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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

LILIANA CARDENAS, on Behalf
of Herself and All Other
Similarly Situated
California Residents,

NO. CIV. S-11-1615 LKK/CKD

Plaintiff,

v.

NBTY, INC., a Delaware
corporation and REXALL
SUNDOWN, INC., a Florida
corporation,

O R D E R

Defendants.

_____ /

This class action alleges that Defendants NBTY Inc. ("NBTY") and Rexall Sundown Inc. ("Rexall") deceptively market and sell the Osteo Bi-Flex line of joint health dietary supplements without support for the efficacy representations made about those products. Plaintiff Liliana Cardenas, on behalf of herself and other similarly situated consumers of the Osteo Bi-Flex products, alleges violations of California's Consumers Legal Remedies Act and its Unfair Competition Law, and also allege breach of express warranty.

Presently before the court is Defendants' motion to dismiss Plaintiff's second amended complaint. See Defs' Mot., ECF No. 26.

1 For the reasons provided below, the court denies Defendants' motion
2 to dismiss.

3 **I. BACKGROUND**

4 **A. Plaintiff's Complaint¹**

5 Within the last year and a half, Plaintiff Liliana Cardenas
6 saw Defendants' representations by reading the front, back, and
7 sides of the Osteo Bi-Flex Regular Strength label at a Rite Aid
8 store in Roseville, California. Pl's Second Am. Compl., ECF No.
9 25, at 4. Plaintiff Cardenas "relied on every single one of
10 Defendants' renewal and rejuvenation representations" and purchased
11 the Osteo Bi-Flex product "to relieve her joint pain." Id. The
12 Osteo Bi-Flex Regular Strength that Plaintiff purchased and took
13 as directed did not help to promote mobility, renew cartilage,
14 maintain healthy connective tissue, or improve joint comfort, as
15 represented. Id. As a result, Plaintiff suffered injury in fact
16 and lost money. Id.

17 Since 1996, Defendants have developed, manufactured, marketed,
18 distributed, and sold a line of joint supplements under the Osteo
19 Bi-Flex brand name, including: (1) Osteo Bi-Flex One Per Day; (2)
20 Osteo Bi-Flex Triple Strength; (3) Osteo Bi-Flex Double Strength;
21 (4) Osteo Bi-Flex Triple Strength with Vitamin D; (5) Osteo Bi-Flex
22 MSM; (6) Osteo Bi-Flex Energy Formula; (7) Osteo Bi-Flex Regular
23

24 ¹ These facts are taken from the allegations in the
25 Plaintiffs' Second Amended Complaint, ECF No. 25, unless otherwise
26 specified. The allegations are taken as true for purposes of this
motion only. See Erickson v. Pardus, 551 U.S. 89, 94, 127 S.Ct.
2197, 167 L.Ed.2d 1081 (2007).

1 Strength; and (8) Osteo Bi-Flex Advanced. Id. at 5.

2 The Osteo Bi-Flex products are sold in a number of major food,
3 drug, and mass retail outlet stores in California, including Wal-
4 Mart, Costco Wholesale, Sam's Club, Rite-Aid, Target, and
5 Walgreens. Id. The Osteo Bi-Flex products are available in 30,
6 75, 80, 120, and 150 count bottles, retailing for approximately
7 \$19.99 to \$44.99. Id.

8 According to Plaintiff, Defendants have consistently conveyed
9 the message to consumers throughout California that Osteo Bi-Flex
10 will help to "promote mobility," "renew cartilage," "maintain
11 healthy connective tissue," and improve joint comfort by taking the
12 recommended number of tablets each day. Id. at 6.

13 According to Plaintiff, Defendants represent that the claimed
14 health benefits are achieved through the combination of ingredients
15 in the products. Id. The primary active ingredient--glucosamine
16 hydrochloride--is in all the Osteo Bi-Flex products and is an amino
17 sugar that the body produces and distributes in cartilage and other
18 connective tissue. Id. Plaintiff asserts that there is no
19 competent and reliable scientific evidence that taking
20 glucosamine--let alone through oral administration--results in the
21 body metabolizing it into something that helps to promote mobility,
22 renew cartilage, maintain healthy connective tissue or improve
23 joint comfort. Id. Clinical cause and effect studies have found
24 no causative link between glucosamine hydrochloride supplementation
25 and joint renewal or rejuvenation. Id.

26 The Osteo Bi-Flex products also contain Defendants' 5-LOXIN

1 Advanced, which consists of a concentrated extract of Boswellia
2 Serrata ("AKBA"). Osteo Bi-Flex Regular Strength is the only
3 product without AKBA. Although Defendants claim that AKBA results
4 in "improvement in joint comfort within 7 days," there is no
5 competent and reliable scientific evidence that taking AKBA--let
6 alone through oral administration--helps to "promote mobility,"
7 "renew cartilage," "maintain healthy connective tissue," or improve
8 joint comfort. Clinical cause and effect studies have been unable
9 to confirm a cause and effect relationship between AKBA
10 supplementation and joint renewal or rejuvenation.

11 The Osteo Bi-Flex products also contain lesser amounts of the
12 following other ingredients: chondroitin sulfate, which is in all
13 of the Osteo Bi-Flex products except for Osteo Bi-Flex One Per Day;
14 methylsulfonylmethane, which is in all of the products except for
15 Osteo Bi-Flex One Per Day and Osteo Bi-Flex Regular Strength;
16 hyaluronic acid, which is in all of the products except for Osteo
17 Bi-Flex Advanced, Osteo Bi-Flex One Per Day, and Osteo Bi-Flex
18 Regular Strength; and vitamin D, vitamin C, manganese, boron, and
19 collagen. Id. at 7-8. There is no competent and reliable
20 scientific evidence that taking chondroitin, methylsulfonylmethane,
21 hyaluronic acid, vitamin D, vitamin C, manganese, boron, or
22 collagen--let alone through oral administration--helps to "promote
23 mobility," "renew cartilage," "maintain healthy connective tissue,"
24 or improve joint comfort. Id. Clinical cause and effect studies
25 have found no causative link between chondroitin,
26 methylsulfonylmethane, hyaluronic acid, vitamin D, vitamin C,

1 manganese, boron, or collagen supplementation and joint renewal or
2 rejuvenation. Id.

3 The packages for the Osteo Bi-Flex products reference two
4 studies supporting the Defendants' representation that the product
5 "shows improvement in joint comfort," but no information is
6 included to enable customers to locate and review the studies. Id.
7 at 8. Defendants do not have competent and reliable scientific
8 evidence that any of the ingredients in their Osteo Bi-Flex
9 products, when taken alone or in combination, are effective at
10 helping provide joint renewal or rejuvenation. Id. at 10.
11 Numerous clinical studies have resulted in a finding of no efficacy
12 for the ingredients in the Osteo Bi-Flex products and the
13 prevention of joint degeneration or relief from joint discomfort.
14 Id.

15 As noted, plaintiff alleges violations of California's Unfair
16 Competition Law ("UCL"), Business & Professions Code § 17200, et
17 seq., and its Consumers Legal Remedies Act ("CLRA"), California
18 Civil Code § 1750, et seq., as well as breach of express warranty.
19 Id. at 14-18. Plaintiff seeks, inter alia, compensatory damages,
20 restitution and disgorgement of Defendants' revenues, injunctive
21 relief, and statutory and punitive damages. Id. at 18-19.

22 **B. Defendants' Motion to Dismiss**

23 Defendants make, inter alia, the following arguments. As a
24 preliminary matter, Defendants argue that Plaintiff lacks standing
25 to pursue claims, including putative class claims, as to the Osteo
26 Bi-Flex products she did not purchase and advertising she did not

1 view. See Defs' Mot., ECF No. 26, at 7-11. Second, Defendants
2 argue that Plaintiff has failed to allege sufficient facts to
3 support any of her claims because: (1) Plaintiff must allege and
4 ultimately prove that the challenged marketing is *actually* false
5 or misleading, and claims that the representation merely lacks
6 substantiation are insufficient, id. at 11-15; and (2) Plaintiff
7 makes conclusory and unspecified allegations regarding clinical
8 cause and effect studies, which are insufficient to show what is
9 specifically false or misleading about Defendants' representations,
10 why those representations are false, and what facts Defendants were
11 purportedly required to disclose, as required by Federal Rules of
12 Civil Procedure 8 and 9(b), id. at 15-18. Finally, Defendants
13 request that the case be dismissed with prejudice because
14 "Plaintiff has already amended her complaint twice, and the claims
15 remain fundamentally defective."² Id. at 20.

16 In opposing Defendants' motion to dismiss, Plaintiff argues,
17 inter alia, that: (1) Plaintiff has standing to assert claims based
18 on the advertised representations pertaining to all of the Osteo
19 Bi-Flex products and Defendants' argument that Plaintiff lacks

20
21 ² Plaintiff filed her initial complaint on June 14, 2011.
22 See Pl's Compl., ECF No. 1. On July 5, 2011, before the Defendants
23 responded to Plaintiff's complaint, the parties stipulated that
24 Plaintiff would file a First Amended Complaint, and that Defendants
25 would be given an extension of time to file a response to the First
26 Amended Complaint. See Stip. & Order, ECF No. 8. On July 25,
2011, Plaintiff filed her First Amended Complaint. See Pl's First
Am. Compl., ECF No. 10. On August 24, 2011, Defendants filed a
motion to dismiss Plaintiff's first amended complaint. See Defs'
Mot., ECF No. 19. In response to Defendants' motion to dismiss,
Plaintiff filed the second amended complaint currently at issue.
See Pl's Second Am. Compl., ECF No. 25.

1 standing "is a premature and erroneous Rule 23 typicality argument,
2 made under the guise of a standing argument," see Pl's Opp'n, ECF
3 No. 29, at 5-9; (2) Defendants are improperly characterizing
4 Plaintiff's claims as "lack of substantiation" or "nondisclosure"
5 claims, when Plaintiff, in fact, is alleging claims for false and
6 deceptive advertising, id. at 9-10; (3) even if Plaintiff's claims
7 may be characterized as lack of substantiation claims, it remains
8 "actionable conduct when a manufacturer makes false and misleading
9 health benefit claims about a product without having competent
10 scientific proof supporting those claims," id. at 10-11; (4)
11 Plaintiff's UCL and CLRA claims are not predicated on common law
12 fraud, and thus, Rule 8(a) (as opposed to Rule 9(b)) pleading
13 standards apply and Plaintiff has satisfied those standards, id.
14 at 11-13; and (5) even if the court determines that Plaintiff's
15 complaint does "sound in fraud," Plaintiff has satisfied Rule 9(b)
16 pleading requirements, id. at 14-15.

17 **II. STANDARDS FOR A MOTION TO DISMISS**

18 **A. Dismissal of claims governed by Federal Rule of Civil**

19 **Procedure 8(a)**

20 A Federal Rule of Civil Procedure 12(b)(6) motion challenges
21 a complaint's compliance with the pleading requirements provided
22 by the Federal Rules. In general, these requirements are
23 established by Federal Rule of Civil Procedure 8, although claims
24 that are "grounded in fraud" or "sound in fraud" must meet the
25 requirements provided by Federal Rule of Civil Procedure 9(b).
26 Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1103-04 (9th Cir.

1 2003).

2 Under Federal Rule of Civil Procedure 8(a)(2), a pleading must
3 contain a "short and plain statement of the claim showing that the
4 pleader is entitled to relief." Fed.R.Civ.P. 8(a)(2). The
5 complaint must "give the defendant fair notice of what the claim
6 is and the grounds upon which it rests." Bell Atlantic Corp. v.
7 Twombly, 550 U.S. 544, 555 (2007) (internal quotation and
8 modification omitted).

9 To meet this requirement, the complaint must be supported by
10 factual allegations. Ashcroft v. Iqbal, 556 U.S. 662, 678, 129
11 S.Ct. 1937, 173 L.Ed.2d 868 (2009). "While legal conclusions can
12 provide the framework of a complaint," neither legal conclusions
13 nor conclusory statements are themselves sufficient, and such
14 statements are not entitled to a presumption of truth. Id. at 679.
15 Iqbal and Twombly therefore prescribe a two step process for
16 evaluation of motions to dismiss. The court first identifies the
17 non-conclusory factual allegations, and the court then determines
18 whether these allegations, taken as true and construed in the light
19 most favorable to the plaintiff, "plausibly give rise to an
20 entitlement to relief." Id.; Erickson v. Pardus, 551 U.S. 89, 94,
21 127 S.Ct. 2197, 167 L.Ed.2d 1081 (2007).³

22
23 ³ As discussed below, the court may consider certain limited
24 evidence on a motion to dismiss. As an exception to the general
25 rule that non-conclusory factual allegations must be accepted as
26 true on a motion to dismiss, the court need not accept allegations
as true when they are contradicted by this evidence. See Mullis v.
United States Bankr. Ct., 828 F.2d 1385, 1388 (9th Cir. 1987),
Durning v. First Boston Corp., 815 F.2d 1265, 1267 (9th Cir. 1987).

1 “Plausibility,” as it is used in Twombly and Iqbal, does not
2 refer to the likelihood that a pleader will succeed in proving the
3 allegations. Instead, it refers to whether the non-conclusory
4 factual allegations, when assumed to be true, “allow[] the court
5 to draw the reasonable inference that the defendant is liable for
6 the misconduct alleged.” Iqbal, 556 U.S. at 678. “The
7 plausibility standard is not akin to a ‘probability requirement,’
8 but it asks for more than a sheer possibility that a defendant has
9 acted unlawfully.” Id. (quoting Twombly, 550 U.S. at 556). A
10 complaint may fail to show a right to relief either by lacking a
11 cognizable legal theory or by lacking sufficient facts alleged
12 under a cognizable legal theory. Balistreri v. Pacifica Police
13 Dep’t, 901 F.2d 696, 699 (9th Cir. 1990).

14 **B. Dismissal of Claims Governed by Federal Rule of Civil**
15 **Procedure 9(b)**

16 A Rule 12(b)(6) motion to dismiss may also challenge a
17 complaint’s compliance with Federal Rule of Civil Procedure 9(b).
18 See Vess, 317 F.3d at 1107. This rule provides that “In alleging
19 fraud or mistake, a party must state with particularity the
20 circumstances constituting fraud or mistake. Malice, intent,
21 knowledge, and other conditions of a person’s mind may be alleged
22 generally.” Fed.R.Civ.P. 9(b). These circumstances include the
23 “time, place, and specific content of the false representations as
24 well as the identities of the parties to the misrepresentations.”
25 Swartz v. KPMG LLP, 476 F.3d 756, 764 (9th Cir. 2007) (quoting
26 Edwards v. Marin Park, Inc., 356 F.3d 1058, 1066 (9th Cir. 2004)).

1 Rule 9(b) requires fraud claims to be specific enough to give
2 defendants notice of the particular misconduct which is alleged to
3 constitute the fraud charged, so that they can defend against the
4 charge and not just deny that they have done anything wrong. Id.
5 (citing Bly-Magee v. California, 236 F.3d 1014, 1019 (9th Cir.
6 2001). That is, the plaintiff must specifically set forth what is
7 false or misleading about a statement, and why it is false. Vess,
8 317 F.3d at 1106 (citing Decker v. GlenFed, Inc., 42 F.3d 1541,
9 1548 (9th Cir. 1994)).

10 III. ANALYSIS

11 A. Osteo Bi-Flex Product Packaging

12 When ruling on a motion to dismiss, the court may consider a
13 variety of documents in addition to the complaint. For example,
14 the court may consider documents attached to the complaint.
15 Durning v. First Boston, Corp., 815 F.2d 1265, 1267 (9th Cir.
16 1987), *cert. denied*, 484 U.S. 944, 108 S.Ct. 330, 98 L.Ed.2d 358
17 (1987). The court may also consider "documents whose contents are
18 alleged in a complaint and whose authenticity no party questions,
19 but which are not physically attached to the pleading." Branch v.
20 Tunnell, 14 F.3d 449, 454 (9th Cir. 1994), *cert. denied*, 512 U.S.
21 1219, 114 S.Ct. 2704, 129 L.Ed.2d 832 (1994), *overruled on other*
22 *grounds*, Galbraith v. County of Santa Clara, 307 F.3d 1119, 1121
23 (9th Cir. 2002). Attached to their motion to dismiss, Defendants
24 have included copies of product packaging for the eight Osteo Bi-
25 Flex products currently at issue in this dispute. Because the
26 packaging serves as a basis for Plaintiff's allegations and

1 Plaintiff does not contest their authenticity, the court here
2 considers the Osteo Bi-Flex product packaging in ruling on
3 Defendants' motion to dismiss. See Defs' Mot., ECF No. 26, Exs.
4 A-H.

5 **B. Standing**

6 To establish Article III standing, a plaintiff must have an
7 injury in fact, which is traceable to the defendant's acts and
8 redressable by a court decision. See Lujan v. Defenders of
9 Wildlife, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 110 L.Ed.2d 351
10 (1992). Injury in fact results from the invasion of a legally
11 protected interested which is concrete and particularized, as well
12 as actual or imminent. Id. at 560 (citations omitted). In a class
13 action, standing is satisfied if "at least one named plaintiff
14 meets the requirements." Bates v. UPS, 511 F.3d 974, 985 (9th Cir.
15 2007).

16 Here, Plaintiff alleged that she read the front, back, and
17 sides of the Osteo Bi-Flex Regular Strength label at a Rite Aid
18 store in Roseville, California, and lost money on the ineffective
19 Osteo Bi-Flex product that she would not have purchased but for the
20 representations thereon. Plaintiff seeks, among other remedies,
21 compensatory damages. These allegations constitute injury in fact
22 and suffice to establish that the Plaintiff has Article III
23 standing, at least as to the Osteo Bi-Flex Regular Strength product
24 that Plaintiff purchased and the representations on the packaging
25 of that product upon which she relied.

26 A plaintiff alleging a UCL claim must satisfy both Article III

1 standing requirements and UCL standing requirements. See Birdsong
2 v. Apple, Inc., 590 F.3d 955, 960 n.4 (9th Cir. 2009). A UCL
3 plaintiff with standing is a person who has (1) suffered injury in
4 fact and (2) lost money or property as a result of the unfair
5 competition. DeGelmann v. Advanced Medical Optics, Inc., 659 F.3d
6 835, 839 (9th Cir. 2011) (citing Cal. Bus. & Prof. Code § 17204).
7 That is, UCL plaintiffs are required to show that they have lost
8 money or property sufficient to constitute an "injury in fact"
9 under Article III of the Constitution. Id. (citing Rubio v.
10 Capital One Bank, 613 F.3d 1195, 1203-04 (9th Cir. 2010); Birdsong,
11 590 F.3d at 959-60). Thus, a UCL plaintiff must have Article III
12 standing in the form of economic injury. In the instant case,
13 Plaintiff's allegation that she lost money on the ineffective Osteo
14 Bi-Flex product is sufficient to meet the standing requirement of
15 economic injury under the UCL, as to the Osteo Bi-Flex Regular
16 Strength product that she purchased.

17 Under the CLRA, an action may be brought by: "Any consumer who
18 suffers any damage as a result of the use or employment by any
19 person of a method, act, or practice declared to be unlawful by
20 Section 1770" Cal. Civ. Code § 1780(a). In order to have
21 standing, a plaintiff must allege that he or she was damaged by an
22 alleged unlawful practice. Johns v. Bayer Corp., No. 09-1935, 2010
23 WL 476688, at *4 (S.D.Cal. Feb. 9, 2010) (citing Meyer v. Sprint
24 Spectrum L.P., 45 Cal.4th 634, 638, 88 Cal.Rptr.3d 859, 200 P.3d
25 295 (2009)). Again, Plaintiff's allegation that she lost money due
26 to Defendants' unlawful representations is sufficient to establish

1 Plaintiff's standing to bring a claim under the CLRA for any
2 misrepresentations she relied upon relating to the Osteo Bi-Flex
3 Regular Strength product that she purchased.

4 It is less clear whether Plaintiff has standing to bring
5 claims under the UCL and the CLRA as to the Osteo Bi-Flex products
6 that she did not purchase and the advertising she did not view.

7 The court in Bayer Corp. provided, in dicta, that a plaintiff
8 "cannot expand the scope of his claims to include a product he did
9 not purchase or advertisements relating to a product that he did
10 not rely upon." Bayer Corp., 2010 WL 476688, at *5. Some district
11 courts in the Ninth Circuit have followed this view. See, e.g.,
12 Carrea v. Dreyer's Grand Ice Cream, Inc., No. 3:10-cv-01044-JSW,
13 2011 WL 159380, at *3 (N.D. Cal. Jan. 10, 2011) (holding that
14 plaintiff has standing to bring UCL and CLRA claims for the
15 Drumstick ice cream products purchased, but dismissing plaintiff's
16 claims for the Dibs ice cream product, which plaintiff never
17 alleged he purchased or suffered a loss), *aff'd*, No. 11-15263, 2012
18 WL 1131526 (9th Cir. April 5, 2012) (unpublished) (declining to
19 address the district court's standing determination); Mlejnecky v.
20 Olympus Imaging Am. Inc., No. 2:10-cv-2630, 2011 WL 1497096, at *4
21 (E.D.Cal. April 19, 2011) (Mendez, J.) (dismissing plaintiff's CLRA
22 and UCL claims relating to a camera model that has the "same
23 underlying defects" and used the same advertisements as the model
24 she purchased, but for which she did not allege any economic
25 injury).

26 Other recent court decisions, however, have applied a

1 different approach when facing, in a class action, a named
2 plaintiff's assertion of claims related to products that she did
3 not buy. For example, in Carideo v. Dell, Inc., the court upheld
4 claims by the named plaintiffs for computer models that they had
5 not purchased, but that were subject to the "same core factual
6 allegations and causes of action." 706 F.Supp.2d 1122, 1134 (W.D.
7 Wash. 2010). And in Hewlett-Packard v. Superior Ct., the court
8 upheld class certification for UCL, CLRA, express warranty, and
9 unjust enrichment claims relating to display failures in several
10 models, even though the named plaintiff only purchased one of those
11 models. 167 Cal.App.4th 87, 89-92, 83 Cal.Rptr.3d 836 (2008).
12 While Carideo can be distinguished from the issues presented in
13 this case because it does not address standing requirements as
14 related to California law, and Hewlett-Packard can be distinguished
15 from the issues here presented because the court in Hewlett-
16 Packard was not analyzing standing issues, it is more difficult to
17 dismiss or distinguish the court's holding in Bruno v. Outen
18 Research Inst., LLC, 8:11-cv-00173, 2011 WL 5592880, at *3-4 (C.D.
19 Cal. Nov. 14, 2011).

20 Similar to the instant case, in Bruno, the plaintiff filed a
21 class action against the manufacturer and marketer of supplements
22 alleging misrepresentations in violation of, inter alia,
23 California's UCL and CLRA. In considering whether the plaintiff
24 in Bruno had standing to bring claims arising from the defendants'
25 gelcap product, when the plaintiff had only purchased the
26 defendants' liquid product, the court noted that "treatises and the

1 vast majority of persuasive authority indicate that . . . the issue
2 of whether a class representative may be allowed to present claims
3 on behalf of others who have similar, but not identical, interests
4 depends not on standing, but on an assessment of typicality and
5 adequacy of representation." Id. at *3 (citing Greenwood v.
6 CompuCredit Corp., No. 4:08-cv-04878, 2010 WL 4807095, at *3 (N.D.
7 Cal. Nov. 19, 2010); Arevalo v. Bank of Am. Corp., -- F.Supp.2d --,
8 2011 WL 1195973, at *4 (N.D. Cal. Mar. 29, 2011); Fallick v.
9 Nationwide Mut. Ins. Co., 162 F.3d 410, 423 (6th Cir. 1998)
10 (holding that, because plaintiff had standing to sue for injury
11 arising from his own benefit plan, his ability to represent class
12 members with different benefit plans should be analyzed under Rule
13 23, not standing); 7AA Wright et al., Federal Practice and
14 Procedure (3d 2005) § 1785.1).

15 The court here finds the reasoning of Bruno more persuasive
16 than the reasoning provided by the dicta of Bayer Corp. and its
17 progeny. Thus, the court determines that Plaintiff has standing
18 to assert her UCL and CLRA claims based on her purchase of Osteo
19 Bi-Flex Regular Strength and the product's more general
20 representations that its line of Osteo Bi-Flex products, which
21 ostensibly share many similarities in ingredients, "improve
22 mobility," "improve joint comfort," and "support[] renewal of
23 cartilage." The court will analyze solely under Rule 23 whether
24 Plaintiff may be allowed to present claims on behalf of purchasers
25 of the remaining Osteo Bi-Flex products.

26

1 **C. Applicability of Federal Rule of Civil Procedure 9(b)**

2 Defendants argue that Plaintiff's claims sound in fraud and
3 are, therefore, subject to the particularized pleading requirements
4 of Rule 9(b).

5 The Ninth Circuit has specifically held that Rule 9(b)'s
6 heightened pleading standards apply to claims for violations of the
7 CLRA and UCL. Kearns v. Ford Motor Co., 567 F.3d 1120, 1125 (9th
8 Cir. 2009) (citing Vess, 317 F.3d at 1102-05). While fraud is not
9 a necessary element of a claim under the CLRA and UCL, a plaintiff
10 may nonetheless allege that the defendant engaged in fraudulent
11 conduct. Id. (citing Vess, 317 F.3d at 1103). A plaintiff may
12 allege a unified course of fraudulent conduct and rely entirely on
13 that course of conduct as the basis of that claim, in which event,
14 the claim is said to be "grounded in fraud" or to "sound in fraud,"
15 and the pleading as a whole must satisfy the particularity
16 requirement of Rule 9(b). Id. (citing Vess, 317 F.3d at 1103-04).

17 To determine if the elements of fraud have been pleaded to
18 state a cause of action, courts look to state law. Kearns, 567
19 F.3d at 1126 (citing Vess, 317 F.3d at 1105-06). The elements of
20 a cause of action for fraud in California are: "(a)
21 misrepresentation (false representation, concealment, or
22 nondisclosure); (b) knowledge of falsity (or 'scienter'); (c)
23 intent to defraud, i.e., to induce reliance; (d) justifiable
24 reliance; and (e) resulting damage." Id. (citing Engalla v.
25 Permanente Med. Group, Inc., 15 Cal.4th 951, 974, 64 Cal.Rptr.2d
26 843, 938 P.2d 903 (Cal. 1997)).

1 If the claim is grounded in fraud, the pleading of that claim
2 as a whole must satisfy the particularity requirement of Rule 9(b).
3 Kearns, 567 F.3d at 1127 (citing Vess, 317 F.3d at 1103-04).

4 Plaintiff argues that her action does not sound in fraud, but
5 instead, alleges claims of false and deceptive advertising.
6 However, Plaintiff specifically asserts the elements of a cause of
7 action for fraud in her CLRA claim. Specifically, in her CLRA
8 claim, Plaintiff alleges that Defendants "fail[ed] to disclose
9 material facts on the Osteo Bi-Flex product labels and packaging"
10 (nondisclosure), "when they knew, or should have known, that the
11 representations were unsubstantiated" (scienter). Pl's Second Am.
12 Compl., ECF No. 25, at 17, ¶ 59. Plaintiff also asserts that she
13 "relied on every single one of Defendants' renewal and rejuvenation
14 representations" (justifiable reliance), and that she "suffered
15 injury in fact and lost money" (resulting damage). Id. at 4, ¶ 8.
16 Because Plaintiff alleges each of the elements of an action for
17 fraud in her CLRA claim, the pleading of that claim, as a whole,
18 must satisfy the particularity requirement of Rule 9(b).

19 Plaintiff does not, however, allege knowledge of falsity, or
20 scienter, as part of her UCL claim. Plaintiff's UCL claim
21 therefore does not "sound in fraud" and Rule 9(b) applies only
22 insofar as Plaintiff makes specific averments of fraud in her UCL
23 claim. See Vess, 317 F.3d at 1105 ("[I]n a case where fraud is not
24 an essential element of a claim, only allegations . . . of
25 fraudulent conduct must satisfy the heightened pleading
26 requirements of Rule 9(b). Allegations of non-fraudulent conduct

1 need satisfy only the ordinary notice pleading standards of Rule
2 8(a).”).

3 In the complaint as pled, however, it is difficult to
4 distinguish between those averments in Plaintiff’s UCL claim that
5 are based on fraud, and those averments that are based on non-
6 fraudulent conduct.⁴ As part of Plaintiff’s UCL claim, Plaintiff
7 alleges that she and other class members “lost money as a result
8 of these unlawful, unfair, and *fraudulent* practices.” Pl’s Second
9 Am. Compl., ECF No. 25, at 15, ¶ 51 (emphasis added). Plaintiff
10 characterizes the Defendants’ representations as “fraudulent,”
11 apparently in reference to Defendants’ false advertising generally,
12 and not related to any of Defendants’ statements in particular.
13 Because the alleged fraudulence of Defendants’ advertising is
14 inseparable from any other averments made as part of Plaintiff’s
15 UCL claim, the court determines that Plaintiff’s UCL claim, as a
16 whole, must meet the pleading standards of Rule 9(b).

17 **D. Sufficiency of Plaintiff’s Complaint Under Rule 9(b).**

18 The court here determines that Plaintiff’s complaint meets the
19 pleading standards of Federal Rule of Civil Procedure 9(b). When
20 taking Plaintiff’s factual allegations as true and construing them
21 in the light most favorable to Plaintiff, Plaintiff’s allegations
22 of the falsity of the Osteo Bi-Flex representations are sufficient
23 to survive Defendants’ motion to dismiss.

24

25 ⁴ The court notes that not all claims of false advertising are
26 necessarily grounded in fraud. See Fraker v. Bayer Corp., No.
1:08-cv-01564, 2009 WL 5865687, at *9 (E.D.Cal. Oct. 6, 2009).

1 Plaintiff argues, and the court agrees, that the gravamen of
2 her complaint asserts that "it is actionable conduct when a
3 manufacturer makes false and misleading health benefit claims about
4 a product without having competent scientific proof supporting
5 those claims." Pl's Opp'n, ECF No. 29, at 11.

6 Pursuant to Section 17500 of the California Business and
7 Professions Code, it is unlawful to make and disseminate any
8 statement that is "untrue or misleading, and which is known, or by
9 the exercise of reasonable care should be known, to be untrue or
10 misleading." Cal. Bus. & Prof. § 17500. A statement is false or
11 misleading if members of the public are likely to be deceived.
12 Fraker v. Bayer Corp., No. 1:08-cv-01564, 2009 WL 5865687, at *7
13 (E.D.Cal. Oct. 6, 2009) (citing McCann v. Lucky Money, Inc., 129
14 Cal.App.4th 1382, 1388, 29 Cal.Rptr.3d 437 (4th Dist. 2005)
15 (internal citations omitted)). A "reasonable consumer" standard
16 applies when determining whether a given claim is misleading or
17 deceptive. Id. at *6. A "reasonable consumer" is "the ordinary
18 consumer acting reasonably under the circumstances," and "is not
19 versed in the art of inspecting and judging a product, in the
20 process of its preparation or manufacture." Id.

21 Plaintiff refers to "clinical cause and effect studies" that
22 "have found no causative link" between the individual ingredients
23 contained in the Osteo Bi-Flex products and the benefits purported
24 thereon.

25 Defendants' representations related to improved joint comfort,
26 joint lubrication, and other joint benefits, appear to be based,

1 at least in part, on the asserted efficacy of individual
2 ingredients in their formulations in achieving joint benefits.

3 For example, the packaging for Osteo Bi-Flex One Per Day,
4 Osteo Bi-Flex Double Strength, Osteo Bi-Flex Triple Strength, Osteo
5 Bi-Flex Triple Strength with Vitamin D3, Osteo Bi-Flex Energy
6 Formula, and Osteo Bi-Flex Advanced all indicate that an active
7 ingredient in their formulations is "5-LOXIN Advanced," which,
8 Defendants represent, "contains high concentrations of AKBA, which
9 is an important Boswellic Acid for helping with joint flare-ups."
10 See, e.g., Defs' Mot., ECF No. 26, Exs. A-D, F. If Plaintiff's
11 assertions are true, and "[c]linical cause and effect studies have
12 been unable to confirm a cause and effect relationship between AKBA
13 supplementation and joint renewal or rejuvenation," ECF No. 25, at
14 6-7, then it stands to reason that Defendants' representations that
15 AKBA "help[s] with joint flare-ups" are actually false. Because
16 Defendants bolster their overarching claims of joint benefits by
17 referring to the importance and efficacy of a particular ingredient
18 which, if Plaintiff is to be believed, has no actual joint
19 benefits, then Defendants' overarching claims are most likely false
20 as well. Thus, Plaintiff's cited clinical cause and effect studies
21 regarding AKBA sufficiently provide Defendants notice of the
22 parameters of their allegedly fraudulent conduct; based on the
23 Plaintiff's allegations, the Defendants can adequately prepare a
24 defense against the charge and not merely deny that they have done
25 anything wrong.

26 Similarly, apparently as a basis for its overarching claims

1 that Osteo Bi-Flex Regular Strength "improves mobility," "improves
2 joint comfort," and "supports renewal of cartilage," the packaging
3 for the regular strength product asserts that "[g]lucosamine . .
4 . helps to maintain the structural integrity of joints and
5 connective tissues," and that "[c]hondroitin . . . helps to
6 lubricate and cushion joints while supporting the renewal of
7 cartilage." See Defs' Mot., ECF No. 26, Ex. H. If, in fact,
8 clinical cause and effect studies have found no causative link
9 between glucosamine hydrochloride supplementation and joint renewal
10 or rejuvenation, nor have clinical cause and effect studies found
11 a causative link between chondroitin supplementation and joint
12 renewal or rejuvenation, then Defendants' assertions regarding the
13 benefits of glucosamine and chondroitin are most likely false.
14 Because the purported joint benefits of the regular strength
15 product are based on Defendants' assertions of the efficacy of the
16 particular ingredients glucosamine and chondroitin, it is
17 reasonable to infer that the regular strength product's asserted
18 overarching benefits of improved mobility, improved joint comfort,
19 and renewal of cartilage, are also false. Thus, the court finds
20 that Plaintiff's cited clinical cause and effect studies are
21 sufficiently specific to provide Defendants notice of what is
22 allegedly false or misleading about the Osteo Bi-Flex
23 representations, and why those representations are alleged to be
24 false, as required by Rule 9(b).

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IV. CONCLUSION

For the foregoing reasons, Defendants' motion to dismiss, ECF No. 26, is DENIED.

IT IS SO ORDERED.

DATED: May 3, 2012.



LAWRENCE K. KARLTON
SENIOR JUDGE
UNITED STATES DISTRICT COURT