

1 Daniel J. Herling (SBN 103711)
djherling@mintz.com
2 MINTZ LEVIN COHN FERRIS GLOVSKY AND POPEO P.C.
44 Montgomery Street, 36th Floor
3 San Francisco, California 94104
Telephone: 415-432-6000
4 Facsimile: 415-432-6001

5 Nicole V. Ozeran (SBN 302321)
nvozeran@mintz.com
6 MINTZ LEVIN COHN FERRIS GLOVSKY AND POPEO P.C.
2029 Century Park East, Suite 3100
7 Los Angeles, CA 90067
Telephone: 310-586-3200
8 Facsimile: 310-586-3202

9 Attorneys for Defendant Benihana, Inc.

10 **UNITED STATES DISTRICT COURT**
11 **CENTRAL DISTRICT OF CALIFORNIA**
12

14 YOUNGSUK KIM, an individual, and
15 on behalf of other members of the
general public similarly situated;
16 JENNIFER GREENE, an individual,
and on behalf of other members of the
17 general public similarly situated

18 Plaintiffs,

19 vs.

20 BENIHANA, INC. a Florida
21 corporation,

22 Defendant.
23

Case No. 5:19-cv-02196 FMO (KKx)

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
BENIHANA, INC.'S MOTION FOR
JUDGMENT ON THE PLEADINGS**

DATE: May 28, 2020

TIME: 10:00 a.m.

DEPT.: 6D

JUDGE: Hon. Fernando M. Olguin

Complaint filed September 26, 2019
First Amended Complaint filed March
23, 2020

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

- I. INTRODUCTION 1
- II. RELEVANT PROCEDURAL AND FACTUAL BACKGROUND.....2
 - A. Relevant Procedural Background.....2
 - B. Plaintiffs’ Allegations2
 - C. Benihana’s Menus3
- III. LEGAL STANDARD5
- IV. ARGUMENT.....5
 - A. Plaintiffs’ CLRA, UCL, and FAL Claims Fail Because No Reasonable Consumer Would Have Been Misled by Benihana’s Menu.....5
 - 1. Benihana’s Menu Expressly States that the Food Products Are Made with Imitation Crab.....7
 - 2. Review of Other Items on the Menu Further Clarifies the Difference Between “Crab[†]” and “Crab”9
 - 3. It is Commonplace Knowledge that Kani Kama Crab is Imitation Crab9
 - B. Plaintiffs’ Claim for Breach of Express Warranty Fails Because Benihana Did Not Expressly Warrant that the Subject Food Items Contained “Actual Crab Meat” 11
 - C. Plaintiffs Have No Basis for Their Claims Concerning Benihana’s “California[†] Roll” 12
- V. CONCLUSION 12

TABLE OF AUTHORITIES

Page(s)

Federal Cases

Adams v. Johnson,
355 F.3d 1179 (9th Cir. 2004)5

Baker v. Citibank (S.D.) N.A.,
13 F. Supp. 2d 1037 (S.D. Cal. 1998)5

Dworkin v. Hustler Magazine, Inc.,
867 F.2d 1188 (9th Cir. 1989)5

Ecological Rights Foundation v. Pacific Gas & Elec. Co.,
713 F.3d 502 (9th Cir. 2013)4

Forouzesht v. Starbucks Corp.,
No. CV 16-3830 PA, 2016 U.S. Dist. LEXIS 111701
(C.D. Cal. Aug. 19, 2016)..... 11

Freeman v. Time, Inc.,
68 F.3d 285 (9th Cir. 1995) 7, 8

Hishon v. King & Spalding,
467 U.S. 69 (1984).....5

McGann v. Ernst & Young,
102 F.3d 390 (9th Cir. 1996)5

Pelayo v. Nestle USA, Inc., et al.,
989 F. Supp. 2d 973 (C.D. Cal. 2013)6

Rooney v. Cumberland Packaging Corp.,
12-cv-0033, 2012 WL 1512106 (S.D. Cal. Apr. 16, 2012).....6

Sperling v. Stein Mart, Inc.,
No. EDCV 15-01411 BRO (KKx), 2016 U.S. Dist. LEXIS 111227
(C.D. Cal. Jan. 26, 2016) 7

Swartz v. KPMG LLP,
476 F.3d 756 (9th Cir. 2007)4

1 *United States v. Ritchie*,
 2 342 F.3d 903 (9th Cir. 2003) 4

3 *Videtto v. Kellogg USA*,
 4 08-cv-01324, 2009 WL 1439086 (E.D. Cal. May 21, 2009) 6

5 *Viggiano v. Hansen Natural Corp.*,
 6 944 F. Supp. 2d 877 (C.D. Cal. 2013) 11

7 *Weisbuch v. Cnty. of L.A.*,
 8 119 F.3d 778 (9th Cir. 1997) 5

9 *Werbel v. Pepsico, Inc.*,
 10 09-cv-04465-SBA, 2010 U.S. Dist. LEXIS 76289
 (N.D. Cal. July 1, 2010)..... 6

11 **California Cases**

12 *Weinstat v. Dentsply Int’l, Inc.*,
 13 180 Cal. App. 4th 1213 (2010)..... 11

14 **Other State Cases**

15 *Chansue Kang v. P.F. Chang’s China Bistro, Inc.*,
 16 Case No. 19-cv-02252-PA (SPx) (C.D. Cal. Jan. 9, 2020) 1, 8, 9, 11

17 **California Statutes**

18 Cal. Civ. Proc. Code § 1750 (“Consumers Legal Remedies Act” or
 19 “CLRA”).....*passim*

20 Cal. Bus. & Prof. Code § 17500 (“False Advertising Law” or “FAL”)*passim*

21 Cal. Bus. & Prof. Code § 17200 (“Unfair Competition Law” or “UCL”).....*passim*

22 **Other Authorities**

23 Fed. R. Civ. Proc. 12(c)..... 5

24

25

26

27

28

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 The instant suit is a second attempt at alleging unsupported claims under
4 California law. In November 2019, Plaintiffs’ counsel brought a nearly identical suit
5 against P.F. Chang’s, alleging that P.F. Chang’s failed to disclose that its food
6 products were made with imitation crab. The matter, styled as *Chansue Kang v. P.F.*
7 *Chang’s China Bistro, Inc.*, No. 19-cv-02252-PA (SPx) (C.D. Cal. Jan. 9, 2020), was
8 dismissed: the Honorable Percy Anderson finding that the plaintiff’s allegations
9 failed to satisfy the reasonable consumer test because the menu made clear that the
10 food products at issue contained imitation crab. The same reasoning and result
11 should be applied here.

12 Plaintiffs Youngsuk Kim and Jennifer Greene (collectively “Plaintiffs”)
13 acknowledge that Benihana’s menu describes the subject sushi rolls as containing
14 kani kama crab and kani kama crab mix. Plaintiffs also acknowledge that the menu
15 explains that “Kani kama crab & kani kama crab mix contain imitation crab.” Yet,
16 Plaintiffs claim they were misled because the menu fails to inform consumers that
17 the sushi rolls did *not* contain “actual crab meat.” Plaintiffs’ claims defy common
18 sense—the menu explicitly states that the sushi rolls contain imitation crab and never
19 states that “actual crab meat” is used in the products; no reasonable consumer would
20 expect the rolls to nonetheless contain “actual crab meat.” Moreover, if a restaurant
21 customer was unsure whether the products contained “actual crab meat,” he or she
22 could have easily asked a Benihana employee for clarification.

23 Accordingly, as no reasonable consumer would have been misled by
24 Benihana’s menus, Benihana’s Motion for Judgment on the Pleadings should be
25 granted and each of Plaintiffs’ claims should be dismissed with prejudice.

1 **II. RELEVANT PROCEDURAL AND FACTUAL BACKGROUND**

2 **A. Relevant Procedural Background**

3 Plaintiff Youngsuk Kim filed the Complaint in California state court on
4 September 26, 2019. Dkt. No. 3, Ex. A. Benihana removed the matter on November
5 13, 2019. Dkt. No. 3. On March 20, 2020, Plaintiff Kim sought leave through
6 stipulation to file a First Amended Complaint, naming an additional plaintiff and
7 adding numerous subclasses. Dkt. No. 25. This Court granted the stipulated request
8 (Dkt. No. 26), and on March 23, 2020, Plaintiffs filed the instant First Amended
9 Complaint. Dkt. No. 27.

10 On April 22, 2020, Benihana filed its Answer to the First Amended Complaint.
11 Dkt. No. 32. Benihana brings the instant Motion for Judgment on the Pleadings.

12 **B. Plaintiffs’ Allegations**

13 Plaintiffs allege claims for violation of the Consumers Legal Remedies Act,
14 California Civil Code § 1750 (“CLRA”); the Unfair Competition Law, Business and
15 Professions Code § 17200 (“UCL”); and, the False Advertising Law, Business &
16 Professions Code § 17500 (“FAL”), as well as breach of express warranty, arising
17 from Benihana’s description of various food items on its menu. Specifically,
18 Plaintiffs allege that food items on Benihana’s menu, “including but not limited to
19 Shrimp Lovers Roll, Shrimp Crunchy Roll, Alaskan Roll, Dragon Roll, Chili Shrimp
20 Roll, Rainbow Roll, Spider Roll, Sumo Roll Baked, and Lobster Roll, and/or
21 California Roll (hereinafter the ‘Food Product(s)’),” claim to contain “crab,” but that
22 no “actual crab meat” is used in the Food Products. Dkt. No. 27, ¶¶ 2, 3.

23 Plaintiffs acknowledge that the subject “menu items provide notice that ‘Kani
24 kama crab’ and ‘kani kama crab mix’ contain imitation crab.” Dkt. No. 27, ¶ 3.
25 Plaintiffs, nonetheless, allege that Benihana “failed to disclose that the Food Products
26 contain ‘Kani kama crab’ or ‘kani kama crab mix,’ thereby misleading and deceiving
27 their [*sic*] customers into believing that the Food Products contain actual crab meat.”
28

1 *Id.* Plaintiffs allegedly purchased the Food Products in reliance on Benihana’s menu.

2 *Id.* at ¶¶ 6, 15, 16.

3 **C. Benihana’s Menus**

4 Benihana’s menu provides product descriptions for each of the Food
5 Products, except the California roll:

6 **SHRIMP LOVERS ROLL 12.1**
7 Crab[†], avocado, shrimp tempura, shrimp, cucumber.

8 **ALASKAN ROLL 12.4**
9 Crab[†], avocado, salmon*, cucumber.

11 **SHRIMP CRUNCHY ROLL 9.8**
12 Shrimp tempura, avocado, cucumber, crab[†],
13 tempura crumbs.

14 **DRAGON ROLL 12.4**
15 Eel, avocado, crab[†], cucumber.

16 **RAINBOW ROLL 12.4**
17 Tuna*, shrimp, yellowtail*, izumidai*, salmon*, crab[†],
18 avocado, cucumber.

19 **SPIDER ROLL 12.4**
20 Soft shell crab, crab[†], green leaf, cucumber,
21 avocado, soybean paper, yamagobo.

22 **SUMO ROLL *Baked* 13.65**
23 Crab[†], avocado, cucumber, shrimp tempura,
24 salmon, smelt roe, special mayo sauce.

25 **LOBSTER ROLL 22.7**
26 Lobster tempura, crab[†], cucumber, romaine lettuce.
27 Comes with one Lobster Roll and two Lobster Hand Rolls.

1 See Declaration of Jeannie Means filed in Support of Benihana’s Request for
2 Judicial Notice (“Means Decl. ISO RFJN”), Ex. 1.¹

3 The California roll does not include a list of ingredients; it is simply listed as:

4 **CALIFORNIA[†] ROLL** 6.7

5 *Id.*

6 Slightly to the left of the Food Products, the menu states:

7 **†Kani kama crab & kani kama crab mix contain imitation crab.**

8
9 *Id.* The menu’s disclaimer appears on the same page as the Food Products.² Means
10 Decl. ISO RFJN, Ex. 1.

11
12
13 ¹ On a motion for judgment on the pleadings, as with a motion to dismiss, a court’s
14 review is generally limited to facts alleged on the face of the complaint and to exhibits
15 attached to the complaint. *Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007).
16 Under the “incorporation by reference” doctrine, however, a court may take into
17 account documents that are not attached to the complaint, and whose authenticity no
18 party questions, so long as the complaint refers extensively to the documents, or the
19 documents are “central” to the complaint. *Ecological Rights Foundation v. Pacific*
20 *Gas & Elec. Co.*, 713 F.3d 502, 511 (9th Cir. 2013); *United States v. Ritchie*, 342
21 F.3d 903, 908 (9th Cir. 2003); *In re Silicon Graphics Inc. Sec. Litig.*, 183 F.3d 970,
22 986 (9th Cir. 1999) (quoting *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994)).
23 “Whether a document is ‘central’ to a complaint turns on whether the complaint
24 ‘necessarily relies’ on that document.” *Ecological Rights*, 713 F.3d at 511 (citation
25 omitted). Here, Plaintiffs’ First Amended Complaint extensively references
26 Benihana’s menu and the menu is central to Plaintiffs’ claims, as the menu allegedly
27 falsely advertised the Food Products. See Dkt. No. 27. Accordingly, the Court may
28 consider the menus used at Benihana’s California locations during the putative class
period. *Wright v. Gen. Mills, Inc.*, No. 08cv1532 L(NLS), 2009 U.S. Dist. LEXIS
90576, at *12-13 (S.D. Cal. Sep. 30, 2009). Nonetheless, in an abundance of caution,
Benihana also seeks judicial notice of the menu. See Benihana’s RFJN.

² Chamber’s copies of the moving papers and Benihana’s menu have been provided.
The menu, as provided to customers in-store, is 19.5” x 9.75” and the Health
Department and kani kama crab disclaimers are in font size 6.792.

1 **III. LEGAL STANDARD**

2 A motion for judgment on the pleadings is a vehicle for summary adjudication,
 3 but the standard is like that of a motion to dismiss. *Hishon v. King & Spalding*, 467
 4 U.S. 69, 73 (1984); *Dworkin v. Hustler Magazine, Inc.*, 867 F.2d 1188, 1192 (9th
 5 Cir. 1989). It is “functionally identical” to a motion to dismiss for failure to state a
 6 claim; the only significant difference is that a motion pursuant to Rule 12(c) is
 7 properly brought “after the pleadings are closed - but early enough not to delay trial.”
 8 FED. R. CIV. P. 12(C). The Court may grant judgment on the pleadings “when, taking
 9 all allegations in the pleading as true, the moving party is entitled to judgment as a
 10 matter of law.” *McGann v. Ernst & Young*, 102 F.3d 390, 392 (9th Cir. 1996); *Baker*
 11 *v. Citibank (S.D.) N.A.*, 13 F. Supp. 2d 1037, 1044 (S.D. Cal. 1998). However, mere
 12 “conclusory allegations of law and unwarranted inferences are insufficient to defeat
 13 a motion to dismiss.” *Adams v. Johnson*, 355 F.3d 1179, 1183 (9th Cir. 2004).
 14 Furthermore, a plaintiff may plead himself out of court “if he “plead[s] facts which
 15 establish that he cannot prevail on his . . . claim.” *Weisbuch v. Cnty. of L.A.*, 119
 16 F.3d 778, 783 n.1 (9th Cir. 1997) (quoting *Warzon v. Drew*, 60 F.3d 1234, 1239 (7th
 17 Cir. 1995)).

18 Documents attached to, incorporated by reference in, or integral to the
 19 complaint may be properly considered under Rule 12(c) without converting the
 20 motion into one for summary judgment. *See Rose v. Chase Manhattan Bank USA*,
 21 396 F. Supp. 2d 1116, 1119 (C.D. Cal. 2005); *see also, supra*, fn. 1; *see also* RFJN.

22 **IV. ARGUMENT**

23 **A. Plaintiffs’ CLRA, UCL, and FAL Claims Fail Because No**
 24 **Reasonable Consumer Would Have Been Misled by Benihana’s**
Menu

25 Claims brought pursuant to the CLRA, UCL, and FAL are governed by the
 26 “reasonable consumer” test. *Ebner v. Fresh, Inc.*, 818 F.3d 799, 806 (9th Cir. 2016).
 27 “Under this standard, Plaintiff[s] must ‘show that members of the public are likely to
 28

1 be deceived.” *Id.* (citation omitted). The reasonable consumer standard “requires
2 more than a mere possibility that [the defendant’s] label ‘might conceivably be
3 misunderstood by some few consumers viewing it in an unreasonable manner.” *Id.*
4 (quoting *Lavie v. Procter & Gamble Co.*, 105 Cal. App. 4th 496, 508 (2003).

5 While the question of whether a business practice is deceptive typically
6 presents a question of fact that is not amenable to resolution on a motion to dismiss,
7 in certain cases, “the Court can properly make this determination and resolve such
8 claims based on its review of the product packaging.” *Pelayo v. Nestle USA, Inc., et*
9 *al.*, 989 F. Supp. 2d 973, 978 (C.D. Cal. 2013) (citing *Brockey v. Moore*, 107 Cal.
10 App. 4th 86, 100 (2003) (“the primary evidence in a false advertising case is the
11 advertising itself”). Thus, where a court “can conclude as a matter of law that
12 members of the public are not likely to be deceived by the product packaging,
13 dismissal is appropriate.” *Id.*; *see also Rooney v. Cumberland Packaging Corp.*, 12-
14 cv-0033, 2012 WL 1512106, at *4 (S.D. Cal. Apr. 16, 2012) (dismissing without
15 leave to amend a complaint alleging that “Sugar in the Raw” was deceptive because
16 it was actually processed and not natural sugar); *Werbel v. Pepsico, Inc.*, 09-cv-
17 04465-SBA, 2010 U.S. Dist. LEXIS 76289 (N.D. Cal. July 1, 2010) (holding as a
18 matter of law that no reasonable consumer would be led to believe that “Cap’n
19 Crunch’s Crunch Berries” cereal contained real fruit berries despite the use of the
20 word berries in the product); *Videtto v. Kellogg USA*, 08-cv-01324, 2009 WL
21 1439086, at *2-3 (E.D. Cal. May 21, 2009) (dismissing without leave to amend UCL,
22 FAL, and CLRA claims finding no reasonable consumer would believe “Froot
23 Loops” cereal contained “real, nutritious fruit”).

24 Resolution on a motion for judgment on the pleadings is appropriate here.
25 Earlier this year, the Honorable Percy Anderson dismissed a nearly identical
26 complaint filed by Plaintiffs’ counsel against P.F. Chang’s for failure to satisfy the
27 reasonable consumer standard. *Kang v. P.F. Chang’s China Bistro, Inc.*, Case No.

1 19-cv-02252-PA (SPx) (Dkt. No. 23) (Minute Order Granting Defendant’s Motion
2 to Dismiss).

3 1. *Benihana’s Menu Expressly States that the Food Products Are*
4 *Made with Imitation Crab*

5 Plaintiffs allege:

6 Although these menu items provide notice that “Kani kama crab”
7 and “kani kama crab mix” contain imitation crab, they have
8 failed to disclose that the Food Products contain “Kani kama
9 crab” or “kani kama crab mix.”

10 Dkt. No. 27, ¶ 3.

11 Plaintiffs admit the menu fully discloses that the Food Products are made with
12 imitation crab. *Id.* Plaintiffs’ claims are therefore meritless.

13 Even if we give Plaintiffs the benefit of the doubt and assume that Plaintiffs
14 meant to say the *menu* provides notice that “Kani kama crab” and “kani kama crab
15 mix” contain imitation crab, but that the menu fails to disclose that the Food Products
16 contain “Kani kama crab” or “kani kama crab mix,” Plaintiffs’ claims still fail.
17 Means Decl. ISO RFJN, Ex. 1. Since at least as early as 2015 to present-day,
18 Benihana’s menu has described the Shrimp Lovers Roll, Shrimp Crunchy Roll,
19 Alaskan Roll, Dragon Roll, Chili Shrimp Roll, Rainbow Roll, Spider Roll, Sumo
20 Roll Baked, and Lobster Roll as containing “crab[†]” and lists its version of a California
21 roll as “California[†] Roll.” *See id.* The reference symbol used when denoting “crab[†]”
22 and “California[†] Roll” is defined on the same page of the menu as “Kani kama crab
& kani kama crab mix contain imitation crab.” *Id.*

23 A reasonable consumer would not “ignore the qualifying language in small
24 print.” *Freeman v. Time, Inc.*, 68 F.3d 285, 289 (9th Cir. 1995) (“Any persons . . .
25 would be put on notice . . . simply by doing sufficient reading [of the label].”);
26 *Sperling v. Stein Mart, Inc.*, No. EDCV 15-01411 BRO (KKx), 2016 U.S. Dist.
27 LEXIS 111227, at *20 (C.D. Cal. Jan. 26, 2016) (finding that plaintiff failed to satisfy
28

1 reasonable consumer standard where she ignored defendant’s use of an asterisk
 2 referencing the defendant’s policy, which expressly defined the term at the center of
 3 plaintiff’s complaint); *Clark v. Perfect Bar, LLC*, No. C 18-06006 WHA, 2018 U.S.
 4 Dist. LEXIS 219487, at *2 (N.D. Cal. Dec. 21, 2018) (“No consumer, on notice of
 5 the actual ingredients described on the packaging including honey and sugar, could
 6 reasonably overestimate the health benefits of the bar merely because the packaging
 7 elsewhere refers to it as a health bar . . .”). Accordingly, Plaintiffs fail to state a
 8 claim, as their CLRA, FAL, and UCL causes of action do not satisfy the reasonable
 9 consumer standard. No reasonable consumer would have been misled by Benihana’s
 10 menu where “[n]one of the qualifying language is hidden or unreadably small.”³
 11 *Freeman v. Time, Inc.*, 68 F.3d at 289.

12 Plaintiffs’ counsel conceded this point in their Opposition to P.F. Chang’s’
 13 Motion to Dismiss. There, Plaintiffs’ counsel argued that to not be misleading, a
 14 defendant’s menu “could and should have . . . provided a further explanation [of]
 15 ‘krab mix.’” *Kang v. P.F. Chang’s China Bistro, Inc.*, Case No. 19-cv-02252-PA
 16 (SPx) (Dkt. No. 14 at 8). Benihana’s menu does exactly that—Benihana’s menu lists
 17 the Food Products as containing “crab[†]” and provides an explanation of the reference
 18 mark, explicitly “provid[ing] a further explanation” that the products are made with
 19 imitation crab. *See Means Decl. ISO RFJN, Ex. 1.*

20 Any argument by Plaintiffs that *P.F. Chang’s* differs from the instant matter
 21 because P.F. Chang’s used a “fanciful take on the word ‘crab’” would fail. *Kang v.*
 22

23
 24 ³ Benihana’s menu’s footnote defining “crab[†]” is clearly defined and reasonably
 25 visible. In fact, the kani kama crab disclaimer appears directly below and in the same
 26 font and font size as a disclaimer concerning the sale of raw fish, which is made in
 27 accordance with California Health and Safety Code § 114093 and FDA Food Code
 28 3-603.11. *See Means Decl. ISO RFJN, Ex. 1; Cal. Health & Saf. Code § 114093*
 (allowing disclaimers to appear in footnotes); FDA Food Code 3-603.11 (same).

1 *P.F. Chang's China Bistro, Inc.* (Dkt. No. 23 at 5). Here, Benihana has an explicit
 2 disclosure concerning the ingredients in the Food Products—this is even more
 3 straightforward than any “fanciful” spelling. Accordingly, no reasonable consumer
 4 could be misled by Benihana’s clear and unambiguous menu.

5 **2. *Review of Other Items on the Menu Further Clarifies the***
 6 ***Difference Between “Crab[†]” and “Crab”***

7 Just as in *P.F. Chang's*, a reasonable consumer’s evaluation of Benihana’s
 8 menu would reveal that “crab[†]” refers to imitation crab, as other items are listed as
 9 containing simply “crab.” *See generally* Means Decl. ISO RFJN, Ex. 1. A
 10 reasonable consumer would recognize that the use of “crab[†]” for some items and
 11 “crab” for others, denotes that “crab[†]” is not the same as “crab.” *See Kang v. P.F.*
 12 *Chang's China Bistro, Inc.* (Dkt. No. 23 (citing *Freeman v. Time, Inc.*, 68 F.3d 285,
 13 290 (9th Cir. 1995) (“Any ambiguity that Freeman would have read into any
 14 particular statement is dispelled by the promotion as a whole.”))). When a reasonable
 15 consumer orders an item with “crab[†],” that consumer knows that the item does not
 16 consist of “crab,” simply by recognizing the difference in the two words. Because
 17 no reasonable consumer could be confused by this, Plaintiff fails to state a viable
 18 CLRA, UCL, and FAL claim and Benihana’s Motion should be granted.

19 **3. *It is Commonplace Knowledge that Kani Kama Crab is Imitation***
 20 ***Crab***

21 It is expected that Plaintiffs will make a last ditch argument that Benihana’s
 22 statement that “Kani kama crab & kani kama crab mix contain imitation crab” is
 23 misleading because it does not explicitly state that “Kani kama crab” and “kani kama
 24 crab mix” do not contain “actual crab meat.” This argument fails because “kani kama
 25 crab” is widely understood to mean imitation crab. A simple Google search for “kani
 26 kama crab” illustrates this. *See, e.g.*, https://en.wikipedia.org/wiki/Crab_stick
 27 (stating “Sugiyo Co., Ltd. (スギヨ, Sugiyo) of Japan first produced and patented
 28

1 imitation crab meat in 1974, as Kanikama.”); (last visited April 16, 2020);
2 [https://store.catalinaop.com/products/frozen-cooked-imitation-crab-meat-kani-](https://store.catalinaop.com/products/frozen-cooked-imitation-crab-meat-kani-kama)
3 [kama](https://store.catalinaop.com/products/frozen-cooked-imitation-crab-meat-kani-kama) (selling “Imitation Crab Meat (Kani Kama).”) (last visited April 16, 2020);
4 [https://www.sushifaq.com/sushi-sashimi-info/sushi-item-profiles/kanikama-or-](https://www.sushifaq.com/sushi-sashimi-info/sushi-item-profiles/kanikama-or-surimi/)
5 [surimi/](https://www.sushifaq.com/sushi-sashimi-info/sushi-item-profiles/kanikama-or-surimi/) (stating “KaniKama, or imitation crab meat, is the sticks of fake crab meat
6 which are used in the popular California roll.”) (last visited April 16, 2020).

7 Kani kama crab has a common definition and understanding and, therefore,
8 cannot mislead a reasonable consumer into believing that it contains “actual crab
9 meat”—any misunderstanding by Plaintiffs that kana kama crab contains any amount
10 of “actual crab meat” is unreasonable. *See Cheslow v. Ghirardelli Chocolate*
11 *Company*, Case No. 4:19-cv-07467-PJH, (Dkt. No. 34), at p. 9 (N.D. Cal. April 8,
12 2020) (dismissing false advertising claims where “it would not be appropriate to base
13 liability off of a misunderstanding of the word white,” as it has a “commonplace”
14 meaning); *see also Ebner v. Fresh, Inc.*, 838 F.3d 958 (9th Cir. 2016) (finding that a
15 consumer’s unreasonable understanding of a product’s commonplace features cannot
16 give rise to liability); *see also Becerra v. Dr. Pepper/Seven Up, Inc.*, 945 F.3d 1225,
17 1230 (9th Cir. 2019) (“Just because some consumers may unreasonably interpret the
18 term differently does not render the use of ‘diet’ in a soda’s brand name false or
19 deceptive.” (Citations omitted).)

20 Plaintiffs’ claims cannot survive simply because Plaintiffs unreasonably
21 assumed that the Food Products contained “actual crab meat.” And, any attempt to
22 argue that a menu must list every ingredient that a product does not contain, should
23 be rejected. If the Court were to accept such a theory, it would place an incredible
24 and undue burden on all companies. It is unreasonable and simply impossible to list
25 every ingredient that is *not* in a product, nor do consumers expect such disclaimers.
26
27
28

1 **B. Plaintiffs’ Claim for Breach of Express Warranty Fails Because**
2 **Benihana Did Not Expressly Warrant that the Subject Food Items**
3 **Contained “Actual Crab Meat”**

4 To prevail on a breach of express warranty claim, Plaintiffs must establish “(1)
5 the seller’s statements constitute an ‘affirmation of fact or promise’ or a ‘description
6 of the goods’; (2) the statement was ‘part of the basis of the bargain’; and (3) the
7 warranty was breached.” *Weinstat v. Dentsply Int’l, Inc.*, 180 Cal. App. 4th 1213,
8 1227 (2010); *see also Viggiano v. Hansen Natural Corp.*, 944 F. Supp. 2d 877, 893
9 (C.D. Cal. 2013) (also requiring that “the breach caused injury to plaintiff”). In the
10 instant matter, Benihana has not stated that its Food Products contain “actual crab
11 meat,” nor did Benihana claim that the Food Products contained “fresh crab,” “Blue
12 crab,” “Dungeness crab,” or any other variety of “actual crab meat.” Plaintiffs allege
13 no facts suggesting that Benihana stated, or expressly warranted, that its Food
14 Products contain “actual crab meat.” And, in fact, Benihana expressly states that its
15 Food Products contain “Kani kama crab & kani kama crab mix,” which it defines as
16 imitation crab. Means Decl. ISO RFJN, Ex. 1.

17 As a result, there is no statement by Benihana of any “fact or promise” that
18 forms the basis of the bargain with Plaintiffs that Benihana has breached. “Plaintiff’s
19 strained interpretation of Defendant’s menu descriptions, which is inconsistent with
20 the understanding of a reasonable consumer, does not form the ‘basis of the bargain’
21 that could support a breach of express warranty claim in these circumstances.”
22 *Forouzes v. Starbucks Corp.*, No. CV 16-3830 PA (AGRx), 2016 U.S. Dist. LEXIS
23 111701, at *10-11 (C.D. Cal. Aug. 19, 2016); *see also Kang v. P.F. Chang’s China*
Bistro, Inc. (Dkt. No 23).

24 Plaintiffs have failed to plausibly allege that Benihana made any express
25 warranty concerning its Food Products and thereby breached that same warranty.
26 Plaintiffs therefore fail to state a viable claim for breach of express warranty.

27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Accordingly, Benihana’s Motion for Judgment on the Pleadings should be granted and Plaintiffs’ false advertising and breach of warranty claims should be dismissed with prejudice.

DATED: April 29, 2020

Respectfully Submitted,
MINTZ LEVIN COHN FERRIS
GLOVSKY AND POPEO PC

By: /s/Nicole V. Ozeran
DANIEL J. HERLING
NICOLE V. OZERAN

Attorneys for Defendant,
BENIHANA, INC.