

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

MICHAEL DODSON, et al.,
Plaintiffs,
v.
TEMPUR-SEALY INTERNATIONAL,
INC., et al.,
Defendants.

Case No. 13-cv-04984-JST

**ORDER DENYING DEFENDANTS’
MOTION TO DISMISS AND MOTION
TO STRIKE**

Re: ECF Nos. 18, 19

In this putative class action for violations of California’s Consumer Legal Remedies Act, California’s Unfair Competition Law, California’s False Advertising Law, and various other states’ consumer protection laws, Defendants move under Federal Rule of Civil Procedure 12(b)(6) to dismiss the first amended complaint (“FAC”). Additionally, Defendants move to strike Plaintiffs’ class allegations. For the following reasons, both motions are DENIED.

I. BACKGROUND

Plaintiffs bring this action on their own behalf and on behalf of a putative class of purchasers of Tempur products against Defendants Tempur-Sealy International, Inc. and Tempur-Pedic North America, LLC (collectively “Defendants”) for claims arising out of Defendants’ marketing and sale of mattresses, pillows, and other bedding products containing “Tempur” material.¹ Specifically, Plaintiffs allege that Defendants’ representation of their Tempur products as “formaldehyde free,” “free of harmful (volatile organic compounds) VOCs,” “allergen resistant,” and “hypoallergenic” are false and misleading, because “reliable testing of Tempur-pedic products reveals that formaldehyde and other potentially harmful VOCs, that can trigger

¹ Plaintiffs are Michael Dodson, Alvin Todd, Henry and Mary Thompson, Robbie Simmons, Tina White, Keith Hawkins, Thomas Comiskey, Louis Pace, Patricia Kaufman, Johnny Martinez, Rosemarie Valdez, Toni Kibbee, and Brian Stone.

1 allergy and asthma symptoms, are present in Tempur-pedic products and in the chemicals off-
2 gassing from Tempur-pedic products.” FAC ¶ 11.

3 Plaintiffs bring twenty-four claims under the laws of eleven states: (1) a claim for
4 violations of California’s Unfair Competition Law (“UCL”), Cal. Bus. & Prof. §§ 17200 et seq.;
5 (2) a claim for violations of California’s False Advertising Law (“FAL”), Cal. Bus. & Prof. §§
6 17500 et seq.; (3) a claim for violations of California’s Consumer Legal Remedies Act (“CLRA”),
7 Cal. Civ. Code §§ 1750 et seq.; (4) a claim for violations of Illinois’ Consumer Fraud and
8 Deceptive Practices Act; (5) unjust enrichment under Illinois’ common law; (6) a claim for
9 violations of Maryland’s Consumer Protection Act; (7) unjust enrichment under Maryland state
10 common law; (8) a claim for violations of Massachusetts’ Consumer Protection Act.; (9) unjust
11 enrichment under Massachusetts state common law; (10) a claim for violations of Missouri’s
12 Merchandising Practices Act; (11) unjust enrichment under Missouri state common law; (12) a
13 claim for violations of North Carolina General Statute; (13) unjust enrichment under North
14 Carolina state common law; (14) a claim for violations of New Jersey’s Consumer Fraud Act; (15)
15 unjust enrichment under New Jersey state common law; (16) a claim for violations of New
16 Mexico’s Unfair Practices Act; (17) unjust enrichment under New Mexico state common law; (18)
17 a claim for violations of New York’s Deceptive Acts and Practices law; (19) a claim for violations
18 of New York’s False Advertising law; (20) unjust enrichment under New York state common law;
19 (21) a claim for violations of Washington’s Consumer Protection Act; (22) unjust enrichment
20 under Washington state common law; (23) a claim for violations of Wisconsin’s Deceptive Trade
21 Practices Act; and (24) unjust enrichment under Wisconsin state common law.

22 The Court has jurisdiction over this action under 28 U.S.C. § 1332(d).

23 **II. LEGAL STANDARD**

24 **A. Motion to Dismiss**

25 A pleading must contain a “short and plain statement of the claim showing that the pleader
26 is entitled to relief.” Fed. R. Civ. P. 8(a)(2). A motion to dismiss under Federal Rule of Civil
27 Procedure 12(b)(6) tests the legal sufficiency of the claims in the complaint. “To survive a motion
28 to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to

1 relief that is plausible on its face. A claim has facial plausibility when the plaintiff pleads factual
2 content that allows the court to draw the reasonable inference that the defendant is liable for the
3 misconduct alleged.” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citation and internal quotation
4 marks omitted). “Threadbare recitals of the elements of a cause of action, supported by mere
5 conclusory statements, do not suffice.” Id. When dismissing a complaint, leave to amend must be
6 granted unless it is clear that the complaint’s deficiencies cannot be cured by amendment. Lucas
7 v. Dep’t of Corrections, 66 F.3d 245, 248 (9th Cir. 1995).

8 **B. Pleading Fraud**

9 A plaintiff asserting a claim sounding in fraud must satisfy the heightened pleading
10 standards of Federal Rule of Civil Procedure 9(b), which require the plaintiff to “state with
11 particularity the circumstances constituting fraud or mistake.” Fed. R. Civ. P. 9(b). A plaintiff
12 satisfies her pleading burden under Rule 9(b) by alleging the “who, what, where, when, and how”
13 of the charged misconduct. Cooper v. Pickett, 137 F.3d 616, 627 (9th Cir. 1997).

14 **C. Motion to Strike**

15 A court “may order stricken from any pleading any insufficient defense or any redundant,
16 immaterial, impertinent, or scandalous matter.” Fed. R. Civ. P. 12(f). “The function of a 12(f)
17 motion to strike is to avoid the expenditure of time and money that must arise from litigating
18 spurious issues by dispensing with those issues prior to trial” Whittlestone, Inc. v. Handi-
19 Craft Co., 618 F.3d 970, 973 (9th Cir. 2010).

20 **III. DISCUSSION**

21 **A. Motion to Dismiss**

22 Defendants move to dismiss each of the claims in the complaint on the ground that the
23 advertisements and representations at issue are protected by a safe harbor, that Plaintiffs fail to
24 plead sufficient facts under Iqbal, and where applicable, that Plaintiffs fail to plead sufficient facts
25 to satisfy the heightened pleading requirements of Rule 9(b). Defendants also contend that
26 several state claims are barred by the applicable statutes of limitations and that Plaintiffs lack
27 standing to pursue their claims.

28 The Court addresses each of these arguments in turn.

1 **1. Safe Harbors**

2 Plaintiffs allege that Defendants made numerous misrepresentations regarding the nature
3 and chemical makeup of their Tempur products. Specifically, Plaintiffs aver that the following
4 representations made by the Defendants were false or misleading: that Tempur products (1) are
5 “formaldehyde free;” (2) are “free of harmful VOCs;” (3) are “allergen resistant” or
6 “hypoallergenic;” (4) are “completely safe;” (5) are “harmless;” and (6) have only a “slight odor”
7 that will “dissipate in a few days.” FAC ¶¶ 5, 7, 9, 10, 11, 138. Plaintiffs also allege that
8 Defendants explicitly omitted from their statements: (1) the fact that numerous health agencies list
9 formaldehyde as a “known human carcinogen;” (2) that VOCs “can be and are often allergenic;”
10 and (3) that Tempur-pedic has received many “customer complaints . . . claiming Tempur-pedic’s
11 products were causing them allergic reactions” FAC ¶¶ 6, 8, 48, 96. Thus, Plaintiffs’
12 allegations thus arise out of the undisclosed presence of formaldehyde and VOCs contained in or
13 emitted from Defendants’ Tempur products.

14 Defendants move to dismiss all claims in the complaint on the ground that California’s
15 Business and Professions Code section 17580.5(b) provides a safe harbor that shields them from
16 liability for representing their products as free from formaldehyde and VOCs even if the products
17 did, in fact, contain formaldehyde and VOCs.

18 As will be discussed below, Defendants fail to show that California’s Business and
19 Professions Code section 17850.5(b) applies to the claims at issue in this action.

20 The California Supreme Court has described its state’s ‘safe harbor’ doctrine in this
21 manner:

22 Although the unfair competition law’s scope is sweeping, it is not
23 unlimited Specific legislation may limit the judiciary’s power
24 to declare conduct unfair. If the Legislature has permitted certain
25 conduct or considered a situation and concluded no action should
26 lie, courts may not override that determination. When specific
27 legislation provides a ‘safe harbor,’ plaintiffs may not use the
28 general unfair competition law to assault that harbor.

29 Davis v. HSBC Bank Nev., N.A., 691 F.3d 1152, 1164 (9th Cir. 2012) (citing Cel-Tech
Commc’ns, Inc., v. L.A. Cellular Tel. Co., 20 Cal. 4th 163, 182 (1999)). “Under the safe harbor

1 doctrine, “[t]o forestall an action under the unfair competition law, another provision must actually
2 ‘bar’ the action or clearly permit the conduct.” Id. (citing Cel-Tech, 20 Cal. 4th at 183).

3 Section 17850.5(a) makes it unlawful for any entity “to make any untruthful, deceptive, or
4 misleading environmental marketing claim, whether explicit or implied.” Cal. Bus. & Prof. Code
5 § 17580.5(a). It defines the term “environmental marketing claim” as including any claim
6 outlined in the “Guides for the Use of Environmental Marketing Claims” distributed by the
7 Federal Trade Commission (“FTC Guides”). Id. Section 17580.5(b) establishes a defense “to
8 any suit or complaint brought under [section 17580.5(a)]” if the “environmental marketing claims
9 conform to the standards or are consistent with the examples contained in the ‘Guides for the Use
10 of Environmental Marketing Claims’ published by the Federal Trade Commission.” Cal. Bus. &
11 Prof. Code § 17580.5(b).

12 Plaintiffs contend that neither section 17850.5 nor the FTC Guides shield Defendants from
13 liability for two reasons. First, Plaintiffs contend that section 17580.5 offers a “safe harbor” only
14 for claims “targeting misrepresentations relating to environmental impact” rather than claims
15 involving health and safety misrepresentations, such as the ones at issue here. Second, Plaintiffs
16 argue that, even if section 17580.5 applies to Defendants’ conduct, Defendants have not and
17 cannot meet their burden to show that their products do not cause material harm and thus fall
18 within the safe harbor at this stage of the litigation, because the question of whether the safe
19 harbor applies is a question of fact that cannot be resolved on a motion to dismiss.

20 The Court concludes that the safe harbor in section 17850.5(b) does not apply to the
21 conduct at issue in this action, because that provision, by its own terms, can only be used as “a
22 defense to any suit or complaint brought under [section 17580.5(a)].” See Cal. Bus. & Prof. Code
23 § 17580.5(b). Here, Plaintiffs do not bring any claims under section 17850.5(a), which makes
24 unlawful any “untruthful, deceptive, or misleading environmental marketing claim[s].”
25 Environmental marketing claims must be based on representations as to “the natural
26 environment,” such as “ecologically friendly,” “earth friendly,” “environmentally friendly,”
27 “ecologically sound,” “environmentally sound,” “environmentally safe,” “ecologically safe,”
28 “environmentally lite,” or “green product[.]” See Cal. Bus. & Prof. Code § 17580; 16 C.F.R.

1 §260.1 et seq (Guides for the Use of Environmental Marketing Claims). No such
2 misrepresentations are alleged here.

3 **2. California’s Consumer Legal Remedies Act (“CLRA”)**

4 Defendants move to dismiss Plaintiffs’ claims under the CLRA. They argue that
5 Plaintiffs’ “claims fail for the reasons set forth in Sections III-VI [of the motion],” which are that
6 Plaintiffs have failed to plausibly allege any cognizable cause of action, actual reliance, a claim
7 based on a nondisclosure of facts, or a duty to disclose.

8 The CLRA prohibits “unfair methods of competition and unfair or deceptive acts or
9 practices undertaken by any person in a transaction intended to result or which results in the sale
10 or lease of goods or services to any customer.” Cal. Civ. Code § 1770(a). Such acts and practices
11 include representing that goods have characteristics that they do not have, representing that goods
12 are of a particular quality when they are of another, and advertising goods with the intent to not
13 sell them as represented. Cal Civ. Code §§ 1770(a)(5), 1770(a)(7), 1770(a)(9).

14 A plaintiff may bring a claim under the CLRA for a failure to disclose a material fact if the
15 plaintiff shows that the defendant had a duty to disclose such a fact. To establish a duty to
16 disclose under California law, a plaintiff must plausibly plead that at least one of the following
17 four circumstances exists: (1) the defendant was in a fiduciary relationship with the plaintiff;
18 (2) the defendant had exclusive knowledge of material facts not known to the plaintiff; (3) the
19 defendant actively concealed a material fact from the plaintiff; or (4) the defendant made partial
20 representations but also suppressed some material fact. Falk v. Gen. Motors Corp., 496 F. Supp.
21 2d 1088, 1095 (N.D. Cal 2007) (citing LiMandri v. Judkins, 52 Cal. App. 4th 326, 337 (1997)).
22 Additionally, a plaintiff asserting a CLRA claim must meet the heightened pleading requirements
23 of Federal Rule of Civil Procedure 9(b). See Kearns v. Ford Motor Co., 567 F.3d 1120, 1125 (9th
24 Cir. 2009) (finding that “Rule 9(b)’s heightened pleading standards apply to claims for violations
25 of the CLRA and UCL”).

26 Here, Plaintiffs do not allege that a fiduciary relationship exists between the parties.
27 Therefore, Plaintiffs must plead facts showing that at least one of the remaining circumstances
28 giving rise to a duty to disclose exists. Each of the three remaining circumstances requires the

1 existence of a material fact. Non-disclosed information is material if, “had the omitted
2 information been disclosed, one would have been aware of it and behaved differently.” Falk, 496
3 F. Supp. 2d at 1095 (citing Mirkin v. Wasserman, 5 Cal. 4th 1082, 1094 (1993)). Within the
4 context of a claim under the CLRA, whether a fact is material is judged from the perspective of a
5 “reasonable consumer.” Id. (citing Consumer Advocated v. Echostar Satellite Corp., 113 Cal.
6 App. 4th 1351, 1360 (2003)).

7 The Court concludes that Plaintiffs have sufficiently pleaded the existence of two of the
8 remaining circumstances giving rise to a duty to disclose.

9 First, Plaintiffs sufficiently allege that Defendants had exclusive knowledge of the
10 chemical contents of its products and the existence of VOCs and formaldehyde. Plaintiffs are not
11 in a position to know the presence of such chemicals in the products, especially given that
12 Defendants attributed the products’ odor to the “manufacturing process.” FAC ¶ 4. Further,
13 Defendants had exclusive access to the chemical contents of its Tempur products, the nature and
14 degree of chemicals off-gassing from its products, and the volume and contents of customer
15 complaints of allergic reactions and symptoms. FAC ¶ 169.

16 Second, Plaintiffs plausibly allege that Defendants actively concealed the contents of their
17 Tempur products because advertisements and promotional materials specifically attributed the
18 products’ strange odor to a “manufacturing process” and explicitly represented that Tempur
19 material is “free of harmful VOCs such as formaldehyde and CFC–harsh chemicals that can
20 trigger allergies and asthma.” FAC ¶¶ 4, 10.

21 Additionally, Plaintiffs have plausibly pled that the presence of VOCs and formaldehyde
22 was material because they allege that they would not have purchased the Tempur products or
23 would have paid less for them had they known the true contents of the products. FAC ¶¶ 132,
24 141.

25 These allegations are sufficient to draw the reasonable inference that Defendants had a
26 duty to disclose the true chemical contents of the Tempur products and the possible ramifications
27 of such chemicals being present in the Tempur material.

28 Furthermore, the Court concludes that Plaintiffs have also sufficiently plead the “who,

1 what, when, where, and how” required by Rule 9(b). Plaintiffs have plausibly alleged that (1)
2 since at least September 2007 and continuing through at least August 7, 2013, Defendants have
3 misrepresented the contents and quality of its Tempur products and omitted the fact that such
4 products were “free of harmful VOCs such as formaldehyde and CFCs” on its website, in its retail
5 in-store brochures, and in other marketing materials; (2) such representations and omissions were
6 likely to deceive a reasonable consumer because Plaintiffs did not have access to information
7 regarding the chemical makeup of its products; (3) that Plaintiffs relied on Defendants’
8 misrepresentations and omissions in purchasing the Tempur products; and (4) that Defendants’
9 misrepresentations and omissions caused injury to Plaintiffs in that Plaintiffs would not have
10 purchased, or would have purchased at a significantly reduced price, the Tempur products had
11 Plaintiffs known their true contents. FAC ¶¶ 10, 54-56, 141, 156.

12 Plaintiffs have also sufficiently pleaded the “who” required by Rule 9(b). In an alleged
13 multi-defendant fraud conspiracy, the rule in this circuit is that “[i]n the context of a fraud suit
14 involving multiple defendants, a plaintiff must, at a minimum, identify the role of each defendant
15 in the alleged fraudulent scheme.” Fields v. Wise Media, LLC, No. C-12-05160-WHA, 2013 WL
16 3187414 at *4 (N.D. Cal. June 21, 2013) (citing Swartz v. KPMG LLP, 476 F.3d 756, 764–65 (9th
17 Cir. 2007)). Plaintiffs are not required, at the pleading stage, to identify which of the Defendants
18 made each particular alleged misrepresentation, particularly where Defendants allegedly had
19 overlapping marketing responsibilities, FAC ¶¶ 37-38, and it is peculiarly within their knowledge
20 which defendant “made” each alleged misrepresentation within the context of their respective
21 marketing campaigns. Fields, 2013 WL 3187414, at *4.

22 As Plaintiffs have pleaded sufficient facts to state a claim under the CLRA, Defendants’
23 motion to dismiss this claim is DENIED.

24 3. California’s False Advertising Law (“FAL”)

25 The FAL makes it unlawful for any person or entity to disseminate any statement “which is
26 untrue or misleading, and which is known, or which by the exercise of reasonable care should be
27 known, to be untrue or misleading” in connection with the sale of “real or personal property” or
28 “services.” Cal. Bus. & Prof. Code § 17500. The FAL encompasses not just false statements, but

1 also those that “may be accurate on some level, but will nonetheless tend to mislead or deceive.”
2 Ariz. Cartridge Remfrs. Ass’n, Inc. v. Lexmark Int’l, Inc., 421 F.3d 981, 985 (9th Cir. 2005).

3 Whether advertising is false or misleading under the FAL will be determined from the
4 perspective of the “reasonable consumer.” Williams v. Gerber Prods. Co., 552 F.3d 934, 938 (9th
5 Cir. 2008) (citation omitted). “Under the reasonable consumer standard, [a plaintiff] must show
6 that members of the public are likely to be deceived [by the advertising].” Id. (citation and
7 internal quotations omitted). Because claims under the FAL are “grounded in fraud,” they must
8 also satisfy the heightened pleading standards of Rule 9(b). See Yumul v. Smart Balance, Inc.,
9 733 F. Supp. 2d 1117, 1122-23 (C.D. Cal. 2010) (citing Vess v. Ciba-Geigy Corp. USA, 317 F.3d
10 1097, 1103-04 (9th Cir. 2003)).

11 Defendants move to dismiss Plaintiffs’ FAL claim. Once again, Defendants argue that
12 “Plaintiff’s FAL claim fails for the same reasons as stated in Sections III - VI [of the motion],”
13 which are that Plaintiffs have not plausibly alleged any cognizable cause of action, actual reliance,
14 a claim based on a nondisclosure of facts, a duty to disclose, and any cause of action under the
15 UCL. Mot. at 16. In a parenthetical, Defendants suggest that, specifically, the FAL claim fails
16 because “Plaintiffs fail to allege the specific representation which was viewed by each
17 representative plaintiff.” Id. at 10-11 (citing Davis-Miller v. Auto. Club of So. Cal., 201 Cal. App.
18 4th 106, 117 (2011)).

19 The Court concludes that Defendants’ motion must be DENIED.

20 First, the Court has already rejected the arguments upon which the motion is predicated in
21 section III.A.2, supra, and it also found that Plaintiffs’ allegations satisfy the requirements of Rule
22 9(b).

23 Second, to the extent that Defendants contend that Plaintiffs have not alleged reliance
24 because they have not alleged that each of them viewed the advertisements at issue, the Court is
25 not persuaded by that argument, because it is premised on Davis-Miller, which is inapposite. The
26 holdings in Davis-Miller pertain to the existence of commonality in the context of class
27 certification. Davis-Miller, 201 Cal. App. 4th at 117. Nevertheless, Davis-Miller is helpful in that
28 it points to In re Tobacco II as containing the correct standard to determine reliance in connection

1 with false advertisements. See In re Tobacco II Cases, 46 Cal. 4th 298, 306 (2009). There, the
2 California Supreme Court held that:

3 [W]here . . . a plaintiff alleges exposure to a long-term advertising
4 campaign, the plaintiff is not required to plead with an unrealistic
5 degree of specificity that the plaintiff relied on particular
6 advertisements or statements. . . . [A] plaintiff must plead and prove
7 actual reliance to satisfy the standing requirement . . . but . . . is not
8 required to necessarily plead and prove individualized reliance on
9 specific misrepresentations or false statements where . . . those
10 misrepresentations and false statements were part of an extensive
11 and long-term advertising campaign.

12 Id. at 328.

13 The question of when to apply the Tobacco II exception is not an easy one, and the
14 appellate courts have yet to draw bright lines for its application. This Court has previously
15 observed “that the Tobacco II ‘exception’ appears to be a narrow one,” Haskins v. Symantec
16 Corp., No. 13-CV-01834-JST, 2013 WL 6234610 (N.D. Cal. Dec. 2, 2013); see also Rodman v.
17 Safeway, Inc., No. 11-CV-03003-JST, 2014 WL 988992 (N.D. Cal. Mar. 10, 2014) (describing the
18 exception as “limited”), and other courts have expressed the fear that over-application of the
19 exception would “swallow the rule” requiring plaintiffs to plead reliance. See, e.g., In re
20 WellPoint, Inc. Out-of-Network UCR Rates Litig., 903 F. Supp. 2d 880, 926 (C.D. Cal. 2012).

21 The present case is a close call. Weighing the arguments on both sides, however, the Court
22 concludes that Plaintiffs have sufficiently pleaded reliance under Tobacco II. Plaintiffs allege that
23 Defendants’ misrepresentations have been extensive, appearing within in-store brochures, on
24 Tempur-pedic’s website, and on its official Facebook page. FAC ¶¶ 5, 11, 25. Further, such
25 misrepresentations have allegedly taken place since at least 2007. Id. ¶ 9. Accordingly, because
26 the allegations in the complaint sufficiently raise the inference that the representations at issue
27 were “part of an extensive long term advertising campaign,” this claim cannot be dismissed on the
28 ground that Plaintiffs have not established reliance.

29 **4. California’s Unfair Competition Law (“UCL”)**

30 Plaintiffs allege that Defendants violated each of the three prongs of the UCL because
31 Defendants failed to disclose or misrepresented the presence and amount of formaldehyde and
32 VOCs in their products, which is unlawful, unfair, and fraudulent.

1 who practices a deceit with intent to defraud the public . . . is deemed to have intended to defraud
2 every individual in that class, who is actually misled by the deceit.” Cal. Civ. Code § 1711.

3 Here, Plaintiffs have stated a claim under sections 1709-11 and have satisfied the
4 requirements of Rule 9(b) with respect to these claims. Plaintiffs have plausibly alleged that (1)
5 since at least September 2007 and continuing through at least August 7, 2013, Defendants have
6 misrepresented the contents and quality of its Tempur products and omitted the fact that such
7 products were “free of harmful VOCs such as formaldehyde and CFCs” on its website, in its retail
8 in-store brochures, and in other marketing materials; (2) such representations and omissions were
9 likely to deceive a reasonable consumer because Plaintiffs did not have access to information
10 regarding the chemical makeup of its products; (3) that Plaintiffs relied on Defendants’
11 misrepresentations and omissions in purchasing the Tempur products; and (4) that Defendants’
12 misrepresentations and omissions caused injury to Plaintiffs in that Plaintiffs would not have
13 purchased, or would have purchased at a significantly reduced price, the Tempur products if
14 Plaintiffs had known their true contents. FAC ¶¶ 10, 54-56, 141, 156. Because Plaintiffs have
15 stated a claim under the unlawful prong of the UCL based on the CLRA, the FAL, and California
16 Civil Code §§ 1709-11, Defendants’ motion to dismiss this claim is DENIED.

17 **b. Unfair Prong**

18 “The UCL does not define the term ‘unfair’ as used in Business and Professions Code
19 section 17200,” Durell v. Sharp Healthcare, 183 Cal. App. 4th 1350, 1364 (2010), and “[t]he
20 standard for determining what business acts or practices are ‘unfair’ in consumer actions under the
21 UCL is currently unsettled.” Yanting Zhang v. Superior Court, 57 Cal. 4th 364, 380 n. 9 (2013).
22 In this circuit, in the consumer context, a practice may be deemed unfair if either (1) it is tethered
23 to specific constitutional, statutory, or regulatory provision, or (2) its harm to consumers
24 outweighs its utility. Lozano v. AT & T Wireless Servs. Inc., 504 F.3d 718, 736 (9th Cir. 2007).²

25 _____
26 ² The parties’ briefs do nothing to assist the Court in resolving the confusion over the appropriate
27 test for unfairness. The Defendants take their definition of “unfair” from an Eleventh Circuit case
28 that was considering the Federal Trade Commission Act, not California’s Unfair Competition
Law. ECF No. 18 at p. 14 (citing Orkin Exterminating Co., Inc. v. F.T.C., 849 F.2d 1354 (11th
Cir. 1988)). Plaintiffs cite Camacho v. Auto. Club of S. California, 142 Cal. App. 4th 1394

1 Here, it is unnecessary to apply the first test, because Plaintiffs allegations easily satisfy
2 the second. Plaintiffs allege that Defendants’ misrepresentations concerning the content of their
3 products led Defendants’ customers to purchase products that triggered class members’ allergies
4 and caused other harm. In their motion, Defendants offer no arguments concerning the utility of
5 the alleged misrepresentations. Thus, the FAC adequately states a claim under the “unfairness”
6 prong of the UCL.

7 Accordingly, Defendants’ motion to dismiss this claim is DENIED.

8 **c. Fraudulent Prong**

9 A plaintiff may bring a claim under the fraudulent prong of the UCL if the defendant’s
10 conduct is “likely to deceive.” Newsom v. Countrywide Home Loans, Inc., 714 F. Supp. 2d 1000,
11 1012 (N.D. Cal. 2010) (citing Morgan v. AT & T Wireless Servs. Inc., 177 Cal. App. 4th 1235,
12 1249 (2009)). To state a claim for fraud under the UCL, a plaintiff must allege the existence of (1)
13 a duty to disclose, and (2) reliance. Id. Additionally, a claim for fraudulent conduct under the
14 UCL must meet the heightened pleading requirements of Rule 9(b). See Kearns, 567 F.3d at
15 1125.

16 Defendants move to dismiss Plaintiffs’ claims under the fraudulent prong of the UCL “for
17 the same reasons articulated in Sections III - VI [of the motion].” Mot. at 16. The Court has
18 already rejected these arguments in section III.A.3.a., supra, and it also found that Plaintiffs had
19 sufficiently complied with Rule 9(b)’s heightened pleading requirements. Accordingly,
20 Defendants’ motion to dismiss this claim is DENIED.

21 **5. Plaintiffs’ State-law Claims**

22 Defendants move to dismiss Plaintiffs’ non-California state-law claims on the ground that
23 “Plaintiffs have failed to allege Tempur engaged in any unfair or deceptive conduct or that
24 Plaintiffs have been injured as a result of the alleged conduct.” Mot. at 18. Each non-California
25 state-law claim requires a factual showing as to elements that are the same or substantially similar
26 to the elements of the California claims at issue. Because the Court has concluded that Plaintiffs

27
28 (2006), whose “unfairness” test the Ninth Circuit has expressly declined to apply in the consumer
context. Lozano, 504 F.3d at 736.

1 have adequately pleaded each of the California claims, Defendants’ motion to dismiss the non-
2 California claims is DENIED.

3 **6. Statutes of Limitations**

4 Defendants contend that the claims of Plaintiffs Michael Dodson and Rosmarie Valdez are
5 barred by the applicable statute of limitations under California and New York law.

6 Plaintiffs respond that the statute of limitations applicable to these claims has been “tolled
7 by Defendants’ fraudulent concealment, the discovery rule, and/or the continuing violations rule.”
8 FAC ¶ 158.

9 **a. Statute of limitations under California Law**

10 Any claim brought under the CLRA “shall be commenced not more than three years from
11 the date of the commission of such method, act, or practice.” Cal. Civ. Code § 1783. Claims
12 brought under the FAL and the UCL “shall be commenced within four years after the cause of
13 action accrued.” Cal. Bus. & Prof. Code § 17208.

14 The Ninth Circuit has recently explained the fraudulent concealment and discovery rules
15 and their application:

16 In California, the discovery rule postpones accrual of a claim until
17 “the plaintiff discovers, or has reason to discover, the cause of
18 action.” California applies a special standard in cases of fraudulent
19 concealment. In these cases, a plaintiff must show: “(1) when the
20 fraud was discovered; (2) the circumstances under which it was
21 discovered; and (3) that the plaintiff was not at fault for failing to
22 discover it or had no actual or presumptive knowledge of facts
sufficient to put him on inquiry.” “A plaintiff must affirmatively
excuse his failure to discover the fraud within [the statute of
limitations] by showing that he was not negligent in failing to make
the discovery sooner and that he had no actual or presumptive
knowledge of facts sufficient to put him on inquiry.”

23 Clemens v. DaimlerChrysler Corp., 534 F.3d 1017, 1024 (9th Cir. 2008) (internal citations and
24 quotations omitted).

25 The Court concludes that the discovery rule and the doctrine of fraudulent concealment toll
26 the applicable California statutes of limitations for purposes of the motion to dismiss. Here,
27 Plaintiffs allege that they did not have a reason to discover Defendants’ alleged wrongdoing at the
28 time they purchased the products at issue, because Defendants’ advertising and promotional

1 materials attribute any smell coming off the products to the “manufacturing process,” and not the
2 “off-gassing” of formaldehyde and VOCs. Moreover, Defendants “had exclusive knowledge
3 about the content of the Tempur products [and] the nature and degree of chemicals off-gassing
4 from Tempur-pedic mattresses and pillows.” FAC ¶ 169. For that reason, Plaintiffs plausibly
5 allege that they could not have been expected to know the true chemical contents of the products
6 at issue at the time of purchase. Plaintiffs also plausibly allege that they did not have a reasonable
7 opportunity to discover the alleged wrongdoing until the “scientific testing” of Tempur-pedic
8 products in 2012 and 2013 exposed Defendants alleged misrepresentations and omissions, which
9 revealed that the Tempur-pedic mattresses and pillows can and do contain potentially harmful
10 VOCs including, but not limited to, formaldehyde. FAC ¶ 11. As such, Plaintiffs’ California
11 claims are not time-barred.

12 **b. Statute of limitations under New York Law**

13 Defendants argue that the claims brought by Plaintiff Rosmarie Valdez on behalf of herself
14 and other New York plaintiffs are barred by the statute of limitations. Plaintiffs respond that the
15 motion must be denied because they have alleged that the deceptive practices of the Defendants
16 continued long after Plaintiff Valdez purchased her mattress.

17 Plaintiff Valdez brings her claims under New York Business Law sections 349 and 350,
18 which are subject to a three year statute of limitations that begins to run when the injury occurs.
19 See Gaidon v. Guardian Life Ins. Co. of Am., 96 N.Y.2d 201, 208 (2001); Gristede’s Foods, Inc.
20 v. Unkechauge Nation, 532 F. Supp. 2d 439 (E.D.N.Y. 2007).

21 “[E]quitable tolling allows plaintiffs to overcome an expired statute of limitations when
22 they were induced by fraud, misrepresentation, or deception to refrain from timely commencing an
23 action.” M & T Mortgage Corp. v. White, 736 F. Supp. 2d 538, 555 (E.D.N.Y. 2010) (citation and
24 internal quotation marks omitted). Equitable tolling can apply if the plaintiff satisfies three
25 elements: (1) that the defendant concealed the existence of the cause of action from the plaintiff;
26 (2) that the plaintiff brought suit within the applicable limitations period upon learning the cause
27 of action; and (3) that plaintiff’s ignorance of the claim did not result from a lack of diligence. Id.
28 at 556.

1 The Court concludes that Plaintiffs have shown that the New York statute of limitations is
2 subject to equitable tolling, as Plaintiffs have alleged that Defendants misrepresented and omitted
3 the chemical content of its Tempur products and thus concealed the existence of the claims they
4 now bring. Plaintiffs have also alleged that they filed this action soon after learning the true
5 contents of the Tempur products from tests taken in 2012 and 2013. Accordingly, these claims are
6 not time-barred.

7 **7. Standing**

8 Defendants argue that the injuries allegedly suffered by Plaintiffs “are nowhere near
9 sufficient to establish the type of injury needed for [Article III] standing.” Mot. at 17. To support
10 this argument, Defendants rely on Boysen v. Walgreen Co., No. C-11-06262-SI, 2012 WL
11 2953069 (N.D. Cal. July 19, 2012), a case that is distinguishable from the facts at issue here.

12 In Boysen, the court found that the plaintiffs did not have Article III standing to assert
13 UCL and FAL claims based on the allegation that the juice drinks they purchased, which were
14 labeled as “Heart Healthy,” contained lead and arsenic. Id. at *2. The plaintiffs did not allege that
15 they were physically harmed by the fruit juice; instead, the injury they alleged was economic, as
16 the plaintiffs alleged that they would not have purchased the drinks if they had known about the
17 drinks’ undisclosed contents. Id. The court granted the defendant’s motion to dismiss, finding
18 that the complaint failed to “alleg[e] that any person has ever been injured by the products [or] . . .
19 that consumption of the products may cause physical harm.” Id. at *7.

20 Here, unlike in Boysen, Plaintiffs have alleged that the chemicals contained in Tempur-
21 pedic’s products can and do cause physical harm and that the products have injured customers.
22 See FAC ¶ 106 (“TEMPUR material can and does contain VOCs including but not limited to
23 formaldehyde and . . . Tempur-pedic’s customers have had ongoing complaints concerning
24 allergic reactions and symptoms related to Tempur-pedic’s products.”). Accordingly, Plaintiffs’
25 claims cannot be dismissed in light of Boysen.

26 Also, the Ninth Circuit has noted that where plaintiffs have “spent money that, absent
27 defendants’ actions, they would not have spent,” there is “a quintessential injury-in-fact” that
28 establishes standing under Article III’s injury requirement. Maya v. Centex Corp., 658 F.3d 1060,

1 1069 (9th Cir. 2011) (citation omitted). Plaintiffs here have alleged that they would not have
2 purchased the products at issue had they known of the products' chemical contents. As such,
3 Defendants' motion to dismiss Plaintiffs' claims for lack of standing is DENIED.

4 **B. Motion to Strike Class Allegations**

5 Plaintiffs seek to represent eleven sub-classes of Tempur-pedic customers. Each of these
6 subclasses will be governed by the law of a different state. FAC ¶¶ 109-123.

7 Defendants move to strike Plaintiffs' class allegations on the ground that the "FAC reveals
8 the insurmountable obstacles to class treatment in this case." Mot. at 2.

9 Plaintiffs oppose the motion, arguing that Defendants "have failed to meet their heavy
10 burden to show that striking the class allegations is warranted at this stage of the litigation."
11 Opp'n at 2.

12 Courts rarely grant motions to strike class allegations at the pleading stage. See, e.g., In re
13 Wal-Mart Stores, Inc. Wage and Hour Litigation, 505 F. Supp. 2d 609, 615 (N.D. Cal. 2007)
14 (noting that "dismissal of class actions at the pleading stage should be done rarely and that the
15 better course is to deny such a motion because 'the shape and form of a class action evolves only
16 through the process of discovery'" (citation omitted); see also 7AA Charles Alan Wright, Arthur
17 R. Miller & Mary K. Kane, Federal Practice and Procedure Civil § 1785.3 (3d. 2005) (providing
18 that the practice employed in the overwhelming majority of class actions is to address class
19 certification issues only after an appropriate period of discovery).

20 Here, discovery has not yet commenced and no motion for class certification has been
21 filed. Accordingly, the Court is not inclined to address issues as to class certification at this stage
22 of the proceedings. Accordingly, Defendants' motion to strike the class allegations is DENIED.

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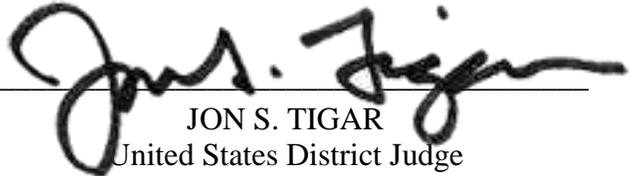
IV. CONCLUSION

Defendants' motions to dismiss and to strike are DENIED.

The Court will conduct a case management conference on May 14, 2014 at 2:00 p.m. A Joint Case Management Statement must be filed at least ten court days beforehand.

IT IS SO ORDERED.

Dated: April 16, 2014



JON S. TIGAR
United States District Judge