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3 MARC SILVER, *et al.*,

4 Plaintiffs,

5 v.

6 BA SPORTS NUTRITION, LLC,

7 Defendant.

8 Case No. 20-cv-00633-SI9  
10 **ORDER RE: DEFENDANT'S MOTION  
FOR SUMMARY JUDGMENT**

11 Re: Dkt. No. 139

12 On December 17, 2021, the Court held a hearing on defendant's motion for summary  
13 judgment. For the reasons set forth below, the motion is GRANTED IN PART and DENIED IN  
14 PART.15  
16 **BACKGROUND**17 **I. Procedural History**18 Plaintiffs filed this lawsuit in January 2020. Defendant BA Sports Nutrition, LLC ("BA  
19 Sports") is a sports drink company that produces and sells BodyArmor SuperDrink sports drinks  
20 ("BodyArmor") with flavors such as Banana Strawberry, Blackout Berry, Fruit Punch, Orange  
21 Mango and Grape. BA Sports advertises that BodyArmor provides "superior hydration," and the  
22 drink labels contain the words "SUPERIOR HYDRATION," as well as images of fruits, the words  
23 "natural flavors and sweeteners," and advertise that the drinks contain "electrolytes," "antioxidants,"  
24 and various vitamins.25 A copy of an "exemplar" product label is reproduced below:<sup>1</sup>26  
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<sup>1</sup> The Court previously took judicial notice of this copy of the front and back of an  
"exemplar" label for the sports drinks. Soffer Decl. Ex. 1 (Dkt. 20-1).



Plaintiffs Marc Silver and Alexander Hill are “sports enthusiasts” who purchased and consumed BodyArmor believing that the drinks were healthy and would benefit their workouts as compared to other sports drinks. The focus of the original complaint was “superior hydration” and the theory that BodyArmor was a “dressed-up soda masquerading as a health drink.” Compl. ¶ 12. The complaint did not contain any allegations that plaintiffs were deceived by the labels’ fruit imagery or that they believed “natural flavors” referred to fruit flavors.

In an order filed June 4, 2020, the Court dismissed the original complaint with leave to amend. Dkt. No. 40. The Court found that the allegations about “superior hydration” amounted to inactionable puffery because “[p]roduct superiority claims that are vague or highly subjective often amount to nonactionable puffery,” while “[a] specific and measurable claim of product superiority based on product testing is not puffery.” *Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1145 (9th Cir. 1997). The Court also held that the plaintiffs’ claims that they were misled about

1 BodyArmor's healthiness were implausible because they were based on puffery ("superior  
2 hydration") and because BodyArmor's label truthfully stated its sugar content, including listing  
3 sugar as the second ingredient and accurately stating the amount of sugar in each bottle.

4 On July 7, 2020, plaintiffs filed an amended complaint that included new allegations that  
5 plaintiffs were misled by the fruit-based labeling of the drinks and that the drinks did not contain  
6 any fruit juice. Plaintiffs also expanded on the allegations that plaintiffs were misled by the labeling  
7 to believe that the sports drinks provided health benefits, including adding new allegations that  
8 plaintiffs understood hydration to be an objective and measurable attribute. The Court denied  
9 defendant's motion to dismiss the amended complaint, finding that "viewed holistically," plaintiffs  
10 had stated a claim.

11 After defendant filed the instant motion for summary judgment, plaintiffs filed an opposition  
12 stating, *inter alia*, that they required certain outstanding discovery in order to fully oppose the  
13 motion. The Court continued the summary judgment hearing to allow for the additional discovery,  
14 and allowed the parties to file supplemental briefs based upon that discovery. Dkt. No. 145. The  
15 parties then filed supplemental briefs; plaintiffs stated that, while they still required certain  
16 discovery for the case writ large, they did not actually need any outstanding discovery in order to  
17 oppose defendant's motion. Dkt. No. 148.

## 19 **II. The First Amended Complaint**

20 The first amended complaint ("FAC") alleges that Silver and Hill perceived hydration to be  
21 "an objective and variable attribute," FAC ¶ 53, that Silver and Hill understood BodyArmor's  
22 labeling claims "to mean that BodyArmor's capacity for superior hydration was objective and  
23 variable in degree and/or measure, and that BA conveyed as much to them intentionally and  
24 honestly, justifying the purchase and price premium." *Id.* ¶ 65. Silver and Hill "also understood  
25 BA's labeling claims to imply that BodyArmor was good for their bodies and health overall"  
26 because of the "superior hydration claims, and/or from the prominent labeling of BodyArmor's high  
27 vitamin and purported fruit contents." *Id.* ¶ 71. Plaintiffs allege that in fact, BodyArmor is a sugar-  
28 sweetened beverage whose "consumption poses serious health risks to Plaintiffs – health risks that

1 Plaintiffs did not understand existed given BA's labeling claims." *Id.* ¶¶ 75-76. Silver and Hill  
2 "have a favorable view of fruits, believing that natural fruits and fruit juices benefit their health,"  
3 and they believed that BodyArmor contained real fruit because of the names of the drinks, the  
4 images of fruit on the labels, and/or the natural ingredients claim. *Id.* ¶¶ 85-86. Plaintiffs would  
5 not have purchased BodyArmor had they understood that the drinks contained very little, if any, of  
6 the labeled fruits as ingredients. *Id.* ¶ 92.

7 The FAC also alleges that Hill saw BodyArmor's non-label advertising in stores, on  
8 billboards, television ads, and on social media. *Id.* ¶¶ 95-100. Hill saw this advertising and  
9 "understood that BodyArmor was superior at hydrating as compared to other sports drinks, including  
10 but not limited to Gatorade, and/or that such superior hydration would translate into correspondingly  
11 better workouts and related physical effects." *Id.* ¶ 99.

12 Silver and Hill seek to represent a nationwide class and several state subclasses. Silver  
13 asserts causes of action under the following California consumer protection statutes: (1) the Unfair  
14 Competition Law ("UCL"), Cal. Bus. & Prof. Code § 17200, *et seq.*, for unlawful business practices;  
15 (2) the UCL for unfair and fraudulent business practices; (3) the False Advertising Law ("FAL"),  
16 Cal. Bus. & Prof. Code § 17500, *et seq.*, for misleading and deceptive advertising; and (4) the  
17 Consumer Legal Remedies Act ("CLRA"), Cal. Civ. Code § 1750, *et seq.*, for deceptive practices  
18 in connection with the sale of misbranded products and misrepresentations regarding those products.  
19 Hill alleges two causes of action under New York's Consumer Protection from Deceptive Acts and  
20 Practices Law, N.Y. Gen. Bus. Law §§ 349-350, for deceptive labeling and marketing and false  
21 advertising. Both plaintiffs allege a claim for unjust enrichment/quasi-contract.<sup>2</sup>

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23 **III. Plaintiffs' Depositions**

24 **A. Hill**

25 At his deposition, Hill testified that when he first purchased BodyArmor in 2012, it was his

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<sup>2</sup> A third plaintiff, Heather Peffer, asserted claims under Pennsylvania law. Peffer dismissed  
her claims in November 2020. Dkt. No. 83.

1 practice to read the nutrition label and he would “look for some specific things,” including  
2 “definitely” “sugar.” Hill Depo. at 32-33 (Dkt. No. 140-3). Hill remembered “seeing lots of  
3 chemicals, or you know, shortening of chemicals” in the ingredients, and that nothing in the  
4 ingredients stood out in his memory. *Id.* at 37-38. Hill stated that he “remember[ed] fruit being on  
5 the label, and that was probably the key thing that drew my eye to it in comparison to a Gatorade,”  
6 and that he thought that BodyArmor’s flavor “was real fruit and, like, fruit added.” *Id.* at 37. Hill  
7 testified that he viewed fruit as important to a healthy diet, that he would occasionally drink fruit  
8 juice in 2012, and that he knows “that fruit juices tend to be high in sugars because they’re fruits,  
9 and those sugars are different.” *Id.* 53-56.

10 Hill testified that since high school<sup>3</sup> he believed that Gatorade was unhealthy because it was  
11 “sugar water,” that he has been drinking Gatorade “for my whole life,” and that when he started  
12 drinking BodyArmor in 2012 he continued to buy Gatorade and Powerade. *Id.* at 16-17. Hill  
13 stopped drinking BodyArmor in 2017 when he reached “that stage in my life where I started to  
14 become a little bit healthier and one of my friends became a much bigger influence in my diet and  
15 he kind of started pointing out all the crappy things I was eating.” *Id.* at 18.

16 When asked about how much hydration a man of his age and size would need after an hour-  
17 long bike ride, Hill testified, “My understanding of hydration is not a measurable quality at this  
18 point. So I don’t know how to answer that question.” *Id.* at 72. Hill stated he understood hydration  
19 to mean “you know, retaining water and retaining a healthy balance in your body between  
20 electrolytes, sugars, salts, and water.” When asked about why he claimed “superior hydration” was  
21 false, Hill stated, “I mean, I’m asserting that if hydration is not a measurable factor, they should not  
22 say they can hydrate better than [indiscernable].” *Id.* at 75. Hill testified that “superior hydration”  
23 means “it has to be superior to something” but that he did not know what BA was claiming  
24 BodyArmor was “superior” to. *Id.* at 75-76; 115-16. Hill was also asked whether “during the period  
25 that you were purchasing BodyArmor, do you feel like you got less hydration than you bargained  
26 for?” Hill replied, “I don’t know how to – I don’t know of a way to quantify hydration. So I can’t  
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<sup>3</sup> At the time of his December 7, 2020 deposition, Hill was 33 years old. *Id.* at 72.

1 say yes or no.” *Id.* at 109.

2 Hill also testified that he did not rely on any off-label advertising when purchasing  
3 BodyArmor. He admitted he never saw any of the YouTube or television ads cited in the FAC as  
4 having deceived him into purchasing BodyArmor’s products. *Id.* at 25-26. Hill testified that he did  
5 not rely on any of the athlete endorsements identified in the FAC, *id.* at 26; he admitted that he had  
6 not relied on any of the social media content cited in the FAC, *id.* at 26-27; he testified that he could  
7 not remember any specific in-store displays or what they said. *Id.* at 27 (“Q. What did the ad say?  
8 A. I do not recall specific things that were written in ads from five years ago.”). With regard to the  
9 in-store displays, Hill testified that those displays “probably just reminded me that this product  
10 existed over another product” and that, as with any advertising in a store, “those sorts of ads  
11 sometimes trigger me to make a point of purchase for a decision like that. I don’t know.” *Id.* at 29-  
12 31.

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14 **B. Silver**

15 Silver first bought BodyArmor in 2014. Silver Depo. at 23.<sup>4</sup> Silver testified that he gave  
16 the label a “precurory [sic] glance,” and started reading the ingredients of foods and beverages in  
17 2017 or 2018 when he became more health conscious. *Id.* at 174, 176-81. After he read the  
18 ingredients, Silver stopped drinking the drinks shortly thereafter. *Id.* at 175. Silver testified that  
19 when he first bought BodyArmor in 2014, he understood that it contained sugar and he agreed that  
20 “part of what you want in a sports drink is sugar because it replaces the – the energy that you are  
21 losing when you’re working out.” *Id.* at 100-02. Silver testified that he has “always known” that  
22 sugar was not healthy. *Id.* at 47.

23 Silver testified that he believed “some fruit juices are healthy or have good attributes and  
24 some also have high fructose in them or fruit sugar.” *Id.* at 90. He testified that he drank fruit juice

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26 <sup>4</sup> Silver was deposed twice. His first deposition occurred the day after Hill’s deposition.  
27 Plaintiff’s counsel obstructed that deposition by making over 200 objections in three hours,  
28 including numerous speaking objections. Defense counsel ultimately suspended the deposition and  
sought relief from the Court. The Court granted defendant’s motion for sanctions in part and ordered  
Silver to appear for a second deposition.

1 as a child but that he no longer drank juice and preferred water, that he thought fruit juices “have  
2 too much sugar,” and that he tried to avoid fruit juice. *Id.* at 90-91, 96.

3 When asked whether he shared Hill’s understanding that hydration is not a measurable  
4 quality, Silver replied “I don’t know how to quantify hydration” and that when he purchased  
5 BodyArmor in 2014, “[t]hat wasn’t even a thought. I was buying a beverage in a store that appealed  
6 to me.” *Id.* at 168. Silver was asked “What did you understand BodyArmor to be claiming that it  
7 was superior to?” Silver answered, “That I cannot tell you because I don’t know the answer.” *Id.*  
8 at 115-16. Silver also testified that felt he was sufficiently hydrated by BodyArmor, “but I am  
9 claiming that they may not have superiorly hydrated me.” *Id.* at 107, 155-56.

10 Silver stated that the relief he was seeking in this lawsuit was “[l]ess sugar,” [m]aybe a little  
11 less deceptive labeling” and “truth in labeling”:

12 Well, when I first saw BodyArmor, there’s fruit all over the label, and I drank it, and  
13 it tasted good to me. It tasted like I figured it should.

14 So I figured that I was getting the benefits that I was supposed to be getting, superior  
15 hydration. I didn’t take the time, in the beginning, to read how much sugar was in  
16 there.

17 And I’m pretty sure it said that it was naturally flavored, which I took to meant that  
18 it was flavored with fruit juices. It sure tasted like it was.  
*Id.* at 283-84.

## 19 **LEGAL STANDARD**

20 Summary judgment is proper if the pleadings, the discovery and disclosure materials on file,  
21 and any affidavits show that there is no genuine dispute as to any material fact and that the movant  
22 is entitled to judgment as a matter of law. *See Fed. R. Civ. P. 56(a).* The moving party bears the  
23 initial burden of demonstrating the absence of a genuine issue of material fact. *Celotex Corp. v.*  
24 *Catrett*, 477 U.S. 317, 323 (1986). The moving party, however, has no burden to produce evidence  
25 showing the absence of a genuine issue of material fact. *Id.* at 325. Rather, the burden on the  
26 moving party may be discharged by pointing out to the district court that there is an absence of  
27 evidence to support the nonmoving party’s case. *Id.*

28 Once the moving party has met its burden, the burden shifts to the non-moving party to

1 “designate ‘specific facts showing that there is a genuine issue for trial.’” *Id.* at 324 (quoting then  
2 Fed. R. Civ. P. 56(e)). To carry this burden, the non-moving party must “do more than simply show  
3 that there is some metaphysical doubt as to the material facts.” *Matsushita Elec. Indus. Co., Ltd. v.*  
4 *Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). “The mere existence of a scintilla of evidence . . .  
5 will be insufficient; there must be evidence on which the jury could reasonably find for the [non-  
6 moving party].” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

7 In deciding a summary judgment motion, the evidence of the non-movant is to be believed,  
8 and all justifiable inferences are to be drawn in his favor. *Id.* at 255. “Credibility determinations,  
9 the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury  
10 functions, not those of a judge . . . ruling on a motion for summary judgment . . . .” *Id.* However,  
11 conclusory, speculative testimony in affidavits and moving papers is insufficient to raise genuine  
12 issues of fact and defeat summary judgment. *Thornhill Publ'g Co., Inc. v. Gen. Tel. & Elec. Corp.*,  
13 594 F.2d 730, 738 (9th Cir. 1979). The evidence the parties present must be admissible. Fed. R.  
14 Civ. P. 56(c)(4).

## 15 DISCUSSION

### 16 I. Summary Judgment Based on Plaintiffs' Deposition Testimony<sup>5</sup>

17 BA Sports contends that each of plaintiffs' claims requires them to show that they relied on  
18 and were injured by allegedly misleading or deceptive labeling or advertising, and that plaintiffs'  
19 deposition testimony proves that they cannot establish these elements. BA Sports argues that  
20 plaintiffs testified that they read the nutrition facts and yet kept drinking the sports drinks, and that  
21 they were not misled by the fruit images, sugar content, or the term “superior hydration.”

22 “California law . . . requires causation – namely, that the plaintiff relied on the  
23 misrepresentation on the label.” *Hawkins v. Kroger Co.*, 906 F.3d 763, 768 (9th Cir. 2018); *see also*  
24 *Moore v. Mars Petcare US, Inc.*, 966 F.3d 1007, 1020 (9th Cir. 2020) (“Since the passage of  
25 Proposition 64,<sup>12</sup> a plaintiff must allege actual reliance in order to have standing to pursue UCL

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28 <sup>5</sup> BA Sports did not move for summary judgment based on the “reasonable consumer”  
standard, but rather on the ground that plaintiffs' deposition testimony refutes their claims.

1 and FAL claims.”). New York law is in accord. *See Orlander v. Staples*, 802 F.3d 289, 300 (2d  
2 Cir. 2015).

3 The Court agrees with BA Sports that plaintiffs’ deposition testimony shows that they did  
4 not rely on and were not deceived by any alleged misrepresentations as to “superior hydration.”  
5 Silver testified that hydration “wasn’t even a thought” when he first purchased BodyArmor.  
6 Importantly, both plaintiffs testified that they did not know what BodyArmor was claiming to be  
7 “superior” to with regard to hydration. Further, both plaintiffs testified – contrary to the one of the  
8 key allegations in the FAC that allowed the “superior hydration” claim to survive dismissal – that  
9 they did not believe hydration to be an objective and measurable attribute. Indeed, when asked  
10 whether they believed that BodyArmor did not provide superior hydration, plaintiffs provided  
11 vague, equivocal answers. *See* Hill Depo. at 109 (“Q: Now, during the period that you were  
12 purchasing BodyArmor, do you feel like you got less hydration than you bargained for? A: I don’t  
13 know of a way to quantify hydration. So I can’t state yes or no.”); Silver Depo. at 107, 155-56  
14 (testified that felt he was sufficiently hydrated by BodyArmor, “but I am claiming that they *may* not  
15 have superiorly hydrated me.”) (emphasis added). Plaintiffs’ testimony demonstrates that they were  
16 not deceived by any specific representations about BodyArmor’s hydrating qualities. Rather than  
17 challenging “a statement that is quantifiable, that makes a claim as to the ‘specific or absolute  
18 characteristics of a product,’” plaintiffs’ claims about “superior hydration” are “general, subjective  
19 claim[s] about a product [that is] non-actionable puffery.” *Newcal Indus., Inc. v. Ikon Office  
20 Solution*, 513 F.3d 1038, 1053 (9th Cir. 2008) (quoting *Cook, Perkiss, & Liehe, Inc. v. Northern  
21 Cal. Coll. Serv., Inc.*, 911 F.2d 242, 246 (9th Cir. 1990)).<sup>6</sup>

22 Plaintiffs’ deposition testimony also undermines their claims that they were misled about  
23 BodyArmor’s sugar content. Both plaintiffs testified that they have “always known” (Silver) or  
24 known since high school (Hill) that sugar is unhealthy, they knew that BodyArmor was a sports  
25 drink that contained sugar when they first purchased the drinks, and they kept drinking BodyArmor.  
26 Both plaintiffs read the label when they first purchased BodyArmor – Hill stated he “definitely”  
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28 <sup>6</sup> The Court hereby incorporates by reference the analysis from the original order dismissing  
the “superior hydration” claims as puffery.

1 looked at the sugar content, and Silver stated he gave the label a “precurory glance” but that he  
2 knew the drink contained sugar. Hill continued to drink Gatorade, which he described as “sugar  
3 water,” during the time he drank BodyArmor. Silver testified that he agreed with the statement that  
4 sugar is a desirable ingredient in sports drinks. Both plaintiffs testified that they became more health  
5 conscious as they got older, and that it was this desire to be healthier that changed their eating and  
6 drinking habits. All of this testimony shows that plaintiffs were not misled or deceived as to the  
7 sugar content in BodyArmor, and they knew prior to and throughout the time they drank BodyArmor  
8 that sugar was unhealthy.

9 The Court also agrees that Hill’s testimony refutes any claim that he relied on off-label  
10 advertising to his detriment. At the most, Hill testified that he vaguely remembered seeing some in-  
11 store displays, and that those displays “just reminded me that this product existed over another  
12 product” and “those sorts of ads sometimes trigger me to make a point of purchase.” Plaintiffs’  
13 attempts to rehabilitate Hill’s testimony are completely unsupported by Hill’s deposition testimony  
14 and are unpersuasive.

15 However, the Court concludes that plaintiffs’ deposition testimony does not doom their  
16 claims that they were misled by the fruit labeling and that they believed BodyArmor contained fruit  
17 juice. Plaintiffs testified that the fruit images on the labels drew them to the product and were part  
18 of the inducement to purchase the drinks, that they thought fruit was healthy, and that they thought  
19 that the fruit flavors of the drinks were “natural” and therefore came from fruit. Defendant argues  
20 that plaintiffs must have known that the drinks did not in fact contain fruit because fruit is not listed  
21 as an ingredient.<sup>7</sup> However, plaintiffs did not affirmatively testify that they knew the drinks did not  
22 contain fruit, and to the contrary, plaintiffs testified that they believed the drinks contained fruit  
23 because of the labeling. Defendant also highlights plaintiffs’ testimony that they currently do not  
24 drink fruit juice. However, plaintiffs both testified that while they do not currently drink fruit juice,  
25 during the time they drank BodyArmor, they believed that the drinks contained natural fruit flavors  
26 and that they believed this to be a healthy and positive attribute of the drinks.

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28 <sup>7</sup> In the exemplar Fruit Punch label submitted by BA Sports, the ingredients do not include  
fruit but include “Natural Fruit Punch Flavor with Natural Flavors.”

1       Thus, the only claims that survive the present motion for summary judgment are plaintiffs' 2 claims that they were misled by the fruit imagery on BodyArmor's labels and that they believed that 3 "natural flavors" referred to flavors from fruit.

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5 **II. Defendant's Other Challenges to the Fruit Labeling Claims**

6       **A. 21 C.F.R. § 101.22(i)**

7       BA Sports raises several other challenges to plaintiffs' fruit claims. First, BA Sports 8 contends that to the extent that plaintiffs' UCL claim is premised on a violation of an FDA 9 regulation, 21 C.F.R. § 101.22(i), that regulation is inapplicable because "sports drinks are not 10 commonly expected to contain fruit juice." 21 C.F.R. § 101.22 is titled "Foods; labeling of spices, 11 flavorings, colorings and chemical preservatives," and subsection (i) provides,

12       (i) If the label, labeling, or advertising of a food makes any direct or indirect 13 representations with respect to the primary recognizable flavor(s), by word, vignette, 14 e.g., depiction of a fruit, or other means, or if for any other reason the manufacturer 15 or distributor of a food wishes to designate the type of flavor in the food other than 16 through the statement of ingredients, such flavor shall be considered the 17 characterizing flavor and shall be declared in the following way:

18           (1) If the food contains no artificial flavor which simulates, resembles or reinforces 19 the characterizing flavor, the name of the food on the principal display panel or 20 panels of the label shall be accompanied by the common or usual name of the 21 characterizing flavor, e.g., "vanilla", in letters not less than one-half the height of the 22 letters used in the name of the food, except that:

23           (i) If the food is one that is commonly expected to contain a characterizing food 24 ingredient, e.g., strawberries in "strawberry shortcake", and the food contains natural 25 flavor derived from such ingredient and an amount of characterizing ingredient 26 insufficient to independently characterize the food, or the food contains no such 27 ingredient, the name of the characterizing flavor may be immediately preceded by 28 the word "natural" and shall be immediately followed by the word "flavored" in letters not less than one-half the height of the letters in the name of the characterizing flavor, e.g., "natural strawberry flavored shortcake," or "strawberry flavored shortcake".

29           (ii) If none of the natural flavor used in the food is derived from the product whose 30 flavor is simulated, the food in which the flavor is used shall be labeled either with 31 the flavor of the product from which the flavor is derived or as "artificially flavored."

32           (iii) If the food contains both a characterizing flavor from the product whose flavor 33 is simulated and other natural flavor which simulates, resembles or reinforces the 34 characterizing flavor, the food shall be labeled in accordance with the introductory 35 text and paragraph (i)(1)(i) of this section and the name of the food shall be 36 immediately followed by the words "with other natural flavor" in letters not less than 37 one-half the height of the letters used in the name of the characterizing flavor.

1 BA Sports argues that plaintiffs' claims under 21 § C.F.R. § 101.22(i)(1)(i) fail because that  
2 regulation only applies “[i]f the food is one that is commonly expected to contain a characterizing  
3 food ingredient,” 21 C.F.R. § 101.22(i)(1)(i), and sports drinks are “not commonly expected” to  
4 contain fruit.<sup>8</sup> As support, BA Sports relies on the declaration of John Sicher, a beverage industry  
5 consultant, as well as plaintiffs' testimony that they were not aware of other sports drinks containing  
6 fruit.

7 Mr. Sicher states,

- 8 1. I am a consultant to companies in, and serving, the beverage industry and am the  
9 former editor and publisher of Beverage Digest. I make this declaration based on  
personal knowledge. If called as a witness, I could, and would, testify competently  
to the facts stated herein.
- 10 2. I have over 25 years of experience in the beverage industry, including reporting,  
11 compiling data, and observing and consulting on industry insights, competitive  
12 dynamics, industry operations, and consumer trends. Between 1994 and 2015, I was  
13 the editor and publisher of Beverage Digest, a leading journal covering the beverage  
14 industry. After I sold Beverage Digest in 2015 and through 2019, I consulted to The  
Coca-Cola Company on beverage industry insights and communication matters. I  
have also consulted to several other companies, including BodyArmor. I consult to  
BodyArmor on matters unrelated to this litigation.
- 15 3. Sports drinks comprise a multi-billion-dollar per year beverage category in the  
16 United States and have been around for more than 50 years, starting with the creation  
17 at the University of Florida in the 1960s of a hydration product which was the pre-  
cursor of Gatorade. Consumers are very familiar with sports drinks.
- 18 4. Based on my experience and knowledge, I am not aware of any sports drink  
19 containing actual fruit, fruit juice or fruit juice concentrate prior to 2019. I am also  
familiar with how sports drinks have been marketed and advertised, and I am  
likewise unaware of any sports drink being promoted, marketed or advertised as  
20 containing fruit, fruit juice or fruit juice concentrate prior to 2019.
- 21 5. In 2019 Gatorade launched a sports drink called Bolt24 that contains watermelon  
22 juice concentrate. In 2020, Gatorade launched a sports drink called “Gatorade  
23 Juiced” that contains various juice concentrates. These are the only sports drinks I  
24 am aware of that contain such concentrates, and both products list “juice concentrate”  
in their ingredient list on the Nutrition Facts panel. In addition, Gatorade has  
marketed its Bolt24 product as containing electrolytes from watermelon and has  
marketed its “Juiced” product as being “juice based” and containing a “blend of fruit  
juices.” Prior to Gatorade’s marketing of its Bolt24 and “Juiced” products, no other  
25 sports drinks I am aware of were marketed as containing fruit juice or fruit juice  
concentrates.

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27 <sup>8</sup> Plaintiffs correctly note that defendant’s motion only addresses subsection 21 C.F.R.  
28 § 101.22 (i)(1)(i), and that the FAC alleges a violation of 21 C.F.R. § 101.22(i), and thus embraces  
subsections (i)(1)(ii) and (iii) as well. To the extent defendant raises new arguments in the reply  
brief about subsections (ii) and (iii), the Court finds that this is improper and does not consider them.

1 Sicher Decl. ¶¶ 1-5 (Dkt. No. 139-1). Silver and Hill stopped drinking BodyArmor prior to 2019.  
2 See Silver Depo. at 22-24, Hill. Depo. at 13-16, 20.

3 Plaintiffs argue that BA Sports has not presented any evidence about consumer expectations  
4 about sports drinks, that plaintiffs have not been able to depose Mr. Sicher, and that Mr. Sicher's  
5 declaration is also irrelevant because he opines about a "non-existent category of foods" – sports  
6 drinks. Plaintiffs argue that "sports drink" is a category created by the sports drink industry and it  
7 is not a food category that has been defined by the FDA.

8 The Court concludes that BA Sports is entitled to summary judgment on this issue. While  
9 plaintiffs criticize Mr. Sicher's declaration, they did not introduce any evidence in opposition to  
10 raise a triable issue of fact. Although plaintiffs' opposition complains that plaintiffs have not been  
11 able to depose Mr. Sicher or obtain certain discovery from BA Sports,<sup>9</sup> plaintiffs' supplemental  
12 reply brief stated that in fact plaintiffs did not require any outstanding discovery to oppose  
13 defendant's motion. Thus, the factual record before the Court consists of Mr. Sicher's declaration  
14 and plaintiffs' deposition testimony that they drank BodyArmor during a time period when no sports  
15 drinks contained fruit juice. In addition, although plaintiffs assert that "sports drink" is too narrow  
16 a category, plaintiffs ignore the fact that the regulation provides "strawberry shortcake" as an  
17 example of a food that is commonly expected to contain strawberries.

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19 **B. Preemption**

20 Second, defendant argues that all of plaintiffs' fruit labeling claims are preempted by the  
21 Food, Drug, and Cosmetic Act ("FDCA"), as amended by the Nutrition Labeling and Education Act  
22 ("NLEA"). The NLEA "established uniform food labeling requirements, including the familiar and  
23 ubiquitous Nutrition Facts Panel found on most food packages." *Lilly v. ConAgra Foods, Inc.*, 743  
24 F.3d 662, 664 (9th Cir. 2014). The NLEA also provides that "no State or political subdivision of a  
25 State may directly or indirectly establish under any authority or continue in effect as to any food in  
26 interstate commerce . . . any requirement for the labeling of food . . . that is not identical to" federal  
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28 <sup>9</sup> The Court addresses discovery matters *infra*.

1 requirements contained in the relevant sections. 21 U.S.C. § 343-1. “Not identical to” “means that  
2 the State requirement directly or indirectly imposes obligations or contains provisions concerning  
3 the composition or labeling of food, or concerning a food container, that: (i) Are not imposed by or  
4 contained in the applicable provision . . . or (ii) Differ from those specifically imposed by or  
5 contained in the applicable provision . . . .” 21 C.F.R. § 100.1(c)(4). Therefore, state labeling  
6 obligations that are “not identical to” those imposed by federal law are expressly preempted.

7 Defendant argues that plaintiffs’ fruit claims are preempted because they are “nutrient  
8 content claims” covered by 21 C.F.R. § 101.13(b)(1).<sup>10</sup> The FDA’s nutrient content regulation, 21  
9 C.F.R. § 101.13(b)(1), provides in relevant part,

10 (b) A claim that expressly or implicitly characterizes the level of a nutrient of the  
11 type required to be in nutrition labeling under § 101.9 or under § 101.36 (that is, a  
12 nutrient content claim) may not be made on the label or in labeling of foods unless  
13 the claim is made in accordance with this regulation and with the applicable  
14 regulations in subpart D of this part or in part 105 or part 107 of this chapter.

15 (1) An expressed nutrient content claim is any direct statement about the level (or  
16 range) of a nutrient in the food, e.g., “low sodium” or “contains 100 calories.”

17 (2) An implied nutrient content claim is any claim that:

18 (i) Describes the food or an ingredient therein in a manner that suggests that a nutrient  
19 is absent or present in a certain amount (e.g., “high in oat bran”); or

20 (ii) Suggests that the food, because of its nutrient content, may be useful in  
21 maintaining healthy dietary practices and is made in association with an explicit  
22 claim or statement about a nutrient (e.g., “healthy, contains 3 grams (g) of fat”).

23 (3) Except for claims regarding vitamins and minerals described in paragraph (q)(3)  
24 of this section, no nutrient content claims may be made on food intended specifically  
25 for use by infants and children less than 2 years of age unless the claim is specifically  
26 provided for in parts 101, 105, or 107 of this chapter.

27 (4) Reasonable variations in the spelling of the terms defined in part 101 and their  
28 synonyms are permitted provided these variations are not misleading (e.g., “hi” or  
“lo”).

(5) For dietary supplements, claims for calories, fat, saturated fat, and cholesterol  
may not be made on products that meet the criteria in § 101.60(b)(1) or (b)(2) for  
“calorie free” or “low calorie” claims, except, in the case of calorie claims, when an  
equivalent amount of a similar dietary supplement (e.g., another protein supplement)

<sup>10</sup> The Court does not address defendant’s arguments that plaintiffs’ claims are really “health claims” preempted by 21 C.F.R. § 101.14(a)(1) because those arguments relate to the “superior hydration” and sugar claims.

1 that the labeled food resembles and for which it substitutes, normally exceeds the  
2 definition for “low calorie” in § 101.60(b)(2).

3 Defendant argues that “plaintiffs’ claim that the . . . depictions of fruit are misleading  
4 because they purportedly state the ‘level . . . of the nutrient in the food product,’ *id.*, is an attempt to  
5 impose a new nutrient content claim rule.” Mtn. at 23.

6 The Court finds defendant’s arguments unpersuasive. Defendant does not cite any authority  
7 for such a broad reading of a “nutrient content claim.” Plaintiffs are not challenging any express or  
8 implied statements about the level of a nutrient. Rather, plaintiffs claim that the pictures of fruit on  
9 the labels, combined with the names of the drinks like “orange mango” and the words “natural  
10 flavors,” led them to believe that the drinks contained fruit. Further, the Court notes that defendant’s  
11 arguments about why the nutrient content claim regulation applies are premised on the “holistic”  
12 challenge to the labels, including “superior hydration” and the sugar claims; now that those claims  
13 have been dismissed, the Court only analyzes whether the fruit labeling constitutes nutrient content  
14 labeling, and it does not.

### 15 **III. Discovery**

16 Discovery in this case has been exceedingly contentious and fraught. The Court has  
17 reviewed the Special Master’s Order No. 5, filed April 22, 2022, in which he discusses the state of  
18 discovery and what is outstanding. The scope of this case has been narrowed as a result of this  
19 order, and the parties are directed to cooperate with each other and to work with the Special Master  
20 to determine what outstanding discovery remains relevant in light of the summary judgment order.

### 22 **CONCLUSION**

23 For the foregoing reasons, defendants’ motion is GRANTED IN PART and DENIED IN  
24 PART.

25 **IT IS SO ORDERED.**

26  
27 Dated: April 29, 2022  
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SUSAN ILLSTON  
United States District Judge