Michael H. Steinberg (CSB No. 134179)
steinbergm@sullcrom.com
Brian R. England (CSB No. 211335)
englandb@sullcrom.com
SULLIVAN & CROMWELL LLP
1888 Century Park East
Los Angeles, California 90067
Telephone: (310) 712-6600
Facsimile: (310) 712-8800

Shawn Joe Lichaa (CSB No. 250902)
lichaas@sullcrom.com
SULLIVAN & CROMWELL LLP
1870 Embarcadero Road
Palo Alto, California 94303
Telephone: (650) 461-5600
Facsimile: (650) 461-5745

Attorneys for Defendants

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

LILIA PERKINS, on behalf of herself and all others similarly situated,

Plaintiff,

v.

PHILIPS ORAL HEALTHCARE, INC., a Washington Corporation; PHILIPS ELECTRONICS NORTH AMERICA CORPORATION, a Delaware Corporation; and DOES 1 through 20, inclusive,

Defendants.

Case No. 12-CV-1414H BGS

CLASS ACTION

DEFENDANTS PHILIPS ORAL HEALTHCARE, INC.'S AND PHILIPS ELECTRONICS NORTH AMERICA CORPORATION'S NOTICE OF MOTION AND MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED CLASS ACTION COMPLAINT

Judge: The Hon. Marilyn L. Huff
Hearing Date: December 3, 2012
Hearing Time: 10:30 a.m.
Courtroom: 13

[Defendants' [Proposed] Order, Declaration of Michael H. Steinberg and Exhibit 1 filed concurrently herewith.]

NOTICE OF MOTION AND MOTION TO DISMISS

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT on December 3, 2012, at 10:30 a.m., or as soon thereafter as counsel may be heard, in Courtroom 13 of the United States District Court for the Southern District of California, located at U.S. District Court, 940 Front Street, San Diego, California, Defendants Philips Oral Healthcare, Inc. ("POH") and Philips Electronics North America Corporation ("PENAC") (collectively, "Philips" or "Defendants"), through their counsel, will and hereby do move this Court to dismiss Plaintiff's First Amended Complaint, and each and all causes of action therein, for failure to state a claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure and failure to allege her fraud-based claims with the specificity required by Rule 9(b) of the Federal Rules of Civil Procedure.

Because of the fundamental failings of the First Amended Complaint and because Plaintiff has already once amended her claims, Defendants seek an order from the Court dismissing this action without leave to amend. This Motion is and will be based upon the accompanying Memorandum, Defendants' Exhibit 1, and such other matters as may be presented to the Court at or before a hearing on this Motion.

Dated: October 31, 2012

Respectfully Submitted:

/s/ Michael H. Steinberg

Michael H. Steinberg (CSB No. 134179)
steinbergm@sullcrom.com
Brian R. England (CSB No. 211335)
englandb@sullcrom.com
SULLIVAN & CROMWELL LLP
1888 Century Park East
Los Angeles, California 90067
Telephone: (310) 712-6600
Facsimile: (310) 712-8800

Shawn Joe Lichaa (CSB No. 250902)
lichaas@sullcrom.com
SULLIVAN & CROMWELL LLP
1870 Embarcadero Road
Palo Alto, California 94303
Telephone: (650) 461-5600
Facsimile: (650) 461-5745

Attorneys for Defendants

Michael H. Steinberg (CSB No. 134179)
steinbergm@sullcrom.com
Brian R. England (CSB No. 211335)
englandb@sullcrom.com
SULLIVAN & CROMWELL LLP
1888 Century Park East
Los Angeles, California 90067
Telephone: (310) 712-6600
Facsimile: (310) 712-8800

Shawn Joe Lichaa (CSB No. 250902)
lichaas@sullcrom.com
SULLIVAN & CROMWELL LLP
1870 Embarcadero Road
Palo Alto, California 94303
Telephone: (650) 461-5600
Facsimile: (650) 461-5745

Attorneys for Defendants

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

LILIA PERKINS, on behalf of herself and all others similarly situated,

Plaintiff,

v.

PHILIPS ORAL HEALTHCARE, INC., a Washington Corporation; PHILIPS ELECTRONICS NORTH AMERICA CORPORATION, a Delaware Corporation; and DOES 1 through 20, inclusive,

Defendants.

Case No. 12-CV-1414H BGS

CLASS ACTION

DEFENDANTS PHILIPS ORAL HEALTHCARE, INC.'S AND PHILIPS ELECTRONICS NORTH AMERICA CORPORATION'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED CLASS ACTION COMPLAINT

Judge: The Hon. Marilyn L. Huff
Hearing Date: December 3, 2012
Hearing Time: 10:30 a.m.
Courtroom: 13

[Defendants' [Proposed] Order, Declaration of Michael H. Steinberg and Exhibit 1 filed concurrently herewith.]

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

CALIFORNIA STATUTES

MEMORANDUM IN SUPPORT

I. PRELIMINARY STATEMENT

Let's be blunt: despite the constant barrage of warnings from dental professionals, not everyone loves to floss. And part of that love loss is that, again bluntly, flossing can be a hassle. As Philips has noted, "[f]loss may be considered to be a functional solution, but patients find it difficult to use, resulting in infrequent use or complete omission." (Plaintiff's Exhibit ("Pl. Exh.") 2, ECF No. 5-1 at 2.) It is no wonder why companies have tried to create alternatives or supplements to traditional flossing: Waterpik's developers, for example, created a popular "oral irrigator" to attack plaque principally between teeth by shooting water through the interdental spaces; other companies have produced interproximal cleaners, such as the "interdental sticks" by Flix, that rely upon rubbing the "interdental stick" between the teeth to clean.

After extensive research efforts, Philips has now achieved its own solution: the Sonicare AirFloss. Powered by electricity, the AirFloss creates unique bursts of pressurized air infused with water ("air and microdroplet technology") to clean between teeth. The consumer simply points the nozzle between his or her teeth, and presses a button on the AirFloss to deliver the considerable burst between the teeth to clean. No waxed or unwaxed string is used. With no string to draw back and forth between one's teeth, in its new product Philips has quite literally replaced "traditional flossing with microbursts of water and air." (*Id.*) That is precisely how the product works. With its dramatically different product and approach, Philips proudly markets its newest achievement as a "new technology chapter in the field of Oral Healthcare." (*Id.*)

To inform both consumers and dental professionals, Philips provides comprehensive, detailed and accurate information about the AirFloss. Both the AirFloss packaging and Philips' marketing statements, separately and together, underscore how Philips markets the AirFloss as an *alternative* or *supplement* to the underutilized dental floss, and *not*— as Plaintiff suggests — as synonymous with, the same as or offering better cleaning than string floss. For one thing, the very name of the product — the *Air*Floss — contrasts the product to string floss. For another, it is hard to miss the differences between traditional string floss and the

AirFloss highlighted by Philips. The AirFloss packaging, a photo of which is attached as Exhibit 1 to the First Amended Complaint, uses a see-through panel to show in full the 8.5 inch long electric device. (*See* Pl. Exh. 1, ECF No. 5 at 2.) On the very same packaging (although not shown in Plaintiff's photograph)[1], Philips notes that "*[i]f flossing isn't a regular part of your oral care routine*," the AirFloss offers "microdroplets of water and pressurized air" as an alternative to flossing. (Defs. Exh. 1 at 3 (emphasis added).) And, at the same time that Philips notes that the AirFloss is an alternative to flossing, it acknowledges that flossing is what consumers *should* do: "Flossing has never been easy or enjoyable but we all know we should do it more often." (*Id.*)

It is this issue — the infrequency of use of traditional dental floss combined with the knowledge by consumers that they should do *something* in addition to brushing — that informs the AirFloss marketing. Thus, as part of its comprehensive disclosures, Philips informs consumers in a booklet available on its website (an excerpt of which is attached as Exhibit 2 to the First Amended Complaint) that the reason for developing this new technology is the difficulties attendant with traditional floss, "resulting in infrequent use or complete omission." (Pl. Exh. 2, ECF No. 5-1 at 2.) In addition to the package noting that the AirFloss is appropriate "[i]f flossing isn't a regular part of your oral care routine" (Defs. Exh. 1 at 3), in the Q&A section on its website Philips states that AirFloss is *not* "designed to directly replace floss in all aspects" — a statement which Plaintiff quotes, in bold, in her Amended Complaint. (Pl. Exh. 3, ECF No. 5-2 at 2; Plaintiff's First Amended Complaint ("First Am. Compl.") ¶ 16.) Similarly, in another public statement available online *and quoted by Plaintiff*, Philips marketing manager states that "AirFloss is not designed to replace string floss." (First Am. Compl. ¶ 8.)

---

[1] Despite attaching a photograph of the AirFloss packaging as Exhibit 1 to the First Amended Complaint, Plaintiff neglected to provide a legible copy of the back panel of the box. *See* Pl. Ex. 1, ECF No. 5 at 3. To ensure the Court has a full record and the full context of Philips' comprehensive disclosures, Philips attaches a legible copy of the entire AirFloss packaging as Defendants' Exhibit 1 to the Declaration of Michael H. Steinberg ("Defs. Exh. 1"). Where plaintiff attaches a portion of a document, the Court may consider the *whole* document on a motion to dismiss. *Loughney* v. *Allstate Ins. Co.*, 465 F. Supp. 2d 1039, 1041 (S.D. Cal. 2006) (citing *Branch* v. *Tunnell*, 14 F.3d 449, 453 (9th Cir.1994)).

All of these disclosures are, apparently, lost on Plaintiff, Lilia Perkins. Plaintiff claims she bought the AirFloss at Costco. (*Id.* ¶ 21.) Although Plaintiff does not allege what statements she saw, or when and where she saw them, or what, if anything, she relied on *before purchasing an AirFloss*, the comprehensive AirFloss packaging and the disclosures on it were obviously available to her at the Costco store at the point of sale. Ms. Perkins, before she became a Plaintiff here, could have picked up the box, noticed its weight and size, checked the price, looked through the clear plastic covering the AirFloss and figured out, quickly, that this was neither waxed nor unwaxed "floss" — *all before even reading a word on that package*. But even if Ms. Perkins didn't take the time to look at the product or the packaging at Costco,[2] her multiple quotes from and references to online sources demonstrate that Plaintiff not only knows how to access the Internet, but also views the Internet as a valuable source of information. Despite all the packaging, other marketing statements quoted in the First Amended Complaint and in the face of common sense — all of which would amply refute the suggestion that she could somehow believe that AirFloss was traditional floss product — Plaintiff hopes to cobble together, on behalf of herself and, worse, a putative class of California residents, several fraud-based claims. But Plaintiff's four alleged causes of action sounding in false advertising and product defect, fall far short of, not only common sense, but also the relevant pleading requirements on each of her theories of liability.

Before demonstrating why Plaintiff's claims fail, it is worth noting what Ms. Perkins does *not* allege. She does not allege that the AirFloss is dangerous or that its use poses a risk of harm to anyone. She does not allege that she or anyone else was physically injured through use of the AirFloss. She does not allege a defect in the design or manufacture of the AirFloss. She does not allege that the AirFloss she purchased was broken when she purchased it or broke at any time thereafter. In fact, Plaintiff does not allege that the AirFloss is "defective" in any traditional meaning of the term. Rather, the only defect Plaintiff alleges is

---

[2] Of course, had Ms. Perkins looked at the packaging, she would have seen Philips' promise to provide her with a "full refund" if she was not "100% satisfied for any reason" after using the AirFloss for 28 days. (Pl. Exh. 1, ECF No. 5 at 5; Defs. Exh. 1 at 4.)

that the AirFloss, the product which she purchased for more than $120, is different than traditional dental floss, which costs but a few dollars. And, Plaintiff does not allege that she tried to take advantage of Philips' offer to allow full returns if she was not "100% satisfied for any reason" after using the AirFloss for 28 days. *See infra* note 2. Try as she might, Plaintiff cannot convert her nonsensical beliefs as to what constitutes a defect into an actionable claim against Philips.

Each of the four causes of action Plaintiff does attempt to bring must be dismissed for at least one of several, independent reasons:

First, at the most basic of levels, Plaintiff fails to plead her fraud-based claims with the requisite specificity under Fed. R. Civ. P. 9(b). Plaintiff, instead, offers labels and conclusions that the two Defendants, POH and PENAC, intended to deceive consumers or induce consumer reliance with respect to the advertising and packaging of the AirFloss. But these conclusory allegations are entitled to no deference and are insufficient to state a claim for relief.

Second, the few isolated marketing statements that Plaintiff does include in the First Amended Complaint cannot save her claims, as they are either taken out of context, directly contradicted by other statements cited by Plaintiff or attached to the First Amended Complaint, or are non-actionable opinions and puffery. Without hesitation (and seemingly ignoring the package which establishes the contrary), Plaintiff makes the diametrically contrasting allegation *both* that (1) Philips has misled consumers *by failing to warn* them that AirFloss is not a replacement for traditional dental floss *and* that (2) Philips *discloses* — on its website and elsewhere — that AirFloss was not designed to replace traditional string floss.[3] The packaging for AirFloss itself — which we know Plaintiff had at some point — is devastating to Plaintiff's claims, as it notes that "we all know we should [floss] more often." (Defs. Exh. 1 at 3.) Thus,

[3] While Plaintiff may plead inconsistent theories or causes of action, Plaintiff may not allege inconsistent *facts*. *Kaplan* v. *Aspen Knolls Corp.*, 290 F. Supp. 2d 335, 339 (E.D.N.Y. 2003); *see also Bellefonte Re Ins. Co.* v. *Argonaut Ins. Co.*, 757 F.2d 523, 528-29 (2nd Cir. 1985) ("A party's assertion of fact in a pleading is a judicial admission by which it normally is bound throughout the course of the proceeding.").

the AirFloss packaging itself imparts the lesson that dental professionals have tried for years to teach. But Plaintiff makes no effort whatsoever to explain how Philips allegedly set about to "hide" a material fact from the public by deliberately posting that fact on either its packaging or on its publicly-available website, both of which were designed to provide additional information to the consumer *about this very product*.

Third, Plaintiff's fraud-based claims fail outright because Plaintiff has not adequately pled reliance. Although Plaintiff asserts that she relied "directly or indirectly" on an assortment of general categories of materials "[i]n bringing this action" (First Am. Compl. ¶ 22), she does not allege that she relied on anything in particular in forming her decision to buy AirFloss, nor does she identify specific statements she was aware of before or at the time of her purchase, nor does she explain what "indirect" reliance even means.

Fourth, Plaintiff's express warranty claim under California law fails for all of the above reasons, and the additional reason that, having purchased AirFloss from a Costco store in Chula Vista, she was not in privity with Philips and has not pled at all — let alone with the requisite particularity — which statements she saw, heard or read, when and where, which could form the basis of a warranty.

No matter how many different causes of action Plaintiff attempts to allege, she fails. Accordingly, this Court should dismiss the First Amended Complaint in its entirety without leave to amend.

II. SUMMARY OF PLAINTIFF'S ALLEGATIONS

The crux of Plaintiff's allegations underlying each of her four causes of action is that Philips "falsely advertised [AirFloss] on both [its] packaging, on the Internet, on the website and in print and digital formats that [its] product *is Floss* and/or *a replacement for Floss*." (First Am. Compl. ¶¶ 1-2 (emphasis added).) As evident from the First Amended Complaint, however, Plaintiff has fallen woefully short of stating a claim.

A. Plaintiff's Purchase of the AirFloss

Precious little is known about Plaintiff's purchase of the AirFloss. The only fact alleged in Plaintiff's 81-paragraph First Amended Complaint is that she purchased the AirFloss

at Costco, for her personal use. (*Id.* ¶ 21.) According to a letter attached to the First Amended Complaint, the purchase was at Costco Wholesale in Chula Vista, California, for $119 plus tax ($129). (Pl. Exh. 4, ECF No. 5-3 at 4.) Plaintiff does not allege when she purchased the AirFloss, what research, if any, she did before her purchase, and what information about the AirFloss, if any, was available to her before her purchase (other than, of course, the AirFloss package in which it came). And, although Plaintiff claims that she "was the recipient of Philips's claim that the product was 'an easier way to floss' and that it 'takes the hassle out of flossing' and other representations" (First Am. Compl. ¶ 21), she does not allege what statements made by Philips, if any, she saw before purchasing the product. Likewise, Plaintiff alleges in bulk that *"[i]n bringing this action . . .* [she] either directly or indirectly relied upon, *inter alia*, the representations, advertising and other promotional materials which were prepared and approved by this [*sic*] Defendants and their agents and disseminated on the face of the packages and Defendant's [*sic*] documentation, and/or through local and national advertising media, including Defendants' Internet websites [*sic*], containing the alleged misrepresentations and/or omissions." (*Id.* ¶ 22 (emphasis added).) But Plaintiff does not state what, if anything, she was aware of and relied upon *in making her decision* to purchase the AirFloss. Nor does she provide any facts to substantiate her curious claim of "indirect" reliance (or direct reliance for that matter). (*See id.*)

B. Philips' Comprehensive Disclosures About the AirFloss

Contrary to Plaintiff's conclusory allegations, any fair review of the marketing materials shows that Philips does *not* market its electric interproximal cleaning device as "synonymous with dental floss" (*id.* ¶ 47) or "the same or better than floss" (*id.* ¶ 57) in cleaning. Far from it — Philips marketed and labeled the AirFloss as an alternative or supplement to the unpopular and often neglected traditional floss. The product itself is highly different. No consumer who spends even a few moments with the AirFloss packaging can believe the electric device to be "synonymous" with or "the same" as string or tape floss. The see-through panel on the front of the box reveals the 8.5 inch wand and angled nozzle of the device, and displays the phrase "Air and microdroplet technology." (*See* Pl. Exh. 1, ECF No. 5 at 2; Defs. Exh. 1 at 2.) Traditional floss lacks that technology.

Nor is there any claim that the AirFloss is *superior in cleaning* to traditional floss. On the box itself, Philips confirms that flossing is the desired method of interproximal cleaning, and that AirFloss is a product for those who, despite entreaties from their dental professionals, just do not floss: "*If flossing isn't a regular part of your oral care routine* . . . . Flossing has never been easy or enjoyable *but we all know we should do it more often*. . . . AirFloss takes the hassle out of flossing so you can get a deep clean every day." (Defs. Exh. 1 at 3 (emphasis added).) The AirFloss package's side panel touts the compressed air and water technology, and compares the efficacy of the AirFloss to that "*a manual toothbrush alone*" (emphasis added) and its decreased messiness to that of "oral irrigators." (Pl. Exh. 1, ECF No. 5 at 4.) Nowhere on the packaging does Philips state that AirFloss is the same as dental floss, nor does Philips compare the AirFloss cleaning ability to that of floss.

The fact is that Philips unambiguously discloses on its website and other marketing statements that the AirFloss provides a compressed air and water technology as an alternative to traditional floss, rather than as a direct replacement or an identical product. Peculiarly, Plaintiff cites to Philips' disclosures no fewer than six times. (*See* First Am. Compl. ¶¶ 7, 8, 16, 59, 64, 70.) For example, in the Frequently Asked Questions section on its website, Philips includes the question: "Is Sonicare AirFloss designed to replace flossing." (*Id.* ¶ 16; *see also* Pl. Exh. 3, ECF No. 5-2 at 2.) Contrary to Plaintiff's assertions that Philips intentionally misrepresented and falsely advertised the AirFloss, Philips answers the question "While **Sonicare Airfloss has not been designed to directly replace floss** in all aspects (eg. Removal of large debris from in-between teeth) it is an excellent alternative for daily interproximal cleaning." (First Am. Compl. ¶ 16 (text bolded in First Amended Complaint).) And in a public statement available on the Internet, Philips' marketing manager confirms that "[t]he Sonicare AirFloss is **not** designed to replace string floss." (*Id.* ¶ 8 (text bolded in First Amended Complaint).)

The only place where Philips mentions a replacement of traditional floss is in describing *how the product works* (since, of course, it does not operate with string) and differentiates the AirFloss from floss based upon the "hassle factor." Philips, accurately, notes

th¶the AirFloss operates by "replac[ing] traditional flossing with microbursts of water and air" (Pl. Exh. 2, ECF No. 5-1 at 2 (emphasis added); *see also* First Am. Compl. ¶ 7), which is precisely how the product works. And further, Philips does offer comparisons to traditional floss in terms of "ease of use" — which is, of course, a principal reason why consumers do not use floss. The AirFloss packaging thus notes that AirFloss offers "[a]n easier way to floss" (Pl. Exh. 1, ECF No. 5 at 2), states that "[i]t's probably the easiest way to floss in just 60 seconds" (Defs. Exh. 1 at 3), and that it takes the "hassle out of flossing so you can get a deep clean every time." (*Id.*).

C. Plaintiff's Allegations Concerning Philips' Purported Warranties

Despite Philips' clear and consistent statements about the AirFloss, Plaintiff throws together as her claim a laundry list of marketing statements, mostly taken out of context or misquoted. Putting aside Plaintiff's incorrect or incomplete citations, not one of the statements she lists contradicts Philips' disclosures or supports Plaintiff's four theories of liability. At most, these are non-actionable statements of opinion and puffery:

"Hassle"-Related Statements:

- "An Easier way to Floss" (First Am. Compl. ¶ 5A);
- "It's probably the easiest way to floss in just 60 seconds" (*id.* ¶ 5B);
- "Airfloss takes the hassle out of flossing so you can get a deep clean every day" (*id.* ¶ 5C); and
- "Sonicare AirFloss is designed to make flossing easier, maximize plaque removal . . ." (*id.* ¶ 6B (ellipsis in First Amended Complaint)).

Product Descriptions:

- "**Air**Floss" (presented on the package in a way that Air is bolder than the Floss) (*id.* ¶ 5D (bolding and parenthetical in Amended Complaint)); and
- "Sonicare Airfloss [*sic*] Replaces Traditional Flossing With Micro Bursts of Water and Air" (*id.* ¶ 6A (citing Pl. Exh. 2)).

General Statements of Opinion Regarding Advances in Oral Care:

- "With Sonicare Airfloss, interdental cleaning has just been reinvented" (*id.* ¶ 6C);
- "They're calling it a game changer that will benefit virtually all their patients" (*id.* ¶ 6D);

- "Sonicare AirFloss has been through meticulous clinical validation . . ." (*id.* ¶ 6E (ellipsis in Amended Complaint)); and
- "The reputation of the Sonicare brand is built on its research-based approach to dental and oral care and AirFloss underwent the same rigorous clinical validation as all Sonicare Products" (*id.* ¶ 6F).

III. LEGAL STANDARD

The Court should dismiss the First Amended Complaint in its entirety pursuant to Rule 12(b)(6) because Plaintiff fails to allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). Plaintiff's claim is not facially-plausible because Plaintiff fails to plead enough facts to "allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft* v. *Iqbal*, 556 U.S. 662, 678 (2009). Plausibility is absent "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct." *Id.* at 679. While the Court must accept as true well-pleaded *factual* allegations, "[t]hread-bare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* at 678. Nor must the Court "accept as true a legal conclusion couched as a factual allegation." *Id.*; *see also Epstein* v. *Wash. Energy Co.*, 83 F.3d 1136, 1140 (9th Cir. 1996) ("conclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss").

Further, as this Court has previously held, the determination of whether an alleged misrepresentation is mere puffery when evaluating a claim under the UCL, FAL or CLRA is a legal question that may be resolved on a motion to dismiss. *In re Ferrero Litig.*, 794 F. Supp. 2d 1107, 1115 (S.D. Cal. 2011) (Huff, J.) (holding that"[w]hether a statement is puffery may be decided as a matter of law on a motion to dismiss."); *see also Annunziato* v. *eMachines, Inc.*, 402 F. Supp. 2d 1133,. 1139 (C.D. Cal. 2005) (dismissing on a 12(b)(6) motion UCL and FAL claims where based on non-actionable puffery). General, vague or highly subjective advertising claims — as opposed to specific, detailed factual assertions — are non-actionable puffery and warrant dismissal without leave to amend. *Cook, Perkiss and Liehe, Inc.* v. *N. Cal. Collection Serv. Inc.*, 911 F.2d 242, 246 (9th Cir. 1990) (affirming decision to grant motion to dismiss without leave to

amend where complaint was based on non-actionable advertisement and an amendment would not have cured the defect and stating "[d]istrict courts often resolve whether a statement is puffery when considering a motion to dismiss pursuant to *Federal Rules of Civil Procedure 12(b)(6)* and we can think of no sound reason why we should not do so".).

It is implausible in the extreme to see how Plaintiff could have been deceived into believing that the AirFloss *is floss* by the AirFloss advertising — regardless of her legal theory. Before delving into the why Plaintiff's claims fail as a matter of law, any claims in this regard are just factually implausible. The AirFloss *packaging* — the same packaging that Plaintiff attached to her Amended Complaint — has a see-through panel displaying to Plaintiff (and the world) exactly what the product is: an electric device that uses air and microdoplet technology to find a different way to remove plaque between teeth. (Pl. Exh. 1, ECF No. 5 at 2.) The remainder of the AirFloss packaging — which states that "[c]ompressed air delivers high speed water droplets to powerfully but gently clean deep between teeth" (*id.* at 4) — and the AirFloss website — which discloses that the AirFloss is not "designed to directly replace floss in all aspects" (Pl. Exh. 3, ECF No. 5-2 at 2) — individually and jointly provide the full picture of what the AirFloss is. No consumer can plausibly be deceived into thinking that the AirFloss is or works exactly like traditional floss.

IV. PLAINTIFF'S FRAUD-BASED CLAIMS MUST BE DISMISSED

A. Plaintiff's Fraud-Based Claims Fail Because Plaintiff's Allegations Lack the Requisite Specificity

Plaintiff alleges three fraud-based claims for violations of (i) the Fraudulent Prong of California's Unfair Competition Law ("UCL") (Second Cause of Action); (ii) California's False Advertising Law ("FAL") (Third Cause of Action); and (iii) the Consumer Legal Remedies Act ("CLRA") (Fourth Cause of Action). *See Sensible Foods, LLC* v. *World Gourmet, Inc.*, No. 11-2819 SC, 2011 WL 5244716, at *7 (N.D. Cal. Nov. 3, 2011) ("False advertising under Section 17500 of the California Business and Professionals Code is a claim sounding in fraud."); *see also Vess* v. *Ciba-Geigy Corp. U.S.A.*, 317 F.3d 1097, 1103, 1105 (9th Cir. 2003) (applying Rule 9(b) to CLRA); *Wilson* v. *Hewlett-Packard Co.*, 668 F.3d 1136 (9th Cir. 2012) (dismissing

claim under fraudulent prong of UCL because it was supported only by conclusory allegations that defendant knew of defect).

Each of these claims fails because Plaintiff's First Amended Complaint lacks the specificity required by Rule 9(b) to support a fraud-based action. *See* Fed. R. Civ. P. 9(b) ("[A] party must state with particularity the circumstances constituting fraud"). Plaintiff's "[a]verments of fraud must be accompanied by 'the who, what, when, where, and how' of the misconduct charged." *Vess*, 317 F.3d at 1105 (citation omitted). And any allegations failing to meet this standard must be "disregarded" or "stripped" from the First Amended Complaint. *Id.* (citations omitted).

Plaintiff provides a mere three paragraphs to support her claim that Philips' actions were fraudulent. (*See* First Am. Compl. ¶¶ 64-66.) Plaintiff has alleged only that Philips knew of its "fraud," an allegation she (ironically) supports by pleading that Philips actually *disclosed* (or, in Plaintiff's lingo, "buried") in the Frequently Asked Questions on its website that AirFloss was not designed as a total replacement for traditional floss with respect to the removal of large pieces of interdental debris. (*Id.* ¶ 64 (citing Pl. Exh. 3, ECF No. 5-2).)[4]

Of course, in a world where "Google" has become a verb, the notion that Philips "buried" information by placing it the Frequently Asked Question section of a publicly-available website specifically intended to provide the public with information about the AirFloss is absurd. The allegation that Philips disclosed a (clear and obvious) limitation of its product cannot suffice to support a fraud theory, absent actual particularized facts — such as the who, what, when, where — supporting an assertion that this information was crucial and fundamentally unavailable (despite its prominence in *Frequently* Asked Questions).

And to the extent that Plaintiff's CLRA claim also sounds in fraud, it must be dismissed for failure to plead fraud with particularity. Plaintiff has not alleged with the

---

[4] Plaintiff "supports" her theory of fraud under the UCL and the FAL with the same deficient allegations. (*Compare* First Am. Compl. ¶ 64 *with id.* ¶ 70.) The elements of an FAL claim are the same as that under the "fraudulent" prong of the UCL. Plaintiff must allege adequately that "members of the public are likely to be deceived." *Buller* v. *Sutter Health*, 74 Cal. Rptr. 3d 47, 51 (Ct. App. 2008). Under either theory of liability, Plaintiff cannot support a claim.

specificity required by Fed. R. Civ. P. 9(b) and the CLRA that any of Philips' statements was false or was literally true but "[was] either actually misleading or . . . ha[d] the capacity or tendency to deceive or confuse the public." *Williams* v. *Gerber Prods. Co.*, 552 F.3d 934, 938 (9th Cir. 2008) (quotations omitted). Far from pleading her allegations with particularity, Plaintiff merely alleges that both Philips defendants "knew and/or should have known that their representations of fact concerning the character and quality of the AirFloss were material and likely to mislead the public." (First Am. Compl. ¶ 76.) While the substance of her allegations (as described below) is meek in and of itself, this allegation simply does not meet the specificity required under the Federal Rules. In the context of fraud-based allegations involving more than one defendant, "a plaintiff must, at a minimum, identify the role of each defendant in the alleged fraudulent scheme." *Swartz* v. *KPMG LLP*, 476 F.3d 756, 764-65 (9th Cir. 2007) (internal citation and quotations omitted).

B. All of Plaintiff's Claims Must Fail Because They Are Based on Non-Actionable Puffery

Where Plaintiff has actually alleged anything of substance, she fails to plead any actionable statements of fact, and instead relies on classic puffery. California law, which governs all of Plaintiff's claims, necessitates dismissal of any causes of action relying on such allegations, and requires addressing those claims on a motion to dismiss. *Cook, Perkiss and Liehe, Inc.*, 911 F.2d at 245 ("District courts often resolve whether a statement is puffery when considering a motion to dismiss [under Rule 12(b)(6)] and we can think of no sound reason why they should not do so."); *In re Ferrero Litig.*, 794 F. Supp. 2d at 1115 ("Generalized, vague, and unspecified assertions constitute 'mere puffery' upon which a reasonable consumer could not rely, and hence are not actionable under the UCL, FAL, or CLRA.") (citations and quotations omitted).

In support of her various theories of liability, Plaintiff primarily identifies three highly-subjective statements: (1) "An Easier Way to Floss"; (2) "It's probably the easiest way to floss in just 60 seconds"; and (3) "AirFloss takes the hassle out of flossing so you can get a deep

clean every day."[5] (*Id.* ¶ 44.) Yet all three statements are classic examples of non-actionable puffery, *i.e.*, expressions of the seller's opinion — as opposed to statements of fact. *See*, *e.g.*, *Cook, Perkiss and Liehe, Inc.*, 911 F.2d at 246 ("best technology," "lower rates" and "better customer service" are non-actionable puffery); *Gillette Co.* v. *Norelco Consumer Prods. Co.*, 946 F. Supp. 115, 137 (D. Mass. 1996) ("Anything closer could be too close for comfort" is innocuous puffery "because the conditional 'could' is denotive of only a possibility; and things that are possible can occur, but they may not."). Such advertising slogans do not constitute statements of fact — how does one measure whether any "hassle" is left in flossing? What factors are to be considered in determining whether AirFloss is "probably the easiest"? How "deep" and how "clean" constitute a "deep clean"? *See Consumer Advocates* v. *Echostar Satellite Corp.*, 8 Cal. Rptr. 3d 22, 29-30 (Ct. App. 2003) (holding that "no reasonable consumer would take [challenged statements] as anything more weighty than an advertising slogan" and that "crystal clear" and "cd quality" are "akin" to puffery); *Omega Eng'g, Inc.* v. *Eastman Kodak Co.*, 30 F. Supp. 2d 226, 259 (D. Conn. 1998) (holding that "[c]laims of perfection for a particular application . . . are statements of opinion, quite subjective and vague," and are "too ambiguous to be understood as representations of fact and represent statement of opinion").

Plaintiff has also alleged that Philips marketed AirFloss as a "product that is synonymous with traditional floss" (First Am. Compl. ¶ 47) and "the same or better than floss." (*Id.* ¶ 57). Putting aside the fact that this is a complete mischaracterization of Philips' marketing materials, terms like "same," "similar" and "synonymous" are also non-actionable puffery. *See Cook, Perkiss & Liehe, Inc.*, 911 F.2d at 245-46 ("*same* collection services at a lower price" is puffery and non-actionable under Lanham Act) (emphasis added)).

Finally, in support of some of her causes of action, Plaintiff offers a laundry list of phrases that are but variations of the types of non-actionable puffery previously addressed: (i) "makes flossing easier"; (ii) "maximize plaque removal"; (iii) "interdental cleaning has just

---

[5] Plaintiff does not specifically allege — aside from incorporation by references — that the other statements in her complaint, found at Paragraphs 5-6, form the basis of her express warranty claim. Similar statements by Philips made on the Internet and print media are also non-actionable, and are addressed with relevant case law in Section VI, *infra*.

been reinvented"; (iv) "game changer that will benefit virtually all their patients;" (v) "AirFloss has been through meticulous clinical validation"; and (vi) "AirFloss underwent the same rigorous clinical validation as all Sonicare products." These challenged statements simply fail to support any cause of action. *See, e.g.*, *Oestreicher* v. *Alienware Corp.*, 544 F. Supp. 2d 964, 973-74 (N.D. Cal. 2008) ("higher performance," and "more innovative," are non-actionable puffery);[6] *Edmunson* v. *Procter & Gamble Co.*, No. 10-CV-2256-IEG (NLS), 2011 WL 1897625, at *6 (S.D. Cal. May 17, 2011) ("best results" and assertions about superior comfort are non-actionable puffery); *Glen Holly Entm't, Inc.* v. *Tektronix Inc.*, 343 F.3d 1000, 1015 (9th Cir. 2003) (dismissing Amended Complaint based on statements "describing the 'high priority' Tektronix placed on product development and alluding to marketing efforts" because no reasonable consumer would have relied on such "vague and unspecific assertions"); *Rochester Laborers Pension Fund* v. *Monsanto Co.*, --- F. Supp. 2d ----, 2012 WL 3143914, at *26 (E.D. Mo. Aug. 1, 2012) ("literally a game changing technology" is non-actionable puffery).[7] Despite Plaintiff's conclusory assertion to the contrary, it is not "easy to see that Defendants have engaged in behavior that violates the law." (First Am. Compl. ¶ 61.)

Regardless of the causes of action Plaintiff asserts, her allegations are based on non-actionable puffery and thus fail, as a matter of law, to support a cause of action against Philips.

C. All of Plaintiff's Claims Must Fail Because Plaintiff Has Not Adequately Pled Reliance.

The Court should also dismiss all of Plaintiff's causes of action because Plaintiff has not pled actual reliance on any challenged statement. Actual reliance is required to bring suit

---

[6] *See also Stickrath* v. *Globalstar, Inc.*, 527 F. Supp. 2d 992, 998 (N.D. Cal. 2007) ("terms such as . . . 'high performance,' and 'latest technology' are non-actionable puffery"); *Anunziato* v. *eMachines, Inc.*, 402 F. Supp. 2d 1133, 1140 (C.D. Cal. 2005) ("the phrase 'latest technology' is non-actionable puffery").

[7] Plaintiff's allegation that "the Mayo Clinic and the ADA all say that Oral Irrigators are not as effective as Floss" (First Am. Compl. ¶ 57) does not turn any of Defendants' non-actionable puffery into violations of the law, especially where Philips never advertised its product as floss or its equivalent in terms of cleaning. (*See* Pl. Exh. 1, ECF No. 5 at 4 (comparing the effectiveness of AirFloss to manual toothbrush alone).)

under each of her purported causes of action. *In re Ferrero Litig.*, 794 F. Supp. 2d at 1111-12, 1117 (reliance is an element of UCL, FAL and express warranty law) (citation omitted); *In re Tobacco II Cases*, 46 Cal. 4th 298, 306 (2009); *Cohen* v. *DIRECTV, Inc.*, 101 Cal. Rptr. 3d 37, 42 (Ct. App. 2009) (reliance is an element of CLRA claim).[8]

To adequately plead reliance, Plaintiff must "specifically allege[] which representations [she] saw, heard, or read" and failure to do so warrants dismissal of the claim. *In re Hydroxycut Mktg. and Sales Practices Litig.*, 801 F. Supp. 2d 993, 1008 (S.D. Cal. 2011); *see also In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, & Prods. Liab. Litig.*, 754 F. Supp. 2d 1145, 1183 (C.D. Cal. 2010) (citations omitted). But even if Plaintiff ultimately alleged what she saw in making her purchase, by definition and as a matter of law, puffery (*i.e.*, generalized and subjective assertions) precludes reliance by consumers. *Cook, Perkiss and Liehe, Inc.*, 911 F.2d at 246.

Plaintiff has made no attempt — aside from bare legal conclusions — to plead reliance, and she certainly did not allege that prior to purchasing AirFloss she "saw, heard, or read" any of the statements she claims create liability for Philips. Plaintiff also never alleges that she visited the AirFloss website or saw other descriptions about AirFloss on the Internet prior to her purchase. (*See* First Am. Compl. ¶ 2.)[9]

At most, Plaintiff alleged that the challenged statements "appears [*sic*] on every package of the AirFloss products and was also reinforced by appearing in numerous other forms of advertising commissioned by Defendants." (*Id.* ¶ 45.) But, as this Court has held, allegations

---

[8] To be precise, reliance is an element of an express warranty claim under California law, where, as here, the plaintiff is not in privity with the manufacturer. *See, e.g.*, *Keegan* v. *Am. Honda Motor Co., Inc.*, No. CV 10-09508 MMM (AJWx), 2012 WL 2250040, at *38 (C.D. Cal. June 12, 2012) ("[I]n the absence of privity, California [express warranty] law requires a showing that a plaintiff relied on an alleged omission or misrepresentation") (citation omitted). Because Plaintiff allegedly purchased her AirFloss from Costco, not from Philips (First Am. Compl. ¶ 21), Plaintiff is not in privity with Philips and must adequately allege reliance in order to pursue an express warranty claim under California law.

[9] Of course, had Plaintiff visited the Philips website prior to making her purchase (or read the back panel of the AirFloss packaging), even according to her own allegations she would have seen language that directly undercuts her claims in this lawsuit — that the AirFloss has not been designed to replace traditional flossing and consumers *should* use traditional floss.

that a defendant published certain statements about its products in various written sources, without further specificity as to which statements plaintiff relied upon, are insufficient to survive a motion to dismiss. *Cruz* v. *Sears*, No. 12-CV-00623-H (BGS), 2012 WL 2923323, at *4 (S.D. Cal. Jan. 18, 2012) (Huff, J.). And, finally, Plaintiff's unsupported allegation that she (and other consumers) purchased the AirFloss "in the belief that they [*sic.*] conformed to the express warranties on the AirFloss' packaging" misses the mark. (First Am. Compl. ¶ 46.) Aside from begging the question as to whether the statements on the packaging were in fact warranties or other statements of fact, Plaintiff still does not allege that she read, saw or heard, was otherwise made aware of, or relied upon those statements prior to making the purchase.

And even if Plaintiff has alleged which specific statements she relied on (which she has not), her allegations would still fail because puffery, which all of the challenged statements are, cannot induce reliance as a matter of law. "The common theme that seems to run through cases considering puffery in a variety of contexts is that consumer reliance will be induced by specific rather than general assertions." *Cook, Perkiss & Liehe, Inc.*, 911 F.2d at 246. Because Plaintiff has failed to adequately allege her reliance (and with respect to her express warranty claim, was also not in privity with Philips), each of her California claims should be dismissed. *Newcal Indus. Inc.* v. *Ikon Office Solution*, 513 F.3d, 1038, 1053 (9th Cir. 2008); *In re Ferrero Litig.*, 794 F. Supp. 2d at 1115.

V. PLAINTIFF'S UCL CLAIMS MUST ALSO BE DISMISSED

This Court should dismiss Plaintiff's claim that Philips violated California's Unfair Competition Law ("UCL"), Cal. Com. & Prof. Code § 17200 *et seq*. (Plaintiff's Second Cause of Action). As addressed earlier, Plaintiff has alleged nothing more than puffery and has failed to plead reliance, each of which necessitates dismissing her UCL claim under any of the "unlawful," "unfair," or "fraudulent" prongs of a UCL claim. Plaintiff's UCL claim cannot survive for additional reasons.

Although some nuances among these three prongs exist, Plaintiff's Amended Complaint may not proceed under any UCL theory unless she alleges that "members of the public are likely to be deceived," *Freeman* v. *Time, Inc.*, 68 F.3d 285, 289 (9th Cir. 1995)

(quotations omitted), and "state[s] with reasonable particularity the facts supporting" her claim to relief, *Stearns* v. *Select Comfort Retail Corp.*, 763 F. Supp. 2d 1128, 1150 (N.D. Cal. 2010).[10]

And yet, Plaintiff has not alleged — and cannot allege — anything remotely showing that consumers are going to be or have been deceived. Plaintiff has only alleged that Philips sold one product — the AirFloss — and complains that it is not a different product (i.e., traditional floss). And if the see-through portion of the AirFloss packaging itself does not prove that the AirFloss is not traditional floss, as already demonstrated, the only statements Plaintiff has challenged are puffery and are not of the type that a reasonable consumer would rely on to take any specific action. *See Webb* v. *Carter's Inc.*, No. 2:08-cv-07367, 2009 WL 3869108, at *6 (C.D. Cal. March 6, 2009) (dismissing entire UCL for, *inter alia*, failing to allege "anything more than mere puffing."). Also, Plaintiff nowhere plausibly alleges concealment; in fact, Plaintiff here has alleged the opposite — that Philips' website actually disclosed to consumers that the AirFloss is not a total replacement for traditional dental floss (First Am. Compl. ¶ 16; Pl. Exh. 3, ECF No. 5-2 at 2) and the packaging also discloses that the AirFloss deploys "air and microdroplet technology." (Pl. Exh. 1, ECF No. 5 at 4.)

A. The Amended Complaint Fails to Allege a Violation of the "Unlawful" Prong of a UCL Claim.

Plaintiff tries to shoehorn her way into a claim under the "unlawful" prong of the UCL by alleging that Defendants violated Health and Safety Code Sections 110390 and 110395, which prohibit false advertising of any food, drug, device or cosmetic. (First Am. Compl. ¶ 56.) In order to survive a motion to dismiss under the "unlawful" prong, Plaintiff must adequately allege with "reasonable particularity" "anything that can properly be called a business practice

[10] Plaintiff, with few additions, supports her UCL claim with the same allegations underlying her theory that Philips created an express warranty, namely that Philips advertised AirFloss as "floss," that AirFloss "replaces traditional floss" and that AirFloss was an "easier way to floss." Defendants respectfully refer the Court to Section IV.B. *supra* as to the reasons why Plaintiff's rehashed allegations are non-actionable puffery (which cannot support a UCL claim), and will only address the additional allegations in support of Plaintiff's UCL claim.

and that at the same time is forbidden by law." *Cal-Tech Commc'n, Inc.* v. *L.A. Cellular Tel. Co.*, 20 Cal. 4th 163, 180 (1999) (quotations and citations omitted).[11]

Here, Plaintiff has offered no supporting facts of any violation of law and, instead, has pled the previously addressed (and insufficient) puffery.

B. Plaintiff Has Failed to Allege a Violation of the "Unfair" Prong of a UCL claim.

Nor has Plaintiff adequately alleged a violation of the "unfair" prong of a UCL claim because she has not alleged that Philips' business practice "offends an established public policy" and is "tethered to specific constitutional, statutory, or regulatory provisions." *Ford* v. *Lehman Bros. Bank, FSB*, No. C 12-00842 CRB, 2012 WL 2343898, at *10-11 (N.D. Cal. June 20, 2012) (noting that this definition of unfairness appears to have garnered the most attention in the Ninth Circuit); *see also Shroyer* v. *New Cingular Wireless Services, Inc.*, 622 F.3d 1035, 1044 (9th Cir. 2010) (unfair practice is one "whose harm to the victim outweighs its benefits").

Plaintiff devotes a scant four paragraphs to her allegations that Philips's conduct was unfair and simply rehashes the same wrong allegations — that Defendants marketed their product as "Floss" and that it "replaces traditional flossing." (First Am. Compl. ¶¶ 60-63.). These allegations fail to support *any* substantive cause of action, because they are just untrue as demonstrated by the very things to which Plaintiff points. But even putting aside the actual statements, and their context, courts applying California law have repeatedly held that these types of "barebones" allegations are insufficient to support a claim under the UCL. *See Shroyer* 622 F.3d at 1044 ("What remains are conclusory allegations about . . . the unfair treatment of New Cingular's customers, and the court cannot determine from [plaintiff]'s barebone allegations that he has stated a plausible claim.");[12] *see also Sosa* v. *Bank of New York Mellon*

---

[11] *Stearns*, 763 F. Supp. 2d at 1150 ("[A]llegations in support of [a UCL] claim must state with reasonable particularity the facts supporting the statutory elements of the alleged violation" (quotations omitted)).

[12] To the extent that any of Plaintiff's allegations are premised on the theory that Philips failed to disclose information, Plaintiff's theory also fails because she has not alleged any duty to disclose required by law. *Buller*, 74 Cal. Rptr. 3d at 51-52 ("This is because a consumer is not 'likely to be deceived' by the omission of a fact that was not required to be disclosed in the first place.").

Trust, No. C 12-00144 LB, 2012 WL 2568188, at *3 (N.D. Cal. July 2, 2012) (summarizing previous court order holding that plaintiffs bare allegations of "deceptive, unfair and fraudulent conduct" to be conclusory); *Lehman Bros. Bank*, 2012 WL 2343898, at *11 (dismissing claim under fraudulent prong for failure to plead facts in accordance with the relevant standards).

To these insufficient allegations, Plaintiff adds that Philips' conduct "causes substantial injury to consumers because consumers are paying in excess of $100 for [AirFloss] that [*sic*] represents that it flosses one's teeth, when it does not, and a product that does floss teeth costs less than $5 (namely string floss)." (First Am. Compl. ¶ 63.) Of course, this conclusory statement relies on the same puffery shown to be deficient *supra*, and the mere fact that one company sells a product for a greater price than another company sells a different product does not render the more expensive product offensive to public policy. Courts even hold that — absent real countervailing public policy factors — a *single* company can charge different prices for *very similar* products. *See Cullen* v. *Netflix*, No. 5:11-cv-01199-EJD, 2012 WL 2906245, at *9 (N.D. Cal. July 13, 2012) (holding that plaintiff has not adequately alleged any public policy harm to show that price difference in subscription fee between streaming Netflix service and DVD-by-mail service is immoral or unscrupulous).[13]

VI. PLAINTIFF'S EXPRESS WARRANTY CLAIM FAILS BECAUSE THE CHALLENGED STATEMENTS ARE NON-ACTIONABLE PUFFERY

Plaintiff's First Cause of Action, for breach of express warranty under California law, must be dismissed because each of the statements she claims to create express warranties are, as already discussed, non-actionable puffery. The only purported warranties Plaintiff alleges in support of her express warranty cause of action are three previously addressed statements — (1) "An Easier Way to Floss;" (2) "It's probably the easiest way to floss in just 60 seconds;" and (3) "AirFloss takes the hassle out of flossing so you can get a deep clean every day" (First Am.

[13] And, as noted, *supra*, Plaintiff's UCL claim and FAL claim should be dismissed for several reasons: (i) failure to plead fraud with particularity; (ii) merely alleging non-actionable puffery; and (iii) failure to allege reliance.

Compl. ¶ 44) — which amount to nothing more than puffery. *See supra*, Section IV.B. And, in any event, Plaintiff also has not adequately alleged reliance. *See supra*, Section IV.C.

But the difficulties are even more substantial here. Even if these failings were insufficient, there is another: to state a claim for breach of express warranty under California law, in addition to the (missing) reliance element addressed earlier, Plaintiff must allege the exact terms of the warranty of which she complains and that the warranty was breached. *In re Ferrero Litig.*, 794 F. Supp. 2d at 1117 ("In order to plead a cause of action for breach of express warranty, one must allege the exact terms of the warranty, plaintiff's reasonable reliance thereon, and a breach of that warranty which proximately causes plaintiff injury") (quoting *Williams* v. *Beechnut Nutrition Corp.*, 229 Cal. Rptr. 605, 608 (Ct. App. 1986)); *see also In re: Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, & Prods. Liab. Litig.*, 754 F. Supp. 2d 1145, 1182 (C.D. Cal. 2010) ("To create a warranty, representations regarding a product must be specific and unequivocal.").

And, even if one accepts the puffery that Plaintiff puts forward as her claims here (an "easier way to floss," "probably the easiest way to floss . . ." and "takes the hassle out of flossing"), California law would preclude those advertising statements from being transformed into actionable express warranties. California law allows that an express warranty may be created in only one of three ways, none of which applies here: (1) by "[a]ny affirmation of *fact* or *promise* made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain. . .;" (2) by "[a]ny description of the goods which is made part of the basis of the bargain. . . "; and (3) by "[a]ny sample or model which is made part of the basis of the bargain. . . ." Cal. Com. Code § 2313(1) (emphases added).[14] Only specific factual representations or promises create express warranties. *Johnson* v. *Mitsubishi Digital Elecs. Am., Inc.*, 578 F. Supp. 2d 1229, 1236 (C.D. Cal. 2008).

By contrast, affirmations "merely of the value of goods [and] statement[s] purporting to be merely the seller's opinion or commendation of goods does not create a

[14] Certainly, there is no assertion that the AirFloss Ms. Perkins bought served as a "sample" or "model" for other purchases to come, so (3) is inapplicable.

warranty." Cal. Com. Code § 2313(2). The vague and highly subjective claims highlighted in the First Amended Complaint constitute "puffery" and thus cannot support liability for breach of express warranty under California law. *Cook, Perkiss & Liehe, Inc.*, 911 F.2d at 246 (citation omitted); *Haskell* v. *Time, Inc.*, 857 F. Supp. 1392, 1399 (E.D. Cal. 1994) (advertising that amounts to mere puffery is not actionable); *Hauter* v. *Zogarts*, 534 P.2d 377, 381 (Cal. 1975).

And, even if there were express warranties, Plaintiff would still have to plead a breach of the warranty. The only support for any purported *breach* of an express warranty by Philips — assuming, *arguendo*, that Philips' statements constitute an express warranty under California law — rests in statements from the Mayo Clinic and the American Dental Association that oral irrigators are not as effective in cleaning as floss. *But Philips never made such a comparison.* Philips only compared the efficacy of the AirFloss to that of a manual toothbrush. (Pl. Exh. 1, ECF No. 5 at 4 ("Removes up to 99% more plaque between teeth where a toothbrush just can't reach," and specifically comparing efficacy to a "manual toothbrush alone.").) Philips further compared the reduced *mess* associated with the AirFloss to "oral irrigators" (*id.*), not to the cleaning qualities of floss. Simply put, the AirFloss packaging contains no qualitative or quantitative comparisons to the cleaning qualities of traditional floss (except to point consumers to the fact that they *should* floss); thus, statements by other organizations opining on such a comparison could never support a breach.

VII. PLAINTIFF'S CALIFORNIA LEGAL REMEDIES ACT CLAIM ALSO FAILS

Plaintiff's Fourth Cause of Action, her CLRA claim, also should be dismissed. Plaintiff's First Amended Complaint alleges that Philips violated Provisions (4), (5), and (9) of the CLRA, Cal. Civ. Code §1770(a). Provision (4) of the CLRA prohibits using deceptive designations or representations of geographic origin — something Plaintiff has not even begun to allege. Provision (5) prohibits misrepresentations about the "approval, characteristics, ingredients, uses [or] benefits," of a product. Provision (9) prohibits "advertising goods or services with intent not to sell them as advertised." None of these even remotely applies.

Passing this failure, Plaintiff's notice is not sufficient under the CLRA, and her request for damages in connection with the alleged violation of Provision (4) of the CLRA must

be denied because Plaintiff's April 16 letter does not even mention Provision (4) of Section 1770(a), let alone provide Philips notice of a potential violation of that provisions. (First Am. Compl. ¶ 77; Pl. Exh. 4, ECF No. 5-3 at 4.) Because Plaintiff violated the CLRA's statutory requirements with respect to Provision (4), Plaintiff may not seek damages for the alleged violation of that provision. *See* Cal. Civ. Code § 1782(a) (requiring notification of the "particular alleged violations of Section 1770").

VIII. PLAINTIFF'S HALF-HEARTED ATTEMPT TO PLEAD AN IMPLIED WARRANTY CLAIM ALSO FAILS

As noted *supra* at footnote 5, Plaintiff's First Amended Complaint contains one sentence asserting that Philips is liable for breach of the implied warranty of merchantability. (First Am. Compl. ¶ 47.) California's implied warranty of merchantability law is codified at Section 1791.1 of the California Civil Code, which, in relevant part, requires that "[g]oods conform to the promises or affirmations of fact made on the container or label." Cal. Civ. Code § 1791.1(c).

Plaintiff does not allege anything specific in support of her one-sentence claim and because Plaintiff did not separately enumerate an implied warranty claim, it is not at all clear that she intended to plead such a claim. Nonetheless, her "claim" fails as a matter of law. *First*, as detailed *supra*, all of the alleged promises or affirmations of fact on the AirFloss packaging are either truthful in context or non-actionable puffery. *Second*, the implied warranty of merchantability provides only "a minimum level of quality"; it does not "impose a general requirement that goods precisely fulfill the expectation of the buyer." *Skelton* v. *General Motors Corp.*, 500 F. Supp. 1181, 1191 (N.D. Ill. 1980), *rev'd. on other grounds*, 660 F.2d 311 (7th Cir. 1981), *cert. denied*, 456 U.S. 974, 72 L. Ed. 2d 848, 102 S. Ct. 2238 (1982); *see also Burr* v. *Sherwin Williams Co.*, 42 Cal. 2d 682, 694 (1954); *Moore* v. *Hubbard & Johnson Lumber Co.*, 308 P.2d 794, 797 (Cal. Dist. Ct. App. 1957). Because Plaintiff does not — and cannot — allege that AirFloss falls below any "minimally acceptable standard of quality," her merchantability claim must be dismissed. *See Skelton*, 500 F. Supp. at 1192.

IX. CONCLUSION

Because Plaintiff has failed to state a claim for which relief can be granted, Defendants respectfully request that the Court dismiss the First Amended Complaint without leave to amend.

Dated: October 31, 2012

Respectfully Submitted:

/s/ *Michael H. Steinberg*
Michael H. Steinberg (CSB No. 134179)
steinbergm@sullcrom.com
Brian R. England (CSB No. 211335)
englandb@sullcrom.com
SULLIVAN & CROMWELL LLP
1888 Century Park East
Los Angeles, California 90067
Telephone: (310) 712-6600
Facsimile: (310) 712-8800

Shawn Joe Lichaa (CSB No. 250902)
lichaas@sullcrom.com
SULLIVAN & CROMWELL LLP
1870 Embarcadero Road
Palo Alto, California 94303
Telephone: (650) 461-5600
Facsimile: (650) 461-5745

Attorneys for Defendants

Michael H. Steinberg (CSB No. 134179)
steinbergm@sullcrom.com
Brian R. England (CSB No. 211335)
englandb@sullcrom.com
SULLIVAN & CROMWELL LLP
1888 Century Park East
Los Angeles, California 90067
Telephone: (310) 712-6600
Facsimile: (310) 712-8800

Shawn Joe Lichaa (CSB No. 250902)
lichaas@sullcrom.com
SULLIVAN & CROMWELL LLP
1870 Embarcadero Road
Palo Alto, California 94303
Telephone: (650) 461-5600
Facsimile: (650) 461-5745

Attorneys for Defendant

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

LILIA PERKINS, on behalf of herself and all others similarly situated,

Plaintiff,

v.

PHILIPS ORAL HEALTHCARE, INC., a Washington Corporation; PHILIPS ELECTRONICS NORTH AMERICA CORPORATION, a Delaware Corporation; and DOES 1 through 20, inclusive,

Defendants.

Case No. 12CV1414H BGS

CLASS ACTION

DECLARATION OF MICHAEL H. STEINBERG IN SUPPORT OF DEFENDANTS PHILIPS ORAL HEALTHCARE, INC.'S AND PHILIPS ELECTRONICS NORTH AMERICA CORPORATION'S MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED CLASS ACTION COMPLAINT

Judge: The Hon. Marilyn L. Huff
Hearing Date: December 3, 2012
Hearing Time: 10:30 a.m.
Courtroom: 13

[Defendants' Notice of Motion and Motion, and Memorandum in Support Thereof filed concurrently herewith.]

DECLARATION OF MICHAEL H. STEINBERG

I, Michael H. Steinberg, declare as follows.

1. I am a partner of Sullivan & Cromwell LLP and am counsel for Philips Electronics North America Corporation and Philips Oral Healthcare, Inc. (collectively "Philips" or "Defendants") in connection with this action. I submit this Declaration, which is based upon my personal knowledge, on behalf of Defendants and in support of their Motion to Dismiss Plaintiff's First Amended Complaint. If called to testify, I could and would testify to the following:

2. Attached hereto as Defendants' Exhibit 1 is a true and correct copy of the Philips Sonicare AirFloss packaging. Defendants attach this exhibit because in Plaintiff's copy of the AirFloss packaging, submitted as Plaintiff's Exhibit 1, ECF No. 5, the text on the back side of the packaging is illegible.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 31st day of October, 2012 in Los Angeles, California.

Michael H. Steinberg

PHILIPS

sonicare

An easier way to floss

Gently and effectively improves oral health

Air and microdroplet technology

2 Handles

Philips Sonicare AirFloss

AirFloss

Simple: point and press

Fast: cleaning in 60 seconds

Effective: removes up to 99% more plaque*

*Than a manual toothbrush alone

Includes:

PHILIPS

sonicare

Philips Sonicare AirFloss

AirFloss

An easier way to floss

Gently and effectively improves oral health

If flossing isn't a regular part of your oral care routine, you're not reaching the bacteria that can build up between teeth, causing plaque, bad breath and infection. Flossing has never been easy or enjoyable but we all know we should do it more often. America loves Philips Sonicare so we designed a device that could be loved just as much. AirFloss takes the hassle out of flossing so you can get a deep clean every day. With microdroplets of water and pressurized air, Philips Sonicare AirFloss removes up to 99% more plaque* between teeth than brushing alone. It's probably the easiest way to floss in just 60 seconds.

Floss your whole mouth in 60 seconds

Simple:
point and press
Deeply clean between your teeth with one press

Fast:
cleaning in 60 seconds
Angled nozzle with guided placement tip

Effective:
removes up to 99% more plaque*
Air and microdroplet technology removes plaque in a single burst

ITEM 575521

0 75020 02169 4

*Than a manual toothbrush alone

ITEM 575521

0 75020 02169 4

PHILIPS
sonicare

Sonicare AirFloss includes:
2 Handles
4 Nozzles
1 Charger base
2 Travel cases

Better check-ups guaranteed
Use Sonicare AirFloss for 28 days and if you are not **100% satisfied** for any reason, we'll give you a **full refund**.

2 year warranty
Register product and get support at **www.philips.com/welcome**

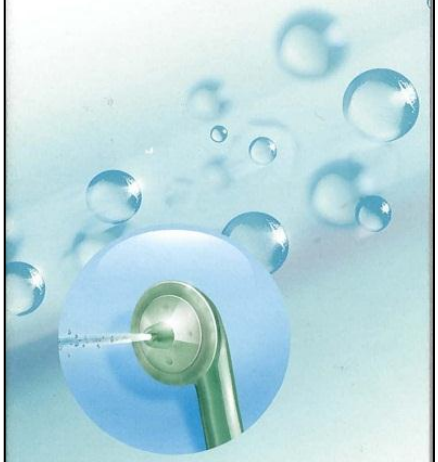
An easier way to floss

Gently and effectively improves oral health

PHILIPS

www.philips.com/sonicare

PHILIPS
sonicare



Air and microdroplet technology

1. Compressed air delivers high-speed water droplets to powerfully but gently clean deep between teeth with less mess**
2. Removes up to 99% more plaque* between teeth, where a toothbrush just can't reach
3. Helps improve gum health and prevent tooth decay
4. Safe and gentle on teeth and gums

*Than a manual toothbrush alone
**Than oral irrigators

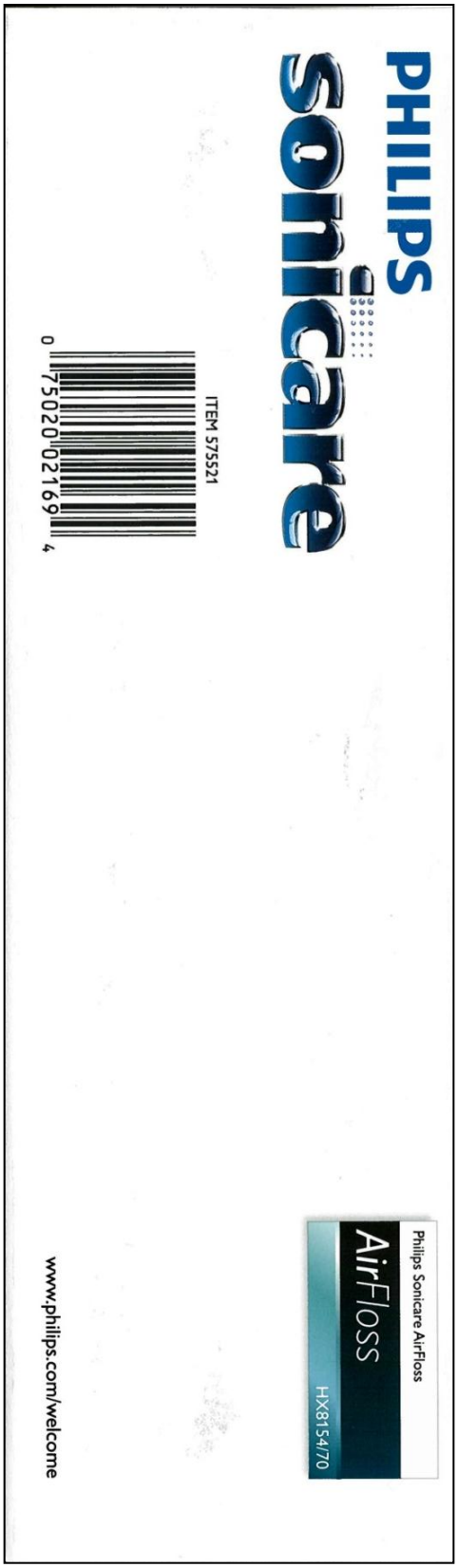
An easier way to floss

Gently and effectively improves oral health

ITEM 575521

0 75020 02169 4


LI-ION
This appliance contains Lithium Ion rechargeable batteries, which must be recycled or disposed of properly.
Charger, 100-240V a.c., 50-60Hz, 0.4-1.4 W
LISTED Personal hygiene appliance 1726
This carton is made of recyclable material.
4235 020 51981
NHB 121503 1
4235 010 15921
ITEM 575521
0 75020 02169 4
Model HX8154/70
Philips Oral Healthcare, Inc.
22100 Bothell Everett Highway
Bothell, WA 98021
U.S.A.
FOR ALL QUESTIONS, CALL: 1-800-682-7664
www.philips.com/sonicare
Parts made in China and Mexico
Patents pending
©2011 Koninklijke Philips Electronics NV (KPENV). All rights reserved. PHILIPS and the Philips Shield Emblem are registered trademarks of KPENV. Sonicare and the Sonicare logo are trademarks of Philips Oral Healthcare, Inc. and/or KPENV.
Reg. U.S. Pat. & Tm. Off.


PHILIPS
sonicare
ITEM 575521
0 75020 02169 4
Philips Sonicare AirFloss
AirFloss
HX8154/70
www.philips.com/welcome