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SOUTHERN DISTRICT OF CALIFORNIA

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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

KIRSTIN MORRISON, on behalf of
herself and all others similarly
situated; and ROES 1 through 100,
inclusive,

Plaintiff,

vs.

TRIVITA, INC., an Arizona
corporation; and DOES 1 through 100,
inclusive,

Defendant.

CASE NO. 12-CV-1387 BEN (BLM)
**ORDER DENYING MOTION TO
DISMISS FIRST AMENDED
COMPLAINT**

[ECF No. 12]

Presently before the Court is Defendant TriVita Inc.'s Motion to Dismiss Plaintiff Kirsten Morrison's First Amended Complaint ("FAC"). (Mot. to Dismiss, ECF No. 12.) Morrison contends that a wellness drink sold by TriVita is more snake oil than miracle tonic. She has sued on behalf of herself and others over allegedly false and misleading claims about the product's health benefits. TriVita moves to dismiss on the grounds that Morrison (1) lacks constitutional and statutory standing, and (2) fails to state with the requisite particularity the circumstances constituting fraud. For the reasons set out below, TriVita's motion to dismiss is **DENIED.**

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BACKGROUND

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2 In May 2012, Morrison filed a putative class action complaint in San Diego
3 Superior Court. In June 2012, TriVita removed the case here. (Not. of Removal,
4 ECF No. 1.) TriVita moved to dismiss the Complaint for failure to state a claim.
5 (ECF No. 6.) Before the Court could resolve that motion, Morrison amended the
6 Complaint, rendering TriVita's motion moot. (FAC, ECF No. 10.) In August 2012,
7 TriVita moved to dismiss the FAC. (Mot. to Dismiss, ECF No. 12.) Morrison filed
8 an Opposition. (Oppo., ECF No. 13.) TriVita filed a Reply. (Reply, ECF No. 14.)
9 The Court took the matter under submission and now resolves the motion pursuant
10 to Civil Local Rule 7.1.d.1.

11 Morrison alleges the following. TriVita is an Arizona corporation that makes
12 and sells Nopalea, a liquid dietary supplement purportedly derived from a cactus.
13 (FAC. ¶¶ 1, 8, 12.) Through aggressive advertising on television and the Internet,
14 TriVita has sold more than 4 million bottles at \$40 per bottle. (*Id.* ¶¶ 1, 8, 13-14.)

15 TriVita pitches Nopalea as a wonder product—an “amazing, natural, anti-
16 inflammatory solution,” and an “astonishing breakthrough wellness drink that helps
17 your body experience an optimal state of wellness.” (*Id.* ¶ 1.) TriVita claims that
18 Nopalea is “guaranteed” to eliminate “inflammation,” relieve and reduce pain,
19 improve breathing, improve circulation, “drain away toxins,” reduce swelling in
20 joints and muscles, cure skin problems, “dramatically” improve energy levels,
21 improve mobility, and “promote healing.” (*Id.*) TriVita claims Nopalea will help
22 “every distressing condition that humans suffer . . . for example: allergies, asthma,
23 migraines, Parkinson's Disease, Alzheimer's Disease, and a host of life-threatening
24 conditions.” (*Id.*) Further, the company suggests Nopalea is recommended by
25 doctors. (*Id.* ¶¶ 26-27.) For example, TriVita has used the name and picture of
26 “Dr. Brazos Minshew,” its chief science officer, in “printed promotional materials,”
27 when Mr. Minshew is not a medical doctor. (*Id.*)

28 Morrison alleges the she saw and relied on TriVita's “deceptive Nopalea

1 promises,” including a late-night television infomercial featuring testimonials about
2 how Nopalea addressed things like: “chronic pain,” “chronic inflammation,”
3 “ankylosing spondylitis,” “facet arthritis,” “fibromyalgia;” “fatigue,” and “mental
4 drain.” (*Id.* ¶¶ 3, 20-24, 36.) Morrison alleges that she purchased \$101 worth of
5 Nopalea in February 2012. (*Id.* ¶¶ 3, 36.) The drink provided none of the
6 advertised benefits. (*Id.* ¶¶ 36.)

7 Morrison alleges that she suffered economic injury. She seeks redress for
8 violations of: (1) Consumer Legal Remedies Act (“CLRA”), California Civil Code §
9 1750, et seq.; (2) Unfair Competition Law (“UCL”), California Business and
10 Professions Code § 17200, et seq.; (3) False Advertising Law (“FAL”), California
11 Business and Professions Code § 17500, et seq.; (4) breach of express warranty; and
12 (5) breach of implied warranty. For simplicity, the Court follows TriVita’s lead and
13 refers to the first three causes of actions as the “unfair competition claims” and the
14 remaining two as the “warranty claims.”

15 DISCUSSION

16 I. Standing

17 At issue is Morrison’s standing to bring this case. The main thrust of
18 TriVita’s motion is that Morrison did not purchase Nopalea, despite allegations to
19 the contrary. TriVita contends that this fact leaves her without constitutional and
20 statutory standing to assert her claims.

21 The appropriate vehicle for challenging constitutional standing is a motion to
22 dismiss under Federal Rule of Civil Procedure 12(b)(1). The appropriate vehicle for
23 challenging statutory standing is a motion to dismiss under Rule 12(b)(6). *Maya v.*
24 *Centex Corp.*, 658 F.3d 1060, 1067-1068 (9th Cir. 2011).

25 A. Constitutional Standing

26 A federal court must dismiss a case if it lacks subject matter jurisdiction. The
27 party asserting a claim has the burden of proving that subject matter jurisdiction
28 exists. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994).

1 Constitutional standing is a core component of federal court jurisdiction.
2 *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *Cetacean Community v.*
3 *Bush*, 386 F.3d 1169, 1174 (9th Cir. 2004) (“A suit brought by a plaintiff without
4 Article III standing is not a ‘case or controversy,’ and an Article III federal court
5 therefore lacks subject matter jurisdiction over the suit.”). To establish Article III
6 standing, a party must show that it has “suffered some actual or threatened injury as
7 a result of the putatively illegal conduct of the defendant, and that the injury can be
8 traced to the challenged action and is likely to be redressed by a favorable
9 decision.” *Valley Forge Christian Coll. v. Ams. United for Separation of Church &*
10 *State, Inc.*, 454 U.S. 464, 472 (1982) (citations and internal quotation marks
11 omitted). In the class action context, “if the representative parties do not have
12 standing, the class does not have standing.” *Cornett v. Donovan*, 51 F.3d 894, 897
13 n.2 (9th Cir. 1995). “The defense of lack of subject matter jurisdiction cannot be
14 waived, and the court is under a continuing duty to dismiss an action whenever it
15 appears that the court lacks jurisdiction.” *Augustine v. United States*, 704 F.2d
16 1074, 1077 (9th Cir. 1983).

17 There are two types of challenges under Rule 12(b)(1): “facial” and “factual.”
18 *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000). “In a facial attack, the
19 challenger asserts that the allegations contained in a complaint are insufficient on
20 their face to invoke federal jurisdiction. By contrast, in a factual attack, the
21 challenger disputes the truth of the allegations that, by themselves, would otherwise
22 invoke federal jurisdiction.” *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039
23 (9th Cir. 2004).

24 In resolving a facial attack, the district court’s review is limited to the
25 allegations in the complaint. *Chandler v. State Farm Mut. Auto. Ins. Co.*, 598 F.3d
26 1115, 1121-22 (9th Cir. 2010). “A district court must accept as true all material
27 allegations in the complaint, and must construe the complaint in the nonmovant’s
28 favor.” *Id.* at 1121. In resolving a factual attack, a court “may review evidence

1 beyond the complaint without converting the motion to dismiss into a motion for
2 summary judgment.” *Safe Air for Everyone*, 373 F.3d at 1039. No presumption of
3 truthfulness attaches to the plaintiff’s allegations in a factual challenge, but the
4 Ninth Circuit has cautioned that a “[j]urisdictional finding of genuinely disputed
5 facts is inappropriate when ‘the jurisdictional issue and substantive issues are so
6 intertwined that the question of jurisdiction is dependent on the resolution of factual
7 issues going to the merits’ of an action.” *Sun Valley Gasoline, Inc. v. Ernst Enters.*,
8 711 F.2d 138, 139 (9th Cir. 1983) (quoting *Augustine*, 704 F.2d at 1077). In such
9 cases, “the jurisdictional determination should await a determination of the relevant
10 facts on either a motion going to the merits or at trial.” *Augustine*, 704 F.2d at
11 1077.

12 Here, Morrison alleges that she purchased Nopalea. TriVita disputes the
13 truthfulness of that assertion. TriVita’s jurisdictional challenge is factual, not facial.

14 In support of its motion, TriVita submits a declaration from Daniel
15 Silverman, its attorney in this case. Silverman declares that opposing counsel,
16 Derrick Coleman, provided him with the order number for Morrison’s alleged
17 purchase, but when TriVita looked that number up in its system, it found the name
18 “James Murphy,” not Morrison. (Silverman Decl. ¶¶ 4-5.) TriVita also submits the
19 order form, which lists “James Murphy” in both the “SHIP TO:” and “BILL TO:”
20 fields, as well as an e-mail from Coleman, who explained to Silverman that Murphy
21 was Morrison’s live-in boyfriend and that Morrison used Murphy’s credit card to
22 make the purchase. (Henderson Decl., Ex. A; Silverman Decl., Ex. A).

23 In reply, Morrison relies on the allegations in the FAC that she purchased
24 Nopalea, as well as the accompanying declaration in which she states: “I
25 purchase[d] the Nopalea product at issue in this action while in San Diego
26 County[.]” (Morrison Decl., FAC, Ex. B.) She argues that TriVita’s use of her
27 attorney’s e-mail is inappropriate because it is a privileged statement made during
28 compromise negotiations about the claim.

1 Because the issue of standing is sufficiently intertwined with the merits of
2 Morrison's claims, the Court declines to dismiss the FAC at this juncture.
3 Ultimately, Morrison must prove injury as a substantive matter. *See Kwikset Corp.*
4 *v. Superior Court*, 51 Cal. 4th 310, 323 (2011) (a UCL or FAL plaintiff must show
5 pecuniary loss); *Meyer v. Sprint Spectrum L.P.*, 45 Cal. 4th 634, 638 (2009) (a
6 CLRA plaintiff must show that "he or she has been damaged by an unlawful
7 practice.") Although TriVita's evidence does suggest that someone else's credit
8 card may have been used to purchase Nopalea, it does not show that Morrison was
9 not party to the sale. TriVita points to no authority (and the Court is aware of none)
10 suggesting that a consumer who uses someone else's credit card to purchase goods
11 can never suffer economic injury. The Court is reluctant to presume that is the case,
12 particularly without knowing more about the circumstances of the transaction and
13 Morrison's relationship to the card holder. For now, the Court assumes Article III
14 standing.

15 **B. Statutory standing**

16 TriVita urges dismissal on statutory standing grounds as well, although the
17 underlying premise is the same. Specifically, TriVita claims that Morrison's failure
18 to purchase Nopalea is fatal to the the UCL, FAL, and CLRA because they require
19 the plaintiff to have suffered injury, and it is fatal to the warranty claims because
20 Morrison cannot state an essential element, namely contractual privity.

21 Statutory "standing, unlike constitutional standing, is not jurisdictional."
22 *Noel v. Hall*, 568 F.3d 743, 748 (9th Cir. 2009). Thus, a challenge to statutory
23 standing is properly viewed as a 12(b)(6) motion, which is generally confined to the
24 contents of the complaint. *See Maya*, 658 F.3d at 1067; *Vaughn v. Bay Envtl.*
25 *Mgmt.*, 567 F.3d 1021, 1024 (9th Cir. 2009). In resolving a motion brought under
26 Rule 12(b)(6), the Court accepts all well-pleaded allegations of material fact as true
27 and construes them in a light most favorable to the nonmoving party. *Wylter Summit*
28 *P'ship v. Turner Broad. Sys., Inc.*, 135 F.3d 658, 661 (9th Cir. 1998). A complaint

1 that fails to state a plausible claim for relief on its face will be dismissed. *Bell Atl.*
2 *Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

3 The UCL, FAL and CLRA all require a plaintiff to allege a legally cognizable
4 injury. Under the UCL, a plaintiff must allege that he or she “has suffered injury in
5 fact and has lost money or property as a result of the unfair competition.” Cal. Bus.
6 & Prof. Code § 17204. Similarly, under the FAL, a plaintiff must suffer an “injury
7 in fact and [have] lost money or property[.]” *Id.* § 17535. Under the CLRA, a
8 plaintiff must suffer “any damage as a result of the use or employment by any
9 person of a method, act, or practice declared to be unlawful by [the CLRA].” Cal.
10 Civ. Code § 1780(a).

11 As before, TriVita contends that there was no injury because Morrison “did
12 not purchase the Nopalea she alleges she consumed.” But Morrison alleges that she
13 did. Specifically, she alleges that she “saw and relied on Defendant’s deceptive
14 promises when she purchased Nopalea and . . . lost money as a result.” (FAC ¶ 3.)
15 She alleges that she “would not have bought Nopalea from the Defendant but for the
16 representations the Defendant made as to Nopalea’s effectiveness, safety, and other
17 qualities. (*Id.* ¶ 7.) She alleges that she spent \$101 on Nopalea. (*Id.* ¶ 36.) Further,
18 she states in a declaration: “I purchase[d] the Nopalea product at issue in this action
19 while in San Diego County[.]” (Morrison Decl., FAC, Ex. B.) On a motion to
20 dismiss, the court accepts these allegations as true. Accordingly, the Court will not
21 dismiss the unfair competition claims on statutory standing grounds. For the same
22 reason, the Court declines to dismiss the warranty claims for want of privity.

23 **II. Federal Rule of Civil Procedure 9(b)**

24 Finally, TriVita asserts that Morrison fails to satisfy the heightened pleading
25 standards of Federal Rule of Civil Procedure Rule 9(b) for her unfair competition
26 claims. Morrison’s allegations are deficient, TriVita argues, because she fails to
27 specify what specific statements *she* relied on in purchasing Nopalea, or when *she*
28 saw, read, or was exposed to any of TriVita’s purported advertisements. Morrison

1 counters that, even if Rule 9(b) applies, the allegations in the FAC suffice.

2 Rule 9(b) requires pleadings to “state with particularity the circumstances
3 constituting fraud or mistake.” Fed. R. Civ. P. 9(b). Simply put, “[a]verments of
4 fraud must be accompanied by ‘the who, what, when, where, and how’ of the
5 misconduct charged.” *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th
6 Cir. 2003). The rule applies both to federal and state law causes of action. *Id.* at
7 1103. When claims under California’s CLRA, UCL, and FAL are based on a
8 manufacturer’s alleged misrepresentations about a product’s characteristics, those
9 claims sound in fraud and Rule 9(b) applies. *Pirozzi v. Apple Inc.*, 12-CV-01529
10 YGR, 2012 WL 6652453, at *6 (N.D. Cal. Dec. 20, 2012) (*Kearns v. Ford Motor*
11 *Co.*; 567 F.3d 1120, 1127 (9th Cir. 2009)).

12 Rule 9(b) applies in this case, but even so, the allegations suffice. The FAC
13 provides specific examples of allegedly deceptive statements by TriVita regarding
14 the health benefits of Nopalea. (FAC ¶ 1.) It identifies specific testimonials posted
15 on TriVita’s website on a particular date (*Id.* ¶ 19) and describes one television
16 infomercial, in particular, that made similar claims (*Id.* ¶¶ 21-22). Morrison
17 alleges that she was “exposed to, saw, and relied on Defendant’s bold claims about
18 Nopalea’s purported benefits, including the late-night television infomercial[.]” (*Id.*
19 ¶ 36.) Although Morrison does not specifically state which statements she found
20 material to her decision to purchase Nopalea, that omission is not fatal because the
21 promotional materials conveyed a common allegedly fraudulent message (namely,
22 that Nopalea is a cure-all). *See In re Oreck Corp. Halo Vacuum & Air Purifiers*
23 *Mktg. & Sales Practices Litig.*, ML 12-2317 CAS JEMx, 2012 WL 6062047, at *15
24 (C.D. Cal. Dec. 3, 2012) (“By identifying a clear common message in the
25 advertising campaign and identifying numerous examples that repeat this message,
26 plaintiffs have adequately notified defendants of the ‘who, what, when, where and
27 how of the misconduct charged.” (quoting *Cafasso, ex rel. United States v. Gen.*
28 *Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1055 (9th Cir.2011)).

1 Although the question is close, the Court concludes that these allegations
2 provide TriVita with adequate notice to allow it to defend Morrison's charge. See
3 *Walling v. Beverly Enters.*, 476 F.2d 393, 397 (9th Cir. 1973) ("[Rule 9(b)] only
4 requires the identification of the circumstances constituting fraud so that the
5 defendant can prepare an adequate answer from the allegations.") TriVita's motion
6 to dismiss for failure to satisfy Rule 9(b) is denied.

7 **CONCLUSION**

8 For the reasons stated above, TriVita, Inc.'s Motion to Dismiss the First
9 Amended Complaint is **DENIED**.

10 **IT IS SO ORDERED.**

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13 DATED: March 18, 2013

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HON. ROGER T. BENITEZ
United States District Court Judge