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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

18 IN RE: JUUL LABS, INC., MARKETING,
19 SALES PRACTICES, AND PRODUCTS
LIABILITY LITIGATION

Case No. 19-md-02913-WHO

**Notice of Motion and Motion to Dismiss
California Plaintiffs' Breach of Implied
Warranty Claim Under Cal. Com. Code
§ 2314(2)(f); Memorandum of Points
and Authorities in Support Thereof**

21 This Document Relates to:

CLASS ACTIONS

Judge: Hon. William H. Orrick
Date: March 26, 2021
Time: 9:00 a.m.
Ctrm : ?

NOTICE OF MOTION AND MOTION

2 **PLEASE TAKE NOTICE** that on March 26, 2021, at 9:00 a.m., or as soon thereafter as
3 this matter may be heard, in Courtroom 2 of this Court, located at 450 Golden Gate Avenue, 17th
4 Floor, San Francisco, California, Defendant Juul Labs, Inc. (“JLI”) will and hereby does move under
5 Federal Rule of Civil Procedure 12(b)(6) for an order dismissing with prejudice the claim for breach
6 of implied warranty of merchantability under California Commercial Code § 2314(2)(f), asserted
7 by the California Plaintiffs on behalf of a putative California class of purchasers of JUUL products,
8 in the Second Amended Consolidated Class Action Complaint (ECF No. 1135) (“SAC”). The Court
9 previously dismissed this claim, with leave to amend, because the California Plaintiffs failed to
10 identify “promises or affirmations of fact made on the container or label” that they saw and to which
11 JUUL products did not conform. Cal. Com. Code § 2314(2)(f). The SAC does not remedy that
12 deficiency.

13 This Motion is based on this Notice of Motion and Motion, the accompanying Memorandum
14 of Points and Authorities, any Reply Memorandum filed in support of this motion, the pleadings
15 and papers on file in this MDL, and such other matters as may be properly presented at or before
16 the hearing.

17 In light of the Court's orders regarding phased motion practice, *see* ECF No. 583, JLI does
18 not waive other Rule 12(b) defenses to these or any other complaints in this MDL by not asserting
19 those defenses by this Motion.

21 DATED: January 4, 2021 MUNGER, TOLLES & OLSON LLP
KIRKLAND & ELLIS LLP

By: /s/ Gregory P. Stone
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Attorneys for Defendant Juul Labs, Inc.

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ISSUE TO BE DECIDED

1. Whether the SAC, like the prior complaint, fails to state a claim for breach of the implied warranty of merchantability under California Commercial Code section 2314(2)(f) on behalf of the California Plaintiffs.

1 **I. INTRODUCTION**

2 The Court should dismiss the California Plaintiffs' claim for breach of the implied warranty
3 of merchantability under California Commercial Code section 2314(2)(f) because the California
4 Plaintiffs have failed to correct the deficiency found by the Court in its October 23, 2020 Order to
5 require dismissal of that same claim.

6 Plaintiffs allege that JLI breached the implied warranty of merchantability under California
7 law in two ways: JUUL products allegedly were not "fit for the ordinary purposes for which such
8 goods are used," Cal. Com. Code § 2314(2)(c), and did not conform to "promises or affirmations of
9 fact made on the container or label," *id.* § 2314(2)(f). In its October 23, 2020 Order, the Court held
10 that although Plaintiffs stated a claim under section 2314(2)(c), they failed to state a claim under
11 section 2314(2)(f) because they did not "identify the specific statements *on the label or container*
12 that they saw and that would breach the implied warranty." ECF No. 1084 at 86 (emphasis added).
13 The Court granted leave to amend to "plead those facts on amendment." *Id.*

14 The Second Amended Consolidated Class Action Complaint ("SAC") asserts the same claim
15 under section 2314(2)(f) but fails to correct the deficiency found by the Court. ECF No. 1135 ¶¶
16 838-846. It adds *no allegations* identifying the specific promises or affirmations of fact on the
17 container or label of JUUL products the California Plaintiffs saw. Instead, the SAC continues to
18 allege that the California Plaintiffs relied on JLI's advertising without alleging that they saw and
19 relied on statements actionable under section 2314(2)(f). ECF No. 1135-1 ("SAC App'x A"), ¶¶
20 181-187, 255-263, 771-780. The SAC even adds a new California Plaintiff—Aiden Young—but
21 he, too, does not identify the promises or affirmations of fact on the container or label of JUUL
22 products that he allegedly saw. *Id.* ¶¶ 1203-1212.

23 Plaintiffs' claim under section 2314(2)(f) fails for the same reasons the Court already found.
24 Because the Court granted leave to amend to remedy this deficiency and Plaintiffs have not even
25 attempted to do so, the Court should dismiss the section 2314(2)(f) claim with prejudice.

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1 **II. ARGUMENT**

2 **A. Plaintiffs Failed to Correct the Deficiency That the Court Found in**
3 **the Implied Warranty Claim Under Cal. Com. Code § 2314(2)(f)**

4 To state a claim for breach of the implied warranty, the California Plaintiffs must allege,
5 among other things, that JUUL products were not merchantable under California Commercial Code
6 section 2314. *See Duross v. Home Depot U.S.A., Inc.*, 2018 WL 5917861, at *6 (C.D. Cal. Aug. 21,
7 2018). To be merchantable under Section 2314(2)(f), a product must “[c]onform to the promises or
8 affirmations of fact made on the container or label if any.” Cal. Com. Code § 2314(2)(f). The
9 California Plaintiffs again claim that JUUL products fail to meet that standard. SAC ¶ 841. But, as
10 in their prior complaint, they fail to plead the facts required to support that theory.

11 In dismissing the prior complaint, the Court gave Plaintiffs another chance to “identify the
12 specific statements on the label or container that they saw and that would breach the implied
13 warranty.” ECF No. 1084 at 86. But the SAC fails to add a single allegation identifying promises
14 or affirmations of fact on the label or container of JUUL products that the four California Plaintiffs
15 saw and on which they relied. Bradley Colgate does not identify any containers or labels. SAC
16 App’x A ¶¶ 179-190. Neither does C.D. *Id.* ¶¶ 252-265. And while L.B. and Young include a
17 handful of grainy pictures of JUUL displays they claim to have seen in stores, they do not identify
18 specific promises or affirmations of fact on those displays that they saw, let alone relied on. *Id.*
19 ¶¶ 771-72, 1208-09.

20 As the Court recognized in its October 23, 2020 Order, unseen statements cannot form the
21 basis of a claim for breach of implied warranty. *See Schmitt v. Younique LLC*, 2018 WL 7348850,
22 at *7 (C.D. Cal. Dec. 21, 2018) (granting summary judgment on implied-warranty claim “[b]ecause
23 it is undisputed that Schmitt did not view the label prior to purchasing such that she would rely on
24 it”); *Sukonik v. Wright Med. Tech., Inc.*, 2015 WL 10682986, at *14 n.16 (C.D. Cal. Jan. 26, 2015)
25 (“Plaintiff’s failure to allege facts demonstrating reasonable reliance also requires dismissal of his
26 implied warranty claim”). As in their prior complaint, the California Plaintiffs fail to state a claim
27 under section 2314(2)(f), and that claim should be dismissed. *See* ECF No. 1084 at 86.

B. The Section 2314(2)(f) Claim Should Be Dismissed with Prejudice

2 The Court should dismiss the California Plaintiffs' section 2314(2)(f) claim with prejudice.
3 "The district court's discretion to deny leave to amend is particularly broad where the court has
4 already given the plaintiff an opportunity to amend his complaint." *Fid. Fin. Corp. v. Fed. Home
5 Loan Bank of S.F.*, 792 F.2d 1432, 1438 (9th Cir. 1986). Plaintiffs were given the chance to amend
6 to attempt to correct the deficiency identified by the Court, yet they failed even to attempt to do so,
7 despite the Court's "specific instructions on how to amend the complaint." *Salameh v. Tarsadia
8 Hotel*, 726 F.3d 1124, 1133 (9th Cir. 2013). That failure is "a strong indication that the plaintiffs
9 have no additional facts to plead," and that further amendment would be futile. *Zucco Partners,
10 LLC v. Digimarc Corp.*, 552 F.3d 981, 1007 (9th Cir. 2009); *see Miller v. Morris*, 2018 WL
11 2085225, at *10 (C.D. Cal. Feb. 27, 2018) ("The exercise of the court's discretion to deny further
12 leave to amend is especially warranted when the amended complaint merely repeats the deficiencies
13 of the original complaint.").

14 | III. CONCLUSION

15 The Court should dismiss with prejudice the California Plaintiffs' claim for breach of
16 implied warranty under California Commercial Code section 2314(2)(f) for failure to state a claim.

18 | DATED: January 4, 2021 Respectfully submitted,

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By: /s/ *Gregory P. Stone*
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