

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

SERENA KWAN,
Plaintiff,
v.
SANMEDICA INTERNATIONAL, LLC,
Defendant.

Case No. [14-cv-03287-MEJ](#)
ORDER RE: MOTION TO DISMISS
Re: Dkt. No. 43

INTRODUCTION

This is an action in diversity for damages and equitable relief by Plaintiff Serena Kwan (“Plaintiff”), as an individual and on behalf of all others similarly situated, against Defendant SanMedica International, LLC (“Defendant”), the manufacturer of SeroVital, an over-the-counter supplement. Plaintiff alleges two claims for relief: violation of California’s Unfair Competition law (“UCL”), Cal. Bus. & Prof. Code § 17200 et seq.; and violation of California’s Consumer Legal Remedies Act (“CLRA”), Cal. Civ. Code § 1750 et seq. Pending before the Court is Defendant’s Motion to Dismiss Plaintiff’s Second Amended Complaint for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6). Dkt. No. 43. Plaintiff filed an Opposition (Dkt. No. 50) and Defendant filed a Reply (Dkt. No. 55). The Court finds this motion suitable for disposition without oral argument and VACATES the March 12, 2015 hearing. Civil L.R. 7-1(b). Having considered the parties’ positions, relevant legal authority, and the record in this case, the Court **GRANTS** Defendant’s Motion for the reasons set forth below.

BACKGROUND

The following allegations are drawn from Plaintiff’s Second Amended Complaint (“SAC”). Dkt. No. 42. Defendant manufactures, markets, sells, or distributes SeroVital, an over-the-counter supplement marketed to boost human growth hormone (“HGH”). SAC ¶ 1. In its

United States District Court
Northern District of California

1 nationwide marketing campaign, Defendant has made the following marketing representations:

- 2 (1) “It is clear that Growth Hormone has been associated with
3 wrinkle reduction, decreased body fat, increased lean muscle mass,
4 stronger bones, improved mood, heightened sex drive, and making
5 users look and feel decades – not years, but DECADES – younger”;
6 (2) “peak growth hormone levels” are “associated with: youthful
7 skin integrity, lean musculature, elevated energy production, [and]
8 adipose tissue distribution”; and
9 (3) that SeroVital is clinically tested to boost human growth
10 hormone (“HGH”) by a mean of 682% (hereafter the “682% HGH
11 increase representation”).

12 *Id.* The SAC separates these associated benefit representations into two separate categories: (1)
13 the wrinkle reduction, stronger bones, improved mood, heightened sex drive, making users look
14 and feel decades younger, youthful skin integrity and elevated energy production representations
15 are referred to as the “fountain of youth representations”; and (2) the decreased body fat, increased
16 lean muscle mass, lean musculature and adipose tissue distribution are referred to as the “body
17 composition representations.” *Id.* ¶¶ 2-3. Plaintiff contends that these representations are either
18 false, misleading, deceptive, or all three. *Id.* ¶ 2.

19 Plaintiff alleges that she saw an advertisement for SeroVital in Shape magazine, which
20 promoted it as having the ability to increase HGH levels by 682% and that peak HGH levels are
21 “clearly associated” with the fountain of youth benefits. *Id.* ¶ 26. In May of 2014, Plaintiff went
22 to Defendant’s website (serovital.com) to purchase the product, and while browsing the website
23 read representations confirming the information contained in the marketing to which she had
24 previously been exposed. *Id.* Plaintiff purchased one box of SeroVital based upon those
25 representations. *Id.* If she had known that SeroVital was being unlawfully sold and that it was not
26 proven to provide the represented benefits, she would not have purchased it. *Id.* ¶¶ 26, 52.

27 Plaintiff represents a class of individuals who, in reliance upon Defendant’s claims,
28 purchased SeroVital. On July 21, 2014, Plaintiff filed suit in this matter. Dkt. No. 1. On August
29 27, 2014, Plaintiff filed a First Amended Complaint (“FAC”), in which she alleged two causes of
30 action: (1) violation of the UCL; and (2) violation of the CLRA. Dkt. No. 13. Defendant moved
31 to dismiss the FAC, arguing that Plaintiff brought only substantiation claims, for which there
32 exists no available private right of action, and that even if Plaintiff’s claims were construed to be

1 something other than substantiation claims, she failed to demonstrate that Defendant’s claims
2 regarding SeroVital were false. Dkt. No. 21-1. The Court agreed and granted Defendant’s motion
3 on October 30, 2014. *Order re: Mot. to Dismiss*, Dkt. No. 39. The Court granted Plaintiff leave
4 to amend, but only if she could allege facts from which the Court could conclude that Defendant’s
5 advertising representations were false. *Id.* at 7. The Court warned Plaintiff that it would not be
6 enough to attack the methodology of Defendant’s study; “instead, she must allege facts
7 affirmatively disproving Defendant’s claims.” *Id.* The Court identified three ways she could
8 accomplish this:

9 Plaintiff could allege that one or more of the authorities alluded to
10 actually studied or tested the formula SeroVital contains and found
11 that it does not produce a 682% mean increase in HGH levels, or
12 that Plaintiff herself did not experience such an increase when using
the product, or that a study exists somewhere demonstrating that a
682% increase is categorically impossible to achieve in an over-the-
counter pill.

13 *Id.*

14 Plaintiff filed her SAC on December 1, 2014. In addition to her previous allegations, she
15 now refers to the top of the front of SeroVital’s label, which states “It is clear that “Growth
16 Hormone has been associated with wrinkle reduction, decreased body fat, increased lean muscle
17 mass, stronger bones, improved mood, heightened sex drive, and making users look and feel
18 decades – not years, but DECADES – younger.” SAC ¶ 2. Plaintiff alleges this statement is
19 categorically false with respect to wrinkle reduction, stronger bones, improved mood, heightened
20 sex drive and the fountain of youth representations, because it is not “clear” that growth hormone
21 has been associated with any of these benefits. *Id.* Plaintiff further alleges that there are no
22 studies demonstrating that the SeroVital ingredients, alone or in combination, provide any of the
23 fountain of youth represented benefits. *Id.* Plaintiff also points to Defendant’s statement at the
24 bottom of the front of the label – “PEAK GROWTH HORMONE LEVELS ASSOCIATED
25 WITH: Youthful skin integrity [and] Elevated Energy Production.” *Id.* ¶ 3. She alleges this is
26 categorically false because “[p]eak growth hormone levels have not been associated with these
27 benefits based upon any reliable scientific evidence.” *Id.*

28 In addition, Plaintiff adds allegations regarding Defendant’s statement that SeroVital is

1 “Clinically Tested.” *Id.* ¶¶ 4-5. She alleges that a reasonable consumer reading this would
2 interpret “Clinically Tested” to mean “clinically proven,” and that SeroVital had been clinically
3 tested to provide all of the benefits set forth on the front of the label. *Id.* ¶ 5. Plaintiff contends
4 that “[w]hen a manufacturer represents that its product has been clinically tested, as Defendant
5 does on the front of the SeroVital label, the reasonable consumer rightfully believes that the
6 defendant has clinically tested the product and has adequate scientific substantiation for the claims
7 linked to the clinically tested representation.” *Id.* ¶ 6.

8 The SAC also includes allegations regarding the study on which the SeroVital advertising
9 claims rely. Plaintiff refers to a “purported supporting summary of a ‘study’ Defendant includes
10 on its website,” alleging that it “is so riddled with flaws that it cannot be relied upon to draw
11 efficacy conclusions.” *Id.* ¶ 4. She alleges that it “is not a study report but a summary that would
12 not be accepted by any credible, peer-reviewed scientific journal,” that “[t]here are no authors
13 identified with regard to the study summarized on Defendant’s web site, another indicator that the
14 report on the web site is not to be relied upon,” and “the summary of the study’s results reveal
15 numerous flaws that would lead experts in the area to conclude that this study is not credible and
16 cannot be relied upon to base efficacy conclusions.” *Id.* ¶¶ 32-34.

17 Defendant now moves to dismiss the SAC, arguing that it “is again based entirely on
18 allegations for which there is simply no private right of action—allegations concerning a
19 purported lack of scientific substantiation for the advertising claims related to [SeroVital].”¹
20 Mem. at 4, Dkt. No. 46. Defendant argues that the SAC is fatally deficient, because it does not
21 contain allegations based on testing, scientific literature, or anecdotal evidence claiming that the
22 advertisements are false or misleading. *Id.* at 5. While the SAC contains allegations that
23

24 ¹ Defendant ask the Court to take judicial notice of various documents in support of its Motion.
25 Dkt. No. 44. Plaintiff opposes Defendant’s request. Dkt. No. 51. Although in general the Court
26 may not consider any materials beyond the pleadings when ruling on a Rule 12(b)(6) motion, *Lee*
27 *v. City of L.A.*, 250 F.3d 668, 689 (9th Cir. 2001), the Court may, in some circumstances, consider
28 evidence upon which the Complaint necessarily relies, *Daniels-Hall v. Nat’l Educ. Ass’n*, 629
F.3d 992, 998 (9th Cir. 2010). However, the Court does not rely on any of the materials for which
judicial notice is sought, and therefore Defendant’s Motion is DENIED AS MOOT.

1 Defendant’s advertising claims are based on an underlying study that is flawed, Defendant
 2 contends that these allegations cannot form the basis for actions under the UCL or CLRA because
 3 they “are lack of substantiation claims—they all attack the scientific support for [SeroVital’s]
 4 claims without citing to or alleging that there are studies or other scientific evidence that
 5 contradict the scientific support on which Defendant substantiates the advertising claims.” *Id.* at
 6 6. Even if Plaintiff could bring her claims, Defendant argues they fail as a matter of law because
 7 the SAC fails to demonstrate that Defendant’s claims regarding SeroVital are false. *Id.* at 13.

8 LEGAL STANDARD

9 Under Federal Rule of Civil Procedure 12(b)(6), a party may file a motion to dismiss based
 10 on the failure to state a claim upon which relief may be granted. A Rule 12(b)(6) motion
 11 challenges the sufficiency of a complaint as failing to allege “enough facts to state a claim to relief
 12 that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A facial
 13 plausibility standard is not a “probability requirement” but mandates “more than a sheer
 14 possibility that a defendant has acted unlawfully.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)
 15 (internal quotations and citations omitted). For purposes of ruling on a Rule 12(b)(6) motion, the
 16 court “accept[s] factual allegations in the complaint as true and construe[s] the pleadings in the
 17 light most favorable to the non-moving party.” *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519
 18 F.3d 1025, 1031 (9th Cir. 2008). “[D]ismissal may be based on either a lack of a cognizable legal
 19 theory or the absence of sufficient facts alleged under a cognizable legal theory.” *Johnson v.*
 20 *Riverside Healthcare Sys.*, 534 F.3d 1116, 1121 (9th Cir. 2008) (internal quotations and citations
 21 omitted); *see also Neitzke v. Williams*, 490 U.S. 319, 326 (1989) (“Rule 12(b)(6) authorizes a
 22 court to dismiss a claim on the basis of a dispositive issue of law.”).

23 Even under the liberal pleading standard of Rule 8(a)(2), under which a party is only
 24 required to make “a short and plain statement of the claim showing that the pleader is entitled to
 25 relief,” a “pleading that offers ‘labels and conclusions’ or ‘a formulaic recitation of the elements of
 26 a cause of action will not do.’” *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555).
 27 “[C]onclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to
 28 dismiss.” *Adams v. Johnson*, 355 F.3d 1179, 1183 (9th Cir. 2004); *see also Starr v. Baca*, 652

1 F.3d 1202, 1216 (9th Cir. 2011) (“[A]llegations in a complaint or counterclaim may not simply
 2 recite the elements of a cause of action, but must contain sufficient allegations of underlying facts
 3 to give fair notice and to enable the opposing party to defend itself effectively.”). The court must
 4 be able to “draw the reasonable inference that the defendant is liable for the misconduct alleged.”
 5 *Iqbal*, 556 U.S. at 663. “Determining whether a complaint states a plausible claim for relief . . .
 6 [is] a context-specific task that requires the reviewing court to draw on its judicial experience and
 7 common sense.” *Id.* at 663-64.

8 If a Rule 12(b)(6) motion is granted, the “court should grant leave to amend even if no
 9 request to amend the pleading was made, unless it determines that the pleading could not possibly
 10 be cured by the allegation of other facts.” *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (en
 11 banc) (internal quotations and citations omitted).

12 DISCUSSION

13 As in its previous motion, Defendant argues that Plaintiff’s claims must be dismissed
 14 because they are based entirely upon substantiation allegations for which there exists no private
 15 right of action.²

16 In response, Plaintiff argues that her falsity claims are not based on a lack of substantiation
 17 theory, but instead allege that Defendant’s representations are false because there is no clinical
 18 proof supporting any of the represented benefits on the label, and the summary of a study
 19 Defendant includes on its website cannot serve as this clinical proof because “it is so riddled with
 20 flaws that it cannot be relied on to draw efficacy conclusions.” Opp’n at 1. Plaintiff also argues
 21 that the SAC alleges two additional claims: (1) that Defendant’s marketing and sale of SeroVital
 22 are unlawful under the UCL; and (2) that Defendant is liable for engaging in misleading
 23 representations because it lacks substantiation for its claims. *Id.* at 3.

24
 25 ² Defendant also appears to raise a standing argument, arguing that Plaintiff fails to allege that she
 26 “even took the product in the first place.” Mot. at 11. “However, the sale itself caused an
 27 economic injury-in-fact, and therefore this Court has standing to adjudicate the controversy.”
 28 *Cortina v. Wal-Mart, Inc.*, 2015 WL 260913, at *2 (S.D. Cal. Jan. 20, 2015) (citing *Steel Co. v.*
Citizens for a Better Env’t, 523 U.S. 83, 103 (1998)).

United States District Court
Northern District of California

1 **A. False Advertising**

2 California’s UCL prohibits “any unlawful, unfair or fraudulent business act or practice and
3 unfair, deceptive, untrue or misleading advertising” Cal. Bus. & Prof. Code § 17200. The
4 CLRA prohibits any “unfair methods of competition and unfair or deceptive acts or practices
5 undertaken by any person in a transaction intended to result or which results in the sale or lease of
6 goods or services to any consumer” Cal. Civ. Code § 1770. “In an action for false
7 advertising under the UCL and CLRA, the plaintiff ‘bears the burden of proving the defendant’s
8 advertising claim is false or misleading.’” *Stanley v. Bayer Healthcare LLC*, 2012 WL 1132920,
9 at *3 (S.D. Cal. Apr. 3, 2012) (quoting *Nat’l Council Against Health Fraud, Inc. v. King Bio
10 Pharm., Inc.*, 107 Cal. App. 4th 1336, 1342 (2003)). Individuals may not bring suit under the
11 UCL or the CLRA alleging only that advertising claims lack substantiation. *Id.* Instead, that right
12 is reserved to “the Director of Consumer Affairs, the Attorney General, any city attorney, or any
13 district attorney” Cal. Bus. & Prof. Code § 17508. Therefore, because no private right of
14 action exists for a substantiation claim, private litigants may only bring claims under these
15 sections for false or misleading advertising, and must provide adequate factual bases for such
16 allegations. *Fraker v. Bayer Corp.*, 2009 WL 5865678, at *8 (E.D. Cal. Oct. 6, 2009).

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

25 In her SAC, Plaintiff alleges that Defendant’s advertising for SeroVital is false and
26 misleading because: (1) there are no studies that support Defendant’s representations, and
27 Defendant lacks any credible scientific substantiation for these representations; (2) the only studies
28 associating HGH with Defendant’s representations involve prescription drugs and HGH that was

1 injected intravenously, not orally administered; (3) the supporting summary of a study Defendant
 2 includes on its website is “riddled with flaws,” including that it is written by an unknown author
 3 and that it is not a study report but a summary that would not be accepted by any credible, peer-
 4 reviewed scientific journal; (4) a reasonable consumer would interpret “clinically tested” as
 5 meaning “clinically proven,” and such a consumer rightfully believes that Defendant has clinically
 6 tested the product and has the scientific substantiation to back up its claims as to all the benefits on
 7 the front of the label; and (5) experts in HGH deem the only credible scientific evidence to
 8 substantiate human health benefit claims is evidence from high quality randomized controlled
 9 clinical trials, and no such trials exist to substantiate Defendant’s claims. SAC ¶¶ 2, 4-6, 8-9, 13-
 10 14, 32.

11 1. Defendant’s Summary

12 The Court previously addressed Plaintiff’s allegations regarding the flaws in the study
 13 Defendant summarizes and the lack of any other study supporting its representations. *Order re:*
 14 *Mot. to Dismiss* at 5 (“Plaintiff’s argument that Defendant claims support for its representations,
 15 when there in fact is no such support, perfectly describes a substantiation claim.”) (citing *Eckler*,
 16 2012 WL 5382218, at *3). Once again, the SAC cites no study that disproves Defendant’s claims.
 17 The SAC claims that: “Plaintiff, through her counsel and her counsel’s consulting experts, has
 18 conducted a comprehensive search of the published literature on the ingredients specific to the
 19 Defendant’s Product.” SAC ¶ 41. Based on this search, Plaintiff alleges that “[n]o published
 20 reports . . . were found supportive of the represented 682% HGH increase, ‘fountain of youth’ or
 21 ‘body composition’ benefit representations.” *Id.* However, Plaintiff still does not allege that a
 22 study exists showing that these benefits are categorically impossible to achieve, or that one or
 23 more authorities studied or tested SeroVital’s formula and found that it does not produce the results
 24 Defendant claims.

25 Thus, as before, the Court finds that Plaintiff’s allegations regarding the study Defendant
 26 summarizes constitute a substantiation claim. Courts have repeatedly held that actions based on
 27 such allegations are not actionable by private individuals. *Engel v. Novex Biotech LLC*, 2014 WL
 28 5794608, at *3 (N.D. Cal. Nov. 6, 2014); *Johns v. Bayer Corp.*, 2013 WL 1498965 *36 (S.D. Cal.

1 Apr. 10, 2013) (“[I]n the absence of affirmative scientific evidence . . . that proves that zinc and
 2 vitamin E did not support prostate health, the strength of Bayer’s evidence is irrelevant and
 3 Plaintiff’s claims are based on ‘lack of substantiation’ rather than proof of falsity.”); *Stanley*, 2012
 4 WL 1132920, at *4 (“alleged lack of substantiation does not render claims false and misleading
 5 under the UCL or CLRA.”); *Fraker*, 2009 WL 5865687, at *8 (granting motion to dismiss where
 6 the plaintiff failed to allege that “Defendant’s advertising claims with respect to Product are
 7 actually false; not simply that they are not backed up by scientific evidence.”). Accordingly,
 8 Plaintiff’s allegations that Defendant’s claims are not substantiated by the supporting study,
 9 standing alone, cannot serve as a basis to assert claims under either the UCL or CLRA.

10 However, the Court must look at the SAC as a whole to determine whether Plaintiff alleges
 11 only a substantiation claim. *See Bronson v. Johnson & Johnson, Inc.*, 2013 WL 1629191, at *8
 12 (N.D. Cal. Apr. 16, 2013). “A claim can survive a lack of substantiation challenge by, for
 13 example, alleging studies showing that a defendant’s statement is false.” *Id.*

14 2. FTC and FDA

15 In her FAC, Plaintiff alleged: (1) the Federal Trade Commission (“FTC”) has stated that
 16 “no reliable evidence” supports that non-prescription products have the same effect as prescription
 17 HGH (FAC ¶ 18); (2) the New England Journal of Medicine published an article in the 1990s
 18 touting HGH’s benefits, and another article in 2003 warning about the potential for misleading
 19 consumers (*Id.* ¶¶ 19-20); and (3) the Food & Drug Administration (“FDA”) has stated that “it is
 20 unaware of any reliable evidence to support anti-aging claims for over-the-counter pills and sprays
 21 that supposedly contain HGH” (*Id.* ¶ 21). The Court found that these statements may be relevant
 22 to Plaintiff’s claims, but they failed to demonstrate that Defendant’s advertising claims are false.
 23 *Order re: Mot. to Dismiss* at 6. The Court noted that none of the authorities cited actually refer to
 24 SeroVital, and that there was no way of knowing whether the alleged statements were made before
 25 SeroVital was in testing or on the market. *Id.* at 6-7. For these reasons, the Court granted leave to
 26 amend, but only if Plaintiff could allege facts “affirmatively disproving Defendant’s claims.” *Id.*
 27 at 7.

28 In her SAC, Plaintiff does not mention the New England Journal of Medicine statements,

1 but she reproduced her allegations regarding the FDA statement. SAC ¶ 43 (“The FDA has also
2 stated that it is unaware of any reliable evidence to support anti-aging claims for over-the-counter
3 pills and sprays that supposedly contain HGH and it has not approved any such products for anti-
4 aging or any other purpose.”) (*compare* FAC ¶ 21). She also reproduced her allegations regarding
5 the FTC statement. SAC ¶ 42 (“Indeed, the FTC’s stated position is that with respect to oral, as
6 opposed to injectable/prescription HGH products, there is ‘no reliable evidence to support the
7 claim that these ‘wannabe’ products have the same effect as prescription HGH.’”) (*compare* FAC
8 ¶ 18). Unlike the FAC, however, Plaintiff adds: “This statement is equally valid today, since the
9 science has not changed as evidenced by the fact that this statement is still on the FTC’s web site.”
10 SAC ¶ 42. Even with this addition, neither the FTC nor the FDA statements disprove Defendant’s
11 claims, let alone show that any authority studied or tested SeroVital’s formula.

12 In fact, the SAC cites no study that disproves Defendant’s claims. Plaintiff argues that
13 Defendant’s representations are “categorically false” because “[t]here are no studies showing that
14 any of the ingredients in SeroVital, alone or in combination, provide increases in the HGH levels
15 represented on the packaging.” Opp’n at 7. As discussed above, Plaintiff states that her counsel
16 and her counsel’s consulting experts conducted a comprehensive search of the published literature
17 on the ingredients specific to SeroVital, but found no published reports that supported Defendant’s
18 representations. SAC ¶ 41. However, Plaintiff still does not allege that a study exists showing
19 these benefits are categorically impossible to achieve. Again, in the false advertising context, an
20 advertising claim is false if it has “actually been disproved.” *Eckler*, 2012 WL 5382218, at *3.
21 Plaintiff’s allegation that Defendant’s claim lacks evidentiary support is said to be unsubstantiated.
22 *Id.*

23 3. Defendant’s Use of “Clear”

24 In her FAC, Plaintiff alleged that Defendant’s advertising is false because the study did not
25 specifically test for “youthful skin integrity, lean musculature, elevated energy production, [and]
26 adipose tissue distribution,” which appears on the bottom of the packaging. FAC ¶ 14. The Court
27 rejected this contention “outright,” finding that the SeroVital advertising does not state that the
28 product was clinically tested to produce these results, only that peak growth hormone levels are

1 associated with those benefits. *Order re: Mot. to Dismiss* at 5. Thus, “it is irrelevant that the
2 study upon which the advertising claims rely did not test for the presence of those benefits, and
3 this alleged deficiency cannot serve as the basis for Plaintiff’s false advertising claim.” *Id.*

4 In the SAC, Plaintiff adds allegations of other benefits described on the front of
5 SeroVital’s packaging. *See* SAC ¶ 2 (“It is clear that Growth Hormone has been associated with
6 wrinkle reduction, decreased body fat, increased lean muscle mass, stronger bones, improved
7 mood, heightened sex drive, and making users look and feel decades – not years, but DECADES –
8 younger.”). Plaintiff contends that Defendant’s use of “it is clear” and “associated with” are
9 categorically false, because it is not “clear” that growth hormone has been associated with any of
10 these benefits, yet these statements “impart the message that the available science establishes that
11 increased HGH levels provide these benefits.” *Id.*; *Opp’n* at 7-8. She argues that “[t]here are no
12 studies involving oral over-the-counter secretagogues such as SeroVital demonstrating that the
13 SeroVital ingredients, alone or in combination, provide any of the body composition benefits.”
14 *Opp’n* at 7. However, once again, Plaintiff does not allege that a study exists showing that these
15 benefits are categorically impossible to achieve, or that one or more authorities studied or tested
16 the formula SeroVital contains and found that it does not produce such results.

17 4. Clinically Tested

18 Plaintiff has also added allegations that “[a] reasonable consumer reading Defendant’s
19 SeroVital label as a whole would rightfully interpret ‘Clinically Tested’ to mean ‘clinically
20 proven,’” and “would understand the ‘Clinically Tested’ representation to mean that SeroVital had
21 been clinically tested to provide all of the benefits set forth on the front of the label.” SAC ¶ 5.
22 Plaintiff notes that the phrase “Clinically Tested” is “in the middle of the label” and “not textually
23 connected to a particular statement on the label nor is it qualified in any manner.” *Id.* She also
24 notes that the study that Defendant summarizes on its web site “did not even test whether
25 SeroVital provided any of the fountain of youth or body composition benefits.” *Id.* ¶ 7. Plaintiff
26 argues that Defendant’s use of “Clinically Tested” takes her claim out of the realm of the lack of
27 substantiation cases. *Opp’n* at 8. The Court disagrees.

28 In its previous Order, the Court addressed Plaintiff’s argument that she “does not simply

1 allege that Defendant's growth hormone benefit representations are unsubstantiated; rather
2 Plaintiff alleges that Defendant misrepresents that its growth hormone benefit representations are
3 supported by clinical testing when they are not." *Order re: Mot. to Dismiss* at 5. The Court found
4 that "Plaintiff's argument that Defendant claims support for its representations, when there in fact
5 is no such support, perfectly describes a substantiation claim." *Id.* (citing *Eckler*, 2012 WL
6 5382218, at *3).

7 In support of her revised claim, Plaintiff cites to the same cases cited in her prior
8 opposition: *McCrary v. Elations Co., LLC*, 2013 WL 6403073 (C.D. Cal. July 12, 2013); *Hughes*
9 *v. Ester C Co.*, 930 F. Supp. 2d 439, (E.D.N.Y. 2013); *Rikos v. Proctor & Gamble Co.*, 782 F.
10 Supp. 2d 522 (S.D. Ohio 2011); *Cabral v. Supple, LLC*, No. 12-00085-MWF, Dkt. No. 29 at 1, 4
11 (C.D. Cal. July 3, 2012); and *Garcia v. Clarins, et al.*, No. 14-cv-21249, Dkt. No. 16 at 16 (S.D.
12 Fla. Sept. 4, 2014). *See* Opp'n at 8, 10. However, as the Court observed in its prior Order, in
13 those cases the plaintiff was able to demonstrate, with affirmative evidence, that the advertising
14 claims are false in and of themselves. *See Order re: Mot. to Dismiss* at 6 ("The Court therefore
15 rejects Plaintiff's contention that there exists any 'recognized exception' to the rule against private
16 enforcement of substantiation claims"). Plaintiff has failed to provide any such affirmative
17 evidence here, and none of the cases cited by Plaintiff stand for the proposition that she may make
18 an end run around the bar against private substantiation claims by simply alleging that an
19 advertiser's reference to the substantiation itself is misleading.

20 Further, in the SAC, Plaintiff acknowledges that testing has been performed, but disputes
21 the adequacy of that testing. SAC ¶ 32. If the Court were to permit Plaintiff to proceed on this
22 theory, private litigants could bring substantiation causes of action on advertising claims simply
23 by adding "magic words," tethering the claims to an advertiser's particular substantiation. *See*
24 *King Bio*, 107 Cal. App. 4th at 1338 (explaining the purpose of the rule as follows: "This
25 limitation prevents undue harassment of advertisers and is the least burdensome method of
26 obtaining substantiation for advertising claims"); *see also* Cal. Bus. & Prof. Code § 17508 (giving
27 power to demand substantiation for advertising only to "the Director of Consumer Affairs, the
28 Attorney General, any city attorney, or any district attorney"). If Plaintiff wishes to bring claims

1 alleging that Defendant’s advertisements are false or misleading, then she must do so based on
 2 actual facts showing this, not simply an assertion that Defendant’s substantiation is inadequate.
 3 *King Bio*, 107 Cal. App. 4th at 1342.

4 **B. Misleading and/or Deceptive Advertising**

5 Regardless of whether the SeroVital claims are provably false, Plaintiff alleges that she can
 6 prevail by showing that the challenged representations are deceptive, misleading or both. SAC
 7 ¶ 8. She argues that this is a separate and independent claim under the CLRA, and maintains that
 8 *King Bio*—the source of the rule of law that lack of substantiation claims do not state a claim—“is
 9 either wrongly decided or has been wrongly applied to misleading and deceptive claims.” Opp’n
 10 at 3. Specifically, Plaintiff notes that the CLRA provides for claims against false, misleading or
 11 deceptive representations,” and “[r]equiring a plaintiff to establish falsity in order to state a claim
 12 for misleading or deceptive representations violates basic principles of statutory construction by
 13 rendering the terms ‘misleading’ and ‘deceptive’ surplusage.” *Id.* As such, she seeks review of
 14 the *King Bio* holding. *Id.*

15 If the Court were to adopt Plaintiff’s proposal, it would not only overturn *King Bio*, but the
 16 entire body of law on this issue, including the laws enacted by the California State Legislature. As
 17 the Court previously observed, “[i]ndividuals may not bring suit under the UCL or the CLRA
 18 alleging only that advertising claims lack substantiation. Instead, that right is reserved to ‘the
 19 Director of Consumer Affairs, the Attorney General, any city attorney, or any district attorney . . .
 20 .’” *Order re: Mot. to Dismiss* at 5 (quoting Cal. Bus. & Prof. Code § 17508 and citing *Stanley v.*
 21 *Bayer Healthcare LLC*, 2012 WL 1132920, at *3 (S.D. Cal. Apr. 3, 2012) (“Private individuals
 22 may not bring an action demanding substantiation for advertising claims” and “alleged lack of
 23 substantiation does not render claims false and misleading under the UCL or CLRA.”)). As this
 24 rule is both settled and fundamental, the Court declines to overrule the Legislature’s explicit
 25 exception for cases where advertising is allegedly misleading or deceptive due to lack of
 26 substantiation. *See* Cal. Bus. & Prof. Code § 17508 (giving power to demand substantiation for
 27 advertising only to “the Director of Consumer Affairs, the Attorney General, any city attorney, or
 28 any district attorney”); *see also King Bio*, 107 Cal. App. 4th at 1345-46 (“The Legislature

United States District Court
Northern District of California

1 indicated an intent to alter the burden of substantiating advertising claims only with respect to
2 prosecuting authorities”).

3 **C. Plaintiff’s UCL Claim**

4 In her Opposition, Plaintiff argues that she has stated a valid claim under the UCL because
5 “selling SeroVital without the prerequisite competent and reliable scientific
6 evidence/substantiation” is “unlawful.” Opp’n at 18. However, as discussed above, individuals
7 may not bring suit under the UCL or the CLRA alleging only that advertising claims lack
8 substantiation. Further, unsubstantiated claims are already, by definition, unlawful under section
9 17508: “It shall be *unlawful* for any person doing business in California and advertising to
10 consumers in California to make any false or misleading advertising claim, including claims that
11 (1) purport to be based on factual, objective, or clinical evidence. . . .” Cal. Bus. & Prof. Code
12 § 17508 (emphasis added). Thus, as the Legislature has carved out a specific exception limiting
13 the right to bring lack of substantiation claims to prosecuting authorities, private litigants may only
14 bring claims under these sections for false or misleading advertising, and must provide adequate
15 factual bases for such allegations. *Engel*, 2014 WL 5794608, at *2 (citing *Fraker*, 2009 WL
16 5865678, at *8). As Plaintiff has failed to show that Defendant’s advertising claims have
17 “actually been disproved,” her UCL claim must also fail.

18 **CONCLUSION**

19 Based on the analysis above, Defendant’s Motion to Dismiss is **GRANTED**. As the Court
20 previously provided Plaintiff the opportunity to amend her complaint, and she has once again
21 failed to allege facts from which the Court could conclude that Defendant’s advertising
22 representations were false, the case is **DISMISSED WITH PREJUDICE**. The Clerk of Court
23 shall close the file.

24 **IT IS SO ORDERED.**

25

26 Dated: February 25, 2015

27

28



MARIA-ELENA JAMES
United States Magistrate Judge