

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

KENNY DORSEY, individually
and on behalf of all others
similarly situated and the
general public,

Plaintiff,

v.

ROCKHARD LABORATORIES, LLC,
a Georgia limited liability
company; and ROCKHARD
LABORATORIES HOLDINGS LLC, a
Georgia limited liability
company,

Defendants.

Case No. CV 13-07557 DDP (RZx)

**ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANTS'
MOTION TO DISMISS**

[DKT. NO. 36]

Presently before the Court is Defendants' motion to dismiss Plaintiff's class-action complaint (the "Motion"). (Docket No. 36.) For the reasons stated in this order, the Motion is GRANTED IN PART and DENIED IN PART.

I. Background

Plaintiff Kenny Dorsey ("Plaintiff") brings this action on behalf of himself and a putative class of consumers who purchased products marketed and sold by Defendants Rockhard Laboratories, LLC

1 and Rockhard Laboratories Holdings, LLC (collectively,
2 "Defendants").¹ (Second Amended Complaint ("SAC"), Docket No. 32, ¶
3 1.) Defendants manufacture, advertise, distribute, and sell a
4 product known as Rockhard Weekend ("RHW"), a male sexual
5 enhancement product. (Id. ¶¶ 16-17.) Plaintiff alleges that
6 Defendants advertise and promote RHW primarily through uniform
7 labeling on the front of the product's packaging, which purports to
8 represent the benefits of taking the product. (Id. ¶ 17.)

9 The exact chemical formulation and the packaging of RHW have
10 changed several times over the years, but Plaintiff alleges that
11 the product name, the product's purported use, and overall message
12 of Defendants' advertising with regard to the product have remained
13 the same. (Id. ¶¶ 19, 29.) RHW is available in multiple packaging
14 arrangements, including a one-capsule blister pack retailing for
15 around \$5, a three-capsule bottle retailing for around \$15, and an
16 eight-capsule bottle retailing for around \$30. (Id. ¶¶ 20, 28; Exh.
17 A.) Defendants' packaging involves, or has involved, statements
18 that represent RHW as a "sexual performance enhancer for men" or
19 "the 72-hour sexual performance pill for men." (Id. ¶ 22.) The
20 packaging also claims that RHW is "Doctor Tested," "Doctor
21 Approved," "Fast & Effective," and provides "Rockhard Results."
22 (Id.) Defendants also advertise RHW as "All Natural," even though,
23 Plaintiff alleges, some of the ingredients of RHW are "synthetic,
24
25

26 ¹Two other defendants were named in Plaintiff's SAC but have
27 already been dismissed pursuant to stipulation of the parties.
28 (Docket No. 34.) Therefore, the Court does not include the
dismissed defendants, John R. Miklos and Joshua Maurice, in its
discussion of the issues raised in the Motion.

1 chemically reduced and/or have carcinogenic properties." (Id. ¶
2 23.)

3 From April 2011 to June 2011, Plaintiff purchased RHW from B&B
4 Liquor on Western Avenue in Los Angeles for approximately \$30 per
5 bottle.² (Id. ¶ 25.) Plaintiff alleges that when he purchased RHW,
6 he relied upon the various representations made on the labeling.
7 (Id. ¶ 26.) Plaintiff alleges that the advertising claims amount to
8 "explicit claims that RockHard Weekend would enhance Plaintiff's
9 sexual performance." (Id.) Plaintiff alleges that he would not have
10 purchased RHW without these advertising claims. (Id.) Plaintiff
11 alleges that he "used RHW pursuant to the instructions on its
12 respective packaging but RHW was not as advertised." (Id. ¶ 27.)

13 Plaintiff alleges that Defendants' advertising is false and
14 misleading because none of the ingredients in any iteration of RHW
15 has the effect of enhancing male sexual performance. (Id. ¶¶ 30,
16 31.) Plaintiff also alleges that Defendants' labeling on RHW is
17 unlawful because it is a "new drug" unapproved by the FDA to make
18 claims that it is an aphrodisiac. (Id. ¶¶ 43-48.) Plaintiff brings
19 the following six claims: (1) violation of California Consumers
20 Legal Remedies Act; (2) violation of California unfair competition
21 law; (3) false advertising; (4) breach of express warranty; (5)
22 breach of implied warranty of merchantability; and (6) violation of
23 the Magnuson-Moss Warranty Act. (Id. ¶¶ 113-163.) Defendants now
24 move to dismiss the SAC on multiple grounds. (Docket No. 36.)

25 **II. Legal Standard**

26
27 ²It is unclear from the SAC the number of occasions on which
28 Plaintiff purchased RHW, the packaging format that he purchased,
and the iteration/formula of the product that he purchased.

1 A complaint will survive a motion to dismiss when it contains
2 "sufficient factual matter, accepted as true, to state a claim to
3 relief that is plausible on its face." Ashcroft v. Iqbal, 556 U.S.
4 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544,
5 570 (2007)). When considering a Rule 12(b)(6) motion, a court must
6 "accept as true all allegations of material fact and must construe
7 those facts in the light most favorable to the plaintiff." Resnick
8 v. Hayes, 213 F.3d 443, 447 (9th Cir. 2000). Although a complaint
9 need not include "detailed factual allegations," it must offer
10 "more than an unadorned, the-defendant-unlawfully-harmed-me
11 accusation." Iqbal, 556 U.S. at 678. Conclusory allegations or
12 allegations that are no more than a statement of a legal conclusion
13 "are not entitled to the assumption of truth." Id. at 679. In other
14 words, a pleading that merely offers "labels and conclusions," a
15 "formulaic recitation of the elements," or "naked assertions" will
16 not be sufficient to state a claim upon which relief can be
17 granted. Id. at 678 (citations and internal quotation marks
18 omitted).

19 "When there are well-pleaded factual allegations, a court
20 should assume their veracity and then determine whether they
21 plausibly give rise to an entitlement of relief." Id. at 679.
22 Plaintiffs must allege "plausible grounds to infer" that their
23 claims rise "above the speculative level." Twombly, 550 U.S. at
24 555. "Determining whether a complaint states a plausible claim for
25 relief" is a "context-specific task that requires the reviewing
26 court to draw on its judicial experience and common sense." Iqbal,
27 556 U.S. at 679.

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1 **III. Discussion**

2 A. Threshold Issues

3 1. *Reliance and Injury*

4 Defendants argue that Plaintiff does not have standing to
5 bring this action and/or that Plaintiff's pleadings are
6 insufficient under Rule 12(b)(6) because Plaintiff has not alleged
7 facts establishing either his reliance on the alleged
8 misrepresentations or an injury in fact.

9 With regard to the issue of reliance, Defendants argue that
10 Plaintiff has not pleaded with specificity which exact iteration of
11 RHW he purchased. Defendants argue that without that information,
12 Plaintiff fails to establish reliance on any particular
13 misrepresentation, as the product packaging changed over time.
14 While it is true that Plaintiff does not allege exactly which
15 iteration of RHW he purchased, it is clear from looking at the
16 packaging of various iterations of the product that the same
17 messages were conveyed to all potential purchasers of RHW. (See SAC
18 Exh. A.) Plaintiff alleges that he read the statements on the
19 packaging and relied on those statements in deciding to purchase
20 the product. With a consumer product such as RHW, which is designed
21 to be used on a single occasion or a limited number of occasions,
22 it is unsurprising that Plaintiff no longer has the packaging of
23 the product he purchased. Further, due to the similar nature of the
24 various packaging iterations, it is also unsurprising that
25 Plaintiff is unable to differentiate between the different versions
26 of RHW. The Court, therefore, finds that Plaintiff's allegations
27 are sufficient to show Plaintiff's reliance on the packaging
28 statements.

1 Defendants also allege that Plaintiff has not provided
2 sufficient specificity regarding how or why RHW did not perform as
3 advertised. It is true that Plaintiff's allegations could be more
4 specific in this regard. However, Plaintiff alleges that "[n]one of
5 the ingredients in any iteration of RHW ... will enhance male
6 sexual performance." (SAC ¶ 31.) This statement, even without
7 specifics regarding what happened when Plaintiff took RHW,
8 demonstrates an injury in fact: the product contains no ingredient
9 that has the effect that the packaging represents the product to
10 have. In addition, Plaintiff alleges that he would not have
11 purchased RHW but for the alleged misrepresentations. See Hinojos
12 v. Kohl's Corp., 718 F.3d 1098, 1105 (9th Cir. 2013). This
13 statement is highly plausible; unlike a food product, which may
14 offer multiple benefits (such as nutrition, flavor, satiety, etc),
15 there is likely only one reason an individual purchases a product
16 that purports to enhance male sexual performance: to enhance male
17 sexual performance. Therefore, the Court finds that Plaintiff has
18 pleaded sufficient facts to demonstrate his reliance on the
19 representations on RHW packaging and an injury in fact.

20 *2. RHW Iterations Plaintiff Did Not Purchase*

21 Defendants also argue that Plaintiff lacks standing to
22 represent a putative class that includes individuals who purchased
23 iterations of RHW different from the version that Plaintiff
24 purchased. Plaintiff responds that it is inappropriate for the
25 Court to make such a determination at this stage and that the issue
26 is more appropriately decided as part of the typicality and
27 adequacy prongs of a class certification motion under Rule 23.
28 Plaintiff also argues that, should the Court decide the issue now,

1 there is sufficient similarity between the different iterations of
2 RHW's formula and packaging to allow Plaintiff to have standing to
3 represent all individuals who purchased any iteration of the
4 product.

5 There are court decisions going both ways on this issue, with
6 some finding that a plaintiff has no standing to pursue claims
7 based on products he or she did not purchase. See, e.g., Granfield
8 v. NVIDIA Corp., 2012 WL 2847575, at *6 (N.D. Cal. 2012). However,
9 "[t]he majority of the courts that have carefully analyzed the
10 question hold that a plaintiff may have standing to assert claims
11 for unnamed class members based on products he or she did not
12 purchase so long as the products and alleged misrepresentations are
13 substantially similar." Miller v. Ghirardelli Chocolate Co., 912
14 F.Supp.2d 861, 869 (N.D. Cal. 2012). Further, some courts have held
15 that "the issue of whether a class representative may be allowed to
16 present claims on behalf of other who have similar, but not
17 identical, interests depends not on standing, but on an assessment
18 of typicality and adequacy of representation" at the class
19 certification stage. Bruno v. Quten Research Inst., LLC, 280 F.R.D.
20 524, 530 (C.D. Cal. 2011).

21 The Court will revisit this issue at the class certification
22 stage in determining whether a class can be certified and, if so,
23 the contours of that class.³ However, it appears that Plaintiff's
24 claims are sufficiently similar to those of putative class members
25 who purchased a different iteration of the RHW product to
26 potentially allow him to represent them in this class action. See

27
28 ³Additional clarity on the class definition will be needed at
the class certification stage.

1 Astiana v. Dreyer's Grand Ice Cream, Inc., 2012 WL 2990766, at *13
2 (N.D. Cal. 2012) ("Plaintiffs have alleged sufficient similarity
3 between the products they did purchase and those that they did not;
4 any concerns of [defendant] and/or the Court about material
5 differences are better addressed at the class certification stage
6 rather than at the 12(b)(6) stage."). In looking at the various
7 versions of the packaging attached to Plaintiff's SAC, it appears
8 that very similar phrasing was used on every version of RHW and
9 that the marketing scheme for RHW remained consistent even as the
10 formula and packaging underwent some changes. See id. ("Plaintiffs
11 are challenging the same kind of food products (i.e., ice cream) as
12 well as the same labels for all of the products.... That the
13 different ice creams may ultimately have different ingredients is
14 not dispositive as Plaintiffs are challenging the same basic
15 mislabeling practice across different product flavors."). Further,
16 the name of the product, Rockhard Weekend, never changed. The Court
17 therefore finds that there are sufficient similarities between the
18 RHW product that Plaintiff purchased and other iterations of the
19 formula and packaging of RHW to survive the Motion.

20 B. Plaintiff's Fraud-Based Claims (UCL, FAL, and CLRA)

21 Plaintiff's causes of action can be separated into two
22 categories: claims sounding in fraud (UCL, CLRA, false advertising)
23 and warranty-based claims. As to Plaintiff's fraud-based claims,
24 Defendants present multiple arguments as to why these claims are
25 insufficiently pleaded in the SAC. Defendants argue (1) Plaintiff
26 has not pleaded facts with the specificity required by Rule 9(b);
27 (2) some of the statements made on the packaging are mere puffery
28 and therefore not actionable; (3) the "All Natural" label is not

1 actionable; (4) the "Doctor Tested, Doctor Approved" statement is a
2 non-actionable lack of substantiation claim; (5) Defendants have
3 not engaged in any "unfair" conduct under the UCL; and (6)
4 Plaintiff's UCL claim should be dismissed to the extent it raises
5 violations of FDCA regulations.

6 1. *Rule 9(b)*

7 Rule 9(b) requires that "[i]n alleging fraud or mistake, a
8 party must state with particularity the circumstances constituting
9 fraud or mistake." The rule requires that "[a]verments of fraud ...
10 be accompanied by 'the who, what, when, where, and how' of the
11 misconduct charged." Vess v. Ciba-Giegy Corp. USA, 317 F.3d 1097,
12 1106 (9th Cir. 2003) (quoting Cooper v. Pickett, 137 F.3d 616, 627
13 (9th Cir. 1997)). Further, "Rule 9(b) does not allow a complaint to
14 merely lump multiple defendants together but requires plaintiffs to
15 differentiate their allegations when suing more than one defendant
16 ... and inform each defendant separately of the allegations
17 surrounding his alleged participation in the fraud." Swartz v. KPMG
18 LLP, 476 F.3d 756, 764-65 (9th Cir. 2007). Defendants argue that
19 Plaintiff's allegations do not involve sufficient specificity to
20 meet the requirements of Rule 9(b) and that Plaintiff fails to
21 differentiate between Defendants in his allegations.

22 The Court finds that Plaintiff has met his pleading
23 requirement with regards to the alleged misrepresentations at issue
24 here. As to the various representations indicating that RHW is a
25 male sexual performance enhancer, Plaintiff specifically pleads the
26 language of the various representations and includes Exhibit A to
27 his SAC, which shows the statements in context on the packaging.
28 (See SAC ¶ 26; Exh. A.) Therefore, Plaintiff has sufficiently

1 alleged what the false statements were. He specifically alleges
2 when and where he purchased RHW. Plaintiff then alleges that
3 "Defendants ... mislead consumers to believe that RHW will enhance
4 'sexual performance' of the human male," but that "[n]one of the
5 ingredients in any iteration of RHW ... will enhance male sexual
6 performance." (Id. ¶¶ 30, 31.) Plaintiff includes further, specific
7 allegations regarding the falsity of the statements "Fast &
8 Effective" and "RockHard Results." (Id. ¶¶ 37, 38.) These
9 allegations specify exactly how Plaintiff alleges that the
10 representations made on the packaging are false, including what
11 consumers would understand the statements to mean and how that
12 understanding is misleading. See Peviani v. Natural Balance, Inc.,
13 774 F.Supp.2d 1066, 1070-72 (S.D. Cal. 2011) (finding sufficient
14 specificity for UCL claims based on similar allegations).

15 Plaintiff includes similar allegations as to the specific
16 claims that RHW is "All Natural" and "Doctor Tested, Doctor
17 Approved." Plaintiff alleges that "a reasonable consumer would
18 expect an 'all-natural' product to contain ingredients found in
19 nature, derived from natural sources, absent of manmade processes,
20 and which are wholesome and safe." (Id. ¶ 35.) Plaintiff then
21 includes specific allegations regarding various chemicals allegedly
22 contained in iterations of RHW that do not meet this expectation.
23 (Id.) Further, Plaintiff alleges that "a reasonable consumer is
24 likely to believe," based on the "Doctor Tested, Doctor Approved"
25 label, that RHW "is used, endorsed, or recommended by doctors
26 practicing medicine in clinical settings." (Id. ¶ 39.)

27 Defendants also argue that Plaintiff has failed to
28 differentiate between Defendants in making his factual allegations.

1 However, the individual defendants originally named in the SAC have
2 been dismissed; the only two Defendants that remain are two
3 corporate entities involved in the manufacture, sale, and
4 advertising of RHW. The Court does not find Plaintiff's SAC
5 deficient merely because he has not differentiated between the two
6 related corporate entities at this stage.

7 2. *Puffery*

8 Defendants next contend that many of the representations
9 contained on RHW packaging are mere puffery, which no reasonable
10 consumer would understand to be a guarantee regarding the product.
11 Puffery is "exaggerated advertising, blustering, and boasting upon
12 which no reasonable buyer would rely." Southland Sod Farms v.
13 Stover Seed Co., 108 F.3d 1134, 1145 (9th Cir. 1997). "The
14 distinguishing characteristics of puffery are vague, highly
15 subjective claims as opposed to specific, detailed factual
16 allegations." Haskell v. Time, Inc., 857 F.Supp. 1392, 1399 (E.D.
17 Cal. 1994); see also Cook, Perkiss and Liehe, Inc. v. Northern
18 California Collection Service Inc., 911 F.2d 242, 246 (9th Cir.
19 1990). The Court must consider the packaging as a whole in
20 evaluating whether the advertisement can be read as implying
21 specific facts about the product. See id. at 245.

22 Defendants argue that the statements "Sexual Performance
23 Enhancer for Men," "Fast & Effective," "Rockhard Results," and
24 other, similar statements contained on various iterations of RHW
25 packaging are mere puffery and therefore are not actionable.
26 Defendants contend that these statements are "vague, highly
27 subjective claims as opposed to detailed factual assertions."
28 (Motion, Docket No. 36, p.11.) However, the Court finds that the

1 statements, taken as a whole and in context, do not constitute
2 puffery, but rather make specific claims regarding the benefits of
3 taking RHW. These statements create the impression that, by taking
4 the product, a consumer will have enhanced sexual performance, that
5 the effect will happen quickly, and that the consumer can expect to
6 have a "Rockhard" erection. See Peviani v. Natural Balance, 774
7 F.Supp.2d 1066, 1072 (S.D. Cal. 2011) (declining to dismiss as
8 puffery false advertising claims where the name "Cobra Sexual
9 Energy," the statement "aphrodisiac plants to enhance sexual
10 energy," and other statements were on packaging of sexual
11 enhancement product); American Home Products Corp. v. F.T.C., 695
12 F.2d 681, 687 (2d Cir. 1982) ("The impression created by the
13 advertising, not its literal truth or falsity, is the
14 desideratum."). Therefore, the Court does not dismiss on the basis
15 that the statements are mere puffery.

16 3. "All Natural"

17 Defendants argue that Plaintiff's claim that the "All Natural"
18 label on RHW is misleading must be dismissed because a reasonable
19 consumer would not be deceived by that statement. Defendants cite
20 Pelayo v. Nestle USA, 2013 WL 5764644 (C.D. Cal. 2013) for the
21 proposition that the phrase "all natural" "cannot be considered to
22 be deceptive to a consumer acting reasonably under the
23 circumstances." (Motion, Docket No. 36, p.13.) Defendants appears
24 to conclude, therefore, that representations that a product is "all
25 natural" are *never* actionable. Defendants also cite multiple
26 district court cases that conclude, under the particular
27 circumstances of the case, that no reasonable consumer could be
28 deceived by the "all natural" or similar representation where there

1 was contradictory information contained on the label. See, e.g.,
2 Rooney v. Cumberland Packing Corp., 2012 WL 1512106 (S.D. Cal.
3 2012); Morgan v. Wallaby Yogurt Co., Inc., 2013 WL 5514563 (N.D.
4 Cal. 2013).

5 The Ninth Circuit appears to have rejected the simplistic
6 approach to representations that a product is “all natural”
7 suggested by Defendants’ interpretation of Pelayo. Williams v.
8 Gerber Products Co., 552 F.3d 934, 938-40 (9th Cir. 2008). In
9 Williams, the Ninth Circuit “disagree[d] with the district court
10 that reasonable consumers should be expected to look beyond
11 misleading representations on the front of the box to discover the
12 truth from the ingredient list in small print on the side of the
13 box.” Id. at 939. “[R]easonable consumers expect that the
14 ingredient list contains more detailed information about the
15 product that *confirms* other representations on the packaging.” Id.
16 at 939-40 (emphasis added).

17 The cases cited by Defendants are inapposite, especially in
18 light of the controlling authority of Williams. Plaintiff has
19 alleged a plausible interpretation of what “All-Natural” would mean
20 to a reasonable consumer of RHW and indicated exactly which
21 ingredients in various iterations of RHW do not meet this
22 definition. (See SAC ¶¶ 35, 36.) Further, unlike in Defendants’
23 cases, there is no indication that any of the labeling contained
24 any information, other than that contained in small type in the
25 nutrition facts panel on the back of the packaging, that would lead
26 a reasonable consumer to question the “All-Natural” representation,
27 nor any indication that Plaintiff would have had reason to read the
28 nutrition facts or that the “All-Natural” representation was

1 located near or in the same typeface as the ingredients list.
2 Simply listing the actual ingredients of the product does not
3 absolve Defendants of all potential liability for making false
4 statements that contradict the ingredient list. See Williams, 552
5 F.3d at 939 (“We do not think that the FDA requires an ingredient
6 list so that manufacturers can mislead consumers and then rely on
7 the ingredient list to correct those misinterpretations and provide
8 a shield for liability for the deception.”). Therefore, the
9 underlying facts give rise to a plausible claim that the phrase
10 “All-Natural” would have been misleading to a reasonable consumer
11 under the circumstances.

12 4. *“Doctor Tested, Doctor Approved”*

13 Defendants argue that Plaintiff cannot bring a claim based on
14 Defendants’ label “Doctor Tested, Doctor Approved” because
15 Plaintiff is improperly trying to bring a lack of substantiation
16 claim rather than a claim that the label is actually false or
17 misleading. “Consumer claims for a lack of substantiation are not
18 cognizable under California law.” In re Clorox Consumer Litigation,
19 894 F.Supp.2d 1224, 1232 (N.D. Cal 2012). In the SAC, Plaintiff
20 alleges that “Defendants have not and cannot cite any research
21 studies or unsolicited endorsements of RHW by medical doctors, nor
22 is RHW used in clinical settings for the treatment of male
23 impotence or any other condition.” (SAC ¶ 39.)

24 The Court finds that the SAC sufficiently alleges a false
25 advertising claim rather than merely a lack of substantiation
26 claim. Plaintiff includes allegations regarding what “Doctor
27 Tested, Doctor Approved” would mean to a reasonable consumer: that
28 RHW is “used, endorsed, or recommended by doctors practicing

1 medicine in clinical settings." (*Id.*) Plaintiff then alleges that
2 RHW is not used in any clinical setting to treat any condition,
3 thereby alleging that Defendants' representation is false. (*Id.*)
4 Therefore, Plaintiff does not merely allege that Defendants have
5 not substantiated their claim, but also that the claim is false.
6 Plaintiff has satisfied his pleading burden to survive the Motion.⁴

7 5. *Unfair Conduct Under the UCL*

8 Plaintiff's UCL allegations are more properly based on the
9 "unlawful" and "fraudulent" prongs of the UCL. All of Plaintiff's
10 factual allegations pertain to the false and misleading nature of
11 the statement on RHW packaging. Because the Court has already found
12 that Plaintiff has alleged sufficient facts to support his claim
13 that Defendants' conduct was "fraudulent" and also was "unlawful"
14 under the CLRA, Plaintiff's UCL claim survives on those prongs. As
15 to the "unfair" prong, Plaintiff provides little in his pleading,
16 beyond a recitation of the situations in which a plaintiff may show
17 that a defendant's conduct is "unfair." (*See* SAC ¶¶ 127-129); *see*
18 *Eckler v. Wal-Mart Stores, Inc.*, 2012 WL 5382218, at *4-5 (S.D.
19 Cal. 2012). Therefore, though Plaintiff's UCL claim may proceed
20 under the "unlawful" and "fraudulent" prongs, Plaintiff has not
21 pleaded sufficient facts to support his claim under the "unfair"
22 prong.

23
24 ⁴Defendants are correct that Plaintiff will bear the burden of
25 producing evidence that Defendants' "Doctor Tested, Doctor
26 Approved" claim is false or misleading. Plaintiff's allegation that
27 Defendants have not produced any evidence of research studies or
28 endorsements by clinical medical professionals does not shift the
burden of producing evidence to Defendants to substantiate their
"Doctor Tested, Doctor Approved" claim. *See National Council*
Against Health Fraud, Inc. v. King Bio Pharmaceuticals, Inc., 107
Cal.App.4th 1336, 1344-45 (2003).

1 6. *FDCA Allegations*

2 Plaintiff's UCL claim is based, in part, on allegedly unlawful
3 labels purporting to advertise RHW as an aphrodisiac. (See SAC ¶¶
4 43-48.) Plaintiff alleges that Defendants' intended use of RHW as
5 an aphrodisiac by consumers must be approved by the FDA, pursuant
6 to the FDCA and 21 C.F.R. § 310.528, before the drug can be
7 marketed to the public. (SAC ¶ 44-45.) RHW has not received FDA
8 approval to be labeled as an aphrodisiac, and therefore Plaintiff
9 alleges that RHW is "misbranded" under 21 U.S.C. § 352. (SAC ¶ 46.)

10 Defendants argue that to the extent that Plaintiff's claims
11 are based on mislabeling or misbranding under the FDCA, Plaintiff's
12 allegations are misguided because RHW is a dietary supplement, not
13 a drug, and as a result, RHW is not subject to the same approval
14 process before it makes claims regarding the benefits of using its
15 product. (Motion, Docket No. 36, pp.15-17.)

16 Under the FDCA, a "drug" is defined, in pertinent part, as an
17 "article[] intended for use in the diagnosis, cure, mitigation,
18 treatment, or prevention of disease in man or other animals." 21
19 U.S.C. § 321(g)(1)(B). On the other hand, a dietary supplement,
20 which is a food and not a drug, is "a product ... intended to
21 supplement the diet that bears or contains one or more of the
22 following dietary ingredients: (A) a vitamin; (B) a mineral; (C) an
23 herb or other botanical; (D) an amino acid; (E) a dietary substance
24 for use by man to supplement the diet by increasing the total
25 dietary intake; or (F) a concentrate, metabolite, constituent,
26 extract, or combination of any ingredient described in clause (A),
27 (B), (C), (D), or (E)." 21 U.S.C. § 321(ff)(1).

1 RHW is labeled on its packaging as a "dietary supplement."
2 (See SAC, Exh. A.) Further, although the packaging as a whole may
3 represent to a reasonable consumer that RHW will improve male
4 sexual performance, no statement on any packaging submitted as an
5 exhibit to the SAC proclaims that RHW is designed to cure erectile
6 dysfunction, impotence, or any other "disease." Further, the word
7 "aphrodisiac" does not appear on any of the packaging. The Court,
8 therefore, finds that Plaintiff has not plausibly alleged that RHW
9 is a "drug," requiring prior approval of its labeling by the FDA.
10 Therefore, to the extent that Plaintiff's claims are based on
11 Defendants' failure to obtain FDA approval for its packaging
12 claims, Plaintiff's claims fail and are therefore dismissed.

13 * * * *

14 In summary, the Court DENIES the Motion with respect to
15 Plaintiff's fraud-based claims, except that the Court GRANTS the
16 Motion to the extent that Plaintiff's claims are based on the
17 purported failure to obtain FDA approval for RHW's packaging and
18 GRANTS the Motion as to Plaintiff's UCL claim to the extent that it
19 is based on the "unfair" prong.

20 C. Warranty-Based Claims

21 Plaintiff brings claims alleging breach of express warranty,
22 breach of the implied warranty of merchantability, and violation of
23 the Magnuson-Moss Warranty Act. Defendants argue that Plaintiff has
24 failed to state a warranty claim.

25 1. *Express and Implied Warranty Claims*

26 Defendants present two arguments as to why Plaintiff's express
27 and implied warranty claims should be dismissed. First, Defendants
28 argue that Plaintiff did not provide the requisite notice and

1 opportunity to cure to Defendants prior to filing this action.
2 Second, Defendants argue that statements that are puffery are not
3 actionable as warranty claims.

4 As to the notice requirement, Defendants cite the proposition
5 that “[t]o avoid dismissal of a breach of contract or breach of
6 warranty claim in California, ‘[a] buyer must plead that notice of
7 the alleged breach was provided to the seller within a reasonable
8 time after discovery of the breach.’” Alvarez v. Chevron Corp., 656
9 F.3d 925, 932 (9th Cir. 2011) (quoting Stearns v. Select Comfort
10 Retail Corp., 763 F.Supp.2d 1128, 1142 (N.D. Cal. 2010)). However,
11 Defendants omit an important and applicable exception to this rule:
12 the notice requirement “is excused as to a manufacturer with which
13 the purchaser did not deal.” In re Toyota Motor Corp. Unintended
14 Acceleration Marketing, Sales Practices, and Products Liability
15 Litigation, 754 F.Supp.2d 1145, 1180 (C.D. Cal. 2010) (citing
16 Greenman v. Yuba Power Products, 59 Cal.2d 57, 61 (1963)).
17 Therefore, Plaintiff need not have provided notice to Defendants,
18 as he alleges that he purchased RHW at a liquor store in Los
19 Angeles, not directly from the manufacturers.

20 As to Defendants’ puffery argument, the Court already
21 addressed the puffery issue above and determined that the
22 statements at issue here, taken in context, are not mere puffery.
23 Therefore, this argument is unavailing. As a result, the Court
24 DENIES the Motion as to Plaintiff’s express and implied warranty
25 claims.

26 2. *Magnuson-Moss Warranty Act Claim*

27 Plaintiff alleges that Defendants violated the Magnuson-Moss
28 Warranty Act (“MMWA”) by breaching specific, express written

1 warranties contained on RHW packaging. The MMWA defines a written
2 warranty as "any written affirmation of fact or written promise
3 made in connection with the sale of a consumer product by a
4 supplier to a buyer which relates to the nature of the material or
5 workmanship and affirms or promises that such material or
6 workmanship is defect free or will meet a specified level of
7 performance over a specified period of time." 15 U.S.C. §
8 2301(6)(A). "A product description does not constitute a warranty
9 under the MMWA." Anderson v. Jamba Juice Co., 888 F.Supp.2d 1000,
10 1004 (N.D. Cal. 2012); see also Brazil v. Dole Food Co., Inc., 935
11 F.Supp.2d 947, 966 (N.D. Cal. 2013).

12 As to the statements "Sexual Performance Enhancer for Men" and
13 "Fast & Effective," Plaintiff has stated a plausible claim under
14 the MMWA. These claims relate to the nature of the product and are
15 not mere product descriptions. See Allen v. Hyland's Inc., 2013 WL
16 1748408, at *5 (C.D. Cal. 2013) ("Plaintiffs claim both that the
17 products do not work and that there simply is no active ingredient
18 in Defendants' products. In the sense that Defendants' statements
19 imply that there is an active ingredient and that the active
20 ingredient performs any function beyond that of a sugar pill, those
21 statements relate to the nature of the material."). "While a
22 product that is 'synthetic' and 'artificial' may not be defective,
23 a product that is ineffective is." Id. at *6. Here, as in Allen,
24 Plaintiff claims that there is no ingredient in RHW that has the
25 effect of enhancing male sexual performance, despite Defendants'
26 representations on the packaging that the product will have such an
27 effect.

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1 As to the statements that RHW is "Doctor Tested, Doctor
2 Approved," those statements do not relate to the nature of the
3 product itself, except to the extent that they further support
4 Plaintiff's theory that Defendants represented that RHW contains an
5 active, effective ingredient. Apart from that contribution to the
6 overall message, however, this statement does not relate directly
7 to the "material or workmanship" of the RHW pill and therefore is
8 not independently actionable under the MMWA.⁵

9 D. Class Issues

10 Defendants further request that the Court strike Plaintiff's
11 putative class definition or, in the alternative, require Plaintiff
12 to provide a more definite statement of the class definition. The
13 Court declines to require Plaintiff to do more at this time.
14 However, at the time Plaintiff moves for class certification,
15 Plaintiff will be required to clarify to what extent he seeks to
16 include in the class definition individuals outside of the state of
17 California.

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26 ⁵Plaintiff does not purport to base his MMWA claim on the "All
27 Natural" label, and rightly so. Several courts have determined that
28 the statement "All Natural" is merely a product description and
that the presence of artificial ingredients in a product so labeled
does not make that product "defective." See, e.g., Anderson v.
Jamba Juice Co., 888 F.Supp.2d 1000, 1003-04 (N.D. Cal. 2012).

1 **IV. Conclusion**

2 For the foregoing reasons, the Motion is GRANTED IN PART and
3 DENIED IN PART. As Plaintiff has already amended his complaint
4 twice, and as the Court finds that it would generally be futile to
5 allow Plaintiff to attempt to amend the identified deficiencies,
6 the dismissal of some portions of Plaintiff's claims shall be
7 WITHOUT LEAVE TO AMEND.

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9 IT IS SO ORDERED.

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12 Dated: September 19, 2014

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DEAN D. PREGERSON
United States District Judge