

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

PEOPLE FOR THE ETHICAL
TREATMENT OF ANIMALS
and LORI GRASS,

Plaintiffs,

v.

WHOLE FOODS MARKET
CALIFORNIA, INC., et al.,

Defendants.

Case No. [15-cv-04301 NC](#)

**ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANTS'
MOTION TO DISMISS PLAINTIFFS'
SECOND AMENDED COMPLAINT**

Re: Dkt. No. 32

In this consumer class action, Whole Foods moves to dismiss Plaintiffs' second amended complaint in its entirety without leave to amend. Whole Foods claims that Plaintiffs lack standing, that the second amended complaint fails to allege fraud-based state law claims with the specificity required by Federal Rule of Civil Procedure 9, that Plaintiffs' claims are all preempted by federal law, and that Plaintiffs' class action allegations fail because they fail to allege commonality. The Court finds that Plaintiffs have standing and have adequately alleged class action allegations. However, the Court finds that Plaintiffs have failed to allege their fraud-based claims with the required specificity, and that the Court cannot determine whether the state claims are preempted without more specific allegations. Therefore, the Court GRANTS Whole Foods' motion to dismiss as to the Rule 9 specificity and preemption and DENIES the motion as to Plaintiffs' standing and class certification.

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I. BACKGROUND

People for the Ethical Treatment of Animals, Inc. (PETA) is an international animal protection organization. Dkt. No. 20 at 5. PETA is organized as a nonprofit corporation and charity pursuant to section 501(c)(3) of the Internal Revenue Code with headquarters in Norfolk, Virginia and offices in Los Angeles, California. *Id.* PETA’s “mission focuses on improving and educating the public about animal use in four main areas, including animals raised for food.” Dkt. No. 20 at 5. PETA states in the second amended complaint that “[i]t brings this case on its own behalf for injunctive relief to protect its organizational interests and resources.” Dkt. No. 20 at 6.

Lori Grass is a Whole Foods customer suing on behalf of herself and all others similarly situated. Dkt. No. 20 at 3. She is a citizen of the state of California residing in Portola Valley. *Id.* at 6. Grass has “purchased Meat Products from Defendants’ retail store located in Mountain View and Redwood City, California, regularly over the last four years preceding the filing of the complaint.” *Id.*

In their second amended complaint, Plaintiffs claim that Whole Foods has touted “superior animal welfare” to sell meat products at a marked up price. *Id.* at 13. They claim that Whole Foods has violated California law, specifically the Unfair Competition Law (UCL), Cal. Bus. & Prof. Code §§ 17200, *et seq.*, the Consumers Legal Remedies Act (CLRA), Cal. Civ. Code § 1750, and the False Advertising Law (FAL), Cal. Bus. & Prof. Code §§ 17500, *et seq.*

The allegations state that Whole Foods’ in-store advertisements on placards, signs, and napkins mislead customers into believing that the animals raised for meat are treated in a humane manner exceeding industry standards, specifically as shown in numerical “call-outs” on a five step Global Animal Partnership rating of 1-5+. *Id.* at 17. However, Plaintiffs assert that the step rating does not reflect a higher quality of treatment for the animals and that the review process is insufficient, rendering the call-outs useless and misleading. *Id.* at 18. Currently before the Court is Whole Foods’ motion to dismiss the second amended complaint. All parties have consented to the jurisdiction of a magistrate

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1 judge in accordance with 18 U.S.C. § 636(c). Dkt. Nos. 7, 18.

2 **II. JUDICIAL NOTICE**

3 Both parties have submitted motions for judicial notice with documents they wish
4 the Court to consider. See Dkt. Nos. 33, 37. Neither party has objected to the other’s
5 motion for judicial notice and judicial notice is granted to both parties’ documents. The
6 Court has reviewed the documents in considering the present motion.

7 **III. LEGAL STANDARD**

8 A motion to dismiss for failure to state a claim under Rule 12(b)(6) tests the legal
9 sufficiency of a complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). On a
10 motion to dismiss, all allegations of material fact are taken as true and construed in the
11 light most favorable to the non-movant. *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-
12 38 (9th Cir. 1996). The Court, however, need not accept as true “allegations that are
13 merely conclusory, unwarranted deductions of fact, or unreasonable inferences.” *In re*
14 *Gilead Scis. Secs. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008). Although a complaint need
15 not allege detailed factual allegations, it must contain sufficient factual matter, accepted as
16 true, to “state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*,
17 550 U.S. 544, 570 (2007). A claim is facially plausible when it “allows the court to draw
18 the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft*
19 *v. Iqbal*, 556 U.S. 662, 678 (2009).

20 If a court grants a motion to dismiss, leave to amend should be granted unless the
21 pleading could not possibly be cured by the allegation of other facts. *Lopez v. Smith*, 203
22 F.3d 1122, 1127 (9th Cir. 2000).

23 **IV. DISCUSSION**

24 Whole Foods argues that Plaintiffs’ second amended complaint should be dismissed
25 in its entirety with prejudice because: (1) both PETA and Grass lack standing to bring this
26 suit; (2) the second amended complaint fails to allege fraud-based claims with required
27 specificity; (3) all of Plaintiffs’ claims are preempted by federal law; and (4) Plaintiffs’
28 class action claims fail due to lack of commonality.

A. Standing

Whole Foods claims that both PETA and Grass lack standing. Whole Foods argues that “Plaintiff Grass admits that she does not recall what advertising she reviewed and therefore cannot allege the element of reliance required for each of her claims.” Dkt. No. 32 at 9. Whole Foods also states that PETA “has not alleged any facts demonstrating a diversion of time or resources that might demonstrate its standing.” *Id.*

Plaintiffs argue that both Grass and PETA have alleged sufficient facts to show their standing. Dkt. No. 36. Specifically, the second amended complaint includes Grass’ allegations that she saw in-store advertisements at the Whole Foods in Mountain View and Redwood City, California, and purchased meat products “that she would not have purchased had she known that Whole Foods does not ensure compliance with its animal welfare standards or that key standards do not ensure meaningful improvement over common industry practice.” *Id.* at 27. PETA states that it has standing because it has alleged a “diversion” of its organizational resources and a frustration of its mission of a well-informed public due to Whole Foods’ actions. *Id.* at 28.

1. Grass’ Standing

Federal courts evaluate motions to dismiss for lack of standing pursuant to Federal Rule of Civil Procedure 12(b)(1), which authorizes a party to move to dismiss a lawsuit for lack of subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1); *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000). To establish standing within the meaning of Article III, a plaintiff must show “injury in fact,” causation, and redressability. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992); *Sprint Communications Co., L.P. v. APCC Servs., Inc.*, 554 U.S. 269, 274 (2008).

To have standing under the FAL, CLRA and UCL, Grass must claim to have relied on the alleged misrepresentation and suffered economic injury as a result of the challenged practice or advertising. *See* Cal. Bus. & Prof. Code §§ 17535, 17204. The California Supreme Court in *Kwikset Corp. v. Superior Court*, 51 Cal. 4th 310, 330 (2011), stated, “a consumer who relies on a product label and challenges a misrepresentation contained

1 therein can satisfy the standing requirement of § 17204 by alleging that . . . he or she
2 would not have bought the product but for the misrepresentation.” *See also Hinojos v.*
3 *Kohl’s Corp.*, 718 F.3d 1098, 1104 (9th Cir. 2013) (“[p]leading that one would not have
4 otherwise purchased the product but for the misleading advertising [] satisfies the
5 consumer’s obligation to plead a causal link between the advertising and the alleged
6 economic injury”).

7 Here, Grass alleges that she “saw the advertising signs, placards, and/or napkins
8 described [in the Complaint] in the retail store where she purchased the Meat Products”
9 regularly over four years. Dkt. No. 20 at 6. Grass admits that she “does not recall the
10 specifics of the many advertisements she saw before she purchased the Meat Products,
11 [but] she does recall that superior animal welfare was a consistent theme across the
12 advertisements she saw.” *Id.* at 6-7. The second amended complaint asserts, “[t]hese
13 representations about superior animal welfare influenced her decision to purchase Meat
14 Products. Plaintiff would not have purchased them or paid as much had these
15 advertisements disclosed the truth.” *Id.* at 7.

16 Grass’ statements of reliance are sufficient for standing for her FAL, CLRA, and
17 UCL claims. Further, her assertion that she would not have paid Whole Foods’ prices for
18 the meat but for her belief on the statements about animal welfare satisfies the “injury in
19 fact” requirement for Article III standing. Grass therefore has standing.

20 2. PETA’s Standing

21 Unlike Grass, PETA is not a customer of Whole Foods. Instead, PETA alleges that
22 as an organizational plaintiff, it has standing because it has diverted resources as a result of
23 Whole Foods’ alleged unlawful business practices, which have thwarted PETA’s mission.
24 The Ninth Circuit in *La Asociacion de Trabajadores de Lake Forest*, 624 F.3d 1083 (9th
25 Cir. 2010) requires an organization like PETA to show that it has suffered both a
26 “diversion of its resources” and “a frustration of its mission” in order to have standing.
27 *See also Animal Legal Def. Fund v. Great Bull Run, LLC*, 14-cv-01171 MEJ, 2014 WL
28 2568685, at *6 (N.D. Cal. June 6, 2011).

1 Here, PETA alleges that its mission “focuses on improving and educating the public
2 about animal use in four main areas, including animals raised for food.” Dkt. No. 20 at ¶
3 11. In language tracking the Ninth Circuit’s requirements in *Asociacion de Trabajadores*,
4 PETA argues that it “has suffered a frustration of its mission of a well-informed public and
5 has had to divert resources from other PETA projects in order to urge Whole Foods to stop
6 its misleading advertising and to educate the public about the inadequacy of [Whole
7 Foods]’ standards.” Dkt. No. 36 at 28. At this stage in the pleadings, the Court takes as
8 true the allegations in the complaint. *Cahill*, 80 F.3d at 337. Therefore, under *Asociacion*
9 *de Trabajadores*, PETA has sufficiently alleged organizational standing.

10 **B. Fraud-Based State Law Claims**

11 To state a claim for false or misleading advertising under the UCL or FAL,
12 Plaintiffs must allege facts showing that Whole Foods’ advertising is “likely to deceive a
13 reasonable customer.” *Williams v. Gerber Products, Co.*, 552 F.3d 934, 938 (9th Cir.
14 2008). Plaintiffs’ claim under the CLRA must allege facts showing that Whole Foods
15 advertised its Meat Products as having characteristics, benefits, uses, qualities,
16 sponsorships, approvals or certifications that they do not have. Cal. Civ. Code §
17 1770(a)(2),(5),(7). And because their UCL, FAL, and CLRA claims contain an element of
18 fraud, Plaintiffs must satisfy the heightened pleading standards of Federal Rule of Civil
19 Procedure 9(b). *Vess v. Ciba-Geigy Corp., USA*, 317 F.3d 1097, 1103-06 (9th Cir. 2003).

20 **1. Pleading Reliance With Specificity Under Rule 9(b)**

21 According to Rule 9(b), “a party must state with particularity the circumstances
22 constituting fraud.” Fed. R. Civ. P. 9(b). To satisfy Rule 9(b)’s standards, Plaintiffs must
23 allege circumstances “specific enough to give defendants notice of the particular
24 misconduct . . . so that they can defend against the charge and not just deny that they have
25 done anything wrong.” *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1124 (9th Cir. 2009)
26 (internal quotations omitted). “Plaintiffs’ complaint must identify the who, what, when,
27 where, and how of the misconduct charged, as well as what is false or misleading about the
28 purportedly fraudulent statement, and why it is false.” *Salameh v. Tarsadia Hotel*, 726

1 F.3d 1124, 1133 (9th Cir. 2013) (internal quotations omitted).

2 Here, Whole Foods argues that that second amended complaint fails to satisfy the
3 requirements of Rule 9(b) because it does not “identify the specific advertisements upon
4 which plaintiff Grass allegedly relied.” Dkt. No. 32 at 26. Because Grass “admits that she
5 cannot remember what the advertisements stated, but simply remembers a ‘superior animal
6 welfare . . . theme’” the second amended complaint fails to “identify any particular
7 fraudulent statement, or actual source, that plaintiff Grass relied upon in purchasing meat
8 products from Whole Foods.” *Id.*

9 Further, Whole Foods argues that the second amended complaint fails to “state with
10 particularity when Grass viewed any specific advertisements.” *Id.* Although it “generally
11 states” that Grass purchased unprepackaged meats during the four year period, it “does not
12 disclose when she viewed any purportedly misleading advertisements.” *Id.* at 27. Finally,
13 Whole Foods claims that “it is not evident from the [second amended complaint] exactly
14 which Meat Products are implicated by Plaintiffs’ claims.” *Id.* According to Whole
15 Foods, because Grass’ allegations are “completely devoid of any allegation as to what
16 step(s) of meat (1, 2, 3, 4, and/or 5+) plaintiff Grass purchased for each species of Meat
17 Product” Whole Foods cannot determine whether Grass alleges that she purchased every
18 rating of meat or only certain levels of meat “on reliance on particular advertisements.” *Id.*

19 Plaintiffs argue that their allegations are sufficient under Rule 9(b) because the
20 second amended complaint identifies the “who, what, when, where, and how of the
21 misconduct charged, as well as what is false or misleading about the purportedly
22 fraudulent statement, and why it is false.” *Cafasso v. Gen Dynamics C4 Sys., Inc.*, 637
23 F.3d 1047, 1055 (9th Cir. 2011) (internal citations omitted). “As required by *Cafasso*,
24 Plaintiffs satisfy the who (Whole Foods), the what (misrepresentations regarding superior
25 animal treatment and omission that standards are not enforced or a meaningful
26 improvement), the when (since four years prior to the complaint being filed and throughout
27 the class period), the where (in-store signs, placards, and napkins), and the how
28 (misrepresentations and omissions resulting in premium payments that would not have

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1 otherwise been made.” Dkt. No. 36 at 23 (internal citations to the second amended
2 complaint omitted).

3 However, the Ninth Circuit in *Cafasso* specifically stated that general allegations do
4 not suffice to pass Rule 9(b) scrutiny. The plaintiff’s allegation was rejected under Rule
5 9(b) because “[t]his type of allegation, which identifies a general sort of fraudulent conduct
6 but specifies no particular circumstances of any discrete fraudulent statement, is precisely
7 what Rule 9(b) aims to preclude.” *Cafasso*, 637 F.3d at 1057. Likewise, here Plaintiffs’
8 second amended complaint does not satisfy Rule 9(b) because it does not specifically
9 identify what misleading advertisements Grass relied on.

10 For example, Plaintiffs attach multiple exemplar photographs to the complaint, but
11 it is not clear in the photographs which placards and signs they allege are illegal, are not
12 preempted, and were relied on by Grass. *See* Dkt. No. 20. At page ten of the second
13 amended complaint, the Plaintiffs have included photographs of Whole Foods’ display
14 cases of unprepackaged meats ranging from chicken breasts to steaks. *Id.* at 12. There are
15 small white placards inside the glass display case giving information about each of the
16 meats. *Id.* There is also a chart along the bottom of the display case stating, “5-Step
17 Animal Welfare Rating, Your Way Of Knowing How The Animals Were Raised,”
18 accompanied by a series of different colored boxes with each Step and a brief description.
19 *Id.* At the top of the glass display is another bar with the words “Country Natural” and
20 “Pasture Centered,” although the rest of the writing is cut off from the photograph. *Id.*

21 From this photograph and the allegations in the second amended complaint, it is not
22 clear whether the Plaintiffs object to the white placards within the glass, the statements on
23 the top bar, the bottom bar, or all three. It is also not clear what statements Grass alleges
24 she relied upon when she decided to purchase unprepackaged meat products at Whole
25 Foods. Therefore, the second amended complaint does not provide enough information to
26 satisfy Rule 9(b)’s requirement to allege specific misrepresentations.

27 **2. Pleading A Tobacco II Advertising Campaign**

28 In *In re Tobacco II Cases*, 46 Cal. 4th 298, 327, 328 (2009), the California Supreme

1 Court held that while a plaintiff alleging a UCL claim “must plead and prove actual
2 reliance,” the plaintiff “is not required to necessarily plead and prove individualized
3 reliance on specific misrepresentations or false statements where, as here, those
4 misrepresentations and false statements were part of an extensive and long-term
5 advertising campaign.” Under *Tobacco II*, a plaintiff may plead “an extensive and long-
6 term advertising campaign,” rather than pleading reliance on specific misrepresentations.
7 *Id.* Here, Plaintiffs argue that they have sufficiently alleged a *Tobacco II*-type extensive
8 and long-term advertising campaign, allowing them to “rely on the cumulative message of
9 Whole Foods’s advertising campaign.” Dkt. No. 36 at 25 n.97.

10 A district court in *Opperman v. Path, Inc.*, 84 F. Supp. 3d 962, 976 (N.D. Cal.
11 2015), applied *Tobacco II* to find that consumers had adequately alleged defendant
12 Apple’s long-term advertising campaign for class action to pass Rule 9(b) scrutiny without
13 alleging specific misrepresentations. The court stated that “once a plaintiff sufficiently
14 alleges exposure to a long-term advertising campaign as set forth in *Tobacco II*, she d[oes]
15 not need to plead specific reliance on an individual representation.” *Id.* at 977. The court
16 examined the duration and frequency of Apple’s advertising and found “that the fifteen or
17 twenty more-specific statements about sandboxing, protection of personal information, and
18 consumer privacy Plaintiffs have identified, combined with the larger and more general
19 campaign expressing Apple’s concern with privacy and security, are sufficiently related to
20 the alleged failing of the iDevices to satisfy *Tobacco II*’s pleading requirements.” *Id.* at
21 982-83.

22 Likewise, the court in *Morgan v. AT & T Wireless Servs., Inc.*, 177 Cal. App. 4th
23 1235, 1258, 99 Cal. Rptr. 3d 768, 787 (2009), found allegations sufficient under *Tobacco*
24 *II* because, “although the advertising campaign alleged in this case was not as long-term a
25 campaign as the tobacco companies’ campaign discussed in *Tobacco II*, it is alleged to
26 have taken place over many months, in several different media, in which [defendant]
27 consistently promoted its GMS/GPRS network as reliable, improving, and expanding.”

28 Here, Plaintiffs argue that Whole Foods’ “advertisements create an overall message

1 of ensuring superior animal treatment—the consumer takeaway is not in the details of the
2 ‘call-outs.’” Dkt. No. 36 at 26. Whole Foods argues that *Tobacco II* is inapposite because
3 there the tobacco companies were saturating the market with radio ads, posters, and other
4 forms of advertisement. Conversely here, the second amended complaint alleges that
5 Whole Foods has “inundated” Grass and other customers with signs, placards, and napkins
6 over a four year period. However, it is not clear from the second amended complaint
7 which signs and placards were deceptive advertising, over what time period they were
8 placed in the store and Grass was exposed to them, and therefore whether the alleged
9 advertising campaign rises to the level required under *Tobacco II*. As such, the second
10 amended complaint fails to qualify for an exemption from Rule 9(b)’s requirement to plead
11 specific misrepresentations.

12 **C. Federal Preemption**

13 The next issue is whether Plaintiffs’ state law claims are preempted by the Federal
14 Poultry and Poultry Products Act, 21 U.S.C. § 451, *et seq.* and the Federal Meat Inspection
15 Act, 21 U.S.C. § 601, *et seq.* Whole Foods claims that all of Plaintiffs’ claims are
16 preempted because the statements in the signs, placards, and napkins come from labels that
17 have been reviewed by the USDA’s Food Safety and Inspection Service (FSIS). Dkt. No.
18 32 at 8.

19 Whole Foods alleges two types of federal preemption of Plaintiffs’ state law claims.
20 First, Whole Foods argues that the federal laws “expressly” preempt state law claims based
21 on labeling approved by FSIS. Dkt. No. 32 at 8. Alternatively, Whole Foods argues
22 “conflict” preemption; the theory that the federal laws “also impliedly preempt state law
23 claims based on advertising that contains the same information as labels approved under
24 the Acts for those same products because such enforcement necessarily conflicts with the
25 authority granted to the USDA to determine whether or not the statements are false or
26 misleading.” *Id.*

27 **1. Express Preemption**

28 First, Whole Foods states that the Meat and Poultry Acts include express

1 preemption provisions that bar any state-law requirements that are not identical to the
2 federal requirements. 21 U.S.C. § 678; 21 U.S.C. § 467(e). However, this express
3 preemption must be clear. To determine the scope of an express preemption provision,
4 “we apply the assumption that the historic police powers of the States were not to be
5 superseded . . . unless that was the clear and manifest purpose of Congress.” *Am. Meat*
6 *Inst. v. Leeman*, 180 Cal. App. 4th 728, 748, 102 Cal. Rptr. 3d 759, 774 (2009) (internal
7 citations and quotations omitted).

8 Whole Foods argues that FSIS approved labels are attached to the meat by the
9 suppliers, and the Whole Foods signs around the meat area are duplicative of the labels
10 “approved by FSIS for those products.” Dkt. No. 39 at 6. “Whole Foods receives the
11 Meat Products from its suppliers in crates and boxes that are labeled with FSIS approved
12 labeling that includes the GAP insignia, step rating and applicable call-out specific to the
13 enclosed products. Whole Foods displays those same Meat Products in its refrigerated
14 cases using the GAP insignia, step rating and marketing call-outs listed on the FSIS
15 approved labeling.” Dkt. No. 39 at 6.

16 In *Meaunrit v. ConAgra Foods Inc.*, No. 09-cv-02220 CRB, 2010 WL 2867393, at
17 *7 (N.D. Cal. July 20, 2010), the court dismissed the plaintiffs’ state law claims that the
18 defendant’s labels were false and misleading because defendant’s chicken pot pies
19 received pre-approval by the USDA and FSIS. Whole Foods argues that under *ConAgra*,
20 Plaintiffs’ claims are challenging labeling that the FSIS has approved. “The FSIS pre-
21 approved the labeling of various Whole Foods meat suppliers whose labels include the
22 GAP insignia, and the applicable step rating and marketing call-out for that meat product,
23 i.e. GAP’s Steps 1, 2, 3,4, 5, and 5+ for chicken, turkey, pork and beef.” Dkt. No. 32 at
24 18.

25 Whole Foods also cites to *American Meat Inst.* 180 Cal. App. 4th at 781-784, where
26 a California state court found that Prop 65 warnings were labeling. “As we have explained,
27 in *Kordel*, the [California] Supreme Court stated that material ‘accompanies’ a product,
28 and thus constitutes ‘labeling’ if there is a ‘textual relationship’ between the material and

1 the product. One article or thing is *accompanied* by another when it supplements or
2 explains it, in the manner that a committee report of the Congress accompanies a bill. No
3 physical attachment one to the other is necessary. Material constitutes labeling if it was
4 designed for use in the distribution and sale of the product.” *American Meat Inst.* 180 Cal.
5 App. 4th at 784 (internal citations and quotations omitted).

6 Plaintiffs claim that Whole Foods’ signs, placards, and napkins do not refer to
7 specific products and are therefore advertisements, not labels. Dkt. No. 36 at 10. Plaintiffs
8 distinguish *ConAgra* on the grounds that there, “the in-store materials promoted the
9 specific chicken pot pies made by the defendant manufacturer” while “here the in-store
10 signs, placards, and napkins do not refer to specific meat products, much less a specific
11 meat product from a certain supplier – instead, they refer to all of them. Thus they are not
12 labels under the Meat and Poultry Acts” and there is no preemption. Dkt. No. 36 at 12.
13 Plaintiffs argue that the Whole Foods materials give misleading explanatory statements to
14 assure customers that they “know” how the animals are treated. Dkt. No. 20 at 17.

15 This question turns on whether or not the Whole Foods signage, placards, and
16 napkins are simply reproductions of the suppliers’ labels. If they are, and the statements
17 are FSIS approved labels, then they are expressly preempted. However, if the signage,
18 placards, and napkins are not the same and are instead Whole Foods advertising, then there
19 is not express preemption. However, the second amended complaint does not provide
20 sufficient information to know whether the signage, placards, and napkins are labels or
21 advertisement. The attached photos do not clearly distinguish what signs and placards are
22 federally reviewed labels, and which are independent signs made by Whole Foods
23 promoting their fresh meats in general. Therefore, the second amended complaint does not
24 provide enough specificity to determine whether Plaintiffs’ claims are preempted.

25 2. Conflict Preemption

26 Whole Foods also argues that if there is no express preemption, “conflict
27 preemption would still bar Plaintiffs’ claims.” Dkt. No. 32 at 19. This is because “the
28 labels approved by FSIS use the same language, statements and information that are

1 displayed in the Whole Foods' placards, signage and napkins at the foundation of
2 Plaintiffs' claims." *Id.* Therefore, "[a]llowing a jury or court to decide whether these
3 preapproved statements are misleading would conflict with the federal regulatory scheme."
4 *Id.* However, the same questions of whether Whole Foods' signage, placards, and napkins
5 are duplicative of federally-approved labels apply to conflict preemption.

6 **D. Class Certification**

7 Rule 23(c)(1)(A) addresses the timing of a district court's class certification
8 determination, and states: "*Time to Issue*: At an early practicable time after a person sues
9 or is sued as a class representative, the court must determine by order whether to certify
10 the action as a class action." Fed. R. Civ. P. 23(c)(1)(A). "Courts that have stricken class
11 allegations at the pleading stage have recognized that the granting of motions to strike
12 class allegations before discovery and in advance of a motion for class certification is rare
13 and have only done so in rare occasions where the class definition is obviously defective in
14 some way." *Perkins v. LinkedIn Corp.*, 53 F. Supp. 3d 1190, 1221 (N.D. Cal. 2014).

15 In its motion to dismiss, Whole Foods claims that Plaintiffs have failed to plead a
16 class action complaint under the Federal Rule of Civil Procedure 23(c)(1). Dkt. No. 32 at
17 31. More specifically, Whole Foods claims that the second amended complaint fails to
18 allege predominating common issues as required for class certification. Dkt. No. 32 at 32.
19 "Each of GAP's steps is associated with a different marketing call-out that corresponds to
20 different standards and different types of meat. Thus, independent circumstances will
21 determine which GAP Call-Out each class member viewed, how each customer interpreted
22 that call-out, the type of Meat Product each member purchased in reliance on that call-out
23 and which of GAP's standards applies to each individuals [sic] claim." *Id.*

24 However, the test at a motion to dismiss is whether the class action allegations are
25 plausible. At paragraph 73 of the second amended complaint, Plaintiffs list multiple
26 common questions of law and fact for their proposed class. *See* Dkt. No. 20 at 28-29.
27 Plaintiffs' class allegations are plausible at this stage, and Plaintiffs have stated that they
28 "propose to move for class certification by January 11, 2017." Dkt. No. 38 at 8.

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1 Therefore, the Court denies Whole Foods’ motion to dismiss the class action allegations at
2 this stage in the pleadings.

3 **V. CONCLUSION**

4 Because the second amended complaint does not contain enough information to
5 allege fraud with the specificity required by Rule 9(b) or the *Tobacco II* line of cases,
6 Whole Foods’ motion to dismiss is GRANTED with leave to amend. If Plaintiffs wish to
7 file an amended complaint, they must do so by February 16, 2016. Fed. R. Civ. P.
8 12(a)(4)(A). The Court cannot rule on whether Plaintiffs’ claims are preempted by federal
9 law without more specific allegations. Whole Foods’ motion to dismiss all class action
10 allegations is DENIED.

11 **IT IS SO ORDERED.**

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13 Dated: January 29, 2016



NATHANAEL M. COUSINS
United States Magistrate Judge

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