

1 LIVIA M. KISER (SBN 285411)  
 lkiser@kslaw.com  
 2 ETHAN P. DAVIS (SBN 294683)  
 edavis@kslaw.com  
 3 SAMUEL R. DIAMANT (SBN 288738)  
 sdiamant@kslaw.com  
 4 KING & SPALDING LLP  
 50 California Street, Suite 3300  
 5 San Francisco, California 94111  
 Telephone: (415) 318-1200  
 6 Facsimile: (415) 318-1300

7 *Attorneys for Defendant*  
 Walmart Inc.

8  
 9  
 10  
 11 **UNITED STATES DISTRICT COURT**  
 12 **NORTHERN DISTRICT OF CALIFORNIA**  
 13 **SAN FRANCISCO DIVISION**

14 SUSAN GAGETTA and TRACIE GOMEZ,

15 Plaintiffs,

16 v.

17 WALMART INC.,

18 Defendant.

Case No. 3:22-cv-03757-WHO

**WALMART INC.’S MOTION TO  
 DISMISS PLAINTIFFS’ COMPLAINT**

**(FED R. CIV. P. 12(b)(1) & 12(b)(6))**

Date: December 7, 2022  
 Time: 2:00 p.m.

Hon. William H Orrick III

**TABLE OF CONTENTS**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

NOTICE OF MOTION AND MOTION .....1

MEMORANDUM OF POINTS AND AUTHORITIES .....2

I. INTRODUCTION .....2

II. FACTUAL BACKGROUND.....4

A. FDA and USDA are Responsible for the Safety of Food in the U.S. Food Supply .....4

B. The November 2021 Consumer Reports Article Underpinning Plaintiffs’ Claims .....5

C. Plaintiffs’ Allegations Depend Entirely on Consumer Reports .....6

III. ARGUMENT .....8

A. Plaintiffs Allege No Injury and Therefore Lack Article III Standing.....8

1. Plaintiffs Have Alleged No Physical or Economic Injury.....8

2. Plaintiffs Lack Standing to Seek Injunctive Relief.....11

B. Plaintiffs Have Not Pleaded Plausible Reliance on Any Alleged Omission From the Product Label. ....12

C. Plaintiffs’ California and Common Law Claims Fail for Additional Reasons. ....13

1. Plaintiffs’ UCL Claim (Count Two) Also Fails Because Plaintiffs Have Not Alleged Any Unlawful Act or Practice .....14

2. Plaintiffs’ Implied Warranty Claims (Counts Six and Seven) Also Fail Because the Products Were Fit for Ordinary Use.....15

3. Plaintiffs’ Unjust Enrichment Claim (Count Nine) Also Fails Because California Law Does Not Recognize it as an Independent Cause of Action on These Facts.....16

4. Plaintiffs’ Negligent Failure to Warn Claim (Count Ten) Fails For Lack of a Legal Duty. ....16

IV. CONCLUSION.....17

**TABLE OF AUTHORITIES**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**Page(s)**

**Cases**

*Andrade v. Pangborn Corp.*,  
No. C 02–3771, 2004 WL 2480708 (N.D.Cal. Oct. 22, 2004).....15

*Astiana v. Hain Celestial Grp, Inc.*,  
783 F.3d 753 (9th Cir. 2015) .....16

*Backus v. General Mills*,  
122 F. Supp. 3d 909 (N.D. Cal. 2015) .....14

*Bell Atlantic Corp. v. Twombly*,  
550 U.S. 544 (2007).....8

*Birdsong v. Apple*,  
590 F.3d 955 (9th Cir. 2009) .....8, 15

*Boysen v. Walgreen Co.*  
No. C 11-06262 SI, 2012 WL 2953069 (N.D. Cal. July 19, 2012) .....10

*Brazil v. Dole Food Co.*,  
935 F. Supp. 2d 947 (N.D. Cal. 2013) .....16

*Colgate v. JUUL Labs, Inc.*,  
345 F. Supp. 3d 1178 (N.D. Cal. 2018) .....15

*Daugherty v. American Honda Motor Co., Inc.*,  
144 Cal. App. 4th 824, 835 (Cal. Ct. App. 2006) .....12

*Davidson v. Kimberly-Clark Corp.*,  
889 F.3d 956(9th Cir. 2018) ..... 11-12

*Durell v. Sharp Healthcare*,  
183 Cal. App. 4th 1350 (2010) .....14

*Frye v. L’Oreal USA, Inc.*,  
583 F. Supp. 2d 954 (N.D. Ill. 2008) .....11

*In re Hard Disk Drive Suspension Assemblies Antitrust Litig.*,  
No. 19-MD-02918-MMC, 2021 WL 4306018 (N.D. Cal. Sept. 22, 2021) .....16

*Herrington v. Johnson & Johnson Consumer Companies, Inc.*,  
No. C 09-1597 CW, 2010 WL 3448531 (N.D. Cal. Sept. 1, 2010).....9, 10

*Jackson v. Gen. Mills, Inc.*,  
No. 18CV2634-LAB, 2020 WL 5106652 (S.D. Cal. Aug. 28, 2020) .....11

1 *Koronthaly v. L'Oreal USA, Inc.*,  
374 F. App'x 257 (3d Cir. 2010) .....10

2 *Lanovaz v. Twinings N. Am., Inc.*,  
3 726 Fed. Appx. 590 (9th Cir. 2018).....12

4 *Lujan v. Defs. of Wildlife*,  
5 504 U.S. 555 (1992).....8, 9

6 *Mariscal v. Graco, Inc.*,  
52 F. Supp. 3d 973 (N.D. Cal. 2014) .....17

7 *Mirkin v. Wasserman*,  
8 5 Cal. 4th 1082 (1993) .....12

9 *Mocek v. Alfa Leisure, Inc.*,  
10 114 Cal.App. 4th 402, 406 (2003) .....15

11 *Myers v. BMW of N. Am., LLC*,  
No. 16-CV-00412-WHO, 2016 WL 11791913 (N.D. Cal. Dec. 19, 2016).....12

12 *Pels v. Keurig Dr. Pepper, Inc.*,  
13 No. 19-CV-03052-SI, 2019 WL 5813422 (N.D. Cal. Nov. 7, 2019) .....9, 10

14 *Rodriguez v. Just Brands USA, Inc.*,  
15 No. 220CV04829ODWPLAX, 2021 WL 1985031 (C.D. Cal. May 18, 2021).....12

16 *Salmon Spawning & Recovery Alliance v. Gutierrez*,  
545 F.3d 1220 (9th Cir. 2008) .....8, 9, 11

17 *Schmier v. U.S. Court of Appeals for 9th Circuit*,  
18 279 F.3d 817 (9th Cir. 2002) .....8

19 *Silver v. Stripe Inc.*,  
20 No. 4:20-CV-08196-YGR, 2021 WL 3191752 (N.D. Cal. July 28, 2021).....16

21 *Vess v. Ciba-Geigy Corp. USA*,  
317 F.3d 1097 (9th Cir. 2003) .....13

22 **Statutes and Rules**

23 21 U.S.C. § 331(a) .....4

24 21 U.S.C. § 342(a)(1).....4

25 21 U.S.C. § 393(b) .....4

26 Fed. R. Civ. P. § 8.....1

27 Fed. R. Civ. P. § 9(b) .....13

28

1 Fed. R. Civ. P. § 12(b)(1).....1

2 Fed. R. Civ. P. § 12(b)(6).....1

3 **Other Authorities**

4 Cal. Bus. & Prof. Code § 17200 *et seq* .....7, 14

5 Cal. Bus. & Prof. Code § 17500 .....8

6 Cal. Bus. & Prof. Code § 1750 *et seq* .....8

7 Cal. Civ. Code § 1790 *et seq*.....8

8 **Publications**

9 FDA, *Closer to Zero: Action Plan for Baby Foods*, available at:

10 [https://www.fda.gov/food/metals-and-your-food/closer-zero-action-plan-baby-](https://www.fda.gov/food/metals-and-your-food/closer-zero-action-plan-baby-foods)

11 [foods](https://www.fda.gov/food/metals-and-your-food/closer-zero-action-plan-baby-foods).....5, 13, 14

12 FDA, *Metals and Your Food*,

13 available at: [https://www.fda.gov/food/chemical-contaminants-metals-](https://www.fda.gov/food/chemical-contaminants-metals-pesticides-food/metals-and-your-food)

14 [pesticides-food/metals-and-your-food](https://www.fda.gov/food/chemical-contaminants-metals-pesticides-food/metals-and-your-food) ..... *passim*

15 FDA, *FDA Shares Action Plan for Reducing Exposure to Toxic Elements from*

16 *Foods for Babies and Young Children*,

17 available at: [https://www.fda.gov/food/cfsan-constituent-updates/fda-shares-](https://www.fda.gov/food/cfsan-constituent-updates/fda-shares-action-plan-reducing-exposure-toxic-elements-foods-babies-and-young-children)

18 [action-plan-reducing-exposure-toxic-elements-foods-babies-and-young-](https://www.fda.gov/food/cfsan-constituent-updates/fda-shares-action-plan-reducing-exposure-toxic-elements-foods-babies-and-young-children)

19 [children](https://www.fda.gov/food/cfsan-constituent-updates/fda-shares-action-plan-reducing-exposure-toxic-elements-foods-babies-and-young-children) .....3

20 USDA, *Closer to Zero: Partnership to Protect Our Food*, available at:

21 [https://www.usda.gov/media/blog/2022/01/21/closer-zero-partnership-protect-](https://www.usda.gov/media/blog/2022/01/21/closer-zero-partnership-protect-our-food)

22 [our-food](https://www.usda.gov/media/blog/2022/01/21/closer-zero-partnership-protect-our-food).....5

23 Lisa L. Gill, *Your Herbs and Spices Might Contain Arsenic, Cadmium, and Lead*,

24 CONSUMER REPORTS, Nov. 9, 2021 ..... *passim*

25

26

27

28

**NOTICE OF MOTION AND MOTION**

1  
2 PLEASE TAKE NOTICE that on December 7, 2022 at 2:00 p.m., or as soon thereafter as  
3 this matter may be heard, in Courtroom 2, San Francisco Courthouse, 17th Floor, 450 Golden Gate  
4 Avenue, San Francisco CA 94102, before the Honorable William H. Orrick III, Defendant  
5 Walmart Inc. (“Walmart”) will and hereby does move the Court for entry of an order dismissing  
6 Plaintiffs’ Susan Gagetta and Tracie Gomez (“Plaintiffs”) Complaint filed in this action on June  
7 24, 2022 (ECF No. 1) pursuant to Federal Rules of Civil Procedure 8, 9(b), 12(b)(1), and 12(b)(6).

8 There is good cause to grant this Motion, including because:

- 9 1. Plaintiffs have not alleged any injury or future harm, and therefore lack Article III  
10 standing to pursue their claims and to seek injunctive relief.
- 11 2. Plaintiffs have not pleaded any plausible reliance on any alleged omission from the  
12 product label.
- 13 3. Plaintiffs cannot state a claim for “unlawful” conduct under the UCL because there  
14 is no allegation that the products fail to comply with FDA regulations (because the  
15 products certainly do).
- 16 4. Plaintiffs’ breach of implied warranty claims also fail because Plaintiffs cannot  
17 allege that the challenged products were not fit for their ordinary purpose.
- 18 5. Plaintiffs’ unjust enrichment claim also fails because California law does not  
19 recognize it as an independent cause of action on these facts.
- 20 6. Plaintiffs’ negligent failure to warn claim also fails for lack of a legal duty.

21 The Motion is based upon this Notice of Motion, Motion, and Memorandum and Points of  
22 Authorities; the Declaration of Livia M. Kiser (“Kiser Decl.”); the other pleadings and papers on  
23 file; and any information and oral argument that may be requested or permitted by the Court.

24  
25  
26  
27  
28

**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. INTRODUCTION**

This is a lawsuit without any injury based on trace elements (metals) in herb and spice products which are naturally occurring in the food supply and cannot be avoided. Plaintiffs' complaint trades on false information debunked by judicially noticeable, science-based facts published by federal agencies in charge of overseeing this nation's food supply. Elements exist in the air, water and soil, are frequently taken up in tiny amounts during a plant's growing process and cannot be avoided no matter how a plant is cultivated. As a result, they naturally exist in trace amounts in foods, including herbs and spices – which consumers consume in minute amounts – meaning the amount of naturally occurring metals a person may consume from eating herbs and spices is miniscule. Consequently, it is not surprising the pleading contains no plausible allegation that the Plaintiffs (or anyone else) have been injured by purchasing certain Great Value herbs and spices from Walmart stores. Without any theory that Plaintiffs have been harmed, or that they are likely to be harmed, Plaintiffs do not have Article III standing. This action is therefore properly dismissed.

The complaint is based entirely on a nonauthoritative Consumer Reports article published in November 2021 titled “Your Herbs and Spices Might Contain Arsenic, Cadmium, and Lead.”<sup>1</sup> The vague conclusions of this article are the focal point of Plaintiffs' speculative complaint which does not (and cannot) allege that they have been injured by the trace metals that are indisputably naturally occurring. No regulatory action has been taken by the agencies in charge of the food supply, namely, the United States Food and Drug Administration (“FDA”) and Department of Agriculture (“USDA”). The FDA and USDA acknowledge that naturally occurring arsenic, cadmium and lead are ubiquitous in the food supply, are taken up during the growing process no matter how an agricultural product is cultivated (*e.g.*, organic, home-grown, small farm, etc.), and that such naturally occurring metals cannot be avoided. *See* Kiser Decl. Ex. B, FDA.gov, *Metals*

---

<sup>1</sup> *See* Kiser Decl. Ex. A, Lisa L. Gill, Your Herbs and Spices Might Contain Arsenic, Cadmium, and Lead, CONSUMER REPORTS, Nov. 9, 2021, <https://www.consumerreports.org/food-safety/your-herbs-and-spices-might-contain-arsenic-cadmium-and-lead/> (“CR Article”).

1 *and Your Food*, available at: <https://www.fda.gov/food/chemical-contaminants-metals-pesticides->  
2 [food/metals-and-your-food](https://www.fda.gov/food/chemical-contaminants-metals-pesticides-) (accessed Sept. 19, 2022) (“[m]etals, like other naturally occurring  
3 elements, enter our food supply through our air, water and soil”).<sup>2</sup>

4 Despite these important facts, the Consumer Reports article purports to describe (contrary  
5 to the statements of the FDA and USDA) that consumption of foods containing naturally occurring  
6 elements in ordinary amounts could somehow be harmful to a person’s health, though none of the  
7 “concerns” it mentions are described. *See generally* CR Article. The article focuses on the  
8 potential presence of such metals in herbs and spices. In its own words, the article is described as  
9 a “spot check of the market” which (the article states) “*cannot be used to draw definitive*  
10 *conclusions about brands.*” CR Article 11 (emphasis added). Based on questionable assumptions  
11 and methodology, the article speculates that consumption of certain herbs and spices over  
12 recommended serving sizes “*could, over time, pose a health risk*” to children and possibly adults  
13 as well. *Id.* (emphasis added). The author then falsely claims consumers can reduce the levels of  
14 naturally occurring metals in herbs and spices by growing and drying their own. According to the  
15 USDA and FDA, however, home grown agricultural products may have *higher* levels of trace  
16 metals than those that are store-bought. *See* Kiser Decl. Ex. C, FDA.gov, *FDA Shares Action Plan*  
17 *for Reducing Exposure to Toxic Elements from Foods for Babies and Young Children*, available  
18 at <https://www.fda.gov/food/cfsan-constituent-updates/fda-shares-action-plan-reducing->  
19 [exposure-toxic-elements-foods-babies-and-young-children](https://www.fda.gov/food/cfsan-constituent-updates/fda-shares-action-plan-reducing-) (accessed Sept. 19, 2022).

20 Plaintiffs fail to state a claim because they have not alleged any physical or economic injury  
21 based on their alleged purchases of certain Great Value herbs and spices. Plaintiffs do not even  
22 definitively allege that the products contain heavy metals, prevaricating that the products “contain  
23 (*or risk containing*)” heavy metals (emphasis added). Even so, the presence of these naturally

---

24 <sup>2</sup> Pursuant to Federal Rule of Evidence 201, Walmart requests that the Court take judicial  
25 notice of the public statements made on FDA and USDA websites as referenced herein and  
26 attached as Exhibits B-E to the Declaration of Livia M. Kiser. *See Gerritsen v. Warner Bros.*  
27 *Ent. Inc.*, 112 F. Supp. 3d 1011, 1033 (C.D. Cal. 2015) (“Under Rule 201, the court can take  
28 judicial notice of public records and government documents available from reliable sources on  
the Internet, such as websites run by governmental agencies.”) (cleaned up); *see also Santos v.*  
*Minnesota Life Ins. Co.*, No. 20-CV-06707-PJH, 2021 WL 5302950, at \*4 (N.D. Cal. Nov. 15,  
2021) (taking judicial notice of government webpages).



1 occurring elements in miniscule quantities cannot be avoided. Plaintiffs do not allege that they  
2 have experienced any harm from the herbs and spices alleged in the complaint. In fact, they do  
3 not even allege that they consumed these herbs and spices at all.

4 Because Plaintiffs lack Article III standing to bring this suit, along with the additional  
5 reasons stated below, this action is properly dismissed in its entirety.

## 6 **II. FACTUAL BACKGROUND**

### 7 **A. FDA and USDA are Responsible for the Safety of Food in the U.S. Food 8 Supply**

9 The Federal Food, Drug and Cosmetic Act (“FDCA”) requires that the FDA “promote the  
10 public health by promptly and efficiently reviewing clinical research and taking appropriate action  
11 on the marketing of regulated products in a timely manner” and “with respect to such products,  
12 protect the public health by ensuring that [] foods are safe, wholesome, sanitary, and properly  
13 labeled . . .” 21 U.S.C. § 393(b)(1)-(2)(A). Relatedly, the FDA may commence enforcement  
14 actions to remove “adulterated” products from the U.S. food supply. *See* 21 U.S.C. § 331(a). A  
15 food is deemed to be adulterated under the FDCA “[i]f it bears or contains any poisonous or  
16 deleterious substance which may render it injurious to health; but in case the substance is not an  
17 added substance such food shall not be considered adulterated under this clause *if the quantity of*  
18 *such substance in such food does not ordinarily render it injurious to health.*” 21 U.S.C. §  
19 342(a)(1) (emphasis added). Plaintiffs do not allege that any of the herb and spice products  
20 identified in the complaint have been found to be “adulterated” by the FDA. And rightly so  
21 because they have not.

22 In accordance with the charge above, “the FDA monitors, tests, and sets standards for  
23 metals in foods, animal feed and in cosmetics. When the level of metals is determined to be unsafe,  
24 the FDA uses its authority to take action on a case-by-case basis.” FDA.gov, *Metals and Your*  
25 *Food*, available at: [https://www.fda.gov/food/chemical-contaminants-metals-pesticides-](https://www.fda.gov/food/chemical-contaminants-metals-pesticides-food/metals-and-your-food)  
26 [food/metals-and-your-food](https://www.fda.gov/food/chemical-contaminants-metals-pesticides-food/metals-and-your-food) (accessed Sept. 19, 2022). The FDA acknowledges that “[m]etals, like  
27 other naturally occurring elements, enter our food supply through our air, water and soil.” *Id.*  
28 Therefore, some level of one or more metals (including arsenic, cadmium and/or lead) is inevitable

1 in nearly all agricultural products. The FDA is actively monitoring the levels of these elements  
2 across the nation's food supply, including through the FDA's Toxic Elements Working Group  
3 which "is looking at the presence of metals in all products . . . and identifying the areas where the  
4 FDA can have the greatest impact on reducing exposures. The workgroup is focusing first on: lead,  
5 arsenic, cadmium, and mercury in foods, cosmetics, and dietary supplements, because high levels  
6 of exposure to those metals are likely to have the most significant impact on public health." *Id.*  
7 For example, the FDA collects data on contaminants and nutrients in foods as part of its Total Diet  
8 Study and publishes test results, including test results for heavy metals, on its website. *See id.*  
9 Again, none of the products alleged in this lawsuit have been flagged by regulators for any  
10 concerning content of naturally occurring metals.

11 The USDA and FDA are collaborating on an action plan called "Closer to Zero" to reduce  
12 exposure to heavy metals from foods eaten by babies and young children "to as low as possible."  
13 *See Kiser Decl. Exs. D-E, FDA.gov, Closer to Zero: Action Plan for Baby Foods*, available at:  
14 <https://www.fda.gov/food/metals-and-your-food/closer-zero-action-plan-baby-foods> (accessed  
15 Sept. 19, 2022); *USDA.gov, Closer to Zero: Partnership to Protect Our Food*, available at:  
16 <https://www.usda.gov/media/blog/2022/01/21/closer-zero-partnership-protect-our-food> (accessed  
17 Sept. 19, 2022). These regulators acknowledge that these elements in the nation's food supply are  
18 natural and cannot be avoided. They have focused on regulating areas of potential impact to public  
19 health, such as foods eaten by babies and young children. Regulators have not focused on the  
20 content of metal elements that are naturally occurring in herbs and spices. This is not surprising  
21 because herbs and spices do not form a significant component of a person's diet because they are  
22 consumed in very small quantities and mostly by older people. In short, the federal agencies who  
23 are actively monitoring potential exposures to these elements in the food supply have expressed  
24 no concern about the amount of those elements that are naturally occurring in herbs or spices.

25 **B. The November 2021 Consumer Reports Article Underpinning Plaintiffs'**  
26 **Claims**

27 This lawsuit turns a blind eye to science-based conclusions of government regulators in  
28 favor of an article published on the internet under the banner of Consumer Reports, a missive that

1 expressly disclaims its own validity: “[o]ur findings are a spot check of the market and *cannot be*  
2 *used to draw definitive conclusions about brands.*” CR Article 11 (emphasis added).

3 The Consumer Reports article does not dispute essential facts publicly stated by the FDA  
4 and USDA. The article admits the scientific fact that “[h]eavy metals can show up in food if the  
5 water or soil where food is grown contains them naturally . . .” CR Article 5; *see also* FDA.gov,  
6 *Metals and Your Food*, available at: [https://www.fda.gov/food/chemical-contaminants-metals-](https://www.fda.gov/food/chemical-contaminants-metals-pesticides-food/metals-and-your-food)  
7 [pesticides-food/metals-and-your-food](https://www.fda.gov/food/chemical-contaminants-metals-pesticides-food/metals-and-your-food) (accessed Sept. 19, 2022) (“[m]etals, like other naturally  
8 occurring elements, enter our food supply through our air, water and soil.”) The Consumer Reports  
9 article also acknowledges that the FDA “is responsible for the safety of herbs and spices” and (2)  
10 that “[t]he agency hasn’t set limits on heavy metals in food, except in a few cases, such as arsenic  
11 in infant rice cereal and lead in candy.” CR Article 7.

12 The Consumer Reports article then describes its “spot check” of the market involving the  
13 purchasing and purported testing of various herbs and spices in three states during a limited period.  
14 The article’s conclusions are presented with the vague metric of colored red dots for “some  
15 concern” (one red dot), “moderate concern” (two red dots), and “high concern” (three red dots).  
16 CR Article 11. The only explanation for the grading system is “[t]he more red boxes [sic] next to  
17 a product, the higher the concern.” *Id.* There is no scientific explanation whatsoever for the  
18 conclusions of this article, or the methodology underpinning the “results.”<sup>3</sup> There is also no  
19 description of the “concern” arising from the consumption of any products.<sup>4</sup>

### 20 C. Plaintiffs’ Allegations Depend Entirely on Consumer Reports

21 The Consumer Reports article is the linchpin of Plaintiffs’ claims. *See* Compl. ¶¶ 2, 16-  
22 23. Based solely on the Consumer Reports article, the complaint alleges that “Great Value’s Basil  
23 Leave, Chili Powder, Ground Cumin, Organic Ground Ginger, and Organic Paprika . . . contain

25 <sup>3</sup> The testing “methodology” described in the article raises more questions than it answers.  
26 The report references “combined levels of the three heavy metals” (*i.e.*, arsenic, cadmium, and  
27 lead) without explaining how/why those individual substances are properly “combined” into a  
28 single purported “concern.” *See* CR Article 11.

<sup>4</sup> Even so, the most “concern” Consumer Reports can muster about the Great Value  
products mentioned is “some concern,” not “high concern” or even “moderate concern.” *Id.* at  
11-18.

1 (*or risk containing*) lead, arsenic, and cadmium...” *Id.* ¶ 1 (emphasis added). There is no  
2 definitive allegation that the products contain any of these trace metals; rather the pleading  
3 consistently caveats they “contain (*or risk containing*).” But as set forth above, the presence of  
4 those elements would not be any surprise at all considering that the elements exist in nature and  
5 the air, water, and soil through which agricultural products are cultivated. Nevertheless, the  
6 Complaint includes a talismanic assertion that “[h]ad Defendant disclosed on the label that the  
7 Products contained (*or risked containing*) unsafe toxic Heavy Metals, [Plaintiff] would have been  
8 aware of that fact and would not have purchased the products or would have paid less for them”  
9 (*id.* ¶¶ 5, 7), even though all agricultural products, including herbs and spices, either contain or are  
10 at the “risk of” containing these substances.

11 There are two named Plaintiffs who purport to allege claims on behalf of themselves and a  
12 proposed class. Plaintiff Susan Gagetta claims to have purchased at least Great Value’s Chili  
13 Powder and Organic Paprika “as recently as May 2022” from Instacart and a Walmart located in  
14 Antioch, California. *Id.* ¶ 5. Plaintiff Tracie Gomez claims to have purchased Great Value’s Basil  
15 Leave, Chili Powder and Ground Cumin “monthly during the class period” from a Walmart located  
16 in Morgan Hill, California. *Id.* ¶ 7. Neither Plaintiff claims to have purchased Great Value’s  
17 Organic Ground Ginger despite their demand to recover “damages” on that product. *See id.* ¶ 1.

18 The complaint is notable for the allegations that it does *not* contain. The complaint glosses  
19 over the scientific fact (admitted by the Consumer Reports article) that trace levels of metals are  
20 naturally occurring and therefore inevitable in the food supply (including in herbs and spices).  
21 Plaintiffs have not alleged that they have been injured by the consumption of the Great Value spice  
22 products which they allegedly purchased. *See generally* Compl. Nor could they plausibly so  
23 allege, given (as noted) trace elements are essentially ubiquitous across the food supply. And there  
24 is no allegation that the Plaintiffs even consumed the products that they allegedly bought. *See*  
25 *generally* Compl.

26 Plaintiffs bring ten causes of action under: (1) California’s Unfair Competition Law  
27 (“UCL”), California Business and Professions Code § 17200, *et seq.*, for alleged fraudulent acts  
28 and practices (Compl. ¶¶ 79-89); (2) California’s UCL for alleged unlawful acts and practices (*id.*

¶¶ 90-100); (3) California’s UCL for alleged unfair acts and practices (*id.* ¶¶ 101-113); (4) California’s False Advertising Law (“FAL”), California Business and Professions Code § 17500 (*id.* ¶¶ 114-123); (5) California’s Consumers Legal Remedies Act (“CLRA”), California Civil Code § 1750, *et seq.* (*id.* ¶¶ 124-134); (6) California’s Song-Beverly Act, Cal. Civ. Code § 1790 *et seq.*, for alleged breach of implied warranty (*id.* ¶¶ 135-145); (7) breach of the implied warranty of merchantability (*id.* ¶¶ 146-158); (8) common law fraud (*id.* ¶¶ 159-165); (9) unjust enrichment (*id.* ¶¶ 166-177); and (10) negligent failure to warn (*id.* ¶¶ 178-187).

### III. ARGUMENT

Plaintiffs’ complaint fails as a matter of law for multiple reasons. First, Plaintiffs have not alleged any injury that confers standing for their claims for “damages” or injunctive relief. Second, Plaintiffs do not allege any plausible theory of reliance on alleged omissions from the product labels, “omissions” that are immaterial as a matter of law. In addition, Plaintiffs’ various claims under California and common law fail to state a claim for various additional reasons. In short, Plaintiffs’ complaint fails to allege any sufficiently plausible claim and is properly dismissed in its entirety. *See generally Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (“[f]actual allegations must be enough to raise a right to relief above the speculative level”).

#### A. Plaintiffs Allege No Injury and Therefore Lack Article III Standing.

##### 1. Plaintiffs Have Alleged No Physical or Economic Injury.

To establish Article III standing, a plaintiff must show: “(1) he or she has suffered an injury in fact that is concrete and particularized, and actual or imminent; (2) the injury is fairly traceable to the challenged conduct; and (3) the injury is likely to be redressed by a favorable court decision.” *Salmon Spawning & Recovery Alliance v. Gutierrez*, 545 F.3d 1220, 1225 (9th Cir. 2008); *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992) (“[t]he party invoking federal jurisdiction bears the burden of establishing these elements”); *see also Schmier v. U.S. Court of Appeals for 9th Circuit*, 279 F.3d 817, 821 (9th Cir. 2002) (“[a] concrete injury is one that is “distinct and palpable . . . as opposed to merely abstract”) (citations omitted). Claims brought under California law must satisfy federal standing requirements under Article III. *See Birdsong v. Apple*, 590 F.3d 955, n.4 (9th Cir. 2009) (citing *Cantrell v. City of Long Beach*, 241 F.3d 674, 683 (9th Cir. 2001)) (holding that a

1 party asserting state law claims in federal court “must meet the stricter federal standing  
2 requirements of Article III.”). Plaintiffs’ claims allege no injury and therefore fail separately and  
3 independently under each of the three required factors.

4 Plaintiffs have not alleged injury that is “concrete and particularized” and “actual” or  
5 “imminent.” *Salmon Spawning*, 545 F.3d at 1225; *Lujan*, 504 U.S. at 560. Plaintiffs have not  
6 even alleged that the products they bought contain any heavy metals at all: instead, they caveat  
7 the products “contain (*or risk containing*) lead, arsenic, and cadmium . . .” *See, e.g.*, Compl. ¶ 1  
8 (emphasis supplied). Neither have Plaintiffs alleged that they consumed the spices they  
9 purportedly purchased. Plaintiffs have not plausibly alleged any actual or imminent harm resulting  
10 from their alleged purchases of certain Great Value spices. Plaintiffs merely allege that they would  
11 not have purchased these Great Value products had the potential presence of trace naturally-  
12 occurring heavy metals been revealed to them on the product packaging.

13 Judge Wilken’s decision in *Herrington v. Johnson & Johnson Consumer Companies, Inc.*,  
14 No. C 09-1597 CW, 2010 WL 3448531 (N.D. Cal. Sept. 1, 2010) is both instructive and  
15 dispositive. In that case, plaintiff purchased children’s bath products containing ingredients that  
16 “*may be carcinogenic for humans*” as alleged by plaintiff. *Id.* at \*3 (original emphasis). Judge  
17 Wilken concluded that “[t]he risk Plaintiffs plead is too attenuated and not sufficiently imminent  
18 to confer Article III standing.” *Id.* Any potential physical harm was judged to be “too speculative  
19 and uncertain to confer Article III standing.” *Id.* at \*4. Moreover, there was no economic harm  
20 alleged because “Plaintiffs do not plead a distinct risk of harm from a defect . . . that would make  
21 such an economic injury cognizable.” *Id.* In similar fashion, Judge Ilston dismissed claims against  
22 mineral spring water which allegedly contained violative levels of arsenic because that plaintiff  
23 failed “to plead a particularized injury by failing to plead the water *he* purchased contained  
24 violative arsenic levels.” *Pels v. Keurig Dr. Pepper, Inc.*, No. 19-CV-03052-SI, 2019 WL  
25 5813422, at \*5 (N.D. Cal. Nov. 7, 2019) (original emphasis). As in *Pels*, these Plaintiffs do not  
26 make the “straightforward allegation” that the Great Value products they allegedly purchased  
27 contained high (or indeed any) quantities of heavy metals. *See, e.g.*, Compl. ¶¶ 1, 4, 62, 63, 65-66  
28 (emphasis added).

1 Even if Plaintiffs alleged that the Great Value products definitively contain trace levels of  
2 one or more metals, though they do not, this would still not be sufficient to state a claim for injury  
3 under analogous Northern District case law. *Boysen v. Walgreen Company* concerned allegations  
4 of high arsenic levels in fruit juice. No. C 11-06262 SI, 2012 WL 2953069 (N.D. Cal. July 19,  
5 2012). The *Boysen* court concluded that the plaintiff had not alleged any concrete injury, even  
6 though he pleaded that the products contained harmful toxins, because plaintiff “does not expressly  
7 allege that the levels of lead and arsenic contained in defendant’s juices are likely to cause physical  
8 harm.” *Id.* at \*7. The same is true here. There are no allegations that the Great Value products  
9 contain levels of elements likely to cause physical harm. *See also Koronthaly v. L’Oreal USA,*  
10 *Inc.*, 374 F. App’x 257, 259 (3d Cir. 2010) (“[plaintiff] has asserted only a subjective allegation  
11 that the trace amounts of lead in the lipsticks are unacceptable to her, not an injury-in-fact sufficient  
12 to confer Article III standing”). It is a scientific fact that herbs and spice products (like all  
13 agricultural products) are likely to contain trace elements of naturally occurring metals because  
14 they are present in the air, water and soil and taken up during the growing process. But this  
15 scientific fact does not equate to injury: it’s no more cognizable than the possibility of falling due  
16 to the existence of gravity. As in *Herrington, Pels*, and *Koronthaly*, the Plaintiff cannot invoke  
17 the mere potential presence of naturally existing trace elements in certain agricultural products to  
18 claim “injury.” As courts in this District have consistently held, the mere existence of naturally  
19 occurring substances, even if alleged to be “harmful” with theoretical potential harm, is too  
20 attenuated to confer Article III standing.

21 Plaintiff’s theory of alleged economic harm also fails under case law that cannot be  
22 meaningfully distinguished. Plaintiffs make the bare claim that they would not have purchased  
23 the products, or that they would have paid less for them, had they known of the risk that they  
24 contained heavy metals. *See* Compl. ¶¶ 5, 7. But as the FDA and USDA have said (and as even  
25 Consumer Reports admits) these trace elements are ubiquitous in the food supply in trace amounts,  
26 including in herbs and spices, and therefore there is no alternative to their consumption: they are,  
27 to a greater or lesser extent, *in food*. There is also no allegation that the spices somehow failed in  
28 their essential purpose of seasoning and flavoring other foods. Plaintiffs therefore fail to allege

1 any economic consequence that would give rise to injury. *See Frye v. L’Oreal USA, Inc.*, 583 F.  
2 Supp. 2d 954, 958 (N.D. Ill. 2008) (“there is no allegation that the presence of lead in the lipstick  
3 had any observable economic consequences”).

4 Because Plaintiffs fail to allege any concrete and particularized physical or economic injury  
5 based on their alleged purchase of certain Great Value herbs and spices, they cannot allege the  
6 remaining factors that “(2) the injury is fairly traceable to the challenged conduct; and (3) the  
7 injury is likely to be redressed by a favorable court decision.” *See Salmon Spawning*, 545 F.3d at  
8 1225. Because Plaintiffs have not been injured at all, this case is properly dismissed.

9 **2. Plaintiffs Lack Standing to Seek Injunctive Relief.**

10 Moreover, Plaintiffs lack standing to seek injunctive relief because they fail to allege  
11 “actual and imminent” and “certainly impending” threatened or future injury. *Davidson v.*  
12 *Kimberly-Clark Corp.*, 889 F.3d 956, 967(9th Cir. 2018). The complaint alleges that Plaintiffs  
13 “continue[] to desire to purchase the Products” (Compl. ¶¶ 6-7) but will somehow struggle in their  
14 decision-making unless Walmart ensures the products are “safe and healthy.” *See id.* But there is  
15 no allegation in the complaint that the products are unsafe or unhealthy (because they are both safe  
16 and healthy). Unlike in *Davidson*, where the plaintiff had no way of determining the veracity of  
17 the labels, Plaintiffs now know the “truth” (*i.e.*, that trace metals are in herbs and spices because  
18 they are taken up during the growing process). Plaintiffs therefore cannot possibly be deceived in  
19 the future (except by Consumer Reports, which falsely suggests a person can grow his or her own  
20 herbs and spices to avoid trace metals, which is not true). *See Jackson v. Gen. Mills, Inc.*, No.  
21 18CV2634-LAB, 2020 WL 5106652, at \*5 (S.D. Cal. Aug. 28, 2020) (“where a plaintiff learns  
22 information during litigation that enables her to evaluate product claims and make appropriate  
23 purchasing decisions going forward, an injunction would serve no meaningful purpose as to that  
24 plaintiff”).

25 Based on their present knowledge of the products, including (ostensibly) that all herbs and  
26 spices are at risk of containing trace levels of certain metals, Plaintiffs are not at risk of future harm  
27 under the *Davidson* test. *See Davidson*, 889 F.3d at 970 (“[i]n other cases, the threat of future  
28 harm may be the consumer’s plausible allegations that she might purchase the product in the future



1 . . . as she may reasonably, but incorrectly, assume the product was improved”); *see also Lanovaz*  
 2 *v. Twinings N. Am., Inc.*, 726 Fed. Appx. 590, 591 (9th Cir. 2018) (plaintiff’s statement that she  
 3 would “consider buying” defendant’s product in the future did not satisfy the “actual or imminent”  
 4 standard for future harm); *Rodriguez v. Just Brands USA, Inc.*, No. 220CV04829ODWPLAX,  
 5 2021 WL 1985031, at \*4 (C.D. Cal. May 18, 2021) (collecting cases with deficient pleadings of a  
 6 past consumer’s “some day intention”).

7 **B. Plaintiffs Have Not Pleaded Plausible Reliance on Any Alleged Omission**  
 8 **From the Product Label.**

9 Plaintiffs allege violation of California and common law based on an alleged failure to  
 10 disclose that the Products contain (or risk containing) heavy metals. *See* Compl. ¶¶ 82, 95, 106,  
 11 118, 129, 141, 156, 161, 170, 185. “To prove reliance on an omission, a plaintiff must show that  
 12 the defendant’s nondisclosure was an immediate cause of the plaintiff’s injury-producing  
 13 conduct.” *Myers v. BMW of N. Am., LLC*, No. 16-CV-00412-WHO, 2016 WL 11791913, at \*3  
 14 (N.D. Cal. Dec. 19, 2016) (citation omitted). While an omission can constitute a misleading  
 15 statement, “to be actionable the omission must be contrary to a representation actually made by  
 16 the defendant, or an omission of a fact the defendant was obliged to disclose.” *Mirkin v.*  
 17 *Wasserman*, 5 Cal. 4th 1082, 1091-95 (1993) (quoting *Daugherty v. American Honda Motor Co.,*  
 18 *Inc.*, 144 Cal. App. 4th 824, 835 (Cal. Ct. App. 2006)).

19 Plaintiffs do not (and cannot) allege any reasonable reliance on any alleged omission.  
 20 Plaintiffs’ own cited Consumer Reports Article, along with available FDA publications, confirm  
 21 that metals are naturally occurring and present across the food supply. *See* CR Article 5 (“[h]eavy  
 22 metals can show up in food if the water or soil where food is grown contains them naturally ..”);  
 23 FDA.gov, *Metals and Your Food*, available at: [https://www.fda.gov/food/chemical-contaminants-](https://www.fda.gov/food/chemical-contaminants-metals-pesticides-food/metals-and-your-food)  
 24 [metals-pesticides-food/metals-and-your-food](https://www.fda.gov/food/chemical-contaminants-metals-pesticides-food/metals-and-your-food) (accessed Sept. 19, 2022) (“[m]etals, like other  
 25 naturally occurring elements, enter our food supply through our air, water and soil”).

26 Since trace amounts of heavy metals are largely inevitable in the food supply, nearly every  
 27 food product sold in stores will “risk containing” heavy metals in trace amounts. The disclosure  
 28 that effectively all food products “risk containing” some heavy metal thus would be meaningless.

1 The FDA (and USDA) actively regulate in this area and to date have not set levels for trace  
2 amounts of naturally occurring heavy metals in herbs and spices (or most other agricultural  
3 products, for that matter) because they are taken up naturally during the growing process. As the  
4 FDA has observed, reducing the levels of elements in foods is “complicated and multifaceted,”  
5 and it is “crucial to ensure that measures taken to limit arsenic, lead, [and] cadmium ... in foods  
6 does not have unintended consequences—like eliminating from the marketplace foods that have  
7 significant nutritional benefits or reducing the presence of one element while increasing another.”  
8 FDA.gov, *Closer to Zero: Action Plan for Baby Foods*, available at:  
9 <https://www.fda.gov/food/metals-and-your-food/closer-zero-action-plan-baby-foods> (accessed  
10 Sept. 19, 2022).

11 Moreover, if the simple mention of an unidentified “concern” in an online publication  
12 could create a disclosure obligation, courts would be inundated with spurious claims such as this,  
13 and the national regulation of the U.S. food supply would be utterly undermined. The law and the  
14 Constitution require far more than what Plaintiffs allege.

15 Plaintiffs fall well short of pleading fraud with the particularity required by law. *See* Fed.  
16 R. Civ. Pro. 9(b); *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003) (requiring  
17 “who, what, when, where, and how of the misconduct charged” to be pled with specificity). A  
18 person cannot be defrauded by the alleged omission of the scientific fact that agricultural products  
19 contain trace quantities of metals from the environments in which they were grown. There can be  
20 no specificity alleged because the theory of reliance is entirely implausible. A consumer cannot  
21 be induced based on an omission of the statement “may contain heavy metals” which, if required,  
22 would be required on basically all agricultural products (and products derived from agricultural  
23 products) in grocery stores nationwide. Plaintiffs’ theory of “fraud” fails.

24 **C. Plaintiffs’ California and Common Law Claims Fail for Additional Reasons.**

25 As shown above, all of Plaintiffs’ claims fail independently for lack of (1) any injury that  
26 would confer Article III standing and (2) any plausible reliance on the alleged omission from the  
27 product label. Plaintiffs’ specific claims also fail for the additional reasons set forth below:  
28

1                   **1.       Plaintiffs' UCL Claim (Count Two) Also Fails Because Plaintiffs Have**  
2                   **Not Alleged Any Unlawful Act or Practice.**

3                   “An unlawful business practice under Business and Professions Code section 17200 is an  
4                   act or practice, committed pursuant to business activity, that is at the same time forbidden by law.”  
5                   *Durell v. Sharp Healthcare*, 183 Cal. App. 4th 1350, 1361 (2010) (citations omitted). Plaintiffs  
6                   cannot state a claim for “unlawful” practices because the Great Value herbs and spices they  
7                   purchased are fully compliant with all applicable laws.

8                   The FDA and USDA are responsible for regulating and protecting this nation’s food  
9                   supply. To that end, these agencies are actively studying and monitoring any impacts of the metals  
10                  which are omnipresent in the environment (air, water, and soil), and therefore our agricultural  
11                  products. Where appropriate, the FDA and USDA have developed regulatory guidance and action  
12                  plans such as the “Closer to Zero” action plan to reduce exposure to heavy metals from foods eaten  
13                  by babies and young children “to as low as possible.” FDA.gov, *Closer to Zero: Action Plan for*  
14                  *Baby Foods*, available at: [https://www.fda.gov/food/metals-and-your-food/closer-zero-action-](https://www.fda.gov/food/metals-and-your-food/closer-zero-action-plan-baby-foods)  
15                  plan-baby-foods (accessed Sept. 19, 2022). The responsible federal agencies fully recognize that  
16                  heavy metals cannot be eliminated entirely from foods because “[m]etals, like other naturally  
17                  occurring elements, enter our food supply through our air, water and soil.” FDA.gov, *Metals and*  
18                  *Your Food*, available at: [https://www.fda.gov/food/chemical-contaminants-metals-pesticides-](https://www.fda.gov/food/chemical-contaminants-metals-pesticides-food/metals-and-your-food)  
19                  food/metals-and-your-food (accessed Sept. 19, 2022).

20                  These agencies identify priority food items (such as those consumed by young children) to  
21                  reduce exposure “to as low as possible.” Unsurprisingly, the FDA and USDA have expressed no  
22                  concern regarding levels of naturally occurring metals in the food supply of herbs and spices. The  
23                  FDA has not determined any Great Value herbs or spices are problematic or adulterated in any  
24                  way. In short, the Great Value herbs and spices identified in the complaint are fully compliant  
25                  with applicable law. *See also Backus v. General Mills*, 122 F. Supp. 3d 909, 934 (N.D. Cal. 2015)  
26                  (“[w]hether a body of evidence sufficiently demonstrates that a particular amount of a chemical  
27                  substance poses a serious public health risk is precisely the kind of expert question that agencies  
28                  are better suited to answer than courts or juries”).

1 Thus, Plaintiffs' "unlawful" claim must fail because Great Value products are fully  
2 compliant with all relevant laws and regulations. Plaintiffs premise their entire action on a  
3 questionable online article (which of course is not a law). Consumer Reports is a for profit online  
4 publication. And of course, Consumer Reports is not a regulator and has no authority to make or  
5 enforce laws. In the absence of an actual law that was violated, Plaintiffs do not state a claim  
6 under the UCL for an act or practice that was "unlawful."

7 **2. Plaintiffs' Implied Warranty Claims (Counts Six and Seven) Also Fail**  
8 **Because the Products Were Fit for Ordinary Use.**

9 "A plaintiff who claims a breach of the implied warranty of merchantability must show  
10 that the product 'did not possess even the most basic degree of fitness for ordinary use.'" *Colgate*  
11 *v. JUUL Labs, Inc.*, 345 F. Supp. 3d 1178, 1194 (N.D. Cal. 2018) (Orrick, J.) (citing *Mocek v. Alfa*  
12 *Leisure, Inc.*, 114 Cal.App. 4th 402, 406 (2003)). "The substantive elements are the same under  
13 the Song-Beverly Act." *Birdsong*, 590 F.3d at 958, n.4.

14 Plaintiffs do not claim that the herb and/or spice products that they allegedly purchased  
15 were without the most basic degree of fitness. For example, Plaintiffs do not allege that the  
16 products were worthless or failed to perform their basic function of flavoring or seasoning. Indeed,  
17 Plaintiffs concede that the products had value through the statement that they "would have paid  
18 less for them" had they known the products potentially contained (naturally occurring) metals. *See*  
19 *Compl.* ¶¶ 5, 7.

20 Moreover, any claim for breach of the implied covenant requires that the plaintiff "was  
21 harmed, and . . . the failure of the product to have the expected quality was a substantial factor in  
22 causing the plaintiff's harm." *Andrade v. Pangborn Corp.*, No. C 02-3771, 2004 WL 2480708, at  
23 \*23 (N.D.Cal. Oct. 22, 2004). Here, as discussed above, Plaintiffs have not alleged concrete and  
24 particularized harm. *See* Section III.A *supra*.

1                   **3.       Plaintiffs’ Unjust Enrichment Claim (Count Nine) Also Fails Because**  
 2                   **California Law Does Not Recognize it as an Independent Cause of**  
 3                   **Action on These Facts.**

4                   Plaintiffs allege that “Defendant has been unjustly enriched in retaining the revenues  
 5                   derived from Plaintiff’s and Class members’ purchases of the Products.” Compl. ¶ 170. This  
 6                   claim also fails because it is not cognizable under California law.

7                   In California, “there is not a standalone cause of action for ‘unjust enrichment’.” *Astiana*  
 8                   *v. Hain Celestial Grp., Inc.*, 783 F.3d 753, 762 (9th Cir. 2015). Under some circumstances, courts  
 9                   may “construe the cause of action as a quasi-contract claim seeking restitution.” *Id.* (citation  
 10                  omitted). Still, if a claim for restitution provides the same remedy as statutory claims, that  
 11                  restitution (*i.e.*, unjust enrichment) claim is subject to dismissal. “[P]laintiffs cannot assert unjust  
 12                  enrichment claims that are merely duplicative of statutory or tort claims.” *Brazil v. Dole Food Co.*  
 13                  *Inc.*, 935 F. Supp. 2d 947, 967 (N.D. Cal. 2013) (citations omitted).

14                  Here, Plaintiffs already seek restitution under the UCL claims (Compl. ¶¶ 86, 97, 110),  
 15                  FAL claim (Compl. ¶ 120), and CLRA claim (Compl. ¶ 134). Because Plaintiffs already seek  
 16                  restitution under the state law statutory claims, the separate claim for unjust enrichment is properly  
 17                  dismissed as duplicative. *See also Silver v. Stripe Inc.*, No. 4:20-CV-08196-YGR, 2021 WL  
 18                  3191752, at \*8 (N.D. Cal. July 28, 2021) (when a plaintiff proceeds with statutory claims,  
 19                  “plaintiffs are not entitled to restitution under a quasi-contract theory”); *see also In re Hard Disk*  
 20                  *Drive Suspension Assemblies Antitrust Litig.*, No. 19-MD-02918-MMC, 2021 WL 4306018, at  
 21                  \*24 (N.D. Cal. Sept. 22, 2021) (holding the same).

22                   **4.       Plaintiffs’ Negligent Failure to Warn Claim (Count Ten) Fails For**  
 23                   **Lack of a Legal Duty.**

24                  To prevail on a claim for negligent failure to warn, a plaintiff must plead and prove that:  
 25                  “(1) the defendant manufactured, distributed, or sold the product; (2) the defendant knew or  
 26                  reasonably should have known that the product was dangerous or was likely to be dangerous when  
 27                  used in a reasonably foreseeable manner; (3) the defendant knew or reasonably should have known  
 28                  that users would not realize the danger; (4) the defendant failed to adequately warn of the danger  
 or instruct on the safe use of the product; (5) a reasonable manufacturer, distributor, or seller under

1 the same or similar circumstances would have warned of the danger or instructed on the safe use  
2 of the product; (6) the plaintiff was harmed; and (7) the defendant's failure to warn or instruct was  
3 a substantial factor in causing the plaintiff's harm.” *Mariscal v. Graco, Inc.*, 52 F. Supp. 3d 973,  
4 991 (N.D. Cal. 2014) (citation omitted).

5 On the face of the complaint, none of these requirements are satisfied. There is no express  
6 allegation in or inference from the pleading that Walmart knew or reasonably should have known  
7 that any Great Value herb or spice product was somehow “dangerous” because Plaintiffs  
8 themselves do not even so contend. Therefore, there could be no duty to “warn” consumers about  
9 products that are exactly what they purport to be: spices that *may* contain trace levels of naturally  
10 occurring arsenic cadmium or lead (given these substances exist naturally in the air, water and  
11 soil). As established *supra* in Section III.A, Plaintiffs have not alleged any concrete and  
12 particularized injury (whether physical or economic) based on their alleged purchase of the Great  
13 Value products. The bare statement that the use of the herbs and spices “could cause and has  
14 caused injuries” is not sufficient to state a claim because no injury has been described anywhere  
15 else in the complaint and no such injury could conceivably be alleged based on Plaintiffs’ dubious  
16 legal theories.

#### 17 **IV. CONCLUSION**

18 For all of the foregoing reasons, Walmart respectfully requests that the Court dismiss  
19 Plaintiffs’ complaint in its entirety.

20 DATED: September 19, 2022

KING & SPALDING LLP

21  
22 By: /s/ Livia M. Kiser

Livia M. Kiser

Ethan P. Davis

Samuel R. Diamant

23  
24 *Attorneys for Defendant*

Walmart Inc.