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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

EVANGELINE RED and RACHEL WHITT, on Behalf of Themselves and All Others Similarly Situated, Plaintiffs, vs. KRAFT FOODS INC., KRAFT FOODS NORTH AMERICA, and KRAFT FOODS GLOBAL, INC., Defendants.	No. CV10-01028 (GW) (AGRX) **KRAFT FOODS GLOBAL, INC.'S NOTICE OF MOTION AND MOTION TO DISMISS SECOND AMENDED COMPLAINT PURSUANT TO RULES 9(B) AND 12(B)(6); MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT** Hearing Date: January 13, 2011 Time: 8:30 a.m. Courtroom: 10 Judge: Hon. George H. Wu Action Filed: February 11, 2010

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NOTICE OF MOTION AND MOTION TO DISMISS

TO PLAINTIFFS AND THEIR ATTORNEY OF RECORD:

PLEASE TAKE NOTICE that on January 13, 2011 at 8:30 a.m. in the courtroom of the Honorable George H. Wu, United States District Judge, Central District of California, located at 225 East Temple Street, Los Angeles, CA 90012, Defendant Kraft Foods Global, Inc. will move, and hereby does move, to dismiss the Second Amended Complaint of Plaintiffs Evangeline Red and Rachel Whitt pursuant to Fed. R. Civ. P. 9(b) and 12(b)(6) on the ground that the Complaint fails to state a claim upon which relief can be granted.

This Motion is based on this Notice of Motion and Motion, the attached Memorandum of Points and Authorities, the declaration of Kenneth K. Lee and attached exhibits, the previously-filed declaration of Ellen M. Smith and Defendant's Request for Judicial Notice (ECF Dkt. No. 30), and the court records and files in this Action.

Dated: December 7, 2010

DEAN N. PANOS
KENNETH K. LEE
JILL M. HUTCHISON

By: /s/ Kenneth K. Lee

Attorneys for Defendants KRAFT FOODS INC., KRAFT FOODS NORTH AMERICA, and KRAFT FOODS GLOBAL, INC.

MEMORANDUM OF POINTS & AUTHORITIES

Introduction

The Second Amended Complaint (SAC) alleges that Plaintiffs purchased various Kraft Foods products relying on supposedly deceptive labels that indicated that snacks such as Teddy Grahams were healthful treats. This Court has repeatedly requested Plaintiffs to identify the allegedly false or misleading statements, and more importantly specify "*why* they're false." *See, e.g.*, Nov. 4 Hearing Tr. 19, attached as Ex. 1 to the accompanying Declaration of Kenneth K. Lee (emphasis added). In their SAC, Plaintiffs continue their mantra that objectively true statements and puffery found on the packaging of the snacks are actionable under California law. But they still cannot articulate how or why these challenged statements are false or misleading.

Plaintiffs essentially concede that a true statement such as "Made with Real Vegetables" — standing alone — is not actionable under state law. But their latest theory is that a true statement highlighting a "good" ingredient or the flavor of a product becomes misleading if the snack also contains ingredients that Plaintiffs deem to be "bad." So, for example, Plaintiffs insist that Vegetable Thins crackers cannot include the true statement "Made with Real Vegetables" on its packaging because it also contains white flour and high fructose corn syrup. And like Captain Renault in *Casablanca*, Plaintiffs claim that they were "shocked, shocked" to discover that snacks such as Teddy Grahams Cinnamon — which are sold alongside cookies in the aisle of grocery stores — contain white flour and refined sugar. They allege that the use of words such as "graham" and "smart choices" on the packaging misled them into thinking that Teddy Grahams do not include white flour or refined sugar, even though they are disclosed on the box.

Under California law, a true statement becomes actionable only if there is either (a) an affirmative misrepresentation or (b) a material omission of fact that is contrary to a specific representation made. And to survive a motion to dismiss here, Plaintiffs must

plead with particularity that it is "likely" or "probable" that a reasonable consumer would be deceived by the representations made on the labels.

Here, Plaintiffs do not allege any affirmative misrepresentation or material omission of fact that makes a true statement false or misleading:

- **No particularized allegation of affirmative misrepresentation:** Neither the SAC nor the Nov. 9 Supplemental Brief ("Pl. Supp. Br.") identifies a single affirmative misrepresentation in Kraft Foods product packaging.
- **No particularized allegation of material omission of fact:** Plaintiffs do not specify any material omission of fact that is contrary to a specific representation made by Kraft. The supposedly "bad" ingredients that Plaintiffs complain about are *already disclosed* in descending order of predominance by weight, as required by the FDA. 21 C.F.R. § 101.4.

The absence of any affirmative misrepresentation or material omission of fact dooms Plaintiffs' case, as no reasonable consumer would likely be deceived by the true statements or puffery. In an attempt to avoid dismissal, Plaintiffs point to a disclosed "bad" ingredient and then make the bare-bones allegation that it renders a true statement highlighting a "good" ingredient false or misleading. But it is not plausible, let alone "likely" or "probable," that a reasonable consumer would be misled into believing that snacks like Teddy Grahams do not contain ingredients such as white flour or sugar (which are fully disclosed on the box) solely because the packaging highlights the "good" graham content and flavor. There is no nexus between the supposedly "bad" ingredient and the true statement highlighting the "good" ingredient. In short, Plaintiffs must allege with particularity *why* or *how* the presence of the so-called "bad" ingredient is contrary to the true statement about the "good" ingredient. Otherwise, a plaintiff could easily manufacture a triable claim related to virtually any food product by merely pointing to the existence of a so-called "bad" ingredient. Indeed, under Plaintiffs' theory, California prevents a milk company from pointing out that milk contains calcium or vitamin D

because it also contains "bad" ingredients such as fat.

The SAC is nothing more than a lawyer-manufactured lawsuit based on an implausible theory, as no reasonable consumer can plausibly have been misled about the nature of and ingredients contained in the Kraft Foods products. For ease of reading, this memorandum will first discuss the objectively true statements (*e.g.*, "Made with Real Vegetables," "Graham," "Honey,"), and then analyze the puffery statements (*e.g.*, "Sensible Snacking," "Smart Choice").[1]

Argument

Under Federal Rule of Civil Procedure 12(b)(6), dismissal is appropriate where a complaint lacks a cognizable legal theory or sufficient facts to support that theory. *See, e.g.*, *City of Arcadia v. U.S. Envtl. Prot. Agency*, 411 F.3d 1103, 1106 n.3 (9th Cir. 2005). Claims alleging misrepresentations under California law can survive a 12(b)(6) motion only if it is "'probable,' not merely 'possible'" that a reasonable consumer would be deceived. *See, e.g.*, *Ford v. Hotwire, Inc.*, No. 07-1312, 2008 WL 5874305, at *3 (S.D. Cal. Feb. 25, 2008); *see also, e.g.*, *Fraker v. KFC Corp.*, No. 06-1284, 2007 WL 1296571, at *5 (S.D. Cal. Apr. 30, 2007) (dismissing complaint alleging misleading statements about KFC chicken); *Hoyte v. Yum! Brands, Inc.*, 489 F. Supp. 2d 24, 30 (D.D.C. 2007) (same); *McKinniss v. Sunny Delight Beverages Co.*, No. 07-2034, 2007 WL 4766525, at *4-5 (C.D. Cal. Sept. 4, 2007) (dismissing complaint alleging misleading statements about juice). And the U.S. Supreme Court has directed lower courts to conduct a searching examination of the complaint to determine if it sets forth a "plausible," as opposed to merely possible, claim for relief. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (courts must dismiss complaints based on "threadbare recitals of the

[1] This Court at the Nov. 18 hearing recognized that certain statements are expressly preempted, but declined to dismiss the complaint in its entirety at this point because it is a "close" call. Ex. 2 at 7. As detailed in our prior motion-to-dismiss brief and other filings, Kraft Foods preserves its argument that all of the challenged statements are expressly preempted because they impose "non-identical" state law conditions on the federal trans fat disclosure standard, and the FDA has declined to issue "disqualifying" trans fat regulations that would have prevented food companies from making true statements if there is presence of trans fat.

elements of a cause of action, supported by mere conclusory statements").

Federal Rule of Civil Procedure 9(b) requires a plaintiff alleging fraud to "state with particularity the circumstances constituting fraud." Rule 9(b)'s pleading requirement applies to the Unfair Competition Law (UCL), False Advertising Law (FAL), and Consumers Legal Remedies Act (CLRA). *See Herrington v. Johnson & Johnson Consumer Cos., Inc.*, No. 09-1597, 2010 WL 3448531, at *7 (N.D. Cal. Sept. 1, 2010) ("UCL, FAL and CLRA claims sound in fraud and are therefore subject to the scrutiny of Rule 9(b)"); *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125-26 (9th Cir. 2009) (same).

I. Plaintiffs' Claims Must Be Dismissed Because The Objectively True Statements On Kraft Foods' Packaging Are Not False Or Misleading.

California's trio of consumer statutes — the CLRA, UCL, and FAL — apply in two circumstances:

First, they apply where there has been an affirmative misrepresentation — a flat-out false statement. *See Prata v. Superior Court*, 91 Cal. App. 4th 1128, 1137 (2001) (quoting *Day v. AT&T*, 63 Cal. App. 4th 325, 332-33 (1998) (finding actionable "advertisements which have deceived or misled because they are untrue").

Second, a true statement may be actionable if "other relevant information" has been omitted such that the true statement alone is "likely to mislead or deceive the customer." *Aron v. U-Haul Co. of Cal.*, 143 Cal. App. 4th 796, 807 (2006). For a literally true statement to be actionable, the omission must be (a) "contrary to a representation actually made by the defendant," or (b) "an omission of a fact the defendant was obliged to disclose." *Daugherty v. Am. Honda Motor Co., Inc.*, 144 Cal. App. 4th 824, 835 (2006); *see also McCann v. Lucky Money, Inc.*, 129 Cal. App. 4th 1382, 1392-98 (2005) (holding that failure to inform currency exchange customers of foreign exchange spread rate was not actionable under UCL or FAL because financial regulations imposed no statutory obligation to disclose it).

As explained below, Plaintiffs' claims must be dismissed because the challenged

statements are objectively true, and Plaintiffs do not allege with particularity any affirmative misrepresentation or omission of material fact that makes these statements false or misleading. And in the absence of any affirmative misrepresentation or omission of a material fact, it is not "possible" or "likely" that a reasonable consumer would be misled into believing that snacks do not contain white flour, refined sugar or other ingredients that Plaintiffs complain about.

A. "Graham"

Plaintiffs fail to state a claim because they do not allege with particularity how or why the term "graham" on products such as Teddy Grahams is false or misleading. To properly plead that they were misled by the word "graham," Plaintiffs must either allege an "active misrepresentation" or an "active concealment related to the characteristics or quality of goods that are contrary to what has been represented about the goods." *Morgan v. Harmonix Music Sys., Inc.*, No. 08-5211, 2009 WL 2031765, at *3 (N.D. Cal. July 30, 2009) (citing *Outboard Marine Corp. v. Superior Court*, 52 Cal. App. 3d 30, 36 (1972)). Plaintiffs do neither. Therefore, it is not plausible — let alone "likely" or "probable" — that a reasonable consumer would be somehow deceived into believing that the term "graham" means that Teddy Grahams do not include disclosed ingredients such as white flour or refined sugar. *See, e.g., Hotwire*, 2008 WL 5874305, at *3 ("'Likely' to deceive requires that deception is 'probable,' not merely 'possible'" for complaint to survive a motion-to-dismiss).

(i) Plaintiffs fail to identify any affirmative misrepresentation that contradicts the objectively true term "graham."

Plaintiffs do not and cannot allege that the statement "graham" is false or misleading because it is objectively true. Plaintiffs do not dispute that Kraft Foods' graham products in fact contain graham flour. *Cf. McKinniss v. Gen. Mills, Inc.*, No. 07-2521, 2007 WL 4762172, at *2 n.3 (C.D. Cal. Sept. 18, 2007) (complaint failed to state a claim where plaintiffs "acknowledge[d] that Defendant truthfully disclosed the ingredients for its products"). The ingredient list for each of the Teddy Grahams and

Honey Maid products specifically states that it contains "graham flour." *See* Kraft Foods' Request for Judicial Notice ("Request for Judicial Notice") (ECF Dkt. 30), Exs. A, B, C, D, K, L.[2]

Furthermore, as this Court recognized during the November 18 hearing, the term "graham" also accurately describes the flavor of the labeled products. *See* Nov. 18 Hearing Tr., Ex. 2 at 9 (acknowledging that graham "refers to the flavor, not necessarily the composition of the type of flour that's being used"). FDA regulations authorize food packaging to include "the common or usual name of the characterizing flavor, e.g., 'vanilla.'" 21 C.F.R. § 101.22(i)(1). Accordingly, courts in this District have repeatedly held that food labeling is not misleading where the challenged term refers to the product's "characterizing flavor" in compliance with the FDA regulations. For example, a complaint alleging that a cereal box misleadingly depicted fruit images was dismissed because those fruit images merely "indicate that product's 'characterizing flavor.'" *McKinniss v. Kellogg USA*, No. 07-2611, 2007 WL 4766060, at *4 (C.D. Cal. Sept. 19, 2007).

Numerous other decisions in this district have dismissed similar complaints on the grounds that the challenged statement or image only indicated the product's flavoring, as FDA regulations specifically permit. *See, e.g.*, *Sunny Delight*, 2007 WL 4766525, at *3-4 (rejecting claim that use of "various fruit names" misleadingly "impl[ied] a high fruit content" where the fruits constituted "characterizing flavor[s]" and labels disclosed that water and HFCS were the most predominant ingredients); *Gen. Mills*, 2007 WL 4762172, at *3 (finding that images of fruit would not mislead a reasonable consumer since, pursuant to FDA regulations, "if it tastes like blueberries, the packaging may contain a

[2] To avoid duplicative filings, Kraft Foods refers to the previously filed Request for Judicial Notice in Support of Its Motion to Dismiss (ECF Dkt. 30), which includes the entire and clear copies of the packaging in question. The Court is allowed to take judicial notice of these labels. *See, e.g., Wright v. General Mills, Inc.*, No. 08-1532, 2009 WL 3247148, at *4-5 (S.D. Cal. Sept. 30, 2009) (taking judicial notice of and incorporating by reference product labels and packaging items because they serve as the basis for the allegations in the plaintiff's complaint).

depiction of a blueberry"); *cf. Pom Wonderful LLC v. Coca Cola Co.*, --- F. Supp. 2d ----, 2010 WL 2836269, at *18-19 (C.D. Cal. 2010) (rejecting claim that juice's name was misleading because the named juices were "not the predominant juices by volume" since the name "'Pomegranate Blueberry Flavored Blend of 5 Juices' complied with the relevant FDA regulations" regarding flavoring).

Because Kraft Foods' graham products include graham flour and their packaging indicates the products as graham-flavored, the SAC fails to state a claim that the use of the term "graham" is false or misleading.

(ii) Plaintiffs fail to identify a material omission rendering the word "graham" false or misleading because Kraft Foods has disclosed the allegedly "bad" ingredient.

Unable to identify any affirmative misrepresentation in the packaging, Plaintiffs contend that it is misleading to use the word "graham" because the products are "made primarily from highly-refined white flour, rather than graham flour." Pl. Supp. Br. 1, 7. However, a true statement is actionable only if "other relevant information" has been omitted such that the true statement alone is "likely to mislead or deceive the customer." *Aron*, 143 Cal. App. 4th at 807.

Plaintiffs fail to identify any material omission of fact that renders "graham" false or misleading. In fact, Plaintiffs do not dispute that Kraft has *already disclosed* the presence of white flour in the FDA-regulated ingredient list. *See* Request for Judicial Notice (Dkt. 30), Exs. A, B, C, D, K, L. Nor do Plaintiffs dispute that that the ingredient list in accordance with FDA regulations clearly discloses that there is more "unbleached enriched flour" than "graham flour." *See id.*; *see also* C.F.R. § 101.4 (requiring ingredient lists to state the ingredients in a descending order of predominance by weight). *Cf. Pom Wonderful*, 2010 WL 2836269, at *18-19 (holding that naming a product with an ingredient that is less predominant than others is not misleading where the volume of each ingredient is disclosed on the packaging and the less predominant ingredient is the product's "characterizing flavor"); *Verzani v. Costco Wholesale Corp.*, No. 09-2117,

2010 WL 3911499, at *2 (S.D.N.Y. Sept. 28, 2010) (relying on the fact that the "label lists the ingredients in descending order based on their relative weight" in concluding plaintiff's claim could not survive a motion to dismiss); *Gen. Mills*, 2007 WL 4762172, at *3 ("A reasonable consumer would . . . be expected to peruse the product's contents simply by reading the side of the box containing the ingredient list").[3]

(iii) In the absence of any misrepresentation or omission, it is not "likely" or "probable" that a reasonable consumer would be misled by a true statement highlighting "graham."

Plaintiffs' failure to plead any affirmative misrepresentation or material omission of fact is fatal to their complaint. Recognizing this flaw, Plaintiffs resort to the implausible argument that a reasonable consumer would be misled into believing that Teddy Grahams and Honey Grahams do not contain white flour, refined sugar and other so-called "bad" ingredients because the packaging uses the word "graham."

Plaintiffs' convoluted theory must fail because they do not allege with particularity how or why the presence of a supposedly "bad" ingredient renders a true statement about a "good" ingredient or flavor misleading. Courts have repeatedly held that for a true statement to be actionable, a plaintiff must allege "concealment *related* to the characteristics or quality of goods *that are contrary to what has been represented* about

[3] *Williams v. Gerber Products Co.* does not require a contrary result because central to the court's decision was the *affirmative misrepresentations* on the packaging. 552 F.3d 934 (9th Cir. 2008). For example, Gerber's Fruit Juice Snacks contained "no fruit juice from any of the fruits pictured on the packaging," and, therefore, "the statement that Fruit Juice Snacks was made with 'fruit juice and other all natural ingredients' . . . appear[ed] to be false." *Id.* at 936, 939. In short, "*Williams* stands for the proposition that where product packaging contains an *affirmative misrepresentation*, the manufacturer cannot rely on the small-print nutritional label to contradict and cure that misrepresentation." *Yumul v. Smart Balance, Inc.*, 2010 WL 3359663, at *9 (C.D. Cal. 2010) (emphasis added); *cf. Videtto v. Kellogg USA*, No. 08-1324, 2009 WL 1439086 (E.D. Cal. May 21, 2009) (post-*Williams* decision dismissing complaint where there was no affirmative misrepresentation and "common sense" dictated that no reasonable consumer would believe Froot Loops contains actual fruit). In contrast, Plaintiffs do not allege any affirmative misrepresentations. The challenged ingredients were disclosed in accordance with FDA regulations. And, unlike Gerber in *Williams*, Kraft Foods did not use the nutrition facts panel to correct an affirmative misrepresentation on the front of the packaging. Rather, Kraft Foods supplemented true statements with accurate ingredient information as required by federal law.

the goods." *See Morgan*, 2009 WL 2031765, at *3 (emphasis added).[4] The *Morgan* court dismissed the plaintiffs' CLRA claim on the ground that the plaintiffs failed to identify any false or misleading statement by the manufacturer of the videogame Rock Band. Specifically, although the plaintiffs alleged a defect in the drum pedal device associated with the video game, "plaintiffs' claim for violation of the CLRA fail[ed] because the complaint neither allege[d] facts showing defendants were 'bound to disclose' any known defects related to the Rock Band drum pedal, nor allege[d] a single affirmative representation by defendants *regarding the drum pedals*." *Id.*, at *4 (emphasis added). In other words, there must be a nexus between the alleged "bad" quality of the product and any "positive" representation made by the company. Otherwise, "*any* statement made by defendants" could "form the basis of an actionable CLRA misrepresentation claim." *Id.*, at *3 (emphasis added).

Plaintiffs cannot merely point to a supposedly "bad" ingredient and then make the threadbare allegation that a true statement about a "good" ingredient or flavor ("graham") is therefore false or misleading. Rather, Plaintiffs must allege with particularity *how* or *why* the so-called "bad" ingredient makes the true statement false — there must be a logical connection between the two items. Otherwise, a plaintiff could evade dismissal by only pointing to the existence of a "bad" ingredient in a food product. In effect, Plaintiffs' theory would preclude a company from identifying any "good" ingredients included in a product because virtually *every* food product contains something that may be viewed as "bad" (*e.g.*, fat, sugar, calories, or artificial flavorings). If this Court accepts Plaintiffs' reasoning, then California law will prevent a juice company from promoting that orange juice contains Vitamin C because it also contains "bad"

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[4] *See also Hovsepian v. Apple, Inc.*, No. 08-5788, 2009 WL 5069144, at *3 (N.D. Cal. Dec. 17, 2009) (dismissing CLRA and UCL claims under 9(b) where complaint failed to "state with sufficient particularity when and where Apple made an affirmative representation, if any, that *contradicts* its alleged omissions) (emphasis added); *Tietsworth v. Sears, Roebuck & Co.*, No. 09-288, 2009 WL 3320486, at *8 (N.D. Cal. Oct. 13, 2009) ("Defendants owed no affirmative duty to Plaintiffs to disclose any alleged defect with the Electronic Control Boards, as Defendants did not make any misrepresentations *regarding this component* of the Machines.") (emphasis added).

ingredients or nutrients such as fructose and calories. This cannot be what the law means.

As in *Morgan* and the cases cited in footnote 4, Plaintiffs fail to identify a nexus between the challenged representation by the defendant ("graham") and the "bad" ingredient that supposedly renders the statement misleading. Furthermore, Plaintiffs never explain how the existence of white flour in the Kraft Foods snack products is "contrary to what has been represented" (*i.e.*, it contains graham flour). *Morgan*, 2009 WL 2031765, at *3. As one federal district court in California put it, judges are not required to suspend their "common sense" in determining whether a reasonable consumer would "likely" be deceived by a particular statement. *Videtto*, 2009 WL 1439086, at *4 (dismissing complaint that alleged the name "Froot Loops" misleadingly suggested the cereal was made of fruits). And it defies common sense here to accept that a reasonable consumer would likely believe that Teddy Grahams does not have white flour or sugar (which are disclosed on the box) merely because the packaging uses the word "graham."

Indeed, Plaintiffs' theory of the case is precisely the "implausible" claim for relief that the Supreme Court warned against in *Iqbal*. *See* 129 S.Ct. at 1949 (drawing the "line between possibility and plausibility of 'entitlement to relief'"). A federal court in California recently relied on *Iqbal*'s plausibility standard to dismiss a complaint alleging that a reasonable consumer would have been misled by statements such as "nutritious blend" on the packaging of margarine. *See Rosen v. Unilever*, No. 09-2563, 2010 WL 4807100, at *4-6 (N.D. Cal. May 3, 2010). And if Plaintiffs' theory of the case is not even plausible, then it certainly is not "likely" or "probable." Plaintiffs may object to the use of white flour, but it does not render a true statement about graham flour or flavor false or misleading.

B. "Honey"

Plaintiffs fail to state a claim because, as with "graham," they do not allege with particularity how or why the term "honey" or images of honey are false or misleading.

They fail to identify a single affirmative misrepresentation or material omission of fact that renders false or misleading the objectively true term "honey." *Cf. Morgan*, 2009 WL 2031765, at *3. It is, therefore, not "likely" or "probable" that a reasonable consumer would be deceived by the term "honey" or images of honey and believe that Honey Grahams does not include ingredients such as white flour or high fructose corn syrup.

(i) Plaintiffs fail to identify any affirmative misrepresentation that contradicts the objectively true term "honey."

Plaintiffs do not and cannot allege that the term "honey" is false or misleading because it is objectively true. Plaintiffs do not dispute that the products at issue in fact contain honey. The ingredient list for Honey Maid Grahams specifically states that the product contains "honey." *See* Request for Judicial Notice (Dkt. 30), Exs. K, L. In addition, the term "honey" accurately describes the flavor of the labeled products. FDA regulations authorize food packaging to include "the common or usual name of the characterizing flavor, e.g., 'vanilla.'" 21 C.F.R. § 101.22(i)(1). As discussed, courts in this District therefore have held that a food label is not misleading if the challenged term or image refers to the product's "characterizing flavor." *See, e.g.*, *Kellogg*, 2007 WL 4766060, at *4. In short, the SAC fails to state a claim that the use of the term "honey" is false or misleading because these snacks include honey and their packaging identifies the products as honey-flavored.

(ii) Plaintiffs fail to identify a material omission rendering the word "honey" false or misleading because Kraft Foods has disclosed the allegedly "bad" ingredient.

Plaintiffs argue that it is misleading to use the word "honey" because "it falsely suggests [the] product is naturally sweetened with honey" whereas the product allegedly "derives its sweetness and flavor from HFCS." Pl. Supp. Br. 7. As set forth above, a true statement is actionable only if "other relevant information" has been omitted such that the true statement alone is "likely to mislead or deceive the customer." *Aron*, 143 Cal. App. 4th at 807.

Plaintiffs fail to identify any material omission of fact that renders "honey" false or misleading. Plaintiffs do not dispute that Kraft Foods has disclosed the presence of HFCS in the product's ingredient list. *See* Request for Judicial Notice (Dkt. 30), Exs. K, L. Moreover, Plaintiffs do not dispute that that this FDA-regulated ingredient list clearly discloses that there is more "high fructose corn syrup" in the product than "honey." *Id.*; *see also* C.F.R. § 101.4 (requiring ingredient lists to state the ingredients in a descending order of predominance by weight); *cf. also Pom Wonderful*, 2010 WL 2836269, at *18-19; *Gen. Mills*, 2007 WL 4762172, at *3.

(iii) In the absence of any misrepresentation or omission, it is not "likely" or "probable" that a reasonable consumer would be misled by a true statement highlighting "honey."

As detailed above, the absence of any affirmative misrepresentation or material omission dooms Plaintiffs' case. Plaintiffs attempt to avoid dismissal by making the dubious claim that the presence of a disclosed so-called "bad" ingredient (*e.g.*, HFCS) makes a true statement highlighting a "good" ingredient or flavor (honey) false or misleading. But Plaintiffs do not articulate how or why the presence of a "bad" ingredient is "contrary" to the fact that the snack contains honey and has a honey flavor. *Cf. Morgan*, 2009 WL 2031765, at *3 (for a true statement to be actionable, a plaintiff must allege a "concealment related to the characteristics or quality of goods that [is] contrary to what has been represented about the goods"). Whether the product contains 0g or 100g of HFCS, it cannot and does not change the fact that the product contains honey and is honey-flavored. And it is simply unlikely that a reasonable consumer would be misled into believing that Honey Maid Grahams does not include white flour or HFCS (which are disclosed) merely because the word "honey" is used on the box.

C. "Whole Wheat"

(i) Plaintiffs fail to identify any affirmative misrepresentation that contradicts the objectively true term "whole wheat."

Plaintiffs' "whole wheat" claim must also be dismissed because they fail to allege either an "active misrepresentation" or an "active concealment related to the

characteristics" of the product that is "contrary to what has been represented." *See Morgan*, 2009 WL 2031765, at *3. There is no dispute that the Kraft Foods product in question includes whole wheat, as disclosed in the FDA-regulated ingredients list. *See* Request for Judicial Notice (Dkt. 30), Ex. I.

(ii) Plaintiffs fail to identify a material omission rendering the statement "whole wheat" false or misleading because Kraft has disclosed the allegedly "bad" ingredient.

Because there are no affirmative misrepresentations, Plaintiffs resort to the argument that the term "whole wheat" is misleading because "white refined flour" is also included, along with whole wheat. Pl. Supp. Br. 6. However, Plaintiffs fail to identify any material omission of fact that makes the term "whole wheat" false or misleading. Plaintiffs do not dispute that that the FDA-regulated ingredient list clearly discloses that the product contains both whole wheat flour and white flour. *See* Request for Judicial Notice (Dkt. 30), Ex. I; *see also* 21 C.F.R. § 101.4.

(iii) In the absence of any misrepresentation or omission, it is not "likely" or "probable" that a reasonable consumer would be misled by a true statement highlighting "whole wheat."

Plaintiffs' claim must fail because they do not allege with particularity how or why the presence of "white refined flour" makes the statement that the product contains "whole wheat" false or misleading. Courts have repeatedly held that for a true statement to be actionable, a plaintiff must allege "concealment related to the characteristics or quality of goods *that are contrary to what has been represented* about the goods." *See Morgan*, 2009 WL 2031765, at *3 (emphasis added). Plaintiffs do not identify a proper nexus between "whole wheat" and "white refined flour" that renders the true statement that the product is made of "whole wheat" misleading. This failure to allege a connection between the "good" ingredient and the "bad" ingredient is fatal because it is not likely or probable that a reasonable consumer would be deceived by the use of the term "whole wheat."

D. "Made with Real Vegetables"

To properly plead that they were misled by the phrase "Made with Real Vegetables" and images of vegetables, Plaintiffs must either allege an "active misrepresentation" or an "active concealment" of a fact that is "contrary to what has been represented about the" products. *See Morgan*, 2009 WL 2031765, at *3.

(i) Plaintiffs fail to identify any affirmative misrepresentation that contradicts the objectively true statement "Made with Real Vegetables."

Plaintiffs cannot allege that the statement "Made with Real Vegetables" is false or misleading because it is objectively true. Plaintiffs cannot contest that Vegetable Thins crackers in fact contain carrots, onion, celery, cabbage, red bell pepper, tomato, and parsley, as properly disclosed in the FDA-regulated ingredient list. *See* Request for Judicial Notice (Dkt. 30), Ex. E; *see also* Ex. F; *cf. Gen. Mills*, 2007 WL 4762172, at *4 (holding that the phrase "Flavored with Real Fruit Juice" was a truthful statement where the product did in fact contain "orange juice concentrate, the product's sixth listed ingredient").[5]

(ii) Plaintiffs fail to identify a material omission rendering the phrase "Made with Real Vegetables" false or misleading because Kraft has disclosed the allegedly "bad" ingredients.

Plaintiffs argue that the objectively true phrase "Made with Real Vegetables" is misleading because Vegetable Thins contains supposedly "bad" ingredients such as disodium 5'guaylate (DG), monosodium glutamate (MSG), white flour, and HFCS. Pl. Supp. Br. 3, 4. But Plaintiffs do not dispute that Kraft has disclosed the presence of DG, MSG, white flour, and HFCS in the FDA-regulated ingredient list. *See* Request for Judicial Notice (Dkt. 30), Ex. E; *see also* F. In other words, there is no material omission of material fact that makes the true statement "Made with Real Vegetables"

[5] Trying to manufacture a factual dispute, Plaintiffs misleadingly state that that Vegetable Thins "contains *virtually no* carrots, tomatoes, onions, or red bell peppers." Pl. Supp. Br. 3 (emphasis added). However, vegetables are listed *third* in the FDA-regulated and factually undisputed ingredient list. *See* Request for Judicial Notice, Ex. E. In fact, vegetables are much greater in quantity than MSG, despite Plaintiffs' allegation that "Vegetable Thins is *high*" in MSG. *Id.* (emphasis added).

false or misleading. That Vegetable Thins contains (and discloses the presence of) MSG, white flour or any other ingredient does not alter the fact that Vegetable Thins is indeed made with real vegetables.

(iii) In the absence of any misrepresentation or omission, it is not "likely" or "probable" that a reasonable consumer would be misled by a true statement highlighting "Made with Real Vegetables."

Because Plaintiffs cannot point to any affirmative misrepresentation or material omission of fact, the SAC must be dismissed. Plaintiffs try to avoid that fate by offering the far-fetched claim that they were deceived by the true statement "Made with Real Vegetables": They essentially claim that the they believed that Vegetable Thins does not include ingredients such as white flour — even though they are disclosed — because of the phrase "Made with Real Vegetables." For this theory to even enter the realm of plausibility, Plaintiffs must allege with particularity how or why the presence of supposedly "bad" ingredients makes a true statement about a "good" ingredient false or misleading. They fail to do so. There is no nexus between, on the one hand, the inclusion of MSG or white flour, and on the other hand, the true statement "Made with Real Vegetables." Stated differently, the fact that a product contains MSG or white flour cannot and does not negate the fact that the product actually is made of real vegetables.

(iv) Plaintiffs fail to allege with particularity how the omission of the presence of sub-0.5g trans fat renders the true statement "Made with Real Vegetables" false or misleading.

Plaintiffs also claim the phrase "Made with Real Vegetables" is misleading because the products contain "more PHVO and trans fat than all the vegetables pictured on the box." Pl. Supp. Br. 3. But it is well-settled that a true statement is actionable only if "other relevant information" has been omitted such that the true statement alone is "likely to mislead or deceive the customer." *Aron*, 143 Cal. App. 4th at 807. To qualify as "likely to mislead or deceive the customer" (*id.*), the omission either (a) "must be contrary to a representation actually made by the defendant," *or* (b) must be "an omission

of a fact the defendant was obliged to disclose." *Daugherty*, 144 Cal. App. 4th at 835.

Here, there is no material omission that Kraft Foods "was obliged to disclose" because it is legally precluded under FDA regulations from disclosing the presence of sub-0.5g of trans fat. *See* 21 C.F.R. § 101.9(c)(2)(ii); *cf. Morgan*, 2009 WL 2031765, at *5 ("a consumer is not 'likely to be deceived' by the omission of a fact that was not required to be disclosed in the first place"); *Seinfeld v. Bartz*, 322 F.3d 693, 699-700 (9th Cir. 2003) (allegation that proxy statement was misleading failed to state a claim where challenged language was true and no law required disclosure of the facts shareholder claimed should have disclosed).

To sustain their claim, Plaintiffs therefore must allege with particularity that the omission of the sub-0.5g trans fat is "contrary to" the true statement "Made with Real Vegetables." *Daugherty*, 144 Cal. App. 4th at 835. But Plaintiffs fail to articulate why or how trace presence of trans fat makes the true statement "Made with Real Vegetables" false or misleading. Whether or not Vegetable Thins contains trans fat, it remains true that the products are in fact made with real vegetables. *See Morgan*, 2009 WL 2031765, at *3 (plaintiff must allege "concealment related to the characteristics or quality of goods *that are contrary to what has been represented* about the goods") (emphasis added). That reality is reinforced by the FDA, which has determined that the presence of trans fat does not prevent a company from making true statements about other ingredients or product qualities. *See, e.g.*, 68 F.R. 41507, 41508 (July 11, 2003) (declining barring "no cholesterol" statement on products that contain trans fat); *see also Chacanaca v. Quaker Oats Co.*, 2010 WL 4055954, at *8 (N.D. Cal. Oct. 14, 2010) ("then the presence of trans fat alone is not a 'disqualifying' nutrient which would prevent Quaker Oats from emphasizing whatever other health benefits are available from the Bars' other ingredients or because it lacks certain ingredients."). If Plaintiffs disagree with the FDA, the proper course is to "lobby Congress or petition FDA to change its rules." *Pom Wonderful*, 2010 WL 2836269, at *19.

E. "Made with Real Ginger & Molasses"

To plead that they were misled by "Made with Real Ginger & Molasses," Plaintiffs must either allege an affirmative misrepresentation or a material omission that contradicts a specific representation. Plaintiffs, again, do neither.

(i) Plaintiffs fail to identify any affirmative misrepresentation that contradicts the objectively true statement "Made with Real Ginger & Molasses."

Plaintiffs do not and cannot allege that the statement "Made with Real Ginger & Molasses" is false or misleading because it is objectively true. Plaintiffs do not dispute that the product in fact contains ginger and molasses. *See* Request for Judicial Notice (Dkt. 30), Ex. M. In addition, the phrase "Made with Real Ginger & Molasses" accurately describes the flavor of the products in compliance with FDA regulations.

(ii) Plaintiffs fail to identify a material omission rendering the phrase "Made with Real Ginger & Molasses" false or misleading because Kraft has disclosed the allegedly "bad" ingredients.

The phrase "Made with Real Ginger & Molasses" is supposedly false or misleading because it is in fact sweetened with "chemically processed HFCS." Pl. Supp. Br. 8. But in accordance with FDA regulations, Kraft Foods has disclosed that its product contains HFCS and in higher quantity than ginger. *See* Request for Judicial Notice (Dkt. 30), Ex. M. There is thus no material omission of fact that contradicts the true statement that the snack actually contains ginger and molasses.

(iii) In the absence of any misrepresentation or omission, it is not "likely" or "probable" that a reasonable consumer would be misled by a true statement highlighting "ginger" and "molasses."

Plaintiffs do not plead with particularity how or why the presence of HFCS renders a true statement about the presence of ginger and molasses in a product false or misleading. The law is clear that Plaintiffs cannot merely point to an allegedly "bad" ingredient (HFCS) and then make the bare-bones allegation that its presence turns a true statement about a "good" ingredient or flavoring (real ginger and molasses) into a false or

misleading one. Rather, Plaintiffs must allege with particularity *how* the presence of the so-called "bad" ingredient makes the true statement false. *Cf. Morgan*, 2009 WL 2031765, at *3. Plaintiffs fail to do so.

(iv) Plaintiffs fail to allege with particularity how the omission of the presence of sub-0.5g trans fat renders the true statement "Made with Real Ginger & Molasses" false or misleading.

Plaintiffs argue that the phrase "Made with Real Ginger & Molasses" is misleading because the product contains "more PHVO/trans fact . . . than ginger." Pl. Supp. Br. 8. As explained above, a true statement is actionable only if "other relevant information" has been omitted such that the true statement alone is "likely to mislead or deceive the customer." *Aron*, 143 Cal. App. 4th at 807. And the omission either (a) "must be contrary to a representation actually made by the defendant," *or* (b) must be "an omission of a fact the defendant was obliged to disclose." *Daugherty*, 144 Cal. App. 4th at 835.

Here, there is no material omission that Kraft Foods "was obliged to disclose" because FDA regulations bar the disclosure of sub-0.5g of trans fat. *See* 21 C.F.R. § 101.9(c)(2)(ii). Thus the only way to avoid dismissal is to allege with particularity that the omission of the sub-0.5g trans fat is "contrary to" the true statement "Made with Real Ginger & Molasses." But Plaintiffs fail to identify how or why the presence of small amounts of trans fat changes the otherwise true phrase to false or misleading. Even if the snack contained more than trace amounts of trans fat — which it does not — it remains true that the product is indeed made with ginger and molasses. Moreover, the FDA has declined to make trans fat a "disqualifying" nutrient and, therefore, the presence of trans fat in a product does not prevent a food manufacturer from making true statements about other ingredients or characteristics of that product. *See, e.g.*, 68 F.R. 41507, 41508 (July 11, 2003); *Chacanaca*, 2010 WL 4055954, at *8.

F. <u>"Nutritionists Recommend" and "Steps to a Healthier You"</u>

Under the heading "MyPyramid.gov STEPS TO A HEALTHIER YOU," the Ritz Crackers packaging in questions states "Nutritionists Recommend eating at least three

one-ounce equivalents of whole grain products per day (about 16g whole grains per serving, or at least 48g per day). One serving of Ritz Whole Wheat crackers provides 5g of whole grain, approximately 10% of the minimum daily amount nutritionists recommend." Request for Judicial Notice (Dkt. 30), Ex. I. Nothing alleged in the SAC makes this accurate statement false or misleading.

(i) Plaintiffs do not allege any affirmative misrepresentation that contradicts the factual accuracy of the statement in question.

Plaintiffs do not dispute that nutritionists recommend eating whole grain products or that one serving of Ritz Crackers includes 10% of the recommended minimum daily amount of whole grain. Further, they do not allege any active misrepresentation in the packaging that puts the true statement in dispute.

(ii) Plaintiffs fail to allege any material omission of fact that makes the objectively true statement misleading.

Plaintiffs essentially concede that the statement in question is true, but complain that it is misleading because Ritz Crackers contain "highly processed unbleached enriched flour." Pl. Br. 6. Kraft Foods, however, has disclosed the presence of unbleached enriched flour in the FDA-regulated ingredient list. *See* Request for Judicial Notice (Dkt. 30), Ex. I. There is thus no material omission of fact that makes the challenged statement false or misleading.

(iii) In the absence of any misrepresentation or omission, it is not "likely" or "probable" that a reasonable consumer would be misled by a true statement highlighting nutritional requirements.

Plaintiffs simply fail to allege with particularity how or why the presence of a disclosed ingredient (unbleached enriched flour) transforms a true statement — that nutritionists recommend consumption of whole grain, an ingredient found in Ritz Crackers — into a false or misleading claim. Plaintiffs cannot plead a claim of deception by merely pointing out that a food product contains disclosed amounts of an allegedly "bad" ingredient. But that is precisely what Plaintiffs are doing.

(iv) Plaintiffs fail to allege with particularity how the omission of the presence of sub-0.5g trans fat renders a true statement false or misleading.

As detailed above, Plaintiffs fail to plead with particularity why the trace presence of trans fat makes the true statement about whole grain consumption false or misleading. Stated differently, Plaintiffs must specify a nexus between the presence of trans fat and the objectively true statement about whole grains such that the latter is rendered false or misleading. Plaintiffs cannot do so. The trace amounts of trans fat in Ritz Crackers does not make untrue the statement that nutritionists recommend consuming certain amounts of whole grains daily, 5g of which is provided in a serving of Ritz Crackers.

G. "Good Source of Calcium, Iron & Zinc to Support Kids' Growth and Development."

Plaintiffs do not plead with particularity any affirmative misrepresentation or material omissions that turns the true statement about calcium, iron and zinc into a misleading one.

(i) Plaintiffs fail to identify any affirmative misrepresentation that contradicts the true statement that calcium, iron and zinc support growth and development.

There is no dispute by Plaintiffs that Teddy Grahams contains calcium, iron and zinc, and that these ingredients support the growth and development of children. *See* Request for Judicial Notice (Dkt. 30), Ex. A. Moreover, Plaintiffs do not identify any active misrepresentation in the packaging that casts doubt on the veracity of that statement.

(ii) Plaintiffs fail to identify a material omission making the true statement about calcium, iron & zinc false or misleading because Kraft Foods has disclosed the allegedly "bad" ingredients.

Due to the lack of any affirmative misrepresentations, Plaintiffs rely on the argument that the reference to calcium, iron & zinc is misleading because Teddy Grahams also contains "highly-refined flour and added sugar." Pl. Supp. Br. 2. However, Kraft Foods has disclosed these allegedly "bad" ingredients in the packaging,

and Plaintiffs therefore cannot point to any material omission of fact.

(iii) In the absence of any misrepresentation or omission, it is not "likely" or "probable" that a reasonable consumer would be misled by a true statement highlighting calcium, iron and zinc.

Because there is no affirmative misrepresentation or material omission, Plaintiffs' claims must be dismissed. In an attempt to avoid dismissal, Plaintiffs have concocted the theory that they did not believe that Kraft Foods snacks contained "highly-refined flour and added sugar" because the box also references calcium, iron and zinc. But despite repeated requests from the Court, Plaintiffs never explain why the presence of flour and sugar makes it unlawful for Kraft Foods to state that Teddy Grahams contains calcium, iron & zinc.

(iv) Plaintiffs fail to allege with particularity how the omission of the presence of sub-0.5g trans fat renders a true statement false or misleading.

Plaintiffs do not plead with particularity why the small presence of trans fat makes the true statement about calcium, iron and zinc false or misleading. There is simply no nexus between trans fat, on the one hand, and calcium, iron and zinc, on the other.

II. The Remaining Challenged Statements Are Not Actionable As a Matter Of Law Because They Are Mere Puffery.

In addition to objectively true statements, Plaintiffs challenge various non-quantifiable and non-verifiable puffery statements — *e.g.*, "Sensible Snacking," "Sensible Solution," "Smart Choices," and "Wholesome" — as misleading. These claims must fail because they are non-actionable as a matter of law.

It is well settled that "[g]eneralized, vague, and unspecified assertions constitute 'mere puffery' upon which a reasonable consumer could not rely, and hence are not actionable." *Oestreicher v. Alienware Corp.*, 544 F. Supp. 2d 964, 973 (N.D. Cal. 2008). In other words, although "a statement that is quantifiable, that makes a claim as to the 'specific or absolute characteristics of a product,' may be an actionable statement of fact, . . . a general, subjective claim about a product is non-actionable puffery." *Newcal*

Indus., Inc. v. Ikon Office Solution, 513 F.3d 1038, 1053 (9th Cir. 2008) (quoting *Cook, Perkiss, & Liehe v. N. Cal. Collection Serv., Inc.*, 911 F.2d 242, 245 (9th Cir. 1990)). Thus, to be actionable, advertisements must be "*factual representations*" that can be demonstrated to be true, or false. *Consumer Advocates v. Echostar Satellite Corp.*, 113 Cal. App. 4th 1351, 1361 (2003) (emphasis added). Stated differently, puffery by definition cannot be actionable because there is no objective way to quantify or determine whether a statement is misleading. For example, the Ninth Circuit in *Coastal Abstract Service, Inc. v. First American Title Insurance Co.* dismissed a claim based on the statement that a competitor business was "too small" to handle a project because it "was not a specific and measurable claim, capable of being proved false." 173 F.3d 725, 731 (9th Cir. 1999). Similarly here, there is no judicial standard for this Court to assess whether the terms "Sensible Solutions," "Sensible Snacking," "Smart Choices," or "Wholesome" are accurate or not.

A. "Sensible Solutions" and "Sensible Snacking"

Courts have repeatedly held that the word "sensible" — standing alone — is non-actionable because it is too vague without any articulable standard to determine its accuracy. For example, in *Fraker*, the court found that the phrase "You can enjoy 'fast food' as part of a *sensible* balanced diet" constituted "non-actionable puffery." 2007 WL 1296571, at *3; *see also Hoyte*, 489 F. Supp. 2d at 30 (holding that "[t]he statement that KFC food could be part of a healthy lifestyle is also non-actionable"); *Pelman v. McDonald's Corp.*, 237 F. Supp. 2d 512, 538 (S.D.N.Y. 2003) ("Merely encouraging consumers to eat [McDonald's] products 'everyday' is mere puffery, at most").

Here, Kraft Foods' use of the word "sensible" to describe its snacks is a classic example of non-actionable puffery because the word "sensible" is too vague and non-quantifiable to be proven true or false. *See* Request for Judicial Notice (Dkt. 30), Exs. G, H, I, J, K, L, M. If Kentucky Fried Chicken's marketing of its fast food as "sensible" is mere puffery, then Kraft Foods snacks can also be described as "sensible."

Perhaps recognizing that courts have held that the word "sensible" is non-actionable puffery, Plaintiffs insist that "sensible" nonetheless becomes misleading because the Kraft Foods snacks contain sub-0.5g of trans fat as well as various disclosed ingredients (*e.g.*, HFCS and white flour). Pl. Supp. Br. 5-6. But as explained above, (a) Kraft Foods has disclosed the presence of supposedly "bad" ingredients in the FDA-regulated nutritional statement, and (b) Plaintiffs do not articulate the nexus between trace presence of trans fat and the puffery statement that it is "sensible" to consume these snacks. In other words, a non-actionable puffery statement cannot suddenly become a cognizable claim in the absence of any affirmative misrepresentation or material omission of fact that renders puffery false or misleading.

B. "Smart Choices"

A number of federal courts have found that the term "smart" is too vague to constitute an actionable representation. For example, the D.C. Circuit recently held that the description of a product as a "smart option" was "too general and subjective in nature to be considered [a] misrepresentation[]" and was, "at most, mere puffery." *Whiting v. AARP*, 701 F. Supp. 2d 21, 30 n.7 (D.D.C. 2010). *See also In re XM Satellite Radio Holdings Secs. Litig.*, 479 F. Supp. 2d 165, 180 (D.D.C. 2007) (ruling that "generalized positive statements" like "*smart*" and "sound" are "vague and incapable of objective verification" and, therefore, constitute puffery) (emphasis added); *Tylka v. Gerber Prods. Co.*, No. 96-1647, 1999 WL 495126, at *8-9 (N.D. Ill. July 1, 2009) (ruling as puffery the statements "you can't buy a better baby food" and "learning how to *eat smart*") (emphasis added); *cf. In re Splash Tech. Holdings Inc. Secs. Litig.*, 160 F. Supp. 1059, 1077 (N.D. Cal. 2001) (statements which used the terms "strong," "solid," and "healthy" were non-actionable puffery on which no reasonable investor would rely).

Similarly, Kraft Foods has stated that it is a "smart choice" to eat its snacks. *See* Request for Judicial Notice (Dkt. 30), Exs. A, B, C, D. This is yet another typical case of puffery because the word "smart" is too "vague and incapable of objective

verification." *In re XM Satellite*, 479 F.Supp. 2d at 180.

And like with the other challenged statements, Plaintiffs fail to identify any material omission of fact or affirmative representation that would transform a non-actionable puffery statement into a misleading statement that is cognizable under California law.

C. "A fun, wholesome choice for your family!"

Plaintiffs claim that the statement that "great-tasting Teddy Grahams" are "a fun, wholesome choice for your family!" is misleading. *See* Request for Judicial Notice (Dkt. 30), Exs. A, B, C. Courts, however, have held that the word "wholesome" is too subjective and vague and therefore amounts to puffery. For example, the court in *Tylka* held that "liability cannot follow for such vague, all encompassing, communications" as phrases like "most nutritious" and "most *wholesome* nutritious safe foods you can buy anywhere in the world" because, "although quantifiable in some respects," "[n]utrition is a nebulous concept." 1999 WL 495126, at *8-9 (emphasis added). And as detailed above, the fact that Teddy Grahams has small amounts of trans fat and disclosed "bad" ingredients does not change the fact that the sentence is mere puffery.

CONCLUSION

This Court should dismiss the SAC in its entirety with prejudice because there are no affirmative misrepresentations or material omissions of facts.

Dated: December 7, 2010

KRAFT FOODS INC., KRAFT FOODS NORTH AMERICA, and KRAFT FOODS GLOBAL, INC.

/s/ Kenneth K. Lee

By one of their attorneys

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