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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BRADLEY COLGATE, KAYTLIN MCNIGHT, M.H., a minor, by her Mother and Natural Guardian JENNIFER HELLMAN, L.B., a minor, by her Mother and Natural Guardian, JILL NELSON, ANTHONY SMITH, COREY SMITH, KACIE ANN LAGUN, A.U., a minor, by her mother and natural guardian, LISA COMMITANTE, TOMMY BENHAM, and DAVID LANGAN on behalf of themselves, the general public and those similarly situated,

Plaintiffs,

v.

JUUL LABS, INC.; PAX LABS, INC.,

Defendants.

CASE NO. 18-cv-02499-WHO

DEFENDANT JUUL LABS, INC.'S NOTICE OF MOTION AND MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Declaration of Austin V. Schwing and [Proposed] Order filed concurrently herewith

Hon. William H. Orrick, III

Hearing Date: September 5, 2018
Hearing Time: 2:00 p.m.
Hearing Place: Courtroom 2, 17th Floor

Action Filed: April 26, 2018
Trial Date: None Set

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE THAT on September 5, 2018, at 2:00 p.m., or as soon thereafter as the matter may be heard before the Honorable William H. Orrick, III in Courtroom 2, 17th Floor, of the United States District Court for the Northern District of California in the San Francisco Courthouse, 450 Golden Gate Avenue, San Francisco, California, 94102, Defendant JUUL Labs, Inc. ("JUUL Labs" or "Defendant"), will and does move this Court, pursuant to Rules 9(b) and 12(b)(6) of the Federal Rules of Civil Procedure, for an order dismissing Plaintiffs' First Amended Complaint in its entirety on the ground that Plaintiffs have failed to state a claim against Defendant upon which relief may be granted.

JUUL Labs' Motion is based on this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities, the concurrently filed Declaration of Austin V. Schwing, any other matters of which the Court may take judicial notice, other documents on file in this action, and any oral argument of counsel.

Dated: July 24, 2018

GIBSON, DUNN & CRUTCHER LLP

By: /s/ *Austin V. Schwing*
Austin V. Schwing

Attorneys for Defendant JUUL LABS, INC.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

JUUL Labs, Inc. ("JUUL Labs") is a San Francisco-based company that designs, manufactures, and markets Electronic Nicotine Delivery Systems ("ENDS"), including the market-leading JUUL device and JUULpods. JUUL Labs' corporate mission is to improve the lives of the world's one billion adult smokers. In 2009, the United States Congress noted that "[t]obacco use is the foremost preventable cause of premature death in America. It causes over 400,000 deaths in the United States each year, and approximately 8,600,000 Americans have chronic illnesses related to smoking." 21 U.S.C. § 387, note.[1] "In 2016, more than 15 of every 100 U.S. adults aged 18 years or older (15.5%) currently smoked cigarettes. This means an estimated 37.8 million adults in the United States currently smoke cigarettes. More than 16 million Americans live with a smoking-related disease."[2] JUUL Labs is dedicated to eliminating combustible cigarettes by offering existing adult smokers an alternative in the form of ENDS.

Nevertheless, in a crusade to stifle the lawful sale of JUUL products—and to try to obtain damages and attorneys' fees—Plaintiffs, through their First Amended Complaint ("FAC") (Dkt. No. 24) mount a sweeping attack on JUUL Labs and its products, with baseless allegations and claims ranging from consumer fraud to product liability to breach of warranty, and several others. All this is despite the fact that many of the Plaintiffs admit they were hopelessly addicted to cigarettes before trying JUUL products and have not returned to smoking cigarettes since. Each of Plaintiffs' claims fails for multiple, independent reasons, and the FAC should be dismissed in its entirety.

First, Plaintiffs' claims are preempted by federal law. JUUL Labs' lawful ENDS products are subject to significant federal government oversight and scrutiny, including by the United States Food and Drug Administration ("FDA") under the Federal Food, Drug, and Cosmetic Act ("FD&C Act") and its implementing regulations. On May 10, 2016, the FDA published its Final Rule Deeming

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[1] According to the Centers for Disease Control and Prevention, "Tobacco use remains the single largest preventable cause of death and disease in the United States. Cigarette smoking kills more than 480,000 Americans each year." https://www.cdc.gov/tobacco/campaign/tips/resources/data/cigarette-smoking-in-united-states.html.

[2] https://www.cdc.gov/tobacco/data_statistics/fact_sheets/adult_data/cig_smoking/index.htm.

Tobacco Products To Be Subject to the Federal Food, Drug, and Cosmetic Act (the "Final Rule"). 81 Fed. Reg. 28974. Among other things, the Final Rule deems ENDS to be subject to the FD&C Act and mandates certain labeling requirements. 21 C.F.R. § 1143.3(a)(1). Importantly, the Family Smoking Prevention and Tobacco Control Act ("TCA"), which is Subchapter IX of the FD&C Act, expressly preempts state requirements that impose labeling requirements that are "different from, or in addition to" any required by federal law, which broadly covers any written, printed, or graphic matter on ENDS products or "accompanying" such products. 21 U.S.C. §§ 321(m), 387p(a)(2)(A). Congress decided that the FDA's determination of FD&C Act requirements, not state law, would determine the careful balancing of policy interests relating to ENDS labeling. This lawsuit, which seeks to convince this Court to regulate ENDS, purportedly under general state law claims that do not even reference ENDS, must be rejected. Indeed, in a very similar case decided shortly after the FDA's Final Rule took effect, Judge Selna dismissed a wide range of state-law claims regarding ENDS labeling. *In re Fontem*, 2016 WL 6520142, at *9 (C.D. Cal. Nov. 1, 2016).

Second, while the FAC is heavy on rhetoric regarding the supposed perils of JUUL Labs' lawful, FDA-regulated ENDS, and boldly asserts the legal conclusion that JUUL Labs was supposedly involved in a "massive fraud," it is hopelessly deficient in pleading Plaintiffs' claims with the particularity required by Rule 9(b) of the Federal Rules of Civil Procedure. Among other defects, the FAC does not identify what supposed misrepresentations Plaintiffs allegedly saw, where they saw them, when they saw them, why they were false, or how any supposed representation or omission by JUUL Labs impacted them (or anyone else) in any way. Plaintiffs' FAC is a far cry from what is required to plead claims sounding in fraud under Rule 9(b). *See* Fed. R. Civ. P. 9(b); *Salameh v. Tarsadia Hotel*, 726 F.3d 1124, 1133 (9th Cir. 2013).

Third, Plaintiffs fail to state a claim under any state's consumer protection laws because they fail to plausibly allege causation, reasonable reliance, or any actionable material misrepresentations or omissions. Again, Plaintiffs do *not* allege exposure to any specific advertising, let alone reasonable reliance on such advertising or any other statements. Nor can Plaintiffs plead reasonable reliance on statements that are mere puffery (*e.g.*, that JUUL is a "satisfying alternative to cigarettes'" (FAC ¶ 4)), or that would not deceive or mislead a reasonable person. This is especially true given that, as

addressed below, the nicotine content of JUUL products is disclosed on its packaging, and there can be no serious dispute that reasonable people today are well aware of the addictive properties of nicotine, including many of the Plaintiffs who have conceded they were addicted to the nicotine in cigarettes before even trying JUUL products. For similar reasons, Plaintiffs fail to plead essential elements of their fraud, negligent misrepresentation, unjust enrichment, and strict liability claims.

Finally, Plaintiffs' express and implied warranty claims are barred because, among other reasons, they fail to plausibly allege any facts showing a breach, and their express warranty claim is explicitly precluded by JUUL Labs' written warranty. For each of these reasons, and those addressed below, the Court should grant JUUL Labs' Motion and dismiss Plaintiffs' FAC in its entirety.

II. BACKGROUND AND SUMMARY OF ALLEGATIONS

The FDA, which regulates ENDS, has concluded that "the inhalation of nicotine (*i.e.*, nicotine without the products of combustion) is of less risk to the user than the inhalation of nicotine delivered by smoke from combusted tobacco products." Final Rule, 81 Fed. Reg. at 28981.[3] The "FDA recognizes that completely switching from combusted cigarettes to ENDS may reduce the risk of tobacco-related disease for individuals currently using combusted tobacco products, given the products' comparative placements on the continuum of nicotine-delivering products." *Id*. at 29030.

Plaintiffs allege that JUUL Labs is the market-leading manufacturer of ENDS, including the JUUL device and JUULpods. *See* FAC ¶¶ 66–67. JUUL e-cigarettes provide a much-needed alternative to smoking combustible cigarettes. JUUL Labs is clear that its JUULpods contain nicotine. The JUULpod packaging plainly states that "1 JUULpod contains – 0.7mL with 5% nicotine by weight//approximately equivalent to about 1 pack of cigarettes." Schwing Decl., Ex. A.[4] The label also clearly contains a California Proposition 65 Warning: "This product contains chemicals known to

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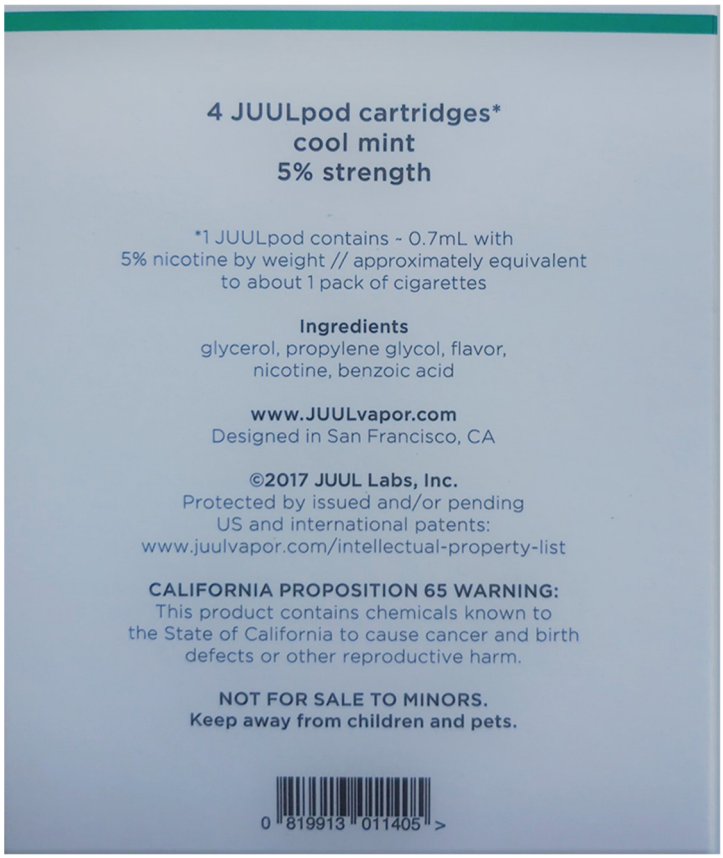
[3] *Deeming Tobacco Products To Be Subject to the Federal Food, Drug, and Cosmetic Act, as Amended by the Family Smoking Prevention and Tobacco Control Act; Restrictions on the Sale and Distribution of Tobacco Products and Required Warning Statements for Tobacco Products*, 81 Fed. Reg. 28974 (May 10, 2016) (codified at 21 C.F.R. pts. 1100, 1140, 1143).

[4] Because Plaintiffs reference the JUULpod product packaging and website in the FAC, FAC ¶¶ 6, 27, 77, 87, 89, 123–127, 159, 193, 256, and Plaintiffs attempt to base their claims on them, the content of the packaging and website are incorporated by reference in Plaintiffs' complaint. *See Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir. 2006).

the State of California to cause cancer and birth defects or other reproductive harm." Schwing Decl., Ex. A; FAC ¶ 77. It also states that the product is "NOT FOR SALE TO MINORS" and to "[k]eep away from children and pets." Schwing Decl., Ex. A.



JUUL Labs' website also plainly identifies that JUULpods contain nicotine – the ingredients are listed as: glycerol, propylene glycol, flavor, nicotine, and benzoic acid. Schwing Decl., Ex. B.

Plaintiffs acknowledge that the JUUL Labs website states that each "JUULpod is designed to contain approximately 0.7mL with 5% nicotine by weight at time of manufacture which is approximately equivalent to 1 pack of cigarettes or 200 puffs." FAC ¶ 89. The FAQs on JUUL Labs' website regarding nicotine content also provide:

> **What is the nicotine concentration?**
>
> **Each JUULpod contains 0.7ml with 5% nicotine by weight at time of manufacture which is approximately equivalent to 1 pack of cigarettes or 200 puffs. Nicotine content may decrease over an extended period of time.**

> **What is in JUULpod Juice?**
>
> **Our ingredients include glycerol, propylene glycol, natural oils, extracts and flavor, nicotine and benzoic acid.**
> **…**
> **Nicotine content: 0.7ml with 5% nicotine by weight (59 mg/ml per pod, ~ content of a pack of cigarettes).**

Schwing Decl., Ex. C.

Additionally, JUUL Labs' Terms and Conditions on its website states that JUUL products contain nicotine and that nicotine has potential health impacts:

> Additionally, no tobacco-based or nicotine product should be considered safe. If you have any health concerns about use of JUUL or any other tobacco product, we recommend that you consult with your physician. Inhalation of e-vapor from JUUL may aggravate existing respiratory conditions and ingestion of nicotine may cause other conditions (such as an increase your heart rate and blood pressure and cause dizziness, nausea, and stomach pain). If you do not currently use nicotine containing products, we recommend that you do not start. CALIFORNIA PROPOSITION 65 WARNING: This product contains chemicals known to the state of California to cause cancer and birth defects or other reproductive harm.

Schwing Decl., Ex. D.

ENDS, including JUUL Labs' products, are among the tobacco products that are heavily regulated by the FDA. FAC ¶¶ 136–47. On May 10, 2016, the FDA issued the Final Rule (also known generally as the "Deeming Regulations"), which deems e-cigarettes to be "tobacco products" and concludes that they fall under the FDA's authority to regulate tobacco products. *See* Final Rule, 81 Fed. Reg. at 28976. The Final Rule also requires that as of August 10, 2018, "[p]ackaging and advertising for all newly deemed products other than cigars must display an addictiveness warning that states: 'WARNING: This product contains nicotine. Nicotine is an addictive chemical.'" Final Rule, 81 Fed. Reg. at 28988; *see also* 21 C.F.R. § 1143.3(a)(1). The TCA expressly and unambiguously prohibits states from imposing requirements "different from, or in addition to, any requirement under the provisions of this subchapter relating to tobacco product standards, premarket review, adulteration, misbranding, labeling, registration, good manufacturing standards, or modified risk tobacco products." 21 U.S.C. § 387p(a)(2)(A). Thus, as addressed in greater detail below, the FDA has expressly preempted claims based on what is or could be included on warning labels for ENDS.

Plaintiffs—ten individuals from seven states (California, Massachusetts, Michigan, New Jersey, New York, Pennsylvania, and Washington)—allege that they purchased and/or used JUUL products, and vaguely assert they would not have done so had they "known the truth of the matter about JUUL." *See, e.g.*, FAC ¶¶ 15, 18. Although the Plaintiffs are from only seven states, they seek to represent a class of "[a]ll persons who purchased, in the United States, a JUUL e-cigarette and/or JUULpods," and a subclass of underage purchasers who purchased JUUL products illegally.[5] FAC ¶¶ 162–63. Employing a kitchen-sink approach, Plaintiffs assert eleven separate causes of action: (1) False Advertising (under Cal. Bus. & Prof. Code § 17500 ("FAL") and "the laws of all other states"); (2) Consumer Legal Remedies Act (under Cal. Civ. Code § 1750 ("CLRA") and "similar laws of other states"); (3) Fraud; (4) Unfair, Unlawful and Deceptive Trade Practices (under Cal. Bus. & Prof. Code § 17200 ("UCL") and "the laws of all other states"); (5) Unjust Enrichment; (6) Strict Product Liability – Failure to Warn; (7) Strict Liability – Design Defect; (8) Strict Liability – Manufacturing Defect; (9) Breach of Implied Warranty of Merchantability; (10) Breach of Express Warranty; and (11) Negligent Misrepresentation. FAC ¶¶ 175–277.

Plaintiffs include seven adults (the "Adult Plaintiffs") and three minors, each represented by a parent (the "Minor Plaintiffs"). At least five of the Adult Plaintiffs are former smokers who allege they were addicted to nicotine before they switched to JUUL. FAC ¶¶ 13, 36, 44, 49, 52. They allege they switched to JUUL with the intent to stop smoking cigarettes, which actually appears to have been successful for many Plaintiffs, as they allege they still use JUUL products and do not claim that they still smoke cigarettes. *Id.* ¶¶ 13–14, 36–37, 44–45, 49–50, 52. Curiously, Plaintiffs also allege that they switched to JUUL to reduce their nicotine consumption (*id.*) even though they fail to point to *any* representations by JUUL that its products are designed to eliminate nicotine consumption, and admit that JUUL Labs states that a JUULpod contains "about" the same amount of nicotine as a pack of cigarettes (*id.* ¶ 89).

[5] As explained in JUUL Labs' concurrently filed Motion to Strike Plaintiffs' Nationwide Class Allegations And To Dismiss Nationwide Class Claims ("Motion to Strike"), Plaintiffs cannot represent citizens from all 50 states because they have no standing to bring claims based on state laws that do not apply to them, and a 50-state class action would be wholly unmanageable and otherwise impermissible under Rule 23 of the Federal Rules of Civil Procedure.

The Minor Plaintiffs allege that they did not know JUULpods contained nicotine (FAC ¶¶ 21, 27, 47), even though, as addressed above, the JUULpod packaging and JUUL Labs' website plainly state that JUULpods contain nicotine. The Minor Plaintiffs do not allege that they made purchases from JUUL Labs at all, but instead describe that they obtained JUUL products from a variety of illicit, unnamed third-party sources, none of whom are alleged to be under JUUL Labs' control in any way. FAC ¶¶ 20, 23 (M.H. alleges she obtained JUULpods from friends, from older students, and from retail stores that illegally sell to minors); *id.* ¶¶ 27–29, 31 (L.B. alleges purchasing a JUUL device "from an unknown source" and JUULpods from eBay); *id.* ¶ 47 (A.U. allegedly made illegal purchases from a smoke shop).

Plaintiffs allege little to nothing about what advertising, product labeling, or other representations they saw, let alone why these representations allegedly were false or misleading, when they saw them, where they saw them, or how such items supposedly affected them. The FAC quotes only three alleged advertising statements that can be attributed specifically to JUUL Labs and allegedly appeared somewhere on JUUL Labs' website at some unidentified time: that JUUL is "'the satisfying alternative to cigarettes'" (FAC ¶ 4); that "'[u]nlike other alternatives on the market, JUUL accommodates nicotine levels akin to a cigarette's in order to satisfy smokers switching'" (*id.* ¶ 7); and that JUUL Labs' automatic JUULpod shipment service can be canceled "'anytime'" (*id.* ¶ 129). Plaintiffs, however, do not allege they saw these statements, when they saw them, where they saw them, or how or why such a statement would cause a reasonable person to believe something that is untrue. Far from being false or misleading, Plaintiffs' own admitted conduct—switching to JUUL and not returning to smoking, (*id*. ¶¶ 13–14, 36–37, 44–45, 49–50, 52)—suggests that the first two alleged statements are actually true, *i.e.*, JUUL is a "satisfying alternative" and can "satisfy smokers switching." And Plaintiffs expressly acknowledge that JUUL Labs' representation about its autoship service (which Plaintiffs do not allege they actually used) is completely accurate (*id.* ¶ 129); *i.e.*, the terms of the service provide that it can be cancelled at any time.

Instead of alleging specific representations by JUUL Labs that Plaintiffs actually saw, Plaintiffs predominantly allege what ***they supposedly concluded*** from these unidentified representations; *i.e.,* that JUUL is "a safer, healthier alternative to smoking," "deliver[ed] lower doses of nicotine," or is "a

safer, less addictive alternative to smoking cigarettes." *E.g.*, FAC ¶¶ 36, 49. But because they completely fail to tie these purported understandings to any specific advertising or statements, the FAC offers nothing but vague, conclusory allegations. These conclusory assertions, moreover, are entirely implausible and wholly inconsistent with the statements Plaintiffs admit JUUL Labs *actually made*, such as the Proposition 65 warning indicating the JUULpods contain substances known to cause cancer, birth defects, and reproductive harm, and the clear statements that they contain nicotine that is "approximately equivalent to about 1 pack of cigarettes," and that they are "NOT FOR SALE TO MINORS" and to "[k]eep away from children and pets." Schwing Decl., Ex. A.

JUUL Labs cannot glean anything about what supposed representations Plaintiffs may be challenging from the timing of Plaintiffs' purchases either, because Plaintiffs plead very little about their purchase dates and, as the FAC alleges, JUUL Labs' advertisements have changed over time. FAC ¶ 6. Only one Plaintiff, Langan, narrows his purchase window to a few months, stating that he purchased JUULpods "shortly" after some time in "March 2017." (*Id.* ¶ 52). Three Plaintiffs do not allege anything at all about their purchase date. *See* FAC ¶¶ 26–34 (L.B.), 43–45 (Lagun), 46–47 (A.U.). Six Plaintiffs narrow the range to a year *at best*. *Id.* ¶¶ 13 (Colgate made a purchase "[i]n 2017"), 17 (McKnight made a purchase "[i]n 2017"), 20 (M.H. is "[p]resently 17 years-old" and "began 'JUULing' at the age of 15"), 38 (A. Smith "has consumed JUULpods on a daily basis for over three years"), 41 (C. Smith "is 18 years old, and started consuming JUULpods when he was 17"), 49 (Benham "is 20 years old" and made a purchase "at the age of 18"). And, critically, none of the Plaintiffs alleges that he or she actually relied on any specific statement by JUUL Labs before purchasing JUUL products.

III. LEGAL STANDARD

Under Federal Rule of Civil Procedure 12(b)(6), courts must dismiss a complaint that fails to state a claim upon which relief can be granted. To survive a Rule 12(b)(6) motion to dismiss, Plaintiffs must allege "sufficient factual matter . . . to 'state a claim to relief that is plausible on its face,'" meaning that a plaintiff must "plead[] factual content that allows the court to draw [a] reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556, 570 (2007)). This facial plausibility standard

mandates "more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 556 U.S. at 678. After stripping away any "legal conclusions" and "conclusory statements," the Court, relying on its "judicial experience and common sense," *id.* at 678–79, must dismiss if the remaining factual allegations fail to "raise a right to relief above the speculative level," *Twombly*, 550 U.S. at 545. State law causes of action that are expressly preempted by federal law must be dismissed. *In re Fontem*, 2016 WL 6520142, at *9 (C.D. Cal. Nov. 1, 2016) (dismissing causes of action preempted by the TCA).

Claims sounding in fraud or mistake are subject to the heightened pleading standard of Federal Rule of Civil Procedure 9(b). *See Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1126 (9th Cir. 2009). Rule 9(b) requires that such claims "state with particularity the circumstances constituting fraud or mistake," including "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." *Cafasso, U.S. ex rel. v. Gen. Dynamics C4 Sys., Inc*., 637 F.3d 1047, 1054–55 (9th Cir. 2011) (alterations and internal quotation marks omitted). Allegations of fraud "must be specific enough to give defendants notice of the particular misconduct which is alleged to constitute the fraud charged so that they can defend against the charge and not just deny that they have done anything wrong." *Swartz v. KPMG LLP*, 476 F.3d 756, 764 (9th Cir. 2007). Rule 9(b) serves "to deter the filing of complaints as a pretext for the discovery of unknown wrongs," and "to prohibit plaintiffs from unilaterally imposing upon the court, the parties and society enormous social and economic costs absent some factual basis." *Bly-Magee v. California*, 236 F.3d 1014, 1018 (9th Cir. 2001).

IV. ARGUMENT

The Court should dismiss the FAC in its entirety for multiple, independent reasons. *First*, Plaintiffs' claims are preempted by the FD&C Act, as amended by the TCA, which provides the FDA with exclusive authority to promulgate regulations of labeling for ENDS. *Second*, Plaintiffs' claims sound in fraud but wholly fail to satisfy Rule 9(b)'s heightened pleading requirements. *Third*, Plaintiffs fail to allege sufficient facts to plausibly satisfy the elements of any of their claims.

A. Plaintiffs' Claims Are Expressly Preempted And Should Be Dismissed

The FDA has promulgated regulations regarding ENDS that expressly preempt Plaintiffs' state law claims based on alleged misrepresentations or failures to warn of alleged risks. Federal preemption

of state law under the supremacy clause of the United States Constitution, article VI, clause 2 "may be either express or implied," and "is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Shaw v. Delta Air Lines, Inc.* 463 U.S. 85, 95 (1983) (quotations omitted). Under express preemption, "Congress explicitly may define the extent to which its enactments preempt state law." *Schneidewind v. ANR Pipeline Co.* 485 U.S. 293, 299 (1988). "Preemption fundamentally is a question of congressional intent…, and when Congress has made its intent known through explicit statutory language, the court's task is an easy one." *English v. General Electric Co.* 496 U.S. 72, 78–79 (1990) (internal citation omitted).

The TCA (21 U.S.C. §§ 387-387u), enacted on June 22, 2009, amends the FD&C Act, and provides the FDA with the authority to regulate the manufacture, labeling, marketing, and distribution of tobacco products to protect the public health generally. 21 U.S.C. § 387, *et seq*. Cigarettes, smokeless tobacco, and roll-your-own tobacco products were immediately covered by the FDA's authority under the FD&C Act when the TCA went into effect. 21 U.S.C. § 387a(b). The FDA issued the Final Rule on May 10, 2016, with the effective date of August 8, 2016, deeming e-cigarettes "tobacco products" and bringing them under the oversight of the FDA. Final Rule, 81 Fed. Reg. at 28976.

The TCA expressly prohibits states from issuing any requirements that are "different from, or in addition to" any requirement of the TCA or regulations promulgated thereunder regarding, among other things, labeling or tobacco product standards:

> No State or political subdivision of a State may establish or continue in effect with respect to a tobacco product any requirement which is ***different from, or in addition to***, any requirement under the provisions of this subchapter relating to ***tobacco product standards***, premarket review, adulteration, misbranding, ***labeling***, registration, good manufacturing standards, or modified risk tobacco products.

21 U.S.C. § 387p(a)(2)(A) (emphasis added).

Under the FD&C Act, the term "label" means "a display of written, printed, or graphic matter upon the immediate container of any article …." 21 U.S.C. § 321(k). "Labeling" is even more broadly defined to mean "all labels and other written, printed, or graphic matter (1) upon any article or any of its containers or wrappers, or (2) accompanying such article." 21 U.S.C. § 321(m). "Consequently,

by the express terms of 21 U.S.C. § 387p(a)(2)(A), no State can impose 'any requirement which is different from, or in addition to' the FDA's requirements regarding the written, printed, or graphic matter that appears on tobacco products or accompanies those products." *In re Fontem US Inc.*, 2016 WL 6520142, at *3 (C.D. Cal. Nov. 1, 2016).

As part of the Final Rule issued on May 10, 2016, the FDA instituted requirements for e-cigarette labeling and advertising to go into effect in 2018. As the FDA explained in the Final Rule:

> The adulteration and misbranding provisions of sections 902 and 903 of the FD&C Act will automatically subject all tobacco products to certain basic requirements. For example, their labeling and advertising cannot be false or misleading, which will help reduce consumer confusion and misperception. The FDA will be able to take enforcement action against any tobacco product that does not meet these basic requirements.

Final Rule, 81 Fed. Reg. at 29051. The Final Rule requires that "[p]ackaging and advertising for all newly deemed products other than cigars must display an addictiveness warning that states: 'WARNING: This product contains nicotine. Nicotine is an addictive chemical.'" 81 Fed. Reg. at 28988; *see also* 21 C.F.R. §§ 1143.3(a)(1), (b)(1), 1143.13. The required warning must appear on at least 30 percent of the two principal display panels of the package, and 20 percent of the area of advertisements. 81 Fed. Reg. at 28988; *see also* 21 C.F.R. § 1143.3(a)(2)(i), (b)(1)(i). While the Final Rule initially indicated that the labeling requirement would go into effect on May 10, 2018, 21 C.F.R. § 1143.13, the FDA extended the deadline to August 10, 2018.[6] Thus, the TCA and the Final Rule provide that the FDA has exclusive authority over labeling for ENDS products and it has exercised that authority. JUUL Labs fully intends to comply with these labeling requirements, which will not go into effect until after this memorandum is filed.

As applied here, Plaintiffs' allegations largely boil down to the conclusory assertion that JUUL Labs supposedly violated various state laws because it should have included more or different information on its product labeling regarding nicotine content, the addictiveness of nicotine, and the potential health impacts of nicotine. *See, e.g.*, FAC ¶ 77 ("Despite making numerous revisions to its

---

[6] FDA, *Extension of Certain Tobacco Product Compliance Deadlines Related to the Final Deeming Rule*, at p. 2 (November 2017), *available at* https://www.fda.gov/downloads/TobaccoProducts/Labeling/RulesRegulationsGuidance/UCM557716.pdf.

packaging since 2015, JUUL has not added nicotine warnings to the JUUL device, the JUULpods, or their product labels[.]");[7] *id.* ¶ 11 ("Plaintiffs will be unable to rely on Defendants' labels when shopping for nicotine products in the future absent an injunction[.]"); *see also*, FAC ¶¶ 83, 85, 91, 158, 160, 177, 179, 191, 195, 202, 206, 210, 220, 233, 256, 273.

Plaintiffs here are attempting to get this Court to improperly second-guess the FDA's careful balancing of policy and health interests and compliance dates, to usurp its authority to require JUUL Labs to make different or additional warnings than what the FDA requires in its Final Rule, and to pay damages and attorneys' fees for not doing it sooner. But that effort must fail because of federal preemption. Indeed, in a strikingly similar case against other ENDS companies, Judge Selna recently held that claims asserting deception or inadequate warnings of ingredients or potential health effects are expressly preempted under the TCA. "[B]y the express terms of 21 U.S.C. § 387p(a)(2)(A), no State can impose 'any requirement which is different from, or in addition to' the FDA's requirements regarding the written, printed, or graphic matter that appears on tobacco products or accompanies those products." *In re Fontem*, 2016 WL 6520142, at *3. "[T]he preemption analysis is straightforward: the FDA, under the authority it possesses under the [TCA], *see* 21 U.S.C. § 387f(d)(2), has promulgated a labeling requirement that applies to e-cigarettes," which means that "state labeling requirements that apply to e-cigarettes that are 'different from, or in addition to' the FDA's requirement are preempted." *Id*. On March 8, 2017, Judge Selna issued an additional order finding that the preemptive force of this legislation had retroactive effect because of the clear language of the TCA that a state may not "continue in effect" a requirement that is different from or in addition to a regulation set forth by the FDA. *In re Fontem*, No. 15-CV-01026 (C.D. Cal. March 8, 2018), Dkt. 110 at 6. Judge Selna therefore dismissed all of plaintiffs' claims premised on alleged misrepresentations or omissions of information about product ingredients or health risks.[8] *In re Fontem*, 2016 WL 6520142, at *6; *see also Akee v. Dow Chemical Co.*, 272 F. Supp. 2d 1112, 1133 (D. Haw. 2003) (granting summary

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[7] As noted above, this allegation is patently false since the JUULpod packaging states that the JUULpods contain nicotine. *See* Schwing Decl., Ex. A.

[8] The only claim that survived was a Business & Professions Code § 17200 claim premised on an alleged violation of Proposition 65, *see id.* at *6–8, but there is no such claim here because Plaintiffs admit that JUUL has a Proposition 65 warning, FAC ¶ 77.

judgment and finding that preemption clause of the Federal Insecticide, Fungicide, and Rodenticide Act, which contains similar language to the TCA, preempted claims based on labeling and failure to warn of alleged risks). This Court should do the same and dismiss Plaintiffs' claims.

The FAC includes two allegations suggesting Plaintiffs may (incorrectly) argue that their claims are not preempted here, but *In re Fontem* has already rejected both of these arguments. *First*, Plaintiffs cite 21 U.S.C. § 387p(a)(1) (FAC ¶ 137), a "[p]reservation" provision that directly precedes § 387p(a)(2), the "[p]reemption" provision at issue here. While § 387p(a)(1) preserves states' rights to enact laws "in addition to, or more stringent than, requirements established under this subchapter" for certain things like sales and advertising, that broad preservation provision is immediately followed and qualified by the preemption provision. In the preemption provision, "Congress listed categories of requirements that were to have preemptive effect. One of those categories is labeling, and the FDA has promulgated a regulation that constitutes a requirement, under the TCA, regarding labeling," which, as addressed above, is broadly defined to include the tobacco product or material "accompanying such article." *In re Fontem*, 2016 WL 6520142, at *5; 21 U.S.C. § 321(m). *Second*, Plaintiffs allege that comments to the Final Rule asked the FDA to address preemption, and in response, the FDA directed commenters to 21 U.S.C. § 387 and stated "No State or local laws in effect at the close of the public comment period were identified that FDA determined would be preempted by this final rule." FAC ¶ 141. But Plaintiffs take this statement out of context because the preceding sentences indicate that "[a] State or local statute is facially preempted only if no set of circumstances exists under which the statute would be valid," and the "FDA notified State and local jurisdictions about the potential impact this rule could have on their requirements." Final Rule, 81 Fed. Reg. at 28989. The fact that no *facially* preempted requirements were identified does not mean that particular requirements, if identified, would not be preempted. As *In re Fontem* pointed out, the FDA's comments effectively amount to a non-position. 2016 WL 6520142, at *8 ("this amounts to a statement that the FDA did not find preemption or non-preemption"). But that certainly does not mean that Plaintiffs can create new nicotine warning requirements out of whole cloth by pointing to generic consumer protection laws that do not even expressly address the issue of nicotine warnings. That would contradict and entirely frustrate Congress's express reservation of FDA authority over labeling. Thus,

the TCA is clear on its face that Plaintiffs' state law claims premised on labeling are preempted and should be dismissed.

B. The FAC Fails To Satisfy Rule 9(b)'s Heightened Pleading Requirements

Even if Plaintiffs' claims were not preempted (they are), the FAC wholly fails to meet the heightened pleading requirement of Rule 9(b). The thrust of Plaintiffs' FAC is that JUUL Labs allegedly engaged in "false and deceptive advertising of JUUL e-cigarettes and JUUL pods[.]" FAC ¶ 2. Indeed, Plaintiffs allege that "JUUL has built a commercial empire on fraud, misrepresentations and omissions." *Id.* ¶ 10. Because Plaintiffs' allegations are "grounded in fraud," they must be pleaded with particularity under Rule 9(b). *Kearns*, 567 F.3d at 1125.

To survive a motion to dismiss under Rule 9(b), Plaintiffs must plead the "time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentations." *Swartz*, 476 F.3d at 764 (quoting *Edwards v. Marin Park, Inc.*, 356 F.3d 1058, 1066 (9th Cir. 2004)). Further, the Ninth Circuit has "specifically ruled" that Rule 9(b) applies to state law claims. *Kearns*, 567 F.3d at 1125; *see also Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1103 (9th Cir. 2003) ("It is established law, in this circuit and elsewhere, that Rule 9(b)'s particularity requirement applies to state-law causes of action.").[9]

Rule 9(b) requires dismissal where, as here, Plaintiffs "ha[ve] failed to specifically allege that [they] saw any of the statements that [they] claim[] are misleading, or where [they] saw them, under what circumstances, how they impacted [their] purchasing decision[s], etc." *Elias v. Hewlett-Packard Co.*, 903 F. Supp. 2d 843, 858 (N.D. Cal. 2012). The FAC offers scant allegations that relate in any way to Plaintiffs, and those allegations that exist specify nothing at all about the time, place, or specific content of *any representations* any Plaintiff may have seen. *See* FAC ¶¶ 12–52.

Plaintiffs do not identify *what* specific JUUL advertisements they allegedly saw or heard when making their purchasing decisions—let alone describe *how* any such statements were false or

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[9] *Kearns*' interpretation of Rule 9(b)'s scope also governs Plaintiffs' claims under other states' laws. *Gold v. Lumber Liquidators, Inc.*, 2015 WL 7888906, at *12 (N.D. Cal. Nov. 30, 2015) (district courts evaluating "any claim that is 'grounded in fraud' or 'sound[s] in fraud'" under any state's laws are "bound to apply Ninth Circuit precedent as set forth in *Kearns*") (quoting *Keegan v. Am. Honda Motor Co., Inc.*, 838 F. Supp. 2d 929, 958 (C.D. Cal. 2012) (court must "analyze plaintiffs' non-California state law claims under Rule 9(b)")).

misleading. Only four of the Plaintiffs (A. Smith, C. Smith, Lagun, and Benham) allege any exposure whatsoever to representations allegedly made by JUUL Labs, but each of their allegations is far too vague to satisfy Rule 9(b). *See* FAC ¶¶ 36, 41, 44, 49. For example, Lagun alleges that she "saw JUUL advertisements when she went to purchase cigarettes, which led he[r] to go to the JUUL website for more information." *See id.* ¶ 44. She does not identify what the supposed advertisement or website material was, what it said, when she saw it, or how it supposedly influenced her. As another example, Benham alleges in conclusory fashion that he "decided to try JUUL products based on advertising" that he allegedly saw "in posters, magazines and Facebook depicting JUUL e-cigarettes as a safer, less addictive alternative to smoking cigarettes." *See id.* at ¶ 49. But that is simply a conclusory characterization of how Benham supposedly perceived these unidentified ads. Notably, Plaintiffs have not identified a single ad by JUUL Labs in which it represents that its product is marketed as a smoking cessation product or as a "safer, less addictive alternative to smoking cigarettes." What did the ads actually say? Where did he see these posters and magazines? How did they influence him? None of these core required allegations are pleaded in the FAC. The same is true of the other Plaintiffs. Across the board, Plaintiffs woefully fail to identify a single specific advertisement or representation from JUUL Labs that they allegedly saw, let alone how it was false, and how it influenced their decisions to purchase JUUL products. *See In re Iphone 4S Consumer Litig.*, No. C 12-1127 CW, 2014 WL 589388, at *5 (N.D. Cal. Feb. 14, 2014), *aff'd*, 637 F. App'x 414 (9th Cir. 2016) (dismissing claims under Rule 9(b) where plaintiff did not "identify the specific statements . . . that were false and misleading," because "generally describ[ing] the contents of [advertisements] . . . does not give [the defendant] sufficient notice of which representations caused the deception alleged"); *Maxwell v. Unilever U.S., Inc.*, No. 5:12-CV-01736-EJD, 2013 WL 1435232, at *5 (N.D. Cal. Apr. 9, 2013) (dismissing claims under Rule 9(b) where plaintiff did not "present the precise language that constitutes misrepresentation").

Further, Plaintiffs do not specify *when* they allegedly saw or heard JUUL Labs' allegedly false statements (whatever they supposedly were) or purchased JUUL products. Three Plaintiffs (Lagun, L.B., and A.U.) do not even allege a purchase year; six (Colgate, McKnight, A. Smith, C. Smith, Benham, and M.H.) narrow the range to a year at best; and one (Langan) only states that he purchased

JUULpods at some unidentified time after "March 2017." *See* FAC ¶¶ 12–52. Such vague windows of time are insufficient under Rule 9(b), especially where Plaintiffs plead little else about the allegedly fraudulent representations that supposedly influenced their decisions to purchase JUUL products. *See, e.g.*, *Wang v. OCZ Tech. Grp., Inc*., 276 F.R.D. 618, 627 (N.D. Cal. 2011) (dismissing claims under Rule 9(b) where plaintiff "fail[ed] to allege when in [the pre-2011] period he viewed, read, or otherwise came to rely upon [defendant's] representations") (citing *Kearns*, 567 F.3d at 1126); *Grimm v. APN Inc.*, 2017 WL 6398148, at *6 (C.D. Cal. Aug. 31, 2017) (dismissing claims under Rule 9(b) where complaint "[did] not allege with particularity when [plaintiff] purchased [the products], merely stating that she purchased them monthly starting in 2016"); *Yumul v. Smart Balance, Inc*., 733 F. Supp. 2d 1117, 1124 (C.D. Cal. 2010) (dismissing claims under Rule 9(b) where plaintiff "failed to allege when during the period from January 1, 2000 to the present she saw or heard the particular representations upon which her complaint is based"). This fatal deficiency is exacerbated by the fact—as Plaintiffs concede—that JUUL Labs' advertising and product packaging changed over time. FAC ¶¶ 6, 77.

Plaintiffs' FAC also lacks sufficient allegations of *where* they supposedly saw false representations, and from whom the Adult Plaintiffs supposedly made their purchases. And while the minors vaguely reference illegal purchases from friends or a "smoke shop" (not JUUL Labs), they lack the specificity required by Rule 9(b). FAC ¶¶ 12–52. "These omissions are fatal under Rule 9(b)." *Garcia v. Sony Computer Entm't Am., LLC*, 859 F. Supp. 2d 1056, 1063 (N.D. Cal. 2012) (dismissing UCL and CLRA claims where plaintiff "generally assert[ed] that the statements to be found on the [product] packaging and [defendant's] website [were] misleading . . . [but did] not specifically aver that [plaintiff] relied on those particular statements, or even expressly state that he was aware of them").

Plaintiffs' allegations of omissions are similarly deficient. To plead an omissions-based claim with the required particularity, "plaintiff must describe the content of the omission and where the omitted information should or could have been revealed[.]" *Marolda v. Symantec Corp*., 672 F. Supp. 2d 992, 1002 (N.D. Cal. 2009). Plaintiffs must also "provide representative samples of advertisements, offers, or other representations *that plaintiff relied on to make her purchase* and that failed to include the allegedly omitted information." *Id.* (emphasis added). Where, as here, the FAC "includes repeated references to misstatements that allegedly appear on Defendant's website and/or [materials included

with the product] . . . but Plaintiffs offer no information regarding when, or even if, each of the named Plaintiffs viewed the website and/or [other materials]," courts hold that "these conclusory allegations do not come within a county mile of satisfying Rule 9(b)" and the claims based on them "fall woefully short." *See Tait v. BSH Home Appliances Corp.*, No. SACV 10–711 DOC (ANx), 2011 WL 1832941, *3 (C.D. Cal. May 12, 2011). Because Plaintiffs do not allege which materials they supposedly saw or relied on when making their purchases, they have failed to plead their omissions claims with the requisite specificity. Moreover, each state's consumer protection and fraud laws require only the disclosure of *material* facts.[10] As described below, Plaintiffs have not specifically, or even plausibly, alleged a material omission. Instead, they merely misrepresent a few studies that, upon even cursory inspection, contradict the baseless conclusions they seek to draw from them.

The FAC contains several allegations about the content of a PAX Labs, Inc. patent, Patent No. 9,215,895 ("the '895 patent"), which Plaintiffs suggest indicates that at least one of the formulations tested in a study referenced therein could cause a higher uptake of nicotine than a Pall Mall cigarette. FAC ¶¶ 80–82. These allegations do not support Plaintiffs' claims against JUUL Labs or meet the requirements of Rule 9(b) for multiple reasons. As an initial matter, Plaintiffs have not (and cannot) allege that the device and e-liquid formulations used in the blood plasma study described in the PAX '895 patent are the same as the JUUL products that they allegedly purchased. Further, the '895 patent describes that the device used provides 30-55 mg of e-liquid (Schwing Decl., Ex. E, p. 25), but there is no allegation that the JUUL device provides that level of vapor. In short, their allegations about a device and e-liquid formulation that has no bearing on the products at issue in this case cannot support their claims. *See, e.g.*, *Eckler v. Wal-Mart Stores, Inc.*, No. 12-CV-727-LAB-MDD, 2012 WL 5382218, at *6 (S.D. Cal. Nov. 1, 2012) (explaining that dismissal is appropriate when studies do not

[10] *Thibodeau v. Comcast Corp.*, No. CIV. A. 04-1777, 2004 WL 2367828, at *7 (E.D. Pa. Oct. 21, 2004); *Judge v. Blackfin Yacht Corp.*, 815 A.2d 537, 541 (N.J. Super. Ct. App. Div. 2003); *Stutman v. Chem. Bank*, 731 N.E.2d 608, 611 (N.Y. 2000); *Zine v. Chrysler Corp.*, 600 N.W.2d 384, 398 (Mich. Ct. App. 1999); *Griffith v. Centex Real Estate Corp.*, 969 P.2d 486, 492 (Wash. Ct. App. 1998); *Underwood v. Risman*, 605 N.E.2d 832, 835 (Mass. 1993). California law does not specify that a fiduciary's duty to disclose is limited to material facts, *Punian v. Gillette Co.*, No. 14-CV-05028-LHK, 2016 WL 1029607, at *9 (N.D. Cal. Mar. 15, 2016), but sellers of consumer products are not fiduciaries under California law, *Kissling v. Wyndham Vacation Resorts, Inc.*, No. 15-CV-04004-EMC, 2015 WL 7283038, at *5–6 (N.D. Cal. Nov. 18, 2015).

"show what [plaintiff] claims they do . . . [because] the Court would be left with no facts from which to infer that [defendant] is liable"); *Sonterra Capital Master Fund, Ltd. v. UBS AG*, No. 15 Civ. 5844 (GBD), 2017 WL 1091983, *2 (S.D.N.Y. Mar. 10, 2017) (dismissing complaint and finding that article on which plaintiff purported to base claim did not support conclusion drawn from it).

In fact, the only allegations in the FAC regarding studies on the JUUL products *that were sold commercially* undercut Plaintiffs' unfounded assertions manufactured from their misreading of the '895 patent. The FAC includes two charts, one published by TechCrunch and another that allegedly appeared on JUUL Labs' website, reflecting the results of "clinical testing" on JUUL products. FAC ¶¶ 86–87. Both of those charts reflect that JUUL produces nicotine levels *lower* than the "average cigarette." *Id.*[11]

Plaintiffs further allege in conclusory fashion that JUUL Labs misleads users about the "pharmokinetics" of its product, including "the role that benzoic acid plays in JUUL's products." FAC ¶ 90. Notably, none of the Plaintiffs alleges that they saw any representations about benzoic acid, let alone relied on them. In any event, the JUULpod packaging plainly discloses that the pods contain benzoic acid. Schwing Decl., Ex. A.

Lastly, much of Plaintiffs' FAC is filled with extraneous allegations that JUUL Labs previously used "glamourous young models" (FAC ¶¶ 5–6), used flavors that minors (as well as adults) might enjoy (*id.* ¶ 70, 105–106), and priced their products such that minors might be able to obtain them (*id.* ¶ 107–110). Plaintiffs imply that JUUL Labs was required to avoid using any means of advertising

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[11] Plaintiffs also allege that the product labeling for JUULpods is misleading because a study supposedly found that each JUULpod contains "6.2% nicotine salt (about 60 mg/mL) rather than the 5% nicotine (about 50 mg/mL) advertised." FAC ¶ 83 (citing Pankow Study). This is flat wrong. *First*, the Pankow Study does *not* state that JUULpods contain 6.2% nicotine salt as Plaintiffs falsely represent; it states *only* that JUULpods have a nicotine concentration of 61.6 +/- 1.5 mg/ml. Schwing Decl., Ex. F, p. 7. A nicotine concentration of 61.6 would translate to 6.2% only if the liquid in the JUULpod was 1.0 g/mL, which is the density of water. But Plaintiffs do not allege that the liquid in JUULpods is the same as water, nor could they as they admit it contains things in addition to water (*e.g.*, nicotine and benzoic acid). *Second*, Plaintiffs fail to identify any representation by JUUL Labs that JUULpods contain 50 mg/mL of nicotine. In fact, JUUL Labs' website clearly states that JUULpods contain 59 mg/mL of nicotine, which is entirely consistent with the Pankow study (61.6 +/- 1.5 mg/ml.), and explains that this concentration is equivalent to 5% nicotine. Schwing Decl., Ex. F. Accordingly, the Pankow Study does not support Plaintiffs' baseless allegations. *Eckler*, 2012 WL 5382218, at *6 (explaining that dismissal is appropriate when studies do not "show what [plaintiff] claims they do . . . [because] the Court would be left with no facts from which to infer that [defendant] is liable").

that could possibly appeal to *both* consumers of legal smoking age and minors. Ironically, that is precisely what Plaintiffs allege JUUL Labs is doing now on its website—using "middle-aged adults in non-glamourous settings." *Id.* ¶ 6. Nevertheless, Plaintiffs do not allege with any specificity how JUUL Labs' alleged previous use of "attractive images of people in their 20's and 30's" was deceptive or misleading to Plaintiffs. *Id.* ¶¶ 5–6. And of course, it is not unlawful to use models in their 20's and 30's because there is nothing deceptive about depicting individuals of legal smoking age. Nor is there anything deceptive about flavoring, and the FAC is wholly devoid of any specific allegations to that effect. Lastly, Plaintiffs fail to allege how JUUL Labs' pricing, which is subject to market competition, is deceptive. These allegations are simply additional examples of Plaintiffs improperly asking this Court to play policymaker and usurp the role of the FDA. In any event, none of the Plaintiffs alleges that they saw or were deceived by attractive models, flavors, or pricing, so these allegations cannot satisfy Rule 9(b). Thus, Plaintiffs' FAC falls well short of Rule 9(b)'s heightened pleading requirements, and Plaintiffs' claims sounding in fraud should be dismissed for this reason alone.

C. Plaintiffs Fail To State A Claim Under State Consumer Protection Statutes

Plaintiffs purport to bring their First, Second, and Fourth Causes of Action under the consumer protection statutes of California, Massachusetts, Michigan, New Jersey, New York, Pennsylvania, and Washington, as well as "the laws of all other states and the District of Columbia." *See* FAC ¶¶ 178, 188, 212.[12] As a threshold matter, Plaintiffs' First, Second, and Fourth causes of action cite consumer protection statutes that have many subdivisions without identifying which of several alternative statutory provisions JUUL Labs' conduct allegedly violates. This alone is grounds for dismissal. *Storey v. Attends Healthcare Prod., Inc.*, 2016 WL 3125210, at *9 n.10 (E.D. Mich. June 3, 2016) (noting that plaintiffs failed to provide any support for "theoretical claims" where the complaint "vaguely suggest[ed]" that Defendant might have violated certain subsections of the MCPA, without specifically identifying them); *Twombly*, 550 U.S., at 555 (complaint must provide "fair notice of what the ... claim is and the grounds upon which it rests"). This defect, however, is just one of several ways

[12] As explained Defendants' Motion to Strike, Plaintiffs' purported nationwide class is improper, and Plaintiffs, who are from seven states, do not have standing to raise state-law claims for all 50 states.

in which Plaintiffs fail to plead actionable consumer fraud claims with particularity, and their claims should be dismissed.[13]

1. Plaintiffs Fail To Plead Causation Or Reliance Because They Do Not Allege Exposure To Misleading Representations

Plaintiffs cannot state a claim for violations of state consumer protection laws premised on alleged misrepresentations without pleading that they were exposed to JUUL Labs' allegedly misleading statements, as all of these laws require plaintiffs to plead and prove causation and/or reliance. To state a claim under California's FAL, CLRA, or UCL, for example, "[p]laintiffs must allege reliance on the specific marketing materials claimed to be misleading in order to establish standing to bring claims." *Swearingen v. Amazon Pres. Partners, Inc.*, No. 13-CV-04402-WHO, 2014 WL 3934000, at *3 (N.D. Cal. Aug. 11, 2014) (quotations omitted); *see also Sateriale v. R.J. Reynolds Tobacco Co.*, 697 F.3d 777, 794 (9th Cir. 2012) (same). "[T]his Court has consistently held that plaintiffs in misrepresentation cases must allege that they actually read the challenged representations." *Perkins v. LinkedIn Corp*., 53 F. Supp. 3d 1190, 1220 (N.D. Cal. 2014) (collecting cases); *see also Brazil v. Dole Food Co., Inc.*, No. 12-CV-01831-LHK, 2013 WL 5312418, at *9 (N.D. Cal. Sept. 23, 2013) (allowing "purchasers who never 'viewed the defendant's advertising' or misleading labeling" to sue would be "inconsistent with Proposition 64 and [the California Supreme Court's holding in] *Kwikset* [*v. Superior Court*, 51 Cal. 4th 310, 326 (2011)]").

Other states similarly require that plaintiffs plausibly allege causation and/or reliance. *Stoltz v. Fage Dairy Processing Indus., S.A*., 2015 WL 5579872, at *22 (E.D.N.Y. Sept. 22, 2015) ("In the context of claims [under N.Y. Gen. Bus. Law § 349] involving consumable goods, '[t]o properly allege causation, a plaintiff must state in his complaint that he has seen the misleading statements of which he complains before he came into possession of the products he purchased.'"); *Argabright v. Rheem Mfg. Co.*, 258 F. Supp. 3d 470, 492 (D.N.J. 2017) ("These allegations do not allow for an inference that Plaintiffs saw 'the misleading statements' before they came into possession of the products they

[13] Plaintiffs' California Consumer Legal Remedies Act claim is deficient and Plaintiffs cannot seek damages because they did not properly meet the requirement of California Civil Code § 1782(a) to give a 30-day demand notice. Plaintiffs' Massachusetts law claim also necessarily fails because they did not make a pre-suit demand under Mass. Gen. Laws ch. 93A, § 9(3).

purchased, which they must do to properly allege causation or reliance under the[] [New Jersey Consumer Protection] statute[].”); *Lipov v. Louisiana-Pac. Corp*., No. 1:12-CV-439, 2013 WL 3805673, at *4 (W.D. Mich. July 22, 2013) (dismissing MCPA claim where “Plaintiff has failed to allege that he even saw any of the offending materials that allegedly contained these representations”); *see also Rodi v. S. New England Sch. of Law*, 532 F.3d 11, 19 (1st Cir. 2008) (plaintiffs must prove reasonable reliance to state a claim based on fraudulent misrepresentations under Mass. Gen. Laws Ann. Ch. 93A, §§ 1, et seq.); *Hunt v. U.S. Tobacco Co.*, 538 F.3d 217, 221 (3d Cir. 2008) (“a private plaintiff pursuing a claim under [73 Pa. Cons. Stat. §§ 201-2 & 201-3, et seq.] must prove justifiable reliance”); *Robinson v. Avis Rent A Car Sys., Inc*., 22 P.3d 818, 823 (Wash Ct. App. 2001) (“The causation requirement is met where the defendant ‘induced’ the plaintiff to act or refrain from acting.”).

As explained above, Plaintiffs do not allege with particularity that they actually saw or relied on *any* specific advertisement or other statement allegedly made by JUUL Labs, let alone how it was false. Plaintiffs vaguely allege that JUUL Labs has used different types of advertising and product packaging over time (*id.* ¶¶ 6, 77) and different statements on its advertising materials, website, and labeling (*id.* ¶¶ 6–7, 77), but do not allege that any particular alleged statements had any impact on Plaintiffs’ decisions to purchase or use JUUL products. Because Plaintiffs do not identify which (if any) statements they supposedly saw, Plaintiffs’ allegations of supposed reliance on alleged misrepresentations and omissions “are a far cry from the factual allegations required by courts to sufficiently plead reliance.” *Gitson v. Trader Joe’s Co.*, No. 13-cv-01333-WHO, 2014 WL 1048640, at *8 (N.D. Cal. Mar. 14, 2014) (collecting cases).

2. Plaintiffs Fail To Plead Reasonable Reliance Or A Likelihood Of Deception

In addition to failing to adequately allege causation and/or reliance, Plaintiffs have not pleaded that their reliance was *reasonable* or, put differently, that JUUL Labs’ alleged representations or omissions would likely deceive a reasonable consumer. All seven states’ consumer protection statutes require this element, and “where a Court can conclude as a matter of law that members of the public are not likely to be deceived by the [defendant’s statements,] dismissal is appropriate.” *Shaker v. Nature’s Path Foods, Inc*., No. EDCV 13-1138-GW (OPx), 2013 WL 6729802, *3 (C.D. Cal. Dec. 16, 2013) (quoting *Pelayo v. Nestle, USA, Inc*., 989 F. Supp. 2d 973, 978 (C.D. Cal. 2013) (collecting

cases)); *see also Ebner v. Fresh, Inc.*, 838 F.3d 958, 966 (9th Cir. 2016) (affirming dismissal of UCL, CLRA, and FAL claims where "it is not plausible that a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled") (quotations omitted); *Rodi*, 532 F.3d at 19 ("In order for [a plaintiff] to recover under [Massachusetts] Chapter 93A based on his claim of fraudulent misrepresentation he must prove reasonable reliance."); *Hunt*, 538 F.3d at 221 ("a private plaintiff pursuing a claim under the [Pennsylvania consumer protection] statute must prove justifiable reliance"); *Cohen v. JP Morgan Chase & Co*., 498 F.3d 111, 126 (2d Cir. 2007) (under New York law, "the alleged act must be 'likely to mislead a reasonable consumer acting reasonably under the circumstances'") (quoting *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A.*, 647 N.E.2d 741, 745 (N.Y. Ct. App. 1995)); *Adamson v. Ortho-McNeil Pharm., Inc.*, 463 F. Supp. 2d 496, 501 (D.N.J. 2006) ("To state a claim under the [New Jersey] CFA, an advertisement must have the capacity to mislead the average consumer.") (quotations omitted); *Mellon v. Reg'l Tr. Servs. Corp.*, 334 P.3d 1120, 1126 n.2 (Wash. Ct. App. 2014) ("a defendant's act or practice is not 'deceptive' [under Washington's consumer protection statute] unless it involves a representation, omission or practice that is likely to mislead a reasonable consumer") (quotations omitted); *Jackson v. Tel. Chrysler Jeep, Inc*., No. 07-10489, 2009 WL 928224, at *5 (E.D. Mich. Mar. 31, 2009) (no MCPA claim where "the Plaintiffs' asserted reliance was not reasonable as a matter of law").

Here, Plaintiffs have not alleged reasonable reliance or a likelihood of deception as to any of the statements alleged in the complaint. The FAC includes only two direct quotations it attributes to JUUL Labs, although no Plaintiff alleges he or she actually saw either statement: the first, that JUUL Labs' products are a "satisfying alternative to cigarettes" (FAC ¶ 4), is non-actionable puffery, and the second, that "JUUL accommodates nicotine levels akin to a cigarette's" (FAC ¶ 7), is not misleading because no reasonable consumer would expect precisely the same level of nicotine as cigarettes (which have varying nicotine levels). Plaintiffs' remaining allegations, which do not actually identify particular statements, do not plausibly allege anything that would deceive a reasonable consumer.

a. Non-Actionable Puffery. The statement that JUUL is a "satisfying alternative to cigarettes" is mere puffery, and is not actionable under any of the states' laws Plaintiffs identify. "Generalized, vague, and unspecified assertions constitute 'mere puffery' upon which a reasonable consumer could

not rely, and hence are not actionable" under the FAL, UCL, or CLRA. *In re Seagate Tech. LLC Litig.*, 233 F. Supp. 3d 776, 793 (N.D. Cal. 2017).[14] "The distinguishing characteristics of puffery are vague, highly subjective claims as opposed to specific, detailed factual assertions." *Stearns v. Select Comfort Retail Corp.*, No. 08-2746 JF, 2009 WL 1635931, at *11 (N.D. Cal. June 5, 2009) (quotations omitted). Such statements in no way amount to "specific or measurable facts about the [product's] characteristics on which a reasonable consumer could rely," but "consist instead of vague and subjective assertions, amounting to mere puffery." *In re Seagate*, 233 F. Supp. 3d at 793.

The statement that JUUL products are a "satisfying alternative" to traditional cigarettes (FAC ¶ 4) is the archetype of puffery. "Satisfying" is a vague word that is not capable of objective quantification. *See In re Seagate*, 233 F. Supp. 3d at 793. Nor is there any question that JUUL offers an alternative to traditional cigarettes. Both combustible cigarettes and JUUL products deliver nicotine (FAC ¶ 4), and Plaintiffs admit that JUUL provides an alternative to cigarettes since they have switched from smoking cigarettes to using JUUL products. *See id.* ¶¶ 13 (Colgate), 17 (McKnight), 36 (A. Smith), 44 (Lagun), 49 (Benham), 52 (Langan).

b. Not Likely To Deceive *Reasonable* Consumers. The remaining alleged statements Plaintiffs either identify or allude to are not actionable because Plaintiffs fail to plausibly plead "potential deception of consumers ***acting reasonably in the circumstances***—not just any consumers." *Hill v. Roll Int'l Corp.*, 195 Cal. App. 4th 1295, 1304 (2011) (emphasis added). Plaintiffs cannot avoid dismissal simply because there is a "mere possibility that the advertisement might conceivably be

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[14] *See also Mulder v. Kohl's Dep't Stores, Inc.*, 865 F.3d 17, 22 n.5 (1st Cir. 2017) (statements that "do not make an explicit promise or guarantee" are "non-actionable puffery" under Massachusetts' consumer protection law); *In re: Premera Blue Cross Cust. Data Sec. Breach Litig.*, No. 3:15-MD-2633-SI, 2017 WL 539578, at *7 (D. Or. Feb. 9, 2017) ("[g]eneral, subjective, unverifiable claims about a product or service are mere puffery that cannot give rise to false advertising or . . . unfair or deceptive act" under Washington's consumer protection law) (quotations omitted); *Adamson v. Ortho-McNeil Pharm., Inc.*, 463 F. Supp. 2d 496, 501 (D.N.J. 2006) (under New Jersey's consumer protection law, "actionable statements cannot be mere puffery") (quotations omitted); *Cytyc Corp. v. Neuromedical Sys., Inc.*, 12 F. Supp. 2d 296, 301 (S.D.N.Y. 1998) ("opinion," "puffing," or "subjective claims of product quality . . . are nonactionable under §§ 349 or 350"); *Commonwealth v. Golden Gate Nat'l Senior Care LLC*, 158 A.3d 203, 215 (Pa. Commw. Ct. 2017) ("statements of subjective analysis or extrapolations, such as opinions, motives and intentions, or general statements of optimism . . . constitute no more than puffery [and are] not actionable" under Pennsylvania's consumer protection law); *Overton v. Anheuser-Busch Co.*, 205 Mich. App. 259, 261 (1994) ("puffing . . . does not give rise to actionable fraud" under Michigan's consumer protection law).

misunderstood by some few consumers viewing it in an unreasonable manner." *Lavie v. Procter & Gamble Co.*, 105 Cal. App. 4th 496, 508 (2003); *see also Davis v. HSBC Bank Nevada, N.A.*, 691 F.3d 1152, 1162 (9th Cir. 2012) (affirming dismissal of FAL claim where "advertising was not likely to deceive a reasonable consumer" even if "some consumers might hazard such an assumption," or the representations may be "unreasonably misunderstood by an insignificant and unrepresentative segment of the class of persons") (quotations omitted).

Plaintiffs allege that JUUL Labs' website represented that "JUUL accommodates nicotine levels akin to a cigarette's in order to satisfy smokers switching." FAC ¶ 7. But as explained above, *supra* Part IV.B, no Plaintiff alleges actually seeing this supposed statement, where they saw it, or that it influenced them. Further, this language ***does not indicate*** that JUULpods have ***exactly the same nicotine content*** as a pack of cigarettes, as the FAC suggests, but instead states that a JUULpod is "***approximately*** equivalent"[15] and "***about*** 1 pack of cigarettes." Schwing Decl., Ex. A (emphasis added). Thus, any reasonable person reviewing this packaging would know that JUUL Labs did not represent that JUULpods have the same exact amount of nicotine as cigarettes (which do not themselves have a uniform nicotine level). JUUL Labs also provides the precise nicotine percentage by weight; the JUULpod packaging states: "1 JUULpod contains – 0.7mL with 5% nicotine by weight//approximately equivalent to about 1 pack of cigarettes." Schwing Decl., Ex. A. Thus, Plaintiffs have not alleged sufficient facts to support a claim based on these alleged representations.

Other than the two non-actionable statements referenced above, Plaintiffs have not alleged what JUUL Labs *actually stated* but rather what they supposedly *interpreted* JUUL Labs' unidentified statements to mean. For example, Plaintiffs allege in conclusory fashion that JUUL Labs gave "the false impression that they are less addictive than traditional cigarettes and safe to use." FAC ¶ 128. But Plaintiffs wholly fail to support this conclusory assertion. Plaintiffs must support their claims based on what JUUL Labs actually stated, not implausible re-characterizations. "Courts enter dangerous territory when they consider representations actionable based not on what they actually say, but on what plaintiffs claim defendants *seem* to be stating. This goes beyond viewing the allegations

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[15] "Approximate" is an adjective that means "close to actual, but not completely accurate or exact." https://en.oxforddictionaries.com/definition/approximate.

in the light most favorable to the plaintiff." *In re Fontem*, No. 15-cv-01026 (C.D. Cal. March 8, 2018), Dkt. 60 at 18 (quotations omitted); *see also Iqbal*, 556 U.S. at 678–79 (the court should strip away any "legal conclusions" and "conclusory statements," and rely on its "judicial experience and common sense"). That is especially true here given that Plaintiffs' own conclusory assertions suggest that their interpretation would differ from a reasonable consumer's understanding. After all, the product label for JUULpods indicates that they contain nicotine and provides a California Proposition 65 warning: "This product contains chemicals known to the State of California to cause cancer and birth defects or other reproductive harm." Schwing Decl., Ex. A,; FAC ¶ 77. JUUL Labs' website also references that JUULpods contain nicotine, Schwing Decl., Exs. B, C, and it is well known that nicotine is addictive, *see, e.g., Allgood v. R.J. Reynolds Tobacco Co.*, 80 F.3d 168, 172 (5th Cir. 1996); Final Rule, 81 Fed. Reg. at 29063, 29073. Nothing in JUUL Labs' statements suggests that JUUL products are not addictive or that they do not have health risks.[16] To the contrary, these statements are clear and direct warnings to potential consumers.

Several Plaintiffs allege that they purchased JUUL products "in an effort to curtail [a] nicotine addiction and quit smoking." FAC ¶¶ 13 (Colgate), 36 (A. Smith), 44 (Lagun); 49 (Benham); *see also id* ¶¶ 169, 202. However, Plaintiffs do not identify a single statement by JUUL Labs, let alone one that they saw, that indicates that JUUL products offer a way to quit nicotine or that JUUL products are "non-addictive." In addition, these conclusory allegations are wholly implausible, and inconsistent with other allegations in the FAC, because Plaintiffs admit that JUUL Labs represents that its product "accommodates nicotine levels akin to a cigarette . . . ." FAC ¶ 7. As the FDA has noted when it rejected more detailed warnings on ENDS packaging, it is now well known that nicotine is addictive. Final Rule, 81 Fed. Reg. at 29063, 29073. By contrast, Plaintiffs do not offer a single statement by JUUL Labs indicating that the products are not addictive or a way to quit ingesting nicotine, let alone one that they saw.

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[16] Plaintiffs also assert, without supporting factual allegations, that JUUL products are supposedly "falsely advertised as non-addictive." FAC ¶ 169; *id.* ¶ 202. However, Plaintiffs do not identify a single statement by JUUL Labs, let alone one that they saw, that indicates that JUUL products are "non-addictive." To the contrary, the product labels indicate that the products contain nicotine, which is commonly known to any reasonable person to be an addictive substance.

Finally, no reasonable consumer would view the statement that purchasers may cancel autoship of JUULpods at "anytime" as a representation about whether JUUL products themselves are addictive. Giving consumers the opportunity to "[c]ancel anytime" is simply "not deceptive in context." *Pelayo v. Nestle USA, Inc.*, 989 F. Supp. 2d 973, 978 (C.D. Cal. 2013). No reasonable purchaser in the process of signing up for the autoship service would interpret statements about the ability to cancel that auto-shipment service as pertaining to anything other than a cancellation policy. Plaintiffs therefore have no basis to conflate the ability of consumers to cancel autoship deliveries at any time (which they concede) with whether a nicotine product is addictive. In any event, Plaintiffs never allege that any of them saw any representation regarding autoship, let alone relied on it and signed up to receive JUUL products via the autoship service.

Because Plaintiffs do not plausibly plead causation, reasonable reliance, or a likelihood of deception, their First, Second, and Fourth causes of action should be dismissed.

D. Plaintiffs' Claims That Do Not Identify An Applicable State Law Fail

Only Plaintiffs' First, Second, and Fourth Causes of Action are pleaded under the laws of specifically identified states. When a plaintiff does not identify the governing law, federal courts in California apply California's choice of law rules to determine whether conflicts with other states' laws prevent applying California law. *Mar Partners 1, LLC v. Am. Home Mortg. Servicing, Inc.*, No. C 10-02906 WHA, 2011 WL 11501, at *2 (N.D. Cal. Jan. 4, 2011). While several significant conflicts exist as to some elements of Plaintiffs' remaining claims (*see* Motion to Strike at 9–20), these claims should be dismissed on the basis of elements on which these states' laws overlap. The Court may dismiss these eight causes of action without determining whether a choice-of-law analysis permits applying California law to the non-California-resident Plaintiffs' claims because, as shown below, the laws of the seven states in which the Plaintiffs reside have some similar elements and their claims fail for similar reasons.[17] *Aurora World, Inc. v. Ty Inc.*, No. CV 09-08463 MMM (EX), 2010 WL 11506546, at *4 (C.D. Cal. Aug. 24, 2010) ("If the relevant law in the two jurisdictions is similar, the court need not choose between them.").

[17] As described in Defendants' Motion To Strike, the laws of the state of each putative class member must apply to Plaintiffs' claims, making a nationwide class entirely improper and unmanageable.

1. Plaintiffs' Fraud, Negligent Misrepresentation, And Unjust Enrichment Claims Fail For The Same Reasons As Their Claims Under Consumer Protection Statutes

Each state's common law of fraud requires plaintiffs to prove *actual reliance* that is reasonable or justifiable. *Glenn K. Jackson Inc. v. Roe*, 273 F.3d 1192, 1201 (9th Cir. 2001) (applying California law); *Pasternack v. Lab. Corp. of Am. Holdings*, 59 N.E.3d 485, 491 (N.Y. Ct. App. 2016); *Commonwealth v. Lucas*, 34 N.E.3d 1242, 1249 (Mass. 2015); *Allstate New Jersey Ins. Co. v. Lajara*, 117 A.3d 1221, 1231 (N.J. 2015); *Foreman v. Foreman*, 701 N.W.2d 167, 175 (Mich. Ct. App. 2005); *Felix v. Fraternal Order of Police, Philadelphia Lodge No. 5*, 759 A.2d 34, 37 (Pa. Commw. Ct. 2000); *In re Estate of Kessler*, 977 P.2d 591, 601 n.31 (Wash. Ct. App. 1999).

Negligent misrepresentation claims also require proof of this element. *Eberhart v. LG Elecs. USA, Inc.*, 188 F. Supp. 3d 401, 409 (D.N.J. 2016); *JMP Sec. LLP v. Altair Nanotechnologies Inc.*, 880 F. Supp. 2d 1029, 1042 (N.D. Cal. 2012); *Zwicker v. Gen. Motors Corp.*, No. C07-0291-JCC, 2007 WL 5309204, at *2 (W.D. Wash. July 26, 2007); *Cornell Narberth, LLC v. Borough of Narberth*, 167 A.3d 228, 240 (Pa. Commw. Ct. 2017); *Mandarin Trading Ltd. v. Wildenstein*, 16 N.Y.3d 173, 180 (N.Y. Ct. App. 2011); *Gossels v. Fleet Nat. Bank*, 902 N.E.2d 370, 377 (Mass. 2009); *Law Offices of Lawrence J. Stockler, P.C. v. Rose*, 436 N.W.2d 70, 81 (Mich. Ct. App. 1989). As explained above, Plaintiffs have not adequately pleaded fraud under Rule 9(b), plausibly alleged actual or justifiable reliance, or plausibly alleged deceptive statements or material omissions. Accordingly, their fraud and negligent misrepresentation claims must fail.

Plaintiffs' unjust enrichment claim is likewise based on the same defective allegations as Plaintiffs' other claims. But because these claims fail, Plaintiffs cannot allege an essential element of an unjust enrichment claim—"any wrongdoing on the part of [defendant] . . . such that [defendant's] retention of any [benefit] . . . would be considered unjust." *Robinson v. Wells Fargo Home Mortg.*, No. 16-CV-01619-YGR, 2016 WL 6524403, at *6 (N.D. Cal. Nov. 3, 2016). All seven states' laws support dismissing such duplicative unjust enrichment claims. "[A] claim of unjust enrichment cannot stand without a cognizable claim under a quasi-contractual theory or some other misconduct." *Goldman v. Bayer AG*, No. 17-CV-0647-PJH, 2017 WL 3168525, at *8 (N.D. Cal. July 26, 2017). Here, "[b]ecause plaintiff alleges only that [JUUL Labs was] 'unjustly enriched' as a result of the

deceptive marketing and labeling of [its product,] the claim for unjust enrichment is premised on the same allegations as the UCL, CLRA, and [FAL] claim," meaning that Plaintiffs have "failed to allege facts showing that [JUUL Labs] unjustly retained a benefit at plaintiff's expense." *Id*. at *9; *see also Shaulis v. Nordstrom, Inc*., 865 F.3d 1, 16 (1st Cir. 2017) (under Massachusetts law, "a party with an adequate remedy at law cannot claim unjust enrichment," even if legal claims are dismissed); *Ebin v. Kangadis Food Inc*., No. 13 CIV. 2311 JSR, 2013 WL 6504547, at *7 (S.D.N.Y. Dec. 11, 2013) ("an unjust enrichment claim will not lie where it simply duplicates, or replaces, a conventional contract or tort claim") (quotations omitted) (applying New York and New Jersey law); *Zafarana v. Pfizer, Inc*., 724 F. Supp. 2d 545, 560 (E.D. Pa. 2010) ("unjust enrichment is not a substitute for failed tort claims in Pennsylvania"); *Cox v. O'Brien*, 206 P.3d 682, 688–89 (Wash. Ct. App. 2009) (explaining that "the enrichment must be unjust under the circumstances" and affirming dismissal of claim); *Barber v. SMH (US), Inc*., 509 N.W.2d 791, 796 (Mich. Ct. App. 1993) (plaintiff must allege "an inequity resulting to plaintiff because of the retention of the benefit by defendant"). Thus, the Court should dismiss Plaintiffs' unjust enrichment claim.

2. Plaintiffs Fail To Plead Essential Elements Of Their Strict Liability Claims

a. Plaintiffs Fail To Allege An Actionable Failure To Warn

Plaintiffs' failure to warn claim (Sixth Cause of Action) fails for multiple reasons. *First*, Plaintiffs' failure to warn claim is preempted because it is fundamentally premised on the assertion that JUUL Labs should have used different warning labels to inform Plaintiffs of alleged risks. As explained above, the FDA has adopted requirements regarding ENDS labeling, and states cannot impose any requirements "different from, or in addition to" the FDA regulations. 21 U.S.C. § 387p(a)(2)(A).[18] *Second*, no duty to warn existed as to any Plaintiff because an ordinary consumer would understand the risk of addiction from consuming nicotine. The JUULpod package indicates that

[18] Section 387p(b) states that "[n]o provision of this subchapter relating to a tobacco product shall be construed to modify or otherwise affect any action or the liability of any person under the product liability law of any State." This provision's reference to "product liability law" cannot include failure to warn claims, however, as section 387p(a)(2)(A) grants the FDA exclusive authority over labeling, and the statute should not be given a reading that makes it self-contradictory. *See, e.g.*, *Gustafson v. Alloyd Co*., 513 U.S. 561, 569 (1995) (statutes must be interpreted to the extent possible as a "symmetrical and coherent regulatory scheme").

the product contains nicotine that is approximately equivalent to about a pack of cigarettes (Schwing Decl., Ex. A), and the addictiveness of nicotine is a well-known and obvious risk. "Like the dangers of alcohol consumption, the dangers of cigarette smoking have long been known to the community." *Allgood*, 80 F.3d at 172 (holding "defendants had no duty to warn [plaintiff] of the dangers of smoking"). The FDA has also indicated that warnings beyond what will be required under the Final Rule are not necessary because the risk of addiction from nicotine is well-known information that is publicly available. Final Rule, 81 Fed. Reg. at 29063, 29073. Each of the relevant states has long recognized "the obvious danger rule, which provides that there is no need to warn of known risks under either a negligence or strict liability theory." *Johnson v. Am. Standard, Inc*., 43 Cal. 4th 56, 67 (2008); *see also Mathews v. Univ. Loft Co*., 903 A.2d 1120, 1124 (N.J. Super. App. Div. 2006); *Glittenberg v. Doughboy Recreational Indus*., 491 N.W.2d 208, 215 (Mich. 1992); *Kerr v. Koemm*, 557 F. Supp. 283, 286 (S.D.N.Y. 1983); *Sherk v. Daisy-Heddon*, 450 A.2d 615, 618 (Pa. 1982); *Fiorentino v. A. E. Staley Mfg. Co*., 416 N.E.2d 998, 1004 (Mass. Ct. App. 1981); *Connor v. Skagit Corp.*, 638 P.2d 115, 122 (Wash. Ct. App. 1981). Accordingly, Plaintiffs' failure to warn claim fails.

b. Plaintiffs Have Not Plausibly Alleged Design Or Manufacturing Defect Claims

Plaintiffs have not plausibly alleged a design defect claim. "In order to adequately state a claim for design defect, a plaintiff must identify which design defect theory is being utilized, and allege facts to support the test that Plaintiff identifies." *Ferrari v. Nat. Partner, Inc*., No. 15-CV-04787-LHK, 2017 WL 76905, at *5 (N.D. Cal. Jan. 9, 2017) (quotations omitted); *Dilley v. C.R. Bard, Inc*., No. 2:14-CV-01795-ODW, 2014 WL 2115233, at *4 (C.D. Cal. May 21, 2014) (dismissing design defect claim where "all of that information [about the plaintiff's experience with the product] does not translate into an actionable defect without alleging how the product was defective"). Under the consumer expectations test, Plaintiffs "should describe how [JUUL products] failed to meet the minimum safety expectations of an ordinary consumer" of ENDS. *Lucas v. City of Visalia*, 726 F. Supp. 2d 1149, 1155 (E.D. Cal. 2010) (emphasis and quotations omitted). Under the risk-benefits test, Plaintiffs "should allege that the risks of the design outweigh the benefits, and then explain how the particular design of the [JUUL] caused [Plaintiffs] harm." *Id.* (emphasis and quotations omitted). Here, however, Plaintiffs

conclusorily assert both tests, ***but without any supporting facts***. FAC ¶¶ 241–42. These "[t]hreadbare recitals of elements of a cause of action, supported by mere conclusory statements, do not suffice" to state a claim under either design defect theory, or any applicable states' laws. *Iqbal*, 556 U.S. at 678 (quotations omitted); *see also Lucas*, 726 F. Supp. 2d at 1155 (dismissing strict liability claims that "simply track[ed] the general elements of strict products liability and contain[ed] no pertinent factual allegations").

Further, the few facts that are alleged suggest that the JUUL device worked exactly as intended. According to Plaintiffs, the JUUL device was intended "to be used as a method of ingesting nicotine and other aerosolized constituents of JUUL's nicotine solution." FAC ¶ 238. That is, of course, precisely what the JUUL device does according to Plaintiffs' own allegations. *Id.* ¶ 68 (". . . the battery in the JUUL device activates the heating element, which in turn converts the nicotine solution in the JUUL pod into a vapor consisting principally of nicotine, glycerine, and propylene glycol that is inhaled into the lungs"). To the extent what Plaintiffs are really asserting is that JUUL Labs did not warn Plaintiffs of the alleged risks, that is simply a failure-to-warn claim in disguise that is preempted by the TCA.

Plaintiffs' manufacturing defect claim also fails on its face as a matter of law. A product with a manufacturing defect "is one that differs from the manufacturer's intended result or from other ostensibly identical units of the same product line." *Barker v. Lull Eng'g Co.*, 20 Cal. 3d 413, 429 (1978); *Barton v. Lowe's Home Ctrs., Inc.*, 124 A.3d 349, 355 (Pa. Super. Ct. 2015); *Voss v. Black & Decker Mfg. Co.*, 450 N.E.2d 204, 207 (N.Y. Ct. App. 1983); *Prentis v. Yale Mfg. Co.*, 365 N.W.2d 176, 182 (Mich. 1984); *Back v. Wickes Corp.*, 378 N.E.2d 964, 970 (Mass. 1978); *see also* N.J. Stat. Ann. § 2A:58C-2; Wash. Rev. Code Ann. § 7.72.030(2)(a); *Introduction*, Am. L. Prod. Liab. 3d § 31:1 (2018) ("Manufacturing defects are generally limited to situations where something goes wrong in the manufacturing process.") (collecting cases). The analysis "focuses on the 'result' of the manufacturing process—whether the product came off the production line defective in some way." *Schwartz v. Wright Med. Tech., Inc.*, 2014 WL 11320637, at *4 (C.D. Cal. Sept. 11, 2014); *see also Lucas*, 726 F. Supp. 2d at 1155–56 (dismissing manufacturing defect claim because complaint contained no factual allegations "identify[ing] what aspect of . . . manufacture made [the product] defective"). Here,

Plaintiffs do not allege any variations *among* JUUL devices or JUULpods, or any other supposed fault indicating they were not manufactured as designed. Instead, they allege that "[i]n manufacturing the JUULpods, Defendants *routinely* added more nicotine salt to the JUULpods ***than represented on the JUULpods labels*** or Defendants' advertising materials." FAC ¶ 250 (emphasis added). But that is not a manufacturing defect claim. That is simply a labeling allegation that is preempted under the TCA. Because Plaintiffs "fail to assert how the [product] differed from defendants' intended design," Plaintiffs' have not sufficiently alleged a manufacturing defect claim. *Dunson v. Cordis Corp*., No. 16-CV-03076-SI, 2016 WL 3913666, at *6 (N.D. Cal. July 20, 2016).

3. Plaintiffs Fail To State Claims For Express Or Implied Warranty

Plaintiffs fail to state a claim for breach of express warranty because they have not alleged sufficient facts to establish the elements of that cause of action. Plaintiffs improperly attempt to state a breach of warranty based on advertising and other descriptions of the product, rather than breach of a written contractual warranty, without alleging the exact terms of the warranty. Indeed, they allege only in conclusory fashion that JUUL Labs made certain "affirmations of fact and promises made in the marketing of JUUL e-cigarettes." FAC ¶¶ 263–64. The Court should dismiss Plaintiffs' breach of express warranty claim given that they have not alleged the actual terms of the warranty. *See, e.g.*, *Tietsworth v. Sears, Roebuck & Co.*, 2009 WL 1363548, at *2 (N.D. Cal. May 14, 2009) (dismissing express warranty claim where the plaintiff "failed to allege the exact terms of the warranty").

Moreover, the provisions of JUUL Labs' express Limited Warranty necessarily bar Plaintiffs' breach of warranty claim.[19] JUUL Labs' Limited Warranty expressly sets out the terms of JUUL Labs' limited one-year warranty, and then provides that "[e]xcept as stated herein, JUUL Labs makes no other express warranty." Schwing Decl., Ex. G. This Court has held on numerous occasions that disclaimers like the one JUUL Labs used here preclude an extra-contractual "warranty-by-description"

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[19] JUUL Labs' Limited Warranty is incorporated by reference in the complaint and therefore may be properly considered at the motion to dismiss stage. *See Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005). The Limited Warranty is incorporated by reference because Plaintiffs' claim depends on these documents by virtue of representing that JUUL Labs made various binding warranties of its products. *Id*. (documents incorporated by reference where "the plaintiff's claim depends on the contents of a document, the defendant attaches the document to its motion to dismiss, and the parties do not dispute the authenticity of the document, even though the plaintiff does not explicitly allege the contents of that document in the complaint"); Schwing Decl., Ex. G, Limited Warranty.

claim. *See Long v. Hewlett-Packard Co.*, 2007 WL 2994812, at *6 (N.D. Cal. July 27, 2007) (holding that a limited warranty "validly disclaimed any express warranty created by virtue of its extracontractual statements identified by Plaintiffs"); *Nygren v. Hewlett-Packard Co*., No. C 07-05793 JW, 2009 WL 10696446, at *7 (N.D. Cal. May 28, 2009) (same); *see also Berman v. ADT LLC*, 2013 WL 6916891, at *4 (D.N.J. Dec. 13, 2013) (dismissing breach of express warranty claims where "disclaimer in Plaintiffs' contract disclaim[ed] any express warranties not set forth in the contract"); *In re SCBA Liquidation, Inc*., 451 B.R. 747, 773 (Bankr. W.D. Mich. 2011) ("[u]nder Michigan law, express warranties may be negated or limited . . . ."); *Riegel v. Medtronic, Inc.*, 2003 WL 25556778, at *3 (N.D.N.Y. Dec. 2, 2003) (holding that provision disclaiming express warranties was "clear, conspicuous and specific language" that was "sufficient to disclaim any express warranties"); *Mattern Hatchery, Inc. v. Bayside Enterprises, Inc.*, 775 F. Supp. 803, 808 (M.D. Pa. 1991) (contract that "specifically disclaim[ed] liability" on the part of defendant for "any incidental or consequential damages for any cause whatsoever" barred recovery for breach of express warranty). Because the terms of JUUL Labs' Limited Warranty specifically disclaim any warranties beyond those expressly set forth in the Limited Warranty, Plaintiffs' breach of warranty claim should be dismissed.[20]

Plaintiffs' implied warranty of merchantability claim likewise fails. The implied warranty of merchantability "does not impose a general requirement that goods precisely fulfill the expectation of the buyer. Instead, it provides for a minimum level of quality." *American Suzuki Motor Corp. v. Superior Court*, 37 Cal. App. 4th 1291, 1295–96 (1995) (quotations omitted); *see also Caronia v. Philip Morris USA, Inc*., 715 F.3d 417, 434 (2d Cir. 2013) (New York law "requires only that the goods sold be of a minimal level of quality") (quotations omitted); *Hollister v. Dayton Hudson Corp*., 201 F.3d 731, 737 (6th Cir. 2000) (under Michigan law, plaintiff must show that the "product was sold in a defective condition"); *Altronics of Bethlehem, Inc. v. Repco, Inc.*, 957 F.2d 1102, 1105 (3d Cir. 1992)

[20] Under Massachusetts and Washington law, Plaintiffs' claims must be dismissed because Plaintiffs have failed to allege facts showing that they had knowledge of or relied upon the alleged warranties. *See Touchet Valley Grain Growers, Inc. v. Opp & Seibold Gen. Constr.*, 831 P.2d 724 (Wash. 1992) ("Recovery for breach of an express warranty is contingent on a plaintiff's knowledge of the representation."); *Iannacchino v. Ford Motor Co.*, 451 Mass. 623, 628 (2008) (noting trial court's dismissal of breach of express warranty claim where plaintiffs "had not alleged that they had seen or relied on the labels certifying compliance with Federal safety regulations").

(under Pennsylvania law, plaintiff must show product was "defective"); *Rothbaum v. Samsung Telecom's Am., LLC*, 52 F. Supp. 3d 185, 201 (D. Mass. 2014) (implied warranty is "primarily directed at the operative essentials of a product.... It is not intended to guarantee high quality or perfection of detail") (quotations omitted); *Green v. Green Mountain Coffee Roasters, Inc.*, 279 F.R.D. 275, 283 (D.N.J. 2011) (product need only be "reasonably fit for the general purpose for which it should have been sold") (emphasis omitted); *Platypus Marine, Inc. v. Sherwin-Williams, Inc.*, No. C05-5631 RBL, 2006 WL 2981368, at *4 (W.D. Wash. Oct. 16, 2006) (same).

As an initial matter, the FAC's implied warranty claim fails because it does not plausibly allege facts showing a breach; instead, it asserts in conclusory fashion that "Defendants breached the warranty implied." FAC ¶ 259. Plaintiffs allege that "Defendants . . . , in the sale, marketing, and promotion of JUUL products impliedly warranted that JUUL e-cigarettes and cigarettes were equivalent in terms of nicotine content, pharmacokinetics, and puff-count." *Id.* ¶ 257. However, the actual statements, included on a webpage that the FAC incorporates by reference, only indicate that the JUULpods are "approximately equivalent to 1 pack of cigarettes." Schwing Decl., Ex. C, p. 2.

Further, while Plaintiffs allege that "JUUL e-cigarettes are not fit for their intended purposes of offering an alternative to cigarettes because JUUL e-cigarettes, when used as intended or reasonably foreseeable, worsen or aggravate users' underlying nicotine addiction," FAC ¶ 260, these allegations demand what the implied warranty does not require. Plaintiffs who claim a breach of the implied warranty of merchantability must show that the product "***did not possess even the most basic degree of fitness for ordinary use.***" *Swearingen*, 2014 WL 3934000, at *1 (emphasis added, quotations omitted). Here, Plaintiffs' conclusory allegation that JUUL products are not "fit for their intended purposes of offering an alternative to cigarettes" is both unsupported and insufficient to show that JUUL "lack[s] even the most basic degree of fitness for ordinary use." *Id.* (dismissing claim premised on labeling violation where plaintiffs failed to allege that products "lack even the most basic degree of fitness for ordinary use").

V. CONCLUSION

Because Plaintiffs' FAC fails to state a claim upon which relief may be granted, JUUL Labs respectfully requests that the Court dismiss the FAC in its entirety.

Dated: July 24, 2018

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