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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JOANNE ARROYO, on behalf of herself and
all others similarly situated,

No. C-12-4030 EMC

Plaintiff,

**ORDER GRANTING DEFENDANT’S
MOTION TO DISMISS**

v.

PFIZER, INC.,

(Docket No. 19)

Defendant.

_____ /

I. INTRODUCTION

Plaintiff Joanne Arroyo filed a class action lawsuit against Defendant Pfizer, Inc., claiming that Defendant “made, and continues to make, false and misleading statements in its advertising and packaging” of a nutritional supplement called “Pro Nutrients Probiotic” (“Pro Nutrients”) in violation of California law. Amended Complaint (Docket No. 16) (“Am. Comp.”) ¶ 20. Plaintiff claims that “Pro Nutrients does not support healthy immune function as advertised, and provides no benefit to an individual’s immune system.” Am. Comp. ¶ 12. Pfizer has moved to dismiss in full and strike in part Plaintiff’s Amended Complaint, arguing in the main that Arroyo alleges “nothing about her experience with the Product or what led her to believe that Pfizer’s immunity claim was false or misleading,” thus warranting dismissal of the complaint under Fed. R. Civ. P. 12(b)(6). Def.’s Mot. to Dismiss (Docket No. 19) at 2. Having considered the parties’ briefs and accompanying submissions, as well as the oral argument of counsel, the Court hereby **GRANTS** Defendant’s motions for the reasons discussed herein.

1 **II. FACTUAL & PROCEDURAL BACKGROUND**

2 Plaintiff filed an initial class action complaint against Pfizer on July 31, 2012. Compl.
3 (Docket No. 1). The initial complaint alleged that Defendant had violated California’s Unfair
4 Competition Law (“UCL”), False Advertising Law (“FAL”), Consumers Legal Remedies Act
5 (“CLRA”), and had breached an express warranty made to California consumers, by advertising that
6 its Pro Nutrients Probiotic product “supports healthy immune function” when it, in fact, does not.
7 Compl ¶¶ 6, 7, 21. Plaintiff based her allegation on a theory that “the Product cannot support
8 healthy immune function because almost all of the Product is excreted through the urine leaving
9 minimal, if any, benefit to an individual’s immune system.” Compl. ¶ 7. The initial complaint also
10 alleged that Defendant’s immunity claim was false and misleading because Pfizer had “no
11 competent and reliable scientific evidence to support such claims for the Product.” *Id.* ¶ 31. Pfizer
12 filed a Motion to Dismiss the initial complaint (Docket No. 15) on October 1, 2012, to which
13 Plaintiff responded with the instant Amended Complaint (Docket No. 16).

14 Arroyo’s Amended Complaint alleges the following facts. During March of 2012, Ms.
15 Arroyo “purchased and consumed the subject product of this action, ‘Pro Nutrients Probiotic’
16 powder packets (‘Pro Nutrients’ or ‘the Product’) . . . for the purchase price of approximately
17 \$14.99, from a Walgreens pharmacy.” Am. Comp. ¶ 8. She alleges that she “purchased Pro
18 Nutrients believing it would support or enhance her immune system because she relied on the
19 statement on the packaging for Pro Nutrients that it would in fact support her ‘healthy immune
20 function.’” *Id.* ¶ 9. Plaintiff states that “[i]n purchasing Pro Nutrients,” she “read and relied on the
21 labeling and advertising for Pro Nutrients displayed on the packaging; specifically, she relied on the
22 statement on the side of Pro Nutrients’ packaging that it ‘supports healthy immune function,’ by
23 reading it and thereby believing it would *enhance* her immune function.” *Id.* ¶ 10 (emphasis added).
24 Plaintiff states that she “used Pro Nutrients according to the directions on the Product’s label, but
25 stopped using Pro Nutrients because it failed to support her healthy immune function, or in other
26 words, Pro Nutrients failed to enhance her immune function,” but she does not state why she formed
27 this opinion, or how she came to learn that the product did not function as advertised. *Id.* ¶ 11. She
28 then concludes that both herself and similarly situated consumers “[have] been damaged by [their]

1 purchase of Pro Nutrients because the labeling and advertising for Pro Nutrients was and is false
2 and/or misleading under California law because Pro Nutrients does not support healthy immune
3 function as advertised, and provides no benefit to an individual’s immune system, such as Plaintiff
4 or members of the Class.” *Id.* ¶ 12. Ms. Arroyo claims that she “would not have purchased Pro
5 Nutrients, but for Pfizer’s representations, that consuming Pro Nutrients would help support her
6 immune system,” and alleges that she and “other purchasers of Pro Nutrients have suffered injury in
7 fact and have lost money as a result of Pfizer’s false misrepresentations.” Am. Comp. ¶¶ 31, 40.
8 *See also id.* ¶ 44 (“As a result of the misleading representations detailed above, Pfizer was able to
9 charge a price premium for Pro Nutrients compared with similar drink powders that did not make
10 such claims.”).

11 Plaintiff advances four causes of action against Pfizer. First, she claims that Defendant’s
12 alleged misrepresentations constituted “unfair business acts and/or practices” in violation of
13 California’s Unfair Competition Law (“UCL”), Cal. Bus. & Prof. Code §§ 17200, *et. seq.* *See* Am.
14 Comp. ¶¶ 60-76. Second, she claims that “Defendant disseminated, or caused to be disseminated,
15 the deceptive Product labeling and advertising representations that misleadingly claim to support a
16 healthy immune system” in violation of California’s False Advertising Law (“FAL”), Cal. Bus. &
17 Prof. Code §§ 17500, *et. seq.* *Id.* ¶ 78; *see also id.* ¶¶ 77-88. Third, she advances a claim under the
18 California Consumers Legal Remedies Act (“CLRA”), Cal. Civ. Code §§ 1750 *et. seq.*, alleging that
19 Pfizer “represented that Pro Nutrients has characteristics, ingredients, uses, and benefits which it
20 does not have,” and “that Pro Nutrients is of a particular standard, quality, or grade, which it is not.”
21 *Id.* ¶ 95; *see also id.* ¶¶ 89-100. Finally, Ms. Arroyo alleges that Defendant breached an express
22 warranty, made through its advertising and labeling, that Pro Nutrients would “support a healthy
23 immune system,” through its failure “to provide a product with the promised benefits.” *Id.* ¶¶ 101-
24 109. Plaintiff seeks a variety of legal and equitable remedies, including actual, statutory, and
25 punitive damages, restitution, disgorgement of ill-gotten gains, attorney’s fees and costs, as well as
26 an injunction prohibiting “Defendant from making any claims for Pro Nutrients found to violate the
27 UCL, FAL, or CLRA.” *Id.* at 21-22.

28

1 Pfizer has moved to dismiss the amended complaint, arguing that “Plaintiff has neither pled
2 facts that add up to a plausible claim, as required by [the Federal Rules of Civil Procedure], nor pled
3 her claims with the requisite particularity, as required by Rule 9(b).” Def.’s Mot. to Dismiss at 2.
4 Neither, Pfizer argues, has Ms. Arroyo alleged facts showing that a reasonable consumer is likely to
5 be deceived by Defendant’s representations of the product, as is required to state a claim under the
6 UCL, FAL, and CLRA. Defendant also argues that Plaintiff lacks standing to obtain prospective
7 relief in the form of an injunction since she “does not intend to make another purchase [of] Pro
8 Nutrients, as it doesn’t perform for the reason Plaintiff purchased Pro Nutrients--to support her
9 ‘healthy immune function.’” Am. Comp. ¶ 38. Finally, Pfizer argues that paragraph 5 of the
10 Amended Complaint, which states that “more than two-thirds of all of the members of the proposed
11 Plaintiff Class in the aggregate are citizens of a state other than California,” ought to be struck under
12 Rule 12(f) as redundant or confusing insofar as it conflicts with Plaintiff’s own proposed narrower
13 definition of the class. *See id.* ¶ 5 and page 10 (limiting the class to “[a]ll persons residing in the
14 State of California”).

15 III. DISCUSSION

16 A. Motion to Dismiss

17 1. Legal Standard

18 Federal Rule of Civil Procedure 8(a) requires a plaintiff to plead a claim with enough
19 specificity to “give the defendant fair notice of what the . . . claim is and the grounds upon which it
20 rests.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 545 (2007) (quoting *Conley v. Gibson*, 355 U.S.
21 41, 47 (1957)). Under Federal Rule of Civil Procedure 12(b)(6), a party may move to dismiss based
22 on the failure to state a claim upon which relief may be granted. *See Fed. R. Civ. P. 12(b)(6)*. A
23 motion to dismiss based on Rule 12(b)(6) challenges the legal sufficiency of the claims alleged. *See*
24 *Parks Sch. of Bus. v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995). In considering such a motion,
25 a court must take all allegations of material fact as true and construe them in the light most favorable
26 to the nonmoving party, although “conclusory allegations of law and unwarranted inferences are
27 insufficient to avoid a Rule 12(b)(6) dismissal.” *Cousins v. Lockyer*, 568 F.3d 1063, 1067 (9th Cir.
28 2009). While “a complaint need not contain detailed factual allegations . . . it must plead ‘enough

1 facts to state a claim to relief that is plausible on its face.” *Id.* “A claim has facial plausibility when
2 the plaintiff pleads factual content that allows the court to draw the reasonable inference that the
3 defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009); *see*
4 *also Bell Atl. Corp. v. Twombly*, 550 U.S. at 556. “The plausibility standard is not akin to a
5 ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted
6 unlawfully.” *Iqbal*, 129 S. Ct. at 1949.

7 2. Facial Plausibility

8 Pfizer argues that Plaintiff’s complaint ought to be dismissed under Rule 12 because the facts
9 pled within it “do not add up to a plausible claim under the UCL, FAL, or CLRA, or for breach of
10 warranty.” Def.’s Mot. to Dismiss at 7. Defendant reasons that because the “vast majority of
11 allegations underlying Plaintiff’s false advertising claims are ‘bare assertions’ or ‘conclusions’ that
12 are not entitled to the assumption of truth,” the amended complaint does not present a well-pled
13 allegation that Pfizer is liable for false or misleading advertising. *Id.* at 6. *See also id.* at 7
14 (“Plaintiff’s Complaint is now little more than a collection of empty assertions, without supporting
15 facts, that Pfizer’s representation that the Product ‘supports healthy immune function’ is ‘false’
16 and/or ‘misleading.’”). The Court is inclined to agree.

17 “To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted
18 as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 129 S. Ct. at 1949
19 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. at 570). “A pleading that offers ‘labels and
20 conclusions’ or ‘a formulaic recitation of the elements of a cause of action will not do.’” *Id.*
21 Throughout the amended complaint, Arroyo repeatedly alleges that Defendant’s representation that
22 Pro Nutrients “supports healthy immune function” is “false” and/or “misleading.” *See, e.g., Am.*
23 *Comp.* ¶¶ 20-23, 29-30, 32-36. However, nowhere does she allege *why* she believes this to be true.
24 As Defendant argues:

25 Something must have occurred between March 2012 (when Plaintiff
26 picked the product off the shelf) and April 2012 (when she sent a
27 demand letter to Pfizer) that led her to believe Pfizer was liable for
28 false advertising. The basic factual allegations that would fill that
glaring hole in the Complaint – for example, what Plaintiff expected
the product to do, what the Product actually did, and how she came to
the conclusion that it did not “support healthy immune function” as

1 advertised – are all within Plaintiff’s knowledge. Yet they are
2 nowhere to be found in the Complaint.

3 Def.’s Mot. to Dismiss at 7. Particularly in view of the brief time frame between which Plaintiff
4 purchased the product and sent a demand letter, these critical facts explaining why Defendant’s
5 claims are false must be pled as part of the “short and plain statement of the claim showing that the
6 pleader is entitled to relief.” Fed. R. Civ. P. 8.

7 Plaintiff is correct that in assessing the sufficiency of a complaint under Rule 12(b)(6), a
8 Court must “accept as true all of the allegations contained in a complaint,” but not allegations that
9 amount to “legal conclusions” or “threadbare recitals of a cause of action’s elements, supported by
10 mere conclusory statements.” *Iqbal*, 556 U.S. at 678; *see id.* (“Although for the purposes of a
11 motion to dismiss we must take all of the factual allegations in the complaint as true, we ‘are not
12 bound to accept as true a legal conclusion couched as a factual allegation.’”) (quoting *Twombly*, 550
13 U.S. at 555).

14 Plaintiff’s numerous statements that Pro Nutrients’ claim to “support healthy immune
15 function” is false and/or misleading are nothing more than legal conclusions and conclusory
16 statements of fact. Throughout the amended complaint, Plaintiff fails to plead any underlying
17 factual premise that would justify her *factual conclusion* that Pro Nutrients “does not support
18 healthy immune function and provides no actual benefit to a consumer’s immune system,” Am.
19 Comp. ¶ 20, or her *legal conclusion* that Pfizer’s claim to the contrary “is false and/or misleading
20 under California law, *id.* ¶ 20. Without facts substantiating why the product does not work as
21 advertised or explaining why Defendant’s statements were false or misleading, the complaint fails to
22 allege “more than an unadorned, the-defendant-unlawfully-harmed-me accusation.” *Iqbal*, 556 U.S.
23 at 678. A complaint that offers naked assertions devoid of further factual enhancement “stops short
24 of the line between possibility and plausibility of entitlement to relief.” *Twombly*, 550 U.S. at 557
25 (citation and internal quotation marks omitted).

26 District courts have dismissed similar UCL, FAL, and CLRA claims when they are pled with
27 insufficient supporting facts. In *Eckler v. Wal-Mart Stores, Inc.*, 12-CV-727-LAB-MDD, 2012 WL
28 5382218 (S.D. Cal. Nov. 1, 2012), for example, a plaintiff brought suit against Walmart for alleged

1 false advertising of a dietary supplement called “Equate.” The *Eckler* plaintiff’s complaint cited a
2 number of scientific studies suggesting that the ingredients of Equate did not support joint comfort,
3 rebuild cartilage, or lubricate joints, as advertised by the product’s manufacturer, but none of the
4 studies cited by plaintiff addressed the specific “Equate” product or its particular combination of the
5 studied ingredients. The court found that plaintiff’s cited studies could not lend “facial plausibility”
6 to her claims on account of the “mismatch between the representations at issue and the evidence that
7 allegedly debunks them.” *Eckler v. Wal-Mart Stores, Inc.*, 2012 WL 5382218 at *7. Without the
8 studies, plaintiff’s complaint had no remaining factual support other than her own limited pleadings
9 about her experience with the product. The limited nature of those latter pleadings led the court to
10 find “to the extent Eckler’s false advertising claims turns on her own experience with Equate, rather
11 than studies that show it doesn’t deliver the joint benefits it suggests, she needs to say far more than,
12 in essence, ‘I took Equate and didn’t feel any better.’” *Id.*, 2012 WL 5382218 at *8. *See also*
13 *Damabeh v. 7-Eleven, Inc.*, 5:12-CV-1739-LHK, 2012 WL 4009503 at *7-8 (N.D. Cal. Sept. 12,
14 2012) (“Plaintiff’s allegations fail to provide the Court with sufficient information to evaluate
15 whether Defendant might reasonably be held liable under the UCL or FAL” under Rule 8 because
16 “Plaintiff’s allegation that Defendant interfered with Plaintiff’s sale of his store lacks any support
17 (e.g. facts regarding what Defendant did to interfere with the sale of Plaintiff’s store.)”); *Stevens v.*
18 *JPMorgan Chase Bank, N.A.*, C 09-03116 SI, 2010 WL 329963 (N.D. Cal. Jan. 20, 2010)
19 (dismissing FAL claim for want of specific allegations regarding the allegedly misleading
20 advertisements).¹ *Cf. Rosales v. FitFlop USA, LLC*, 11-CV-

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22 ¹ In *Stevens*, Judge Illston held:

23 Plaintiff alleges that defendants engaged in false advertising by
24 applying “misleading standardized practice and advertising” to
25 “Plaintiff and the Class members.” FAC ¶ 40. These misleading
26 practices included “a standardized sales pitch on the telephone” and
27 “uniform advertisements on websites and brochures.” *Id.* Plaintiff
28 adds that “such standardized practices and advertisements expressly or
implicitly represented that customers had a substantial chance of
qualifying for home loan modifications.” *Id.* Throughout the FAC,
however, plaintiff does not give any specific information regarding
these alleged misleading advertisements. Such general claims are
precisely the “labels and conclusions, and a formulaic recitation of the
elements of a cause of action” that *Twombly* deems insufficient at the

1 00973 W WVG, 2012 WL 3224311 at *5 (S.D. Cal. Feb. 8, 2012) (rejecting defendant’s claim that
2 plaintiffs fail to state a UCL claim that is plausible on its face within the parameters of Rule 8(a)
3 because “[p]laintiffs point to several studies involving toning fitness shoes that support their
4 contention that these shoes have no beneficial effect on exercise intensity, improved muscle
5 strength, or toning.”).

6 Plaintiff, acknowledging that *Iqbal* and *Twombly* set the applicable Rule 8 pleading standard,
7 nonetheless argues that “[i]t is well settled that ‘in testing a pleading against a [motion to dismiss]
8 the facts alleged in the pleading are deemed to be true, however improbable they may be.’” Pl.’s
9 Opp. Br. (Docket No. 20 at 2) (quoting *Del E. Webb Corp. v. Structural Materials Co.*, 123 Cal.
10 App. 3d 593, 604 (Cal. Ct. App. 1981)). While that may be a true statement of California law, that
11 is not the pleading standard required by Rule 8 as interpreted by the Supreme Court. The fact that
12 Plaintiff specifically alleges, in a conclusory fashion, the required elements of a false advertising
13 claim does not, in itself, suffice to state a claim in federal court. *See Iqbal*, 556 U.S. at 678
14 (“Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements,
15 do not suffice” to state a viable cause of action.). Plaintiff’s citation to *Vanoni v. Western Airlines*,
16 247 Cal. App. 2d 793, 795 (Cal. App. 1967), and *Reichert v. General Ins. Co. of America*, 68 Cal.2d
17 822, 840 (1968), two California cases discussing the requirements for pleading a cause of action in
18 state court, are inapplicable to her claims before this Court.²

19 Plaintiff’s pleading deficiency is not cured by the complaint’s reference to Dr. Kent Carson’s
20 opinion on the general efficacy and value of probiotics as a class of products. The Amended
21 Complaint indicates that Plaintiff retained Dr. Kent Carson, M.D., “to conduct a good faith and
22 reasonable inquiry into the veracity of Pfizer’s claims,” and reproduces several statements drawn

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pleading stage. *Twombly*, 550 U.S. at 544.

25 *Stevens v. JPMorgan Chase Bank, N.A.*, 2010 WL 329963 at *5 (N.D. Cal. Jan. 20, 2010).

26 ² Plaintiff’s citation to *Koehler v. Litehouse, Inc.*, 12-CV-04055-SI (copy provided in
27 Plaintiff’s Notice of Supplemental Authority (Docket No. 22)), and *Williams v. Gerber Products*
28 *Co.*, 552 F.3d 934 (9th Cir. 2008), are also inapplicable to the resolution of this issue since neither
case discusses, let alone approves of, the *de minimus* pleading standard Plaintiff seeks to advance
here.

1 from a report prepared by him in the text of the complaint. Am. Comp. ¶ 25. Generally, these
2 statements question the efficacy of probiotics products like Pro Nutrients in “supporting” the human
3 immune system. *See id.* ¶¶ 26-28. But the quotations from Dr. Carson are either conclusory in
4 nature or fail to address anything specific about the performance of Pfizer’s product. For instance,
5 ¶ 28(a) of the Amended Complaint quotes Dr. Carson as stating, “We can diminish our immune
6 system with medication and an unhealthy life style but we cannot significantly, and in a healthy
7 manner, boost our immune system artificially. The immune system is complex and not altered by a
8 powder.” This does not address Pfizer’s product specifically. Dr. Carson’s qualifying words such
9 as “significantly,” “in a healthy manner,” and “artificially” do not establish the falsity of Pfizer’s
10 representation that its product “supports healthy immune function.” His statement at ¶ 28(c) of the
11 Amended Complaint, that “Pfizer’s probiotics don’t work and P[f]izer ‘knows this and laugh[s] all
12 the way to the bank from their false, deceptive advertising without which the consumers would not
13 purchase these product[s]’” is conclusory. In addition to qualifying his generalized statements about
14 probiotics with the use of adverbs and adverbial phrases like “significantly” and “in a healthy
15 manner,” he refers to their effects on the “average person” and the needs of average person’s
16 immune system; this leaves the possibility that some consumers may incur some benefit by using
17 Pfizer’s product. *See id.* ¶ 28(a) (“The *average person* needs no alteration of their gut flora. Our
18 immune system *does not need* a boost from the administration of live bacteria into our system.”)
19 (emphasis added). None of these statements adequately support Plaintiff’s conclusory assertion that
20 “Pro Nutrients *does not support* healthy immune function and provides *no actual benefit* to a
21 consumer’s immune system.” *Id.* ¶ 20 (emphasis added).

22 The Court is mindful of the Ninth Circuit’s general rule that “whether a business practice is
23 deceptive will usually be a question of fact not appropriate for decision on demurrer.” *Williams v.*
24 *Gerber Products Co.*, 552 F.3d at 938-39 (“The facts of this case . . . do not amount to the rare
25 situation in which granting a motion to dismiss is appropriate.”). But a case such as *Williams* is
26 distinguishable because the court there found a more specific and more provably false assertion –
27 that Gerber’s “use of the words ‘Fruit Juice’ juxtaposed alongside images of fruits such as oranges,
28 peaches, strawberries, and cherries” on its packaging for “Gerber’s Fruit Juice Snacks” could lead a

1 reasonable consumer to believe that the product contained the juices of the fruit depicted, when in
2 fact it did not. *Williams v. Gerber Products Co.*, 552 F.3d at 936. In contrast, Plaintiff’s complaint
3 here does not take issue with the content of Pro Nutrients, but rather with its efficacy. Pro Nutrients’
4 effectiveness in supporting a healthy immune system cannot be discerned solely from text and a
5 picture on its packaging in the same way that a consumer of a juice drink could reasonably infer that
6 the drink was comprised of the juices of the fruit pictured. To establish a plausible claim that Pro
7 Nutrients does not work as advertised requires more. Ms. Arroyo has failed to “raise [her] right to
8 relief above the speculative level;” as such, her amended complaint has not “nudged [her] claims
9 across the line from conceivable to plausible.” *Twombly*, 550 U.S. at 545-47.

10 3. Heightened Pleading Requirement

11 Pfizer also argues that dismissal of Plaintiff’s claims is warranted because her claims sound
12 in fraud, and are not pled with the particularity required by Fed. R. Civ. P. 9(b). Rule 9(b) states that
13 “[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting
14 fraud or mistake.” “To comply with Rule 9(b), allegations of fraud must be specific enough to give
15 defendants notice of the particular misconduct which is alleged to constitute the fraud charged so
16 that they can defend against the charge and not just deny that they have done anything wrong.” *Bly-*
17 *Magee v. California*, 236 F.3d 1014, 1019 (9th Cir. 2001) (quoting *Neubronner v. Milken*, 6 F.3d
18 666, 672 (9th Cir.1993)) (quotation marks omitted). “[M]ere conclusory allegations of fraud are
19 insufficient.” *Moore v. Kayport Package Express, Inc.*, 885 F.2d 531, 540 (9th Cir.1989).
20 Allegations sounding in fraud must include the “who, what, when, where, and how” of the
21 misconduct charged. *Cooper v. Pickett*, 137 F.3d 616, 627 (9th Cir. 1997).

22 Plaintiff alleges that her claims do not need to comply with Rule 9(b)’s heightened pleading
23 standard. She argues, “[i]t is well-established that, unlike a common law fraud claim, fact-specific
24 or particularized pleading is not required to state a UCL, FAL or CLRA claim, even where
25 ‘fraudulent’ business acts or practices are the gravamen of the Plaintiff’s complaint.” Pl.’s Opp. Br.
26 at 7 (citing *Morgan v. AT&T Wireless Services, Inc.*, 177 Cal. App. 4th 1235, 1256 (2009);
27 *Quelimane Co. v. Stewart Title Guaranty Co.* 19 Cal.4th 26, 46-47 (1998); and *Committee on*
28 *Children’s Television, Inc. v. General Foods Corp.*, 35 Cal. 3d 197, 212 (1983)). As with her earlier

1 argument for adopting a pure notice pleading standard under Rule 8, Plaintiff’s argument here fails
2 to grasp the difference between federal and state procedural rules.

3 “It is well-established in the Ninth Circuit that both claims for fraud and negligent
4 misrepresentation must meet Rule 9(b)’s particularity requirements.” *Neilson v. Union Bank of*
5 *California, N.A.*, 290 F. Supp. 2d 1101, 1141 (C.D. Cal. 2003). Rule 9(b) applies equally to state
6 law causes of action as it does to other claims brought in federal court. *See Vess v. Ciba-Geigy*
7 *Corp. USA*, 317 F.3d 1097, 1103 (9th Cir. 2003) (“It is established law, in this circuit and elsewhere,
8 that Rule 9(b)’s particularity requirement applies to state-law causes of action. ‘[W]hile a federal
9 court will examine state law to determine whether the elements of fraud have been pled sufficiently
10 to state a cause of action, the Rule 9(b) requirement that the *circumstances* of the fraud must be
11 stated with particularity is a federally imposed rule.’”) (quoting *Hayduk v. Lanna*, 775 F.2d 441, 443
12 (1st Cir.1985) (emphasis in original)). Thus, several recent opinions from this district, including one
13 from this Court, have dismissed UCL and CLRA claims sounding in fraud when not pled with the
14 specificity required by Rule 9(b). *See Arroyo v. Chattem, Inc.*, C 12-2129 CRB, 2012 WL 5412295
15 at * 5-6 (N.D. Cal. Nov. 6, 2012) (granting motion to dismiss fraud claims for failure to meet the
16 particularity requirements of Rule 9(b) regarding the marketing of “Dexatrim products as ‘safe,
17 healthy, and appropriate for consumption,’” despite manufacturer’s knowledge that product was
18 tainted with hexavalent chromium); *Fabozzi v. StubHub, Inc.*, C-11-4385 EMC, 2012 WL 506330
19 (N.D. Cal. Feb. 15, 2012) (“Plaintiff’s claims under the UCL alleging deceptive or fraudulent
20 conduct are subject to Rule 9(b)’s particularity requirement, which requires a plaintiff to identify the
21 ‘who, what, when, and how’ with sufficient specificity as to ‘give defendants notice of the particular
22 misconduct so that they can defend against the charge and not just deny that they have done
23 anything wrong.’”) (quoting *Vess v. Ciba-Geigy Corp.*, 317 F.3d at 1105–06).

24 The Ninth Circuit draws a distinction under Rule 9 between claims alleging a unified course
25 of fraudulent conduct, and those that allege a mix of fraudulent and non-fraudulent conduct. In
26 cases “where fraud is not a necessary element of a claim,” but a plaintiff has alleged that a defendant
27 engaged in a unified course fraudulent conduct, and “rel[ies] entirely on that course of conduct as
28 the basis of a claim,” the claim “is said to be ‘grounded in fraud’ or to ‘sound in fraud,’ and the

1 pleading of that claim as a whole must satisfy the particularity requirement of Rule 9(b).” *Vess v.*
2 *Ciba-Geigy Corp. USA*, 317 F.3d at 1103-04. “In other cases, however, a plaintiff may choose not
3 to allege a unified course of fraudulent conduct in support of a claim, but rather to allege some
4 fraudulent and some non-fraudulent conduct. In such cases, only the allegations of fraud are subject
5 to Rule 9(b)’s heightened pleading requirements.” *Id.* at 1104. In *Kearns v. Ford Motor Co.*, 567
6 F.3d 1120 (9th Cir. 2009), the Ninth Circuit applied its holding in *Vess v. Ciba-Geigy Corp. USA* to
7 the specific context of fraud claims advanced under the CLRA and UCL. *Kearns* held that:

8 While fraud is not a necessary element of a claim under the CLRA and
9 UCL, a plaintiff may nonetheless allege that the defendant engaged in
10 fraudulent conduct. A plaintiff may allege a unified course of
11 fraudulent conduct and rely entirely on that course of conduct as the
 basis of that claim. In that event, the claim is said to be ‘grounded in
 fraud’ or to ‘sound in fraud,’ and the pleading ... as a whole must
 satisfy the particularity requirement of Rule 9(b).

12 567 F.3d 1120, 1125 (9th Cir. 2009) (citing *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097) (internal
13 citations omitted).

14 As in *Kearns*, Plaintiff’s claims here allege a “unified course of fraudulent conduct and rely
15 entirely on that course of conduct as the basis” for her claims. *Kearns*, 567 F.3d at 1125. Plaintiff’s
16 UCL, CLRA, and FAL claims are all based on the allegation that Pfizer made false and misleading
17 statements in its advertising and packaging of Pro Nutrients, misrepresenting that the product
18 supports a healthy immune function when it allegedly does not. *See* Am. Comp. ¶¶ 68, 83, 95.
19 Plaintiff alleges that Defendant made these allegedly false representations with the intent that
20 consumers rely on them when choosing to purchase the product, *id.* ¶ 24, and that Ms. Arroyo and
21 putative members of her class “suffered injury in fact and have lost money as a result of [Pfizer’s]
22 false misrepresentations,” *id.* ¶ 31. Sounding in fraud, these claims are required to be pled with
23 particularity under Rule 9(b). *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d at 1103-04.

24 As with the pleading requirements imposed by Rule 8, Plaintiff has failed to plead with
25 particularity “the circumstances constituting fraud or mistake” in this matter. Fed R. Civ. P. 9(b).
26 She has not alleged any non-conclusory facts supporting her assertion that the product does not
27 support an individual’s healthy immune function, or that it otherwise fails to perform as advertised.
28 Again, without pleading these underlying factual details, Plaintiff has failed to allege “the who,

1 what, when, where, and how” of the misconduct charged. *Cooper v. Pickett*, 137 F.3d 616, 627 (9th
2 Cir.1997). Rule 9(b) requires a litigant to “set forth *more* than the neutral facts necessary to identify
3 the transaction. The plaintiff must set forth what is false or misleading about a statement, and why it
4 is false.” *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d at 1106 (quoting *Decker v. GlenFed, Inc. (In re*
5 *GlenFed, Inc. Sec. Litig.)*, 42 F.3d 1541, 1548 (9th Cir.1994) (emphasis in original)). *See also Blake*
6 *v. Dierdorff*, 856 F.2d 1365, 1369 (9th Cir. 1988) (Rule 9(b) requires “specific descriptions of the
7 representations made, [and] *the reasons for their falsity*”) (emphasis added)). Lacking the required
8 particularity, Plaintiff’s allegations of fraudulent conduct underlying her UCL, FAL, and CLRA
9 claims fail to meet the standard set by Rule 9(b).

10 B. Motion to Strike

11 Defendant asks this Court to strike the third sentence of Paragraph 5 of the amended
12 complaint “because it is redundant, confusing, and liable to cause Pfizer prejudice.” Def.’s Mot. to
13 Dismiss at 14. Pursuant to Fed. R. Civ. P. 12(f), a court may strike from a pleading any “redundant,
14 immaterial, impertinent, or scandalous matter.” “[T]he function of a 12(f) motion to strike is to
15 avoid the expenditure of time and money that must arise from litigating spurious issues by
16 dispensing with those issues prior to trial” *Sidney-Vinsein v. A.H. Robins Co.*, 697 F.2d 880,
17 885 (9th Cir. 1983). A court may strike portions of a pleading where they are liable to “confuse the
18 issues, or otherwise prejudice a party.” *Ollier v. Sweetwater Union High School Dist.*, 735 F. Supp.
19 2d 1222, 1223 (S.D. Cal. 2010).

20 Pfizer argues that the third sentence of Paragraph 5 ought to be struck because Ms. Arroyo
21 seeks to certify a class consisting entirely of California residents in Paragraph 44, yet alleges in
22 direct contradiction that “more than two-thirds of all of the members of the proposed Plaintiff Class
23 in the aggregate are citizens of a state other than California” in Paragraph 5. “Because these two
24 allegations are irreconcilable,” Pfizer reasons, “and because the presence of the two-thirds allegation
25 creates confusion as to whether Plaintiff intends to try to certify a California or nationwide class, the
26 third sentence of Paragraph 5 should be stricken.” Def.’s Mot. to Dismiss at 14. Plaintiff’s
27 opposition brief clarifies that the inconsistent statement in Paragraph 5 was made in order to “to
28 ensure its Class rights are preserved under the Class Action Fairness Act of 2005, for venue and

1 as Plaintiff fails to plead sufficient facts to satisfy Rule 8(a), neither does she meet the heightened
2 pleading requirement imposed by Rule 9(b). Further, Plaintiff's inconsistent allegation in the third
3 sentence of Paragraph 5 is inconsistent with the class definition and immaterial to Plaintiff's
4 establishment of jurisdiction under the Class Action Fairness Act, and is therefore struck. Because
5 the Court determines that Plaintiff's amended complaint fails to satisfy the threshold requirements of
6 Rules 8(a) and 9(b), the Court need not reach Defendant's alternate arguments that Ms. Arroyo's
7 claims fail to satisfy the "reasonable consumer" standard, or that she lacks standing to obtain
8 injunctive relief under Article III. The Court does note, however, that Defendant's argument on
9 standing raises serious questions.

10 Rule 15 of the Federal Rules of Civil Procedure mandates that leave to amend "be freely
11 given when justice so requires." Fed. R. Civ. P. 15. "This policy is to be applied with extreme
12 liberality." *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1051 (9th Cir. 2003). *See also*
13 *Foman v. Davis*, 371 U.S. 178, 182 (1962) (implying leave to amend should be granted in the
14 absence of undue delay, bad faith or dilatory motive, or undue prejudice to the opposing party or
15 futility of amendment). Accordingly, this dismissal is without prejudice. Should Plaintiff seek to
16 file a second amended complaint asserting (consistent with Fed. R. Civ. P. 11) claims that are not
17 otherwise precluded by this order, she shall do so within 30 days of the date of this order.

18 The Case Management Conference (CMC) scheduled for February 7, 2013 at 9:00 a.m. has
19 been continued to March 14, 2013 at 9:00 a.m. A Joint CMC statement shall be filed by March 7,
20 2013.

21 This order disposes of Docket No. 19.

22

23 IT IS SO ORDERED.

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25 Dated: January 31, 2013

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EDWARD M. CHEN
United States District Judge