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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

CRYSTAL HILLSLEY, on behalf of
herself and all others similarly situated,

Plaintiff,

v.

OCEAN SPRAY CRANBERRIES, INC.;
ARNOLD WORLDWIDE LLC; and
DOES defendants 1 through 5, inclusive,

Defendants.

Case No.: 17cv2335-GPC(MDD)

**ORDER DENYING DEFENDANTS’
MOTION FOR SUMMARY
JUDGMENT**

[Dkt. No. 31.]

Before the Court is Defendants’ motion for summary judgment. (Dkt. No. 31.) Plaintiff filed an opposition, and Defendants replied. (Dkt. Nos. 40, 65.) Based on a careful review of the briefs, the supporting documents and the applicable law, the Court DENIES Defendants’ motion for summary judgment.

Background

The action was removed to this Court pursuant to the Class Action Fairness Act on November 16, 2017. (Dkt. No. 1.) Plaintiff Crystal Hillsley (“Plaintiff” or “Hilsley”) brings a purported consumer class action against Defendants Ocean Spray Cranberries, Inc. and Arnold Worldwide LLC for violations of California consumer protection laws based on misrepresentation of labels on certain Ocean Spray products. (Dkt. No. 1-2,

1 Compl.) Defendant Ocean Spray Cranberries, Inc. (“Ocean Spray”) manufactures,
 2 distributes, advertises, markets and sells a variety of juices and juice-based beverage
 3 products. Defendant Arnold Worldwide LLC (“Arnold”) participates in the labeling and
 4 advertising of these products for Ocean Spray. (Id. ¶ 6.) According to Hilsley, the labels
 5 on Defendants’ juice-based beverage products labeled “Cran-Apple” and “Cran-Grape”
 6 states “No . . . artificial flavors.” (Dkt. No. 23-19, Hilsley Decl. ¶ 5.) The Cran-Apple
 7 juice drink includes fumaric acid and malic acid as ingredients. (Dkt. No. 31-2, Fritz
 8 Decl. ¶ 9; Dkt. No. 23-4 at 4¹.) The Cran-Grape juice drink contains fumaric acid. (Dkt.
 9 No. 23-6, Marron Decl., Ex. 3 at 8-10.)

10 According to Hilsley, the Cran-Apple juice drink contains an artificial ingredient
 11 called d-l malic acid. (Id. ¶ 6.) “Malic acid is an organic compound with the molecular
 12 formula C₂H₆O₅. (Dkt. No. 40-19, Dr. Somogyi Decl. ¶ 19.) Natural malic acid, also
 13 known as l-malic acid, is found naturally in many fruits and vegetables. (Id. ¶ 21.) Dl-
 14 malic acid is a racemic mixture that does not occur naturally but is produced synthetically
 15 by “hydration of fumaric acid or maleic acid.” (Id. ¶ 22.) The complaint alleges that
 16 Ocean Spray uses a synthetic form of fumaric acid to simulate the flavor of grapes in its
 17 Cran-Grape product.² (Dkt. No. 1-2, Compl. ¶ 56.)

18 According to Plaintiff’s expert, Dr. Somogyi, malic acid is added to foods,
 19 beverages and candies to give tart and fruity flavors. (Dkt. No. 40-19, Dr. Somogyi Decl.
 20 ¶ 25.) Fumaric acid also simulates, resembles or reinforces certain fruit flavors in
 21 beverages and can also affect pH. (Id. ¶ 41.) Fumaric acid combined with malic acid
 22 improves the flavor profile of the product. (Id. ¶¶ 25, 41.) According to Ocean Spray’s
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24
 25 ¹ Page numbers are based on the CM/ECF pagination.

26 ² Defendants state fumaric acid “is produced from malic acid via the isomerization of maleic anhydride .
 27 . . . Malic Acid is made by the hydration of fumaric acid.” (Dkt. No. 31-1, Ds’ P&A at 20 n.9 (citing 21
 28 C.F.R. § 172.350).) Plaintiff’s expert does not assert that fumaric acid is produced synthetically but
 describes fumaric acid as being used to create the synthetically produced dl-malic acid. (Dkt. No. 40-19,
 Dr. Somogyi Decl. ¶ 22.) By implication, it appears that Plaintiff is claiming that fumaric acid is
 synthetically produced.

1 Vice President (“VP”) of research, development, quality and engineering, Ocean Spray
2 uses malic and fumaric acids to control pH and titratable acid levels in their juice
3 products, and are not used as flavors. (Dkt. No. 31-2, Fritz Decl. ¶ 9.)

4 Plaintiff purchased four Ocean Spray juice drinks: 1) Ocean Spray Cran-Apple; 2)
5 Ocean Spray Cran-Grape; 3) Ocean Spray 100% Apple Juice; and 4) Ocean Spray
6 Cranberry Juice Cocktail. (Dkt. No. 23-19, Hilsley Decl. ¶ 4.) Plaintiff concedes that
7 Ocean Spray Cranberry Juice Cocktail does not contain malic acid or fumaric acid and
8 she is no longer asserting claims as to the Cranberry Juice Cocktail. (Dkt. No. 40-20, P’s
9 Response to Ds’ SSUF, Nos. 3, 4.) While Plaintiff agrees that the Ocean Spray 100%
10 Apple Juice does not contain fumaric acid, she disputes Defendants’ claim that Ocean
11 Spray 100% Apple Juice does not contain malic acid and refers to Ocean Spray’s own
12 website where malic acid is an ingredient in the 100% Apple Juice product for the 15.2-
13 ounce bottles. (Id., Nos. 1, 2; Dkt. No. 40-12, Marron Decl., Ex. 10.) According to the
14 labels, the 60-ounce 100% Apple Juice does not contain malic acid while the 15.2-ounce
15 100% Apple Juice contains malic acid. (Compare Dkt. No. 23-6, Marron Decl., Ex. 3 at
16 14 with Dkt. No. 40-12, Marron Decl., Ex. 10.) Defendants argue that since Plaintiff
17 purchased the 64-ounce³ 100% Apple Juice product which does not contain malic acid,
18 her reference to the single-serve bottle is not relevant in this case. The Court disagrees.
19 Neither party has explained the difference in the ingredient labels of the 15.2-ounce and
20 60-ounce bottle of the same exact product. Accordingly, the Court concludes that this is
21 a disputed issue of fact.

22 When Plaintiff purchased Defendants’ juice products, she read and relied on the
23 products’ labels including “No artificial flavors or preservatives” and the fact that the
24 labels failed to state that they contained artificial flavorings. (Dkt. No. 23-19, Hilsley
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28 ³ The 100% Apple Juice product, at issue, comes in a 60-ounce bottle, not a 64-ounce bottle. (See Dkt.
No. 23-6, Marron Decl., Ex. 3 at 14.)

1 Decl. ¶ 5.) Plaintiff would not have purchased the juice products had she known they
2 contained artificial ingredients. (Id. ¶ 7.)

3 The complaint alleges that Defendants’ product labels stating the products contain
4 “No Artificial Flavors” are false and misleading because their juice products contain
5 artificial flavor ingredients of dl-malic acid and fumaric acid. (Dkt. No. 1-2, Compl. ¶
6 10.) The complaint also claims that the products’ ingredient list violates federal and state
7 law because it incorrectly identifies malic acid as a generic “malic acid” instead of using
8 the correct, specific, non-generic chemical name. (Id. ¶ 27.) Plaintiff alleges six causes
9 of action for violation of the Consumer Legal Remedies Act, Cal. Civ. Code § 1750 *et*
10 *seq*; violation of the unlawful prong of the Unfair Competition Law (“UCL”), Cal. Bus.
11 & Professions Code section 17200 *et seq.*; violation of the unfair prong of the UCL;
12 violation of California’s False Advertising Law, breach of express warranty and breach
13 of implied warranty. (Id. ¶¶ 115-187.)

14 Discussion

15 A. Legal Standard on Summary Judgment

16 Federal Rule of Civil Procedure 56 empowers the Court to enter summary
17 judgment on factually unsupported claims or defenses, and thereby “secure the just,
18 speedy and inexpensive determination of every action.” Celotex Corp. v. Catrett, 477
19 U.S. 317, 325, 327 (1986). Summary judgment is appropriate if the “pleadings,
20 depositions, answers to interrogatories, and admissions on file, together with the
21 affidavits, if any, show that there is no genuine issue as to any material fact and that the
22 moving party is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c). A fact is
23 material when it affects the outcome of the case. Anderson v. Liberty Lobby, Inc., 477
24 U.S. 242, 248 (1986).

25 The moving party bears the initial burden of demonstrating the absence of any
26 genuine issues of material fact. Celotex Corp., 477 U.S. at 323. The moving party can
27 satisfy this burden by demonstrating that the nonmoving party failed to make a showing
28 sufficient to establish an element of his or her claim on which that party will bear the

1 burden of proof at trial. Id. at 322-23. If the moving party fails to bear the initial burden,
2 summary judgment must be denied and the court need not consider the nonmoving
3 party's evidence. Adickes v. S.H. Kress & Co., 398 U.S. 144, 159-60 (1970).

4 Once the moving party has satisfied this burden, the nonmoving party cannot rest on the
5 mere allegations or denials of his pleading, but must "go beyond the pleadings and by her
6 own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file'
7 designate 'specific facts showing that there is a genuine issue for trial.'" Celotex, 477
8 U.S. at 324. If the non-moving party fails to make a sufficient showing of an element of
9 its case, the moving party is entitled to judgment as a matter of law. Id. at 325. "Where
10 the record taken as a whole could not lead a rational trier of fact to find for the
11 nonmoving party, there is no 'genuine issue for trial.'" Matsushita Elec. Indus. Co. v.
12 Zenith Radio Corp., 475 U.S. 574, 587 (1986). In making this determination, the court
13 must "view[] the evidence in the light most favorable to the nonmoving party." Fontana
14 v. Haskin, 262 F.3d 871, 876 (9th Cir. 2001). The Court does not engage in credibility
15 determinations, weighing of evidence, or drawing of legitimate inferences from the facts;
16 these functions are for the trier of fact. Anderson, 477 U.S. at 255.

17 **B. Whether Malic and/or Fumaric Acids Function as Flavors**

18 Defendants move for summary judgment on all six causes of action arguing that
19 malic and fumaric acids do not function as flavors in their juice products but instead are
20 acidulants used to control the pH and titratable acid levels in their juices. Because each
21 cause of action is dependent on the determination that malic and fumaric acids function
22 as flavors in Defendants' products, they argue that summary judgment should be granted
23 on all causes of action. Plaintiff responds arguing there are genuine issues of material
24 fact that malic and fumaric acids act as flavors in Defendants' products.

25 21 C.F.R. § 101.22(a)(1) provides,

26 The term artificial flavor or artificial flavoring means any substance, the
27 function of which is to impart flavor, which is not derived from a spice, fruit
28 or fruit juice, vegetable or vegetable juice, edible yeast, herb, bark, bud, root,
leaf or similar plant material, meat, fish, poultry, eggs, dairy products, or

1 fermentation products thereof. Artificial flavor includes the substances
2 listed in §§ 172.515(b) and 182.60 of this chapter except where these are
3 derived from natural sources.

4 21 C.F.R. § 101.22(a)(1). Artificial flavor is also described as any flavor “which
5 simulates, resembles or reinforces the characterizing flavor.” 21 C.F.R. § 101.22(i)(2).

6 Defendants first argue that malic and fumaric acids are not artificial flavors
7 because they are not listed by the FDA as an artificial flavor as provided under 21 C.F.R.
8 §§ 172.515(b) and 182.60. Plaintiff disagrees.

9 Malic and fumaric acids are not listed on the list of artificial flavors promulgated
10 by the FDA. See 21 C.F.R. §§ 172.515(b) and 182.60. However, the lists are not
11 exhaustive. See Allred v. Frito-Lay N. America, Inc., Case No. 17cv1345-JLS-BGS,
12 2018 WL 1185227, at *4 (S.D. Cal. Mar. 7, 2018) (interpreting statutory language
13 “[a]rtificial flavor *includes* the substances listed in §§ 172.515(b) and 182.60” to be not
14 exhaustive (emphasis added)); Engurasoff v. Coca-Cola Co., No. C 13-3990 JSW, 2014
15 WL 4145409, at *3 (N.D. Cal. Aug. 21, 2014) (“absence of phosphoric acid on these lists
16 does not mean that the FDA has made a finding that phosphoric acid is not an artificial
17 flavor”). Therefore, simply because malic and fumaric acids are not on the FDA lists
18 does not mean that the FDA has determined they are not artificial flavors.

19 Next, Defendants argue that malic acid and fumaric acid in their juice products are
20 used to control pH levels and levels of titratable acid. In contrast, Plaintiff asserts that
21 malic and fumaric acids are used to impart a tart, fruity flavor in Defendants’ juice
22 products.

23 The regulations provide that malic acid can be used “as a *flavor enhancer* as
24 defined in § 170.3(o)(11) of this chapter, *flavoring agent and adjuvant* as defined in §
25 170.3(o)(12) of this chapter, and *pH control agent* as defined in § 170.3(o)(23) of this
26 chapter.” 21 C.F.R. § 184.1069(c) (emphasis added). “Flavor enhancers” are
27 “[s]ubstances added to supplement, enhance, or modify the original taste and/or aroma of
28 a food, without imparting a characteristic taste or aroma of its own.” 21 C.F.R. §

1 170.3(o)(11); see Viggianov v. Hansen Natural Corp., 944 F. Supp. 2d 877, 889 (C.D.
2 Cal. 2013) (finding sucralose and ace-k are not “flavors” because they do not give the
3 product an original taste, but “sweeten or amplify whatever characterizing flavor it has
4 from another source.”). “Flavoring agents and adjuvants” are “[s]ubstances added to
5 impart or help impart a taste or aroma in food.” 21 C.F.R. § 170.3(o)(12). pH control
6 agents are “[s]ubstances added to change or maintain active acidity or basicity, including
7 buffers, acids, alkalies, and neutralizing agents.” 21 C.F.R. § 17.03(o)(23).

8 In support of their argument that malic and fumaric acids do not act as flavors in
9 their juice products, Defendants rely solely on the declaration of Erich Fritz, the VP of
10 research, development, quality and engineering at Ocean Spray. (Dkt. No. 31-2, Fritz
11 Decl.) According to Fritz, there are two basic flavor components in each product: (i) the
12 juice or juices used in the product; and (ii) natural flavors. (Id. ¶ 4.) Ocean Spray
13 purchases natural flavors from flavor houses, who certify, pursuant to 21 C.F.R. § 101.22,
14 that the flavors they provide to Ocean Spray are natural, contain no artificial flavor and
15 that no artificial flavors have been added. (Id.) These natural flavors are included as part
16 of what Ocean Spray calls its “bev base,” which are proprietary blends of natural flavors
17 that have been developed to complement the juices in order to deliver the overall flavor
18 profile Ocean Spray desires in any given product. (Id.) The Cran-Apple’s “bev base”
19 contains the only ingredients that impart flavor to the product which includes water,
20 sugar, cranberry juice (from concentrate) and apple juice (from concentrate). (Id. ¶ 8.)

21 Ocean Spray also adds other ingredients to the solution to achieve the specified pH
22 level of 3.9 and to fine tune the solution for titratable acid before the end product is
23 bottled. (Id. ¶ 9.) These ingredients are fumaric acid, sodium citrate and malic acid.
24 (Id.) Ocean Spray uses different acids because of their different properties and it has
25 created blending formulas and technologies to produce delicious juice and juice drink
26 products consumers have come to expect from Ocean Spray. (Id. ¶ 10.) Ocean Spray’s
27 goal is to produce end products that are indistinguishable to the consumer no matter
28 where they were produced or when they were made. (Id.) All juice products contain

1 some amount of juice and the juice is part of the flavor profile in each product and Ocean
2 Spray does not make juice products that do not contain juices and instead derive their
3 flavor profiles from artificial flavors. (Id.)

4 The ingredient list for Cran-Apple lists fumaric acid ahead of malic acid, because
5 there is more fumaric acid, by weight, in the formula.⁴ (Id. ¶ 11.) Ingredients are listed
6 in descending order of predominance by weight. (Id.) Fumaric acid is listed after
7 “natural flavor,” meaning that there is more natural flavor, by weight, than fumaric acid.
8 (Id.) Malic acid is listed even further down the list, meaning that there is less malic acid
9 in the product than fumaric acid. (Id.)

10 The amount of fumaric acid is set by formula so the same amount goes into each
11 batch. (Id. ¶ 12.) However, the amount of malic acid can vary and is used to “fine tune”
12 the titratable acid in the end product before it is bottled. (Id.)

13 One of the specifications is final pH and compliance with that specification is
14 analytically determined by measuring the pH level and not by taste, smell, or any sensory
15 attribute. (Id. ¶ 13.) Both malic and fumaric acids are essentially odorless and have no
16 distinctive flavor, which again sets them distinctly apart from other ingredients added for
17 flavor. (Id. ¶ 14.) However, at some level, a consumer could perceive a difference if
18 there was more acidulants than in a sample with less acidulants. (Id.) A consumer could
19 describe that sensory difference as a difference in “taste,” but the flavor components
20 would be unchanged between the two samples. Fritz asserts that “flavors” (as defined by
21 regulation) and “taste” (a subjective sensory perception) are not the same thing. (Id.) In
22 all cases, the pH level as well as the level of titratable acid is determined by an analytical
23 test, not a sensory test. (Id. ¶ 15.)

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27 ⁴ The ingredients for the Cran-Apple juice drink lists ingredients as follows: “Filtered Water, Sugar,
28 Cranberry Juice (Water, Cranberry Juice Concentrate), Apple Juice (Water, Apple Juice Concentrate),
Natural Flavor, Fumaric Acid, Sodium Citrate, Malic Acid, Ascorbic Acid (Vitamin C), Vegetable
Concentrate for Color.” (Dkt. No. 23-23.)

1 Adding in “too much” malic acid would not change the flavor of the formula,
2 because malic acid is not a flavor but adding in too much malic acid in a formula at some
3 point would create a perceptible difference in mouth feel of the product, because the pH
4 would be altered from the level called for in the specification, and thus would be
5 perceived by Ocean Spray’s quality control personnel as out of specification. (Id. ¶ 16.)

6 Therefore, Fritz asserts it is theoretically possible to add too much malic acid or
7 fumaric acid into a solution that the acidity would overwhelm the actual juices and
8 natural flavors in the solution, and, in that sense, the solution could be said to be
9 “flavored” by the malic or fumaric acid. (Id. ¶ 17.) But such a product would be
10 unpalatable, and never be allowed to leave the production facility and a consumer
11 drinking it would immediately perceive the taste as being something very different from
12 what she expected from an Ocean Spray product. (Id.)

13 In response, Plaintiff presents the expert declaration of Dr. Laszlo D. Somogyi,
14 Ph.D. (Dkt. No. 40-19, Dr. Somogyi Decl.) Dr. Somogyi is a food scientist with
15 extensive experience in food technology research and food product development. (Id. ¶
16 10.) He reviewed “laboratory test results regarding the presence of synthetic d-malic acid
17 isomer in the Ocean Spray Cran-Apple juice beverage.” (Id. ¶ 7.)

18 According to Dr. Somogyi, malic acid can be used by itself or blended with other
19 acids to produce a number of unique and distinct flavor properties. (Id. ¶ 25.) Malic acid
20 is added to foods, beverages and candies to give them a tart taste, and some fruit juice
21 and carbonated beverages rely on malic acid as a flavoring agent. (Id.) Malic acid is
22 used to simulate, resemble, or reinforce certain flavors, or enhance flavors in processed
23 foods and beverages that lose some of their natural flavoring during the processing. (Id.)
24 For flavors with astringency (such as cranberry juice) use of fumaric acid in combination
25 with malic acid improves the flavor profile of the product. (Id.) Dr. Somogyi
26 acknowledges that dl-malic acid can be used as a flavoring agent and adjuvant, a flavor
27 enhancer and pH control agent in beverages, confectionaries, fruit preparations and
28 preserves, desserts and bakery products. (Id. ¶¶ 26-31.)

1 Dr. Somogyi asserts that the Cran-Apple juice drink includes apple and cranberry
2 juice as well as a significant amount of natural l-malic acid (>1%) and other acidulants,
3 such as citric, fumaric, tartaric and ascorbic acid. (Dkt. No. 40-19, Dr. Somogyi Decl. ¶
4 33.) The Cran-Apple juice drink also contains commercial dl-malic acid and is in a lesser
5 quantity as it is listed near the bottom of the ingredient list. (Id. ¶ 34.) According to the
6 laboratory analysis of the Cran-Apple juice drink, there was only a small quantity of dl-
7 malic acid at 0.014g/100ml. (Dkt. No. 40-19, Dr. Somogyi Decl. ¶ 38; Dkt. No. 31-4,
8 Shackleford Decl., Ex. 5 at 88.) Because there is only a small quantity of synthetic malic
9 acid in the Cran-Apple juice drink, Dr. Somogyi opines it would not significantly lower
10 the pH of the juice drink but instead would function as a flavor and flavor enhancer. (Id.
11 ¶ 38.) “Dl-malic acid adds tartness, astringency, and a fruit-like flavor profile to foods
12 and simulates, resembles, or reinforces various tart, fruity flavors, and in particular the
13 flavors of apples.” (Id. ¶ 39.) Dr. Somogyi concludes that dl-malic acid is added to the
14 Cran-Apple juice drink and other products to function as a flavoring agent. (Id. ¶ 40.)
15 He also opines that fumaric acid similarly functions as a flavoring agent to reinforce
16 certain fruit flavors as well as affect pH. With astringent flavors like cranberry juice, the
17 use of fumaric acid along with malic acid “can improve the flavor profile of the product.”
18 (Id. ¶ 41.)

19 The parties acknowledge that malic acid can be used as a “flavor enhancer”, a
20 “flavoring agent and adjuvant” and as a “pH control agent.” See 21 C.F.R. §
21 184.1069(c). Defendants admit that a determination on whether malic acid acts as an
22 “artificial flavor” in a product depends on the manufacturer’s use of it. (Dkt. No. 31-1 at
23 20.) Defendants claims that malic acid and fumaric acid, as used in their products,
24 achieve a specified pH level and fine tunes the solution for titratable acid. (Dkt. No. 31-
25 2, Fritz Decl. ¶¶ 9, 12, 13.) Plaintiff raises an issue of material fact by presenting
26 evidence that Defendants use malic and fumaric acid as a flavor. This is based on the
27 trace amounts of malic acid in the Cran-Apple juice drink. (Dkt. No. 40-19, Dr. Somogyi
28 Decl. ¶ 38.) Dr. Somogyi explains that a small amount of dl-malic acid, 0.014g/100 ml in

1 the Cran-Apple juice drink, would not affect the pH levels of the drink but instead would
2 function as a flavor or flavor enhancer. (Id.)

3 Next, while Defendants assert that malic and fumaric acids are odorless and have
4 no distinctive flavor, (Dkt. No. 31-2, Fritz Decl. ¶ 14), Dr. Somogyi raises an issue of fact
5 by asserting that malic and fumaric acids are used to improve the flavor profile of the
6 product and dl-malic acid adds tartness, astringency and a fruit-like flavor profile to
7 foods. (Dkt. No. 40-19, Dr. Somogyi Decl. ¶¶ 25, 39.)

8 Finally, Plaintiff points out that Defendants make a distinction between “taste” and
9 “flavor” without any legal or factual support. As noted by Plaintiff, the FDA does not
10 make such a distinction. 21 C.F.R. § 101.22(a)(1). Moreover, Plaintiff presents Ocean
11 Spray’s own technical reference document as to l-malic acid,⁵ the natural form of malic
12 acid, where the specification for “Flavor Profile” is described as having a “[s]trong[]
13 acidic taste.” (Dkt. No. 71-4, Marron Decl., Ex. 13 at 2 (UNDER SEAL).) The use of
14 “taste” and “flavor profile” to describe l-malic acid in Ocean Spray’s own documents
15 challenges Defendants’ assertion that taste and flavor are distinct.

16 Based on the competing declarations, the Court concludes that there is a material
17 issue of disputed fact whether malic acid and fumaric acid function as flavors in
18 Defendants’ juice products.⁶ Thus, the Court DENIES Defendants’ motion for summary
19 judgment.⁷

21 ⁵ The Court notes that Ocean Spray’s technical document concerns l-malic acid, the natural form of
22 malic acid. It is not clear whether l-malic acid and dl-malic acid function in the same manner in
23 Defendants’ products. In his declaration, Fritz references “malic acid” and does not indicate whether
24 there is any difference between l-malic acid and dl-malic acid and whether they are both used as
acidulants in Ocean Spray’s juice products.

25 ⁶ Plaintiff also relies on journal articles to support her argument that titratable acidity is a “surrogate for
26 a tart acid flavor” (Dkt. No. 40 at 16, 21); however, the Court, as discussed below, excludes these
journal articles as inadmissible hearsay. Thus, the Court declines to consider her argument concerning
titratable acidity as unsupported by evidence.

27 ⁷ In a footnote, Defendants propose that the Court is within its prerogative to dismiss the case under the
28 doctrine of primary jurisdiction in order to allow the FDA to interpret its regulations concerning whether
malic acid is a flavor and whether labels must distinguish between l-malic acid and dl-malic acid. (Dkt.
No. 31-1 at 11 n.4.) “The primary jurisdiction doctrine allows courts to stay proceedings or to dismiss a

1 **C. Additional Arguments**

2 In their motion, Defendants preemptively present arguments that Plaintiff may
3 raise; however, it is not clear whether they move for summary judgment on these issues
4 as they provide cursory arguments. Nonetheless, because both parties address them, the
5 Court also considers the preemptive arguments.

6 Defendants argue malic acid, as stated in the regulations, is the common and usual
7 name that is properly placed on their labels' ingredient list. Plaintiff opposes arguing that
8 the regulations also provide that the name of an ingredient must be a specific name and
9 not a collective or generic name. She argues that malic acid is the common or generic
10 name for the group of compounds consisting of l-malic, d-malic and dl-malic acid and
11 specific names exist for each. Therefore, the failure to list dl-malic acid in its ingredient
12 list violates 21 C.F.R. § 101.4(b).

13 The FDA regulations state that ingredients "shall be listed by common or usual
14 name." 21 C.F.R. §§ 101.4(a)(1). It also provides that "[t]he name of the ingredient shall
15 be a specific name and not a collective (generic) name, except that: (1) Spices, flavorings,
16 colorings and chemical preservatives shall be declared according to the provisions of §
17 101.22." 21 C.F.R. § 101.4(b). The regulations provide that the "malic acid" is the
18 common name for "1-hydroxy-1, 2-ethanedicarboxylic acid." 21 C.F.R. § 184.1069(a).
19 The regulation then identifies the two types of malic acid: L-malic acid, which "occurs
20 naturally in various foods" and racemic DL-malic acid, which "does not occur naturally"
21 and "is made commercially by hydration of fumaric acid or maleic acid." *Id.*

22 If the ingredient is a flavoring, the provisions of 21 C.F.R. § 101.22 apply. *See* 21
23 C.F.R. § 101.4(b). 21 C.F.R. § 101.22 provides that

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26 complaint without prejudice pending the resolution of an issue within the special competence of an
27 administrative agency. . . and is to be used only if a claim involves an issue of first impression or a
28 particularly complicated issue Congress has committed to a regulatory agency." *Clark v. Time Warner
Cable*, 523 F.3d 1110, 1114 (9th Cir. 2008). Here, Defendants do not specifically move to stay or
dismiss based on primary jurisdiction and have also failed to identify that this issue is currently pending
before the FDA. Accordingly, the Court disregards Defendants' comments on primary jurisdiction.

1 (c) A statement of artificial flavoring, artificial coloring, or chemical
2 preservative shall be placed on the food or on its container or wrapper, or on
3 any two or all three of these, as may be necessary to render such statement
4 likely to be read by the ordinary person under customary conditions of
purchase and use of such food.

5 21 C.F.R. § 101.22(c). “The label of a food to which flavor is added shall declare the
6 flavor in the statement of ingredients in the following way: (1) Spice, natural flavor, and
7 artificial flavor may be declared as “spice”, “natural flavor”, or “artificial flavor”, or any
8 combination thereof, as the case may be.” 21 C.F.R. § 101.22(h).

9 While 21 C.F.R. § 101.4(a) requires that ingredients “shall be listed by common or
10 usual name” on the label, and the name shall be a “specific name and not a collective
11 (generic) name”, the regulations provide for exceptions for labeling flavorings under §
12 101.22. See 21 C.F.R. §§ 101.4(a) & (b)(1). § 101.22 states that an artificial flavor may
13 be labeled as “artificial flavor” in the ingredient list.

14 Therefore, whether Defendants failed to comply with federal labeling laws is
15 dependent on whether malic and fumaric acids function as flavors in Defendants’ juice
16 products. At this stage, since there is a genuine issue of material fact whether malic acid
17 and fumaric acid are flavors, there remains an issue as to how those specific ingredients
18 must be labeled. Accordingly, the Court rejects Defendants’ argument as premature.⁸

19 **D. Defendants’ Request for Judicial Notice**

20 Defendants filed a Request for Judicial Notice of two court orders from the
21 Southern District of California denying motions to dismiss in Allred v. Kellogg Co., No.
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24 ⁸ Defendants present two other preemptive challenges that Plaintiff will make and argue they are
25 irrelevant based on their position that malic and fumaric acids are not used as flavors in their products.
26 They argue that Plaintiff will raise an issue that malic and fumaric acids are made in manufacturing
27 facilities which they claim is irrelevant and Plaintiff will raise the “reasonable consumer” standard
28 which is also irrelevant because the use of malic and fumaric acids are legal issues defined by the federal
regulations. Plaintiff opposes arguing that because malic and fumaric acids are artificial flavors, these
issues are relevant. Based on the Court’s conclusion that there is a disputed issue of fact whether
fumaric and malic acids act as flavors in Defendants’ products, their preemptive arguments are not
persuasive to support summary judgment.

1 17-cv-1354-AJB, Dkt. No. 20, Order Denying Defendant’s Motion to Dismiss (Feb. 23,
2 2018); and Allred v. Frito-Lay North Am., Inc., No. 17-cv-1345-JLS, (Dkt. No. 26),
3 Order Denying Defendants’ Motion to Dismiss (Mar. 7, 2018). Plaintiff did not file an
4 opposition. Court filings are subject to judicial notice. See Reyn’s Pasta Bella, LLC v.
5 Visa USA, Inc., 442 F.3d 741, 767 n.6 (9th Cir. 2006) (“We may take judicial notice of
6 court filings and other matters of public record). Accordingly, the Court GRANTS
7 Defendants’ request for judicial notice.

8 **E. Evidentiary Objections**

9 Plaintiff filed evidentiary objections to certain paragraphs of Fritz’ declaration.
10 (Dkt. No. 40-21.) Defendants did not file a response. The Court notes the objections. To
11 the extent that the evidence is proper under the Federal Rules of Evidence, the Court
12 considered the evidence. To the extent that the evidence is not proper, the Court did not
13 consider it.

14 Defendants also filed evidentiary objections to Plaintiff’s evidence in support of
15 her opposition. (Dkt. No. 65-1.) Plaintiff did not file a response. Defendants object to
16 the declaration of Plaintiff’s expert Dr. Somogyi and the attached newspaper and journal
17 articles to Marron’s declaration.

18 As to Dr. Somogyi’s declaration, Defendants argue it that it should be excluded
19 because he was never disclosed as an expert in discovery. The Court disagrees.
20 Defendants chose to file an early motion for summary judgment before discovery has
21 been completed. The Court notes that while class discovery closed on July 9, 2018, fact
22 and expert discovery is still ongoing. According to the Scheduling Order, fact discovery
23 must be completed by November 8, 2018 and expert discovery to be completed by March
24 11, 2019. (Dkt. No. 14, Sch. Order ¶¶ 5, 9.) In fact, the deadline for the parties to
25 designate their respective experts is December 10, 2018. (Id. ¶ 6.) Accordingly, the
26 Court overrules Defendants’ objection to Dr. Somogyi’s declaration based on a failure to
27 disclose.

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1 Next, Defendants make generalized and summary arguments to exclude Dr.
2 Somogyi's declaration based on Daubert.⁹ First, they contend that Dr. Somogyi is not
3 qualified but do not explain why he is not qualified. Federal Rule of Evidence 702
4 requires that a testifying expert be "qualified as an expert by knowledge, skill,
5 experience, training, or education." Fed. R. Evid. 702. In applying Rule 702, the Ninth
6 Circuit "contemplates a broad conception of expert qualifications." Hangerter v.
7 Provident Life & Accident Ins. Co., 373 F.3d 998, 1015 (9th Cir. 2004) (quoting Thomas
8 v. Newton Int'l Enters., 42 F.3d 1266, 1269 (9th Cir. 1994)). The threshold for
9 qualification is low; a minimal foundation of knowledge, skill, and experience suffices.
10 Hangerter, 373 F.3d at 1015-16; see also Thomas, 42 F.3d at 1269. Moreover, "lack of
11 particularized expertise goes to the weight accorded her testimony, not to the
12 admissibility of her opinion as an expert." United States v. Garcia, 7 F.3d 885, 889 (9th
13 Cir. 1993). "Shaky but admissible evidence is to be attacked by cross examination,
14 contrary evidence, and attention to the burden of proof, not exclusion." Primiano v.
15 Cook, 598 F.3d 558, 564 (9th Cir. 2010) (citing Daubert, 509 U.S. at 596). It appears that
16 Dr. Somogyi is qualified to testify regarding artificial flavors as he is a food scientist.

17 Next, Defendants argue that Dr. Somogyi has not conducted any testing or analysis
18 of any challenged products so his opinions lack any foundation.

19 An expert's failure to independently conduct testing does not render his testimony
20 inadmissible as expert testimony may be in the form of specialized knowledge. See
21 Shuck v. CNH America, LLC, 498 F.3d 868, 875 (8th Cir. 2007) ("observations coupled
22 with expertise generally may form the basis of an admissible expert opinion"); Jaasma v.
23 Shell Oil Co., 412 F.3d 501, 514 (3d Cir. 2005) (rejecting argument that expert report
24 should be excluded because it was not based on independent testing and finding expert
25 opinion reliable). Moreover, a failure to test goes to the weight of his testimony, not
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28 ⁹ Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993).

1 admissibility. See Clay v. Ford Motor Co., 215 F.3d 663, 668–69 (6th Cir. 2000) (“The
2 district court, in its discretion, could have decided that [expert’s] failure to test his
3 theories went to the weight of his testimony regarding defects in the [product], not to its
4 admissibility.”).

5 Here, in support of his opinion, Dr. Somogyi relied on a laboratory test result,
6 (Dkt. No. 31-4, Shackleford Decl., Ex. 5), indicating the amount of synthetic d-malic acid
7 isomer in the Cran-Apple juice drink and his own specialized knowledge as a Certified
8 Food Scientist. (Dkt. No. 40-19, Dr. Somogyi Decl. ¶ 7.) Defendants’ argument that Dr.
9 Somogyi’s declaration is inadmissible because he did not conduct independent testing is
10 without merit. Thus, the Court overrules the objections as to Dr. Somogyi’s declaration.

11 Exhibits 1 through 8 of Marron’s declaration are articles from different journals as
12 well as articles from the website, www.bartek.ca. “It is axiomatic to state that newspaper
13 articles are by their very nature hearsay evidence and are thus inadmissible if offered to
14 prove the truth of the matter asserted[.]” AFMS LLC v. United Parcel Serv. Co., 105 F.
15 Supp. 3d 1061, 1070 (C.D. Cal. 2015) (quoting In re Dual-Deck Video Cassette Recorder
16 Antitrust Litig., No. MDL 765, 1990 WL 126500, at *3 (D. Ariz. July 25, 1990)); see
17 Larez v. City of Los Angeles, 946 F.2d 630, 642 (9th Cir. 1991) (“newspaper articles
18 have been held inadmissible hearsay as to their content”). Here, Plaintiff relies on the
19 articles to demonstrate the malic and fumaric acids are used as flavors and relies on them
20 for truth of the matters asserted. Accordingly, they are inadmissible as hearsay and the
21 Court sustains Defendants’ objection to Exhibits 1-8 of Marron’s declaration.

22 Defendants also present objections to the remaining exhibits of Marron’s
23 declaration, Exhibits 9-16. The Court notes these objections. To the extent that the
24 evidence is proper under the Federal Rules of Evidence, the Court considered the
25 evidence. To the extent that the evidence is not proper, the Court did not consider it.

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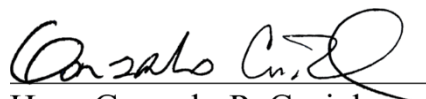
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Conclusion

Based on the above, the Court DENIES Defendants’ motion for summary judgment.¹⁰ The hearing set for November 2, 2018 shall be **vacated**.

IT IS SO ORDERED.

Dated: October 30, 2018


Hon. Gonzalo P. Curiel
United States District Judge

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¹⁰ Because the Court denies summary judgment, it declines to consider Plaintiff’s alternative argument asking the Court to defer ruling until after the close of discovery under Federal Rule of Civil Procedure 56(d).