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

WILLIAM MURRAY, JR.,

Plaintiff,

v.

THE ELATIONS COMPANY, LLC,
et al.,

Defendants.

Case No. 13-cv-02357-BAS(WVG)

**ORDER GRANTING
DEFENDANTS' MOTION TO
DISMISS WITH LEAVE TO
AMEND**

(ECF No. 9)

On October 1, 2013, Plaintiff William Murray Jr. ("Plaintiff") commenced this class action arising out of the advertising and sales of a glucosamine- and chondroitin-based health supplement against The Elations Company, LLC and Beverages Holdings, LLC (collectively, "Defendants") alleging violations of California's Consumers Legal Remedies Act, Cal. Civ. Code §§ 1750 *et seq.* ("CLRA") and Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200, *et seq.* ("UCL"), and breach of express warranty. Defendants now move to dismiss Plaintiff's Complaint ("Complaint") under Federal Rules of Civil Procedure 8(a), 9(b), and 12(b)(6).

1 The Court finds this motion suitable for determination on the papers
2 submitted and without oral argument. *See* Civ. L.R. 7.1(d)(1). For the following
3 reasons, the Court **GRANTS** Defendants’ motion to dismiss **WITH LEAVE TO**
4 **AMEND**.

5 **I. BACKGROUND**

6 Plaintiff alleges in the Complaint that Defendants “distribute, market, and sell
7 ‘Elations’ a line of Glucosamine- and Chondroitin-based supplements that
8 purportedly provide a variety of health benefits focused on improving joint health,
9 mobility, flexibility, and lubrication.” (Complaint at ¶¶ 1, 14.) According to
10 Plaintiff, he “purchased Defendants’ Elations products from time to time” for
11 “approximately two years leading up to May 2013.” (*Id.* at ¶ 11.) Plaintiff alleges
12 that “[d]uring those times, and on May 15, 2013, he was exposed to, read and relied
13 upon Defendants’ representations regarding the joint-health benefits of the Elations
14 products by reading the Elations product label in a Ralph’s store near his home in
15 Laguna Hills, California.” (*Id.*) According to Plaintiff, he also made “additional
16 purchases of the Elations products” at “various stores in Orange County, California.”
17 (*Id.*)

18 Plaintiff contends that he purchased the Elations products “[i]n reliance on the
19 claims listed on the product label...and specifically those claims listed on the
20 product label, that Elations would give him ‘healthier joints’ and ‘improve joint
21 comfort.’” (*Id.*) Plaintiff alleges he “purchased the product believing it would
22 provide the advertised joint-health benefits and improve his joint soreness and
23 comfort.” (*Id.*) Plaintiff contends he “consumed the product regularly for several
24 days, but did not experience the intended, advertised benefits.” (*Id.*) Plaintiff
25 further alleges he purchased the product at Ralphs for approximately \$8.65 and spent
26 “approximately the same amount on other occasions at various stores.” (*Id.*)

27 Plaintiff additionally alleges that Defendants presently offer two forms of the
28 Elations product – a pre-made liquid version and a pre-mixed powder version –

1 online and in stores. (*Id.* at ¶¶ 15-16.) Plaintiff alleges that Elations’ product label
2 for both versions represents that Elations “Helps Improve Your Joint Comfort” and
3 “Helps Improve Your Joint Flexibility” and that he relied on these representations.
4 (*Id.*; *see also* ¶¶ 4, 11, 23-25, Ex. A.) Plaintiff also alleges that since the launch of
5 Elations in 2004, “Defendants have consistently conveyed the message to consumers
6 throughout California that the Elations products will reduce joint pain and increase
7 ‘joint comfort’ and ‘joint flexibility.’” (*Id.* at ¶ 17; *see also* ¶¶ 23-25.) Plaintiff
8 further alleges that Elations’ website and television commercials “repeat and
9 reinforce” the joint-health statements made on the packaging and labeling, including
10 one commercial that represents Elations is “[c]linically proven to improve joint
11 comfort in as little as 6 days” and another commercial that claims Elations “renews
12 cartilage; cushions joints; improves flexibility.” (*Id.* at ¶¶ 26-27.)

13 Plaintiff also contends that while Elations contains more than two ingredients,
14 the two “primary active ingredients” which “Defendants both prominently display
15 on its packaging and diligently promote as providing the purported joint-health
16 benefits” are glucosamine and chondroitin. (*Id.* at ¶¶ 17-19.) Plaintiff alleges that
17 while the “minor ingredients are also not effective in providing the joint-health
18 benefits represented by Defendants,” “the focus is on the uniform false and
19 deceptive representations and omissions that Defendants make about glucosamine
20 and chondroitin on the package labeling of each Elations product.” (*Id.* at ¶ 18.)
21 Plaintiff contends that contrary to the stated representations on the Elations labeling
22 and packaging, there is “no competent scientific evidence” and “Defendants do not
23 possess (and have not possessed) competent scientific evidence” that taking
24 glucosamine and chondroitin, “together or in isolation” can provide the advertised
25 joint-health and cartilage benefits, including relieving the major symptoms of
26 arthritis or any other joint-related ailments. (*Id.* at ¶¶ 21-22, 28-29.) In support of
27 his position, Plaintiff cites numerous studies which he alleges “confirm that the
28

1 representations made on the Elations product label...are false and misleading.” (*Id.*
2 at ¶¶ 30-52.)

3 On October 1, 2013, Plaintiff commenced this class action. In his Complaint,
4 Plaintiff asserts three claims for: (1) violation of the CLRA, (2) violation of the
5 UCL, and (3) breach of express warranty. Defendants now move to dismiss the
6 Complaint under Federal Rules of Civil Procedure 8(a), 9(b), and 12(b)(6). Plaintiff
7 opposes.

8 **II. LEGAL STANDARD**

9 Federal Rule of Civil Procedure 8(a) requires a plaintiff to plead a claim with
10 enough specificity to “give the defendant fair notice of what the ... claim is and the
11 grounds upon which it rests.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)
12 (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). A motion to dismiss pursuant
13 to Rule 12(b)(6) of the Federal Rules of Civil Procedure tests the legal sufficiency of
14 the claims asserted in the complaint. Fed. R. Civ. P. 12(b)(6); *Navarro v. Block*, 250
15 F.3d 729, 732 (9th Cir. 2001). In considering such a motion, the court must accept
16 all allegations of material fact pleaded in the complaint as true and must construe
17 them and draw all reasonable inferences from them in the light most favorable to the
18 nonmoving party. *Cahill v. Liberty Mutual Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir.
19 1996). To avoid a Rule 12(b)(6) dismissal, a complaint need not contain detailed
20 factual allegations, rather, it must plead “enough facts to state a claim to relief that is
21 plausible on its face.” *Twombly*, 550 U.S. at 570. “A claim has facial plausibility
22 when the plaintiff pleads factual content that allows the court to draw the reasonable
23 inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*,
24 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 556).

25 “[A] plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to
26 relief’ requires more than labels and conclusions, and a formulaic recitation of the
27 elements of a cause of action will not do.” *Twombly*, 550 U.S. at 555 (quoting
28 *Papasan v. Allain*, 478 U.S. 265, 286 (1986) (alteration in original)). Furthermore, a

1 court need not accept “legal conclusions” as true. *Iqbal*, 556 U.S. at 678. Despite
2 the deference the court must pay to the plaintiff’s allegations, it is not proper for the
3 court to assume that “the [plaintiff] can prove facts that [he or she] has not alleged or
4 that the defendants have violated the...laws in ways that have not been alleged.”
5 *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459
6 U.S. 519, 526 (1983).

7 As a general rule, a court freely grants leave to amend a complaint which has
8 been dismissed. Fed. R. Civ. P. 15(a). However, leave to amend may be denied
9 when “the court determines that the allegation of other facts consistent with the
10 challenged pleading could not possibly cure the deficiency.” *Schreiber Distrib. Co.*
11 *v. Serv-Well Furniture Co., Inc.*, 806 F.2d 1393, 1401 (9th Cir. 1986).

12 **III. DISCUSSION**

13 **A. Incorporation by Reference**

14 As an initial matter, Defendants request that the Court consider Elations’
15 entire packaging under the “incorporation by reference” doctrine. (ECF No. 9-1
16 (“Mot.”) at p. 4, n. 1.) Defendants argue that the entire packaging should be
17 considered in light of Plaintiff’s allegations that he “read and relied upon”
18 Defendants’ statements on the packaging. (*Id.* (citing Complaint at ¶ 11).) In
19 support of this request, Defendants attach a copy of the Elations product packaging
20 that has been in use since August 26, 2010 to their motion to dismiss. (*Id.*; *see also*
21 ECF No. 9-3 (“Klene Decl.”) at ¶ 3, Ex. A.)

22 Generally, courts may not consider material outside the complaint when ruling
23 on a motion to dismiss. *Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.*, 896
24 F.2d 1542, 1555 n.19 (9th Cir. 1990). However, documents specifically identified in
25 the complaint whose authenticity is not questioned by the parties may also be
26 considered under the “incorporation by reference” doctrine. *Fecht v. Price Co.*, 70
27 F.3d 1078, 1080 n.1 (9th Cir. 1995) (superseded by statutes on other grounds); *see*
28 *also Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005). Moreover, the court

1 may consider the full text of those documents even when the complaint quotes only
2 selected portions. *Id.* If a defendant offers such a document, “the district court may
3 treat such a document as part of the complaint, and thus may assume that its contents
4 are true for purposes of a motion to dismiss under Rule 12(b)(6).” *U.S. v. Ritchie*,
5 342 F.3d 903, 908 (9th Cir. 2003).

6 In his Complaint, Plaintiff alleges that “[f]or approximately two years leading
7 up to May 2013, [he] purchased Defendants’ Elations products from time to time.”
8 (Complaint at ¶ 11.) Plaintiff does not identify which Elations product or products –
9 the liquid or powder version – he purchased and used. He simply alleges that “he
10 was exposed to, read and relied upon Defendants’ representations...by reading the
11 Elations product label,” and “[i]n reliance on the claims listed on the product
12 label...purchased the Elations product.” (*Id.*) Plaintiff claims he specifically relied
13 upon the claims listed on the product label that Elations would give him “healthier
14 joints” and “improve joint comfort.” (*Id.*) Plaintiff further contends that “the
15 advertising and marketing messages for [both] products are nearly identical.” (*Id.* at
16 ¶ 15.)

17 Plaintiff attaches as Exhibit A to his Complaint incomplete copies of various
18 labels which have been used for the liquid and powder versions of Elations. (*Id.* at
19 ¶¶ 2, 4, 15, 17, 23, Ex. A.) The labels appear to have changed over time. (*Cf. id.* at
20 Ex. A, p. 1 and p. 2.) Plaintiff acknowledges the variation, noting that “Defendants
21 further warranted *at some point* during the class period that the claimed benefits
22 could be received in as little as 6 days.” (*Id.* at p. 2 (emphasis added).) While
23 Exhibit A only shows the front label on the liquid version, and front and partial back
24 label of the powder version, Plaintiff describes all sides of the various labels in his
25 Complaint. (*Id.* at ¶¶ 23-25.) Plaintiff alleges that the product packaging makes the
26 following representations:

- 27 • “Healthier Joints;”
- 28 • “Improves Joint Comfort in 6 Days;”

- 1 • “Improves Joint Comfort When Used Everyday;”
- 2 • “Helps Improve Your Joint Comfort;” and
- 3 • “Helps Improve Your Joint Flexibility.”

4 (*Id.* at ¶¶ 5, 23-25, Ex. A).

5 The label attached by Defendants to their motion to dismiss appears to be
6 identical to at least one version of the label referenced in and attached to the
7 Complaint.¹ Plaintiff also does not contest the authenticity of the label attached by
8 Defendants. Therefore, the Court will take into account the label attached to
9 Defendants’ motion to dismiss under the incorporation by reference doctrine.

10 **B. Judicial Notice**

11 Defendants also request that the Court take judicial notice of two judicial
12 opinions issued in *McCrary v. The Elations Co., LLC*, No. EDCV 13-0242 JGB
13 (OPx) (C.D. Cal.) (“*McCrary*”). (ECF No. 9-2.) When ruling on a Rule 12(b)(6)
14 motion to dismiss, courts may consider material properly subject to judicial notice
15 without converting the motion into one for summary judgment. *Barron v. Reich*, 13
16 F.3d 1370, 1377 (9th Cir. 1994). Under Rule 201 of the Federal Rules of Evidence,
17 Courts may take judicial notice of matters of public record, including judicial
18 opinions. *Lee v. City of Los Angeles*, 250 F.3d 668, 690 (9th Cir. 2001).
19 Accordingly, the Court finds it appropriate to take judicial notice of the two opinions
20 issued in *McCrary*.²

21 **C. Plaintiff’s UCL and CLRA Claims**

22 Defendants move to dismiss Plaintiff’s UCL and CLRA claims on the basis
23 that the Complaint does not *plausibly* plead that the statements in Elations
24 advertising are false. (Mot. at pp. 9-14.) Defendants argue Plaintiff fails (1) to
25

26 ¹ The label attached to Defendants’ motion to dismiss does not include
27 the statement: “Improves Joint Comfort in 6 Days.” (*See* ECF No. 9-3.)

28 ² However, the Court will hereinafter refer to the Westlaw citations for
these opinions.

1 allege any scientific studies that address all of the active ingredients in Elations—
2 glucosamine, chondroitin, boron, and calcium; and (2) to link his alleged studies
3 about osteoarthritis to Defendants’ actual representations. (*Id.* at pp. 13-14.) In
4 other words, the Complaint fails to link the results of the scientific studies Plaintiff
5 cites to “confirm that the representations made on the Elations product label...are
6 false and misleading” with Defendants’ advertisements. (Complaint at ¶ 30; Mot. at
7 pp. 9-14.)

8 The UCL prohibits any “any unlawful, unfair or fraudulent business act or
9 practice.” Cal. Bus. & Prof. Code § 17200. The UCL incorporates other laws and
10 treats violations of those laws as unlawful business practices independently
11 actionable under state law. *Chabner v. United Omaha Life Ins. Co.*, 225 F.3d 1042,
12 1048 (9th Cir. 2000). Violation of almost any federal, state or local law may serve
13 as the basis for a UCL claim. *Saunders v. Super. Court*, 27 Cal.App.4th 832, 838–
14 39 (1994). In addition, a business practice “may be unfair or fraudulent in violation
15 of the UCL even if the practice does not violate any law.” *Olszewski v. Scripps*
16 *Health*, 30 Cal.4th 798, 827 (2003). Plaintiff here pleads each prong of the UCL.
17 He alleges that Defendants acted unlawfully by making representations and
18 omissions of material facts in violation of California Civil Code sections 1572
19 (actual fraud), 1573 (constructive fraud), 1709 (fraudulent deceit), and 1711 (deceit
20 with intent to defraud), California Business and Professions Code section 17500, *et*
21 *seq.* (False Advertising Law), the CLRA, and the common law. (Complaint at ¶
22 76.) Based on the same conduct, Plaintiff further alleges that Defendants’ “acts,
23 omissions, misrepresentations, practices and nondisclosures” constitute unfair
24 business acts and practices. (*Id.* at ¶¶ 78-79.) Lastly, Plaintiff alleges that
25 Defendants’ “claims, nondisclosures and misleading statements” are false,
26 misleading and/or likely to deceive the consuming public, and Defendants’ labeling
27 and packaging constitutes unfair, deceptive, untrue and misleading advertising. (*Id.*
28 at ¶¶ 81-82.)

1 Plaintiff also asserts a claim for a violation of the CLRA. He alleges
2 Defendants violated and continue to violate the CLRA by engaging in the following
3 practices proscribed by California Civil Code § 1770(a):

4 (5) Representing that [the Products] have...approval,
5 characteristics,...uses [and] benefits . . . which [they do] not have...[;]

6 (7) Representing that [the Products] are of a particular standard,
7 quality or grade...if [they are] of another[;]

8 (9) Advertising goods... with intent not to sell them as advertised[;
9 and]

10 (16) Representing that [the Products have] been supplied in
11 accordance with a previous representation when [they have] not.

12 (Complaint at ¶ 67.)

13 In order to sufficiently plead a claim for false and misleading advertising
14 under the UCL and CLRA, Plaintiff must plausibly allege that the claims in
15 Defendants' marketing or advertising are false or misleading. *Williams v. Gerber*
16 *Prods. Co.*, 552 F.3d 934, 938 (9th Cir. 2008) (claims under the UCL and CLRA are
17 governed by the "reasonable consumer test," which requires a showing that members
18 of the public are likely to be deceived by the subject representation); *Nat'l Council*
19 *Against Health Fraud, Inc. v. King Bio Pharm., Inc.*, 107 Cal.App.4th 1336, 1342
20 (2003). A "naked assertion that the representation is misleading is nothing more
21 than a legal conclusion," which the court need not accept as true. *Otto v. Abbott*
22 *Labs., Inc.*, 2013 U.S. Dist. LEXIS 53287, at *8 (C.D. Cal. Mar. 15, 2013); *Iqbal*,
23 556 U.S. at 678. For the reasons below, the Court finds that Plaintiff fails, in part, to
24 meet this pleading threshold.

25 Plaintiff alleges Defendants made the following false or misleading statements
26 on the Elations products labels: (1) "Healthier Joints;" (2) "Improves Joint Comfort
27 in 6 Days;" (3) "Improves Joint Comfort When Used Everyday;" (4) "Helps
28 Improve Your Joint Comfort;" and (5) "Helps Improve Your Joint Flexibility."

1 (Complaint at ¶¶ 2, 4-5, 17, 23-25, Ex. A.) Plaintiff further alleges that Defendants
2 made the additional following misrepresentations regarding Elations in other forms
3 of advertising, including its website and television commercials: (1) Reduces joint
4 pain; (2) “Clinically proven to improve joint comfort in as little as 6 days;” (3)
5 “Research indicates that taking 1,500 mg of glucosamine and 1,200 mg of
6 chondroitin daily can help improve joint function;” (4) “[T]he ingredients in Elations
7 are known to actually help renew joint cartilage, cushion joints and improve joint
8 flexibility;” and (5) Elations “renews cartilage; cushions joints; improves
9 flexibility.” (*Id.* at ¶¶ 4, 17, 26-27).

10 To support his claim that these statements are false and misleading, Plaintiff
11 cites to numerous scientific studies. (Complaint at ¶¶ 30-51.) These studies can be
12 broken down into several categories: (1) studies regarding the effect of glucosamine,
13 alone, or in combination with chondroitin, in the treatment of osteoarthritis (*id.* at ¶¶
14 31, 33-41, 46, 48, 50); (2) studies regarding the effect of glucosamine, alone, or in
15 combination with chondroitin, on the restoration or regeneration of cartilage or a
16 reduced rate of cartilage degeneration (*id.* at ¶¶ 32, 36, 42-44); (3) studies regarding
17 the effect of glucosamine, alone, or in combination with chondroitin, in the
18 maintenance of joints (*id.* at ¶¶ 45, 51); (4) studies regarding the effect of
19 glucosamine on chronic low back pain (*id.* at ¶ 47); and (5) a study concluding that
20 “regardless of the formulation used, no marginal beneficial effects were observed as
21 a result of low glucosamine bioavailability” (*id.* at ¶ 49).

22 In his Complaint, Plaintiff acknowledges there are two studies “purporting to
23 claim that the ingestion of glucosamine can affect the growth or deterioration of
24 cartilage,” but attempts to discredit them on the basis that they were both sponsored
25 by a glucosamine supplement manufacturer, the methodologies used had inherently
26 poor reproducibility, and they did not analyze glucosamine *hydrochloride* which is
27 the form of glucosamine found in Elations. (*Id.* at ¶ 52.) Plaintiff therefore contends
28 that these two studies are unreliable and cannot be extrapolated to Elations. (*Id.*)

1 **1. *Claims Regarding Healthier Joints, Reducing Pain, Improving***
2 ***Joint Comfort and Flexibility***

3 Based on the cited studies, the Complaint fails to establish a plausible basis
4 for alleging that Elations’ statements regarding healthier joints, reducing pain, and
5 improving joint comfort and flexibility³ are false and misleading. In other words,
6 Plaintiff does not allege facts that plausibly support the conclusion that Elations does
7 not deliver these benefits to consumers. As argued by Defendants, with regard to
8 these claims, Plaintiff’s Complaint suffers several of “the same defects as the
9 complaints in *Eckler, Padilla, Otto, and McCrary.*” (Mot. at p. 13.)

10 In *McCrary v. Elations Co., LLC*, 2013 WL 6402217 (C.D. Cal. Apr. 24,
11 2013), a class action similarly alleging misrepresentations in Elations advertising,
12 the court found that the first amended complaint failed to establish a plausible basis
13 for the false or misleading nature of Elations advertising claims regarding joint
14 comfort, flexibility, and health because “[a]ll of the studies Plaintiff cites examine
15 whether [glucosamine hydrochloride] and/or [chondroitin sulfate] are effective in
16 treating osteoarthritis.” *Id.* at *3. Because “none of the marketing or advertising
17 claims challenged by Plaintiff concern osteoarthritis,” and “Elations’ packaging
18 explicitly states that the product ‘is not intended to diagnose, treat, cure, or prevent
19 any disease,’” the studies do not plausibly demonstrate that Elations does not
20 improve joint comfort, flexibility, or health. *Id.*; see also *McCrary v. Elations Co.,*
21 *LLC*, 2013 WL 6403073, at *9 (C.D. Cal. July 12, 2013); *Eckler v. Wal-Mart Stores,*

23 ³ These representations include the following statements found on
24 Elations’ packaging: (1) “Healthier Joints;” (2) “Improves Joint Comfort in 6 Days;”
25 (3) “Improves Joint Comfort When Used Everyday;” (4) “Helps Improve Your Joint
26 Comfort;” and (5) “Helps Improve Your Joint Flexibility.” (Complaint at ¶¶ 2, 4-5,
27 17, 23-25, Ex. A.) They also include the following statements Plaintiff alleges are
28 in other forms of Elations’ advertising: (1) reduces joint pain; (2) “[c]linically
proven to improve joint comfort in as little as 6 days;” (3) “the ingredients in
Elations are known to actually help ... cushion joints and improve joint flexibility;”
and (4) Elations “cushions joints; improves flexibility.” (*Id.* at ¶¶ 4, 17, 26-27).

1 *Inc.*, 2012 WL 5382218, at *6-7 (S.D. Cal. Nov. 1, 2012) (finding osteoarthritis
2 studies cited in complaint do not lend facial plausibility to claims that product is
3 false or misleading because they do not address the more general claim that
4 glucosamine is good for the body’s joints); *Padilla v. Costco Wholesale Corp.*, 2013
5 WL 195769, at *3 (N.D. Ill. Jan. 16, 2013) (finding studies regarding the
6 ineffectiveness of glucosamine and chondroitin in treatment of osteoarthritis to be
7 inapplicable where product label “does not claim to be effective for treatment of
8 osteoarthritis”). The same is true in this case. Plaintiff does not allege in his
9 Complaint that Elations made any representations concerning osteoarthritis and the
10 product packaging explicitly states that the product is not intended to diagnose, treat,
11 cure, or prevent any disease, such as osteoarthritis. (*See* Complaint at Ex. A; Klene
12 Decl. at Ex. A.) Therefore, the osteoarthritis studies do not lend plausibility to
13 Plaintiff’s claims.

14 Plaintiff attempts to distinguish his Complaint by arguing that not all of the
15 studies cited address the effectiveness of glucosamine and/or chondroitin in treating
16 osteoarthritis. (Opp. at p. 7.) He argues that, unlike the plaintiffs in *Eckler*, *Padilla*,
17 and *McCrary*, he cites studies addressing “Defendants’ general claims that
18 glucosamine is good for the body’s joints and renews cartilage.” (*Id.* at p. 7, lines
19 13-14.) Plaintiff further argues Defendants have “overstated the importance of
20 minor ingredients in the Elations products.” (*Id.* at p. 1.) He contends that
21 Defendants’ joint health-benefit claims are false and misleading because the cited
22 studies have “found no causative link between the *key active ingredients* present in
23 the Elations products and joint renewal, mobility, and rejuvenation.” (*Id.* at p. 2
24 (emphasis added).) The Court is not persuaded by these arguments.

25 Contrary to Plaintiff’s contention, Defendants do not generally claim that
26 glucosamine, standing alone, is good for the body’s joints and renews cartilage. As
27 alleged in the Complaint, Defendants claim that *Elations* provides certain joint
28 benefits. (Complaint at ¶¶ 2, 4-5, 17, 23-275, Ex. A.) As courts have held in similar

1 cases, the cited studies must have a bearing on the truthfulness of the actual
2 representations made by Defendants. *See Otto*, 2013 U.S. Dist. LEXIS 53287, at
3 *24 (finding none of cited studies “are apposite as they fail to test the precise
4 combination of ingredients in the Products”); *Eckler*, 2012 WL 5382218, at *6
5 (finding cited studies problematic because none of them address the specific product
6 at issue which consisted of a combination of eleven ingredients); *McCrary*, 2013
7 WL 6402217 at *4 (finding claims on Elations’ packaging cannot be extrapolated to
8 reference osteoarthritis); *Padilla*, 2013 WL 195769, at *3 (finding plaintiff failed to
9 make any connection between the findings and conclusions of the cited studies and
10 the representations appearing on the product label where none of the studies assessed
11 the effectiveness of the same combination of ingredients found in the product). None
12 of the studies cited in the Complaint test Elations or the same combination of
13 ingredients found in Elations, and therefore do not bear on the truthfulness of the
14 representations as to Elations. Accordingly, the Court finds that Plaintiff fails to
15 plausibly plead a claim under the UCL or CLRA as to Defendants’ representations
16 regarding healthier joints, reducing pain, and improving joint comfort and
17 flexibility.⁴

18 **2. Claims Regarding (1) Glucosamine and Chondroitin and (2)**
19 **Renewal of Joint Cartilage**

20 The Complaint does, however, establish a plausible basis for alleging that the
21 following representations by Defendants are false and misleading: (1) “[r]esearch
22

23 ⁴ “Claims that rest on a lack of substantiation, instead of provable
24 falsehood, are not cognizable under the California consumer protection laws.”
25 *Bronson v. Johnson & Johnson, Inc.*, 2013 WL 1629191, at *8 (N.D. Cal. Apr. 16,
26 2013) (citing *In re Clorox Consumer Litig.*, 2012 WL 3642263, at *4 (N.D.Cal.
27 Aug.24, 2012) (collecting cases)). “A claim can survive a lack of substantiation
28 challenge by, for example, alleging studies showing that a defendant’s statement is
false.” *Id.* (citing *In re Clorox Consumer Litig.*, 2012 WL 3642263, at *5). “In
contrast, a plaintiff’s reliance on a lack of scientific evidence or inconclusive, rather
than contradictory, evidence is not sufficient to state a claim.” *Id.*

1 indicates that taking 1,500 mg of glucosamine and 1,200 mg of chondroitin daily can
2 help improve joint function;” (2) “the ingredients in Elations are known to actually
3 help renew joint cartilage;” and (3) Elations “renews cartilage.” (See Complaint at ¶¶
4 4, 26-27.) Construing the cited studies in the light most favorable to Plaintiff, the
5 Court finds that the cited studies may have a bearing on the truthfulness of these
6 representations.

7 Plaintiff cites in the Complaint to a European Food Safety Authority opinion
8 from 2009 concluding that “a cause and effect relationship has not been established
9 between the consumption of glucosamine (either as glucosamine hydrochloride or as
10 glucosamine sulphate), either alone or in combination with chondroitin sulphate, and
11 the maintenance of normal joints.” (*Id.* at ¶ 45.) While the Complaint does not
12 detail the specifics of the study, the Court finds the allegation bears on the
13 truthfulness of the claim that “[r]esearch indicates that taking 1,500 mg of
14 glucosamine and 1,200 mg of chondroitin daily can help improve joint function” (*id.*
15 at ¶ 26). See *McCrary*, 2013 WL 6402217, at *5 (finding that claims which single
16 out the effectiveness of glucosamine and chondroitin can be refuted with studies
17 examining those ingredients).

18 The Complaint also cites to studies bearing on the truthfulness of the claim on
19 Elations’ website and in one of its commercials that the ingredients in Elations are
20 known to actually help renew joint cartilage. Specifically, Plaintiff cites a February
21 2004 study in which the authors concluded that “adult cartilage cannot be
22 regenerated.” (Complaint at ¶ 32.) Again, while the Complaint does not detail the
23 specifics of the study, the Court finds the allegation bears on the truthfulness of the
24 claims that “the ingredients in Elations are known to actually help renew joint
25 cartilage” and Elations “renews cartilage” (*id.* at ¶¶ 4, 26-27).

26 Accordingly, the Court finds Plaintiff has plausibly alleged that these
27 particular Defendants’ claims are false and misleading under the UCL and CLRA.

28 ///

1 **3. *Standing***

2 Although Plaintiff has plausibly alleged that certain representations by
3 Defendants’ are false and misleading, the Court’s inquiry does not end there.
4 Defendants argue that even if Plaintiff has plausibly alleged the representations
5 made on the Elations website and in its commercials are false and misleading,
6 Plaintiff lacks standing to pursue his UCL and CLRA claims with regard to
7 Defendants’ representations in television and internet advertisements, as Plaintiff did
8 not allege that he saw, heard, or in any way relied upon these statements before
9 purchasing Elations products. (Mot. at p. 13, n. 5; ECF No. 12 (“Reply”) at pp. 3-7.)
10 In response, Plaintiff argues that he has “standing to pursue claims based upon
11 advertisements other than the ones he saw.” (Opp. at p. 11, lines 14-15.)

12 To establish standing under the UCL, a plaintiff must “(1) establish a loss or
13 deprivation of money or property sufficient to qualify as injury in fact, i.e., *economic*
14 *injury*, and (2) show that that economic injury was the result of, i.e., *caused by*, the
15 unfair business practice or false advertising that is the gravamen of the claim.”
16 *Kwikset Corp. v. Super. Ct.*, 51 Cal.4th 310, 322 (2011) (emphasis in original); *see*
17 *also* Cal. Bus. & Prof. Code § 17204. This requires a “showing of a causal
18 connection or reliance on the alleged misrepresentation.” *Id.* at 326 (citations
19 omitted); *In re Tobacco II Cases*, 46 Cal. 4th 298, 306 (2009) (“[A] class
20 representative proceeding on a claim of misrepresentation as the basis of his or her
21 UCL action must demonstrate actual reliance on the allegedly deceptive or
22 misleading statements, in accordance with well-settled principles regarding the
23 element of reliance in ordinary fraud actions.”); *Laster v. T-Mobile USA, Inc.*, 407
24 F.Supp.2d 1181, 1194 (S.D. Cal. 2005).

25 Similarly, to establish standing under the CLRA, which declares certain
26 practices in the sale of goods or services to consumers to be unlawful, a plaintiff
27 must allege that he was exposed to an unlawful practice and that the defendant’s
28 conduct resulted in a “tangible increased cost or burden to the consumer.” *Meyer v.*

1 *Sprint Spectrum LP*, 45 Cal.4th 634, 641-43 (2009). This requires showing “not
2 only that a defendant’s conduct was deceptive[,] but that the deception caused them
3 harm.” *In re Vioxx Class Cases*, 180 Cal.App.4th 116, 129 (2009) (citation
4 omitted); *see also Mass. Mutual Life Ins. Co. v. Super. Ct.*, 97 Cal.App.4th 1282,
5 1292 (2002) (finding the “as a result of” language in Cal. Civ. Code, § 1780(a)
6 imposes a causation requirement). In a claim for false advertising, a plaintiff suing
7 under the CLRA for misrepresentations in connection with a sale must plead and
8 prove that he relied on a material misrepresentation. *Cattie v. Wal-Mart Stores*, 504
9 F.Supp.2d 939, 946 (S.D. Cal. 2007) (citing *Caro v. Procter & Gamble Co.*, 18
10 Cal.App.4th 644, 668 (1993)); *Tucker v. Pacific Bell Mobile Servs.*, 208 Cal.
11 App.4th 201, 221 (2012) (“[A]ctual reliance must be established for an award of
12 damages [on a CLRA claim.]”).

13 The Complaint does not allege that Plaintiff relied on any representations on
14 the Elations’ website, online promotional materials, or in its commercials or
15 demonstrate any causal connection. Indeed, Plaintiff does not allege that he heard or
16 saw an Elations commercial or visited the Elations website prior to purchasing
17 Elations products. Instead, the Complaint only alleges that Plaintiff relied on the
18 product packaging. (Complaint at ¶¶ 11, 30, 53.) In his Opposition, Plaintiff does
19 not argue that he personally relied on representations in Elations’ website, online
20 promotional materials, or commercials. Rather, he contends that he “has standing to
21 pursue claims based upon advertisements other than the ones he saw.” (Opp. at p.
22 11, lines 15-16.)

23 In support of this argument, Plaintiff cites to a Supreme Court of California
24 case, *In re Tobacco II Cases*, for the proposition that “a plaintiff need [not]
25 demonstrate individualized reliance on specific misrepresentations to satisfy the
26 reliance requirement.” *In re Tobacco II Cases*, 46 Cal. 4th at 327. Rather, “a
27 presumption, or at least an inference, of reliance arises wherever there is a showing
28 that a misrepresentation was material,” *i.e.*, if “a reasonable man would attach

1 importance to its existence or nonexistence in determining his choice of action in the
2 transaction in question.” *Id.* The Court does not find Plaintiff’s argument
3 persuasive on the facts of this case.

4 In *In re Tobacco II Cases*, the Supreme Court of California does not absolve a
5 plaintiff from alleging that a defendant’s alleged misrepresentation was an
6 immediate cause of the injury-producing conduct. *Id.* at 326-28. While it is not
7 necessary that a plaintiff alleges the misrepresentation was the “sole or even the
8 predominant or decisive factor influencing his conduct,” he must allege that the
9 “representation has played a substantial part, and so had been a substantial factor, in
10 influencing his decision.” *Id.* at 326. Moreover, while a plaintiff need not “plead
11 and prove individualized reliance on specific misrepresentations or false statements
12 where...those misrepresentations and false statements were part of an extensive and
13 long-term advertising campaign,” a plaintiff is still required to “plead and prove
14 actual reliance to satisfy the standing requirement of [the UCL].” *Id.* at 327-28. In
15 other words, a class representative does not need to plead or prove with “an
16 unrealistic degree of specificity that the plaintiff relied on particular advertisements
17 or statements,” but he still must plead reliance. *Id.* at 328.

18 Plaintiff argues that he has alleged an extensive and long-term advertising
19 campaign, thus he is not required to plead individualized reliance on a specific
20 misrepresentation. (Opp. at p. 12; Complaint at ¶ 2.) However, “*Tobacco II* does
21 not stand for the proposition that a consumer who was never exposed to an alleged
22 false or misleading advertising or promotional campaign is entitled to [UCL relief].”
23 *Pfizer Inc. v. Superior Ct.*, 182 Cal.App.4th 622, 632 (2010). “Rather, *In re*
24 *Tobacco II* stands for the narrower, and more straightforward proposition that, where
25 a plaintiff has been exposed to numerous advertisements over a period of decades,
26 the plaintiff is not required to plead with an unrealistic degree of specificity [the]
27 particular advertisements and statements that [he or s]he relied upon.” *Kane v.*
28 *Chobani, Inc.*, 2013 WL 5289253, at *9 (N. D. Cal. 2013) (internal quotations and

1 citation omitted). Here, Plaintiff does not allege that he was exposed to the long
2 term advertising campaign. Nor does he allege that he purchased Elations products
3 in reliance on Elations’ website, online promotional materials, and television
4 advertising, but cannot point to an individual advertisement. Rather, he alleges that
5 he relied solely on the representations on the product packaging.

6 Next, Plaintiff argues that the issue of whether he has standing to assert claims
7 for unnamed class members based on misrepresentations he did not view should be
8 addressed at the class certification stage, not on a motion to dismiss. (Opp. at pp.
9 12-15.) He cites to several cases addressing whether a plaintiff has standing to
10 assert claims for unnamed class members based on products he or she did not
11 purchase. (*Id.*) In that situation, “[t]he majority of courts that have carefully
12 analyzed the question hold that a plaintiff may have standing to assert claims for
13 unnamed class members based on products he or she did not purchase so long as the
14 products and alleged misrepresentations are substantially similar.” *Brown v. Hain*
15 *Celestial Group, Inc.*, 913 F.Supp. 2d 881, 890 (N.D. Cal. 2012). However,
16 Defendants argue, and the Court agrees, that the cases cited by Plaintiff are
17 inapposite. (Reply at pp. 4-5.) In each of the cited cases supporting Plaintiff’s
18 argument, the plaintiff had standing in his own right to bring a claim and the only
19 question was whether he could bring substantially similar claims on behalf of others.
20 Here, Plaintiff is required to establish standing in his own right⁵ and he has not done

21
22 ⁵ See e.g., *Mazza v. American Honda Motor Co., Inc.*, 666 F.3d 581,
23 595-96 (9th Cir. 2012) (noting that revised UCL imposes reliance requirement on
24 named plaintiff); *O’Shea v. Littleton*, 414 U.S. 488, 494-95 (1974) (“[I]f none of the
25 named plaintiffs purporting to represent a class establishes the requisite of a case or
26 controversy with the defendants, none may seek relief on behalf of himself or any
27 other member of the class.”); *Warth v. Seldin*, 422 U.S. 490, 502 (1975) (named
28 plaintiffs “must allege and show that they personally have been injured, not that
injury has been suffered by other, unidentified members of the class to which they
belong and which they purport to represent”); Cal. Bus. & Prof. Code §§ 17203–
17204 (authorizing representative UCL claims on behalf of others only if the

1 so. *See McCrary*, 2013 WL 6403073, at *8 (C.D. Cal. July 12, 2013) (“Plaintiff did
2 not actually rely on any website statements and does not have standing to bring
3 [UCL and CLRA] claims based on those statements.”); *Durell v. Sharp Healthcare*,
4 183 Cal. App. 4th 1350, 1363 (2010) (affirming dismissal of UCL claim where
5 plaintiff did not claim that he ever visited the defendant’s website which contained
6 the alleged misrepresentations). Therefore, while Plaintiff has plausibly pled that
7 various statements from Defendants’ website and television commercials are false
8 and misleading, he did not allege in the Complaint that he was exposed to and relied
9 on Defendants’ website, television commercials, or any long-term advertising
10 campaign. Accordingly, the Court finds Plaintiff does not have standing to bring his
11 claims based on those representations under the UCL and CLRA.

12 **D. Plaintiff’s Breach of Express Warranty Claim**

13 To prevail on a breach of express warranty claim, the plaintiff must prove (1)
14 the seller’s statements constitute an affirmation of fact or promise or a description of
15 the goods; (2) the statement was part of the basis of the bargain; and (3) the warranty
16 was breached. *Horvath v. LG Electronics Mobilecomm U.S.A., Inc.*, 2012 WL
17 2861160, at *4 (S.D. Cal. 2012) (citing *Weinstat v. Dentsply Int’l, Inc.*, 180
18 Cal.App.4th 1213, 1227 (2010)). Plaintiff alleges that he formed a contract with
19 Defendants at the time he purchased Elations products. (Complaint at ¶ 86.) He
20 further alleges that the “terms of that contract include the promises and affirmations
21 of fact made by Defendants on the Elations product labels and packages,” and that
22 these representations were express warranties and became part of the basis of the
23 bargain. (*Id.*) Lastly, Plaintiff contends Defendants breached the express warranties
24 “by not providing the Elations products that could provide the benefits” described on
25 the labels and packaging. (*Id.* at 88.) For the reasons discussed already herein,
26 Plaintiff fails to plausibly plead a claim for breach of express warranty.

27
28 claimant meets the standing requirements).

1 In order to plead a breach of express warranty, Plaintiff must allege sufficient
2 facts showing that Defendants' representations are false. *See McKinnis v. Kellogg*
3 *USA*, 2007 WL 4766060, at *5 (C.D. Cal. Sept. 19, 2007) (finding plaintiffs failed to
4 allege sufficient facts to make out a claim for breach of express warranty where the
5 representation was true); *Shein v. Canon U.S.A., Inc.*, 2009 WL 1774287, at *4
6 (C.D. Cal. June 22, 2009) (dismissing breach of express warranty claim where
7 "[e]ven if the statements on the replacement cartridges are warranties that could
8 form the basis for a breach of warranty claim, plaintiffs have failed to allege that any
9 statement made on the packaging or labels of the ink cartridges is inaccurate"); *Tae*
10 *Hee Lee v. Toyota Motor Sales, U.S.A., Inc.*, 2014 WL 211462, at *12 (C.D. Cal.
11 Jan. 9, 2014) (dismissing breach of express warranty claim in part because the
12 marketing brochure contained an unquestionably true statement).


13 As discussed above, Plaintiff has not plausibly alleged that the representations
14 on Elations label and packaging are false or misleading. Accordingly, the Court
15 finds Plaintiff has failed to plausibly plead a breach of warranty claim.

16 **IV. CONCLUSION & ORDER**

17 For the foregoing reasons, the Court **GRANTS WITH LEAVE TO**
18 **AMEND** Defendants' Motion to Dismiss (ECF No. 9).

19 **IT IS SO ORDERED.**

20
21 **DATED: August 4, 2014**


22 **Hon. Cynthia Bashant**
23 **United States District Judge**

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