UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES—GENERAL

Case No. **CV 13-08174 DMG (JCGx)** Date March 31, 2015

Title ***Thomas Flowers, et al. v. Doctor's Best, Inc.*** Page 1 of 14

Present: The Honorable DOLLY M. GEE, UNITED STATES DISTRICT JUDGE

KANE TIEN	NOT REPORTED
Deputy Clerk	Court Reporter
Attorneys Present for Plaintiff(s) None Present	Attorneys Present for Defendant(s) None Present

Proceedings: IN CHAMBERS—ORDER RE DEFENDANT'S MOTION TO DISMISS SECOND AMENDED COMPLAINT [32]

I. PROCEDURAL HISTORY

On July 3, 2014, Plaintiffs Thomas Flowers and Christopher Nelson filed the operative Second Amended Complaint ("SAC") against Defendant Doctor's Best, Inc. alleging violations of (1) California's False Advertising Law ("FAL"), Cal. Bus. & Prof. Code § 17500 *et seq*.; (2) California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code § 17200 *et seq*.; and (3) California's Consumer Legal Remedies Act ("CLRA"), Cal. Civ. Code § 1750 *et seq*. [Doc. # 31.]

On July 28, 2014, Doctor's Best filed a motion to dismiss. [Doc. # 32.] On August 22, 2014, Plaintiffs filed an opposition. [Doc. # 33.] Doctor's Best filed a reply and a request for judicial notice on August 29, 2014. [Doc. ## 34, 35.] On October 15, 2014, the Court took the motion under submission because it deemed the matter appropriate for decision without oral argument. [Doc. # 39.]

Having duly considered the parties' written submissions, the Court now renders its ruling.

II. JUDICIAL NOTICE

Doctor's Best requests that the Court take judicial notice of publicly filed documents in three federal cases: the Second Amended Complaint in *McCrary v. The Elations Co., LLC*, No. 5:13-cv-00242 (C.D. Cal.), filed May 3, 2013; the Second Amended Class Action Complaint in *Padilla v. Costco Wholesale Corp.*, No. 1:11-cv-07686 (N.D. Ill.), filed July 20, 2012; and the First Amended Class Action Complaint in *Pearson v. Target Corp.*, No. 1:11-cv-07972 (N.D. Ill.), filed June 14, 2012. [Doc. # 35.]

A court's review of a Rule 12(b)(6) motion to dismiss is generally limited to the contents of the complaint. *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). If considering evidence outside the pleadings on a Rule 12(b)(6) motion, a court "must normally convert the 12(b)(6) motion into a Rule 56 motion for summary judgment, and it must give the nonmoving party an opportunity to respond." *U.S. v. Ritchie*, 342 F.3d 903, 907-08 (9th Cir. 2003). The Ninth Circuit has identified two exceptions to this general rule: (1) "a court may consider material which is properly submitted as part of the complaint," and "[i]f the documents are not physically attached to the complaint, they may be considered if the documents' authenticity . . . is not contested and the plaintiffs' complaint necessarily relies on them"; and (2) "under Fed. R. Evid. 201, a court may take judicial notice of matters of public record," but "a court may not take judicial notice of a fact that is subject to reasonable dispute." *Lee v. City of Los Angeles*, 250 F.3d 668, 688-89 (9th Cir. 2001) (internal quotations and citations omitted).

Plaintiffs do not oppose the request. Because the documents are matters of public record that are not subject to reasonable dispute, the Court takes judicial notice of them.

III.
FACTUAL ALLEGATIONS[1]

Doctor's Best manufactures and markets supplements, including a line of joint health dietary supplements. (SAC ¶¶ 1-3.) A substantial number of these are sold in California stores and shipped to California residents via online retailers. (*Id.* ¶ 2.) This action concerns Doctor's Best joint health supplements, which include Glucosamine Chondroitin MSM 120C, Glucosamine Chondroitin MSM 240C, and Glucosamine Chondroitin MSM + Hyaluronic Acid. (*Id.* ¶ 32.)

The bottles containing these supplements feature the phrases "science-based nutrition," and "maintains healthy joints & connective tissue," with the exception of Glucosamine Chondroitin MSM + Hyaluronic Acid, which states, "maintains and lubricates healthy joints & connective tissue." (*Id.* ¶ 34.) On its website, Doctor's Best references studies that it claims support the scientific validity of its marketing claims. (*Id.* ¶ 13.) The studies were conducted on patients with arthritis. (*Id.*) The following information regarding the role of glucosamine in the supplements is also on the Doctor's Best website:

> Glucosamine is a fundamental building block for proteoglycans and glycosaminoglycans. Glucosamine sulfate (GS) helps to maintain joint health

[1] The Court assumes the truth of the factual allegations in the Complaint solely for purposes of deciding the motion to dismiss.

> through its ability to both act as a component of and stimulate formation of cartilage glycosaminoglycans and the hyaluronic acid backbone essential for the formation of cartilage proteoglycans.

(*Id.* ¶ 33.)

Multiple studies have concluded that the oral ingestion of glucosamine and/or chondroitin cannot provide any beneficial effects to the joints.[2] (*Id.* ¶¶ 10-11.) In addition, studies have shown MSM to be ineffective. (*Id.* ¶ 50.) Finally, hyaluronic acid, which is found in the Glucosamine Chondroitin MSM + Hyaluronic Acid supplement, does not improve joint health or relieve joint pain because it is quickly degraded during digestion into its constituents, two common sugars found in the normal diet. (*Id.* ¶ 51.)

Plaintiff Flowers has experienced arthritis-like symptoms for the past 20 years. (*Id.* ¶ 19.) Flowers purchased Doctor's Best supplements every few months from approximately May 2010 through October 2012 at stores in and around Goleta, California, paying approximately $20 to $25 per 120 tablet bottle and $40 per 240 tablet bottle. (*Id.* ¶¶ 20, 22.) He also purchased Doctor's Best Glucosamine Chondroitin MSM + Hyaluronic Acid on at least one occasion in 2012 at a Vons in Goleta. (*Id.* ¶ 21.) Prior to making these purchases, he read and relied on the representations on the bottles that the supplements provide "science-based nutrition" and "maintain healthy joints and connective tissue, and that Glucosamine Chondroitin MSM + Hyaluronic Acid "maintain[] and lubricate[] healthy joints and connective tissue." (*Id.* ¶¶ 20-21.) Flowers believed the supplements were marketed toward him, a person suffering from symptoms of arthritis, and he did not find anything on the package to indicate that the supplements were not intended for arthritis patients, other than a boilerplate mandatory FDA disclosure found on every supplement sold in the United States.[3] (*Id.* ¶ 23.) Flowers used the supplements as directed, but his symptoms worsened. (*Id.* ¶ 24.) Had he known that Doctor's Best had misrepresented the benefits of its products, he would not have purchased them. (*Id.* ¶ 24.)

[2] Such studies include a 2004 study that concluded that glucosamine was no more effective than a placebo in treating knee arthritis symptoms; a 2006 Glucosamine/Chondroitin Arthritis Intervention Trial (GAIT) study showing that glucosamine and chondroitin—alone or in combination—were not efficacious; 2008/2010 GAIT studies reporting that glucosamine and chondroitin did not rebuild cartilage; a 2010 meta-analysis stating that glucosamine and chondroitin—alone or in combination—did not reduce joint pain or have an impact on the narrowing of joint space; and a 2013 study concluding that glucosamine was no more effective than a placebo in improving joint health. (SAC ¶¶ 41- 49.)

[3] The disclosure reads: "This product is not intended to diagnose, treat, cure, or prevent any disease." (Mot. at 4.)

Plaintiff Nelson has suffered from arthritis-like symptoms for the past 15 years. (*Id.* ¶ 25.) Nelson purchased the Doctor's Best supplements at issue on multiple occasions from April 2010 through November 2012 in and around Kennett Square, Pennsylvania and Newark, Delaware. (*Id.* ¶ 26.) Prior to each purchase, Nelson read and relied on the representations on the supplement bottles. (*Id.* ¶¶ 26, 28.) At or around the time of purchase, Nelson also visited Defendant's website, where he reviewed the studies cited by Doctor's Best, and upon finding that many were conducted on arthritis patients, concluded that the supplements would be appropriate for his arthritis-like symptoms. (*Id.* ¶ 27.) Nelson also believed the product was marketed toward him, an arthritis patient. (*Id.* ¶ 29.) Nelson used the supplements as directed but did not notice any improvement in his symptoms. (*Id.* ¶ 30.) Had he been aware that Doctor's Best had misrepresented the benefits of the products, he would not have purchased the supplements. (*Id*.)

Dr. Jeremiah E. Silbert is an adjunct Professor of Medicine at Harvard Medical School, Brigham and Women's Hospital, Division of Rheumatology, Immunology and Allergy. (*Id.* ¶ 35.) He has utilized glucosamine extensively in experimentation and contributed significantly to information regarding glucosamine's natural and experimental metabolism, as well as its measurement and utilization. (*Id*.) In addition, he has worked with biosynthesis, cellular localization, and chondroitin sulfate measurement throughout his career. (*Id*.) Dr. Silbert's research shows that ingestion of glucosamine and/or chondroitin cannot provide significant effects on the cartilage, and that no addition of any small amounts of extra glucosamine and/or chondroitin sulfate to the cartilage would have a positive effect on the cartilage. (*Id.* ¶ 36.) Dr. Silbert's research leads to the conclusion that orally ingested glucosamine and chondroitin sulfate do not arrive in quantities significant enough to have any beneficial impact on the joint. (*Id.* ¶ 38.) After examining the ingredients, advertising, promotion, and claims of Doctor's Best products, Dr. Silbert concluded that the supplements are not science-based nutrition, do not maintain healthy joints and connective tissues, and do not lubricate joints. (*Id.* ¶¶ 37, 39.)

IV.
MOTION TO STRIKE

Defendants argue that pursuant to Federal Rules of Civil Procedure 10(c) and 12(f), the Court should strike the declaration of Dr. Silbert, as well as the allegations in the SAC referring to the declaration. (Mot. at 5.) Specifically, Defendants argue that the declaration does not meet the definition of a written instrument under Rule 10(c), and that the allegations in the SAC that are based on the declaration are merely conclusory assertions. Plaintiffs counter that there is no inflexible rule governing the written instruments that can be attached to a pleading, the declaration merely serves to buttress the allegations in the SAC, and the allegations in the SAC

that refer to the declaration include findings that are directly relevant to—and form the basis of—Plaintiffs' claims.

Under Rule 10(c), "[a] statement in a pleading may be adopted by reference elsewhere in the same pleading or in any other pleading or motion. A copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes." Fed. R. Civ. P. 10(c). A "written instrument" under Rule 10(c) is a "document evidencing legal rights or duties or giving formal expression to a legal act or agreement, such as a deed, will, bond, lease, insurance policy or security agreement." *DeMarco v. DepoTech Corp.*, 149 F. Supp. 2d 1212, 1220 (S.D. Cal. 2001) (quoting *Murphy v. Cadillac Rubber & Plastics, Inc.*, 946 F. Supp. 1108, 1115 (W.D.N.Y. 1996) (citing *Black's Law Dictionary* 801, 1612 (6th ed. 1990))). In addition, "[t]he court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f). Based on these rules and definitions, most courts have concluded that "affidavits and declarations . . . are not allowed as pleading exhibits unless they form the basis of the complaint." *U.S. v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003); *see also City of Royal Oak Ret. Sys. v. Juniper Networks, Inc.*, No. 5:11-CV-04003-LHK, 2013 WL 2156358 (N.D. Cal. May 17, 2013).[4]

Here, Dr. Silbert's declaration is similar to the affidavit that was stricken in *DeMarco*. As in *DeMarco*, the declaration "represents a piece of evidentiary matter generated by a retained expert" who had no contact with the defendant. 149 F. Supp. 2d at 1220. Dr. Silbert's declaration serves mainly as an assessment of the accuracy of Doctor's Best's representations, not as the basis of Plaintiffs' claims. *Id.*

The Court agrees with the conclusion of the *DeMarco* court that the best approach would be to "include the expert's nonconclusory assertions within specific paragraphs in the complaint." *Id.* at 1222. Furthermore, like the plaintiffs in *DeMarco*, Plaintiffs here have included the relevant portions of the expert testimony within the body of the SAC. (SAC ¶ 35-39.)

Therefore, because the Silbert declaration does not meet the Rule 10(c) definition of a written instrument and does not form the basis of Plaintiffs' complaint, Defendant's motion to strike is **GRANTED**. The Court **DENIES** the motion to the extent it seeks an order to strike portions of the SAC referring to the declaration except with respect to any conclusory allegations

[4] Some courts have reached the opposite conclusion, stating there exists "no inflexible rule" governing what kinds of written instruments may be attached to a pleading.. See *In Re Mannkind Sec. Actions*, 835 F. Supp. 2d 797, 821 (C.D. Cal. 2011) (quoting *DLJ Mortg. Cap. Inc. v. Kontogiannis*, 726 F. Supp. 2d 225, 234 (E.D.N.Y. 2010)).

made by Dr. Silbert—namely, Dr. Silbert's conclusion that the representations on Doctor's Best's supplement bottles are untrue. (SAC ¶¶ 34, 39.)

V.
MOTION TO DISMISS

Doctor's Best moves to dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1), 12(b)(6), and 9(b). Specifically, Defendant argues that, under Rule 12(b)(6), Plaintiffs fail to state a claim because "the 'science based nutrition' representation constitutes non-actionable puffery," and Plaintiffs "fail to state a claim that the challenged representations are false or misleading." (Mot. at i.) Defendant also contends that Plaintiffs lack standing to seek injunctive relief under Rule 12(b)(1), and that Plaintiffs have failed to meet the heightened pleading standard of Rule 9(b). (Mot. at ii.)

A. Legal Standard

Under Rule 12(b)(1), a plaintiff's standing is a "threshold question which must be answered" before turning to the merits of the claims. *Linda R.S. v. Richard D.*, 410 U.S. 614, 616, 93 S. Ct. 1146, 1148, 35 L. Ed. 2d 536 (1973). To establish the requisite "case or controversy" for standing, a plaintiff must establish: (1) an injury-in-fact; (2) a causal connection between the injury and the defendant's actions or failure to act; and (3) a likelihood that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 2136, 119 L. Ed. 2d 351 (1992).

The Court set forth the standard for a motion to dismiss under Rules 12(b)(6) and 9(b) in its prior Order, filed on June 13, 2014, and therefore need not repeat it here. [Doc. # 30.]

B. Rule 12(b)(6)

Defendant asserts that Plaintiffs fail to state a claim that the challenged representations are false or misleading, and therefore their claims should be dismissed pursuant to Rule 12(b)(6). (Mot. at i).

///
///
///
///
///

i. Non-actionable Puffery

First, Doctor's Best contends that the representation that the supplements provide "science-based nutrition" is sufficiently vague and general that no reasonable consumer would rely on it, and therefore constitutes non-actionable puffery.

"The determination of whether an alleged misrepresentation is a 'statement of fact' or is instead 'mere puffery' is a legal question that may be resolved on a Rule 12(b)(6) motion. *Newcal Industries, Inc. v. Ikon Office Solution*, 513 F.3d 1038, 1053 (9th Cir. 2008) (quoting *Cook, Perkiss, & Liehe v. Northern California Collection Service, Inc.*, 911 F. 2d 242, 245 (9th Cir. 1990)). As a result, the Court finds it appropriate to resolve this issue on a motion to dismiss.

If a claim is highly unlikely to induce consumer reliance, it is considered non-actionable puffery. *Newcal*, 513 F.3d at 1053. "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*, 911 F.2d at 246.

Here, the phrase "science-based nutrition" could induce reasonable consumer reliance when considered in the context of the other representations on the supplement bottle. The phrase can reasonably be read to imply the formulation of the supplements is supported by scientific testing and research. The presence or lack of such supporting research is a "specific" characteristic of the product. *See Edmundson v. Procter & Gamble Co.*, 537 F. App'x 708, 709 (9th Cir. 2013) (quoting *Newcal*, 53 F.3d at 1053). The Court thus concludes that the "science-based nutrition" representation does not constitute non-actionable puffery.

ii. Failure to State a Claim

Doctor's Best argues that Plaintiffs fail to state a claim that the challenged representations are false or misleading for the following reasons: (1) the studies cited in the SAC tested arthritic patients, rather than the types of patients for which the supplements are indicated; (2) none of Plaintiffs' cited studies tested the actual Doctor's Best supplements at issue here; (3) Plaintiffs claim the supplements failed to deliver results that were never promised; and (4) Plaintiffs fail to state a claim under the UCL. (Mot. at i, 11, 14.) In response, Plaintiffs argue that the studies in the SAC address the effectiveness of the products for both arthritic and nonarthritic patients; the studies cited in the SAC prove that Doctor's Best supplements cannot work as represented; Plaintiffs have adequately alleged that the supplements did not provide the

promised benefits; and Plaintiffs have stated plausible claims for relief under the UCL. (Opp'n at 9, 13, 15, 17.) The Court addresses each of these arguments in turn.

a. *Testing on Arthritic Patients*

First, Doctor's Best argues that it does not represent that the supplements treat osteoarthritis, and because Plaintiffs' cited studies testing the supplements for efficacy in the treatment of osteoarthritis, Plaintiffs have failed to state a claim that Doctor's Best's representations are false or misleading. *See McCrary v. Elations Co., LLC*, No. ED 13-cv-0242-JGB-OPX, 2013 WL 6402217, at *4 (C.D. Cal. Apr. 24, 2013) ("Plaintiff's osteoarthritis studies do not address the general claims of joint comfort, health, and flexibility found in Elations' advertising."; *Eckler v. Wal-Mart Stores, Inc.*, No. 12-cv-727-LAB-MDD, 2012 WL 5382218, at *2 (S.D. Cal. Nov. 1, 2012) ("There's really no denying, though, that Eckler's claims are based almost exclusively on her allegations that the purported benefits of glucosamine . . . have been disproved by the scientific community."); *see also Padilla v. Costco Wholesale Corp.*, No. 11 C 7686, 2013 WL 195769, at *3 (N.D. Ill. Jan. 16, 2013) (finding studies conducted on arthritis patients to be insufficient because these studies do "not have any bearing on the truthfulness of the actual representations" that the products could provide benefits to non-arthritic patients). Moreover, in a case with very similar facts to the instant case, *In re GNC Corp. TriFlex Products Marketing and Sales Practices Litigation (No. II)*, the court noted that the plaintiffs should have alleged "that 'experts in the field' are prepared to testify that, on the basis of the existing scientific evidence, any reasonable expert would conclude from the cited studies that glucosomine and chondroitin are ineffective in non-arthritic consumers." *In re GNC Corp. TriFlex Products Mktg. & Sales Practices Litig. (No. II)*, MDL No. 14-2491-JFM, 2014 WL 2812239, at *1 (D. Md. June 20, 2014), *reconsideration denied sub nom*, *In re GNC Corp. Triflex Products Mktg. & Sales Practices Litig.*, No. MDL 14-2491-JFM, 2014 WL 4447113 (D. Md. Sept. 9, 2014).

Here, Plaintiffs have alleged sufficient facts to show the products could not provide any benefits to consumers, whether they suffer from arthritis or not. Plaintiffs allege that the "overwhelming weight of high quality, credible and reliable studies confirm," and the "scientific community generally recogniz[es]," that glucosamine and chondroitin cannot improve joint health, which is sufficient to meet the standard set forth in *In re GNC*. (SAC ¶ 40.) Plaintiffs also cite to research that shows that orally ingested glucosamine and chondroitin do not arrive in quantities significant enough to have *any* beneficial impact on the joint, whether healthy or not.

Furthermore, the studies cited on Defendant's website, which Plaintiff Nelson alleges he visited, show the efficacy of the supplements on arthritic patients, and create the impression that the supplements are in fact intended for such patients. Consumers, including plaintiffs,

reasonably rely on these website representations as indicating the products are intended for use by arthritic patients. Defendant argues the studies cited on the website are insufficient to indicate the supplements are intended for use by arthritic patients. (Reply at 9.) Defendant relies on *McCrary*, in which the defendant referred on its packaging to the symptoms of osteoarthritis, but the court did not find that the defendant had represented the product to be intended for such patients. 2013 WL 6402217, at *4. In *McCrary*, however, the defendant merely recited the primary symptoms of osteoarthritis, whereas here Defendant has cited studies demonstrating the efficacy of the supplements on arthritic patients. *Id.* Though both arguably raise the inference that the supplements are intended for arthritic patients, citing studies performed on arthritic patients would be even more likely to create the inference that the supplements are intended to treat the disease in particular and not just a collection of symptoms typically associated with the disease. Therefore, the studies on Defendant's website adequately support Plaintiffs' claim that Defendant made false or misleading representations that the supplements were intended for arthritic patients.

Finally, the boilerplate and mandatory disclosure on the labels of the supplements is insufficient to completely disclaim and change the apparent meaning of the representations on the bottles and the studies on the website. *See F.T.C. v. Direct Marketing Concepts, Inc.*, 624 F.3d 1, 12 (1st Cir. 2010) ("[D]isclaimers or qualifications in any particular ad are not adequate to avoid liability unless they are sufficiently prominent and unambiguous to change the apparent meaning of the claims and to leave an accurate impression. Anything less is only like to cause confusion by creating contradictory double meanings.") (quoting *Removatron Int'l Corp. v. FTC*, 884 F.2d 1489, 1497 (1st Cir. 1989)); *see also Eckler*, 2012 WL 5382218, at *6 (stating that plaintiff's argument that the court should not consider a disclaimer would be relevant were the disclaimer at issue contradictory to other representations).

b. *Testing of Active Ingredients*

Doctor's Best next argues that Plaintiffs' cited studies cannot support claims of false or misleading representations because the studies only tested discrete ingredients in the supplements, not the supplements themselves. Relying on *Rosen v. Unilever U.S., Inc.*, Doctor's Best contends that the ingredients in the supplements may have different properties as a whole than they do separately. No. C 09-02563 JW, 2010 WL 4807100, at *5 (N.D. Cal. May 3, 2010). Defendant also argues Plaintiffs' studies do not address the other minor ingredients, such as BioCell Collagen, which are contained in one of the supplements.

Defendants' reliance on *Rosen* is inapposite. In *Rosen*, the court found illogical the plaintiff's premise that use of an unspecified amount of a non-nutritious oil in a blend of nutritious oil made the entire blend non-nutritious. 2010 WL 4807100, at *5. Here, in contrast,

Plaintiff argues that studies proving ineffective the active ingredients[5] of supplements suggest that the supplements as a whole are ineffective. While this conclusion is not certain, it is at least sufficiently plausible to "raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 545.[6]

Furthermore, Plaintiffs *do* allege that glucosamine and chondroitin, alone or in combination, are not efficacious. Plaintiffs also plead that any other minor ingredients in the supplements are similarly ineffective. Moreover, because the constituent ingredients are ineffective, it is, at a minimum, plausible that their sum is also ineffective.

c. *Benefits Were Never Promised*

Doctor's Best contends that Plaintiffs' belief that the supplements did not work as promised do not support their claims for two reasons: (1) both named Plaintiffs suffer from arthritis symptoms and Doctor's Best does not represent that the supplements treat arthritis; and (2) Plaintiffs offer only an unadorned conclusion that the supplements did not work based on the fact they did not experience any improvement in their conditions, which they would have no way of knowing for sure.

The first argument is unavailing based on the Court's conclusion, discussed *supra*, that the supplements could be interpreted to be intended for arthritic patients.

With respect to the second argument, Defendant is correct that the nature of the supplements necessitates a scientific evaluation of their ability to deliver promised benefits, not merely Plaintiffs' personal assessments of their symptoms. In *Eckler*, the court noted that the plaintiff could not reasonably be expected to submit a rigorous medical examination showing the ineffectiveness of the defendant's joint supplements, and that only scientific testing could show a supplement's claim to be false and/or misleading. 2012 WL 5382218, at *3 n.2. Unlike in *Eckler*, however, where the plaintiff did not provide any scientific study demonstrating the ineffectiveness of the supplement, here Plaintiffs have cited numerous studies to suggest there is

[5] BioCell Collagen is not among the active ingredients, according to the facts pled in the SAC.

[6] In addition, Defendant's website states, "Glucosamine sulfate (GS) helps to maintain joint health through its ability to both act as a component of and stimulate formation of cartilage glycosaminoglycans and the hyaluronic acid backbone essential for the formation of cartilage proteoglycans." (SAC ¶ 33.) This suggests glucosamine is capable on its own of stimulating cartilage rebuilding. This representation is called into doubt based on the Plaintiff's cited studies finding glucosamine to be ineffective. See *McCrary*, 2013 WL 6402217, at *5 ("Several claims in Elations' advertisements single out the effectiveness glucosamine and chondroitin, therefore Plaintiff can plausibly refute these claims with studies examining these ingredients.").

no connection between the supplements' active ingredients and joint health, sufficiently supporting their allegations that Defendant's representations about the supplements are false or misleading.

d. *Failure to State a Claim Under the UCL*

Finally, Doctor's Best argues that Plaintiffs have failed to state viable claims under any of the prongs of the UCL. The UCL prohibits "unfair competition," which it defines to include "any unlawful, unfair or fraudulent business act or practice." Cal. Bus. & Prof. Code § 17200. It covers "anything that can properly be called a business practice and that at the same time is forbidden by law," and "governs anti-competitive business practices as well as injuries to consumers." *Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co.*, 20 Cal. 4th 163, 180, 83 Cal. Rptr. 2d 548 (1999). The UCL borrows violations of other laws and treats them as unlawful practices that the unfair competition law makes independently actionable. *Id*. Where a plaintiff's UCL claim is grounded in fraud, her pleading must satisfy the particularity requirement of Federal Rule of Civil Procedure 9(b). *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125 (9th Cir. 2009) (citing *Vess*, 317 F.3d at 1102-05).

According to Doctor's Best, any claim under the fraudulent prong or unlawful prong must fail because Plaintiffs' FAL and CLRA claims do not survive based on their failure to state a claim that the challenged misrepresentations are false or misleading. As discussed *supra*, Plaintiffs' claims do survive. Furthermore, as the Court explains *infra*, Plaintiffs have met the particularity requirement under Rule 9(b). Therefore, claims under both prongs survive.

Next, Defendant contend that Plaintiffs have failed to state a claim under the unfair prong, arguing that Plaintiffs have offered only conclusory allegations as to how the conduct was unfair. Plaintiffs offer a formulaic recitation of the elements of the unfair prong, but fail to state the basis for these claims independent of the other grounds for relief. (*See* SAC ¶ 77.) These conclusory allegations are insufficient to state a claim under the UCL. *In re Sony Grant Wega KDF-E A10/A20 Series Rear Projection HDTV Television Litig.*, 758 F. Supp. 2d 1077, 1091 (S.D. Cal. 2010) (to state a claim under the "unfair" prong, a plaintiff must allege facts showing that the consumer injury is substantial, not outweighed by any countervailing consumer benefits, and could not have been reasonably avoided). Therefore, Plaintiffs' claim fails under the unfair prong.

In sum, the Court concludes that the science-based nutrition representation does not constitute non-actionable puffery, and that Plaintiffs have adequately stated a claim that the remaining representations are false or misleading. The Court therefore **DENIES** Defendant's

motion to dismiss the UCL claim under Rule 12(b)(6), except with respect to the unfair prong. To the extent Plaintiffs have now amended their complaint twice, the Court does not grant further leave to amend.

C. Rule 9(b)

Rule 9(b) requires averments of fraud to be accompanied by "the who, what, when, where, and how of the misconduct charged" in order to give the opposing party notice of the particular misconduct at issue. In *Kearns*, the Ninth Circuit determined that the plaintiff had "failed to articulate the who, what, when, where, and how of the misconduct alleged" where it failed to allege: (1) what the allegedly misleading material "specifically stated"; (2) "when he was exposed [to the statements] or which ones he found material"; (3) "which sales material he relied upon in making his decision to buy [the product]"; and (4) who made allegedly false statements and when the statements were made. *Kearn v. Ford Motor Co.*, 567 F.3d 1120, 1126 (9th Cir. 2009).

In the SAC, Plaintiffs have remedied the defects identified in the Court's prior order by specifying the the allegedly false statements at issue, the particular supplements purchased by named Plaintiffs,[7] time frames for Plaintiffs' purchases, the specific allegedly false statements Plaintiffs relied upon in making their purchases, and the locations of the purchases. Plaintiffs also allege sufficient information to infer that the alleged misrepresentations remained consistent throughout the relevant time period. Therefore, Plaintiffs have met Rule 9(b)'s heightened pleading requirements. The Court **DENIES** Defendant's motion to dismiss under Rule 9(b).

D. Rule 12(b)(1)

Doctor's Best argues that Plaintiffs lack Article III standing to pursue their claims and therefore this claim should be dismissed under Rule 12(b)(1). (Mot. at 21.) To establish Article III standing, a plaintiff must demonstrate injury, causation, and redressability. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 2136, 119 L. Ed. 2d 351 (1992).

Doctor's Best alleges that injunctive relief would not redress harm that Plaintiffs face because they are unlikely to ever purchase the supplements again. In order to assert claims on behalf of a class, Plaintiffs must be in danger of the kind of harm for which relief is sought.

[7] Plaintiffs state that the scope of the claims is not limited to the three enumerated products. Plaintiff argues that the "including but not limited to" language only serves to prevent the unfair circumscription of the plaintiff class. (Opp'n at 10 n.7.) Despite the disclaimer, Plaintiffs' failure to specifically identify all products at issue in this action may preclude them from asserting fraud-based claims as to such unidentified products.

Armstrong v. Davis, 275 F.3d 849, 860 (9th Cir. 2001). If there is no reasonable belief that there will continue to be an immediate threat to the named plaintiffs, generally those plaintiffs lack standing for injunctive relief. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 109, 103 S. Ct. 1660, 1669, 75 L. Ed. 2d 675 (1983).

While it is implausible to believe that Plaintiffs will continue to purchase the supplements, to construe that as a lack of redressability here would render California consumer protection laws ineffectual. *Henderson v. Gruma Corp.*, CV 10-04173 AHM AJWX, 2011 WL 1362188, at *7 (C.D. Cal. Apr. 11, 2011) (citing *Fortyune v. American Multi–Cinema, Inc.*, No. CV 10–5551, 2002 WL 32985838, at *7 (C.D. Cal. Oct. 22, 2002)); *see also Ries v. Arizona Beverages USA LLC*, 287 F.R.D. 523, 533 (N.D. Cal. 2012). The California Supreme Court has held that the purpose of these laws is "to protect both consumers and competitors by promoting fair competition in commercial markets for goods and services." *See Kwikset Corp. v. Superior Court*, 51 Cal. 4th 310, 344 (2011) (emphasis omitted). Due to the fact that the alleged false advertising plausibly poses an immediate threat to consumers, Plaintiffs should be able to pursue injunctive relief on their behalf. *See Henderson*, 2011 WL 1362188, at *8.

While Defendant argues that recent cases recognize *Henderson* as wrongly decided, the Court disagrees with the reasoning of those cases. *Mason v. Nature's Innovation, Inc.*, No. 12CV3019 BTM DHB, 2013 WL 1969957, at *4-5 (S.D. Cal. May 13, 2013). As the court in *Henderson* aptly pointed out:

> If the Court were to construe Article III standing for FAL and UCL claims as narrowly as the Defendant advocates, federal courts would be precluded from enjoining false advertising under California consumer protection laws because a plaintiff who had been injured would always be deemed to avoid the cause of the injury thereafter ("once bitten, twice shy") and would never have Article III standing.

Henderson, CV 10-04173 AHM (AJWx), 2011 WL 1362188, at *7.

This point rings especially true in class actions, in which plaintiffs seek "to represent broader interests than [their] own." *Hawkins v. Comparet-Cassani*, 251 F.3d 1230, 1237 (9th Cir. 2001). The very existence of class actions creates a certain "tension" with standing doctrine. *See Gratz v. Bollinger*, 539 U.S. 244, 263 n.15, 123 S. Ct. 2411, 156 L. Ed. 2d 257 (2003) (tension between adequacy of representation and standing); *Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 987 (9th Cir. 2007) (tension between standing and mootness). The same type of tension exists in consumer class actions seeking prospective relief. While a consumer must have

been injured to have standing to bring a claim under a consumer protection statute in the first instance, a lead plaintiff need not allege that he will willingly subject himself to future misconduct, or that he will be fooled by false advertising he now knows to be false, in order to seek injunctive relief on behalf of a class.

Because some members of the class do not have the same knowledge as Plaintiffs presumably now do, there is a likelihood of repeat injury for the class as a whole, and on the basis of "class standing," the claims may proceed. The Second Circuit addressed standing with respect to the differing posture of various class members, distilling several Supreme Court cases to find that:

> [i]n a putative class action, a plaintiff has class standing if he plausibly alleges (1) that he "personally has suffered some actual . . . injury as a result of the putatively illegal conduct of the defendant," [*Blum v. Yaretsky*, 457 U.S. 991, 999, 102 S. Ct. 2777 (1982)] (quotation marks omitted), and (2) that such conduct implicates "the same set of concerns" as the conduct alleged to have caused injury to other members of the putative class by the same defendants, *Gratz*, 539 U.S. at 267, 123 S. Ct. 2411.

NECA-IBEW Health & Welfare Fund v. Goldman Sachs & Co., 693 F.3d 145, 162 (2d Cir. 2012) *cert. denied*, __U.S.__, 133 S. Ct. 1624, 185 L. Ed. 2d 576 (2013). Here, Plaintiffs have clearly alleged an injury due to Defendant's claimed misrepresentations and it implicates the same concerns as the injury to those putative class members who will be harmed by their lack of knowledge of that conduct. Plaintiffs therefore may seek injunctive relief on behalf of the class.

For the foregoing reasons, Plaintiffs have met the redressability requirement in order to achieve Article III standing. The motion to dismiss for lack of standing is **DENIED**.

VI.
CONCLUSION

In light of the foregoing, Doctor's Best's motion to dismiss is **GRANTED** as to the unfair prong of the UCL claim, but is otherwise **DENIED.** Doctor's Best shall file its Answer within 21 days from the date of this Order.

IT IS SO ORDERED.