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IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

NICHOLE BROWNFIELD, an individual; and KIERA CHAMBERS, an individual, on behalf of themselves and all others similarly situated,

Case No. 2:09-cv-00444-JAM-GGH

ORDER GRANTING DEFENDANT BAYER HEALTHCARE PHARMACEUTICALS INC.'S MOTION TO DISMISS COMPLAINT

Plaintiffs,

v.

BAYER CORPORATION; BAYER HEALTHCARE PHARMACEUTICALS, INC.; BAYER PHARMACEUTICALS CORPORATION; BAYER HEALTHCARE, LLC; BAYER HEALTHCARE A.G.; BERLEX LABORATROIES, INC.; and DOES 1 through 50, inclusive,

Defendants.

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This matter comes before the Court on Defendant Bayer HealthCare Pharmaceuticals, Inc.'s ("Bayer") motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil

1 Procedure.<sup>1</sup> Plaintiffs Nichole Brownfield and Kiera Chambers  
2 ("Plaintiffs") oppose the motion. For the reasons set forth  
3 below, Defendant's motion is GRANTED.  
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5 I. FACTUAL AND PROCEDURAL BACKGROUND

6 Bayer markets and sells consumer health products and  
7 pharmaceutical products, including YAZ®. Plaintiffs' Complaint,  
8 Doc. # 1, ("Compl.") ¶ 14. YAZ® is a prescription medication,  
9 approved by the Food and Drug Administration ("FDA") for use as  
10 an oral contraceptive, as a treatment for symptoms of  
11 premenstrual dysphoric disorder ("PMDD") in women who use oral  
12 contraceptives, and for the treatment of moderate acne in women  
13 who use oral contraceptives. Compl., Ex. B. At issue in this  
14 case are specific television commercials presented by Bayer to  
15 members of the public with respect to YAZ®. Compl. ¶ 21.  
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18 Plaintiffs allege the auditory statements, visuals, and  
19 images contained in the Ads do not express the limitations of  
20 YAZ® with regard to the treatment of those symptoms associated  
21 with Pre-menstrual Syndrome ("PMS") or the treatment of various  
22 forms and severities of acne. Id. ¶¶ 41-45. Specifically,  
23 Plaintiffs challenge two Ads entitled "Not Gonna Take It" and  
24 "Balloons." In the Ad "Not Gonna Take It" it states: "YAZ® is  
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27 <sup>1</sup> Because oral argument will not be of material assistance,  
28 the Court orders this matter submitted on the briefs. E.D. Cal.  
L.R. 78-230(h).

1 the only birth control proven to treat the emotional and  
2 physical premenstrual symptoms that are severe enough to impact  
3 your life. It can also help keep your skin clear." Id. ¶ 26.  
4 These verbal representations are accompanied by visual images of  
5 energetic women singing "We're Not Gonna Take It" as they kick,  
6 punch, and push words describing symptoms such as  
7 "IRRITABILITY," "MOODINESS," "BLOATING," and "FEELING ANXIOUS,"  
8 away from the screen, followed by the claim "It's YAZ®! And  
9 there's no other birth control like it." The screen then  
10 displays a listing of symptoms including: irritability;  
11 increased appetite; moodiness; fatigue; feeling anxious;  
12 headaches; bloating; and muscle aches. Id. ¶ 32. Accompanying  
13 the list of symptoms is a statement on the screen which states,  
14 "YAZ® treats PMDD. Symptoms include: [list of symptoms]. PMDD  
15 is a mood disorder related to the menstrual cycle." Compl. Ex.  
16 B.

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20 Similarly, the Ad entitled "Balloons" states that "YAZ® is  
21 the only birth control proven to treat the emotional and  
22 physical premenstrual symptoms that are severe enough to impact  
23 your life. And it also helps keep your skin clear." Id. ¶ 27.  
24 These verbal representations are accompanied by visual images of  
25 numerous balloons throughout the Ad with symptoms, such as  
26 "IRRITABILITY," "MOODINESS," "FEELING ANXIOUS," "BLOATING,"  
27 "FATIGUE," "MUSCLE ACHES," "HEADACHES," "INCREASED APPETITE,"  
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1 and "ACNE." Id. ¶ 34. As the camera in the Ad follows the  
2 balloons upward and zooms in on balloons with words such as  
3 "IRRITABILITY" and "MOODINESS" the screen also displays at the  
4 bottom "PMDD is a mood disorder related to the menstrual cycle."  
5 The next screen states "YAZ® treats PMDD. Symptoms include [list  
6 of symptoms on balloons]. Symptoms occur regularly before a  
7 woman's menstrual cycle." Compl., Ex. D. Plaintiffs allege the  
8 aforementioned representations in the Ads are false and/or  
9 material misrepresentations which cause women to believe that  
10 YAZ® is approved to treat women with any severity of the  
11 symptoms presented, regardless of whether their symptoms are  
12 severe enough to constitute PMDD and that YAZ® treats all  
13 severities of acne when in fact, YAZ® does not. Id. ¶¶ 38-45.

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17 On February 13, 2009, Plaintiffs filed the instant class  
18 action against Bayer. Doc. # 1. Plaintiffs' Complaint contains  
19 five causes of action: (1) negligent misrepresentation; (2)  
20 violation of the Consumers Legal Remedies Act (California Civil  
21 Code § 1750, *et seq.*, or "CLRA") (3) violation of California  
22 Business and Professions Code § 17500, *et seq.* (False  
23 Advertising Law or "FAL"); (4) violation of California Business  
24 and Professions Code § 17200, *et seq.* (Unfair Competition Law or  
25 "UCL") and (5) unjust enrichment. In the instant motion, Bayer  
26 moves to dismiss the Complaint pursuant to Rule 12(b)(6) of the  
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1 Federal Rules of Civil Procedure.<sup>2</sup> Doc. # 8. Plaintiffs oppose  
2 the motion. Doc. 11.

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4 II. OPINION

5 A. Legal Standard

6 On a motion to dismiss under Federal Rule of Civil  
7 Procedure 12(b)(6), the allegations of the complaint must be  
8 accepted as true. Cruz v. Beto, 405 U.S. 319, 322, 92 S. Ct.  
9 1079, 31 L. Ed. 2d 263 (1972). The Court is bound to give  
10 plaintiff the benefit of every reasonable inference to be drawn  
11 from the "well-pleaded" allegations of the complaint. Retail  
12 Clerks Int'l Ass'n v. Schermerhorn, 373 U.S. 746, 753 n.6, 83 S.  
13 Ct. 1461, 10 L. Ed. 2d 678 (1963). Thus, the plaintiff need not  
14 necessarily plead a particular fact if that fact is a reasonable  
15 inference from facts properly alleged. See id.

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18 Nevertheless, it is inappropriate to assume that the  
19 plaintiff "can prove facts which it has not alleged or that the  
20 defendants have violated the . . . laws in ways that have not  
21 been alleged." Associated Gen. Contractors of Cal., Inc. v.  
22 Cal. State Council of Carpenters, 459 U.S. 519, 526, 103 S. Ct.  
23 897, 74 L. Ed. 2d 723 (1983). Moreover, the Court "need not  
24 assume the truth of legal conclusions cast in the form of  
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27 <sup>2</sup> In the alternative to Bayer's motion to dismiss, Bayer  
28 filed a motion to strike portions of Plaintiffs' Complaint.  
Doc. # 9. Because the Court has decided to grant Bayer's motion  
to dismiss, the motion to strike is rendered moot.

1 factual allegations." United States ex rel. Chunie v. Ringrose,  
2 788 F.2d 638, 643 n.2 (9th Cir. 1986).

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4 Ultimately, the Court may not dismiss a complaint in which  
5 the plaintiff has alleged "enough facts to state a claim to  
6 relief that is plausible on its face." Bell Atlantic Corp. v.  
7 Twombly, 550 U.S. 544, 127 S. Ct. 1955, 1974, 167 L. Ed. 2d 929  
8 (2007). Only where a plaintiff has not "nudged [his or her]  
9 claims across the line from conceivable to plausible," is the  
10 complaint properly dismissed. Id. "[A] court may dismiss a  
11 complaint only if it is clear that no relief could be granted  
12 under any set of facts that could be proved consistent with the  
13 allegations." Swierkiewicz v. Sorema N.A., 534 U.S. 506, 514,  
14 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002) (quoting Hudson v. King &  
15 Spalding, 467 U.S. 69, 73, 104 S. Ct. 2229, 81 L. Ed. 2d 59  
16 (1984)).  
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19 B. Standing

20 Bayer contends that Plaintiffs have failed to allege  
21 standing for their Unfair Competition, False Advertising, and  
22 Consumer Legal Remedies Act claims and thus, Plaintiffs' second,  
23 third and fourth causes of action should be dismissed.  
24 Plaintiffs argue their Complaint sufficiently alleges standing  
25 to assert claims under the UCL, FAL, and CLRA.  
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27 The issue of standing is a threshold determination of  
28 "whether the litigant is entitled to have the court decide the

1 merits of the dispute or of particular issues." Warth v.  
2 Seldin, 422 U.S. 490, 498 (1975); Steel Co. v. Citizens For A  
3 Better Env't, 523 U.S. 83, 118 (1998). Article III limits "the  
4 federal judicial power 'to those disputes which confine federal  
5 courts to a role consistent with a system of separated powers  
6 and which are traditionally thought to be capable of resolution  
7 through the judicial process.'" Valley Forge Christian Coll. v.  
8 Americans United For Separation of Church and State, Inc., 454  
9 U.S. 464, 472 (1982) (quoting Flast v. Cohen, 392 U.S. 83, 97  
10 (1968)); Steele, 523 U.S. at 102. "Those who do not possess  
11 Article III standing may not litigate as suitors in the Courts  
12 of the United States." Id. at 476.

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15 The Supreme Court has set forth that "[t]he 'irreducible  
16 constitutional minimum of standing' contains three  
17 requirements." Steele, 523 U.S. at 102-03 (quoting Lujan v.  
18 Defenders of Wildlife, 504 U.S. 555, 560 (1992)). First,  
19 plaintiff must allege an "injury in fact - a harm suffered by  
20 the plaintiff that is concrete and actual or imminent, not  
21 conjectural, or hypothetical." Id. at 103. Second, plaintiff  
22 must allege causation - "a fairly traceable connection between  
23 the plaintiff's injury and the complained-of conduct of the  
24 defendant." Steele, 523 U.S. at 103. (citing Simon v. E. Ky.  
25 Welfare Rights Org., 426 U.S. 26, 41-42 (1976)). Third, the  
26 injury must be redressable - there must be "a likelihood that  
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1 the requested relief will redress the alleged injury. Steele,  
2 523 U.S. at 103 (citing Simon, 426 U.S. at 45-46).

3 The UCL and the FAL contain specific standing requirements.  
4 The UCL prohibits any "unlawful, unfair or fraudulent business  
5 act or practice." Cal. Bus. & Prof. § 17200. While the FAL  
6 prohibits any "unfair, deceptive, untrue, or misleading  
7 advertising." Cal. Bus. & Prof. § 17500. After Proposition 64,  
8 Sections 17204 and 17535 of the Business and Professions Code  
9 were amended to require plaintiffs to "have suffered injury in  
10 fact and lost money or property as a result of the unfair  
11 competition" in order to bring UCL or FAL claims. See Cal. Bus.  
12 & Prof. Code §§ 17200, 17203, 17204. Accordingly, "after  
13 Proposition 64, a person seeking to represent claims on behalf  
14 of others must show that (1) she had suffered an actual injury  
15 in fact, and (2) such injury occurred as a result of the  
16 defendant's alleged unfair competition or false advertising."  
17 Laster v. T-Mobile United States, Inc., 407 F. Supp. 2d 1181,  
18 1194 (S.D. Cal. 2005).

19 The CLRA contains similar language establishing a standing  
20 requirement. California requires a plaintiff suing under the  
21 CLRA for misrepresentations in connection with a sale to plead  
22 and prove she relied on a material misrepresentation. Caro v.  
23 Procter & Gamble Co., 18 Cal. App. 4th 644, 668 (Cal. App. 4th  
24 Dist., 1993) (holding no material misrepresentation was made to  
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1 plaintiff suing under the CLRA because he did not believe the  
2 allegedly misleading statement); cf. Anunziato v. eMachines,  
3 Inc., 402 F.Supp.2d 1133, 1137 (C.D.Cal. 2005) (acknowledging  
4 the CLRA's reliance requirement). Here, because Plaintiffs'  
5 claims are based on allegations of false advertising, Plaintiffs  
6 must allege they relied on the false advertising. Laster v. T-  
7 Mobile USA, Inc., 407 F. Supp. 2d 1181, 1194 (S.D.Cal. 2005).  
8 They must also allege the misrepresentations were material as to  
9 them, i.e., "that without the misrepresentation, [P]laintiff[s]  
10 would not have acted as [they] did." Cattie v. Wal-Mart, Inc.,  
11 504 F. Supp. 2d 939, 946 (S.D. Cal. 2007) (quoting Caro, 18 Cal.  
12 App. 4th at 668).

13 Plaintiffs cite to paragraphs 12, 77, and 84 of their  
14 Complaint for the assertion that they have "unequivocally  
15 allege[d] that Plaintiffs viewed the misleading Ads, purchased  
16 their YAZ® prescriptions in reliance on the direct  
17 misrepresentations and/or omissions of material fact contained  
18 therein, and suffered various injuries in fact." Pls' Opp. at  
19 6:25-28. However, the Court finds these allegations fall  
20 considerably short of alleging standing. All three paragraphs  
21 are comprised of bare and vague conclusions that Plaintiffs were  
22 induced to purchase YAZ® based on Bayer's "misrepresentations"  
23 and "omissions." Compl. ¶¶ 12, 77, 84. Such conclusory  
24 allegations fail to allege what Plaintiffs saw, heard and relied  
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1 upon in making their purchases and suffering injuries in fact  
2 and are insufficient as a matter of law. Warren v. Fox Family  
3 Worldwide, Inc., 328 F.3d 1136, 1139 (9th Cir. 2003).

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5 Bayer has cited two cases, Cattie v. WalMart Stores, Inc.  
6 and Laster v. T-Mobile USA, Inc., which this Court finds  
7 persuasive in support of Bayer's argument that Plaintiffs'  
8 allegations do not suffice to allege standing. In Cattie, the  
9 Court dismissed Plaintiff's UCL, FAL and CLRA claims for failure  
10 to allege standing despite allegations that "the advertising  
11 resulted in the sale of goods" and that "Plaintiff Cattie and  
12 members of the Class have been injured in their money and  
13 property as a result of Defendants' [false advertising] as set  
14 for in this Complaint." Catti, 504 F. Supp. 2d at 947. As the  
15 Cattie Court held, these allegations "[d]o not allege that false  
16 statements or claims had anything to do with [plaintiff's]  
17 decision to purchase the [products at issue]" and, moreover,  
18 "these [allegations] are conclusory and do not adequately allege  
19 reliance." Id. Likewise, the Laster Court held that plaintiffs  
20 failed to allege standing where "none of the named Plaintiffs  
21 allege that they saw, read, or in anyway relied on the  
22 advertisements." Laster, 407 F. Supp. 2d at 1194.

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24 Similarly here, Plaintiffs have not alleged any facts  
25 showing they viewed either of the Ads at issue prior to  
26 purchasing YAZ® or that they purchased YAZ® in reliance on the  
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1 challenged aspects of the Ads and were injured as a result.  
2 Rather, Plaintiffs make conclusory allegations that they were  
3 induced to purchase YAZ® by Bayer's "deceptive representations,"  
4 "fraud and deceit," and "acts, omissions, misrepresentations,  
5 practices, and nondisclosures." Compl. ¶ 84. Such allegations  
6 do not suffice to confer standing to sue under the UCL, FAL, or  
7 the CLRA. See e.g., Laster, 407 F. Supp. 2d at 1194; Cattie,  
8 504 F. Supp. 2d at 948. Not only have Plaintiffs failed to  
9 allege they viewed the Ads, but more importantly, they have  
10 failed to allege any injury based on their purchase. If, for  
11 example, Plaintiffs purchased YAZ® for use as an oral  
12 contraceptive, as a treatment for symptoms of PMDD in women who  
13 use oral contraceptives, and/or for the treatment of moderate  
14 acne in women who use oral contraceptives, then Plaintiffs have  
15 presumably suffered no injury, as YAZ® is FDA approved for those  
16 uses. As such, Plaintiffs fail to allege enough facts to state  
17 a claim to relief that is plausible on its face. The Complaint  
18 fails to allege an injury in fact and fails to adequately allege  
19 a connection between the Plaintiffs' injury, if any, and the  
20 complained-of conduct of Bayer's Ads. Only a complaint that  
21 states a plausible claim for relief survives a motion to dismiss  
22 and Plaintiffs' complaint fails to do so. See Ashcroft v.  
23 Iqbal, 129 S. Ct. 1937 (U.S. 2009); see also Twombly, 550 U.S.  
24 at 556. Accordingly, Plaintiffs' second, third and fourth  
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1 causes of action must be dismissed for failure to allege facts  
2 demonstrating standing to assert a claim for relief against  
3 Bayer.  
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5 C. Failure to Plead Fraud with Particularity

6 Rule 9(b) of the Federal Rules of Civil Procedure provides  
7 that “[i]n all averments of fraud or mistake, the circumstances  
8 constituting fraud or mistake shall be stated with  
9 particularity.” In order to comply with the requirements of  
10 Rule 9(b), the circumstances constituting the alleged fraud  
11 “must be ‘specific enough to give defendants notice of the  
12 particular misconduct which is alleged to constitute the fraud  
13 charged so that they can defend against the charge and not just  
14 deny that they have done anything wrong.’” Bly-Magee v.  
15 California, 236 F.3d 1014, 1019 (9th Cir. 2001) (quoting  
16 Neubronner v. Milken, 6 F.3d 666, 672 (9th Cir. 1993)).  
17  
18 “Averments of fraud must be accompanied by ‘the who, what, when,  
19 where, and how’ of the misconduct charged.” Vess v. Ciba-Geigy  
20 Corp. USA, 317 F.3d 1097, 1106 (9th Cir. 2003). The plaintiff  
21 “must set forth *more* than the neutral facts necessary to  
22 identify the transaction. The plaintiff must set forth what is  
23 false or misleading about a statement, and why it is false.”  
24 Id. (quoting Decker v. GlenFed, Inc., 42 F.3d 1541, 1548 (9th  
25 Cir. 1994)).  
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1 Bayer asserts that the Complaint should be dismissed  
2 because Plaintiffs fail to plead fraud with particularity.  
3 Plaintiffs argue that not all of their claims are grounded in  
4 fraud, but that to the extent they are, they have adequately  
5 alleged facts supporting their claims. Plaintiffs contend that  
6 they do not need to meet Rule 9(b)'s heightened pleading  
7 requirement with respect to their claims because fraud is not a  
8 necessary element of these claims, nor are their claims grounded  
9 in fraud.  
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12 "In cases where fraud is not a necessary element of a  
13 claim, a plaintiff may choose nevertheless to allege in the  
14 complaint that the defendants have engaged in fraudulent  
15 conduct." Vess, 317 F.3d at 1103. The Ninth Circuit has held  
16 that in such cases, where fraudulent conduct is the basis of the  
17 claim, that claim is "grounded in fraud" and "the pleading of  
18 that claim as a whole must satisfy the particularity requirement  
19 of Rule 9(b)." Id. at 1103-04. Claims may be "grounded in  
20 fraud" where a plaintiff alleges a uniform course of fraudulent  
21 conduct. Id. at 1103. Under California law, the "indispensable  
22 elements of a fraud claim include a false representation,  
23 knowledge of its falsity, intent to defraud, justifiable  
24 reliance, and damages." Moore v. Brewster, 96 F.3d 1240, 1245  
25 (9th Cir.1996) (superceded by statute on other grounds) (citing  
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1 Bank of the West v. Valley Nat'l Bank of Arizona, 41 F.3d 471,  
2 477 (9th Cir.1994)).

3 Here, Plaintiffs' first four causes of action are grounded  
4 in averments of fraud. For example, throughout the Complaint  
5 Plaintiffs allege that "the conduct at issue was all part of an  
6 *illegal fraud on consumers*," and that the "the policies,  
7 procedures and practices described herein relating to  
8 Defendants' conduct with respect to the marketing, advertising,  
9 and sale of YAZ® are part of a *common course of conduct*. . ."  
10 Compl. ¶¶ 59, 70. Plaintiffs also allege that Bayer continues  
11 "to engage in conduct that is unlawful, unfair, or fraudulent  
12 through a *pattern of misrepresentation and concealment of*  
13 *material facts* . . ." Compl. ¶ 90. Even Plaintiffs' negligent  
14 misrepresentation claim refers to a common fraudulent scheme  
15 underlying Plaintiffs' first four claims: "[Bayer's]  
16 misrepresentations and omissions were *uniform and part of a*  
17 *common course of conduct* directed to Plaintiffs and members of  
18 the Class." Comp. ¶ 76. Moreover, the factual basis for  
19 Plaintiffs' first four claims arise out of a uniform course of  
20 allegedly fraudulent conduct, specifically, the false and  
21 misleading statements allegedly made by Bayer through its Ads.  
22 Therefore, Plaintiffs' first four claims are "grounded in fraud"  
23 such that they must meet 9(b)'s heightened pleading standard.  
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1 In this case, despite Plaintiffs' allegations of a common  
2 course of fraudulent conduct by Bayer, the Complaint provides no  
3 detail or specificity as to the purported fraud, nor does it  
4 identify any particular misrepresentations upon which Plaintiffs  
5 detrimentally relied. In order to support Plaintiffs' claim for  
6 negligent misrepresentation, Plaintiff must identify a  
7 misrepresentation of fact. Wilson v. Century 21 Great W.  
8 Realty, 15 Cal. App. 4th 298, 306 (Cal. App. 1st Dist. 1993).  
9 "An 'implied' assertion or representation is not enough." Id.  
10 In addition, to meet the requirements to bring Plaintiffs'  
11 claims asserted under the UCL, FAL, and CLRA, Plaintiffs must  
12 allege with particularity when they viewed the Ads and that they  
13 relied on the Ads in making their purchase. Plaintiffs' general  
14 allegations are insufficient to give Bayer notice of the  
15 particular misconduct charged by Plaintiffs. Vess, 317 F.3d at  
16 1106. Plaintiffs' failure to plead averments of fraud, which  
17 underlie each cause of action, with sufficient particularity  
18 renders their entire Complaint, and each cause of action  
19 therein, deficient. Accordingly, the first four claims in  
20 Plaintiffs' Complaint are dismissed for failure to plead fraud  
21 with particularity.

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1 D. Unjust Enrichment


2 Plaintiffs' fifth cause of action for unjust enrichment  
3 fails as a matter of law. "Unjust enrichment is not a cause of  
4 action, [ ] or even a remedy, but rather 'a general principle,  
5 underlying various legal doctrines and remedies.'" McBride v.  
6 Boughton, 123 Cal. App. 4th 379, 387-388 (2004). Accordingly,  
7 Plaintiffs' fifth cause of action for unjust enrichment is  
8 dismissed.  
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11 III. ORDER

12 For the reasons set forth above, Defendant's motion to  
13 dismiss Plaintiffs' Complaint is GRANTED. Plaintiffs are  
14 granted twenty (20) days from the date of this order to file a  
15 first amended complaint in accordance with this order.  
16 Defendant is granted thirty (30) days from the date of service  
17 of Plaintiffs' first amended complaint to file a response  
18 thereto.  
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20 IT IS SO ORDERED.

21 Dated: July 2, 2009

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24 JOHN A. MENDEZ,  
25 UNITED STATES DISTRICT JUDGE  
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