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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 ANDREA NATHAN, on behalf of
12 herself, all others similarly situated,
13 Plaintiff,
14 v.
15 VITAMIN SHOPPE, INC.,
16 Defendant.

Case No.: 3:17-cv-01590-BEN-KSC

**ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANT'S
MOTION TO DISMISS
PLAINTIFF'S FIRST AMENDED
COMPLAINT
[Doc. 12]**

17 Defendant Vitamin Shoppe, Inc. moves to dismiss Plaintiff Andrea Nathan's First
18 Amended Complaint. [Doc. 12.] For the reasons that follow, Defendant's motion is
19 **GRANTED IN PART AND DENIED IN PART.**

20 **I. BACKGROUND**

21 On June 26, 2017, Plaintiff filed this action in the San Diego Superior Court,
22 asserting individual and putative class state-law claims for violation of California's Unfair
23 Competition Law, False Advertising Law, Consumer Legal Remedies Act, and for breach
24 of express and implied warranties. On August 25, 2017, Defendant removed the action to
25 this Court based on diversity jurisdiction. [Doc. 1.] On February 20, 2019, the Court
26 granted without prejudice Defendant's motion to dismiss Plaintiff's Complaint, including
27 granting leave to Plaintiff to amend her pleading. [Doc. 10.] Plaintiff then filed a First
28 Amended Complaint ("FAC"), which Defendant now moves to dismiss. [Docs. 11, 12.]

1 According to Plaintiff's FAC, Defendant Vitamin Shoppe distributes, markets, and
2 sells Garcinia Cambogia Extract¹ (the "Product") nationwide, including in California. In
3 February 2017, Plaintiff Andrea Nathan purchased a 180-caplet bottle of the Product from
4 Defendant in San Diego, California for approximately \$20. The Product's label provided
5 promises of "Weight Management" and "Appetite Control," which led Plaintiff to believe
6 "the Product was an effective dietary aid that would aid weight loss" and would help her
7 to manage her weight and control her appetite. [Doc. 11 at ¶¶ 116-118.]

8 Plaintiff alleges "[t]he representations on the Product's label were and are false and
9 misleading, and had the capacity, tendency, and likelihood to confuse or confound Plaintiff
10 and other consumers acting reasonably (including the putative Class) because . . . the
11 Product cannot deliver the purported benefits and is no more effective than a placebo." [*Id.*
12 at ¶ 119.]

13 II. DISCUSSION

14 On a motion to dismiss under Rule 12(b)(6), the Court must accept the Complaint's
15 allegations as true and construe all reasonable inferences in favor of the nonmoving party.
16 *Ashcroft v. Iqbal*, 556 U.S. 662, 664 (2009). To avoid dismissal, Plaintiff's Complaint
17 must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl.*
18 *Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "Threadbare recitals of the elements of a
19 cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S.
20 at 678.

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24 ¹ Throughout their briefing, the parties appear to use Garcinia Cambogia Extract
25 ("GCE") and Hydroxycitric Acid ("HCA") interchangeably and as referring to the same
26 supplement, including by referencing studies that use either or both terms. *See also*
27 Plaintiff's FAC [Doc. 11 at ¶ 15 ("Randomized, placebo controlled scientific studies
28 demonstrate that Garcinia Cambogia extract and/or HCA does not provide appetite control
benefits in humans.")] Therefore, for purposes of this motion, the Court also refers to both
terms interchangeably throughout and considers them to be the same.

1 In its previous Order dismissing Plaintiff's Complaint, the Court emphasized the
2 distinction between the Product's actual promises of "Weight Management" and "Appetite
3 Control" and the Product's alleged misrepresentations about weight *loss*. Specifically, the
4 Court reasoned that "'Weight Management' suggests management or control of one's
5 weight, whose upward or downward departure may differ depending on an individual
6 person's goals, *i.e.*, to gain, lose, or maintain one's weight." [Doc. 10 at p. 5.] Similarly,
7 "'Appetite Control' indicates control of one's appetite, which may or may not ultimately
8 result in weight-loss." [Doc. 10 at p. 5.] Meanwhile, "weight loss" indicates a decrease in
9 one's weight. Because of these distinctions, the Court found Plaintiff's Complaint failed
10 to state a claim because it equated the Product's promises of "Weight Management" and
11 "Appetite Control" with promises of weight loss, an entirely different promise.

12 The Court additionally found Plaintiff's Complaint's reliance on only one study that
13 actually addressed the representations at issue ("Weight Management" and "Appetite
14 Control") did not state a claim of falsity or misrepresentation because of its qualifying
15 language. [Doc. 10 at p. 5 (explaining that the study's "state[ment] that its results 'did not
16 support the hypothesis that HCA supplementation may be effective on appetite and weight
17 control' was qualifying language not sufficient to raise a plausible claim of falsity or a
18 misrepresentation").]

19 In her First Amended Complaint ("FAC"), Plaintiff addresses both of the defects
20 present in her original Complaint. First, she alleges throughout her Complaint that the
21 Product additionally misrepresents its ability to help consumers control their appetites and
22 manage their weights, which tracks the Product's promises of "Appetite Control" and
23 "Weight Management." Second, she supports her FAC with citations to several additional
24 scientific studies supporting her contention that the Product's claims are false or
25 misleading, and she pleads additional allegations about those studies to provide context
26 and clarify their results. Defendant again moves to dismiss the FAC, in whole or in part,
27 on six separate grounds: (1) the FAC's CLRA, FAL, and UCL claims allege nothing more
28 than noncognizable claims for "lack of substantiation"; (2) the FAC's CLRA, FAL, and

1 UCL claims do not allege false or misleading misrepresentations; (3) the FAC's claims fail
2 under the primary jurisdiction doctrine; (4) Plaintiff lacks standing to seek injunctive relief;
3 (5) the FAC's fraud-based claims do not satisfy Rule 9(b); and (6) the FAC fails to state a
4 claim for breach of an express or implied warranty. The Court addresses each argument in
5 turn.

6 **A. Lack of Substantiation**

7 In essence, Plaintiff's claims under California's Unfair Competition Law ("UCL"),
8 False Advertising Law ("FAL"), and Consumer Legal Remedies Act ("CLRA") are each
9 premised on her contention that Defendant's Product does not provide weight management,
10 appetite control, and/or weight loss benefits. As in its first motion to dismiss, Defendant
11 again argues these claims must be dismissed because they are based entirely upon lack of
12 substantiation allegations for which there is no private right of action. The Court does not
13 agree.

14 The UCL prohibits "any unlawful, unfair or fraudulent business act or practice and
15 unfair, deceptive, untrue or misleading advertising." Cal. Bus. & Prof. Code § 17200. The
16 FAL makes it unlawful for a business to disseminate any statement "which is untrue or
17 misleading, and which is known, or which by the exercise of reasonable care should be
18 known, to be untrue or misleading." Cal. Bus. & Prof. Code § 17500. The CLRA prohibits
19 any "unfair methods of competition and unfair or deceptive acts or practices undertaken by
20 any person in a transaction intended to result or which results in the sale or lease of goods
21 or services to any consumer." Cal. Civ. Code § 1770.

22 Private litigants may not bring suit under the UCL, FAL, or CLRA alleging only that
23 advertising claims lack substantiation. *See Nat'l Council Against Health Fraud, Inc. v.*
24 *King Bio Pharm., Inc.*, 133 Cal. Rptr. 2d 207, 213 (Cal. App. Ct. 2003); *Stanley v. Bayer*
25 *Healthcare LLC*, 2012 WL 1132920, at * 3 (S.D. Cal. 2012). That right is reserved for
26 "the Director of Consumer Affairs, the Attorney General, any city attorney, or any district
27 attorney." Cal. Bus. & Prof. Code § 17508. As a result, private litigants must allege actual
28 falsity or misrepresentation for their UCL, FAL, and CLRA claims, and may do so by

1 citing to “testing, scientific literature, or anecdotal evidence.” *Alvarez v. NBTY, Inc.*, 2017
2 WL 6059159, at *8 (S.D. Cal. Dec. 6, 2017) (quoting *Kwan v. SanMedica Int’l, LLC*, 854
3 F.3d 1088, 1095-96 (9th Cir. 2017)).

4 In the false advertising context, an advertising claim is false if it has “actually been
5 disproved,” that is, if the plaintiff can point to evidence that directly conflicts with the
6 claim. *Eckler v. Wal-Mart Stores, Inc.*, 2012 WL 5382218, at *3 (S.D. Cal. Nov. 1, 2012).
7 By contrast, an advertising claim that merely lacks evidentiary support is said to be
8 unsubstantiated. *Id.* (“There is a difference, intuitively, between a claim that has no
9 evidentiary support one way or the other and a claim that’s actually been disproved. In
10 common usage, we might say that both are ‘unsubstantiated,’ but the caselaw (and common
11 sense) imply that in the context of a false advertising lawsuit an ‘unsubstantiated’ claim is
12 only the former.”).

13 Here, as already discussed, Plaintiff’s FAC addresses both of the shortcomings the
14 Court identified in her initial Complaint. First, Plaintiff’s FAC now alleges that the
15 Product’s promise of “Appetite Control” is misleading because it conveys that the Product
16 will help consumers control their appetite and that the promise of “Weight Management”
17 is misleading because it conveys that the Product will help consumers manage their weight.
18 Second, Plaintiff’s FAC includes additional context on one of its studies to show how the
19 study supports her claims. Specifically, the cited study, *Kovacs I*, tested whether “HCA
20 supplementation might affect BW [body weight] regulation by inducing satiety and
21 reducing food intake.” [Doc. 11 at ¶ 17.] To study whether HCA affected appetite control,
22 *Kovacs I* “measured participants[’] hunger, appetite, anticipated food intake, desire to eat,
23 fullness, satiety, and thirst.” [*Id.* at ¶ 18.] The study concluded that “there was no
24 statistically significant difference between HCA and a placebo on any of these appetite
25 variables.” [*Id.* at ¶ 18.] It further found that “supplementation with HCA . . . did not
26 result in increased satiety or decreased energy intake compared to placebo.” [*Id.* at ¶ 17.]
27 The study concluded that it had “showed that HCA . . . [was] not effective with respect to
28 satiety and energy intake[.]” [*Id.* at ¶ 20.]

1 Defendant argues that *Kovacs I* limits its application to “what that study shows” –
2 that “HCA and HCA combined with MCT were not effective with respect to satiety and
3 energy intake.” [Doc. 15 at p. 8 (emphasis added).] The Court is not persuaded that this
4 phrase somehow undermines the study’s direct application to the allegations in Plaintiff’s
5 Complaint. As relevant to this lawsuit, the study makes a specific finding on the impact of
6 HCA, alone, on satiety and energy intake, *as well as* the impact of “HCA combined with
7 MCT.” *Id.*

8 Further, the Court finds the study’s measurement of variables relevant to “Appetite
9 Control” and “Weight Management” (e.g., hunger, appetite, anticipated food intake, desire
10 to eat, fullness, satiety, and thirst) coupled with the study’s ultimate conclusion that HCA
11 is “not effective with respect to satiety and energy intake” cast sufficient doubt that
12 Defendant’s Product has the “Appetite Control” benefits it claims. *See also, e.g., Dorfman*
13 *v. Nutramax Labs, Inc.*, 2013 WL 5353043 (S.D. Cal. Sept. 23, 2013), at * 12 (“Plaintiff
14 cites to several scientific studies that allegedly undermine Defendants’ representations. . .
15 . The Court finds that these allegations are ‘sufficiently detailed to give us some assurance
16 that Plaintiff’s theory has a basis in fact.’”) (internal quotation marks and citations
17 removed).

18 As to Plaintiff’s contention that the Product misrepresents its ability to aid in
19 “Weight Management,” Plaintiff amended her Complaint to allege that “for a supplement
20 to be effective in aiding weight management, it must help users either (1) lower their energy
21 intake, (2) increase their energy output, or (3) otherwise alter the manner in which the body
22 processes the energy they consume.” [Doc. 11 at ¶ 13.] As to the first weight management
23 mechanism, Plaintiff cites to *Kim*, which found that there was “[n]o effect of GCE [garcinia
24 cambogia extract] supplementation on energy intake.” [*Id.* at ¶ 28.] The *Kim* study authors
25 “concluded that ‘[i]n agreement with past studies the present study provided no evidence
26 that . . . GCE supplementation can modify calorie intake[.]’” [*Id.* at ¶ 29.] As to the second
27 mechanism (lowering energy expenditure), Plaintiff cited studies demonstrating that HCA
28 does not affect metabolism or energy expenditure. *See [Id. at ¶¶ 32-37; see also id. at ¶ 34*

1 (“no effect of HCA on fat oxidation or 24 h energy expenditure was found” when compared
2 to a placebo); and *id* at ¶ 36 (“[t]here was no difference in SMR [sleeping metabolic rate],
3 RMR [resting metabolic rate], DIT [diet-induced thermogenesis], and AEE [activity-
4 induced energy expenditure] between treatments”). Finally, as to the third mechanism
5 (altering the manner in which the body processes the energy consumed), Plaintiff cites
6 *Kriketos*, which explains that the only factor relevant to this mechanism is increased fat
7 oxidation. And, as Plaintiff cites, studies find that HCA does not increase fat oxidation.
8 *See, e.g.*, [Doc. 11 at ¶¶ 45-46 (“HCA supplementation also had no effect ‘on circulating
9 concentrations of blood substrates associated with fat oxidation[.]”).

10 Therefore, because Plaintiff cites to studies supporting her position that HCA does
11 not impact appetite control or weight management, as the Product promises, Plaintiff’s
12 claims are facially plausible and do not merely allege a lack of substantiation. Despite
13 Defendant’s invitation, the Court declines to make further substantive findings about
14 Plaintiff’s proffered studies by weighing the evidence.² Indeed, “the issue of whether the
15 proffered studies do in fact show that [the Product’s] representations are provably false is
16 a question not properly decided on a motion to dismiss.” *Vasic v. Patent Health, LLC*,
17 2014 WL 940323, at *4 (S.D. Cal. Mar. 10, 2014).

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21 ² In conjunction with Defendant’s invitation to weigh the strength of Plaintiff’s
22 studies, Defendant also requests judicial notice of three new scientific studies (Exhibits 13-
23 15) not mentioned in Plaintiff’s FAC and which Defendant argues contradict the studies
24 Plaintiff cited in her FAC. [Doc. 12-2.] Considering such studies, however, would not
25 only improperly convert this Motion to Dismiss into a Motion for Summary Judgment, but
26 the studies are also outside the scope of evidence permitted under Federal Rule of Evidence
27 201. *See also U.S. v. Ritchie*, 342 F.3d 903, 909 (9th Cir. 2003) (“[I]t would have been
28 improper for the court to consider the . . . exhibits . . . without converting the motion to
dismiss into a motion for summary judgment and giving [defendant] an opportunity to
respond.”). Regardless, the Court relies upon the FAC, alone, and does not rely on any of
the 16 exhibits for which Defendant seeks judicial notice. Thus, Defendant’s requests for
judicial notice are DENIED AS MOOT.

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2 **B. False or Misleading Misrepresentations**

3 Similar to its lack of substantiation argument, Defendant contends Plaintiff's studies
4 do not allege actionable misrepresentations. Specifically, Defendant argues that Plaintiff
5 cannot demonstrate (1) a reasonable consumer would be deceived and (2) the Product's
6 representations are false or misleading.

7 As to its first argument, Defendant theorizes that no reasonable consumer would be
8 deceived into believing the Product could assist with weight management and appetite
9 control because the Product's label does not include words like "weight loss" or "appetite
10 reduction," and the label provides a disclaimer: that its "statements have not been evaluated
11 by the Food and Drug Administration," and it "is not intended to diagnose, treat, cure or
12 prevent any disease." [Doc. 12-1 at p. 17.] Contrary to Defendant's argument, Plaintiff
13 has alleged a plausible basis for a reasonable consumer to be misled, including by
14 promising benefits of "weight management" and "appetite control." Moreover, on a
15 motion to dismiss, this Court "cannot hold as a matter of law that disclaimers vitiate claims
16 for misleading representations." *Mullins v. Premier Nutrition Corp.*, 178 F. Supp. 3d 867,
17 892 (N.D. Cal. 2016). By asking the Court to resolve whether a reasonable consumer
18 would be deceived, Defendant asks the Court to make a determination of fact inappropriate
19 at the motion to dismiss stage.

20 As to its second argument, Defendant contends that Plaintiff failed to show the
21 Product's representations are false or misleading because her studies are insufficiently
22 conclusive, and "the *mere existence* of scientific support and an acknowledgement that the
23 issue is not settled are fatal to Plaintiff's claims." [Doc. 15 at p. 7.] In support, Defendant
24 individually critiques each study cited by Plaintiff by contending that they do not apply to
25 Plaintiff, are of limited applicability, are inconclusive, or are otherwise unreliable. As in
26 its prior argument, Defendant's arguments about the cited studies ask the Court to both
27 weigh the evidence and draw inferences in its favor. At the motion to dismiss stage,
28 however, the Court may not engage in either of those tasks. *See, e.g., Vasic v. Patent*

1 *Health, LLC*, 2014 WL 940323 (S.D. Mar. 10, 2014), at *7 (“As noted by countless other
2 courts that have addressed this same issue, the crux of the disagreement between the parties
3 focuses on the strength of the evidence cited in the FAC . . . [and] the Court cannot resolve
4 the parties’ dispute at this juncture.”). As already addressed regarding Defendant’s
5 substantiation argument, Plaintiff’s FAC plausibly alleges the challenged representations
6 are false or misleading, and she supports her claims with numerous studies. Therefore,
7 Defendant’s motion to dismiss on these grounds is denied.

8 **C. Primary Jurisdiction Doctrine Under the FDCA**

9 Defendant next argues that Plaintiff’s claims violate the primary jurisdiction doctrine
10 because she alleges violations of the Federal Food, Drug, and Cosmetic Act (“FDCA”).
11 The Court does not agree. The primary jurisdiction doctrine “is a prudential doctrine under
12 which courts may, under appropriate circumstances, determine that the initial decision
13 making responsibility should be performed by the relevant agency rather than the courts.”
14 *Davel Comm’ns, Inc. v. Qwest Corp.*, 460 F.3d 1075, 1086 (9th Cir. 2006). “[T]he doctrine
15 applies where there is (1) the need to resolve an issue that (2) has been placed by Congress
16 within the jurisdiction of an administrative body having regulatory authority (3) pursuant
17 to a statute that subjects an industry or activity to a comprehensive regulatory scheme that
18 (4) requires expertise or uniformity in administration.” *Id.* at 1086. Notably, “the doctrine
19 does *not*, however, require that all claims within an agency’s purview be decided by the
20 agency.” *Id.* (emphasis added). Where “the allegations of the complaint do not necessarily
21 require the doctrine’s applicability, then the primary jurisdiction doctrine may not be
22 applied.” *Id.* at 1088.

23 When deciding whether to defer jurisdiction at the motion to dismiss stage, courts
24 must “apply a standard derived from Rule 12(b)(6) jurisprudence: whether the complaint
25 plausibly asserts a claim that would *not* implicate the [primary jurisdiction] doctrine.”
26 *County of Santa Clara v. Astra United States*, 588 F.3d 1237, 1251-52 (9th Cir. 2009)
27 (declining to invoke primary jurisdiction where action would “plausibly be adjudicated”
28 without agency’s expertise), *rev’d on other grounds*, 563 U.S. 110 (2011). Here, Plaintiff’s

1 FAC presents a typical false advertising case well within the province of the courts because
2 “allegations of deceptive labeling do not require the expertise of the FDA to be resolved in
3 the courts, as every day courts decide whether conduct is misleading.” *Jones v. ConAgra*
4 *Foods, Inc.*, 912 F. Supp. 2d 889, 899 (N.D. Cal. 2012).

5 Contrary to Defendant’s argument, Plaintiff’s lawsuit does not “fundamentally
6 challenge[] the ability of any manufacturer or distributor to sell Garcinia Cambodia
7 products.” [Doc. 12-1 at p. 29.] Rather, Plaintiff’s claims concern Defendant’s allegedly
8 misleading labeling of its GCE/HCA product with promises of “weight management” and
9 “appetite control,” a determination this Court is equipped to make. Moreover, Defendant
10 does not offer any evidence that the FDA has demonstrated some level of interest in
11 regulating GCE/HCA products in this context. *See, e.g., Rikos v. Procter & Gamble Co.*,
12 782 F. Supp. 2d 522, 530 (S.D. Ohio 2011) (“[C]ourts have declined to apply the primary
13 jurisdiction doctrine when the party seeking agency referral does not provide evidence that
14 ‘the FDA has actually taken any interest in investigating the claims or issues presented
15 here.’ ”) (quoting *Pom Wonderful v. Ocean Spray Cranberries, Inc.*, 642 F. Supp. 2d 1112,
16 1123 (C.D. Cal. 2009)); *see also Cty. of Santa Clara*, 588 F.3d at 1252 (concluding that
17 dismissal was not warranted on primary jurisdiction grounds because the consumers’
18 “claims do not necessarily implicate primary jurisdiction, and the FDA has shown virtually
19 no interest in regulating DHA in this context”).

20 Likewise, the cases Defendant cites in support of this argument are inapposite. For
21 example, Defendant cites to *Clark v. Time Warner Cable*, 523 F.3d 1110 (9th Cir. 2008).
22 In *Clark*, the Ninth Circuit found the primary jurisdiction doctrine applied in part because
23 the FCC had issued a Notice of Proposed Rulemaking showing “that the agency [wa]s
24 actively considering how it w[ould] regulate VoIP services,” an issue central to the
25 resolution of the plaintiff’s claims. *Id.* at 1115. The parties have not raised any such notice
26 or other indication by the FDA that the agency is interested in regulating some aspect of
27 Plaintiff’s claims.

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1 Because Plaintiff's claims do not necessarily require FDA expertise, offer "an issue
2 of first impression," or offer an issue outside "the conventional experience of judges," the
3 doctrine of primary jurisdiction is not implicated at this early pleading stage. *Brown v.*
4 *MCI WorldCom Network Servs., Inc.*, 277 F.3d 1166, 1172 (9th Cir. 2002). Therefore, the
5 Court declines to dismiss or stay the action.

6 **D. Standing**

7 Next, Defendant contends that Plaintiff's requests for injunctive relief under her
8 class allegations and claims for violations of the UCL, FAL, and CLRA must be dismissed
9 for lack of standing under Rule 12(b)(1). To satisfy Article III standing, Plaintiff must
10 allege an injury-in-fact that is concrete and particularized, and actual or imminent; that the
11 injury is fairly traceable to Defendant's challenged action; and that it is likely, not merely
12 speculative, that a favorable ruling will redress the injury. *See Friends of the Earth, Inc.*
13 *v. Laidlaw Env'tl. Servs., Inc.*, 528 U.S. 167, 180-81 (2000).

14 To establish standing for the injunctive relief she requests, then, Plaintiff must
15 establish a "real or immediate threat" of repeated injury. *Hodgers-Durgin v. de la Vina*,
16 199 F.3d 1037, 1042 (9th Cir. 1999). As Defendant argues, however, Plaintiff cannot show
17 a likelihood of future injury where she has no interest in purchasing the Product again
18 because it does not work or perform as labeled. *See, e.g.*, [Doc. 11 at ¶ 121 ("Product . . .
19 is worthless since it is incapable of providing any such benefits"); *id.* at ¶ 127 ("Plaintiff
20 would not have purchased the Product if she knew that its labeling claims were false or
21 misleading, or that the Product is incapable of providing the claimed benefits")]. Courts
22 in other false and misleading advertising cases have found the same. *See, e.g., Forcellati*
23 *v. Hyland's, Inc.*, 2014 WL 1410264, at *12 (C.D. Cal. Apr. 9, 2014) (finding plaintiff
24 lacked standing for injunctive relief "because Plaintiffs have no reason to re-purchase cold
25 and flu products that they consider to be completely worthless and ineffectual"); *Delarosa*
26 *v. Boiron, Inc.*, 2012 WL 8716658, at *4 (C.D. Cal. Dec. 28, 2012) ("Because Plaintiff
27 does not believe the product works and does not intend to purchase it again, there is not a
28 sufficient likelihood that she will again be wronged in a similar way."). Plaintiff offers no

1 response to Defendant's Rule 12(b)(1) attack. For the previous reasons, Defendant's
2 motion to dismiss is **GRANTED** as to Plaintiff's requests for injunctive relief in the FAC's
3 Paragraphs 134.i, 153, 162, 163, and 169.

4 **E. Rule 9(b)**

5 In its Rule 9(b) argument, Defendant contends that Plaintiff's FAC fails to meet the
6 heightened pleading standard for fraud-based claims. Under Rule 9(b), a plaintiff must
7 state with particularity "the circumstances constituting fraud or mistake," including "the
8 who, what, when, where, and how of the misconduct charged." *Kearns v. Ford Motor Co.*,
9 567 F.3d 1120, 1124 (9th Cir. 2009). "Plaintiffs must plead enough facts to give defendants
10 notice of the time, place, and nature of the alleged fraud, together with an explanation of
11 the statement and why it was false or misleading." *Dabish v. Brand New Energy, LLC*,
12 2016 WL 7048319, at *3 (S.D. Cal. Dec. 5, 2016).

13 Defendant contends that Plaintiff "fails to allege at which Vitamin Shoppe she
14 purchased the Product, the exact date of purchase, the method of purchase (i.e., cash or
15 credit card), the purchase price of the product, or how much she paid." [Doc. 12-1 at p.
16 34.] Contrary to Defendant's position, however, Plaintiff pleads her claims with sufficient
17 particularity by alleging that, in approximately "February 2017 in San Diego," she
18 "purchased a 180-caplet bottle of [the Product] for approximately \$20 from Vitamin
19 Shoppe." [Doc. 11 at ¶ 115.]; see *Dabish*, 2016 WL 7048319, at *3. Plaintiff identifies
20 the specific statements she alleges are misleading (e.g., "Weight Management" and
21 "Appetite Control"), attaches the Product's labels, and alleges how the Product's claims
22 are misleading (by not actually providing the advertised benefits).

23 Defendant further argues that Plaintiff "fails to allege she consumed the Product, . .
24 . that she took it as directed on its label," or her weight and exercise habits. [Doc. 12-1 at
25 p. 24.] Defendant offers no authority showing that Rule 9(b) requires such allegations,
26 including actual consumption of the Product. Moreover, Plaintiff's claims do not pertain
27 to whether she, personally, experienced the Product's advertised benefits; they pertain to
28 the Product's mislabeling, based on the Product's inability to actually deliver the claimed

1 benefits. In other words, Plaintiff's claims do not turn on her personal use of the Product
2 *after* purchase. Instead, her claims turn on whether the Product's labeling, which led her
3 to purchase the Product, was false or misleading. *See also Dabish*, 2016 WL 7048319, at
4 *3 ("Plaintiff need not allege consumption of the product . . . [or] that he did not experience
5 any advertised benefits. The allegations do not pertain to allegations of benefits. The
6 allegations pertain to mislabeling the products."). Thus, the Court rejects Defendant's Rule
7 9(b) argument.

8 **F. Breach of Warranties Claims**

9 Defendant additionally moves to dismiss for failure to state a claim Plaintiff's claims
10 for (1) breach of express warranty and (2) breach of the implied warranty of
11 merchantability. The Court considers each claim in turn.

12 1. Breach of Express Warranty

13 California Commercial Code § 2313, which defines express warranty, applies to
14 "transactions in goods." *Viggiano v. Hansen Nat. Corp.*, 944 F. Supp. 2d 877, 893 (C.D.
15 Cal. 2013) (quoting Cal. Com. Code § 2102). To prevail on a breach of express warranty
16 claim, a plaintiff must prove that the seller "(1) made an affirmation of fact or promise or
17 provided a description of its goods; (2) the promise or description formed part of the basis
18 of the bargain; (3) the express warranty was breached; and (4) the breach caused injury to
19 the plaintiff." *Id.* at 893 (quoting *Rodarte v. Philip Morris, Inc.*, 2003 WL 23341208, *7
20 (C.D. Cal. June 23, 2003)).

21 Plaintiff brings a Breach of Express Warranty claim for the Product's affirmation of
22 fact or promise that it would help in "Weight Management" and "Appetite Control,"
23 despite her allegation that the Product's ingredients are incapable of doing so. The Court
24 is not persuaded by Defendant's argument that these phrases are not affirmations of fact or
25 promise because they are "merely indications of use for the Product." [Doc. 12-1 at p. 27.]
26 Plaintiff plausibly alleges an affirmation of fact or promise by pleading that the Product's
27 label promises consumers help with "Weight Management" and "Appetite Control." *See*
28 *also, e.g., Martinez-Leander v. Wellnx Life Sciences, Inc.*, (C.D. Cal. Mar. 6, 2017)

1 (rejecting argument that “Plaintiff fails to plausibly allege any breach of any affirmative
2 promise or act” where “Plaintiffs allege that Defendants marketed the Products as an
3 effective weight loss aid, despite knowing that its only active ingredient HCA, is
4 completely incapable of aiding in weight loss.”).

5 The Court further rejects Defendant’s contention that Plaintiff “fails to allege breach
6 and/or the requisite element of injury as she does not allege ever taking the Product.” As
7 already discussed in Section II.E., Plaintiff’s breach of warranty claim focuses on the
8 Product’s labels, not Plaintiff’s personal consumption of the product. Thus, Plaintiff
9 plausibly alleges breach of the express warranty by pleading her theory that the Product is
10 ineffective because it does not deliver the “Weight Management” and “Appetite Control”
11 benefits its labels advertise.

12 2. Breach of Implied Warranty of Merchantability

13 “To establish a claim for a breach of implied warranty, the plaintiff must demonstrate
14 that a product is not ‘fit for the ordinary purposes for which such goods are used’ or fails
15 to ‘conform to the promises or affirmations of fact made on the container or label.’”
16 *Martinez-Leander v. Wellnx Life Scis., Inc.*, 2017 WL 2616918, at *6 (C.D. Cal. Mar. 6,
17 2017) (quoting *Forcellati v. Hyland’s, Inc.*, 876 F. Supp. 2d 1155, 1163 (C.D. Cal. 2012);
18 Cal. Civ. Code § 1791.1(a)(2), (4)). Defendant contends that Plaintiff “fails to allege that
19 the Product lacks even the most basic degree of fitness for ordinary use.” [Doc. 12-1 at p.
20 28.] The Court disagrees. Plaintiff alleges that “[t]he Product, which has the sole intended
21 purpose is as a dietary aid, is worthless since it is incapable of providing any such benefits,”
22 and the Product “does not aid in weight management and appetite control.” [Doc. 11 at ¶¶
23 122, 180.] Such allegations sufficiently state a claim that the Product “do[es] not conform
24 to the promises or affirmations contained on the . . . label.” *Martinez v. Metabolife Int’l,*
25 *Inc.*, 6 Cal. Rptr. 3d 494, 400 (Cal. App. Ct. 2003); *see also Martinez-Leander*, 2017 WL
26 2616918, at *6 (denying motion to dismiss implied warranty claims where “Plaintiff
27 alleges that Defendants’ [Garcinia Cambogia] Products are not merchantable because they
28 cannot cause weight loss”). Likewise, the Court rejects Defendant’s unsupported assertion

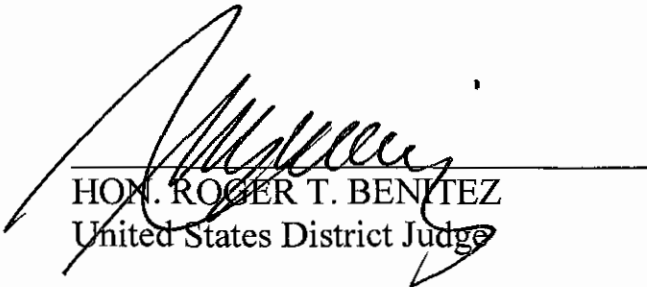
1 that Plaintiff's purchase of the Product is not enough and that she, instead, must "try" the
2 Product to bring this claim. [Doc. 15 at p. 13.]

3 **III. CONCLUSION**

4 For the previous reasons, Defendant's motion to dismiss Plaintiff's FAC is
5 **GRANTED IN PART AND DENIED IN PART**. As to Plaintiff's requests for injunctive
6 relief in Paragraphs 134.i, 153, 162, 163, and 169, the motion is **GRANTED**. As to
7 Defendant's remaining arguments for dismissal, the motion is **DENIED**.

8 **IT IS SO ORDERED.**

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10 DATED: March 12, 2019

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13 HON. ROGER T. BENITEZ
14 United States District Judge
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