

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. LA CV15-00477 JAK (SSx)

Date August 3, 2015

Title Wannita Thesier-Hendricks v. TJJ Enterprises, Inc., et al.

Present: The Honorable JOHN A. KRONSTADT, UNITED STATES DISTRICT JUDGE

Andrea Keifer

Not Reported

Deputy Clerk

Court Reporter / Recorder

Attorneys Present for Plaintiff:

Attorneys Present for Defendants:

Not Present

Not Present

Proceedings: (IN CHAMBERS) ORDER RE DEFENDANTS' MOTION TO DISMISS (DKT. 23)

I. Introduction

Wannita Thesier-Hendricks ("Plaintiff") brought this putative class action against TJJ Enterprises, Inc. ("TJJ") and Jacqueline Courtiol-Lawrence ("Lawrence"), collectively, "Defendants." Compl., Dkt. 1. The Complaint alleges that Defendants made misrepresentations in connection with the sale of homeopathic medicine. *Id.* The Complaint advances eight causes of action: (1) violation of the Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301 *et seq.*; (2) violation of the Consumers Legal Remedies Act ("CLRA"), Cal. Civ. Code §§ 1750 *et seq.*; (3) violation of Cal. Bus. & Prof. Code §§ 17500 *et seq.*; (4-6) violation of Cal. Bus. & Prof. Code §§ 17200 *et seq.*; (7) breach of express warranty; and (8) unjust enrichment. Defendants moved to dismiss the Complaint ("Motion"). Dkt. 23. Plaintiff opposed the Motion (Dkt. 32).¹ Defendants filed a reply in support of the Motion. Dkt. 34.²

A hearing on the Motion was held on June 15, 2015, and the matter was taken under submission. Dkt. 43. For the reasons stated in this Order, the Motion is **GRANTED IN PART** and **DENIED IN PART**.

¹ Plaintiff included the declaration of Christopher Marlborough with her opposition. Dkt. 32-1. Attached to this declaration is a transcript of a podcast as well as an article written by Lawrence. *Id.* None of these documents was attached to, or incorporated by reference in, the Complaint. Nor is it appropriate to take judicial notice of them inasmuch as they present facts subject to reasonable dispute. Accordingly, these materials are not considered in connection with the Motion.

² As part of their reply, Defendants requested judicial notice of the First Amended Complaint in *Ortega v. Natural Balance Inc.*, No. CV-2:13-cv-05942-AB-Ex (C.D. Cal.), the opposition to a motion to dismiss in that case, the Complaint in *Rush v. Nutrex Res.*, No. CV-12-1060-LB (N.D. Cal.) and the opposition to the motion to dismiss in that case. Dkt. 35. Because these materials were not offered prior to the filing of the reply, Plaintiff was not afforded an opportunity to address them. For this reason, they are not considered. For the same reasons, Defendants' request for judicial notice of a written insert that was presented with a bottle of Colic Calm (Dkt. 35) is denied. The same ruling is made with respect to Defendants' second request for judicial notice that was made after the reply was filed. Dkt. 40.

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II. Factual Background**A. Homeopathy**

The Complaint alleges that homeopathy is a form of alternative medicine. It is premised on two principles: “like-cures-like” and “ultra-dilution.” Compl. ¶ 83. “Like-cures-like” refers to when a “substance that causes a symptom is used in diluted form to treat the same symptom in illness.” *Id.* The “ultra-dilution” principle is that “the more a substance is diluted, the more potent it becomes.” *Id.* The Complaint alleges that modern science “refutes the principles of homeopathy.” *Id.* ¶ 87. The Complaint also alleges that homeopathic remedies do not contain “any pharmacologically active molecules” given their heavy dilution. *Id.* ¶ 88. In support of its allegations, the Complaint cites several articles and studies by individuals and government agencies. *Id.* ¶¶ 88-97.

B. Defendants’ Products

Defendants sell the following homeopathic products: Tummy Calm, Colic Calm and Colic Calm Plus (collectively, the “Products”). Compl. ¶ 17. TJL is a California corporation with its principal place of business in Long Beach, California. *Id.* ¶ 10. Lawrence is a citizen of California. *Id.* ¶ 11. She is the President and co-founder of TJL. *Id.* The Products are sold in California through retail stores, including Walgreens, CVS and Babies R’ Us. The Products are also sold through online retailers. Compl. ¶ 19. The products are marketed as effective to treat gas, colic and reflux problems of infants. *Id.*

Colic Calm was created by Lawrence over a two-month period in 2003. *Id.* ¶¶ 24, 26. Lawrence “holds an undergraduate degree in French and a M.A. in Secondary Education.” *Id.* “[S]he had no formal training in the creation of drug products prior to creating Colic Calm in her kitchen.” *Id.* Tummy Calm was released in 2012. *Id.* ¶ 64. The Complaint alleges that Defendants represent Tummy Calm was the result of “years of research and development.” *Id.* ¶ 66.

The Complaint alleges that Defendants falsely claim that the Products are all natural, effective, FDA-regulated and safe. *E.g.*, Compl. ¶¶ 18, 23, 29-33, 35-36. The Colic Calm label also bears a seal that states it is recommended by pediatricians. *Id.* ¶ 37. Defendants also represent that the “individual ingredients have undergone extensive clinical testing to substantiate their safety and effectiveness in order to be listed in the Homeopathic Pharmacopoeia of the United States (HPUS)[.]” *Id.* ¶ 47. The Complaint alleges that the Products “are marketed and advertised together on both the Colic Calm Youtube.com channel, on the Colic Calm website and online and in other advertising.” *Id.* ¶ 20.

1. Colic Calm

The label of Colic Calm states that it contains the following “active homeopathic ingredients: Aloe Socotrina (Aloe) 5x, Carbo Vegetabilis (Vegetable Charcoal) 1x, Carum Carvi (Caraway) 5x, Chamomilla (Chamomile) 5x, Foeniculum Vulgare (Fennel) 5x, Melissa Officinalis (Lemon Balm) 5x, Mentha Piperita (Peppermint) 5x, Primus Spinosa (Blackthorn) 5x, and Zingiber Officinale (Ginger) 5x.” Compl. ¶ 39. The term “x” preceded by a number reflects a factor of 10 by which the ingredient has been diluted. *Id.* Thus, “1x” means the ingredient has been diluted to 1/10 of its original strength. *Id.* The term “5x” means the ingredient has been diluted to 1/100,000 of its original strength. *Id.* There is no information on the label as

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to how much ingredient constitutes the “original strength.” *Id.* For example, it is not clear from the label of Colic Calm whether 1 milligram of Aloe Socotrina has been diluted to 0.00001 milligrams of Aloe Socotrina or if 0.1 milligrams of Aloe Socotrina has been diluted to 0.000001 milligrams of Aloe Socotrina. *Cf. id.* Colic Calm also contains the following inactive ingredients: citric acid, glycerin, potassium benzoate, potassium citrate, purified water, sorbic acid and xylitol. *Id.* The Complaint alleges that xylitol is not all natural and is a sweetening agent derived from a “harsh multi-step chemical reaction that involves the use of sulfuric acid, calcium oxide, phosphoric acid and active charcoal.” Compl. ¶ 112.

Colic Calm is “listed on the FDA Online Label Repository under the marketing category ‘Unapproved Homeopathic.’” Compl. ¶ 44. Drugs in this category “have not been evaluated by [the] FDA for safety and efficacy and their labeling has not been approved.” *Id.* Further, the “FDA is not aware of scientific evidence to support homeopathy as effective.” *Id.* This information is not on the label for Colic Calm. *Id.* ¶ 99.

2. Colic Calm Plus

The label for Colic Calm Plus states that it contains the following active ingredients: “Aloe Socotrina (Aloe) 12x, Carbo Vegetabilis (Vegetable Charcoal) 1x, Carum Carvi (Caraway) 12x, Chamomilla (Chamomile) 12x, Foeniculum Vulgare (Fennel) 12x, Melissa Officinalis (Lemon Balm) 12x, Mentha Piperita (Peppermint) 12x, Prunus Spinosa (Blackthorn) 12x, and Zingiber Officinale (Ginger) 12x[.]” “Asafoetida, Chincona Officinalis and Magnesia Phosphorica at 12x concentrations[.]” Compl. ¶ 58. Once again, the term “x” preceded by a number indicates the factor of 10 by which the ingredient has been diluted. Thus, “12x” means the ingredient has been diluted to 1/1,000,000,000,000 (or a trillionth) of its original strength. *Id.* Once again, it is not clear what amount of each ingredient constitutes its “original strength.” *Cf. id.* Colic Calm Plus also contains the following inactive ingredients: citric acid, glycerin, potassium benzoate, potassium citrate, purified water, sorbic acid and xylitol. *Id.* ¶ 59.

3. Tummy Calm

The label for Tummy Calm states that it is marketed for use by persons of all ages and contains the following active ingredients: “Calcaria Phosphorica 12x, Carbo Vegetabilis 2x, Chamomilla 12x, Colocynthis 12x, Lycopodium 12x, Moschus 12x, Natrum Muriaticum 12x, Silicea 12x, and Thuja 12x.” Compl. ¶ 69. Once again, all of these ingredients have been diluted to one trillionth of their original strength. *Id.* And, once again, it is not clear what amount constitutes the “original strength” of each of these ingredients. *Cf. id.*

C. Plaintiff's Claims

Plaintiff purchased Colic Calm “approximately five times between March 2014 and August 2014 for her infant grandson who was suffering from colic, upset stomach and gas.” Compl. ¶ 112. On each occasion, she paid approximately \$19.00 for a 2oz bottle from a CVS and Walgreens in Montgomery, Alabama. *Id.* ¶ 118; *accord* Decl. of Wannita Thesier-Hendricks (“Pl. Decl.”) ¶ 3, Dkt. 1 at 51. In making these purchases, she relied on representations on the Colic Calm label that it is “safe and gentle,” “all natural,” “provides symptomatic relief for gas, colic and upset stomach,” “fast acting,” and “works within minutes.” Compl. ¶ 119. The Complaint alleges that Colic Calm did not provide the promised results. *Id.* ¶ 120. It

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also alleges that Plaintiff would not have purchased Colic Calm had she known it was ineffective. *Id.* ¶ 12.

III. Analysis

A. Legal Standards

1. Fed. R. Civ. P. 8(a)

Fed. R. Civ. P. 8(a), provides that a “pleading that states a claim for relief must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief[.]” The complaint must state facts sufficient to show that a claim for relief is plausible on its face. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The complaint need not include detailed factual allegations, but must provide more than a “formulaic recitation of the elements of a cause of action.” *Twombly*, 550 U.S. at 555. “The plausibility standard is not akin to a ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are ‘merely consistent with’ a defendant’s liability, it stops short of the line between possibility and plausibility of entitlement to relief.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal citations and quotations omitted).

A party may bring a motion to dismiss a cause of action for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6). Dismissal is appropriate only where the complaint lacks a cognizable legal theory or sufficient facts to support one. *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008). In considering a motion to dismiss, the allegations in the challenged complaint are deemed true and must be construed in the light most favorable to the non-moving party. *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-338 (9th Cir. 1996). However, a court need not “accept as true allegations that contradict matters properly subject to judicial notice or by exhibit. Nor is the court required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences.” *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008).

2. Heightened Pleading Standards for Fraud

Fed. R. Civ. P. 9(b) requires that a plaintiff “state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person’s mind may be alleged generally.” Rule 9(b) requires a plaintiff to allege specific details about the fraud “including an account of the time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentations.” *Swartz v. KPMG LLP*, 476 F.3d 756, 764 (9th Cir. 2007) (internal quotation marks omitted). Allegations must be “specific enough to give defendants notice of the particular misconduct which is alleged to constitute the fraud charged so that they can defend against the charge and not just deny that they have done anything wrong.” *Id.* (internal quotation marks omitted); see also *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1126 (9th Cir. 2009) (a plaintiff must “articulate the who, what, when, where and how of the alleged misconduct”).

3. Fed. R. Civ. P. 12(f)

A court may “order stricken from any pleading . . . any redundant, immaterial, impertinent, or scandalous matter.” Fed. R. Civ. P. 12(f). A prayer for relief may be stricken if the complaint fails to allege facts

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supporting, as a matter of law, the plaintiff's ability to obtain the requested relief. *E.g.*, *Santa Clara Valley Water Dist. v. Olin Corp.*, 2007 WL 2890390, at *5 (N.D. Cal. Sept. 28, 2007) (striking prayer for punitive damages where plaintiff had not alleged the requisite factual bases for such relief); *S.E.C. v. Berry*, 2008 WL 4065865 (N.D. Cal. Aug. 27, 2008). However, "[c]ourts have long disfavored Rule 12(f) motions, granting them only when necessary to discourage parties from making completely tendentious or spurious allegations." *Sapiro v. Encompass Ins.*, 221 F.R.D. 513, 518 (N.D. Cal. 2004).

B. Application

1. Whether the Claims Should Be Dismissed Because Plaintiff Purchased the Products Several Times

Defendants argue that Plaintiff's claims as to the ineffectiveness of Colic Calm are implausible, and are inconsistent with common sense, because she purchased the Products five times.³ Thus, they contend that no reasonable consumer would make a series of purchases if he or she believed the product was ineffective. They argue that this has particular force given that Colic Calm is represented as a "fast acting" medication. Plaintiff responds that this argument is not one that is appropriate on a motion to dismiss because it raises factual issues.

Defendants' argument goes to the merits of the factual bases for Plaintiff's claims. This is not a matter that can be addressed on a motion to dismiss. Whether Plaintiff continued to purchase Colic Calm because she believed it was effective is one factual issue. Her decision-making could have included a belief she had not administered the product correctly, or that her grandson's illness was such that an immediate improvement was not likely. This possibility is supported by statements contained on the Colic Calm product label and package insert, which include:

How long will it take to work?

Most babies experience relief within minutes of their first dose of Colic Calm®. However, some may take longer before showing noticeable improvement, especially infants over one month of age if they have been symptomatic for a while. Sometimes it takes a few days until new positive relief associations can be made with Colic Calm®.

We recommend giving Colic Calm® at least one week to fully work its wonders. Keep in mind that many babies simply have trouble calming down once the crying cycle has begun, so try to administer Colic Calm® at the first signs. We encourage you to email us at customercare@coliccalm.com or please call us at (877) 321-CALM for helpful customized suggestions that can make a difference.

Compl., Ex. A, Dkt. 1 at 56. The Motion is **DENIED** on this ground.

³ In their reply brief, Defendants raised a new argument, *i.e.*, that Plaintiff's claims based on representations concerning the "synergistic effect" of the Products at issue should be dismissed. Reply, Dkt. 34 at 12-13. Because there was not an opportunity for Plaintiff to address them, they are not considered in this Order, but may be raised in response to an amended complaint.

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2. Whether the Claims Should Be Construed as Lack of Substantiation Claims and Dismissed Because Such Claims Are Disallowed

Defendants argue that the Complaint should be dismissed because it is premised on a lack of substantiation of the claimed benefits of the Products. Defendants argue that Plaintiff must offer evidence at the pleading stage that the Products are ineffective. Alternatively, Defendants argue that, because vegetable charcoal has been diluted to only a tenth of the unstated original amount, there is no evidence that ingredient alone could not make its Products effective. In support of these positions, Defendants rely on *Nat'l Council Against Health Fraud, Inc. v. King Bio Pharm., Inc.*, 107 Cal. App. 4th 1336 (2003). There, the plaintiff brought false advertising claims against a seller of homeopathic products. *Id.* at 1341. At trial, the plaintiff offered no proof that the homeopathic products sold by the defendant were ineffective. *Id.* Instead, the plaintiff argued that the defendant had the burden of proof on this issue. *Id.* at 1341-42. The Court of Appeal rejected this argument and found that the plaintiff had the burden of proof. *Id.* at 1342.

During the hearing, Defendants argued that *Vigil v. Gen. Nutrition Corp.*, No. 15-CV-00079-JM-DBHx, 2015 WL 2338982 (S.D. Cal. May 13, 2015) and *Eckler v. Wal-Mart Stores, Inc.*, No. 12-CV-00727-LAB-MDDx, 2012 WL 5382218 (S.D. Cal. Nov. 1, 2012) also support their position. In *Vigil*, the plaintiff claimed that an over-the-counter drug advertised as increasing male sexual health and performance was ineffective. *Vigil*, 2015 WL 2338982, at *1. He relied on several studies that suggested the active ingredients used in the drug had mixed or inconclusive results. *Id.* at *2-4. The complaint also included allegations that there was no evidence to support the defendant's claim that the drug was effective for its claimed purpose. *Id.* at *8. However, because other allegations claimed that the drug had no effect, the district court denied the defendant's motion to dismiss on lack of substantiation grounds. *Id.*

In *Eckler*, the plaintiff alleged that she purchased a dietary supplement marketed as being "good for the health and comfort of joints" that did not "deliver the benefits it promised." *Eckler*, 2012 WL 5382218, at *1. Her complaint contained claims that there was no proof the dietary supplement was good for joint health. *Id.* at *2. However, the complaint also alleged that the dietary supplement was ineffective. *Id.* The court found that the studies that plaintiff alleged to support her claim were not actually on point. *Id.* at *7. Thus, these studies asserted that the supplement did not alleviate symptoms of osteoarthritis. *Id.* They did not support the broader assertion that the supplement did "nothing for the body's joints at all." *Id.* Accordingly, the court dismissed without prejudice because only the lack of substantiation allegations were supported by facts. *Id.* at *8.

Plaintiff argues that she is not relying on a lack of substantiation claim. Thus, she claims that her fraud claim is not based on an alleged absence of testing to substantiate the claims of efficacy. Instead, the fraud claim is based on Plaintiff's allegation that the Products are, in fact, not effective. She relies on studies cited in the Complaint -- not about the Products, specifically -- that dispute efficacy claims as to any homeopathic drugs. These studies assert that, given the extreme dilution of the ingredients, in all probability, such substances "do not contain any pharmacologically active molecules." Compl. ¶ 88.

In response to Defendants' arguments concerning the presence of vegetable charcoal in less diluted concentrations, Plaintiff contends that the Products are marketed as a synergistic mixture. Thus, the labels on the Products claim that all of the active ingredients work together to produce the promised

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results. Whether such synergy could occur with a highly diluted component product, is not clear. However, during the hearing, Plaintiff's counsel conceded that he had not sought the opinion of Plaintiff's experts regarding the efficacy of the Products at issue, or of the vegetable charcoal ingredient.

Defendants' arguments go to a core factual question -- whether the Products are effective. The Complaint alleges that they are not. This allegation is supported with references to scientific studies stating that, given the extreme dilution of active ingredients in homeopathic remedies, they are not likely to have any active ingredients. Accordingly, any perceived benefit is due to a placebo effect. The cited studies do not specifically address the potential effectiveness of vegetable charcoal diluted to a tenth of its unstated, original concentration. However, the Complaint also relies on Plaintiff's personal experience. Thus, it claims that "Plaintiff used Colic Calm on her grandson as directed but did not obtain the advertised relief from these symptoms, nor any benefits, from using Colic Calm." Compl. ¶ 120.

There are sufficient allegations in the Complaint to support its basic claims. Whether Plaintiff's personal experience or the cited scientific studies will ultimately be sufficient evidence to create a triable issue of fact, or to carry Plaintiff's burden of proof at trial, is not a proper matter to be considered on a motion to dismiss. Thus, the Complaint contains factual allegations that the Products are marketed as using all active ingredients in combination to achieve relief for infants and children. The Complaint also implies that the only possible ingredient present in the Products is vegetable charcoal. Finally, the Complaint alleges that Plaintiff's grandson did not benefit from the use of the Products. Collectively, this is sufficient to meet the plausibility requirement. The Motion is **DENIED** on this ground.

3. Whether the Complaint Sufficiently Pleads a Claim that Defendants Warranted that the Products Are "FDA-Approved"

a) Legal Standards

(1) 15 U.S.C. §§ 2301 et seq.

The applicable legal standard requires "elements of the warranty in words or phrases which would not mislead a reasonable, average consumer as to the nature or scope of the warranty." 15 U.S.C. § 2302(13). A "written warranty" is "any written affirmation of fact or written promise made in connection with the sale of a consumer product by a supplier to a buyer which relates to the nature of the material or workmanship and affirms or promises that such material or workmanship is defect free or will meet a specified level of performance over a specified period of time[.]" 15 U.S.C. § 2301(6)(A).

(2) Song-Beverly Warranty Act

The Song-Beverly Consumer Warranty Act provides standards for implied and express warranties for consumer goods sold in California. Under this Act, a "consumer good" is any "new product" purchased for personal, non-retail use. Cal. Civ. Code § 1791(a). An "express warranty" is a "written statement arising out of a sale to the consumer of a consumer good pursuant to which the manufacturer, distributor, or retailer undertakes to preserve or maintain the utility or performance of the consumer good or provide compensation if there is a failure in utility or performance[.]" § 1791.2(a)(1). A statement may be deemed an express warranty under the statute notwithstanding that it does not use "formal words" such as

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“warrant” or “guarantee,” but such words alone are sufficient to show that a statement is an express warranty. § 1791.2(b). “An affirmation merely of the value of the goods or a statement purporting to be merely an opinion or commendation of the goods does not create a warranty.” *Id.*

b) Application

Defendants argue that Plaintiff’s express warranty claims fail under both federal and state law because there was no warranty that the Products are “FDA-Approved.” Plaintiff responds that the juxtaposition of representations that the Products are “FDA-Regulated” and “safe, gentle, and effective” could reasonably have led consumers to believe that Defendants warranted that the Products were approved by the FDA as safe and effective. Plaintiff relies on allegations in the Complaint that Defendants intended to create such consumer confusion. Compl. ¶ 101 (quoting Defendants’ website: “Why is it so important for a Gripe Water to be FDA regulated? Safety is the #1 Concern of Parents. Effectiveness is the #2 Concern of Parents.”). Defendants respond that the advertisement clearly separates the terms “FDA-regulated” and “safe, gentle, and effective” and includes the following image:

Colic Calm® is:

- FDA-regulated medicine
- Safe, gentle, and effective

Reply, Dkt. 34 at 14. Accordingly, they argue that it is not plausible that a consumer could be confused by the presence of these terms.

Once again, Defendants’ arguments are fact-based. They are not appropriate on a motion to dismiss. The allegations in the Complaint support plausible breach of warranty claims. The Motion is **DENIED** on this ground.

4. Whether the Motion Should be Granted as to Lawrence

Defendants argue that Lawrence should be dismissed because she is not the party who sold or distributed the Products, but the President and co-founder of TJL. However, agents may be liable for their own torts. Cal. Civ. Code § 2343; 3 B.E. Witkin, Summary of California Law § 199 (10th ed. 2005). The Complaint alleges that Lawrence appeared in YouTube videos and engaged in other marketing activities during which she allegedly made false statements. Further, whether Plaintiff has standing to challenge statements by Lawrence to which she may not have been exposed is an issue that is more appropriately considered in connection with a later motion for class certification. For these reasons, the Motion is **DENIED** as to Lawrence.

5. Whether Certain Allegations Should Be Stricken

Defendants seek to have stricken from the Complaint statements that they contend are redundant, spurious or disallowed as a matter of law. Thus, although brought as a motion to dismiss under Fed. R. Civ. P. 12(b), these arguments are more properly considered under the standards that apply to a motion

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to strike under Fed. R. Civ. P. 12(f). Each set of allegations to which Defendants object is addressed separately.

a) Claimed Misrepresentations upon which Plaintiff Did Not Rely

Defendants argue that Plaintiff's claims should be dismissed "to the extent that they rely on . . . misrepresentations and warranties" that Plaintiff did not consider or upon which she did not rely. Motion, Dkt. 23-1 at 19. Specifically, they identify statements made on the Internet -- including the YouTube videos featuring Lawrence -- and the statement "FDA-Regulated" on the package insert. Defendants argue that the Complaint offers no support for an inference that Plaintiff saw any alleged misrepresentations on the Internet. *Cf.* Compl. ¶ 119; Pl. Decl. ¶¶ 2-3, Dkt. 1 at 51. As to the statement that the Products are "FDA-Regulated," Defendants argue that Plaintiff's declaration did not specifically state that she relied on it in making her purchasing decisions. *Cf.* Pl. Dec. ¶¶ 2-3. Accordingly, they argue that any allegations in the Complaint claiming or suggesting such reliance are implausible.

Plaintiff agrees to strike any allegation in the Complaint that suggests reliance on a misrepresentation that PBS endorses the efficacy of Colic Calm. Opposition, Dkt. 32 at 25.⁴ However, Plaintiff argues that Defendants repeatedly made the same five misrepresentations on the labels of the Products and on the Internet: (1) the Products are effective; (2) the Products are fast acting; (3) the Products contain ingredients that work in synergy; (4) the Products are recognized by the FDA as being safe and effective; and (5) the Products are all natural. Plaintiff argues that each of these five claims appeared on the label of the Products she purchased. Accordingly, Plaintiff argues that allegations in the Complaint concerning other places in which these misrepresentations were made, including on the Internet, should not be stricken from the Complaint.

Defendants' arguments are not persuasive as to the Motion. There is no basis to strike the disputed allegations. Once again, whether these allegations, and any supporting evidence about them, will warrant a certification of the proposed class is not ripe for determination at this time. This includes whether Plaintiff may appropriately represent those who, unlike Plaintiff, allegedly relied on certain alleged misrepresentations. *E.g., Pfizer Inc. v. Super. Ct.*, 182 Cal. App. 4th 622 (2010) (whether class certification for consumers misled by advertisements was warranted); *Allen v. Hyland's Inc.*, 300 F.R.D. 643 (C.D. Cal. 2014) (whether class certification for consumers misled by representations concerning homeopathic products was warranted); *see also Kwikset Corp. v. Super. Ct.*, 51 Cal.4th 310 (2011) (standing to sue based on allegedly false labeling under Cal. Bus. & Prof. Code § 17204); *cf. Durell v. Sharp Healthcare*, 183 Cal. App. 4th 1350 (2010) (demurrer sustained because plaintiff did not plead reliance on alleged misrepresentations).

For these reasons, the Motion is **GRANTED** as to those allegations Plaintiff voluntarily agreed to strike. The Motion is otherwise **DENIED** on this ground.

⁴ The Complaint alleges that Lawrence appeared on a PBS Program called "Savvy Moms" and promoted the Colic Calm products. Compl. ¶ 29. The Complaint alleges that, after this appearance, Defendants included the PBS logo on their website in a section that discussed groups that "recognize the safety and effectiveness of Colic Calm." *Id.* ¶ 31.

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b) Allegations that Use of the Term “FDA-Regulated” Is Misleading

Defendants argue that “controlling” California law demonstrates that the alleged statement “FDA-Regulated” was “unequivocally true.” Motion, Dkt. 23-1 at 24. Once again, the basis for this position is *Nat’l Council Against Health Fraud, Inc. v. King Bio Pharm., Inc.*, 107 Cal. App. 4th 1336 (2003). There, the Court of Appeal construed FDA regulations concerning homeopathy:

The FDA permits homeopathic remedies included in the Homeopathic Pharmacopoeia to be marketed. King Bio’s products are included in the Homeopathic Pharmacopoeia and otherwise comply with FDA regulations. Thus, prior to the marketing of a product by King Bio, the general efficacy and safety of the remedy has been substantiated to the extent required by federal law. Public policy would not be furthered under these circumstances by requiring King Bio to substantiate its advertising claims as to general efficacy every time a private plaintiff brings a false advertising action. This federal regulation of homeopathic remedies also makes it less likely that there is a substantial probability of wrongdoing by King Bio.

Id. at 1348.

Plaintiff argues that Defendants’ use of the term “FDA-Regulated” implies that the FDA has considered the safety and efficacy of the Products when it has not and constitutes a misleading advertisement. *Delarosa v. Boiron, Inc.*, 818 F. Supp. 2d 1177, 1189 (C.D. Cal. 2011). As noted in *Delarosa*, the FDA “has not set up a comprehensive process to evaluate the safety or efficacy of homeopathic” over-the-counter remedies. *Id.* Instead, the FDA allows homeopathic remedies to be sold so long as they comply with the standards enumerated in the Homeopathic Pharmacopoeia of the United States (“HPUS”). CPG § 400.400, available at <http://www.fda.gov/ICECI/ComplianceManuals/CompliancePolicyGuidanceManual/ucm074360.htm>.⁵ However, the CPG warns that “[a] product’s compliance with requirements of the HPUS . . . does not establish that it has been shown by appropriate means to be safe, effective, and not misbranded for its intended use.” *Id.* Thus, the finding that the FDA has already substantiated claims of safety and efficacy concerning homeopathic products in *National Council Against Health Fraud* is unsupported. Accordingly, the issue of whether the term “FDA-Regulated” is misleading cannot be resolved on a motion to dismiss. The Motion is **DENIED** on this ground.

c) Injunctive Relief

(1) Legal Standard

To have standing to seek injunctive relief, a plaintiff must: (1) have suffered an injury in fact (2) that is fairly traceable to the defendant’s conduct and (3) is likely to be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). A “plaintiff must demonstrate that he has suffered or is threatened with a concrete and particularized legal harm, coupled with a sufficient likelihood that he will again be wronged in a similar way.” *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 979 (9th Cir. 2011) (internal quotation marks removed). “Past wrongs” are “evidence bearing on whether there is a real

⁵ “CPG” is an abbreviation for the “Compliance Policy Guidelines” of the FDA.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. LA CV15-00477 JAK (SSx)

Date August 3, 2015

Title Wannita Thesier-Hendricks v. TJL Enterprises, Inc., et al.

and immediate threat of repeated injury” but are not “real and immediate” threats of injury necessary to meet standing requirements. *Id.* (internal quotation marks removed). Equitable relief is “unavailable absent a showing of irreparable injury, a requirement that cannot be met where there is no showing of any real or immediate threat that the plaintiff will be wronged again—a ‘likelihood of substantial and immediate irreparable injury.’” *City of L.A. v. Lyons*, 461 U.S. 95, 111 (1983). “These elements of standing must be supported in the same way as any other matter for which a plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation.” *Gest v. Bradbury*, 443 F.3d 1177, 1181 (9th Cir. 2006). Thus, “[a]t the pleading stage, general factual allegations of injury resulting from the defendant’s conduct may suffice.” *Id.*

(2) Application

Defendants argue that Plaintiff’s request for injunctive relief fails because she lacks standing to pursue it. Thus, Defendants argue that there is no showing that Plaintiff will likely be injured in the future due to any alleged misconduct. Plaintiff argues that, if this interpretation is accepted, injunctive relief would rarely be available in false advertising cases brought on behalf of a class. *Henderson v. Gruma Corp.*, No. 10-04173, 2011 WL 1362188, at *7 (C.D. Cal. Apr. 11, 2011) (“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.”). The Ninth Circuit has not resolved this issue in the context of consumer class actions.

This issue need not be resolved at this stage of the litigation. What relief, if any, Plaintiff may be entitled to pursue is more appropriately considered later in the proceedings, including at such time, if any, when Plaintiff seeks such relief. For these reasons, the Motion is **DENIED** on this ground.

IV. Conclusion

For the reasons stated in this Order, the Motion is **GRANTED IN PART** and **DENIED IN PART**. On or before August 13, 2015, Plaintiff shall file an amended complaint that includes the modifications to which she agreed in response to the Motion. Plaintiff shall also file, as an exhibit, a red-line version that shows all changes that have been made to the Complaint.

IT IS SO ORDERED.

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