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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CAROL POSTIER,

Plaintiff(s),

v.

LOUISIANA-PACIFIC CORP.,

Defendant(s).

No. C-09-3290 JCS

ORDER GRANTING IN PART AND DENYING IN PART MOTION TO DISMISS AND GRANTING IN PART AND DENYING IN PART PLAINTIFF’S MOTION TO STRIKE [Docket Nos. 7 and 13]

I. INTRODUCTION

On Friday, October 9, 2009, Defendant Louisiana Pacific Corporation’s Motion to Dismiss and Motion to Strike, and Plaintiff Carol Postier’s Motion to Strike came on for hearing. For the reasons stated below, the Defendant’s Motion to Dismiss is GRANTED IN PART and DENIED IN PART. The Plaintiff’s Motion to Strike is GRANTED IN PART AND DENIED IN PART.

II. BACKGROUND

A. Facts¹

The present class action Complaint was filed by Plaintiff Carole Postier (hereafter “Plaintiff”) on behalf of herself an other similarly-situated consumers “who own decking products manufactured warranted, advertised, and sold by Louisiana-Pacific” (hereafter “Defendant”). Complaint at ¶1. Plaintiff alleges that Defendant’s decking products are defective because they discolor and deteriorate prematurely, causing the boards to weaken and break “and are substantially

¹ The Court assumes the allegations in the complaint to be true for the purposes of this motion. See *Cahill v. Liberty Mutual Ins. Co.*, 80 F.3d 336, 338 (9th Cir. 1996)(on motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure, the Court must assume the facts alleged in the complaint are true).

1 certain to fail well before their warranted and expected useful life.” *Id.* ¶ 2. Defendant warranted
2 its composite decking materials with a ten year warranty. *Id.* ¶20. Defendant manufactured its
3 defective products since January 1, 2005. *Id.* ¶3. Plaintiff alleges that “Plaintiff and Class
4 Members justifiably relied on Louisiana-Pacific’s false representations regarding the quality of the
5 aforementioned decking materials and reasonably and justifiably relied upon Defendant’s
6 representations to them in the decision to purchase these products.” *Id.* ¶21.

7 In August 2008, Defendant issued a “product Advisory for decking products sold from its
8 Meridian, Idaho plant after January 1, 2005, because the products can prematurely degrade and
9 break, posing a risk of injury.” *Id.* ¶11. Thereafter, “a deck breakthrough that caused injury”
10 resulted in Defendant having to report the inherent defects in its decking products to the Consumer
11 Products Safety Commission (“CPSC”). *Id.* ¶12. On May 13, 2009, Defendants announced a recall
12 of their decking products marketed under the WeatherBest and LP WeatherBest label. *Id.* ¶¶3, 12.
13 Consumers were instructed to contact Defendants for an inspection. *Id.* ¶4. Plaintiffs allege,
14 however, that the recall is defective and misleading because consumers who participate in the recall
15 inspections “are being routinely denied free replacement of defective decking.” *Id.*

16 Plaintiff is a citizen of California, and Defendant is incorporated in Delaware and has its
17 principal place of business in Nashville, Tennessee. *Id.* ¶6. Plaintiff purchased her decking
18 material in September 2006 for \$2,500.00. *Id.* ¶5. Plaintiff constructed her deck from these
19 materials at an additional cost of \$2,575.00. *Id.* In February 2009, her deck began showing signs of
20 cracking and discoloration. *Id.* Plaintiff participated in the recall program and Defendant’s expert
21 inspected the deck and confirmed the existence of the defects. *Id.* As a result of that inspection,
22 Plaintiff alleges that Defendant offered her only \$48.00 in exchange for a waiver of liability. *Id.*

23 **B. Procedural Background**

24 On July 17, 2009, Plaintiff filed this class action Complaint in federal court. In the
25 Complaint, Plaintiff asserts seven claims: 1) Violation of the Consumer Legal Remedies Acts, Cal.
26 Civ. Code § 1750 *et. seq.* (“CLRA”); 2) Violation of Cal. Bus. & Prof. Code §§ 17200 & 17500 *et.*
27 *seq.* (the “Unfair Business Practices Act”); 3) Breach of Express Warranty; 4) Breach of Implied
28 Warranty; 5) Negligent Misrepresentation and Omission; 6) Intentional Misrepresentation and

1 Omission; and 7) Unjust Enrichment. In her prayer for relief, Plaintiff seeks general and punitive
2 damages, “statutory damages” as well as attorneys’ fees and costs. Defendant subsequently filed the
3 present Motion to Dismiss and to Strike. Thereafter, Plaintiff filed a Motion to Strike the
4 Declaration of Frank Kenamer. Defendant opposes the Plaintiff’s Motion to Strike.

5 **C. The Motions**

6 **1. The Motion to Dismiss**

7 Defendant asserts that Plaintiff fails to state a claim under Rule 12(b)(6) of the Federal Rules
8 of Civil Procedure as to the damages claim in Claim One (Consumer Legal Remedies Act “CLRA”)
9 and as to Claim Four (breach of implied warranty). In the alternative, Defendant moves pursuant to
10 Rule 12(f) to strike the damages request in Claim One.

11 With respect to Claim One, Defendant asserts first that Plaintiff’s allegations establish that
12 she failed to provide proper notice in compliance with the statute. Second, Defendant argues that
13 Plaintiff is barred from seeking damages on this claim under Civil Code §1782, which prohibits an
14 individual action for damages “if an appropriate correction, remedy, repair, replacement or other
15 remedy is given or agreed to be given[.]” In addition, Defendant argues that Plaintiff’s class action
16 seeking damages on this claim is barred for the same reason, citing Civil Code § 1782(c) (similar
17 provision regarding correction, replacement or repair remedies). Defendant argues that Louisiana-
18 Pacific’s (“LP”) recall of its decking materials (*see* Complaint ¶¶ 12 & 23) satisfies the requirements
19 of Civil Code § 1782(c). Accordingly, Defendant argues that Plaintiff cannot prevail on this claim.

20 As to Claim Four, Defendant argues that Plaintiff does not allege that she purchased her LP
21 decking material directly from LP. The allegation of the complaint is that she purchased LP decking
22 material, without reference to the seller. Defendant argues that privity of contract is required under
23 California law in order to establish a breach of implied warranty claim and that no exceptions to that
24 rule exist here. Defendant also argues that leave to amend would be futile because Plaintiff cannot
25 allege that she purchased it directly from LP because LP does not sell its decking materials directly
26 to consumers. Plaintiff responds that there is legal precedent for the argument that the privity
27 requirement can be “relaxed” when an express warranty claim is also filed. Defendant argues that
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1 the case cited by Plaintiff is inapplicable here, and does not stand for the broad proposition advanced
2 by Plaintiff.

3 **2. Plaintiff's Motion to Strike**

4 Plaintiff has filed a Motion to Strike the Declaration of Frank Kennamer on the grounds that
5 it contains matters that are "inadmissible hearsay, irrelevant, speculative, conclusory, lack
6 foundation, and offer disputed facts that contradict the allegations set forth in Plaintiff's Complaint."
7 Plaintiff's Motion at 2. The crux of Plaintiff's argument is that this declaration improperly
8 contradicts factual allegations of the Complaint regarding the efficacy of the recall program. In
9 opposition to Plaintiff's Motion to Strike, Defendant argues that the Kennamer declaration merely
10 seeks to authenticate three documents, two of which were explicitly referenced in the Complaint and
11 one document whose subject matter is referred to in the Complaint. Specifically, the declaration
12 authenticates materials printed from the recall website established by Defendant and letters between
13 counsel regarding the recall. The website materials are attached to the Kennamer Declaration as
14 Exhibit 1. The website is specifically referenced in paragraph 23 of Plaintiff's Complaint. The
15 CLRA notice letter referred to by Plaintiff at paragraph 60 of her Complaint is attached to the
16 Kennamer Declaration as Exhibit 2. Exhibit 3 is a letter from Mr. Kennamer, counsel for Defendant,
17 to Plaintiff's counsel in response to the CLRA notification.

18 **III. ANALYSIS**

19 **A. The Motion to Dismiss**

20 **1. Legal Standard**

21 A complaint may be dismissed for failure to state a claim for which relief can be granted
22 under Federal Rule of Civil Procedure 12(b)(6). Fed. R. Civ. P 12(b)(6). A complaint must "contain
23 either direct or inferential allegations respecting all the material elements necessary to sustain
24 recovery under *some* viable legal theory." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct.
25 1955, 1969 (2007) (quoting *Car Carriers, Incl v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir.
26 1984) (internal quotations omitted; emphasis in original).

27 While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed
28 factual allegations, a plaintiff's obligation to provide the "grounds" of his "entitle[ment] to relief" requires more than labels and conclusions, and a formulaic recitation of the elements

1 of a cause of action will not do. Factual allegations must be enough to raise a right to relief
2 above the speculative level on the assumption that all the allegations in the complaint are true
(even if doubtful in fact).

3 *Id.* at 1964-65. For purposes of resolving the motion, courts accept all allegations of material fact as
4 true and construe the complaint in the light most favorable to the nonmoving party. *Nat'l Wildlife*
5 *Fed'n v. Espy*, 4 F.3d 1337, 1380 (9th Cir. 1995).

6 **2. Claim One (CLRA) for Damages**

7 *a. Section 1782(a)'s Notice Requirement*

8 Defendant contends that Plaintiff is barred from seeking damages under the CLRA due to the
9 fact that she did not comply with the statutory notice requirement. Because Plaintiff
10 “unambiguously seeks damages for violations of the CLRA,” the damages claim must be dismissed.
11 Def.’s Reply Brief at 2. The Court disagrees.

12 Under the CLRA, a Plaintiff is required to provide notice to the Defendant of the alleged
13 violation of the CLRA and a demand that the violation be remedied. Civil Code § 1782(a). Section
14 1782(a) provides:

- 15 Thirty days or more prior to the commencement of an action for damages pursuant to this
16 title, the consumer shall do the following:
- 17 1) Notify the person alleged to have employed or committed methods, acts, or practices
declared unlawful by Section 1770 of the particular alleged violations of Section 1770;
 - 18 2) Demand that the person correct, repair, replace, or otherwise rectify the goods or services
19 alleged to be in violation of Section 1770. . . .

20 Cal. Civ. Code § 1782(a). It is well-established under California law that this notice requirement
21 must be literally applied. *Outboard Marine Corp. v. Superior Court*, 52 Cal.App.3d 30, 38-41
22 (1975). In *Outboard Marine*, the court explained:

23 The purpose of the notice requirement of section 1782 is to give the manufacturer or vendor
24 sufficient notice of alleged defects to permit appropriate corrections or replacements. . . . The
25 clear intent of the act is to provide and facilitate precomplaint settlements of consumer
26 actions wherever possible and to establish a limited period during which such settlement may
be accomplished. This clear purpose may only be accomplished by a literal application of
the notice provisions.

27 *Outboard Marine* at 41. A complaint seeking injunctive relief is not subject to the notice
28 requirement of section 1782(a). Section 1782(d) provides that an “action for injunctive relief . . .

1 may be commenced without compliance with subdivision (a).” Section 1782 specifically states that
2 the notice requirement applies to an “action for damages.” 1782(a).

3 This argument is now moot, as the parties agreed at oral argument that the thirty (30) day
4 waiting period has passed. Plaintiff may amend her Complaint to add a claim for damages under the
5 CLRA.

6 *b. Defendant’s Recall*

7 Defendant argues that Plaintiff’s damages claim is prohibited on an alternate ground – that
8 Civil Code § 1782(b) prohibits a consumer action for “damages” under the CLRA “if an appropriate
9 correction, repair, replacement, or other remedy is given, or agreed to be given within a reasonable
10 time to the consumer within 30 days after receipt of the notice.” Defendant argues that Plaintiff
11 explicitly acknowledges the recall in the Complaint (*see* ¶ 23), including the allegation that Plaintiff
12 has made a claim under Defendant’s recall program. Defendant argues that Plaintiff may not
13 maintain an individual damages claim under the CLRA because her own allegations establish that
14 Defendant has agreed to the “correction, repair, replacement, or other remedy.” Def.’s Motion at 7.
15 Defendant argues that “Plaintiff cannot circumvent the protection of Section 1782(c), and create a
16 claim for damages, by refusing to cooperate with the process through which LP has agreed to
17 provide a remedy.” Def.’s Motion at 8.

18 Defendant’s argument is unpersuasive. First, whether the recall has provided Plaintiff with a
19 suitable remedy and whether it was done so within a reasonable time is in dispute and cannot be
20 decided on a 12(b)(6) motion. Plaintiff alleges in her Complaint that after participating in the recall
21 program, she received an offer of \$48.00 for approximately \$2,500.00 worth of decking materials
22 (not including labor costs). Complaint, ¶5. Plaintiff also alleges that “the recall is defective and
23 contains false representations, in that consumers are being routinely denied free replacement of
24 defective decking.” *Id.* ¶2. Plaintiff details the recall program procedures, including the allegation
25 that the “process typically takes several months, during which time Class members are instructed not
26 to use their decks given the risk of injury.” *Id.* ¶24. Furthermore, “[u]nder the terms of the recall,
27 consumers are not permitted to employ their own inspection firm, and there is no appeal process
28 allowing aggrieved consumers an opportunity to challenge the findings of [Defendant’s inspection

1 entity] BrightClaim, or Louisiana-Pacific’s determination regarding the merits of a recall claim.” *Id.*
2 ¶25. Considering the above allegations of the Complaint, and accepting them as true for purposes of
3 this Motion to Dismiss, the Court cannot conclude that the recall program instituted by Defendant
4 provides an “appropriate correction” to Plaintiff.

5 **3. Claim Four (Breach of Implied Warranty)**

6 Defendant asserts that Plaintiff fails to state a claim for breach of implied warranty because
7 she does not allege that she purchased the decking material directly from LP and that, therefore, she
8 has not pled facts that could support a finding of privity of contract. The Court agrees.

9 Under California law, as a general rule, an action for breach of implied warranty requires
10 vertical privity of contract. *Arnold v. Dow Chemical Co.*, 91 Cal.App.4th 698, 720 (2001);
11 *Fieldstone Co. v. Briggs Plumbing Prods., Inc.*, 54 Cal.App.4th 357, 371 (1997) (“[T]here is no
12 privity between the original seller and a subsequent purchaser who is in no way a party to the
13 original sale.”) There are certain exceptions to this rule, such as when the plaintiff relies on written
14 labels or advertisements of a manufacturer. *Clemens v. Daimler Chrysler Corp.*, 534 F.3d 1017,
15 1023 (9th Cir.2008) (citing *Burr v. Sherwin Williams Co.*, 42 Cal.2d 682, 696 (1954)). There are
16 other special exceptions, such as in cases involving foodstuffs, pesticides, and pharmaceuticals, and
17 where the end user is an employee of the purchaser. *Id.*

18 Here, Plaintiff alleges that she purchased the decking materials “in or around February 2006
19 for approximately \$2,500.00.” Complaint ¶5. Plaintiff does not allege from whom she purchased
20 the materials, nor does she allege any direct dealings with Defendant. She also fails to allege any
21 facts that would support a finding of a contract with Defendant. Plaintiff fails to state a claim
22 because she does not sufficiently allege that she is in privity with the seller.

23 Defendant argues that the dismissal should be with prejudice because amendment would be
24 futile – Plaintiff cannot amend her Complaint to allege privity because Defendant has never sold its
25 decking products directly to consumers. Defendant’s Motion at 3. *See e.g., Wolph v. Acer America*
26 *Corp.*, 2009 WL 2969467 (N.D.Cal. September 14, 2009) (dismissing implied warranty claim with
27 prejudice on grounds of lack of privity). The claim must be dismissed because Plaintiff has not pled
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1 that she or other putative class members purchased the decking products directly from Defendant.
2 Nor does it appear that Plaintiff has adequately pled one of the exceptions to the privity rule.²

3 In opposition to the Motion, Plaintiff argues that there is an exception to the privity
4 requirement under California law. Citing *Atkinson v. Elk Corp. of Texas*, 142 Cal.App.4th 212
5 (2006), Plaintiff argues that privity is not required if a defendant provides an express warranty. In
6 *Atkinson v. Elk Corp. of Texas*, the court concluded, under the circumstances of the case, that “the
7 general rule that privity of contract is required should be relaxed” because the defendant advertised
8 its product as containing an express written warranty and “[i]t would be inconsistent to recognize
9 privity existing for breach of express quality warranties ... and to reach the opposite conclusion in
10 the same transaction for breach of the implied warranty of merchantability.” *Id.* at 229.

11 Plaintiff’s reliance on *Atkinson* is unavailing. First, as several courts have noted, this
12 language in *Atkinson* is dicta. *See e.g., Hartless v. Clorox Co.*, 2007 WL 3245260, at *2 (S.D.Cal.,
13 November 2, 2007) (in *Atkinson*, the court “merely indicated in dicta that the privity requirement
14 might be relaxed if the dismissed implied warranty claim were brought alongside a related express
15 warranty claim.”). Moreover, unlike the allegations in Plaintiff’s Complaint, in *Atkinson* the
16 plaintiff alleged that she had actually relied upon the warranty. *See Atkinson*, 142 Cal.App.4th at
17 217 (“Based on the written warranty he saw in the brochure, Atkinson instructed Pacific to use Elk
18 Prestique I shingles to re-roof his home”); *see also Zabit v. Ferettie Group, USA*, 2006 WL
19 3020855, at *6 (N.D.Cal., October 23, 2006) (stating that the “ *Atkinson* court’s holding was based
20 upon the fact that the manufacturer had issued a written warranty on the product in question ... and
21 based upon the fact that the plaintiff relied on that warranty when he instructed his contractor to use
22 the defendant’s roofing shingles”). Although the Complaint here does contain an allegation that
23 Defendant “warranted its composite decking materials with a ten (10) year transferable warranty,”
24 (complaint, ¶ 20), Plaintiff has not alleged that she or any putative class members relied on any

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26 ²For example, there is an exception to the privity requirement in express warranty cases where
27 a plaintiff alleges that she relied on advertisements or where the defendant represented that the product
28 comes with a warranty and plaintiff relied on that promise. *See e.g., Burr, supra*. At oral argument on
Defendant’s motion, counsel for Plaintiff stated that he does not intend to amend the Complaint to allege
any such reliance on the part of Plaintiff or the class members here.

1 advertisements regarding that ten year warranty when deciding to purchase the decking. The Court
2 is not persuaded by Plaintiff’s reliance upon *Atkinson*. Moreover, *Atkinson* appears to be an
3 anomaly in that it contravenes the well-established principle under California law that privity is
4 required in cases alleging breach of an implied warranty. *See Burr, supra* at 695; *Blanco v. Baxter*
5 *Healthcare Corp.*, 158 Cal.App.4th 1030, 1058-59 (2008). At oral argument, counsel conceded that
6 the Plaintiff could not amend to allege privity as required by the Court. Accordingly, Plaintiff’s
7 breach of implied warranty claim is therefore DISMISSED WITH PREJUDICE.

8 **B. The Motion to Strike**

9 **1. Legal Standard**

10 Plaintiff moves to strike the Declaration of Frank Kennamer on grounds that it references
11 matters outside of the Complaint. Under Rule 12(b)(6), if “matters outside the pleading are
12 presented to and not excluded by the court, the [12(b)(6)] motion shall be treated as one for
13 summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable
14 opportunity to present all material made pertinent to such motion by Rule 56.” Fed. R. Civ. P. 12(b).
15 However, under the “incorporation by reference” rule, “documents whose contents are alleged in a
16 complaint and whose authenticity no party questions, but which are not physically attached to the
17 pleading, may be considered in ruling on a Rule 12(b)(6) motion to dismiss.” *Branch v. Tunnell*, 14
18 F.3d 449, 454 (9th Cir. 1994), *overruled on other grounds by Galbraith v. County of Santa Clara*,
19 307 F.3d 1119 (9th Cir. 2002).

20 **2. Analysis**

21 Paragraph 23 of the Complaint references Defendant’s recall website and states “Louisiana-
22 Pacific’s recall materials state that Louisiana-Pacific will ‘replace at no charge’ decks affected by
23 premature deterioration. (<http://www.deckingnotice.com/index.html>).” Complaint, ¶ 23. Plaintiff
24 argues that Defendant improperly suggests that the recall program has provided an appropriate
25 remedy to Plaintiff, and that the declaration should therefore be stricken. The Court disagrees. The
26 website is specifically referenced in Plaintiff’s Complaint. Defendant’s declaration merely
27 authenticates the materials printed from that website. Plaintiff does not indicate that she disputes the
28 authenticity of the documents submitted. Accordingly, the Court these are properly considered, and

1 the Court DENIES Plaintiff’s Motion to Strike them. Similarly, the CLRA notice letter referenced
2 in Plaintiff’s Complaint may be properly considered by the Court without converting the
3 Defendant’s Motion to Dismiss into a motion for summary judgment under Rule 56. *See Branch v.*
4 *Tunnell*, 14 F.3d 449 at 454.

5 On the other hand, the Court GRANTS Plaintiff’s motion to strike Defense counsel’s letter in
6 response to the CLRA notification. *See United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003)
7 (holding that “[a]ffidavits and declarations. . . are not allowed as pleading exhibits unless they form
8 the basis of the complaint”); *see also Erlich v. Glasner*, 374 F.2d 681 (9th Cir. 1967) (finding
9 reversible error where a court took judicial notice of an affidavit outside of the pleadings without
10 converting the motion to dismiss into a motion for summary judgment). Plaintiff’s Complaint does
11 not reference counsel’s letter, attached as Exhibit 3 to the Kennamer declaration. This letter (and
12 any statements in the Kennamer declaration regarding the letter³) may not be considered on a
13 12(b)(6) motion.

14 **IV. CONCLUSION**

15 For the reasons state above, the Motion to Dismiss is GRANTED IN PART AND DENIED
16 IN PART as follows: The Motion to Dismiss with prejudice the damages claim under Claim One
17 (“CLRA”) is DENIED as moot, and Plaintiff may amend within thirty (30) days to specifically seek
18 damages under the CLRA. The Motion to Dismiss the Implied Warranty claim (Claim Four) is
19 GRANTED. That claim is DISMISSED WITH PREJUDICE.

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23 ³Defendant argues that the declaration does not comment on any of the documents, but merely
24 seeks to authenticate them. With respect to counsel’s letter to Plaintiff, the Court disagrees. Paragraph
25 4 of the Kennamer Declaration states: “In response to Plaintiff’s CLRA notice letter, I sent a letter by
26 Certified U.S. Mail and by E-mail on July 31, 2009 to Mr. Joshua Ezrin, counsel for Plaintiff and the
27 putative class. On behalf of LP, I offered to schedule a second inspection of Plaintiff’s deck. I
28 followed-up [sic] with a telephone message to Mr. Ezrin on August 5, 2009. To date, I have not
received a response to LP’s offer. A true and correct copy of my July 31, 2009 letter is attached as
Exhibit 3.” The Court cannot consider counsel’s testimony regarding the recall or his own offers to have
Plaintiff’s deck inspected (as set forth in paragraph 4 of the Kennamer declaration) without converting
the Defendant’s 12(b)(6) Motion into a Motion pursuant to FRCP 56.

1 Defendant's motion to Strike is DENIED. Plaintiff's Motion to Strike is GRANTED IN PART
2 AND DENIED IN PART.

3 IT IS SO ORDERED.

4 Dated: October 13, 2009

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8 JOSEPH C. SPERO
9 United States Magistrate Judge
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