

**UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF
CALIFORNIA**

Obillo v. i-Health Inc.

No. 24-cv-02459-PHK (N.D. Cal. Mar. 18, 2025) · No. 24-cv-02459-PHK · Decided March 18, 2025

OPINION

1 2 3 4 UNITED STATES DISTRICT COURT 5 NORTHERN DISTRICT OF CALIFORNIA 6
SAN FRANCISCO DIVISION 7 8 MALIA OBILLO, Case No. 24-cv-02459-PHK 9 Plaintiff,
ORDER GRANTING MOTION TO 10 v. DISMISS WITH LEAVE TO AMEND 11 I-HEALTH
INC., Re: Dkt. 27 12 Defendant. 13 14 This is a putative class action brought by Plaintiff Malia
Obillo (“Plaintiff”) against 15 Defendant i-Health Inc. (“Defendant”).

The Parties have consented to proceed before a Magistrate 16 Judge for all purposes, including
entry of a final judgment under 28 U.S.C. § 636(c). See Dkts. 17 12, 17. Before the Court is
Defendant’s motion to dismiss Plaintiff’s first amended complaint 18 (“Complaint”) pursuant to
Federal Rule of Civil Procedure 12(b)(6). [Dkt. 27]. Plaintiff has filed 19 an opposition to the
motion, and Defendant has filed a reply.

[Dkt. 31; Dkt. 34]. The Court heard 20 oral argument on the motion on December 4, 2024. See
Dkt. 36. Having reviewed the Parties’ 21 written and oral arguments and the governing law, the
Court GRANTS the motion and 22 DISMISSES the Complaint WITH LEAVE TO AMEND for
the reasons discussed herein. 23 BACKGROUND 24 The following factual summary is derived
from the Complaint.

Plaintiff is a California 25 citizen who purchased Defendant’s Culturelle IBS Complete Support
 (“the Product”), on June 11, 26 2022, from a Target store in Emeryville, California. [Dkt. 24 at ¶¶
1, 4, 42]. Plaintiff alleges that 27 she read and relied on the Product’s label, which states that the
Product is “clinically shown to 1 at ¶¶ 1, 42. Plaintiff alleges that she believed, based on the
Product’s labelling, that the Product 2 was “clinically proven” to be “effective” in treating IBS
symptoms.

Id. at ¶¶ 37, 42. Plaintiff 3 alleges that she “experienced all” of the symptoms referenced on the
Product’s label and that she 4 purchased the Product to treat those symptoms. Id. at ¶ 41. 5
Plaintiff alleges that Defendant’s advertising statements on the Product’s label are false 6 and
misleading because the Product has “not been ‘clinically proven’ to be effective” in treating 7 IBS
symptoms, and because she herself “did not experience any of the relief” the label claimed the 8
Product would provide.

Id. at ¶¶ 37, 44. The primary basis for Plaintiff’s allegation of falseness is 9 that the National Advertising Division of the Better Business Bureau published a report on May 10 31, 2022 (the “NAD Report”), which stated that the sole clinical study offered by Defendant to 11 support its labelling claims was methodologically unreliable. Id. at ¶¶ 24-34; see Dkt.

1-1. The 12 NAD Report concluded with the recommendation that Defendant discontinue labelling claims that 13 the Product was “clinically shown” to improve IBS symptoms. [Dkt. 1-1 at 7]. Plaintiff alleges 14 that she would not have purchased the Product (or at least paid as much as she did) had she known 15 Defendant’s advertising statements on the Product’s label were “unsubstantiated.” Id. at ¶¶ 45, 50.

16 On behalf of a putative class of all people in the State of California who purchased 17 Defendant’s Product within four years prior to April 25, 2025, Plaintiff alleges the following 18 claims for relief: (1) violation of the California Consumers Legal Remedies Act (“CLRA”), CAL. 19 CIV. CODE §§ 1750 et seq.; (2) violation of the California Unfair Competition Law (“UCL”), CAL. 20 BUS. & PROF.

CODE §§ 17200, et seq.; (3) violation of the California False Advertising Law 21 (“FAL”), CAL. BUS. & PROF. CODE §§ 17500, et seq.; (4) breach of express warranty; (5) breach of 22 implied warranty; (6) breach of contract; (7) negligent misrepresentation; (8) intentional 23 misrepresentation; and (9) unjust enrichment. Id. at ¶¶ 55, 70-152. Plaintiff seeks damages, 24 injunctive relief, and unspecified equitable relief for her CLRA cause of action; restitution, 25 disgorgement of profits, and injunctive relief for her UCL and FAL causes of action; damages for 26 breach of express and implied warranties, breach of contract, and negligent and intentional 27 misrepresentation causes of action; and restitution and disgorgement of profits for the unjust 1 Characterizing the Complaint as “facially deficient pleading,” Defendant now moves to 2 dismiss all of Plaintiff’s claims.

[Dkt. 27 at 8]. 3 LEGAL STANDARD 4 Federal Rule of Civil Procedure 12(b)(6) provides that a defendant may move to dismiss a 5 complaint for “failure to state a claim upon which relief can be granted.” A motion to dismiss 6 under Rule 12(b)(6) tests the legal sufficiency of the causes of action asserted in a complaint. A 7 dismissal under Rule 12(b)(6) may be based on the lack of a cognizable legal theory or based on 8 the absence of sufficient facts alleged under a cognizable legal theory.

Mollett v. Netflix, Inc., 795 9 F.3d 1062, 1065 (9th Cir. 2015) (quoting Hinds Invs., L.P. v. Angioli, 654 F.3d 846, 850 (9th Cir. 10 2011)). 11 In reviewing the sufficiency of a complaint, the Court accepts all well-pleaded factual 12 allegations as true and construes them in the light most favorable to the plaintiff. Great Minds v. 13 Office Depot, Inc., 945 F.3d 1106, 1109-10 (9th Cir.

2019) (citing *Malibu Textiles, Inc. v. Label 14 Lane Int'l, Inc.*, 922 F.3d 946, 951 (9th Cir. 2019)). “To survive a motion to dismiss, a complaint 15 must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible 16 on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 17 U.S. 544, 570 (2007)). “A claim has facial plausibility when the plaintiff pleads factual content 18 that allows the court to draw the reasonable inference that the defendant is liable for the 19 misconduct alleged.” *Id.* (citing *Twombly*, 550 U.S. at 556). “Plausibility requires pleading facts, 20 as opposed to conclusory allegations or the ‘formulaic recitation of the elements of a cause of 21 action[.]’” *Somers v. Apple, Inc.*, 729 F.3d 953, 959-60 (9th Cir.

2013) (quoting *Twombly*, 550 22 U.S. at 555). “Factual allegations must be enough to raise a right to relief above the speculative 23 level.” *Id.* (quoting *Twombly*, 550 U.S. at 555). “Where a complaint pleads facts that are merely 24 consistent with a defendant's liability, it stops short of the line between possibility and plausibility 25 of entitlement to relief.” *Id.* (quoting *Iqbal*, 556 U.S. at 678).

26 In addition, Federal Rule of Civil Procedure 9(b) requires that causes of action grounded in 27 fraud be pled “with particularity.” See *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1126 (9th Cir. 1 9(b) applies even if fraud is not a necessary element of the claim). “Because allegations of fraud 2 inescapably carry a degree of moral turpitude, Rule 9(b) imparts a heightened note of seriousness, 3 requiring a greater degree of pre-discovery investigation by the plaintiff, followed by the plaintiff's 4 required particular allegations, thereby protecting a defendant's reputation from frivolous and 5 unfounded allegations and permitting a particularized basis for a defendant to respond to the 6 particularized allegations.” *Irving Firemen's Relief & Ret.*

Fund v. Uber Techs., Inc., 998 F.3d 7 397, 404 (9th Cir. 2021). To plead fraud with particularity, “the pleader must state the time, place, 8 and specific content of the false representations as well as the identity of the parties to the 9 misrepresentation.” *Odom v. Microsoft Corp.*, 486 F.3d 541, 553 (9th Cir. 2007) (quoting 10 *Schreiber Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir.

1986)). 11 In evaluating a Rule 12(b)(6) motion to dismiss, a court may consider documents attached 12 to the complaint, documents incorporated by reference into the complaint, and matters subject to 13 judicial notice. *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003). 14 “In dismissing for failure to state a claim, a district court should grant leave to amend even 15 if no request to amend the pleading was made, unless it determines that the pleading could not 16 possibly be cured by the allegation of other facts.” *Yagman v. Garcetti*, 852 F.3d 859, 863 (9th 17 Cir.

2017) (quoting *Ebner v. Fresh, Inc.*, 838 F.3d 958, 963 (9th Cir. 2016)). 18 ANALYSIS 19 I. Request for Judicial Notice 20 As an initial matter, Defendant asks the Court to take judicial

notice of: (1) the definition 21 of “open label study” as set forth on the National Institute of Health website; (2) an advertising 22 guide regarding dietary supplements published on the Federal Trade Commissioner’s website; and 23 (3) a full copy of the NAD Report.

[Dkt. 27-1]. Plaintiff filed no opposition to the request for 24 judicial notice and, at the hearing, confirmed that she does not oppose the request. 25 The incorporation by reference doctrine allows a court to take judicial notice of a 26 document not attached to the complaint “if the plaintiff refers extensively to the document or the 27 document forms the basis of the plaintiff’s claim.” Ritchie, 342 F.3d at 908. “The defendant may 1 and thus may assume that its contents are true for purposes of a motion to dismiss under Rule 2 12(b)(6).” Id. Here, the Complaint explicitly refers to the NAD Report.

[Dkt. 24 at ¶¶ 24-34]. 3 An excerpted portion of the NAD Report is attached to Plaintiff’s initial complaint. See Dkt. 1-1. 4 The NAD Report forms the basis of Plaintiff’s claim that the Product’s label is false and 5 misleading. Plaintiff does not dispute the authenticity of the document and does not oppose 6 Defendant’s request for judicial notice.

The Court therefore finds that judicial notice of the NAD 7 Report is appropriate. 8 Federal Rule of Evidence 201(b) provides that a court “may judicially notice a fact that is 9 not subject to reasonable dispute because it: (1) is generally known within the trial court’s 10 territorial jurisdiction; or (2) can be accurately and readily determined from sources whose 11 accuracy cannot reasonably be questioned.” It is well-settled that websites and their contents may 12 be judicially noticed.

Threshold Enters. Ltd. v. Pressed Juicery, Inc., 445 F. Supp. 3d 139, 146 13 (N.D. Cal. 2020) (collecting cases); see also Masry v. Lowe’s Cos., Inc., No. 24-cv-00750-CRB, 14 2024 WL 3228086, at *2 (N.D. Cal. June 28, 2024) (“Information on government agency websites 15 have often been treated as proper subjects for judicial notice.”) (alterations omitted).

Because the 16 documents from the National Institute of Health and Federal Trade Commission websites are 17 matters of public record, there are no issues of authenticity, and because Plaintiff does not oppose 18 and has raised no questions as to accuracy, the Court finds that judicial notice of these documents 19 is also appropriate. 20 Accordingly, Defendant’s request for judicial notice is GRANTED.

21 II. Injunctive Relief 22 Plaintiff seeks monetary damages, as well as various forms of equitable and injunctive 23 relief. Defendant argues that Plaintiff lacks Article III standing to pursue injunctive relief 24 because: (1) Plaintiff fails to allege that she intends to purchase the Product again, and thus, fails 25 to allege any risk of future harm; and (2) Defendant no longer sells the Product at issue, and thus, 26 there is no possibility of actual or future harm.

[Dkt. 27 at 23-24]. In her opposition brief, 27 Plaintiff confirmed that she has withdrawn her injunctive relief claims (without prejudice, should 1 this withdrawal. Accordingly, Plaintiff's causes of action, to the extent seeking any injunctive 2 relief, are DISMISSED WITHOUT PREJUDICE. 3 III. Equitable Relief 4 Defendant moves to dismiss Plaintiff's UCL, FAL, and unjust enrichment claims for 5 restitution and disgorgement, as well as her request for unspecified equitable relief under the 6 CLRA, arguing that Plaintiff has failed to allege that she lacks an adequate remedy at law.

[Dkt. 7 27 at 21-23]. 8 The Ninth Circuit has made clear that, under "traditional principles governing equitable 9 remedies in federal court," a plaintiff in federal court must "establish that she lacks an equitable 10 remedy at law before securing equitable restitution for past harm[.]" *Sonner v. Premier Nutrition 11 Corp.*, 971 F.3d 834, 844 (9th Cir. 2020).

Courts within this District have understood this to mean 12 that a plaintiff "must, at a minimum, plead that she lacks adequate remedies at law if she seeks 13 equitable relief." *Takahashi-Mendoza v. Coop. Regions of Organic Producer Pools*, 673 F. Supp. 14 3d 1083, 1093 (N.D. Cal. 2023) (quoting *Guthrie v. Transamerica Life Ins. Co.*, 561 F. Supp. 3d 15 869, 875 (N.D.

Cal. 2021)). 16 Upon careful review of the Complaint, the Court concludes that Plaintiff does not allege 17 that she lacks an adequate remedy at law to be able to pursue claims for equitable relief. With 18 regard to her CLRA cause of action, Plaintiff alleges without explanation or further pleading that 19 she "seeks compensatory, monetary, and punitive damages, in addition to equitable and injunctive 20 relief." [Dkt.

24 at ¶ 89]. As to her UCL cause of action, Plaintiff alleges that she is entitled to 21 "judgments that may be necessary to disgorge Defendant's ill-gotten gains and to restore to any 22 person in interest any money paid" for Defendant's Product. *Id.* at ¶ 104.

As to her FAL cause of 23 action, Plaintiff requests "an Order requiring Defendant to disgorge ill-gotten gains and/or award 24 full restitution of all monies wrongfully acquired by Defendant by means of such acts of false 25 advertising, plus interests and attorneys' fees." *Id.* at ¶ 116. Plaintiff neither explains why the 26 compensatory damages that she seeks would be an inadequate remedy, nor otherwise attempts to 27 distinguish her requests for equitable relief from her requests for damages.

See *In re Calif.* 1 Mar. 29, 2021) ("[N]owhere in the complaint do Plaintiffs allege that the three-fold damages they 2 seek are inadequate or otherwise distinguish their request for restitution from their request for 3 damages."). 4 In opposing dismissal of her equitable relief claims, Plaintiff argues, first, that there is no 5 outright prohibition to seeking alternate forms of relief at the pleadings stage, and second, as to her 6 UCL claim specifically, that the UCL "only provides equitable remedies." [Dkt.

31 at 21-22]. 7 These arguments are unpersuasive. First, while alternative pleading is allowed, that does not 8 relieve Plaintiff of the obligation to satisfy the minimum pleading requirements for each claim for 9 relief, including any alternative forms of relief.

To pursue equitable relief claims, Plaintiff was 10 required to plausibly allege that she lacks an adequate remedy at law. See *Calif. Gasoline*, 2021 11 WL 1176645, at *8 (dismissing equitable relief claims for failure to allege adequate remedies at 12 law and finding argument regarding entitlement to alternative pleading to be “unavailing”); see 13 also *In re MacBook Keyboard Litig.*, No. 5:18-cv-02813-EJD, 2020 WL 6047253, at *2 (N.D.

14 Cal. Oct. 13, 2020) (“[T]his is not an election of remedies issue. The question is not whether or 15 when Plaintiffs are required to choose between two available inconsistent remedies, it is whether 16 equitable remedies are available to Plaintiffs at all.

In other words, the question is whether 17 Plaintiffs have adequately pled their claims for equitable relief, and that question is not premature 18 on a motion to dismiss.”). Alternative pleading is not a substitute for inadequate pleading.

As 19 with the deficient complaints in *California Gasoline* and *MacBook*, here the Complaint fails to 20 adequately plead that equitable remedies are available at all (even assuming Plaintiff here is 21 entitled to plead alternative forms of relief). 22 To the extent Plaintiff argues that the UCL only allows for equitable relief, she still does 23 not explain why monetary damages, if awarded for her other causes of action, would not be 24 enough to remedy the injuries for which she seeks redress.

See *Johnson v. Trumpet Behavioral 25 Health, LLC*, No. 3:21-cv-03221-WHO, 2022 WL 74163, at *3 (N.D. Cal. Jan. 7, 2022) 26 (dismissing UCL claim for failure to adequately allege a lack of an adequate remedy, where the 27 plaintiffs alleged only that they sought equitable remedies to the extent legal remedies were 1 As to her unjust enrichment cause of action, Plaintiff alleges only that she seeks equitable 2 relief, “[i]n the event” she “lack[s] adequate remedies at law for the past, present, and future 3 injuries Defendant has inflicted.” [Dkt.

24 at ¶ 147]. This conditional phrasing “is not an 4 allegation that [Plaintiff] lack[s] adequate remedies at law.” *Johnson*, 2022 WL 74163, at *3. 5 Plaintiff’s expressly conditional pleading here lays bare the same defect as with her other pleading 6 for equitable relief: alternative (or conditional) pleading is not a substitute for satisfying the 7 minimum pleading requirements.

As with her equitable relief claims under the CLRA, UCL, and 8 FAL, Plaintiff does not allege that actually she lacks adequate remedies at law. This is a 9 fundamental legal defect in the pleading. Indeed, the conditional phrasing here inherently admits 10 (and leaves open the possibility) that she has an adequate remedy at law, which would be fatal to 11 this claim even as expressly pled.

Plaintiff's pleading here does not attempt to distinguish her 12 request for unjust enrichment from her requests for damages for her other causes of action 13 (especially where all causes of action in this Complaint are based on the same common nucleus of 14 operative facts). 15 Because Plaintiff's UCL, FAL, and unjust enrichment causes of action each seek only 16 equitable relief, those causes of action are all DISMISSED WITHOUT PREJUDICE.

17 Plaintiff's claim for any equitable relief under the CLRA is likewise DISMISSED WITHOUT 18 PREJUDICE. 19 IV. CLRA Claim 20 Plaintiff seeks damages for alleged violations of the CLRA. [Dkt. 24 at ¶¶ 70-89]. 21 Defendant argues that this claim should be dismissed because it is improperly based on a theory of 22 a lack of substantiation. [Dkt. 27 at 12-16].

23 The CLRA prohibits certain "unfair methods of competition and unfair or deceptive acts or 24 practices undertaken by any person in a transaction intended to result or which results in the sale 25 or lease of goods or services to any consumer[.]" CAL. CIV. CODE § 1770(a).

The practices 26 proscribed by the CLRA include misrepresenting the "characteristics," "uses," or "benefits" of 27 product; misrepresenting that a product is "of a particular standard, quality or grade;" and 1 It is well-settled that private litigants may not bring suit under the CLRA "to demand 2 substantiation for advertising claims." Nat'l Council Against Health Fraud, Inc. v. King Bio 3 Pharms., Inc., 107 Cal. App.

4th 1336, 1345 (Cal. App. 2003) ("Private plaintiffs are not 4 authorized to demand substantiation for advertising claims."); Kroessler v. CVS Health Corp., 977 5 F.3d 803, 810 (9th Cir. 2020) ("Although the FDCA requires manufacturers to have substantiation 6 for their structure/function claims, California law prohibits private plaintiffs from demanding that 7 advertisers substantiate their claims."); Kwan v. SanMedica Int'l, 854 F.3d 1088, 1095 (9th Cir.

8 2017) (collecting cases). The authority to challenge advertising on lack of substantiation grounds 9 is reserved to "the Director of Consumer Affairs, the Attorney General, any city attorney, or any 10 district attorney." CAL. BUS. & PROF. CODE § 17508; see also King Bio, 107 Cal. App. 4th at 1345 11 ("The Legislature has expressly permitted prosecuting authorities, but not private plaintiffs, to 12 require substantiation of advertising claims.").

13 To state a false advertising claim under the CLRA, a private litigant must "allege specific 14 facts pointing to actual falsehood" of the statements. Kwan, 854 F.3d at 1096-07 ("[E]ach of these 15 is simply an allegation that defendant's marketing claims lack scientific substantiation. Since 16 California law does not provide a private cause of action for claims that advertising lacks 17 substantiation, the failure to allege specific facts pointing to actual falsehood constitutes a fatal 18 flaw."); Dachauer v. NBTY, Inc., 913 F.3d 844, 847 (9th Cir.

2019) ("[A] private plaintiff bears 19 the burden of producing evidence to prove that the challenged statement is false or misleading."). 20 A plaintiff may establish such falsity by citing to

“testing, scientific literature, or anecdotal evidence.” *Mosher-Clark v. Gravity Defyer Med. Tech. Corp.*, 691 F. Supp. 3d 1113, 1118 (N.D. Cal. 2023) (quoting *King Bio*, 107 Cal. App.

4th at 1348); see also *Brockey v. Moore*, 107 Cal. 23 App. 4th 86, 99 (Cal. App. 2003) (suggesting that the experience of “very few persons” or “isolated examples” may not suffice to show falsity). Absent allegations demonstrating actual falsity, “the claim collapses into a ‘lack of substantiation’ claim that private litigants may not bring under California law.” *Perez v. Bath & Body Works, LLC*, No. 21-cv-05606-BLF, 2022 WL 27 2756670, at *3 (N.D.

Cal. July 14, 2022) (citing *Engel v. Novex Biotech LLC*, No. 14-cv-03457-1. The law recognizes the conceptual dividing line between a claim that an advertisement is false versus a claim that an advertisement lacks substantiation. “Courts have been careful to distinguish between allegations that a defendant’s advertising [statements] are actually false and allegations that such [statements] lack substantiation.” *Locklin v. StriVectin Operating Co.*, No. 21-cv-07967-VC, 2022 WL 867248, at *4 (N.D.

Cal. Mar. 23, 2022) (quoting *In re Clorox Consumer Litig.*, 894 F. Supp. 2d 1224, 1232 (N.D. Cal. 2012)). An advertising claim is false if it has “actually been disproved,” such that “the plaintiff can point to evidence that directly conflicts with the claim.” *Cooper v. Curallux LLC*, No. 20-cv-02455-PJH, 2020 WL 4732193, at *4 (N.D. Cal. Aug. 14, 2020) (quoting *Kwan v. SanMedica Int’l, LLC*, No. 14-cv-03287-MEH, 2015 WL 10 848868, at *4 (N.D.

Cal. Feb. 25, 2015)). An advertising claim is unsubstantiated if it has “no evidentiary support one way or the other.” *Id.* (quoting *Eckler v. Wal-Mart Stores, Inc.*, No. 12-12 CV-727-LAB-MDD, 2012 WL 5382218, at *3 (S.D. Cal. Nov. 1, 2012)); *Liou v. Organifi, LLC*, 13 491 F. Supp. 3d 740, 750 (S.D. Cal. 2020) (“[A]n advertising claim that merely lacks evidentiary support is said to be unsubstantiated.”).

Here, Plaintiff alleges that Defendant’s advertising statements on the Product’s label are false, but the crux of the matter is how and why they are purportedly false. Plaintiff’s theory here is that the underlying study relied upon for the labelling statements did not meet the minimum scientific standards to qualify as a “clinical” study. From the face of the Complaint, Plaintiff has not alleged any facts that disprove that the Product is “clinically shown to relieve” IBS symptoms.

Rather than allege the reasons why that claim is false, Plaintiff challenges the sufficiency of the methodology of the underlying study and challenges the grounds for stating that the study can “clinically” show anything. This is not a situation where Plaintiff has pointed to facts which show actual falsehood in the Product’s labelling.

For example, Plaintiff does not allege that the underlying study is fictitious, was falsified, or did not happen. Nor does Plaintiff cite evidence, such as actual testing or other studies yielding

contrary results, to allege that the results of the underlying study were 27 disproved or refuted. Cf. *Debari v. Winix Global LLC*, No. 24-cv-06596-JSC, 2025 WL 56414, at 1 allege the True HEPA representation is false because, based on actual testing, the filters do not 2 meet HEPA standards.”); *Graham v. Central Garden & Pet Co.*, No. 22-cv-06507-JSC, 2023 WL 3 2744391, at *2 (N.D.

Cal. Mar. 30, 2023) (“Plaintiff plausibly alleges the statements are false or 4 misleading and that reasonable consumers could be misled. Defendant claims the products 5 ‘reduce multi-cat conflict and destructive behavior,’ provide ‘anxiety and stress relief,’ and 6 ‘reduce scratching’ and ‘urine marking.’ But, according to Plaintiff, three studies found synthetic 7 pheromones had no effect on cat behavior.

As alleged, and together with Plaintiff's other factual 8 allegations, the studies help ‘nudge’ an inference of falsity ‘across the line from conceivable to 9 plausible.’”) (internal citations omitted). Nor does Plaintiff allege that other experts in the field 10 have confirmed that the study's results were disproven by the scientific community. Cf. *Cooper v. 11 Curallux LLC*, 2020 WL 4732193, at *4 (N.D.

Cal. Aug. 14, 2020) (“[I]t is clear that plaintiff's 12 allegations that defendant falsely advertises the products offer hair growth ‘without side effects,’ is 13 not a substantiation claim. By alleging, ‘[s]cientific studies and experts in the field of hair 14 restoration confirm there are several side effects associated with use of low level laser therapy for 15 hair loss,’ plaintiff is contending that defendant's advertising claim has been disproved by the 16 scientific community.”) (internal citation omitted).

17 Claiming that the study underlying the Product's label is not rigorous enough to qualify as 18 a “clinical” study is inherently an allegation that the “clinically shown” statement is not 19 sufficiently substantiated. Upon careful examination of the Complaint, the Court finds that 20 Plaintiff alleges insufficient facts to establish the falsity of Defendant's labelling.

Fundamentally, 21 when read in full context, the Complaint alleges only a lack of substantiation claim. See *Perez*, 22 2022 WL 2756670, at *4 (dismissing false advertising claim alleging that the product at issue was 23 “clinically tested to instantly lock in moisture” as an impermissible challenge based on a lack of 24 substantiation); *Engel*, 2015 WL 846777, at *6 (dismissing CLRA claim alleging that the product 25 at issue was “clinically tested” for lack of substantiation, where the plaintiff acknowledged in the 26 complaint that testing had been performed but disputed the adequacy of that testing).

27 In an effort to avoid dismissal, Plaintiff argues that her cause of action alleges “an 1 backed up with scientific proof.” [Dkt. 31 at 12, 14]. Plaintiff argues that her allegations 2 plausibly show “that the method used by [Defendant] in its study was unreliable,” and by 3 extension, “that there

is no evidence to support the conclusion that the product is clinically proven to be effective.” *Id.* at 14.

Plaintiff argues that she is entitled to challenge “affirmatively false statements that a product is backed up with scientific proof.” *Id.* As support, Plaintiff cites *Bitton v. Gencor Nutrientes, Inc.*, 654 F. App’x 358 (9th Cir. 2016); *Rikos v. Procter & Gamble Co.*, 782 F. Supp. 2d 522 (S.D. Ohio 2011); and *Cabral v. Supple, LLC*, No. ED 12-00085-MWF (OPx), 8 2012 WL 12895824 (C.D.

Cal. July 3, 2012). *Id.* at 14-15. The Court finds these cases to be distinguishable or otherwise inapposite. In *Bitton*, the defendant manufactured a nutritional supplement and represented it had conducted a study with “‘statistically significant results’ showing increases in ‘free testosterone’ in study participants who took” the supplement. 654 F. App’x at 362.

The *Bitton* plaintiffs alleged that this statement was false and—unlike Plaintiff here—appended to their complaint an expert report that concluded the results from the underlying study were not, in fact, statistically significant. *Id.* The Ninth Circuit held that the allegations, supported by an expert report directly contradicting the study’s results, were sufficient to state a claim.

Id. Here, by contrast, Plaintiff did not submit an expert report with her Complaint, and she challenges the study’s adequacy as opposed to its results. In *Rikos*, the defendant manufactured a food supplement and stated on the product’s label and in advertisements that the product’s digestive health benefits were “clinically proven.” 782 F. 2d at 527.

There, the plaintiff alleged the statement was false, citing to the defendant’s own clinical study which concluded that there were “no statistically significant differences” between the outcome of the control and non-control groups. *Id.* Further, the complaint in *Rikos* alleged the existence of other studies, including one study which found that persons receiving the active ingredient in the defendant’s product did not experience any improvement in their condition.

Id. Here, unlike in *Rikos*, Plaintiff does not allege the existence of other clinical studies (or indeed any other scientific evidence) which contradicts the results of the Product’s underlying study. 1 product’s key ingredients were “clinically proven effective” to provide “fast relief from joint suffering”—was false and misleading. 2012 WL 12895824, at *2.

However, there, unlike here, the plaintiff alleged that one of the underlying clinical studies at issue evaluated a chemical compound that was not even found in the defendant’s product. *Id.* Further, the plaintiff in *Cabral* alleged the existence of “a series of clinical trials” showing that “the combination of these ingredients [was] no more effective than placebo.” *Id.* at 1.

Again, unlike Cabral, Plaintiff does not allege the existence of other clinical studies evaluating the Product's intended benefits. To the extent that Plaintiff relies on the NAD Report to argue actual falsity of Defendant's "clinically shown" statement, that argument is unavailing.

The NAD Report concluded only that the underlying study was unreliable. The NAD Report did not conclude, nor does Plaintiff otherwise allege, that the underlying study's findings regarding the Product's intended benefits were wrong. See *Gaul v. Bayer Healthcare LLC*, No. 12-5110 (SRC), 2013 WL 12181778, at *13 (D.N.J. Feb. 11, 2013) ("[T]he Complaint alleges merely that the NAD Report criticized Bayer's study as unreliable....

That a research study may be unreliable does not mean that its conclusions are necessarily incorrect."); see also *Yamasaki v. Zicam LLC*, No. 21-cv-02596-HSG, 2021 WL 16 4951435, at *5 (N.D. Cal. Oct. 25, 2021) (dismissing claim alleging defendant's "clinically proven" statements were false because they lacked "robust scientific support" and rejecting assertion that "only studies that are 'sufficiently large, randomized, controlled, double-blind' and publicly available can provide [] scientific consensus").

Finally, to the extent that Plaintiff relies on her allegations that she "did not experience any of the relief the Product claimed it would provide" to demonstrate actual falsity, she still fails to state a plausible claim for relief. See *Aloudi v. Intramedic Rsch. Grp.*, 729 F. App'x 514, 516-17 (9th Cir. 2017) (affirming dismissal of claim alleging falsity, where the plaintiff alleged that they "personally did not lose weight after taking the product as directed").

This allegation is, at best, anecdotal evidence of one person's experience. Just because one person did not obtain relief from IBS symptoms after using the Product does not mean that the "clinically shown" statement is false.

The Product's label does not state a guarantee that every person who takes the Product will. Accordingly, Defendant's motion to dismiss Plaintiff's CLRA claim is GRANTED WITH LEAVE TO AMEND. V. Breach of Contract and Warranty Claims Plaintiff alleges that Defendant breached the terms of a contract, as well as express and implied warranties, by representing that the Product was "clinically shown" to relieve IBS symptoms.

[Dkt. 24 at ¶¶ 117-36]. Defendant moves to dismiss these causes of action, arguing that Plaintiff failed to plead pre-suit notice and failed to plausibly allege the requisite elements of the claims. [Dkt. 27 at 24-25]. "To avoid dismissal of a breach of contract or breach of warranty claim in California, a buyer must plead that notice of the alleged breach was provided to the seller within a reasonable time after discovery of the breach." *Alvarez v. Chevron Corp.*, 656 F.3d 925, 932 (9th Cir.

2011); 12 CAL. COM. CODE § 2607 ("A buyer must, within a reasonable time after he discovers or should have discovered any breach, notify the seller of breach or be barred from any

remedy.”). “The 14 purpose of this rule is to ‘allow the seller the opportunity to repair the defective item, reduce 15 damages, avoid defective products in the future, and negotiate settlements.” *Minkler v. Apple, 16 Inc.*, 65 F. Supp. 3d 810, 817 (N.D.

Cal. 2014) (quoting *Cardinal Health 301 v. Tyco Elec. Corp.*, 17 169 Cal. App. 4th 116, 135 (Cal. App. 2008)). 18 Here, Defendant argues that Plaintiff’s breach of contract and breach of warranty claims 19 fail because Plaintiff does not allege that she gave pre-suit notice of the alleged breaches. [Dkt. 27 20 at 25]. Plaintiff does not directly respond to this argument in her opposition brief, and at the 21 hearing, Plaintiff effectively conceded that these causes of action are subject to dismissal on that 22 basis.

23 Accordingly, because Plaintiff fails to plausibly allege that she provided adequate pre-suit 24 notice or that pre-suit notice was not required, the Court GRANTS Defendant’s motion to dismiss 25 Plaintiff’s claims for breach of contract, breach of express warranty, and breach of implied 26 warranty WITH LEAVE TO AMEND. See *Steiner v. Vi-Jon Inc.*, 723 F. Supp. 3d 784, 795 27 (N.D.

Cal. 2024) (“Absent any representation that the statutory notice was provided or that an 1 fails.”). 2 VI. Negligent and Intentional Misrepresentation 3 The Complaint alleges a single, undifferentiated cause of action for negligent and 4 intentional misrepresentation. [Dkt. 24 at ¶¶ 137-45]. Defendant moves to dismiss the negligent 5 misrepresentation claim as barred by the economic loss rule.

[Dkt. 27 at 25]. At the hearing, 6 Defendant argued that Plaintiff’s intentional misrepresentation claim was also subject to dismissal 7 based on the economic loss rule; Plaintiff did not oppose Defendant’s request to modify the basis 8 for its request for dismissal of that cause of action. 9 Under applicable California law, the economic loss rule precludes a party from recovering 10 both in contract and tort for “purely economic losses.” *Robinson Helicopter Co. v. Dana Corp.*, 11 102 P.3d 268, 272 (Cal.

2004) (The economic loss rule “requires a purchaser to recover in contract 12 for purely economic loss due to disappointed expectations, unless he can demonstrate harm above 13 and beyond a broken contractual promise.”). This means a party cannot recover pure monetary 14 damages that “resulted from a breach of contract unless [the party] can show a violation of some 15 independent duty arising in tort.” *Rattagan v. Uber Techs., Inc.*, 19 F.4th 1188, 1191 (9th Cir.

16 2021) (citing *Erlich v. Menezes*, 981 P.2d 978, 983 (Cal. 1999)); accord *Sheen v. Wells Fargo 17 Bank N.A.*, 505 P.3d 625, 633 (Cal. 2022) (“Not all tort claims for monetary losses between 18 contractual parties are barred by the economic loss rule. But such claims are barred when they 19 arise from—or are not independent of—the parties’ underlying contracts.”).

20 Here, Plaintiff alleges that Defendant made affirmative misrepresentations regarding the 21 Product at issue, and on that basis alternatively alleges these misrepresentations resulted from 22 either negligence or intentional conduct. 23 First, with regard to negligent misrepresentation, Plaintiff alleges economic loss 24 unaccompanied by physical injury or property damage, and thus, fails to state a claim for relief as 25 a matter of law.

26 The required elements of a negligent misrepresentation claim are: (1) the misrepresentation 27 of a past or existing material fact; (2) without reasonable ground for believing it to be true; (3) 1 misrepresentation; and (5) resulting damage. *Apollo Cap. Fund LLC v. Roth Cap. Partners LLC*, 2 158 Cal. App. 4th 226, 243 (Cal. App. 2007) (citing *Shamsian v. Atl.*

Richfield Co., 107 Cal. App. 3 4th 967, 983 (Cal. App. 2003)). “In contrast to fraud, negligent misrepresentation does not require 4 knowledge of falsity.” *Id.* However, a person who makes false statements “honestly believing 5 that they are true,” may still be liable for negligent misrepresentation if he or she has no 6 “reasonable ground for such belief.” *Id.* (citation omitted).

7 “In general, there is no recovery in tort for negligently inflicted ‘purely economic losses,’ 8 meaning financial harm unaccompanied by physical or property damage[,]. . . unless two 9 conditions are satisfied.” *Rattagan v. Uber Techs., Inc.*, 553 P.3d 1213, 1224 (Cal. 2024).

First, 10 the plaintiff must “demonstrate the defendant's injury-causing conduct violated a duty that is 11 independent of the duties and rights assumed by the parties when they entered the contract.” *Id.* 12 “Second, the defendant's conduct must have caused injury to persons or property that was not 13 reasonably contemplated by the parties when the contract was formed.” *Id.* 14 Here, the Complaint does not allege the violation of any duty that is independent of the 15 duties and rights assumed by the Parties under the alleged contract accompanying the sale of the 16 Product.

See *Crystal Springs Upland Sch. v. Fieldturf USA, Inc.*, 219 F. Supp. 3d 962, 970 (N.D. 17 Cal. 2016) (“[A] negligent misrepresentation claim paralleling a contract claim that prays only for 18 economic damages will be barred by the economic loss rule unless the plaintiff alleges both that 19 the defendant made an affirmative misrepresentation, and that the defendant's misrepresentation 20 exposed the plaintiff to independent personal liability.”).

Nor does the Complaint allege that the 21 alleged misrepresentation exposed Plaintiff to personal liability or damages independent from the 22 alleged contract breach. See *Tasion Commc'ns, Inc. v. Ubiquiti Networks, Inc.*, No. C-13-1803, 23 2013 WL 4530470, at *9-11 (N.D. Cal. Aug. 26, 2013) (dismissing negligent misrepresentation 24 claim based on alleged misrepresentations contained in advertisements which became a part of the 25 sales contract).

The Complaint does not allege injury to a person or property that was not 26 reasonably contemplated by the Parties when the contract was formed. Rather, the damages 27 claimed here

are the economic losses stemming from purchase of the Product, which by definition 1 Plaintiff's claim for intentional misrepresentation is likewise deficiently pled in light of 2 the economic loss rule. "California's economic loss rule has exceptions that fall into two broad 3 categories.

The first category applies to products liability cases, where the California rule first 4 arose. In the products liability context, the rule may be overcome by allegations of 'personal 5 injury or damages to other property [besides the defective product].'" *Wine Bottle Recycling, LLC 6 v. Niagara Sys. LLC*, No. 12-1924 SC, 2013 WL 5402072, at *3 (N.D. Cal. Sept.

26, 2013) (citing 7 *Robinson Helicopter*, 102 P.3d at 274 n.7). As discussed above, the Complaint here has no 8 allegation of personal injury or damages to other property. 9 "California's economic loss rule has a second category of exceptions for breach of a 10 noncontractual duty. These exceptions require the breach of a tort duty apart from the general 11 duty not to act negligently." *Id.* (citation omitted). "California courts have found exceptions to 12 the economic loss rule in the noncontractual duty category where the conduct also (1) breaches a 13 duty imposed by some types of special or confidential relationships; (2) breaches a duty not to 14 commit certain intentional torts; or (3) was committed intending or knowing that such a breach 15 will cause severe, unmitigable harm in the form of mental anguish, personal hardship, or 16 substantial consequential damages." *Id.* (citing *Robinson Helicopter*, 102 P.3d at 273-74) (internal 17 quotation marks omitted).

Here, the Complaint contains no allegations plausibly suggesting a 18 special or confidential relationship between the Parties; it does not allege the existence of an extra 19 contractual duty not to commit this intentional tort; and it does not allege that the 20 misrepresentation was made with the intention to, or knowing that it would, cause severe, 21 unmitigable harm in the form of mental anguish, personal hardship, or substantial consequential 22 damages.

23 Fundamentally, Plaintiff fails to plead any misconduct independent of the Product's sale or 24 make allegations otherwise rebutting Defendant's showing that she only seeks economic losses— 25 the same economic losses stemming from the alleged breach of contract. "When a contractual 26 breach results only in economic losses, the pecuniary injury may fall within the scope of parties' 27 precontractual expectations and their allocation of risks, and it is less likely to implicate the breach 1 For these reasons, the Court finds that the economic loss rule bars Plaintiff's claims for 2 || negligent and intentional misrepresentation as currently pled.

Therefore, Plaintiff's causes of 3 action for negligent and intentional misrepresentation are DISMISSED WITHOUT 4 } PREJUDICE as barred by the economic loss rule. 5 CONCLUSION 6 Accordingly, for all the reasons discussed herein, IT IS ORDERED THAT: 7 1. Defendant's motion to dismiss [Dkt. 27] is GRANTED. 8 2.

The Complaint [Dkt. 24] is DISMISSED WITHOUT PREJUDICE, pursuant to Federal 9 Rule of Civil Procedure 12(b)(6), for failure to state a claim for relief. 10 3. Plaintiff is GRANTED LEAVE to file an amended complaint that addresses the issues 11 discussed herein by no later than April 18, 2025. 13 || ITIS SO ORDERED. |) Dated: March 18, 2025 16 United States Magistrate Judge Z 18 19 20 21 22 23 24 25 26 27 28