sufficient to show injury.

To the extent the district court could be understood to have conducted a *statutory* standing analysis, ER-11–14, such reasoning was also incorrect. Appellant has statutory standing because he alleged that he would not have purchased the hand sanitizers without the misrepresentations on the labels. *See Hawkins v. Kroger Co*., 906 F.3d 763, 768–69 (9th Cir. 2018) (applying the statutory standing requirements under the Unfair Competition and False

Advertising Laws). The district court suggested that because "Plaintiff paid for hand sanitizer and received hand sanitizer," he was not injured, and therefore lacked standing, because he received the "benefit of his bargain." ER-12–13. But the "benefit of the bargain" rationale applied by the district court was "explicitly rejected" by the California Supreme Court, which held that a consumer who buys a product in reliance on a material misrepresentation has not received the benefit of the bargain and may still be injured, even if the product is fully functional. *Hinojos*, 718 F.3d at 1107 (citing *Kwikset Corp. v. Superior Ct.*, 51 Cal. 4th 310, 332–33 (2011) (holding that plaintiff had statutory standing where the product was falsely advertised as "Made in the USA"; rejecting argument that plaintiffs received benefit of their bargain and were not injured because they paid for locksets and "received locksets in return")). Relying on *Kwikset*, this Court explained in *Hinojos* that the "benefit of the bargain" rationale does not defeat statutory standing where a plaintiff alleges that a "[defendant] made material misrepresentations that induced him to buy products he would not otherwise have purchased." *Hinojos*, 718 F.3d at 1107. Since Appellant alleged that material misrepresentations about the sanitizer's efficacy influenced his decision to

purchase it, and that he would not otherwise have purchased the product, he has adequately alleged an economic injury sufficient to confer statutory standing.[1]

II. THE DISTRICT COURT ERRED IN DISMISSING THE CASE ON THE PLEADINGS

A. Deceptive Advertising Claims Generally Present Questions of Fact Not Appropriate for Resolution at the Pleading Stage

The Unfair Competition Law is a broad and flexible consumer protection statute. It provides a mechanism for remedying "wrongful business conduct in whatever context such activity might occur." *Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co*., 20 Cal. 4th 163, 181 (1999) (internal quotation marks omitted). The statute is thus "intentionally framed in . . . broad, sweeping language, precisely to enable judicial tribunals to deal with the innumerable 'new schemes which the fertility of man's invention would contrive.'" *Id.* (quoting *Am. Philatelic Soc'y v. Claibourne*, 3 Cal. 2d 689, 698 (1935)).

[1] An alleged misrepresentation's materiality is a question of fact, unless it is so "obviously unimportant" that a jury could not reasonably find that a reasonable person might be influenced by it. *Engalla v. Permanente Med. Grp., Inc.*, 15 Cal. 4th 951, 977 (Cal. 1997), *as modified* (July 30, 1997). In this case, the efficacy term of the hand sanitizer is not "obviously unimportant"—especially in the context of a pandemic—and its materiality therefore poses a factual question inappropriate for resolution at the pleading stage. When considered with the aid of evidence, it seems likely a judge would deem the product's efficacy term material since "a reasonable consumer would attach importance to it. . . ." *Hinojos*, 718 F.3d at 1107. That Appellee and other marketers prominently position efficacy representations on product labels is perhaps the most potent proof of their materiality.

The Unfair Competition Law prohibits "unfair competition," defined in part as any "unlawful, unfair, or fraudulent business act or practice." Cal. Bus. & Prof. Code § 17200. The text is written in the disjunctive, so an act or practice may be challenged if it fits within any one of these "three varieties," or prongs, of unfair competition. *Cel-Tech*, 20 Cal. 4th at 180; *In re Tobacco II Cases*, 46 Cal. 4th 298, 311–12 (2009). Under the "fraudulent" prong, the one at issue in this case, litigants "need not plead and prove the elements of a tort," but must only "'show that members of the public are likely to be deceived.'" *Bank of the W. v. Superior Ct.*, 2 Cal. 4th 1254, 1267 (1992) (citation omitted); *see also Williams v. Gerber Prods. Co.*, 552 F.3d 934, 938 (9th Cir. 2008).

In the context of deceptive marketing claims, both the Unfair Competition Law and the False Advertising Law prohibit advertising that is false, as well as statements that, although true, are "either actually misleading or [have] a capacity, likelihood or tendency to deceive or confuse the public." *Kasky v. Nike, Inc.*, 27 Cal. 4th 939, 951 (2002) (internal quotation marks omitted); *see also Williams*, 552 F.3d at 938.

Claims under the Unfair Competition Law's "fraudulent" prong and under the False Advertising Law are governed by the "reasonable consumer" test. [2] *Williams*,

[2] Like the Unfair Competition and False Advertising Laws, in the context of deception claims, the Consumers Legal Remedies Act, Cal. Civ. Code §§ 1750 *et*

552 F.3d at 938. Unless advertising targets a particular population, courts evaluate whether it is misleading from the vantage point of an "ordinary consumer acting reasonably under the circumstances" who "is not versed in the art of inspecting and judging a product." *Colgan v. Leatherman Tool Grp., Inc.*, 135 Cal. App. 4th 663, 682 (2006) (internal quotation marks omitted); *see also Moore v. Mars Petcare US*, 966 F.3d 1007, 1017–18 (9th Cir. 2020). Such a consumer need be neither "exceptionally acute and sophisticated" nor "wary or suspicious." *Lavie v. Procter & Gamble Co.*, 105 Cal. App. 4th 496, 509–10, 512 (2003) (internal quotation marks omitted); *see also Mars Petcare US*, 966 F.3d at 1018 (recognizing that in evaluating the deceptiveness of a pet food label, the reasonable consumer test looked to whether consumers, not veterinarians, would be misled).[3]

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seq., involves application of the "reasonable consumer" standard. *Williams*, 552 F.3d at 938. And if the Court reverses the dismissal of the "reasonable consumer" claims, dismissal of Appellant's quasi-contract and express warranty claims should also be reversed. *See Astiana v. Hain Celestial Grp., Inc.*, 783 F.3d 753, 762 (9th Cir. 2015) ("entic[ement]" through "'false and misleading' labeling" causing "'unjust enrich[ment]'" is "sufficient to state a quasi-contract cause of action"); *Brady v. Bayer Corp.*, 26 Cal. App. 5th 1156, 1177–79 (emphasizing that express warranty is created by "'affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis for the bargain'" (quoting Cal. Com. Code § 2313)).

[3] In *Moore v. Trader Joe's Co.*, 4 F.4th 874, 883 (9th Cir. 2021), this Court suggested that consumers of "Manuka honey, a niche specialty product," "would likely know more than most about the production of the product. . . ." *Id.* at 884. By contrast, reasonable consumers of everyday products do not have such knowledge. *See id.*

This Court has recognized that whether a business practice is deceptive is usually a factual question inappropriate for dismissal on the pleadings. *Williams*, 552 F.3d at 938. That is because evaluating advertising's "capacity, likelihood or tendency to deceive or confuse[,]" *Kasky*, 27 Cal. 4th at 951, requires "'consideration and weighing of evidence from both sides[,]'" which is not possible at the pleading stage. *Linear Tech. Corp. v. Applied Materials, Inc.*, 152 Cal. App. 4th 115, 134–35 (2007) (quoting *McKell v. Wash. Mut., Inc.*, 142 Cal. App. 4th 1457, 1472–73 (2006)); *see Williams*, 552 F.3d at 939. Because of the central role evidence plays in evaluating capacity to deceive or confuse, courts should decide those issues on motions to dismiss only in "rare situation[s,]" *Williams*, 552 F.3d at 939, where the allegations "compel the conclusion as a matter of law that consumers are not likely to be deceived." *Chapman v. Skype, Inc.*, 220 Cal. App. 4th 217, 226–27 (2013) (citing cases).

The state Court of Appeal in *Brady v. Bayer Corp*. synthesized California cases and articulated the two categories of these "rare" situations applicable in labeling cases. First, a claim that illustrates "wishful thinking" on the plaintiff's part or "runs counter to ordinary common sense or the obvious nature of the product . . . is fit for disposition" at the pleading stage. *Brady v. Bayer Corp.*, 26 Cal. App. 5th 1156, 1165–66 (2018); *see Mars Petcare US*, 966 F.3d at 1018 ("[I]f common sense would not lead anyone to be misled, then the claim may be

disposed of at a motion to dismiss stage."). Second, where there are "qualifiers sufficiently prominent on the *front* of the product" such that "[t]here [is] no need to look at the back" because the truth is "unavoidably clear" from the front label, dismissal may be appropriate. *Brady*, 26 Cal. App. 5th at 1169 (emphasis in original); *see Mars Petcare US*, 966 F.3d at 1017.

In both those types of cases, California courts and federal courts applying California law dismiss false advertising causes of action on the pleadings because the facts alleged make clear that *no* reasonable consumer could be misled. *See, e.g.*, *Freeman v. Time*, 68 F.3d 285, 289 (9th Cir. 1995) ("*no* reasonable reader could ignore [the qualifying language] . . ."); *Williams*, 552 F.3d at 939 (explaining that dismissal was appropriate where it was "impossible for the plaintiff to prove that a reasonable consumer was likely to be deceived"); *Becerra v. Dr Pepper/Seven Up, Inc.*, 945 F.3d 1225, 1229 (9th Cir. 2019) ("*no* reasonable consumer would assume . . ."); *Ebner v. Fresh Inc.*, 838 F.3d. 958, 967 (9th Cir. 2016) ("*no* reasonable consumer expects . . ."); *Davis v. HSBC Bank Nevada, N.A.*, 691 F.3d 1152, 1161 (9th Cir. 2009) ("*no* reasonable consumer would have been deceived . . ."); *Brady*, 26 Cal. App. 5th at 1166, 1168 (referring to standard as "*no* reasonable consumer would in fact be misled" and "*no* reasonable consumer could be deceived"); *Simpson v. The Kroger Corp.*, 219 Cal. App. 4th 1352, 1372 (2013) ("*No* reasonable person could . . . believ[e] . . ."); *Hill v. Roll Int'l. Corp.*, 195 Cal.

App. 4th 1295, 1307 (2011) ("*no* reasonable consumer would be misled . . .") (emphasis added, all). That narrow ground for dismissal on the pleadings flows logically from the "reasonable consumer" standard—a standard that requires evaluation of the fact-intensive questions of how reasonable consumers would perceive the challenged advertising and whether such advertising has the "capacity, likelihood or tendency to deceive or confuse" them. *Kasky*, 27 Cal. 4th at 951.

Conversely, where there is any doubt about how real-world consumers would understand advertising, evidence can resolve that fact issue, and dismissal on the pleadings is inappropriate. *See Bell v. Publix Super Mkts., Inc.*, 982 F.3d 468, 493 (7th Cir. 2020) (Kanne, J., concurring) (applying consumer laws of multiple states, including California's Unfair Competition Law and Consumers Legal Remedies Act) ("Just as important, however, is the corollary to this principle: that if a plaintiff's interpretation of a challenged statement is *not* facially illogical, implausible, or fanciful, then a court may *not* conclude that it is nondeceptive as a matter of law.") (emphasis in original). That is the case even when the challenged advertisement is part of the pleadings that a court considers when ruling on a motion to dismiss. While it is true that "the primary evidence in a false advertising case is the advertising itself[,]" *Brockey v. Moore*, 107 Cal. App. 4th 86, 100 (2003), primary does not mean exclusive. Even when judges doubt, based on the advertising standing alone, that deception is likely, they should generally consider

evidence to avoid substituting their own impressions for those of the reasonable consumer.

B. Back Labels Cannot Cure Misleading Front Labels

Courts have applied the above pleading-stage dismissal standards in assessing false advertising claims involving product labels, and have recognized that labeling is critical to consumer decision-making. As the California Supreme Court has reasoned, "[t]he marketing industry is based on the premise" that "labels matter." *Kwikset*, 51 Cal. 4th at 328. Labels "serve as markers for a host of tangible and intangible qualities" and "[m]isrepresentations in labeling undermine this signifying function, preventing consumers from correctly identifying the goods and services that carry the attributes they desire while also hampering honest producers' attempts to differentiate their merchandise from the competition." *Quesada v. Herb Thyme Farms, Inc.*, 62 Cal. 4th 298, 302–03 (2015).

Courts protect consumer choice and competition from misleading labeling tactics in part through the rule that back labels do not cure misleading front labels. *Mars Petcare US*, 966 F.3d at 1017; *Brady*, 26 Cal. App. 5th at 1167–70 (distinguishing between circumstances where back labels conflicted with unqualified statements on the front labels and cases where front labels included sufficiently prominent qualifiers). As this Court held in *Williams v. Gerber Products Co.*, reasonable consumers are not "expected to look beyond misleading

representations on the front of the box to discover the truth from the . . . small print" elsewhere on the product. 552 F.3d at 939. Instead, "reasonable consumers expect that the [back label] contains more detailed information about the product that confirms other representations on the packaging." *Id.* at 939–40; *accord Brady*, 26 Cal. App. 5th at 1172 ("The [back label] must *confirm* the expectations on the front, not contradict them.") (emphasis in original).

Front-label asterisks do not change the analysis because they are in tension with the core principles recognized in cases like *Brady* and *Williams*: consumers need not look beyond a misleading front label to find the truth, and the back label should provide more detail, not undermine the front label. *See Williams*, 552 F.3d at 939–40. If it were otherwise, sellers could append an asterisk to clearly deceptive claims, then point to the asterisk to defeat deceptive advertising claims at the pleading stage, even if the disclaimer was minuscule, difficult to locate, and inconsistent with the front label. *See Beardsall v. CVS Pharmacy, Inc.*, 953 F.3d 969, 978 (7th Cir. 2020) ("We are skeptical of defendants' position . . . that an asterisk pointing to an ingredient list in fine print could save virtually any deceptive slogan claiming purity."). Accordingly, the rule in California is clear and well-established: in consumer labeling, "[y]ou cannot take away in the back fine print what you gave on the front in large conspicuous print." *Brady*, 26 Cal. App. 5th at 1172; *see also Williams*, 552 F.3d at 939 ("We do not think that the FDA

requires an ingredient list so that manufacturers can mislead consumers and then rely on the ingredient list to correct those misinterpretations and provide a shield for liability for the deception.").

C. Appellant Adequately Pled a Claim that the Hand Sanitizer Labels Mislead Consumers About Their Effectiveness

The district court erred under those standards in dismissing Appellant's consumer deception claims on the pleadings. Appellant has adequately alleged that the hand sanitizers do not kill 99.99% of germs found on hands:[4] he alleged that the products are ineffective against significant classes of germs transmitted by hand contact, including norovirus, cryptosporidium, HPV, and C. difficile. ER-25–27 ("A substantial number of" 54 identified pathogens against which Appellee's products are ineffective are transmitted by hands; they annually cause "millions of cases of infection" in this country.). Those allegations arguably render the claim that the products "kill[] 99.99% of germs" literally false. *See Brady*, 26 Cal. App. 5th at 1167 ("[T]here is no protection for literal falseness."). The complaint therefore sufficiently states a consumer deception claim under California's consumer protection laws.

[4] Appellant alleged in the Second Amended Complaint that he relied on the front label's representations and purchased the products "for the particular purpose of sanitizing hands and killing germs." ER-28. In light of that allegation and the fact that the challenged products are *hand* sanitizers, it does not seem unreasonable to conclude that the front label's representation "kills 99.99% of germs" would be understood to mean "kills 99.99% of germs *that can be found on hands*."

Nor would the back label solve the problem presented by the front label, even if, contra *Brady* and *Williams*, a back label could cure front-label deception. In some of the smallest print on the challenged product bottles, surrounded by other text, the following words appear: "Effective at eliminating more than 99.99% of many common harmful germs and bacteria in as little as 15 seconds." ER-24; 29–30. That statement conflicts with the front label's unqualified assurance that the product "kills 99.99% of germs," and, in any event, Appellant has alleged the product is ineffective against even common, harmful germs on hands. *See* ER-26–27. The back label thus does not fulfill the only approved function of back-label disclaimers: to provide more "detailed information about the product that confirms other representations on the packaging." *Williams*, 552 F.3d at 939–40; *see Mars Petcare US*, 966 F.3d at 1017 ("If, however, 'a back label ingredients list . . . conflict[s] with, rather than confirm[s], a front label claim,' the plaintiff's claim is not defeated.") (quoting *Brady*, 26 Cal. App. 5th at 1168) (alterations and omission in original).

Apart from misapplying the reasonable consumer standard, the district court also made unsupported assumptions about reasonable consumer behavior. *See infra* Section II.D. It also reached factual conclusions regarding various germs that contradict the allegations made in the complaint and appear inaccurate, or at the

very least contestable. *See* ER-15–18; ER-76 (Dec. 6, 2021 order incorporating Mar. 3, 2021 order's reasoning).

For example, in its order dismissing the First Amended Complaint, the district court made factual findings that contradicted the Appellant's allegations about types of germs found on hands that the hand sanitizer does not kill. Appellant alleged, for example, that HPV causes finger warts and may be spread by hand contact, but that the hand sanitizer does not kill that type of virus. *See* ER-26. The district court called those allegations "out and out falsehoods," citing a CDC website that appears to relate only to *genital* forms of HPV. ER-72. Based on that website, the court concluded that "HPV can only be spread by ***intimate*** skin on skin contact, in other words through oral, anal, or vaginal sex, [and] to allege otherwise is irresponsible." ER-72 (citing https://www.cdc.gov/std/hpv/stdfact-hpv.htm) (emphasis in original).[5] But as Appellant pointed out in the Second Amended Complaint—citing three scientific sources in support—non-genital forms of HPV occur on hands and can be spread by hand contact. *See* ER-39–40. This example underscores why dismissing deception claims on the pleadings should be rare: such questions inherently require fact-finding, and resolving them

[5] The district court discussed HPV in its order dismissing the First Amended Complaint without prejudice, but adopted the reasoning of that order in its subsequent order dismissing the Second Amended Complaint with prejudice. ER-18.

prior to receiving evidence can mean relying on unsupported assumptions about how the facts would play out at trial. *See Doe v. Regents of Univ. of Cal.*, 23 F.4th 930, 932 (9th Cir. 2022) ("Because this appeal arises from a motion to dismiss, we accept as true the well-pleaded allegations contained in the operative complaint and construe them in the light most favorable to [the plaintiff].").

Whether the labels' assertion that the hand sanitizer "kills 99.99% of germs" would *in fact* mislead reasonable consumers may be debatable, but dismissal on the pleadings represented an improper determination as a matter of *law* that it would not. Under this Court's prior applications of California law, Appellant was entitled to the opportunity to prove his claims. Indeed, considering nearly identical claims, two other district courts have denied motions to dismiss consumer deception causes of action involving the same Vi-Jon hand sanitizer labels at issue here. Courts in the Central District of California and the Eastern District of Missouri have allowed consumer deception claims to proceed past the pleading stage, applying the well-settled legal standards governing those claims. *See Mier*, 2021 WL 1559367 at *6 ("[T]he Court determines that Plaintiff has stated a plausible claim that a reasonable consumer would be deceived by CVS's labeling."); *Macormic v. Vi-Jon, LLC*, No. 4:20CV1267 HEA, 2021 WL 6119166 at *6 (E.D. Mo. Aug. 6, 2021) ("Plaintiffs' factual allegations plausibly show that a reasonable

customer would believe the Products kill more germs than they actually do."). The same result is warranted here.

D. Courts Should Consider How Reasonable Consumers Actually Behave

One significant reason that granting motions to dismiss should be rare in consumer deception cases is that courts cannot assume reasonable consumers act with perfect knowledge, deliberation, or analytical rigor. In practice, reasonable consumers usually cannot focus thoughtfully on each of the many purchases they make. In light of that reality, courts have begun to draw from behavioral science research to acknowledge that situational and cognitive constraints can impact the decisions of reasonable consumers.

Courts applying California's Unfair Competition and False Advertising Laws have long recognized that reasonable consumers lack the time, motivation, and background to thoroughly analyze advertising messaging. Reasonable consumers are "not versed in the art of inspecting and judging a product," *Colgan*, 135 Cal. App. 4th at 682, may lack "acu[ity] and sophisticat[ion]," and may be neither "wary [n]or suspicious." *Lavie*, 105 Cal. App. 4th at 509–10, 512 (internal quotation marks omitted). They are "'ordinary'" consumers who act "'reasonably[,]'" but reasonableness is not a static concept, and must be evaluated in light of the surrounding "'circumstances.'" *See Colgan*, 135 Cal. App. 4th at 682 (quoting *Lavie*, 105 Cal. App. 4th at 512–13). The standard insists on the

reasonable exercise of consumers' human faculties, but equally recognizes their human limitations, both situational (the "circumstances") and cognitive (lack of acuity, sophistication, wariness, suspicion). The law demands situational reasonableness, but not extraordinary composure or superhuman rationality.

In applying this standard at the pleading stage, courts have increasingly acknowledged the distinction between how consumers assess advertising claims and typical modes of legal analysis, such as statutory or contract interpretation. For example, the California Court of Appeal in *Brady v. Bayer Corp*. reviewed claims that the front-label brand name "One A Day" misled consumers of a vitamin gummy product into believing the serving size was one gummy per day, where the back label disclosed the actual daily serving was two gummies. 26 Cal. App. 5th 1156 (2018). Relying in part on marketing literature, the court rejected the notion that "reasonable consumers of vitamins are back-label scrutinizers" as "untenable[,]" noting that while "many people—including some judges and lawyers—would make such an inquiry[,]" "other consumers—knowing they have very little scientific background[,]" would not. *Id.* at 1174.

Likewise, in *Bell v. Publix Super Markets, Inc.*, the Seventh Circuit contrasted how judges and lawyers engage in analyses with how reasonable consumers might consider a product labeled "100% grated parmesan cheese" that disclosed its non-cheese ingredients only on the back label. 982 F.3d 468 (7th Cir. 2020). Citing

Williams and applying several state consumer laws, including California's, *Bell* held that the district court erred in dismissing the plaintiff's claim that the "100%" label was misleading. Echoing *Brady*, the court noted that "[m]any reasonable consumers do not instinctively parse every front label or read every back label before placing groceries in their carts." *Id.* at 476; *see also Trader Joe's Co.*, 4 F.4th at 884 (recognizing *Bell*'s reasoning that consumers may exhibit lower care when purchasing everyday items). The Seventh Circuit concluded that the district court erred by "attributing to ordinary supermarket shoppers a mode of interpretation more familiar to judges trying to interpret statues in the quiet of their chambers." *Bell*, 982 F.3d at 476. "Consumer-protection laws do not impose on average consumers an obligation to question the labels they see and to parse them as lawyers might for ambiguities, especially in the seconds usually spent picking a low-cost product." *Id.* (approvingly quoting *Danone, US, LLC v. Chobani, LLC*, 362 F. Supp. 3d 109, 123 (S.D.N.Y. 2019) ("[A] parent walking down the dairy aisle in a grocery store, possibly with a child or two in tow, is not likely to study with great diligence the contents of a complicated product package, searching for and making sense of fine-print disclosures . . . . Nor does the law expect this of a reasonable consumer.")).

Citing behavioral research as support, the Seventh Circuit in *Bell* further opined, "We doubt it would surprise retailers and marketers if evidence showed

that many grocery shoppers make quick decisions that do not involve careful consideration of all information available to them." *Bell*, 982 F.3d at 481 (citing four sources); *cf. Hinojos*, 718 F.3d at 1106 (quoting, at pleading stage, consumer behavior research in support of conclusion that price discounts matter to consumers). The *Bell* court concluded that questions of deception "may not be answered as a matter of law simply because lawyers can construe an ambiguous claim in a way that would not be deceptive. Plaintiffs are entitled to present evidence on how consumers actually understand these labels. . . . These are matters of fact, subject to proof that can be tested at trial, even if as judges we might be tempted to debate and further speculate about them." *Bell*, 982 F.3d at 480–81.[6]

The First Circuit in *Dumont v. Reily Foods Co*. also considered a deceptive labeling issue on the pleadings, and in allowing the case to proceed, similarly contrasted how real-world consumers understand labels with how an expert conducting a rigorous analytical review might understand them. 934 F.3d 35 (1st Cir. 2019). The front label at issue promised "Hazelnut Crème" coffee, but the back label disclosed the product contained no hazelnut. *Id.* at 37–38. The *Dumont* court disapproved of envisioning the reasonable consumer as an "erudite reader of

[6] This Court has recognized the problem with the manufacturer in *Bell* relying on an ambiguous front-label claim and then "try[ing] to retain some 'level of deniability' by clarifying the front-label claim with back-label disclosures." *Trader Joe's Co.*, 4 F.4th at 883 (quoting *Bell*, 982 F.3d at 477).

labels, tipped off by the accent grave on the word 'crème,' and armed perhaps with several dictionaries, a bit like a federal judge reading a statute." *Id.* at 40. Expressing doubt that reasonable consumers "would exhibit such linguistic precision," the court concluded "we think it best that [the fact finder] decide on a full record whether the challenged label 'has the capacity to mislead' reasonably acting, hazelnut-loving consumers." *Id.* at 40–41 (citation omitted).

Established behavioral science supports applying a less lawyerly, more "real-world" lens to consumer deception issues. For example, research has shown that information overload can confuse consumers or promote reliance on heuristic decision-making, in which the consumer simplifies a decision by examining only certain aspects of it. Lauren E. Willis, *Decisionmaking and the Limits of Disclosure: The Problem of Predatory Lending: Price*, 65 Md. L. Rev. 707, 766–71 (2006). Decision simplification (as advertisers well know) sometimes means skipping past disclaimers: consumers "ignore [disclosure] data to make their task more manageable[,]" in order to avoid opportunity costs, or because disclosures look unimportant or they believe they already know what the disclosures will say. Omri Ben-Shahar & Carl E. Schneider, *More than You Wanted to Know: The Failure of Mandated Disclosure* 64–78 (2014). Similarly, consumers may "satisfice" when faced with time constraints, forgoing exhaustive product investigation for time savings. Willis, *supra*, at 742, 767–69. These shortcuts are

more likely for low-dollar purchases: where consumers perceive the stakes to be low, decision-making "involves a simpler process of choice where heuristics are more easily applied." Tilde Heding et al., *Brand Management: Research, Theory and Practice* 93 (2d ed. 2016). It is reasonable—and decidedly human—for consumers to simplify their choices in these ways when pressed for time and forced to make rapid decisions about each of many routine purchases in the modern marketplace.

Marketers know that real-world consumers take shortcuts, and design their advertising accordingly. One marketing text points out that consumers' tendency to economize cognitive processing means that advertisers "must counter consumers' tendencies to screen out marketing-related stimuli or remain insensitive to them[.]" Allan J. Kimmel, *Psychological Foundations of Marketing* 87 (2d ed. 2018). In light of the 50,000 products available in the typical supermarket, "*the average package has about one-tenth of a second to make an impression on the shopper*." *Id*. at 90–91 (emphasis added). That timeframe underscores why it is improper to treat the reasonable consumer like a lawyer or judge. As another marketing text frames the issue, "although rational decision models might suggest what people *ought to do* (normative), they are a poor guide for what people *actually do* (descriptive)." Robert East et al., *Consumer Behaviour: Applications in Marketing* 6 (2d ed. 2013) (emphasis in original).

Thus, a recent line of cases and behavioral science both lend support to the notion that reasonable consumers approach advertising differently than courts or lawyers parsing statutes or contracts. Courts should generally consider evidence about how consumers behave in the real world, rather than dismissing cases based on intuitions that may suffer from incomplete information. Evidence gathered during litigation and presented at trial, which can include consumer or expert testimony, can help courts assess advertising through the eyes of a reasonable consumer and better understand the market circumstances and everyday realities within which consumers make purchase decisions.

CONCLUSION

The district court's judgment should be reversed.

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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