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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

SANDRA SEEGERT, individually and on
behalf of all other similarly situated,

Plaintiff,

v.

REXALL SUNDOWN, INC.,

Defendant.

Case No.: 17cv1243-JAH (JLB)

ORDER GRANTING DEFENDANT’S
MOTION TO DISMISS (Doc. No. 17)
AND MOTION TO STRIKE (Doc. No.
18)

INTRODUCTION

Pending before the Court are Defendant Rexall Sundown Incorporated’s (“Defendant”) motion to dismiss and motion to strike Plaintiff Sandra Seegert’s (“Plaintiff”) class action complaint (“Complaint”) pursuant to Rules 12(b)(6) and 12(f) of the Federal Rules of Civil Procedure. Doc. Nos. 17, 18. Defendant also requests the Court to take judicial notice of specific documents. Doc. No. 19. Plaintiff filed oppositions to both motions. Doc. Nos. 24, 25. After a careful review of the pleadings filed by both

1 parties, and for the reasons set forth below, the Court **GRANTS** Defendant’s motion to
2 dismiss, motion to strike, and request for judicial notice.

3 **FACTUAL BACKGROUND**

4 Plaintiff alleges Defendant engaged in false and misleading advertising of four Osteo
5 Bi-Flex dietary supplements. Doc. No. 1. at pg. 2. Plaintiff posits that Defendant falsely
6 claims the products promote joint health. Id. Plaintiff contends that on February 20, 2017,
7 Plaintiff purchased one of Defendant’s products, Osteo Bi-Flex Triple Strength, in reliance
8 on the product’s advertising. Id. at pg. 3. Plaintiff alleges the product did not provide
9 “meaningful joint health benefits” and was falsely, deceptively, and misleadingly
10 advertised. Id.

11 Plaintiff argues that Defendant violated three California statutes: (1) California’s
12 Unfair Competition Law, Cal. Bus. & Prof. Code § 17200; (2) California’s Consumers
13 Legal Remedies Act, Cal. Civ. Code § 1750; and California’s False Advertising Law, Cal.
14 Bus. & Prof. Code § 17500. Doc. No. 1 at pgs. 21-27. Plaintiff presents allegations on
15 behalf of herself and a putative class of similarly situated individuals. Id. Specifically,
16 Plaintiff asserts that Defendant falsely advertises four products: Osteo Bi- Flex One Per
17 Day; Osteo Bi-Flex Triple Strength; Osteo Bi-Flex Triple Strength MSM; and Osteo Bi-
18 Flex Triple Strength with Vitamin D. Id. at pgs. 4-5. Plaintiff argues that none of the four
19 products achieve their intended purpose, to support or benefit joint health. Id. Plaintiff
20 requests restitution, disgorgement, injunctive relief, attorney’s fees, and interest on damage
21 awards. Id. at pg. 28.

22 **PROCEDURAL BACKGROUND**

23 Plaintiff filed her Complaint on June 19, 2017, on behalf of herself and a putative
24 class. Doc. No. 1. On August 14, 2017, Defendant filed a motion to dismiss Plaintiff’s
25 Complaint. Doc. No. 17. The same day, Defendant filed a motion to strike. Doc. No. 18.
26 Defendant also filed a request for judicial notice. Doc. No. 19. On October 9, 2017,
27 Plaintiff filed a response in opposition to Defendant’s motion to dismiss. Doc. No. 22. On
28

1 the same day, Plaintiff filed a response in opposition to Defendant’s motion to strike. Doc.
2 No. 24.

3 LEGAL STANDARD

4 **I. Federal Rule of Civil Procedure 12(b)(6)**

5 A motion to dismiss under Rule 12(b)(6) tests the sufficiency of the complaint.
6 Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001). Dismissal is warranted under Rule
7 12(b)(6) where the complaint lacks a cognizable legal theory or fails to allege sufficient
8 facts to support a cognizable legal theory. Li v. Kerry, 710 F.3d 995, 999 (9th Cir. 2013).
9 “To survive a motion to dismiss, a complaint must contain sufficient factual matter,
10 accepted as true, to ‘state a claim to relief that is plausible on its face.’” Ashcroft v. Iqbal,
11 556 U.S. 662, 678 (2009) (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570
12 (2007)). A claim is facially plausible when the factual allegations permit “the court to draw
13 the reasonable inference that the defendant is liable for the misconduct alleged.” Iqbal,
14 556 U.S. at 678. In other words, “the non-conclusory ‘factual content,’ and reasonable
15 inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff
16 to relief.” Moss v. U.S. Secret Serv., 572 F.3d 962, 969 (9th Cir. 2009) (citing Iqbal, 556
17 U.S. at 678). “Determining whether a complaint states a plausible claim for relief will . . .
18 be a context-specific task that requires the reviewing court to draw on its judicial
19 experience and common sense.” Iqbal, 556 U.S. at 679.

20 In reviewing a motion to dismiss under Rule 12(b)(6), a court must assume the truth
21 of all factual allegations and construe the factual allegations in the light most favorable to
22 the nonmoving party. Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336, 337–38 (9th Cir. 1996).
23 However, legal conclusions need not be taken as true merely because they are “cast in the
24 form of factual allegations.” Ileto v. Glock Inc., 349 F.3d 1191, 1200 (9th Cir. 2003). “Nor
25 does a complaint suffice if it tenders ‘naked assertion[s]’ devoid of ‘further factual
26 enhancement.’” Iqbal, 556 U.S. at 678 (citing Twombly, 550 U.S. at 557). The court may
27 consider facts alleged in the complaint, documents attached to the complaint, documents
28 relied upon but not attached to the complaint when authenticity is not contested, and

1 matters of which the court takes judicial notice. Lee v. City of Los Angeles, 250 F.3d 668,
2 688–89 (9th Cir. 2001). If a court determines that a complaint fails to state a claim, the
3 court should grant leave to amend unless it determines that the pleading could not possibly
4 be cured by the allegation of other facts. Doe v. United States, 58 F.3d 494, 497 (9th Cir.
5 1995).

6 **II. Federal Rules of Civil Procedure 8**

7 Rule 8 of the Federal Rules of Civil Procedure provides that in order to state a claim
8 for relief in a pleading it must contain “a short and plain statement of the grounds for the
9 court’s jurisdiction” and “a short and plain statement of the claim showing that the pleader
10 is entitled to relief.” Fed.R.Civ.P. 8(a)(1) & (2). “The pleading standard Rule 8 announces
11 does not require ‘detailed factual allegations,’ but it demands more than an unadorned, the
12 defendant-unlawfully-harmed me accusation.” Iqbal, 556 U.S. at 678 (quoting Twombly,
13 550 U.S. at 555).

14 **III. Federal Rule of Civil Procedure 9(b)**

15 Under Rule 9(b) of the Federal Rules of Civil Procedure, “[i]n alleging fraud or
16 mistake, a party must state with particularity the circumstances constituting fraud or
17 mistake.” Under Ninth Circuit case law, Rule 9(b) imposes two distinct requirements on
18 complaints alleging fraud. First, the basic notice requirements of Rule 9(b) require
19 complaints pleading fraud to “state precisely the time, place, and nature of the misleading
20 statements, misrepresentations, and specific acts of fraud.” Kaplan v. Rose, 49 F.3d 1363,
21 1370 (9th Cir. 1994); see also Vess v. Ciba-Geigy Corp., U.S.A., 317 F.3d 1097, 1106 (9th
22 Cir. 2003) (citation omitted) (stating that a plaintiff must set forth the “who, what, when,
23 where and how” of the alleged misconduct). Second, Rule 9(b) requires that the complaint
24 “set forth an explanation as to why the statement or omission complained of was false or
25 misleading.” Yourish v. California Amplifier, 191 F.3d 983, 993 (9th Cir. 1999) (citation
26 and quotation omitted).

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1 unfair business practice or false advertising that is the mainstay of the claim. See Kwikset
2 Corp. v. Superior Court, 51 Cal.4th 310, 321 (2011); Stearns v. Ticketmaster Corp., 655
3 F.3d 1013 (9th Cir. 2011).

4 The “irreducible constitutional minimum” of Article III standing has three elements.
5 LSO, 205 F.3d at 1152 (internal quotations omitted). First, plaintiff must have suffered
6 “an injury in fact — an invasion of a legally protected interest which is (a) concrete and
7 particularized, and (b) actual and imminent, not conjectural or hypothetical.” Lujan v.
8 Defenders of Wildlife, 504 U.S. 555, 560 (1992) (internal citations and quotations omitted).
9 Second, plaintiff must show a causal connection between the injury and the conduct
10 complained of; i.e., “the injury has to be fairly . . . trace[able] to the challenged action of
11 the defendant, and not . . . th[e] result [of] the independent action of some third party not
12 before the court.” Id. (quoting Simon v. Eastern Ky. Welfare Rights Organization, 426
13 U.S. 26, 41-42 (1976))(alterations in original). Third, it must be “likely,” and not merely
14 “speculative,” that the plaintiff’s injury will be redressed by a favorable decision. Id. at
15 561. If the Court finds plaintiff lacks Article III standing, it must dismiss plaintiff’s claim.
16 Nichols v. Brown, 859 F. Supp. 2d 1118, 1127 (C.D. Cal. 2012).

17 Here, Defendant points out that Plaintiff admits she only relied on an advertisement
18 for one of Defendant’s four products. Doc. No. 17-1 at pgs. 26-27. Defendant argues
19 Plaintiff cannot assert claims for the three other products she did not purchase. Id.
20 Defendant further contends that Plaintiff’s Complaint references advertisements that
21 Plaintiff never read. Id. at pg. 27. For example, Plaintiff challenges three products she
22 never purchased: Osteo Bi-Flex Triple Strength MSM, Osteo Bi-Flex One Per Day, and
23 Osteo Bi-Flex Triple Strength with Vitamin D. Id. at pgs. 26-27. However, Plaintiff never
24 relied on advertisement for these products. Id.

25 Defendant also posits that numerous district courts in the Ninth Circuit now
26 implement a bright line rule where the named plaintiff of a putative class action “cannot
27 expand the scope of his claims to include a product he did not purchase or advertisements
28 relating to a product that he did not rely upon.” Id.; see also Johns v. Bayer Corp., No.

1 09CV1935DMSJMA, 2010 WL 476688 (S.D. Cal. Feb. 9, 2010); Granfield v. NVIDIA
2 Corp., No. C 11-05403 JW, 2012 WL 2847575 (N.D. Cal. July 11, 2012); Hairston v. S.
3 Beach Beverage Co., No. CV 12-1429-JFW DTBX, 2012 WL 1893818 (C.D. Cal. May
4 18, 2012).

5 In response, Plaintiff maintains that she has standing. Doc. No. 22 at pgs. 23-30.
6 Plaintiff argues that while she only purchased one of Defendant’s four products,
7 Defendant’s business practice is consistent across all four products. Id. at pg. 26. Plaintiff
8 contends all four products are advertised in a similar fashion and contain the same main
9 ingredient, glucosamine hydrochloride. Id. Plaintiff also argues that she has standing to
10 seek injunctive relief because fraud impacts the market wholly. Id. at pg. 24. Plaintiff
11 contends she is filing suit on behalf of the class of people impacted by Defendant’s actions.
12 Id. at pg. 26.

13 The Court finds Plaintiff lacks standing to assert a claim in the instant matter. While
14 the standard for reviewing standing at the pleading stage is lenient, the Court reiterates that
15 a plaintiff cannot rely solely on conclusory allegations of injury or ask the court to draw
16 unwarranted inferences in order to find standing. See Schmeir v. U.S. Ct. of Appeals for
17 the Ninth Cir., 279 F.3d 817, 820 (9th Cir. 2001). Plaintiff fails to demonstrate how
18 Defendant’s advertisement of its product, Osteo Bi-Flex Triple Strength, is false or
19 misleading. Plaintiff fails to specifically mention any of the challenged labels in her
20 Complaint. Doc. No. 17-1 at pg. 8. Defendant’s products do not purport to treat
21 osteoarthritis or any other joint-related disease. Id. at pg. 6. Plaintiff also fails to show
22 that her cited scientific studies are relevant or that the active ingredients in Defendant’s
23 products do not deliver promised results. Id. at pgs. 18-23. As to Defendant’s three other
24 products, Plaintiff fails to show how she was injured by products she did not come across
25 or purchase. Plaintiff also fails to demonstrate that she faces “imminent harm” pursuant to
26 the requirements necessary for injunctive relief.

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1 **b. Rule 9(b) Standard**

2 Defendant also argues that Plaintiff’s claims fail because Plaintiff has not plead her
3 claims with the specificity required under Rule 9(b). Doc. No. 17-1 at pgs. 23-25.

4 Claims grounded in fraud must set forth allegations “specific enough to give defendants
5 notice of the particular misconduct . . . so that they can defend against the charge and not
6 just deny that they have done anything wrong.” See Vess v. Ciba-Geigy Corp. USA, 317
7 F.3d 1097, 1103–04, 1108 (9th Cir. 2003) (applying Rule 9(b) when the allegations in the
8 complaint described fraudulent conduct); In re Sony Gaming Networks & Customer Data
9 Sec. Breach Litig., 903 F. Supp. 2d 942, 967, n. 20 (S.D. Cal. 2012) (“Rule 9(b)’s
10 heightened pleading standards apply equally to claims for violation of the UCL . . . that
11 are grounded in fraud”). As noted above, under Rule 9(b) of the Federal Rules of Civil
12 Procedure, “[i]n alleging fraud or mistake, a party must state with particularity the
13 circumstances constituting fraud or mistake.” This requires allegations of fraud to
14 include the “who, what, when, where, and how” of the circumstances giving rise to the
15 claim. Cooper v. Pickett, 137 F.3d 616, 627 (9th Cir. 1997) (citation omitted).

16 Defendant argues that Plaintiff’s Complaint pleads generally vague and conclusory
17 allegations, which fail to identify the “who, what, when, where and how” of Defendant’s
18 misconduct. Doc. No. 17-1 at pgs. 23-24. Defendant argues that Plaintiff fails to allege
19 how Defendant’s advertisement was false or misleading. Id. at pg. 24. Defendant posits
20 that Plaintiff fails to state if she used Defendant’s product; followed the product’s
21 instructions; why she took the product; what she expected from the product; and whether
22 the product was effective. Id.

23 In response, Plaintiff maintains that the Complaint meets the standards of Rule 9(b).
24 Doc. No. 22 at pg. 22. Plaintiff contends she properly alleged deficiencies in the product
25 she purchased; when and where she made this purchase; how Defendant’s false advertising
26 deceived her; and why Defendant’s representations are untrue. Id.

27 The Court finds Plaintiff fails to sufficiently allege the “who, what, where, how and
28 why” of Defendant’s misconduct. The pleadings do not allege with specificity how

1 Defendant misrepresented its product. In addition, the pleadings do not provide specific
2 examples demonstrating Defendant has misrepresented its product. Plaintiff fails to
3 demonstrate that the cited scientific studies are relevant to Defendant’s products. Doc. No.
4 17-1 at pgs. 18-20. Plaintiff also fails to show that Defendant’s products do not achieve
5 the intended purpose. Id. at pgs. 18-23. Thus, the Court finds that Plaintiff’s Complaint
6 does not demonstrate Plaintiff has plead with particularity sufficient to meet the 9(b)
7 heightened standard.

8 **II. Motion to Strike**

9 Defendant moves to strike Plaintiff’s class definition and allegations relating to
10 standing as factually insufficient.¹ Defendant argues that Plaintiff’s class includes putative
11 class members that have already settled their claims against Defendant and thus lack
12 standing. Doc. No. 18-1 at pgs. 9-12.

13 Specifically, Defendant argues that Plaintiff’s class definition includes members that
14 have not been injured and do not have standing to sue. Doc. No. 18-1 at pg. 10. Defendant
15 contends that Plaintiff’s class definition includes individuals that have already settled their
16 case in Pearson v. NBTY Inc., No. 11-cv-7972 (N.D. Ill.). Id. Defendant posits that these
17 individuals from the Pearson settlement lack standing to sue. Id. at pgs. 11-12.

18 In response, Plaintiff states she does not oppose modifying the class definition to
19 exclude all transactions covered by the Pearson settlement. Doc. No. 24 at pg. 2. Plaintiff
20 suggests her class definition can change, including to “[a]ll persons who purchased in the
21 state of California any of the following products between January 19, 2016, and the date
22 of notice of this class action...” Id.²

26 ¹ Because the Court has already addressed Plaintiff’s standing relating to allegations involving products
27 she did not purchase, the Court will solely address Defendant’s motion to strike Plaintiff’s class
28 definition.

² The Court will not accept Plaintiff’s intention to modify the class definition by way of her response.
Any modification should be undertaken in an amended complaint.

1 For the reasons stated in Section I (a) above, Plaintiff cannot assert claims for
2 products she did not purchase regardless of whether members of the putative class
3 participated in the Pearson settlement. Id.

4 Here, Plaintiff fails to prove that all members of her class definition have been
5 injured and/or have standing pursuant to Article III. Members of the class must have the
6 same interest and suffer the same injury as other class members. Fed. R. Civ. P. 23. Thus,
7 the Court **GRANTS** Defendant’s motion to strike the class definition pursuant to FRCP
8 Rule 12(f).

9 **III. Request for Judicial Notice**

10 Defendant filed a request for judicial notice. Doc. No. 19. This Court may take
11 judicial notice of an adjudicative fact “not subject to reasonable dispute because it can
12 be...accurately and readily determined from sources whose accuracy cannot be reasonably
13 questioned.” See Fed. R. Evid. 201; Grason Elec. Co. v. Sacramento Mun. Util. Dist., 571
14 F. Supp. 1504, 1521 (E.D. Cal. 1983).

15 Defendant seeks judicial notice of product labelling and various documents. The
16 documents Defendant submits for judicial notice include packaging and labeling for four
17 Osteo products (Exhibits 1-4) and documents from Pearson (Exhibits 5-14). Doc. No. 19.
18 Because the request of judicial notice is capable of accurate and ready determination from
19 sources whose accuracy cannot be reasonably questioned and the parties do not dispute the
20 authenticity of the document, Defendant’s request for judicial notice is **GRANTED**.

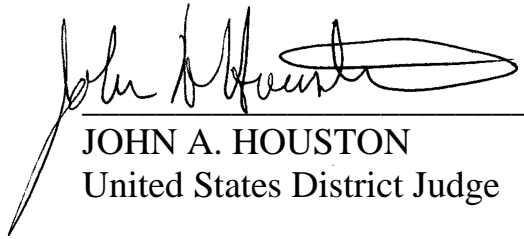
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CONCLUSION AND ORDER

Based on the foregoing reasons, **IT IS HERBEY ORDERED THAT** Defendant’s motion to dismiss Plaintiff’s Complaint (Doc. No. 17) is **GRANTED**, and Plaintiff’s claims are **DISMISSED WITHOUT PREJUDICE**. Accordingly, Defendant’s motion to strike (Doc. No. 18) is **GRANTED** as well. To the extent that Plaintiff is able to cure the noted deficiencies, Plaintiff may file a second amended complaint within **30 days** of this order.

DATED: December 1, 2017



JOHN A. HOUSTON
United States District Judge