

No. 25-4978

IN THE
**United States Court of Appeals
For the Ninth Circuit**

BRITTANY BOUNTHON; VIVIANNA RIVERA; GINA ALLEN,

Plaintiffs-Appellants,

v.

THE PROCTER & GAMBLE COMPANY,

Defendant-Appellee.

On Appeal from the United States District Court for the
Northern District of California, No. 3:23-cv-00765
Honorable Araceli Martinez-Olguin, U.S. District Judge

**BRIEF OF AMICUS CURIAE THE CHAMBER OF
COMMERCE OF THE UNITED STATES OF AMERICA
IN SUPPORT OF DEFENDANT-APPELLEE**

Andrew R. Varcoe
Kevin R. Palmer
U.S. Chamber Litigation Center
1615 H Street, NW
Washington, DC 20062

Matthew A. Fitzgerald
Morgan V. Maloney
MCGUIREWOODS LLP
800 East Canal Street
Richmond, VA 23219
T: (804) 775-4716
T: (804) 775-1080
mfitzgerald@mcguirewoods.com
mmaloney@mcguirewoods.com

Counsel for the Chamber of Commerce of the United States of America

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/s/ Matthew A. Fitzgerald
Matthew A. Fitzgerald

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IDENTITY AND INTEREST OF AMICUS CURIAE

The Chamber of Commerce of the United States of America (the “Chamber”) is the world’s largest business federation. The Chamber represents around 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus briefs in cases, like this one, that raise issues of concern to the nation’s business community.

The Chamber’s members are often targeted as defendants in lawsuits asserting claims for mislabeling and deceptive advertising. The Chamber thus is familiar with such litigation, both from the perspective of individual defendants and from a more global perspective, and has a significant interest in this case, in which the district court properly applied the reasonable consumer standard. Timely dismissal of actions that fail to meet this standard, before the parties are required to dedicate significant resources to litigation of meritless claims, is an issue of

immense significance not only for businesses, but also for the customers, employees, and other businesses that depend on them.¹

INTRODUCTION AND SUMMARY OF ARGUMENT

After allegedly testing three Procter & Gamble (“P&G”) tampons in a laboratory, Plaintiffs claim they detected some unspecified amount of organic fluorine, a chemical bond, in or on them. Plaintiffs provide no more specificity—no allegations about how much organic fluorine their supposed “testing” detected, and no suggestion about how the organic fluorine came to be present.

First, Plaintiffs fail to allege standing because they fail to allege that the tampons they actually purchased contained any amount of organic fluorine, no matter how *de minimis*. The Court can dispose of this appeal on this ground alone.

In any event, the district court properly dismissed this action. Plaintiffs seek to turn their supposed discovery into a multi-state mislabeling class action. Plaintiffs accuse P&G of mislabeling their

¹ Counsel for all parties confirmed that they do not oppose the filing of this brief. No counsel for any party authored this brief in whole or in part and no entity or person, aside from *amicus curiae*, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

tampon products by describing them as “pure” and as containing “100% organic cotton.” But California law and the Federal Rules of Civil Procedure require more than this threadbare notice pleading. Plaintiffs were required to plead to a reasonable consumer standard, and reasonable consumers do not believe that advertisements touting a product as “pure” or “100% organic cotton” guarantee perfection down to the molecular level. Instead, consumers reasonably understand these words to mean that the product is made out of organic cotton and without added substances. Further, Plaintiffs were required to plead their claims with specificity, yet they failed to plead the essential methodological details of their supposed “testing” or even the complete test results.

If Plaintiffs’ allegations here can survive a motion to dismiss, then nearly any labeling allegations can, and the reasonable consumer standard will cease to be a bulwark against conjectural mislabeling claims. Plaintiffs’ rule would trigger meritless litigation aimed at extracting settlements from businesses complying with state and federal regulations. The district court properly concluded that the action should not proceed. This Court should order the case dismissed for lack of

standing or should affirm the district court's dismissal for failure to state a claim.

ARGUMENT

I. Plaintiffs fail to adequately allege injury-in-fact for standing.

In dismissing the Second Amended Complaint, the district court held that *Bowen v. Energizer Holdings, Inc.*, 118 F.4th 1134 (9th Cir. 2024) “dispenses with P&G’s standing arguments.” *Bounthon v. Procter & Gamble Co.*, No. 23-cv-765, 2024 WL 4495501, at *7 (N.D. Ca. Oct. 15, 2024). Although the district court was correct in ultimately dismissing that Complaint, the court erred on this threshold matter and failed to grapple with key parts of *Bowen*’s holding. Because Plaintiffs fail to allege injury-in-fact, they lack standing. *See, e.g., TransUnion LLC v. Ramirez*, 594 U.S. 413, 423 (2021) (to have standing, a plaintiff must allege an “injury in fact that is concrete, particularized, and actual or imminent”).

Plaintiffs allege that they suffered an injury because, if they knew the tampons contain organic fluorine, they would not have purchased them. Pls. Opp. to Mot. to Dismiss TAC at 7, Dkt. 85. But Plaintiffs fail to allege that the tampons *they bought* contained organic fluorine. In

Bowen, this Court held that a plaintiff had standing when she purchased sunscreen containing benzene and alleged she would not have purchased it if she knew that it contained benzene. 118 F.4th at 1146–47. There, the plaintiff had the bottle that “she purchased and partially used” tested. *Id.* at 1139. *That* bottle contained benzene. *Id.*

Here, on the other hand, Plaintiffs allege that they tested “three different samples of the Tampon Products.” ER-023. But they do not allege that they tested any tampons that they actually purchased for use. Nor can Plaintiffs’ testing of *three* out of the tens of billions of tampons P&G has sold be extrapolated to create a presumption that *all* the tampons contain organic fluorine. ER-036 (P&G’s distribution of the tampons “is voluminous and nationwide”); ER-014 (P&G sold 4.5 billion *boxes* of Tampax tampons in 2019). Not only is three a paltry sample size, but Plaintiffs do not allege that these samples are representative of the whole of P&G’s inventory, nor that they are even randomized. Plaintiffs also do not allege that each sample contained similar levels of organic fluorine. As the district court observed when dismissing the Third Amended Complaint, Plaintiffs’ “bare allegation ... offers even less factual content than Plaintiffs’ Second Amended Complaint, which the

Court found insufficient.” *Bounthon v. Procter & Gamble Co.*, No. 23-cv-765, 2025 WL 1874890, at *1 (N.D. Cal. July 7, 2025). In that Complaint, Plaintiffs had at least alleged testing levels, ER-092, but the district court still found the allegations insufficient, *Bounthon*, 2024 WL 4495501, at *9.

In similar cases, other courts have declined to find standing. For example, in *Wallace v. ConAgra Foods, Inc.*, consumers alleged that ConAgra mislabeled packages of meat as “100% kosher” when, in reality, the packages contained non-kosher meat. 747 F.3d 1025, 1028, 1030 (8th Cir. 2014). Despite the consumers’ allegations that they purchased meat from the defendants, the Eighth Circuit held they lacked a particularized injury. *Id.* at 1030–31. “Even supposing ... [that] some beef was improperly certified as kosher, the consumers give no reason to think all the beef marked as kosher under the quota did not meet kosher standards.” *Id.* at 1030. So, “it is pure speculation to say the particular packages sold to the consumers were tainted by non-kosher beef.” *Id.* at 1031.

Other cases are similar. See *In re Recalled Abbott Infant Formula Prods. Liab. Litig.*, 97 F.4th 525, 529 (7th Cir. 2024) (plaintiffs lacked a

particularized injury when they failed to allege that they purchased contaminated baby formula or that the contamination was “sufficiently widespread to plausibly affect any given unit”); *Doss v. Gen. Mills, Inc.*, 816 F. App’x 312, 313–14 (11th Cir. 2020) (per curiam) (no injury because, despite “[t]esting ... reveal[ing] trace amount of glyphosate in samples of [Cheerios],” the plaintiff did not allege that she purchased any Cheerios with glyphosate). Failing to allege an injury “particularized” to them, Plaintiffs lack standing. *TransUnion LLC*, 594 U.S. at 423.

II. Reasonable consumers would not be misled by P&G’s label and Plaintiffs failed to allege their claims with particularity.

In any event, Plaintiffs fail to state a claim. P&G labeled its tampons as “pure” and “100% organic cotton.” Opening Br. 10. Plaintiffs protest that this is misleading, citing the existence of some unspecified amount of organic fluorine detected in laboratory testing. Properly applying the reasonable consumer standard, the district court correctly dismissed Plaintiffs’ Third Amended Complaint.

Plaintiffs bring suit under a collection of California consumer protection laws “prohibit[ing] unlawful, unfair, or fraudulent business

practices.” *Ebner v. Fresh, Inc.*, 838 F.3d 958, 963 (9th Cir. 2016).² “To survive dismissal,” these “claim[s] must pass two tests: (1) the ‘reasonable consumer’ test set forth in California case law, and (2) the heightened pleading standard set forth in Fed. R. Civ. P. 9(b).” *Bodenburg v. Apple Inc.*, 146 F.4th 761, 768 (9th Cir. 2025); *McGinity v. Procter & Gamble Co.*, 69 F.4th 1093, 1097 (9th Cir. 2023) (applying the reasonable consumer standard to California Consumer Legal Remedies Act, Unfair Competition Law, and False Advertising Law claims). Plaintiffs fail both tests.

A. Reasonable consumers would not understand P&G’s label to mean that the tampons are free of even the smallest amount of an unintentionally included molecule.

Plaintiffs’ theory of liability hinges on one sentence in their Third Amended Complaint: they allege that their “testing detected ‘above trace amounts [of organic fluorine] ... well within the detection limits.’” *Bounthon*, 2025 WL 1874890, at *1. But Plaintiffs fail to allege the actual

² Plaintiffs primarily pursue claims under the California Consumers Legal Remedies Act (“CLRA”), Cal. Civ. Code §§ 1750 *et seq.*; the California Unfair Competition Law (“UCL”), Cal. Bus. & Prof. Code §§ 17200 *et seq.*; and the California False Advertising Law (“FAL”), Cal. Bus. & Prof. Code §§ 17500 *et seq.*

amount of the organic fluorine that their testing detected. *See* ER-023. And they fail to allege how organic fluorine got into or onto the tampons. Plaintiffs certainly do *not* allege that P&G intentionally added organic fluorine or any chemical containing it.

In other words, Plaintiffs allege that reasonable consumers would be misled by a label stating that tampons are “pure” and “organic” if there is *any* amount of organic fluorine, no matter how *de minimis* or how it became present in the product. Adopting that theory would open the floodgates of mislabeling claims, making it impossible for manufacturers to advertise their efforts to make good products. No manufacturer can reasonably guarantee the molecular-level “purity” that Plaintiffs demand, and reasonable consumers do not expect as much.

The “reasonable consumer” standard “is not a negligible burden,” *Moore v. Trader Joe’s Co.*, 4 F.4th 874, 882 (9th Cir. 2021) (cleaned up). It “requires a probability that *a significant portion* of the general consuming public ..., acting reasonably in the circumstances, could be misled.” *Ebner*, 838 F.3d at 965 (emphasis added). So, statements are not “false and deceptive merely because they may be unreasonably misunderstood by an insignificant and unrepresentative segment of

consumers.” *Bodenburg*, 146 F.4th at 770 (cleaned up). “The touchstone under the ‘reasonable consumer’ test is whether the product labeling and ads promoting the products have a *meaningful capacity* to deceive consumers.” *McGinity*, 69 F.4th at 1097 (emphasis added).

This Court has affirmed dismissal when it is “not plausible” that a “reasonable consumer would be deceived” by the advertisement. *Ebner*, 838 F.3d at 965; *see also Bodenburg*, 146 F.4th at 769–70 (affirming dismissal on the pleadings); *Moore*, 4 F.4th at 877 (same); *Becerra v. Dr Pepper/Seven Up, Inc.*, 945 F.3d 1225, 1229–30 (9th Cir. 2019) (same). The Court should do the same here.

Plaintiffs allege that reasonable consumers would believe that P&G’s tampon products did not contain even a hint of organic fluorine, a common molecular bond that is present in many substances. That cannot be right. Reasonable consumers understand that it is simply infeasible to remove every single trace of the many elements and substances that a product’s raw materials may be exposed to – and particularly infeasible for raw materials that are agricultural crops grown in real-world conditions. It is an “insignificant and unrepresentative segment of consumers,” *Bodenburg*, 146 F.4th at 770, that inquires into the

molecular-level purity of such a product and its packaging when deciding whether to purchase a product. Plaintiffs' theory thus is based on an unreasonable assumption about what reasonable consumers expect.

This Court considered and rejected a similarly unreasonable assumption in *Moore v. Trader Joe's Co.* There, Plaintiffs alleged that Trader Joe's label that its honey was "100% New Zealand Manuka Honey" was misleading, even though "only between 57.3% and 62.6% of the honey came from Manuka flower nectar." 4 F.4th at 879–80. As the Court noted, reasonable consumers would know that it "is impossible to exercise complete control over where bees forage down to each specific flower or plant." *Id.* at 883. So they would not think that the honey came completely from one particular kind of flower. As the Court concluded, because "Trader Joe's does not insert any additional ingredients to produce the product or mix Manuka honey with other, non-Manuka honeys to dilute it," the "100% New Zealand Manuka Honey" label was not deceptive. *Id.*

This case is even stronger for the defense than *Moore*. Reasonable consumers would understand P&G's advertising to allow for some degree of *de minimis* presence of a commonly occurring chemical bond like

organic fluorine, as long as P&G did not *intentionally* add it (which Plaintiffs do not allege P&G did).

Nature does not produce anything that is completely pure. Considered at the molecular level, not even cotton is 100% cotton. Cotton fibers contain “5 to 8 percent water, and 4 to 6 percent natural impurities.” Cotton, Encyclopedia Britannica, <https://www.britannica.com/topic/cotton-fibre-and-plant> (last visited Mar. 22, 2026). The only way to be certain that any agricultural product is *entirely* free of organic fluorine or similar substances (whether derived from groundwater or rainwater; from the soil; or even from the air) would be to grow it in a completely sterile laboratory—which, to say the least, would be wildly impractical. Nor is it feasible to expect manufacturers to eliminate all traces of molecular bonds like organic fluorine during the manufacturing process.

Because “[a] reasonable consumer would not understand [P&G’s] label here as promising something that is impossible to find,” *Moore*, 4 F.4th at 883, Plaintiffs’ claims were properly dismissed.

B. Plaintiffs fail to satisfy Rule 9(b)'s heightened pleading standard.

Failing to allege fraud with specificity, Plaintiffs' claims also fall short of Rule 9(b)'s pleading standard.

Because Plaintiffs' claims sound in fraud, Plaintiffs must meet Fed. R. Civ. P. 9(b)'s heightened pleading standard. *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125 (9th Cir. 2009) (“we have specifically ruled that Rule 9(b)'s heightened pleading standards apply to claims for violations of the CLRA and UCL”); *see also Bodenburg*, 146 F.4th at 771 (applying Rule 9(b)'s standard to UCL, CLRA, and FAL claims). Rule 9(b) requires that, when “alleging fraud ..., a party must state with particularity the circumstances constituting fraud.” Fed. R. Civ. P. 9(b). To satisfy this standard, a plaintiff asserting fraud-based claims “must set forth what is false or misleading about the defendant’s statements, and *why* they are false.” *Bodenburg*, 146 F.4th at 771 (emphasis added).

Here, Plaintiffs’ statement that “testing” detected some amounts of organic fluorine fails to satisfy Rule 9(b)'s requirement that Plaintiffs allege with particularity *why* P&G's claims are false.

In a similar case, the Sixth Circuit affirmed dismissal when the plaintiffs alleged that the defendant mislabeled its honey by describing

it “as 100% raw Tennessee honey.” *Greer v. Strange Honey Farm, LLC*, 114 F.4th 605, 609 (6th Cir. 2024). Plaintiffs pointed to unspecified “testing” they allegedly conducted which, they claimed, demonstrated that the honey was neither raw nor from Tennessee nor completely honey. The Sixth Circuit found these allegations inadequate, noting that “[t]he complaint gives no explanation of what this alleged ‘testing’ entailed” and failed to “explain how these samples were tested, who conducted the testing, how many samples were tested, when or where the samples were purchased ..., or other details that would adequately show why the statements on [the] labels were false.” *Id.* at 615.

Plaintiffs’ Third Amended Complaint suffers similar defects. Plaintiffs fail to name the third-party tester they used, identify the lab, or state when and where the samples were purchased. ER-023. Most importantly, they fail to state the *outcome* of that testing beyond the conclusory allegation that the tampons “contained organic fluorine.” *Id.* This is not enough to surmount Rule 9(b).

CONCLUSION

For these reasons and those in Procter & Gamble's brief, the Court should order the case dismissed for lack of standing or, in the alternative, should affirm the district court's dismissal for failure to state a claim.

Dated: March 23, 2026

Respectfully submitted,

/s/ Matthew A. Fitzgerald

Matthew A. Fitzgerald

Morgan V. Maloney

MCGUIREWOODS LLP

Gateway Plaza

800 East Canal Street

Richmond, VA 23219

T: (804) 775-4716

T: (804) 775-1080

mfitzgerald@mcguirewoods.com

mmaloney@mcguirewoods.com

Andrew R. Varcoe

Kevin R. Palmer

U.S. Chamber Litigation Center

1615 H Street, NW

Washington, DC 20062

Counsel for Amicus Curiae

the Chamber of Commerce

of the United States of America

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) because it contains 2,724 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

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/s/ Matthew A. Fitzgerald
Matthew A. Fitzgerald

CERTIFICATE OF SERVICE

I hereby certify that on March 23rd, 2026, the foregoing was electronically filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate ACMS system. All participants in the case are registered ACMS users and will be served by the system.

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Matthew A. Fitzgerald