Appeal No. 17-2980

In The United States Court Of Appeals For The Third Circuit

MONA ESTRADA, on Behalf of Herself and
All Others Similarly Situated,

Plaintiff-Appellant,

v.

JOHNSON & JOHNSON; and
JOHNSON & JOHNSON CONSUMER COMPANIES, INC.,

Defendants-Appellees.

Appeal From the United States District Court
for the District of New Jersey
No. 3:16-cv-07492 (FLW), Hon. Freda L. Wolfson

PLAINTIFF-APPELLANT'S OPENING BRIEF AND APPENDIX VOL. I, pp. AA001-37

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I. INTRODUCTION

Johnson's® Baby Powder is the cornerstone of the Johnson & Johnson consumer product brand. For decades, defendants Johnson & Johnson and Johnson & Johnson Consumer Inc. (together "J&J") have marketed their Baby Powder as a safe way to eliminate friction on the skin, absorb unwanted moisture, and maintain freshness. In addition to use on babies, J&J specifically targeted adult women to use the powder daily in the genital area. J&J knows this is a continued use of the Baby Powder, just as it intended. Meanwhile, J&J has known for decades that use of the Baby Powder in this manner is dangerous because it significantly increases a woman's risk on developing ovarian cancer—an extremely deadly form of cancer.

Plaintiff Mona Estrada purchased the Baby Powder for years for her own use. In purchasing the Baby Powder, Estrada relied on the product's label. The Baby Powder label did not warn about the safety risks associated with genital use of the Baby Powder and instead instructed Estrada to apply it to the skin to eliminate moisture and friction. Had Estrada known that the Baby Powder was unsafe to use, she would not have purchased it.

Estrada alleges California state law claims for violations of California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code §§ 17200, *et seq.* and Consumers Legal Remedies Act ("CLRA"), Cal. Civ. Code §§ 1750, *et seq.*, as well as for negligent misrepresentation and breach of implied warranty.

Estrada's economic injury in paying money for a falsely advertised product she otherwise would not have purchased is a classic form of injury-in-fact under Article III. Under California's consumer protection statutes, when a consumer purchases a product in reliance on a false or deceptive label, the consumer has suffered "economic harm" because "the consumer has purchased a product that he or she paid more for than he or she otherwise might have been willing to pay if the product had been labeled accurately." *Kwikset Corp. v. Super. Ct.*, 51 Cal. 4th 310, 329 (2011); *Davidson v. Kimberly-Clark Corp.*, 873 F.3d 1103, 1111-12 (9th Cir. 2017).

Recently, in *Cottrell v. Alcon Labs.*, 874 F.3d 154, 165, 167 (3d Cir. 2017), the Third Circuit confirmed that a consumer's purchase of a product based on the manufacturer's deceptive and unfair business practices constitutes injury-in-fact. Estrada has a legally protected interest in the money she paid for the Baby Powder due to J&J's unfair and deceptive business practices in advertising the Baby Powder as safe when it was not. Her economic injury is concrete, particularized, and actual as she has already paid the money.

Without the benefit of *Cottrell*, the district court erred in finding Estrada did not allege injury-in-fact. Instead, the district court assumed three methods of calculating damages that Estrada never alleged. These have nothing to do with injury-in-fact (or the various methodologies for equitable, legal monetary, and other relief Estrada would ultimately present at the correct stage of the litigation).

As this Court held in *Cottrell* in examining the same approach, the district court's analysis improperly mixed merits determinations with Article III. This Court should reverse the order of the district court and remand for further proceedings.

II. JURISDICTIONAL STATEMENT

The district court had jurisdiction pursuant to the Class Action Fairness Act, 28 U.S.C. § 1332(d). This Court has jurisdiction over the district court's dismissal of the case pursuant to 28 U.S.C. § 1291.

III. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Whether the district court erred in finding Plaintiff Mona Estrada did not allege injury-in-fact under Article III where Estrada alleged she purchased a falsely advertised product in reliance on the advertising and product labeling. AA036; AA049.[1]

IV. STATEMENT OF RELATED CASES AND PROCEEDINGS

This case has not previously been before the Court. This is a consumer class action originally filed in the Eastern District of California and brought under California law. It was consolidated as part of a Multidistrict Litigation ("MDL") proceeding titled *In Re: Johnson & Johnson Talcum Powder Products Marketing, Sales Practices, and Products Liability Litigation* and transferred to the District of New Jersey for coordinated proceedings. The MDL includes thousands of individual personal injury actions and one other consumer class action titled

[1] All "AA" references are to Appellant's Appendix.

Mihalich v. Johnson & Johnson, et al. Mihalich concerns Illinois consumer protection claims and was similarly dismissed by the District of New Jersey for lack of Article III standing. Plaintiff in *Mihalich* did not appeal. The remainder of the MDL has continued to proceed in the district court while this case is on appeal.

V. STATEMENT OF THE CASE

A. Factual Allegations

Estrada, a California resident, brings claims for violations of California's UCL and CLRA, and for negligent misrepresentation and breach of implied warranty, against defendants Johnson & Johnson and Johnson & Johnson Consumer Inc. (together "J&J") concerning their manufacture and sale of Baby Powder. AA047 (¶1).[2] J&J's Baby Powder is a consumer product made up entirely of talc and fragrance. AA054 (¶21).

Since 1961, dozens of studies have been conducted regarding perineal use of talc-based powders, including J&J's Baby Powder, and nearly all have reported an elevated risk of ovarian cancer, with the majority of the studies showing statistically significant elevations. AA054-65 (¶¶24-60). Since at least 1982, J&J has been aware of these studies and the increased risk of ovarian cancer resulting from perineal use of its Baby Powder. AA067-68 (¶¶67-72).

[2] Johnson & Johnson Consumer Inc. is formerly known as Johnson & Johnson Consumer Companies, Inc.

Despite this information, J&J has marketed and sold its Baby Powder to women for this use because it eliminates friction on the skin, absorbs unwanted moisture, and maintains freshness. AA047, 50-51 (¶¶2, 14, 15, 16). Historically, the Baby Powder label and advertising encouraged women to dust themselves with Baby Powder daily to mask odors, just as the Baby Powder is used on babies. AA050 (¶15). Although the labels have changed over time, the marketing message conveyed by J&J remains the same: Baby Powder is safe and gentle for use by all, including women when applied to the genital area. AA051-52, 69-70 (¶¶16, 17, 74, 75). Indeed, the very name "Baby Powder" connotes that the powder is safe for use on the most vulnerable—babies—and thus, is also safe for use on adults.

This advertising message is far from true. In February of 2006, the International Association for the Research of Cancer ("IARC") classified genital use of talc-based powder as a "Group 2B" possible human carcinogen. AA065 (¶62). IARC concluded that scientific studies consistently found an increased risk in ovarian cancer in women from perineal use of talc. *Id*. Based on IARC's classification, the California Department of Public Health ("CDPH") also lists "talc-based body powders (perineal use of)" as an ingredient known or suspected to cause cancer, and requires, under the California Safe Cosmetics Act, that manufacturers register any products containing this ingredient with the CDPH. AA066 (¶66). In violation of this law, J&J failed to register Baby Powder with the CDPH. *Id*.

In 2006, the Canadian government classified talc as a "D2A," "very toxic," "cancer causing" substance under its Workplace Hazardous Materials Information Systems. *Id*. (¶64). The National Cancer Institute and American Cancer Society recognize genital talc use as a risk factor for ovarian cancer. *Id*. (¶65).

Despite the overwhelming authority and J&J's knowledge of Baby Powder's dangers, J&J has never warned consumers. AA069 (¶73). J&J's warning on the label suggests only that "contact with eyes" and "inhalation" should be avoided. *Id*. Nowhere on the product label or in any other advertising does J&J inform consumers that use of Baby Powder increases the risk of ovarian cancer or that it is unsafe for women to use in the genital area. AA069 (¶74). J&J further concealed the safety risks by failing to register the Baby Powder with the CDPH, which maintains a publicly available and searchable database of cosmetics that contain cancer-causing chemicals. *Id*. In fact, it was only after the filing of this lawsuit that J&J finally registered Baby Powder with the CDPH.[3]

Based on J&J's omissions about safety of the Baby Powder, representations regarding appropriate use, and written warnings that say nothing about an increased risk of ovarian cancer, consumers, including Estrada, reasonably expect that the Baby Powder is safe to be used as marketed. AA069 (¶74). Estrada purchased Baby Powder believing it was safe for her use. AA049 (¶11). Had

[3] *See* https://safecosmetics.cdph.ca.gov/search/product-detail.aspx (last visited Jan. 5, 2018).

Estrada known that genital use of Baby Powder could cause an increased risk of ovarian cancer, she would not have purchased it. *Id*.

B. Procedural Background

Estrada filed her complaint in the Eastern District of California where she resides. *See id*. On March 27, 2015, Judge Nunley of the Eastern District of California dismissed Estrada's original complaint for lack of Article III standing, finding that Estrada did not allege she suffered an economic injury.

On April 24, 2015, Estrada filed her First Amended Complaint ("FAC") to comply with Judge Nunley's order. On May 18, 2015, J&J moved to dismiss the FAC. That motion was fully briefed and on June 25, 2015, Judge Nunely took it under submission without oral argument. Before Judge Nunley ruled on the motion, Estrada's case was transferred on October 4, 2016, by the Judicial Panel on Multidistrict Litigation to the District of New Jersey. AA041-45. On December 22, 2016, J&J refiled its motion to dismiss the FAC in the District of New Jersey.

C. The District of New Jersey's Dismissal Order

On July 14, 2017, Judge Freda L. Wolfson of the District of New Jersey dismissed Estrada's FAC for failure to allege Article III standing. AA005. The district court focused on Estrada's inability to prove injury-in-fact by fitting into one of three assumed damage methodologies which the court termed the benefit of the bargain, alternative product, and premium price methodologies. AA016-17. As is customary in a complaint, Estrada did not allege, and never intended to allege,

specific methodologies for calculating damages. The district court did not address Estrada's prayer for restitution, injunctive relief (including corrective advertising), or other remedies.

As to the "benefit of the bargain" theory, the district court stated that Estrada was required to allege that she "did not receive the benefit of her bargain in purchasing Baby Powder, and thus, her damages are the purchase of that product." *Id*. In rejecting this theory, the district court first held that Estrada failed to allege "Defendants were under any legal obligation to disclose the risks associated with Baby Powder on the product's label or advertisements." AA018. The court found that "[a]bsent any authority to the contrary, Plaintiff cannot assert a benefit-of-the-bargain theory of economic harm based on an omission.…" AA019.

The district court also held that "[a]bsent an allegation of adverse health consequences from using the Baby Powder, or that Baby Powder failed to perform satisfactorily for its intended use, Plaintiff cannot claim that she was denied the benefit of her bargain." AA023. The court concluded that because Estrada failed to allege the "Baby Powder was ineffective for its intended use" and "continued purchasing Baby Powder for a substantial period, and consumed the product in its entirety each time," she did not suffer any economic injury. AA027.

As to the so-called "alternative product" method, the district court found that Estrada was required to allege the existence of a cheaper alternative product she would have purchased had she known the truth about the Baby Powder. AA030.

The court found that while the FAC alleged Estrada would have purchased cornstarch-based powder that does not have the same cancer risks, she did not allege that the cornstarch powder was cheaper. AA033.

Finally, the district court couched Estrada's allegation that J&J has "been able to sell the product for more than they otherwise would have had they properly informed consumers about the safety risks" as a "premium price" theory. *Id.* (quoting FAC, ¶¶6, 77). The district court held that under this purported theory, Estrada was required to allege that J&J "advertised Baby Powder as superior to other products" and thus, was able to sell it at a premium over competitor products, and that there were "comparable, cheaper products to demonstrate that Baby Powder was in fact sold at a premium." AA035.

The district court dismissed with leave to amend and provided specific instructions on any amendment:

> [T]o the extent that Plaintiff seeks to amend her benefit-of-the-bargain theory on the basis of an omission, Plaintiff must allege that Defendants had an affirmative legal obligation to disclose the omitted fact. In addition, to the extent Plaintiff seeks to amend her benefit-of-the-bargain theory on the basis of the alleged misrepresentations appearing in Defendants' advertisements or on their website, Plaintiff must allege that she actually relied on those misrepresentations in purchasing Baby Powder. Plaintiff will not be given leave to amend her alternative product theory, however, in light of her concession that a cornstarch-based alternative would not have been cheaper than Baby Powder. Should Plaintiff seek to assert a price premium claim, that claim must be pled with sufficient factual support.

AA036-37. Given the district court's analysis and holding that Estrada lacked Article III standing to bring any of the claims in federal court, Estrada opted not to

amend her complaint and instead requested the court enter judgment so that she may appeal. AA039. On August 10, 2017, the district court entered judgment in favor of J&J and dismissed Estrada's complaint. AA004. On September 8, 2017, Estrada appealed to this Court. AA002.

VI. SUMMARY OF THE ARGUMENT

The district court erred by not finding Estrada suffered injury-in-fact under Article III by purchasing a falsely advertised product. The Court's recent opinion in *Cottrell v. Alcon Labs.*, 874 F.3d 154, 165, 167 (3d Cir. 2017), subsequent to the district court's ruling, confirms that a plaintiff who purchases a product based on a defendant's violation of a state consumer protection statute has suffered injury-in-fact.

Here, Estrada's claims under the UCL and CLRA expressly contemplate economic injury resulting from the purchase of a falsely advertised product. Therefore, the California Supreme Court has held that in a false advertising case, a plaintiff meets the federal injury-in-fact requirement under Article III if she purchased a falsely advertised product.

In conducting an analysis under the injury-in-fact requirement for Article III standing, the California Supreme Court stated: "For each consumer who relies on the truth and accuracy of a label and is deceived by misrepresentations into making a purchase, the economic harm is the same: the consumer has purchased a product that he or she paid more for than he or she otherwise might have been willing to

pay if the product had been labeled accurately." *Kwikset Corp. v. Super. Ct.*, 51 Cal. 4th 310, 329 (2011). Federal appellate courts have held the same in their Article III standing analyses. *Davidson v. Kimberly-Clark Corp.*, 873 F.3d 1103, 1111-12 (9th Cir. 2017); *Hinojos v. Kohl's Corp.*, 718 F.3d 1098, 1105 (9th Cir. 2013). Safety-related omissions are treated in the same manner. *Wilson v. Hewlett-Packard Co.*, 668 F.3d 1136, 1141 (9th Cir. 2012); *Daugherty v. Am. Honda Motor Co., Inc.*, 144 Cal. App. 4th 824, 835 (2006); *Davidson*, 873 F.3d at 1112. Accordingly, Estrada has suffered injury-in-fact by purchasing the Baby Powder in reliance on J&J's misrepresentations and omissions regarding safety.

As this Court has already held in *Cottrell*, the district court's focus on separate methodologies of calculating legal damages to determine Article III standing was in error. Estrada was not required, at the pleading stage, to allege the method she intended to use for calculating damages to establish standing. She need only allege an economic injury caused by J&J's conduct. Estrada suffered injury-in-fact by purchasing a falsely advertised product. This is sufficient for Article III standing.

The district court's discussion of damages methodologies also failed to address the primary relief Estrada actually seeks—restitution and injunctive relief in the form of corrective advertising. Under the CLRA, the remedies sought include damages, restitution, injunctive relief and any other relief the court ultimately deems proper. AA074 (¶¶91, 92); Cal. Civ. Code § 1780(a). Under the

UCL, the remedies sought were restitution and injunctive relief. AA076 (¶105); Cal. Bus. & Prof. Code § 17203. The district court failed to address these forms of relief.

VII. STANDARD OF REVIEW

The Court "exercise[s] plenary review over a dismissal for lack of standing." *Cottrell*, 874 F.3d at 161. When considering whether a plaintiff has Article III standing, the Court must assume the merits of her legal claim. *Wyeth v. Seldin*, 422 U.S. 490, 501-02 (1975).

VIII. ARGUMENT

A. The District Court Erred by Finding Estrada's Purchase of a Falsely Advertised Product Was Not Injury-In-Fact

Article III of the United States Constitution limits federal courts' exercise of jurisdiction to cases where the plaintiff has standing "to seek redress for a legal wrong." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). Standing is separate "from any assessment of the merits of the plaintiff's claim." *Cottrell*, 874 F.3d at 162. The Court therefore must "assume for purposes of [the] standing inquiry that a plaintiff has stated valid legal claims" and instead, focus "on whether the plaintiff is the proper party to bring those claims." *Id*.

Standing consists of three elements: (1) injury-in-fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). This appeal concerns only injury-in-fact.

"The contours of the injury-in-fact requirement, while not precisely defined, are very generous," requiring only that plaintiff "allege[] some specific, identifiable trifle of injury." *Bowman v. Wilson*, 672 F.2d 1145, 1151 (3d Cir. 1982). To establish injury-in-fact, the plaintiff must show that he or she has suffered "an invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560; *Cottrell*, 874 F.3d at 162-63.

Although the district court recited the different components of injury-in-fact (AA012-13), it did not apply them to Estrada's allegations. Instead, the court discussed broader theories of purported relief. This resulted in the district court converting the standing analysis into a merits analysis, while ignoring the theories of relief actually pled by Estrada. *See Cottrell*, 874 F.3d at 163. The district court erred. Application of the injury-in-fact requirements to Estrada's allegations confirms she has Article III standing.

1. Estrada Alleged She Suffered an Invasion of a Legally Protected Interest

"[W]hether a plaintiff has alleged an invasion of a 'legally protected interest' does not hinge on whether the conduct alleged to violate a statute does, as a matter of law, violate the statute." *Cottrell*, 874 F.3d at 164. "While it is difficult to reduce injury-in-fact to a simple formula, economic injury is one of its paradigmatic forms." *Danvers Motor Co. v. Ford Motor Co.*, 432 F.3d 286, 291

(3d Cir. 2005). "Monetary harm is a classic form of injury-in-fact. Indeed, it is often assumed without decision." *Id*. at 293; *Cottrell*, 874 F.3d at 163.

Here, Estrada has a legally protected interest in the money she spent on Baby Powder that she otherwise would not have spent if she was told the truth about its safety. AA049 (¶11). Her claimed interest arises from the UCL and CLRA which provide monetary relief to consumers who are injured as a result of a defendant's violation of those statutes. Cal. Bus. & Prof. Code § 17203 (permitting restitution); Cal. Civ. Code § 1780(a) (permitting restitution and damages). Those statutes also give her a legally protected interest in being free from false advertising. *See Davidson*, 873 F.3d at 1115.

After the district court's dismissal here, this Court confirmed in *Cottrell* that such economic injury constitutes an invasion of a legally protected interest. In *Cottrell*, plaintiffs alleged they suffered economic injury under various states' consumer protection statutes, including the UCL, by purchasing eye drops that were packaged in a way that resulted in more medication being dispensed than necessary. 874 F.3d at 159, 161. The *Cottrell* Court found that plaintiffs' claimed interest in the money they paid for the wasted eye drops arose "from state consumer protection statutes that provide monetary relief to private individuals who are damaged by business practices that violate those statutes." *Id*. at 165. The Court held that "[t]hese claims fit comfortably in categories of 'legally protected interests' readily recognized by federal courts." *Id*.

The California Supreme Court expressly recognizes that proof of "economic injury" under the UCL necessarily satisfies Article III. *Kwikset*, 51 Cal. 4th at 324. Relying on this Court's decision in *Danvers*, the *Kwikset* court held that "the quantum of lost money or property necessary to show standing [under the UCL] is only so much as would suffice to establish injury in fact." *Kwikset*, 51 Cal. 4th at 324. Addressing the "Made in the U.S.A." false advertising claims at issue there, the *Kwikset* court concluded:

> For each consumer who relies on the truth and accuracy of a label and is deceived by misrepresentations into making a purchase, the economic harm is the same: the consumer has purchased a product that he or she paid more for than he or she otherwise might have been willing to pay if the product had been labeled accurately. This economic harm – the loss of real dollars from a consumer's pocket – is the same whether or not a court might objectively view the products as functionally equivalent.

Id. at 329 (emphasis omitted). Federal appellate courts recognize that a consumer is injured under the UCL by purchasing a falsely advertised product. *See Davidson*, 873 F.3d at 1111-12; *Hinojos*, 718 F.3d at 1105.

The same is true under the CLRA. *Hinojos*, 718 F.3d at 1108; *Davidson*, 873 F.3d at 1111-12; *Meyer v. Sprint Spectrum L.P.*, 45 Cal. 4th 634, 645-46 (2009) (holding that the CLRA's broad requirement of "any damage" includes any pecuniary damages resulting from defendant's unlawful business practices). Accordingly, where a plaintiff alleges she "paid more for [a product] than [she] otherwise would have paid, or bought it when [she] otherwise would not have done

so" she has suffered an Article III injury-in-fact. *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 595 (9th Cir. 2012).

The district court ignored the overwhelming authority and instead attempted to distinguish *Kwikset* on the basis that *Kwikset* concerned misrepresentations and not omissions. AA023. The district court here found that based on the misrepresentations alleged in *Kwikset*, the court in *Kwikset* "found that the plaintiffs did not receive the benefit of their bargain because they purchased lockets [sic] that the defendant had represented were manufactured in the United States, but were not." AA025. According to the district court, because Estrada did not allege a misrepresentation by J&J that "induced" her purchase of the Baby Powder, she did not suffer the same economic injury. AA027. This was error.

The premise laid out in *Kwikset* that a consumer is injured by purchasing a falsely advertised product she otherwise would not have purchased, is not limited to claims based on misrepresentations, but applies equally to claims based on omissions. *See Wilson*, 668 F.3d 1136 at 1141; *Daugherty*, 144 Cal. App. 4th at 835; *Davidson*, 873 F.3d at 1112.

In *Daugherty*, the court held that omissions may form the basis of CLRA and UCL claims when the omissions are "contrary to a representation actually made by the defendant" or are "an omission of fact the defendant was obligated to disclose," such as a safety-related attribute. 144 Cal. App. 4th at 835; *see also id*. at 838. Following *Daugherty*, the Ninth Circuit in *Wilson* held that manufacturers are

obligated to disclose unreasonable safety hazards in their products. *Wilson*, 668 F.3d at 1143; *see also Davidson*, 873 F.3d at 1112 (recognizing harm under the UCL and CLRA based on misrepresentation by omission); *Weske v. Samsung Elecs., Am., Inc.*, 934 F. Supp. 2d 698, 705 (D.N.J. 2013) (recognizing rule stated in *Wilson* and finding "[t]he 'safety issue' exception is grounded in policy concerns"); *In re Toyota Motor Corp. Unintended Acceleration Mktg. Sales Practices & Prods. Liab. Litig.*, 754 F. Supp. 2d 1145, 1173 (C.D. Cal. 2010) ("Nondisclosures about safety considerations of consumer products are material.").

Here, Estrada alleges the Baby Powder was unsafe for its intended use because it causes a significantly increased risk of ovarian cancer when used as directed in the genital area. AA054-66 (¶¶24-66). Estrada also alleges J&J knew of these safety risks. AA067-68 (¶¶67-72). J&J was required to disclose the safety risks and its failure to do so resulted in Estrada's purchase of the Baby Powder. As Estrada alleges, had she "known the truth about the safety of using Johnson's® Baby Powder, she would not have purchased the product." AA049 (¶11). Accordingly, Estrada suffered injury-in-fact by spending money on a product she otherwise would not have purchased.

The district court's holding that Estrada could not allege economic harm based on J&J's "alleged omissions" because there was no "affirmative legal duty on the part of [J&J] to disclose the omitted facts" was therefore error. AA023; *see*

also AA018-19. Because the alleged omissions concern safety, J&J was required to disclose them. *Wilson*, 668 F.3d at 1143.

Estrada also sufficiently alleges she relied on J&J's misrepresentations on the product label. Estrada alleged that J&J has "spent decades developing the brand as one to be trusted to provide safe products." AA053 (¶19). In addition to the name of the product, "Baby Powder," which connotes that it is safe for even babies, the product label states that it "is designed to gently absorb excess moisture helping skin feel comfortable" and instructs consumers to "smooth[] onto the skin." AA050-52 (¶¶16, 17). Estrada alleged she purchased the Baby Powder "[i]n reliance on the label" and her reasonable expectation that her use of the product was safe. AA049 (¶11). These allegations of reliance are sufficient. *See In re Tobacco II Cases*, 46 Cal. 4th 298, 327 (2009) (holding that plaintiffs need not identify specific advertisements or statements on which they relied where plaintiffs were exposed to long-term advertising message).

Nonetheless, whether Estrada can ultimately state a claim based on J&J's misrepresentations or omissions improperly conflates the standing and merits analyses. As the Court in *Cottrell* found, "[t]his logic flips the standing inquiry inside out, morphing it into a test of a legal validity of the plaintiffs' claims of unlawful conduct." 874 F.3d at 166. Under the appropriate standing analysis, like plaintiffs in *Cottrell*, Estrada has a legally protected interest in the money she spent on a falsely advertised product and therefore, Article III standing. *Id*. at 165.

Cottrell also confirms that even on the merits, the district court erred because the UCL "prohibit[s] business practices that are 'unfair' and 'unconscionable' in addition to practices that are fraudulent, deceptive, or misleading." *Id.* at 166 and n.9 (emphasis omitted). Estrada alleges J&J's sale of unsafe Baby Powder constitutes an unfair business practice under the UCL. AA075 (¶¶99, 100). Therefore, like plaintiffs in *Cottrell*, Estrada's standing is not dependent on "theories of injury" found in consumer fraud claims. 874 F.3d at 166-67; *see also Smith v. State Farm Mutual Automobile Ins. Co.*, 93 Cal. App. 4th 700, 717-18 (2001) (recognizing that "unlawful," "unfair," and "fraudulent" prongs of UCL are distinct).

The district court also attempted to distinguish *Kwikset* on the basis that Estrada failed to allege the Baby Powder "was ineffective" and instead "continued purchasing Baby Powder for a substantial period of time, and consumed the product in its entirety each time." AA027. This is incorrect factually but has nothing to do with standing.

The fact that Estrada used the Baby Powder because she did not know it was unsafe does not change her economic injury in purchasing an unsafe product she otherwise would not have purchased. Estrada does not challenge whether J&J's advertising regarding the Baby Powder's ability to eliminate friction or moisture are false or misleading. Estrada challenges J&J's representations and omissions about the Baby Powder's safety. Estrada has Article III standing to do so because

she paid money for a product she would not have purchased but for J&J's false and misleading advertising regarding the product's safety.

In fact, *Kwikset* addressed this very issue. The UCL requires a named plaintiff in a potential class action to have suffered an economic injury sufficient to meet the Article III injury-in-fact standard. 51 Cal. 4th at 323-34. In *Kwikset*, defendants argued that plaintiffs did not suffer injury-in-fact because "consumers who receive a fully functioning product have received the benefit of their bargain, even if the product label contains misrepresentations that may have been relied upon by a particular class of consumers." *Id.* at 332. In rejecting defendants' argument, the *Kwikset* court concluded:

> Plaintiffs selected Kwikset's locksets to purchase in part because they were "Made in U.S.A."; they would not have purchased them otherwise; and, it may be inferred, they value what they actually received less than either the money they parted with or working locksets that actually were made in the United States. They bargained for locksets that were made in the United States; they got ones that were not.

Id. Accordingly, "[t]his economic harm – the loss of real dollars from a consumer's pocket – is the same whether or not a court might objectively view the products as functionally equivalent." *Id*. at 329.

Therefore, the fact that Estrada received Baby Powder that kept her skin dry does not change the economic injury she suffered by purchasing Baby Powder she would not have purchased had she known it was unsafe.

The district court's reliance on the unpublished decision in *Koronthaly v. L'Oreal USA, Inc.*, 374 F. App'x 257, 259 (3d Cir. 2010) is misplaced. AA022-23. *Koronthaly* does not concern the UCL or CLRA and the plaintiff could not allege that the lead in the lipstick she purchased was actually unsafe. 374 F. App'x at 258, 259. Thus, the Court held that plaintiff did not allege injury-in-fact because she did not allege she was promised something she did not receive (*i.e.*, safe lipstick.). *Id*.

By contrast here, Estrada alleges numerous facts supporting her allegations that the Baby Powder is not safe and continues to pose safety risks to her. AA054-66 (¶¶24-66). Estrada also alleges she would not have purchased the Baby Powder if she knew it was unsafe. AA049 (¶11).

Rivera v. Wyeth-Ayerst Labs., 283 F.3d 315 (5th Cir. 2002), is similarly inapposite. AA021. In *Rivera*, plaintiffs alleged they were injured by purchasing defendant's anti-inflammatory drug because it had inadequate warnings regarding the potential for liver disease, but failed to plead how the inadequate warnings actually damaged them. 283 F.3d at 316-17, 319-20. Plaintiffs did not allege that had defendant "acted 'lawfully' (produced a safer drug or provided more extensive warnings), … the plaintiffs would not have purchased [the product]." *Id*. at 321.

Here, Estrada alleges that had J&J acted lawfully by disclosing that the Baby Powder was not safe for genital use, she would not have purchased it. Estrada's payment of money based on J&J's unlawful conduct constitutes an invasion of a legally protected interest for purposes of Article III standing.

2. Estrada's Economic Injury Is Concrete and Particularized

To satisfy "injury-in-fact" under Article III, Estrada's injury must also be concrete and particularized. *Spokeo*, 136 S. Ct. at 1548. For an injury to be "concrete," it must be "real" and "actually exist." *Id*. "For an injury to be 'particularized,' it 'must affect the plaintiff in a personal and individual way.'" *Id*. A plaintiff's loss of money by purchasing a falsely advertised product is sufficiently concrete and particularized. *Cottrell*, 874 F.3d at 167; *see also Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1021 (9th Cir. 2011) (in a UCL action, injury is concrete and particularized where plaintiff "was relieved of money in the transactions").

Here, Estrada alleges she suffered economic injury in the amount she paid for Baby Powder that she would not have purchased had J&J disclosed the truth regarding its safety. AA049 (¶11). Estrada's monetary loss is concrete and particularized.

3. Estrada's Economic Injury Is Actual Because It Has Already Occurred

Finally, a plaintiff's injuries must be "actual or imminent" rather than merely "conjectural or hypothetical." *Spokeo*, 136 S. Ct. at 1548. "The plaintiff must show that he 'has sustained or is immediately in danger of sustaining some direct injury' as the result of the challenged [] conduct and the injury or threat of injury must be both 'real and immediate,' not 'conjectural' or 'hypothetical.'" *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983). Where "financial harm has

already occurred, it is not merely possible, or even probable." *Cottrell*, 874 F.3d at 168 (emphasis in original); *see also Maya v. Centex Corp.*, 658 F.3d 1060, 1069 (9th Cir. 2011) (where "plaintiffs spent money that, absent defendants' actions, they would not have spent.… [t]his is quintessential injury-in-fact.").

Here, Estrada alleges she was injured in the amount she paid for the Baby Powder that she would not have spent absent J&J's conduct. AA049 (¶11). Her payment for the falsely advertised Baby Powder has already occurred and therefore, is not merely possible or probable. Estrada's injury is actual. Accordingly, Estrada has Article III standing to pursue her claims.

B. The District Court's Purported Methods of Calculating Legal Damages Do Not Address Estrada's Alleged Injury or the Relief She Seeks

Rather than conducting the proper Article III standing analysis, the district court focused on potential theories of calculating Estrada's legal damages. AA016-17. However, the purported methods proposed by the district court have nothing to do with the injury alleged by Estrada for purposes of Article III and ignore the type of relief she actually seeks.

Estrada was not required to plead a method of calculating damages. *See* Fed. R. Civ. P. 8(a) (pleading must contain "a demand for the relief sought, which may include relief in the alternative or different types of relief"). Estrada was only required to plead the specific type of remedies she sought. Estrada alleges that she seeks restitution and damages related to the money she paid for the Baby Powder

and injunctive relief for corrective advertising. AA074, 76, 78-79 (¶¶91, 92, 105, 108, 120; Prayer).

Allegations regarding how any monetary relief in the form of restitution or legal damages will be calculated are not necessary at the pleading stage. Indeed, such allegations would be premature as determination of the appropriate model to use in calculating equitable monetary relief in a false advertising case depends on discovery taken in the case and a determination by the fact finder after hearing the evidence. *See Colgan v. Leatherman Tools Grp., Inc.*, 135 Cal. App. 4th 663, 700 (2006) (holding that restitution award under the UCL and CLRA must be supported by "substantial evidence"). At the appropriate time after discovery, Estrada will proffer a model for measuring monetary relief.

Additionally, the damages methodologies proposed by the district court have nothing to do with Estrada's injury-in-fact, let alone the forms of monetary relief she seeks. *See Comcast Corp. v. Behrend*, 569 U.S. 27, 35 (2013) (damages model proffered at the class certification stage must measure the injury attributable to the class-wide damages alleged). Restitution is the only monetary remedy available under the UCL. Cal. Bus. & Prof. Code § 17203; AA076 (¶105). As permitted, Estrada seeks both restitution and damages under the CLRA. AA074 (¶¶91, 92); Cal. Civ. Code. § 1780(a).

The district court's analysis completely ignores Estrada's claims for restitution. Restitution is measured by "the return of the excess of what the plaintiff

gave the defendant over the value of what the plaintiff received." *Cortez v. Purolator Air Filtration Prods. Co.*, 23 Cal. 4th 163, 174 (2000); *see also F.T.C. v. Figgie Int'l*, 994 F.2d 595, 606 (9th Cir. 1993) ("The fraud in the selling, not the value of the thing sold, is what entitles consumers in this case to full refunds or to refunds for each [product] that is not useful to them."), *cert. denied*, 510 U.S. 1110 (1994). The amount of restitution also factors in "deterring the offender from future violations." *Colgan*, 135 Cal. App. 4th at 695. Legal damages, by contrast, are intended to compensate for actual loss. *Id.* at 696.

Therefore, whether Estrada received any value from the Baby Powder does not defeat the fact that she was injured and does not eliminate her ability to receive relief in this case under either a restitution or damages model. Indeed, in *Kwikset*, the plaintiffs' economic injury did not matter that the locksets operated properly. 51 Cal. 4th at 332, 329. Even if discovery proved that consumers received some benefit from their purchases of the Baby Powder that was relevant, this can be factored into the model to calculate monetary relief. *See In re ConAgra Foods, Inc.*, 90 F. Supp. 3d 919, 947-48 (C.D. Cal. 2015) (finding regression analyses appropriate to determine effect on price of product in UCL and CLRA action), *aff'd Briseno v. ConAgra Foods, Inc.*, 674 Fed. App'x 654, 657 (9th Cir. Jan. 3, 2017).

Estrada's injury in this case does not depend on her ability to purchase an alternative product at a cheaper price. AA030. Estrada was injured because she

purchased a product based on J&J's deceptive and unfair business practices that she otherwise would not have purchased. *Kwikset*, 51 Cal. 4th at 329.

Finally, the district court's "premium price" methodology has nothing to do with Estrada's claims. AA033. The district court held that Estrada did not allege a "price premium" theory because she did not allege "she would not have a paid a premium for Baby Powder, but for Defendants' advertisements of that product as superior to competing brands." AA035. J&J's competitors' products have nothing to do with Estrada's claims. Estrada alleges that J&J was able to charge more for its Baby Powder than it would be able to if it accurately informed consumers regarding the safety of the Baby Powder. AA070 (¶77); *see Kwikset*, 51 Cal. 4th at 330 (economic injury where "the consumer paid more than he or she actually valued the product"). This has nothing to with competitor products.

The amount Estrada and other members of the class may receive in damages or restitution is a different question than whether Estrada has standing. Estrada has standing because she purchased a falsely advertised product she otherwise would not have purchased. At the appropriate time after discovery, Estrada can put forth models for calculating damages and restitution that are linked to her theory of relief and are based on the evidence in the case.

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IX. CONCLUSION

For the foregoing reasons, Plaintiff Mona Estrada respectfully requests that the district court's dismissal for lack of Article III standing pursuant to Federal Rule of Civil Procedure 12(b)(1) be reversed and the action remanded for further proceedings.

Respectfully submitted,

Dated: January 5, 2018

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CERTIFICATE OF BAR MEMBERSHIP

The undersigned hereby certifies that he is counsel of record and is a member of the Bar of the United States Court of Appeals for the Third Circuit.

Dated: January 5, 2018

By: *s/ Timothy G. Blood*
TIMOTHY G. BLOOD

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE AND TYPE-STYLE REQUIREMENTS

I, Timothy G. Blood, hereby certify that:

1. This brief complies with the type-volume limitation of 3d Cir. L.A.R. 32.1(c) and Fed. R. App. P. 32(a)(7)(B) because the brief contains 6,436 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman.

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TIMOTHY G. BLOOD

CERTIFICATE OF IDENTICAL COMPLIANCE OF BRIEFS

Pursuant to 3d Cir. L.A.R. 31.1(c) (2011), I hereby certify that the text of the electronically filed brief and the text of the hard paper copies of the brief are identical.

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CERTIFICATE OF PERFORMANCE OF VIRUS CHECK

Pursuant to 3d Cir. L.A.R. 31.1(c), I hereby certify that on January 5, 2018, I caused a virus check to be performed on the electronically filed copy of this brief using the following virus software: Symantec Endpoint Protection. No virus was detected.

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TIMOTHY G. BLOOD

CERTIFICATE OF SERVICE

I hereby certify that on January 5, 2018, I filed the foregoing Appellant's Opening Brief and Appendix Vol. I with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: January 5, 2018

By: *s/ Timothy G. Blood*
TIMOTHY G. BLOOD