

1 Mark C. Goodman (State Bar No. 154692)
mark.goodman@bakermckenzie.com

2 **BAKER & McKENZIE LLP**
3 Two Embarcadero Center, 11th Floor
4 San Francisco, CA 94111
Telephone: +1 415 576 3000
Facsimile: +1 415 576 3099

5 Alexander G. Davis (State Bar No. 287840)
alexander.davis@bakermckenzie.com

6 Anne Kelts Assayag (State Bar No. 298710)
anne.assayag@bakermckenzie.com

7 **BAKER & McKENZIE LLP**
8 600 Hansen Way
9 Palo Alto, CA 94304-1044
Telephone: +1 650 856 2400
Facsimile: +1 650 856 9299

10 Attorneys for Defendants
11 SUBWAY RESTAURANTS, INC.,
12 FRANCHISE WORLD HEADQUARTERS, LLC and
13 SUBWAY FRANCHISEE ADVERTISING TRUST FUND LTD.

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

16 KAREN DHANOWA and NILIMA AMIN, on
17 behalf of themselves and all others,

18 Plaintiffs,

19 vs.

20 SUBWAY RESTAURANTS, INC., a Delaware
21 Corporation; FRANCHISE WORLD
22 HEADQUARTERS, LLC., a Connecticut Limited
23 Liability Corporation; SUBWAY FRANCHISEE
24 ADVERTISING TRUST FUND LTD., a
25 Connecticut Corporation; and DOES 1 through 50,
26 Inclusive,

27 Defendants.

Case No. 4:21-cv-00498-JST

**DEFENDANTS' MOTION TO DISMISS
FIRST AMENDED COMPLAINT**

Date: September 2, 2021

Time: 2:00 p.m.

Ctrm: Courtroom 6 – 2nd Floor

Judge: Hon. Jon S. Tigar

Oakland Courthouse

Complaint Filed: January 21, 2021

Amended Complaint Filed: June 8, 2021

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1 **NOTICE OF MOTION AND RELIEF REQUESTED**

2 **TO PLAINTIFFS AND THEIR ATTORNEYS OF RECORD:**

3 Please take notice that, on September 2, 2021, at 2:00 p.m. or as soon thereafter as the matter
4 can be heard in Courtroom 6, 2nd Floor, of the United States District Court, Oakland Courthouse,
5 located at 1301 Clay Street, Oakland, CA 94612, Defendants Subway Restaurants, Inc., Franchise
6 World Headquarters, LLC and Subway Franchisee Advertising Trust Fund Ltd. (collectively,
7 “Subway”) will and do hereby move the Court for an order dismissing the plaintiffs’ First Amended
8 Complaint (the “FAC”).

9 Subway’s motion is based on this Notice of Motion and Motion, the accompanying
10 Memorandum of Points and Authorities, the Request for Judicial Notice, the declarations of
11 Alexander G. Davis and Jennifer Myers, the Proposed Order, any oral argument that may be
12 presented at the hearing, on all other papers, records and pleadings on file in this action and on such
13 additional evidence and argument as the Court may allow prior to and during the hearing on this
14 motion.

15 ***Relief Requested:*** Subway respectfully requests that the Court (1) grant its request for
16 judicial notice and (2) issue an order dismissing with prejudice the FAC in its entirety under Federal
17 Rule of Civil Procedure 12(b)(6) for failure to state any claim on which relief may be granted and
18 terminating the action.

19 **STATEMENT OF ISSUES TO BE DECIDED**

20 1. Whether the FAC must be dismissed under Federal Rules of Civil Procedure 8 and
21 9(b) because it fails to allege facts demonstrating that certain alleged representations by Subway
22 about its tuna products are false or misleading to a reasonable consumer of tuna products.

23 2. Whether the FAC must be dismissed under Federal Rules of Civil Procedure 8 and
24 9(b) because it fails to allege facts supporting a plausible inference that the plaintiffs relied on
25 misleading statements before purchasing tuna products from Subway restaurant locations in
26 California at some time between January 21, 2017 and December 31, 2020 or were damaged in any
27 way as a result of purchasing such products.

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 **I. INTRODUCTION**

3 One of the most fundamental tenets of federal pleading standards is that a plaintiff's factual
4 allegations "must be enough to raise a right to relief above the speculative level." *Bell Atl. Corp. v.*
5 *Twombly*, 550 U.S. 544, 555 (2007). Here, despite initially filing a baseless lawsuit recklessly
6 claiming that Subway tuna products do not contain any tuna whatsoever, being warned repeatedly
7 by Subway to withdraw their unsupportable claims and being provided facts demonstrating that
8 their claims were demonstrably false because all Subway tuna products consist of tuna, the plaintiffs
9 refused to dismiss the meritless suit and instead filed an amended complaint that entirely withdraws
10 the claim that Subway tuna is not tuna but asserts vague, wholly speculative and unsupportable
11 claims about the origins of Subway's tuna products. Such tactics cannot be allowed to succeed.

12 Indeed, after first baldly claiming that Subway's tuna was not tuna, a demonstrably false
13 claim that was quickly abandoned, the plaintiffs -- still without a scintilla of actual factual support
14 -- now allege that tuna wraps, sandwiches or salads purchased from a Subway restaurant in
15 California at some point during a three year period may not have been "100% sustainably caught
16 skipjack and yellowfin tuna" and/or might have contained "tuna species that come from anything
17 less than healthy stocks, for example Albacore and Tongol." Plaintiffs offer no facts to support
18 these allegations. In an extraordinary violation of their requirements to conduct due diligence before
19 filing claims in this Court and to plead the fraud alleged in the FAC "with particularity" under
20 Federal Rule of Civil Procedure 9(b), the plaintiffs do not set forth facts sufficient to explain *what*
21 false statements they supposedly saw, *where* and *when* they saw those statements and *why and how*
22 any statements made by Subway are false. Perhaps more importantly, the plaintiffs also fail to
23 plausibly allege actual reliance on any alleged representations because they do not claim they visited
24 the lone page on Subway's website where such statements have ever actually appeared and do not
25 allege that they did so before they purchased any Subway tuna products or that they incurred any
26 actual damages as a result of purchasing and enjoying Subway's tuna products.

27 Plaintiffs' failure to allege facts that state a plausible claim against Subway does violence to
28 the core policies of Rule 9(b): "[T]o deter the filing of complaints as a pretext for the discovery of

1 unknown wrongs, to protect defendants from the harm that comes from being subject to fraud
2 charges, and to prohibit plaintiffs from unilaterally imposing upon the court, the parties and society
3 enormous social and economic costs absent some factual basis” (*United States v. United Healthcare*
4 *Ins. Co.*, 848 F.3d 1161, 1180 (9th Cir. 2016) (internal citations and quotations omitted)), to
5 safeguard a “defendant’s reputation and goodwill from improvident charges of wrongdoing” and to
6 “inhibit the institution of strike suits” (*IUE AFL-CIO Pension Fund v. Herrmann*, 9 F.3d 1049, 1057
7 (2d Cir. 1993)). These principles are dear and the Court should not tolerate the violation of Rule 9
8 that the plaintiffs are perpetrating here.

9 Given the allegations in the FAC and the circumstances at issue -- including the fact that the
10 plaintiffs cannot allege that they purchased Subway tuna products based only on statements that are
11 not made in any Subway advertisement, in any Subway restaurant or on any Subway menu -- the
12 Court should dismiss the plaintiffs’ FAC without leave to amend, put an end to this frivolous lawsuit
13 and allow Subway and its thousands of small business franchisees to clear their good names.

14 **II. RELEVANT FACTUAL BACKGROUND**

15 **A. Plaintiffs’ Unexplained And Speculative Fraud Allegations**

16 Plaintiffs are alleged to be residents of Alameda County, California. (FAC at ¶¶14-15.)
17 At some point between January 21, 2017 and “2020,” the plaintiffs each purchased one or more
18 tuna products -- including tuna sandwiches, wraps and/or salads -- from Subway restaurants in
19 California. (*Id.* at ¶33.) The FAC does not allege that the plaintiffs actually read or relied on any
20 specific statements by Subway or at a Subway restaurant before purchasing and consuming
21 Subway tuna products or that the plaintiffs tested or otherwise investigated the products to
22 determine how the tuna was caught or what kind of tuna it is. Instead, the plaintiffs generally
23 allege that Subway’s advertising, labeling, marketing and packaging have at some point included
24 statements that (1) tuna products are “100% sustainably caught skipjack and yellowfin tuna” and
25 (2) tuna products do not include “tuna species that come from anything less than healthy stocks,
26 for example Albacore and Tongol.” (*Id.* at ¶25.) Plaintiffs do not attempt to link either alleged
27 statement to a particular mode of advertising, labeling, marketing or packaging, do not allege who
28 supposedly made the statements or when exactly those statements were made and do not allege

1 facts demonstrating that the alleged statements are false or caused them to incur any specific
 2 damages. Tellingly, the plaintiffs do not allege that they ever visited Subway’s website before
 3 purchasing any Subway tuna products.

4 **B. Subway’s Actual Menus, Labeling And Advertising Practices**

5 While the claims alleged in the FAC depend on consumers actually being misled by
 6 labeling or advertising, Subway’s restaurants, labels and advertising have never featured the
 7 representations alleged in the FAC. The menus at every Subway restaurant in California and on
 8 the internet simply describe Subway’s tuna products as “Tuna” or “Classic Tuna.” (Request for
 9 Judicial Notice(“RJN”), Exs. A-H, M-R.)¹ Subway tuna sandwiches and wraps are served in
 10 nonspecific paper packaging and “To-Go” bags that make no representations about tuna or any
 11 other aspect of the product. (RJN, Exs. J and L.) Subway tuna salads likewise are served in
 12 packaging bearing no statements regarding the products. (RJN, Ex. K.)

13 The “US Product Ingredient Guide” -- available for download on the Subway website and
 14 available in paper copy at Subway restaurant locations -- describes Subway “Tuna Salad” as
 15 “Flaked Tuna in Brine (tuna, water, salt), mayonnaise.” (RJN, Ex. U.) For the time period during
 16 which the plaintiffs claim they purchased Subway tuna products, the ordering portal on the
 17 Subway website stated that the “Classic Tuna” sandwich included “[f]laked tuna blended with
 18 creamy mayo then topped with your choice of crisp, fresh veggies.” (RJN, Exs. M and N.) The
 19 website ordering page similarly described tuna wraps and salads as “flaked tuna.” (RJN, Exs. O-
 20 R.) The FAC does not take issue with any of the representations that a consumer might actually
 21 see when purchasing tuna products from Subway.

22 The fact is, Subway did not run any media advertising campaigns between January 21,
 23 2017 and December 31, 2020 stating that its tuna products are “100% sustainably caught skipjack
 24

25 ¹ The Court can consider these matters on a motion to dismiss: “When ruling on a Rule 12(b)(6)
 26 motion to dismiss, a court may, without converting the motion to one for summary judgment,
 27 consider ‘documents attached to the complaint, documents incorporated by reference in the
 28 complaint, or matters of judicial notice[.]’” *Love v. FYI MC, LLC*, No. 21-cv-02845-EMC, 2021
 WL 2913654, at *3 (N.D. Cal. July 12, 2021) (quoting *United States v. Ritchie*, 342 F.3d 903,
 907-08 (9th Cir. 2003)).

1 and yellowfin tuna” or that Subway does not use “tuna species that come from anything less than
2 healthy stocks, for example Albacore and Tongol.” Instead, a few Subway advertising campaigns
3 simply used the word “Tuna” to describe certain new sandwich offerings. (RJN, Ex. I.) Plaintiffs
4 do not allege any specific facts to the contrary in the FAC.

5 Importantly, while the FAC does not alleged any facts about where they were made or who
6 exactly made them, the representations alleged in the FAC in fact appeared only on a single page
7 on Subway’s website that has nothing to do with ordering or purchasing any food products.
8 Indeed, to see the statements alleged in the FAC, a customer not only would have to go to
9 Subway’s website, she would have to click on a tab at the top of the homepage titled
10 “Responsibility” and then would need to select a tab labeled “Our Communities” from five
11 available options. From the “Our Communities” menu, the customer would have to select a sub-
12 section called “Responsible Sourcing” from three other options. The customer would then have to
13 go to the very bottom of that page, where she would see the following statements about tuna
14 between approximately September 2018 and November 2020: “We only sell skipjack and
15 yellowfin tuna. It is sourced from fisheries with non-threatened stock levels. Furthermore, we
16 have a global ban on the sale of tuna species that come from anything less than healthy stocks, for
17 example Albacore and Tongol.” (RJN, Exs. S and T.) The FAC does not include any facts
18 demonstrating that the plaintiffs ever explored the Subway website, much less found the
19 “Responsible Sourcing” sub-section of the “Our Communities” page, or that they did so before
20 purchasing tuna products from a Subway restaurant in California and specifically relied on those
21 particular statements in making their purchasing decisions. Nor does the FAC allege any facts
22 demonstrating that Subway competitors sell tuna that is different than the tuna that Subway sells
23 or that is priced any differently.

24 **C. Plaintiffs Do Not Allege Facts Showing *Why* Subway’s Statements Are False**

25 The FAC concedes that the plaintiffs did not verify the contents of the tuna they allegedly
26 purchased from Subway. (FAC at ¶34.) However, this lack of facts did not stop the plaintiffs
27 from claiming that Subway tuna products do not contain 100% sustainably caught skipjack and
28 yellowfin tuna, whatever that means. (*Id.* at ¶31.) Critically, the FAC -- unlike the abandoned

1 claims from the original complaint -- does not expressly allege that Subway's tuna products are
2 not 100% tuna or that the products are not 100% sustainably caught. Indeed, the FAC does not
3 even allege what the tuna products are if they are not 100% sustainably caught skipjack and
4 yellowfin tuna. The FAC does not identify any testing indicating the presence of ingredients other
5 than what Subway has said is in its tuna products; *i.e.*, tuna and mayonnaise. Nor does the FAC
6 set forth any subjective facts -- such as that the product smelled or tasted like something other than
7 tuna -- but instead summarily and baldly proclaims that Subway's representations about its tuna
8 are false, period, without further explanation. Plaintiffs even go so far as to attempt to shift their
9 pleading burden onto Subway, claiming that they did not receive a tuna product that **Subway** "can
10 establish . . . was 100% sustainably caught skipjack and yellowfin tuna. (*Id.* at ¶6.) Such
11 allegations improperly attempt to turn the rules of pleading on their head.

12 Plaintiffs next allege that Subway does not take "sufficient measures to control or prevent
13 the known risks of adulteration" of its tuna products. (FAC at ¶22.) This allegation was
14 undoubtedly cut and pasted from a prior complaint in a different lawsuit that the plaintiffs'
15 lawyers filed about defective food products, as there is no allegation in this case that the tuna
16 products were actually adulterated. Indeed, the FAC stops well short of alleging what the known
17 risks are, what adulteration might have befallen the tuna products the plaintiffs allegedly
18 purchased and consumed or what measures would be sufficient to prevent adulteration and why.
19 Plaintiffs charge Subway with "actively perpetuat[ing] actions and steps that encourage mixing
20 non-tuna ingredients into the" tuna products but they provide no facts explaining what these
21 "actions and steps" are, what "non-tuna ingredients" might actually be in the products or how the
22 plaintiffs have made any such determination. (*Id.*) The most the plaintiffs say is the wholly
23 unsupportable claim that, because Subway's tuna arrives at its stores in sealed vacuum bags that
24 are packaged outside of the United States, the contents of those bags cannot be trusted. (*See id.*)
25 These allegations are not only hopelessly speculative, they ignore the fact that such imports are
26 subject to FDA jurisdiction and regulations, meaning that those food products are just as
27 trustworthy as anything packaged in the United States. *See generally, Fmali Herb, Inc. v.*
28 *Heckler*, 715 F.2d 1385, 1386 (9th Cir. 1983) (describing FDA regulations governing pretesting

1 requirements relating to introduction of foreign-originating food substances into products sold in
2 the United States).

3 The FAC asserts a variety of statutory and common law claims, all of which sound in fraud
4 and are based on the same theory; *i.e.*, for reasons the plaintiffs are entirely incapable of
5 explaining, Subway's representations about the content of its tuna products are somehow
6 inaccurate or misleading. (*See* FAC at ¶¶45-124.) All of these claims must be dismissed.

7 **III. PROCEDURAL HISTORY**

8 It would be bad enough if the FAC represented the plaintiffs' first effort at stating claims
9 against Subway. But it is truly telling (and damning) that this lawsuit was initiated by the
10 plaintiffs' lawyers filing a complaint alleging that Subway's tuna products contain *no tuna fish at*
11 *all*. (*See* ECF No. 4 at ¶2 ("The Products lack tuna and are completely bereft of tuna as an
12 ingredient").) Plaintiffs and their attorneys appear to have reasoned that filing these public
13 charges to maximize media attention would somehow result in a quick settlement and excuse their
14 failure to have a reasonable basis on which to make such claims. Indeed, the plaintiffs, and much
15 more likely their attorneys, made these irresponsible claims with callous indifference not only to
16 the facts but to the hard working Subway franchisees around the world who have since suffered
17 decreases in sales of one of their best-selling products because of press reports about the lawsuit
18 and its sensational -- and wholly meritless -- claims.

19 After Subway painstakingly provided the plaintiffs' lawyers with evidence demonstrating
20 the quality and sourcing of Subway's tuna products, and *the fact that the tuna was in fact tuna*,
21 the plaintiffs quickly abandoned their "no tuna at all" theory, thereby effectively conceding that
22 their original claims were unsupportable. However, rather than do the right thing and dismiss the
23 suit and publicly apologize for the harm that they caused to Subway's franchisees, the plaintiffs
24 came up with a new theory that consumers were somehow misled by claims that the tuna is 100%
25 sustainably caught skipjack and yellowfin. Thus, while Subway has offered the plaintiffs' and
26 their counsel a graceful exit from the morass they had created by simply dismissing their claims
27 with prejudice and issuing a public apology, they have instead doubled down on their destructive
28 behavior with new, equally unsupportable claims that they refuse to withdraw. Their decision to

1 continue to press forward with a complaint that violates the most basic requirements of federal
 2 pleading standards, the policies underlying Rule 9(b) and the strictures of Rule 11 represents the
 3 nadir of consumer litigation practice and is something for which the plaintiffs and their attorneys
 4 should ultimately be held accountable.

5 **IV. DISCUSSION**

6 **A. The Pleading Standards That Apply To This Case**

7 A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of the claims asserted
 8 in the complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). In ruling on such a
 9 motion, the Court ignores “legally conclusory statements” in the pleadings not supported by actual
 10 factual allegations. *Astiana v. Ben & Jerry’s Homemade, Inc.*, No. C 10-4387 PJH, 2011 WL
 11 2111796 at *2 (N.D. Cal. May 26, 2011) (internal quotations and citations omitted). And the
 12 Court must disregard “allegations that contradict matters properly subject to judicial notice” or
 13 “allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable
 14 inferences.” *Romero v. Flowers Bakeries, LLC*, No. 14-cv-05189-BLF, 2015 WL 2125004 at *3
 15 (N.D. Cal. May 6, 2015) (quoting *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir.
 16 2008)) (internal quotations omitted).

17 What the Court *can consider* on a motion to dismiss are any well-pled allegations of fact
 18 to determine whether those allegations state a facially plausible claim for relief. *Shroyer v. New*
 19 *Cingular Wireless Servs., Inc.*, 622 F.3d 1035, 1041 (9th Cir. 2010) (citing *Ashcroft v. Iqbal*, 556
 20 U.S. 662, 677-78 (2009)). Plausible claims set forth sufficient facts to allow the Court “to draw
 21 the reasonable inference that the defendant is liable for the misconduct alleged.” *Moore v. Trader*
 22 *Joe’s Co.*, No. 4:18-cv-04418-KAW, 2019 WL 2579219 at *2 (N.D. Cal. June 24, 2019) (quoting
 23 *Iqbal*, 556 U.S. at 678) (internal quotations omitted). This means that the plaintiffs’ factual
 24 allegations must create more than a “sheer possibility that a defendant has acted unlawfully
 25 When a complaint pleads facts that are merely consistent with a defendant’s liability, it stops short
 26 of the line between possibility and plausibility of entitlement to relief.” *Id.* (quoting *Iqbal*, 556
 27 U.S. at 678) (internal quotations omitted). Stated another way, the plaintiffs’ factual pleading in
 28 this case “must be enough to raise a right to relief above the speculative level.” *Astiana*, 2011 WL

1 2111796 at *2 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)) (internal quotations
2 omitted). Plaintiffs’ complaint here falls far short of this mark because it simply “tenders naked
3 assertion[s] devoid of further factual enhancement.” See *In re Ferrero Litig.*, 794 F.Supp.2d 1107,
4 1111 (S.D. Cal. 2011) (quoting *Iqbal*, 556 U.S. at 678) (internal quotations omitted).

5 In addition, where, as here, claims sound in fraud, the plaintiffs must allege facts with
6 particularity to satisfy the heightened pleading requirements of Rule 9(b). *Jones v. Conagra*
7 *Foods, Inc.*, 912 F.Supp.2d 889, 894 (N.D. Cal. 2012) (citing Rule 9(b)). This rule exists “to deter
8 the filing of complaints as a pretext for the discovery of unknown wrongs, to protect defendants
9 from the harm that comes from being subject to fraud charges, and to prohibit plaintiffs from
10 unilaterally imposing upon the court, the parties and society enormous social and economic costs
11 absent some factual basis.” *United States v. United Healthcare Ins. Co.*, 848 F.3d 1161, 1180 (9th
12 Cir. 2016) (internal citations and quotations omitted). Rule 9(b) further safeguards a “defendant’s
13 reputation and goodwill from improvident charges of wrongdoing” and “inhibit[s] the institution
14 of strike suits.” *IUE AFL-CIO Pension Fund v. Herrmann*, 9 F.3d 1049, 1057 (2d Cir. 1993).

15 In light of these strongly-held policies, the core requirement of this heightened pleading
16 burden -- and the most glaring omission in the case before this Court -- is to “set forth what is
17 false or misleading about a statement, **and why it is false.**” *Brazil v. Dole Food Co.*, 935
18 F.Supp.2d 947, 953 (N.D. Cal. 2013) (quoting *Decker v. Glenfed, Inc.*, 42 F.3d 1541, 1548 (9th
19 Cir. 1994) (en banc), *superseded by statute on other grounds as stated in Marksman Partners,*
20 *L.P. v. Chantal Pharmaceutical Corp.*, 927 F.Supp. 1297, 1309 (C.D. Cal. 1996)) (internal
21 quotations omitted) (emphasis added). In addition, the complaint must allege “an account of the
22 ‘time, place, and specific content of the false representations as well as the identities of the parties
23 to the misrepresentations.’” *Id.* (quoting *Swartz v. KPMG LLP*, 476 F.3d 756, 764 (9th Cir. 2007)
24 (per curiam)). Here, the plaintiffs fail to satisfy both plausibility **and** the heightened pleading
25 standards for fraud. As a result, the Court is required to dismiss the FAC in its entirety.

1 **B. Plaintiffs Cannot Meet The Federal Pleading Standard**

2 **1. Plaintiffs Offer no Facts to Support their Misrepresentation Allegations**

3 The FAC’s causes of action all sound in fraud. The First Cause of Action is titled
 4 “Common Law Fraud” and alleges that Subway provided the plaintiffs “with false or misleading
 5 material information and failed to disclose material facts.” (FAC at ¶47.) The Second Cause of
 6 Action, entitled “Intentional Misrepresentation,” alleges that Subway knowingly made “false
 7 representations.” (*Id.* at ¶52.) The Third Cause of Action for “Negligent Misrepresentation”
 8 similarly alleges that Subway “knew or should have known” that certain of its representations
 9 were false. (*Id.* at ¶59.) *See generally Chevron Prods. Co. v. Advanced Corrosion Techs. &*
 10 *Training, LLC*, No. 20-cv-09095-CRB, 2021 WL 2156467, at *3 (N.D. Cal. May 27, 2021)
 11 (noting differing approaches to assessing whether negligent misrepresentation claims trigger Rule
 12 9(b) and ultimately applying a “case-by-case” approach so that “if plaintiffs are alleging conduct
 13 ‘grounded in fraud . . . the pleading of that claim *as a whole* must satisfy the particularity
 14 requirement of Rule 9(b).’”) (quoting *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125 (9th Cir.
 15 2009)) (emphasis added). While the FAC’s Fourth Cause of Action is for “Unjust Enrichment,” it
 16 demands recovery based on the premise that Subway has misrepresented the content of its tuna
 17 products and so, like the other claims in the FAC, requires heightened pleading. (FAC at ¶66.)
 18 Finally, all three of the plaintiffs’ California statutory claims -- under the Consumer Legal
 19 Remedies Act, False Advertising Law and Unfair Competition Law (*id.* at ¶¶68-124) -- arise from
 20 the core allegation that Subway made false statements of fact about its tuna products in
 21 unspecified advertising, labeling and marketing claims and so must be pled with particularity. *See*
 22 *Brazil*, 935 F.Supp.2d at 963 (UCL, FAL and CLRA claims based on food mislabeling were “all
 23 subject to the heightened pleading requirement of Rule 9(b)”; *Romero*, 2015 WL 2125004 at *3
 24 (“This Court -- along with other courts in this District -- has rejected the notion that ‘misbranding’
 25 under the ‘unlawful’ prong of the UCL excuses a plaintiff’s obligation to plead fraud with
 26 particularity”); *see generally Kearns*, 567 F.3d at 1125 (“we have specifically ruled that Rule
 27 9(b)’s heightened pleading standards apply to claims for violations of the CLRA and UCL”).
 28

1 Plaintiffs cannot satisfy this heightened pleading burden with respect to any of their
 2 claims. The FAC repeats as a mantra two alleged statements -- that Subway’s tuna products (1)
 3 are “100% sustainably caught skipjack and yellowfin tuna” and (2) do not contain “tuna species
 4 that come from anything less than healthy stocks, for example Albacore and Tongol” -- and claims
 5 these statement are false or misleading. (FAC at ¶¶2, 4-8, 21, 23, 25, 31-33.) ***But the FAC offers***
 6 ***no facts demonstrating that the statements are actually false or explaining why the plaintiffs***
 7 ***believe these statements are false or how the statements caused damages to the plaintiffs.*** Any
 8 claim of false representation about consumer products must supply this foundational information
 9 to survive a motion to dismiss. *See, e.g., Colgate v. JUUL Labs, Inc.*, 345 F.Supp.3d 1178, 1183
 10 (N.D. Cal. 2018) (defendant misrepresented the amount of nicotine in its products ***because “they***
 11 ***contain 6.2% nicotine salt, rather than the 5% nicotine advertised”***) (emphasis added); *Ham v.*
 12 *Hain Celestial Grp., Inc.*, 70 F.Supp.3d 1188, 1191 (N.D. Cal. 2014) (“All Natural” label is false
 13 ***“because one of the ingredients is a nonorganic synthetic substance”***) (emphasis added); *Cooper*
 14 *v. Curallux LLC*, No. 20-cv-02455-PJH, 2020 WL 4732193 at *1 (N.D. Cal. Aug. 14, 2020)
 15 (defendants’ claim of “no side effects” for its low level laser hair loss therapy was false ***because***
 16 ***“scientific studies and experts in the field of hair restoration state that there are several side***
 17 ***effects”*** associated with that treatment) (emphasis added).

18 By contrast to the myriad authority requiring facts demonstrating a misrepresentation, the
 19 plaintiffs in this case do not allege a single such fact. Instead, the plaintiffs simply conclude that
 20 the statements are false based on a tautology: “Because we have alleged Subway’s statements are
 21 false, therefore they are false.” (*See, e.g.*, FAC at ¶2 (“Defendants label and advertise the
 22 Products as ‘100% tuna’ and additionally represent that the tuna in their products contains either
 23 skipjack and/or yellowfin tuna from sustainably farmed fisheries In reality, the Products do
 24 not contain 100% skipjack and yellowtail [sic] tuna”).) For example, the FAC does not cite any
 25 documents, pictures or other evidence that the tuna sold by Subway is not sustainably caught
 26 (indeed, they do not even allege what they think “sustainably caught” means) or is not 100%
 27 skipjack or yellowfin tuna. Nor does the FAC cite to any scientific data or test results showing the
 28 presence of other species of tuna in the tuna sold at Subway restaurants in California. The FAC

1 does not even attempt to explain what else the plaintiffs claim was actually in their sandwiches
2 *other than* skipjack and yellowfin tuna. Indeed, the plaintiffs confirm that they made no effort to
3 attempt to ascertain the contents of the Subway tuna products at the time they purchased and
4 consumed those products, meaning that there is no means alleged by which the plaintiffs could
5 have reasonably determined what was in their tuna or how it was caught. (*Id.* at ¶34.) The result
6 is a fundamentally deficient theory of fraud that requires the parties and the Court to speculate
7 wildly about what the plaintiffs are claiming and how they might prove their case. Such
8 circumstances require the Court to dismiss the FAC in its entirety. *See, e.g., In re Harmonic Inc.*
9 *Sec. Litig.*, 163 F.Supp.2d 1079, 1097 (N.D. Cal. 2001) (dismissing securities fraud claims “for
10 failure to allege falsity with particularity” where the “plaintiffs highlight certain phrases or
11 passages in some of the analysts’ reports, but do not explain why the highlighted passages were
12 false”); *In re Invision Techs., Inc. Sec. Litig.*, No. C04-03181 MJJ, 2006 WL 538752 at *4 (N.D.
13 Cal. Jan. 24, 2006) (dismissing PSLRA claim where the “plaintiffs did not explain why that
14 statement in particular was false or misleading”); *Tompkins v. Emc Mortg. Corp.*, No. CV 10-608-
15 PHX-SRB, 2010 WL 11629510 at *4 (D. Ariz. Oct. 28, 2010) (fraud-based claims must be
16 dismissed when they “do not explain why the alleged omissions were false or misleading”).

17 Although the FAC includes a section purporting to satisfy Rule 9(b) requirements (FAC at
18 ¶¶35-41), on the key issue of “why,” the plaintiffs simply answer the wrong question: Plaintiffs
19 allege that Subway supposedly made the alleged representations because it wanted to induce
20 consumers to detrimentally rely on those representations, which is itself merely a legal conclusion.
21 (*See id.* at ¶41.) But the inquiry cannot be about the defendants’ motives -- *i.e.*, why they would
22 supposedly make a false statement -- but must show why *the statement is actually false*. *See*
23 *Cafasso v. Gen. Dynamics C4 Sys.*, 637 F.3d 1047, 1055 (9th Cir. 2011). Plaintiffs cannot survive
24 12(b)(6) scrutiny by paying lip service to Rule 9(b) requirements while failing to allege the facts
25 required under federal procedure and Ninth Circuit case law.

1 **2. Plaintiffs’ Allegations about Adulteration are Speculative, too**

2 Plaintiffs’ remaining allegations do not offer any explanation for their fraud claims but,
3 instead, dabble in the sort of speculation, “sheer possibilities” and unwarranted inferences that
4 federal pleading standards do not tolerate. *See Iqbal*, 556 U.S. at 678.

5 First, the plaintiffs speculate that Subway “does not take sufficient measures to control or
6 prevent the known risks of adulteration.” (FAC at ¶22.) Plaintiffs do not identify any such
7 measures, much less explain how they bear on adulteration risks. Second, the plaintiffs leap to the
8 conclusion that Subway “actively perpetuate[s] actions and steps that encourage mixing non-tuna
9 ingredients into the Products.” (*Id.*) Missing from their pleading, however, is even the slightest
10 factual detail of what these “actions and steps” might be or what “non-tuna ingredients” are mixed
11 into the product, if any are. Third, the plaintiffs “reason” that, because the tuna products are
12 vacuum sealed “outside the United States,” their contents are suspect and Subway lacks a “reliable
13 and standardized protocol to ensure . . . the sealed vacuum bags are actually tuna. (*Id.*) This
14 offensive -- and xenophobic -- notion that foreign-packed food items cannot be trusted falls
15 squarely into the realm of base speculation and unwarranted inference. *See Iqbal*, 556 U.S. at 678.

16 Finally, the plaintiffs suggest that their fraud claims may have merit because *Subway*
17 cannot currently establish that tuna sandwiches allegedly consumed by the plaintiffs at some point
18 during a three-year class period *did* contain the tuna fish species as advertised. (FAC at ¶6.) This
19 attempt to shift the plaintiffs’ pleading burden onto the defendants finds no basis in the law and, at
20 any rate, is based on nothing more than rank speculation.

21 The Court should grant Subway’s motion to dismiss.

22 **3. Plaintiffs do not Allege where they saw Subway’s Representations**

23 As it evident from the face of the FAC, the plaintiffs have failed to allege facts giving rise
24 to a plausible inference of reliance. This problem results from the failure to allege any facts about
25 *where* and *when* the plaintiffs supposedly encountered the representations at issue, as Rule 9(b)
26 requires, which necessarily means that the plaintiffs have not alleged facts sufficient to show that
27 they actually relied on any such representations. *See, e.g., Romero*, 2015 WL 2125004 at *4
28 (“Related to Plaintiff’s failure to plead particular misrepresentations is her failure to plead her

1 actual reliance on those misrepresentations”) (citations omitted). Instead of meeting the pleading
 2 standard, the plaintiffs simply suggest that the supposedly offending statements appear somewhere
 3 in Subway’s “labeling,” “packaging,” “marketing,” “advertising,” “website” and “menus.” (*See*,
 4 *e.g.*, FAC at ¶¶2, 21 and 31.) These allegations are woefully insufficient.

5 Critically, the plaintiffs do not state where on any of the media identified in the FAC they
 6 supposedly saw the representations to which they refer; they only claim to have purchased tuna
 7 products from Subway at some point between January 21, 2017 and “2020.” (FAC at ¶33.) This
 8 is an important omission because, as noted *supra*, the representations to which the plaintiffs refer
 9 in the FAC were never made on any labeling, packaging, marketing, advertising or menus. (*See*
 10 RJN, Exs. A-R.) Thus, the allegations in the FAC are fatally vague under Rule 9(b): As this
 11 Court reasoned when faced with considerably more detailed allegations than those in the FAC
 12 here, “Plaintiff cannot simply identify a list of products, allege a slew of problems with
 13 Defendant’s labeling of those products, and then ask Defendant and the Court to mix and match.
 14 It is not the task of the Court or of Defendant to diagram the intersection between the challenged
 15 products and the mislabeling allegations.” *Romero*, 2015 WL 2125004 at *4. Plaintiffs’ failure to
 16 allege the “where,” “what” and “when” of their misrepresentation claims is an additional reason to
 17 dismiss the FAC. *See, e.g., Colgate v. JUUL Labs, Inc.*, 345 F.Supp.3d at 1191 (“because
 18 plaintiffs have not identified which advertisements they saw during the class period, or where they
 19 saw them (outside of social media), I grant JUUL’s motion to dismiss plaintiffs’ false advertising,
 20 CLRA, . . . fraud, and UCL . . . claims”).

21 But the plaintiffs must also allege actual reliance to maintain UCL, CLRA and FAL
 22 claims. *See In re Ferrero Litig.*, 794 F.Supp.2d at 1111. The same is true for their fraud and
 23 misrepresentation claims. *See Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1105 (9th Cir.
 24 2003) (describing “indispensable elements of a fraud claim” under California law); *Colgate v.*
 25 *JUUL Labs, Inc.*, 345 F.Supp.3d at 1195 (citing elements of claim for negligence
 26 misrepresentation under California law) (citing *Fox v. Pollack*, 181 Cal.App.3d 954, 962 (1986)).²

27
 28 ² Plaintiffs’ “Common Law Fraud” and “Intentional Misrepresentation” causes of action are
 duplicative because, “[u]nder California law, intentional misrepresentation is [simply] a species of

1 This means that the plaintiffs must allege facts demonstrating that they actually read the two
 2 statements at issue (*i.e.*, what they read and where they read it) and relied on both of them before
 3 purchasing tuna products from Subway (*i.e.*, when they read it and why it mattered to them).

4 Instead of alleging such facts, the plaintiffs merely claim that Subway made
 5 representations regarding 100% sustainably caught tuna and that the plaintiffs purchased tuna
 6 from Subway at unspecified locations on unspecified dates in Alameda County and elsewhere in
 7 California. (FAC at ¶33.) Neither plaintiff alleges that they viewed Subway’s website before
 8 making such purchases. This omission is unsurprising: No materials physically located at
 9 Subway restaurants between January 21, 2017 and December 31, 2020 contained representations
 10 that Subway tuna was “100% sustainably caught skipjack and yellowfin tuna” or that it did not
 11 contain “tuna species that come from anything less than healthy stocks, for example Albacore and
 12 Tongol.” (RJN, Exs. A-L.) Instead, the menus at Subway restaurants describe the product simply
 13 as “Tuna” or “Classic Tuna” (RJN, Exs. A-H) and the packaging of tuna sandwiches, wraps and
 14 salads simply states “Subway” or contains the restaurant’s “S” trademark. (RJN, Exs. J-L).
 15 Plaintiffs cannot plausibly allege reliance on the other representations under such circumstances.

16 To the extent the plaintiffs might try to suggest that they ordered their tuna products
 17 through Subway’s website, those efforts would fail, too. First, the plaintiffs specifically allege in
 18 the FAC that they purchased Subway products at a brick and mortar restaurant. (FAC at ¶33.)
 19 Second, even if the plaintiffs had ordered their food online, which they do not allege, Subway’s
 20 online ordering portal during the time in question did not contain the representations that the
 21 plaintiffs allege in the FAC. Instead, the ordering portal described tuna products as “flaked tuna.”
 22 (RJN, Exs. M-R.) The same description is included in the detailed “Nutrition Facts” information
 23 for tuna on the Subway website. (RJN, Ex. U.)

24
 25
 26 _____
 27 fraud.” *Sherwin-Williams Co. v. JB Collision Servs.*, No. 13-CV-1946-LAB-WVG, 2014 WL
 28 5112057 at *4 (S.D. Cal. Oct. 9, 2014). The California Civil Jury Instructions do not include a
 separate cause of action for “Common Law Fraud,” only “Intentional Misrepresentation.” See
 CACI § 1900.

1 Subway’s print and media advertising in California during the relevant time period did not
2 contain the phrases “100% sustainably caught skipjack and yellowfin tuna” or “tuna species that
3 come from anything less than healthy stocks, for example Albacore and Tongol,” either. Instead,
4 Subway’s advertising simply used the word “Tuna” to market new tuna-based menu items, such as
5 the “Green Goddess Tuna Melt” or the “Southwest Tuna” sandwich. (RJN, Ex. I.)

6 Indeed, the *only* place that Subway has ever made the representations identified in the
7 FAC is on a non-commerce page of its website titled “Our Communities.” (RJN, Exs. S and T.)
8 A consumer cannot order food from this page and does not need to view this page to order food or
9 obtain nutritional information about Subway’s tuna products. Instead, to get to that particular
10 page, and the representations about which the plaintiffs complain, a consumer must (1) click on
11 the “Responsibility” tab at the top of the Subway homepage, (2) then select the option for “Our
12 Communities” from five separate choices, (3) then consider four subsections on the “Our
13 Communities” page and, from those four subsections, (4) select the “Responsible Sourcing”
14 subsection and, finally, (5) scroll down to the bottom of that page to see that Subway says:

15 We only sell skipjack and yellowfin tuna. It is sourced from fisheries
16 with non-threatened stock levels. Furthermore, we have a global ban
17 on the sale of tuna species that come from anything less than healthy
18 stocks, for example Albacore and Tongol. (RJN, Ex. T.)

18 As this is the only place where Subway has ever made such representations, the claims cannot
19 constitute food labeling under federal law because they do not appear on the tuna products (or
20 their containers or wrappers) and do not “accompany” the products when they are purchased. *See*
21 *McFall v. Perrigo Co.*, No. 2:20-cv-07752-FLA (MRWx), 2021 WL 2327936 at *7 (C.D. Cal.
22 Apr. 15, 2021) (describing definition of “labeling” under the Federal Food, Drug, and Cosmetic
23 Act) (citing 21 U.S.C. § 321).

24 Ultimately, it is simply not plausible to infer that two individuals (much less an entire class
25 of consumers) who purchased Subway tuna products in California at some point during a three-
26 year period would have first reviewed the “Responsible Sourcing” sub-subsection of the “Our
27 Communities” subsection of the “Responsibility” section of the Subway website before
28 purchasing a tuna sandwich. Plaintiffs certainly have not offered any specific allegation to that

1 effect and such behavior would not be typical of a consumer of Subway products. The inability to
 2 make such allegations means that the plaintiffs have not pled actual reliance and do not have
 3 standing to bring the claims they have alleged. The Court should therefore dismiss the FAC
 4 without leave to amend.

5 V. CONCLUSION

6 This lawsuit demonstrates why Rule 9(b) (and Rule 11) exists. A consumer cannot come
 7 to this Court, charge a business with highly-publicized accusations of fraud and then utterly fail to
 8 explain *where* they saw the alleged misstatements and *why* those statements were misleading and
 9 *how* they caused actual damages to the consumer. Plaintiffs and their attorneys have “unilaterally
 10 impos[ed] upon the [C]ourt, the parties and society” -- including the thousands of independent
 11 Subway restaurant franchisees who have suffered real injury as a result of this irresponsible and
 12 cynical lawsuit -- “enormous social and economic costs” without any factual basis on which to do
 13 so. *See United Healthcare*, 848 F.3d at 1180. Such conduct is, frankly, outrageous.

14 The Court should therefore grant the motion to dismiss so that Subway and its franchisees
 15 can begin to put this unfortunate matter behind them and the plaintiffs and their counsel can
 16 proceed to face the consequences of their actions under Rule 11.

17
 18
 19 Dated: July 23, 2021

BAKER & McKENZIE LLP

21 By: /s/ Mark C. Goodman
 22 Mark C. Goodman
 23 Attorneys for Defendants
 24 SUBWAY RESTAURANTS, INC.,
 25 FRANCHISE WORLD HEADQUARTERS,
 26 LLC, and SUBWAY FRANCHISEE
 27 ADVERTISING TRUST FUND LTD.
 28