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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JANICE COOPER,
Plaintiff,
v.
CURALLUX LLC,
Defendant.

Case No. 20-cv-02455-PJH

**ORDER GRANTING IN PART AND
DENYING IN PART MOTION TO
DISMISS AND DENYING MOTION TO
STRIKE**

Re: Dkt. Nos. 30, 31

United States District Court
Northern District of California

Before the court is defendant Curallux LLC’s (“Curallux” or “defendant”) motion to dismiss and motion to strike. The matter is fully briefed and suitable for decision without oral argument. Having read the parties’ papers and carefully considered their arguments and the relevant legal authority, and good cause appearing, the court hereby rules as follows.

BACKGROUND

Plaintiff Janice Cooper (“plaintiff”) filed this putative class action against defendant on April 10, 2020 asserting claims for (1) violation of the California Consumer Legal Remedies Act (“CLRA”), Cal. Civ. Code § 1750 et seq.; (2) violation of the California False Advertising Law (“FAL”), Bus. & Prof. Code § 17500 et seq.; (3) violation of the California Unfair Competition Law (“UCL”), Cal. Bus. & Prof. Code § 17200 et seq.; (4) breach of express warranty; and (5) unjust enrichment. Dkt. 1. After defendant filed a prior motion to dismiss, plaintiff filed the operative First Amended Complaint (“FAC”), which asserts the same five claims as the complaint. Dkt. 22.

Defendant Curallux is a Florida limited liability company that is headquartered in

1 Miami, Florida. Id. ¶ 8. Defendant manufactures and distributes a series of hair regrowth
 2 products including CapillusUltra, CapillusPlus, Capillus X+, and Capillus Pro (collectively
 3 the “products”), which are baseball-style hats with lasers in them. Id. ¶¶ 1–2. These
 4 lasers provide low level light treatment to the scalp, which defendant claims stimulates
 5 and energizes cells with hair follicles. Id. ¶ 2. In March 2018, plaintiff purchased one of
 6 the products and alleges that she relied upon advertising and marketing of the products
 7 as being “without side effects” and “physician recommended.” Id. ¶ 7. These advertising
 8 claims appeared in television commercials, on the products’ packaging and label, and on
 9 defendant’s website. Id. ¶ 27. Plaintiff developed several side effects after using the
 10 product including itchy scalp, dry scalp, dandruff, headaches, and dizziness. Id. ¶ 7.

11 According to the FAC, scientific studies and experts in the field of hair restoration
 12 state that there are several side effects associated with the use of low level laser therapy
 13 for hair loss. Id. ¶ 22. Plaintiff also alleges that defendant relied on eight physicians to
 14 endorse the products and further alleges that these physicians have a financial incentive
 15 to make the purported recommendations. Id. ¶ 29. Plaintiff alleges that a reasonable
 16 consumer would interpret “physician recommended” to mean a physician without financial
 17 incentive to recommend the product. Id. ¶ 30.

18 Thus, plaintiff alleges that the statements “without side effects” and “physician
 19 recommended”¹ are false, deceptive, and misleading in violation of the CLRA, FAL, and
 20 UAL. Further, plaintiff seeks to certify a class of “[a]ll persons who purchased the
 21 Products in the United States or, alternatively, in California, for personal consumption and
 22 not for resale during the time period of four years prior to the filing of the complaint
 23 through the present.” Id. ¶ 43.

24 ///

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26
 27 ¹ Plaintiff also alleges that defendant advertised that “Capillus is the preferred laser
 28 therapy brand of leading hair restoration surgeons.” FAC ¶ 27. Other than the single
 reference to that advertisement in paragraph 27, plaintiff does not appear to bring her
 claims based on that statement.

1 **DISCUSSION**

2 **A. Legal Standard**

3 **1. Rule 12(b)(6)**

4 A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) tests for the
5 legal sufficiency of the claims alleged in the complaint. Ileto v. Glock, 349 F.3d 1191,
6 1199–1200 (9th Cir. 2003). Under Federal Rule of Civil Procedure 8, which requires that
7 a complaint include a “short and plain statement of the claim showing that the pleader is
8 entitled to relief,” Fed. R. Civ. P. 8(a)(2), a complaint may be dismissed under Rule
9 12(b)(6) if the plaintiff fails to state a cognizable legal theory, or has not alleged sufficient
10 facts to support a cognizable legal theory. Somers v. Apple, Inc., 729 F.3d 953, 959 (9th
11 Cir. 2013).

12 While the court is to accept as true all the factual allegations in the complaint,
13 legally conclusory statements, not supported by actual factual allegations, need not be
14 accepted. Ashcroft v. Iqbal, 556 U.S. 662, 678–79 (2009). The complaint must proffer
15 sufficient facts to state a claim for relief that is plausible on its face. Bell Atl. Corp. v.
16 Twombly, 550 U.S. 544, 555, 558–59 (2007) (citations and quotations omitted).

17 A claim has facial plausibility when the plaintiff pleads factual content that allows
18 the court to draw the reasonable inference that the defendant is liable for the misconduct
19 alleged.” Iqbal, 556 U.S. at 678 (citation omitted). “[W]here the well-pleaded facts do not
20 permit the court to infer more than the mere possibility of misconduct, the complaint has
21 alleged—but it has not ‘show[n]’—that the pleader is entitled to relief.” Id. at 679. Where
22 dismissal is warranted, it is generally without prejudice, unless it is clear the complaint
23 cannot be saved by any amendment. Sparling v. Daou, 411 F.3d 1006, 1013 (9th Cir.
24 2005).

25 Because plaintiff’s claims sound in fraud, their complaint must also meet the
26 heightened pleading standard of Federal Rule of Civil Procedure 9(b). See Kearns v.
27 Ford Motor Co., 567 F.3d 1120, 1125 (9th Cir. 2009). Rule 9(b) requires a party alleging
28 fraud or mistake to state with particularity the circumstances constituting fraud or mistake.

1 To satisfy this standard, the “complaint must identify the who, what, when, where, and
2 how of the misconduct charged, as well as what is false or misleading about the
3 purportedly fraudulent statement, and why it is false.” Salameh v. Tarsadia Hotel, 726
4 F.3d 1124, 1133 (9th Cir. 2013) (citation and internal quotation marks omitted).

5 Review is generally limited to the contents of the complaint, although the court can
6 also consider a document on which the complaint relies if the document is central to the
7 claims asserted in the complaint, and no party questions the authenticity of the
8 document. See Sanders v. Brown, 504 F.3d 903, 910 (9th Cir. 2007). The court may
9 consider matters that are properly the subject of judicial notice, Knieval v. ESPN, 393
10 F.3d 1068, 1076 (9th Cir. 2005); Lee v. City of Los Angeles, 250 F.3d 668, 688-89 (9th
11 Cir. 2001), and may also consider exhibits attached to the complaint, see Hal Roach
12 Studios, Inc. v. Richard Feiner & Co., Inc., 896 F.2d 1542, 1555 n.19 (9th Cir. 1989), and
13 documents referenced extensively in the complaint and documents that form the basis of
14 a the plaintiff’s claims. See No. 84 Emp’r-Teamster Jt. Counsel Pension Tr. Fund v. Am.
15 W. Holding Corp., 320 F.3d 920, 925 n.2 (9th Cir. 2003).

16 **2. Rule 12(f)**

17 Federal Rule of Civil Procedure 12(f) provides that the court “may order stricken
18 from any pleading any insufficient defense or any redundant, immaterial, impertinent, or
19 scandalous matter.” Fed. R. Civ. P. 12(f). “The function of a [Rule] 12(f) motion to strike
20 is to avoid the expenditure of time and money that must arise from litigating spurious
21 issues by dispensing with those issues prior to trial.” Whittlestone, Inc. v. Handi-Craft
22 Co., 618 F.3d 970, 973 (9th Cir. 2010) (quoting Fantasy, Inc. v. Fogerty, 984 F.2d 1524,
23 1527 (9th Cir. 1993), rev’d on other grounds, 510 U.S. 517 (1994)).

24 Motions to strike are not favored and “should not be granted unless it is clear that
25 the matter to be stricken could have no possible bearing on the subject matter of the
26 litigation.” Colaprico v. Sun Microsystem, Inc., 758 F. Supp. 1335, 1339 (N.D. Cal. 1991)
27 (citing Naton v. Bank of Cal., 72 F.R.D. 550, 551 n.4 (N.D. Cal. 1976)). When a court
28 considers a motion to strike, it “must view the pleadings in light most favorable to the

pleading party.” Uniloc v. Apple, Inc., No. 18-CV-00364-PJH, 2018 WL 1640267 (N.D. Cal. Apr. 5, 2018) (quoting In re 2TheMart.com, Inc., Sec. Litig., 114 F. Supp. 2d 955, 965 (C.D. Cal. 2000)). A court must deny the motion to strike if there is any doubt whether the allegations in the pleadings might be at issue in the action. In re 2theMart.com, 114 F. Supp. 2d at 965 (citing Fantasy, Inc., 984 F.2d at 1527).

B. Analysis

1. First Through Third Claims—False Advertising

Plaintiff brings three claims using three different California statutes: the UCL, FAL, and CLRA. The UCL prohibits any “unlawful, unfair or fraudulent business act or practice.” Cal. Bus. & Prof. Code § 17200. “The false advertising law prohibits any unfair, deceptive, untrue, or misleading advertising.” Williams v. Gerber Prod. Co., 552 F.3d 934, 938 (9th Cir. 2008) (citing Cal. Bus. & Prof. Code § 17500) (internal quotation marks omitted). The CLRA prohibits “unfair methods of competition and unfair or deceptive acts or practices.” Cal. Civ. Code § 1770.

The Ninth Circuit has explained that “these [three] California statutes are governed by the ‘reasonable consumer’ test.” Williams, 552 F.3d at 938 (quoting Freeman v. Time, Inc., 68 F.3d 285, 289 (9th Cir. 1995)); accord Consumer Advocates v. Echostar Satellite Corp., 113 Cal. App. 4th 1351, 1360 (Ct. App. 2003). “Under the reasonable consumer standard, [plaintiff] must show that members of the public are likely to be deceived.” Williams, 552 F.3d at 938. “The California Supreme Court has recognized that these laws prohibit not only advertising which is false, but also advertising which[,] although true, is either actually misleading or which has a capacity, likelihood or tendency to deceive or confuse the public.” Id. (internal quotation marks omitted) (quoting Kasky v. Nike, Inc., 27 Cal. 4th 939, 951 (2002)). The reasonable consumer test requires more than a mere possibility that defendant’s product “might conceivably be misunderstood by some few consumers viewing it in an unreasonable manner.” Lavie v. Procter & Gamble Co., 105 Cal. App. 4th 496, 508 (Ct. App. 2003). Rather, the test requires a probability “that a significant portion of the general consuming public or of targeted consumers,

1 acting reasonably in the circumstances, could be misled.” Id.

2 Generally, “whether a reasonable consumer would be deceived . . . [is] a question
3 of fact not amenable to determination on a motion to dismiss.” Ham v. Hain Celestial
4 Grp., Inc., 70 F. Supp. 3d 1188, 1193 (N.D. Cal. 2014); see Reid v. Johnson & Johnson,
5 780 F.3d 952, 958 (9th Cir. 2015). “However, in rare situations a court may determine,
6 as a matter of law, that the alleged violations of the UCL, FAL, and CLRA are simply not
7 plausible.” Ham, 70 F. Supp. 3d at 1193.

8 Plaintiff alleges two statements, made by defendant, are false or misleading. First,
9 that Curallux’s products offer hair growth “without side effects” (FAC ¶ 20), and second,
10 that the products are “physician recommended.” Id. ¶ 27. Defendant moves to dismiss
11 plaintiff’s three false advertising claims because it characterizes these statements as
12 substantiation claims—that is, the claim lacks substantiation—rather than false
13 advertising claims. Mtn. at 5.

14 A substantiation claim involves an advertising claim “that has no evidentiary
15 support one way or the other.” Eckler v. Wal-Mart Stores, Inc., No. 12-cv-727-LAB-MDD,
16 2012 WL 5382218, at *3 (S.D. Cal. Nov. 1, 2012). In contrast, a false advertising claim is
17 one in which the claim has “actually been disproved,” id., such that “the plaintiff can point
18 to evidence that directly conflicts with the claim.” Kwan v. SanMedica Int’l, LLC, No. 14-
19 cv-3287-MEJ, 2015 WL 848868, at *4 (N.D. Cal. Feb. 25, 2015). The difference between
20 a substantiation claim and a false advertising claim is important because private
21 individuals may not bring a substantiation claim under the UCL or CLRA. Kwan, 2015
22 WL 848868, at *4. Instead, only “the Director of Consumer Affairs, the Attorney General,
23 any city attorney, or any district attorney” may bring a substantiation claim.² Cal. Bus. &

24 _____
25 ² Defendant argues that substantiation claims rest exclusively with the Federal Trade
26 Commission (“FTC”). Mtn. at 5. The authorities cited by defendant do not support this
27 proposition. While “private litigants may not invoke the jurisdiction of the federal district
28 courts by alleging that defendants engaged in business practices proscribed by [15
U.S.C. § 45(a)(1),” Driesbach v. Murphy, 658 F.2d 720, 730 (9th Cir. 1981), plaintiff does
not cite a violation of the Federal Trade Commission Act as a cause of action. At this
stage, it is sufficient to recognize that the California legislature prohibits private litigants
from bringing a substantiation claim under California state law.

1 Prof. Code § 17508; see also Nat'l Council Against Health Fraud, Inc. v. King Bio Pharm.,
 2 Inc., 107 Cal. App. 4th 1336, 1345 (Ct. App. 2003) (“The Legislature has expressly
 3 permitted prosecuting authorities, but not private plaintiffs, to require substantiation of
 4 advertising claims.”). The relevant question, therefore, is whether plaintiff’s allegations
 5 are substantiation claims or false advertising claims.

6 **a. “Without Side Effects”**

7 Plaintiff claims that defendant advertises that its products regrow hair “without side
 8 effects” when, in fact, the products caused side effects that are not disclosed to
 9 consumers. FAC ¶¶ 20–21. Plaintiff alleges that “[s]cientific studies and experts in the
 10 field of hair restoration confirm there are several side effects associated with use of low
 11 level laser therapy for hair loss, including, but not limited to: temporary hair shedding,
 12 scalp pruritus, itchy scalp, dry scalp, dandruff, headaches, light headedness, dizziness,
 13 nausea, and stimulation of existing cancer cells.” Id. ¶ 22. In support of this allegation,
 14 plaintiff cites a study published in the medical journal *Lasers in Medical Science* (“LIMS”).
 15 Id. at 8 n.10.

16 Defendant contends that this allegation should be characterized as a
 17 substantiation claim because plaintiff is alleging that defendant cannot substantiate the
 18 safety of its product. Mtn. at 9. Defendant acknowledges that the LIMS study is the only
 19 allegation that goes to whether the advertising claims are false, rather than
 20 unsubstantiated, but would distinguish the study on several grounds. Along the same
 21 lines, plaintiff argues that where a plaintiff points to studies and expert testimony to show
 22 falsity, courts reject substantiation arguments. Opp. at 6.

23 In Eckler v. Wal-Mart Stores, Inc., 2012 WL 5382218, at *3, the district court
 24 discussed the difference between claims that are completely unsubstantiated and those
 25 that “have been disproved by the scientific community.” The court reasoned

26 [t]here is a difference, intuitively, between a claim that has no
 27 evidentiary support one way or the other and a claim that’s
 28 actually been disproved. In common usage, we might say that
 both are “unsubstantiated,” but the caselaw (and common
 sense) imply that in the context of a false advertising lawsuit

and “unsubstantiated” claim is only the former.

1
2 Id. With that framing in mind, it is clear that plaintiff’s allegations that defendant falsely
3 advertises the products offer hair growth “without side effects,” is not a substantiation
4 claim. By alleging, “[s]cientific studies and experts in the field of hair restoration confirm
5 there are several side effects associated with use of low level laser therapy for hair loss,”
6 (FAC ¶ 22), plaintiff is contending that defendant’s advertising claim has been disproved
7 by the scientific community. The dispositive inquiry is whether plaintiff has alleged
8 sufficient factual material to plausibly state a claim. To resolve that question, the court
9 turns to the LIMS study,³ which plaintiff offers as scientific evidence and defendant
10 argues is distinguishable.

11 First, defendant argues the study does not actually discuss its product. Mtn. at 10.
12 Defendant reads the study too narrowly. For example, the abstract of the article states:
13 “Low-level laser/light therapy (LLLT) has been increasingly used for promoting hair
14 growth in androgenetic alopecia (AGA). Our institute developed a new home-use LLLT
15 device, RAMACAP, with optimal penetrating energy, aiming to improve therapeutic
16 efficacy and compliance.” Mtn., Ex. 1 at 1107.⁴ Plaintiff alleges that defendant sells
17 “laser caps [that] provide low level light treatment to the scalp, which Defendant claims
18 stimulates and energizes the cells within the hair follicles, thus producing hair growth.”
19 FAC ¶ 2. The technology (low level light treatment/therapy) and the goal (hair growth) is
20 the same in both the study and defendant’s products.

21 Second, defendant asserts the article does not support the side effects alleged in
22 the FAC because the words “itchy scalp,” “dry scalp,” “dandruff,” “headaches,”
23 “lightheadedness,” “dizziness,” “nausea,” and “cancer” do not appear in the study. Mtn.

24
25 _____
26 ³ Defendant attaches the study in question to its motion. See Mtn., Ex. 1. The court can
27 consider a document on which the complaint relies if the document is central to the
28 claims asserted in the complaint, and no party questions the authenticity of the
document. Sanders, 504 F.3d at 910. The study was cited and referenced in the FAC
and plaintiff does not object to the document, so the court may properly consider the
study.

⁴ For clarity, the court uses the study’s original pin citations.

1 at 10. The study's abstract states "[r]eported side effects included temporary hair
2 shedding and scalp pruritus." Id., Ex. 1 at 1107. Later the study explains in greater
3 depth, "There was no serious adverse event reported in any subject. One female subject
4 in the laser group complained of increased hair shedding, which occurred at 2 weeks
5 after starting treatment and spontaneously resolved within 6 weeks. Mild scalp itching
6 was described in two laser-treated subjects and one sham-treated subject without the
7 need for treatment." Id., Ex. 1 at 1110–11. The court agrees with defendant that many of
8 plaintiff's alleged side effects are not discussed in the study; however, the study
9 specifically references itchy scalp and scalp pruritus, which is the medical term for itchy
10 scalp. Thus, contrary to defendant's argument, one of the side effects alleged by plaintiff
11 appears in the study.

12 Third, defendant argues the study was conducted using a helmet (whereas
13 defendant's product is a hat) and some of the side effects may be caused by the
14 helmet. Id. at 11. Indeed, the study's authors theorized that "[w]earing a helmet might
15 create a warmer environment and higher humidity on the scalp, possibly leading to
16 itchiness." Id., Ex. 1 at 1113. Additionally, the itchy scalp side effect occurred in both the
17 laser group and the control group. Id. These facts could indicate that the itchy scalp side
18 effect was not caused by the low level laser therapy but by the helmet used in the study.

19 Whether plaintiff's allegations plausibly state a claim is a close question. On the
20 one hand, plaintiff relies on only one study in which the authors hypothesize that the one
21 side effect described in the study and alleged by plaintiff, i.e., itchy scalp, may have been
22 caused by wearing a helmet. On the other hand, the study does not conclusively rule out
23 the cause of the itchy scalp and plaintiff alleges that defendant advertises that its
24 products offer hair growth "without side effects." At the pleading stage, a plaintiff need
25 only allege factual matter to allow the court to infer that she could state a claim. The
26 court cannot say that plaintiff fails, as a matter of law, to state a claim based on this
27 statement.

28 ///

1 **b. “Physician Recommended”**

2 Plaintiff also alleges that defendant falsely, deceptively, and misleadingly
3 advertises its products are physician recommended, those physicians have a financial
4 incentive to make the recommendation, and a reasonable consumer would interpret
5 “physician recommended” to mean the physician does not have a financial incentive.
6 FAC ¶¶ 27–30. Defendant asserts that plaintiff’s false advertising claim that the products
7 are “physician recommended” is, in fact, a substantiation claim. Mtn. at 6. According to
8 defendant, plaintiff alleges that Capillus cannot substantiate the claim that physicians
9 actually recommend the product because the company’s survey of physicians are all
10 biased because they are paid by Capillus. *Id.* Plaintiff does not respond directly to this
11 argument, instead arguing that defendant’s representations are actually untrue or
12 misleading. Opp. at 5.

13 The court is not persuaded this is a substantiation claim. Plaintiff is not alleging
14 that the products lack competent clinical evidence. Rather, she alleges that there was
15 clinical evidence (i.e., physicians recommend the product) but defendant failed to
16 disclose a potential source of bias (that the physicians were compensated for their
17 statements). A case from the Northern District of Illinois, cited by defendant, is
18 illustrative. There, the plaintiff alleged a defendant’s claims regarding wrinkle-repair claim
19 were false because there was “no competent clinical evidence” to support the claims.
20 Greifenstein v. Estee Lauder Corp., No. 12-cv-9235, 2013 WL 3874073, at *4 (N.D. Ill.
21 July 26, 2013). The court characterized this claim as a substantiation claim and then
22 pointed out that, in spite of the allegation of no competent clinical evidence, the
23 “complaint itself allege[d] that substantiation exists for [defendant’s] claims that the serum
24 is ‘clinically proven’ to reduce wrinkles.” *Id.* The court cited a portion of the complaint
25 that alleged the defendant collaborated with a university to test the wrinkle serum and
26 then reasoned the plaintiff “may quarrel that [the defendant] failed to disclose the study’s
27 methodology and that [the defendant] itself funded the study, but the mere existence of
28 the study alone defeats her argument that [the defendant’s] wrinkle-repair claims lack

1 substantiation.” Id. (citation omitted).

2 The Greifenstein court distinguished between substantiation claims and a claim
3 that the defendant failed to disclose a study’s methodology or funding. In this case,
4 plaintiff’s claim is more similar to a failure to disclose the study’s methodology or funding
5 than to a failure to substantiate a claim. In other words, plaintiff’s claim goes to the bias
6 of the physicians and not that defendant’s advertising was without support or
7 substantiation.

8 In its reply, defendant cites In re Epogen & Aranesp Off-Label Marketing & Sales
9 Practices Litigation, 590 F. Supp. 2d 1282 (C.D. Cal. 2008), for the proposition that
10 plaintiff cannot transform her allegation regarding “physician recommended” into an
11 affirmative misrepresentation. Reply at 3. Defendant reasons that what is actually
12 alleged by such a statement is that there is no basis to make the statement because the
13 physicians are biased. Id.

14 In re Epogen does not support defendant’s proposition. In that case, the
15 defendant issued a number of press releases “touting the positive results of clinical
16 studies on the off-label use of Aranesp. Many of these press releases did not reveal that
17 the studies were not conducted by independent researchers and instead were funded by
18 [the defendant].” In re Epogen, 590 F. Supp. 2d at 1285. The court recognized that “to
19 the extent that Plaintiffs have alleged that Defendants made statements that were
20 fraudulent (i.e., literally false, misleading, or omitted material facts), their claims are
21 actionable.” Id. at 1291 (citation omitted). However, the court dismissed all claims
22 because the plaintiffs’ allegations of fraud were “so intertwined with allegations that
23 Defendants engaged in illegal off-label promotion” and off-label promotion claims were
24 preempted by the Food, Drug, and Cosmetic Act (“FDCA”), 21 U.S.C. § 301 et seq. Id. at
25 1292.

26 In re Epogen is relevant in a few aspects. First, the court recognized that a claim
27 alleging that a defendant’s statements are false and not preempted by the FDCA is
28 cognizable. Second, while the court referenced the potential bias in the press releases

1 stemming from the fact that the defendant funded the clinical studies, a close reading of
 2 the case demonstrates that the press releases were not relevant to the court's order
 3 granting the motion to dismiss. Rather, the court dismissed the claims because they
 4 were so intertwined with allegations that the defendants engaged in illegal off-label
 5 promotion. In this case, defendant has not argued the FDCA preempts plaintiff's claims
 6 and her claims are that defendant's statement was fraudulent, i.e., literally false,
 7 misleading, or omitted material facts.

8 Defendant does not address whether a reasonable consumer would be deceived
 9 by a company failing to disclose that "physician recommended" really means paid
 10 physician recommended. Nor does defendant argue that it did not have a duty to
 11 disclose a material fact. Cf. Stanley v. Bayer Healthcare LLC, No. 11-cv-862-IEG (BLM),
 12 2012 WL 1132920, at *4 (S.D. Cal. Apr. 3, 2012) ("A plaintiff may state a claim under the
 13 CLRA or UCL based upon alleged omissions of fact in advertising. However, such
 14 plaintiff must first demonstrate the defendant had a duty to disclose.").

15 For the foregoing reasons, defendant's motion to dismiss plaintiff's first through
 16 third causes of action is DENIED.⁵

17 **2. Fourth Claim—Breach of Express Warranty**

18 Plaintiff's fourth claim is that defendant expressly warranted in its television
 19 commercials, the products' packaging and labels, and defendant's website that the
 20 products are without side effects and are physician recommended. FAC ¶ 110. Plaintiff
 21 goes on to allege that the claims constituted an affirmation of fact, promise, or description
 22 of the goods that became an express warranty and that defendant breached the terms of
 23 the contract. Id. ¶¶ 110, 112.

24 "Under California law, any affirmation of fact or promise relating to the subject
 25 _____

26 ⁵ In its reply, defendant argues plaintiff abandoned her UCL and CLRA claims by failing
 27 to address them in the opposition. Reply at 3. All three causes of action—FAL, UCL,
 28 and CLRA—rely on the reasonable consumer standard and plaintiff's opposition is
 sufficiently clear that it applies to all of her false advertising causes of action. See Opp.
 at 7 ("Plaintiff has sufficiently pleaded false advertising causes of action" (emphasis
 added)).

1 matter of a contract for the sale of goods, which is made part of the basis of the parties'
2 bargain, creates an express warranty." McDonnell Douglas Corp. v. Thiokol Corp., 124
3 F.3d 1173, 1176 (9th Cir. 1997) (citing Cal. Com. Code § 2313(1)(a)).

4 California courts use a three-step approach to express
5 warranty issues. First, the court determines whether the
6 seller's statement amounts to "an affirmation of fact or promise"
7 relating to the goods sold. Second, the court determines if the
8 affirmation or promise was "part of the basis of the bargain."
9 Finally, if the seller made a promise relating to the goods and
10 that promise was part of the basis of the bargain, the court must
11 determine if the seller breached the warranty.

12 Id. (quoting Keith v. Buchanan, 173 Cal. App. 3d 13 (Ct. App. 1985)).

13 "[C]ourts in this district regularly hold that stating a claim under California
14 consumer protection statutes is sufficient to state a claim for express warranty." Hadley
15 v. Kellogg Sales Co., 273 F. Supp. 3d 1052, 1095 (N.D. Cal. 2017) (citing Tsan v.
16 Seventh Generation, Inc., No. 15-cv-00205-JST, 2015 WL 6694104, at *7 (N.D. Cal. Nov.
17 3, 2015) (because plaintiffs satisfied the reasonable consumer standard with respect to
18 their California consumer protection claims, the same "allegations [we]re sufficient to
19 state a claim for breach of express warranty")); see also Ham, 70 F. Supp. 3d at 1195
20 (denying motion to dismiss breach of express warranty claim "for the same reasons as
21 the consumer protection and misrepresentation-based claims").

22 Defendant argues that plaintiff's express warranty claim essentially tries to dress
23 up her substantiation claims, which are within the exclusive jurisdiction of the FTC. Mtn.
24 at 12. Because the court has determined that plaintiff's claims are not substantiation
25 claims, defendant's reprise of its substantiation argument is unpersuasive. Instead,
26 because plaintiff's allegations are sufficient to state a claim under the reasonable
27 consumer standard, they are likewise sufficient to state a claim for breach of express
28 warranty.

Accordingly, defendant's motion to dismiss plaintiff's fourth cause of action for
breach of express warranty is DENIED.

///

1 **3. Fifth Claim—Unjust Enrichment**

2 Plaintiff’s fifth claim alleges unjust enrichment because defendant knowingly
3 received and retained wrongful benefits and funds from plaintiff and class members.
4 FAC ¶ 119. Defendant argues that, under California law, unjust enrichment is not a
5 cause of action. Mtn. at 12–13. Plaintiff fails to address unjust enrichment in her
6 opposition.

7 The court agrees with defendant. “[U]njust enrichment is not a valid cause of
8 action in California.” Enreach Tech., Inc. v. Embedded Internet Sols., Inc., 403 F. Supp.
9 2d 968, 976 (N.D. Cal. 2005). “Unjust enrichment is not a cause of action, or even a
10 remedy, but rather a general principle, underlying various legal doctrines and remedies.
11 It is synonymous with restitution.” McBride v. Boughton, 123 Cal. App. 4th 379, 387 (Ct.
12 App. 2004) (citations omitted). “There are several potential bases for a cause of action
13 seeking restitution.” Id. Plaintiff, however, has not articulated a cause of action or theory
14 permitting restitution.

15 For the foregoing reasons, defendant’s motion to dismiss plaintiff’s fifth cause of
16 action for unjust enrichment is GRANTED. Because plaintiff has failed to articulate other
17 facts that could be plead in an amended complaint, further amendment of this claim is
18 futile and the dismissal is WITH PREJUDICE.

19 **4. Motion to Strike**

20 **a. Attorneys’ Fees**

21 Defendant moves to strike plaintiff’s request for attorneys’ fees. According to
22 defendant, the FTC already investigated Curallux and required Curallux to change its
23 advertising from “no side effects” to “no adverse side effects” and “recommended by
24 physicians” to “recommended by physicians within Capillus’ network.”⁶ Dkt. 31 at 5.
25 According to defendant, plaintiff seeks attorneys’ fees pursuant to California Code of Civil
26 Procedure § 1021.5, which requires a plaintiff to demonstrate that he or she actually
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⁶ Curallux was previously known as Capillus, LLC. Dkt. 31 at 3 n.1.

1 motivated a defendant to change its advertising in order to recover attorneys' fees. Id.
 2 Because the FTC motivated the change in advertising, defendant argues that plaintiff
 3 could not be the reason defendant changed its advertising. Plaintiff responds by arguing
 4 that a motion to strike is only proper for redundant, immaterial, impertinent, or scandalous
 5 matter and her request for attorneys' fees fits in none of those categories. Dkt. 40 at 1–2.
 6 Further, her prayer for attorneys' fees are authorized by California Civil Code § 1780(e)
 7 and California Code of Civil Procedure § 1021.5. Id. at 2.

8 The court begins by noting that plaintiff brings a cause of action pursuant to the
 9 CLRA, Cal. Civ. Code § 1750 et seq. FAC ¶ 97. Under Civil Code § 1780(e), a plaintiff
 10 prevailing in litigation filed pursuant to the CLRA shall be awarded costs and attorneys'
 11 fees. Because the court has determined that plaintiff states a claim pursuant to the
 12 CLRA, the remedy for such a violation also survives. For that reason it is premature to
 13 strike plaintiff's request for attorneys' fees. The court takes no position on whether
 14 plaintiff can prevail in seeking attorneys' fees pursuant to California Code of Civil
 15 Procedure § 1021.5 and defendant is free to raise its argument at a later stage.

16 **b. Injunction**

17 Next, defendant argues that, because the FTC has already addressed its
 18 advertising, there is nothing left to enjoin. Dkt. 31 at 6. Plaintiff argues that Rule 12(f)
 19 does not permit a court to strike a prayer for injunctive relief. Dkt. 40 at 3.

20 It is not clear to the court that the FTC remedial action agreed to by defendant is
 21 coextensive with plaintiff's requested injunction. Put differently, even though defendant
 22 appears to have already made some changes to its advertising, plaintiff may be able to
 23 demonstrate that further equitable relief is warranted. At the very least, defendant has
 24 not demonstrated that the request for injunctive relief could have no possible bearing on
 25 the subject matter of the litigation. Colaprico, 758 F. Supp. at 1339. This is especially
 26 true where the facts concerning the FTC's investigation⁷ and any remedial action are not

27 _____
 28 ⁷ Defendant requests the court judicially notice a Civil Investigative Demand issued by
 the FTC to Curallux and excerpts from defendant's website that purport to demonstrate

1 fully briefed and squarely before the court.

2 **c. Class Allegations**

3 Finally, defendant argues that the court should strike plaintiff's class action
4 allegations because a class action cannot be maintained where a plaintiff alleges
5 personal injury. Dkt. 31 at 7. Plaintiff asserts that class action allegations are generally
6 not tested at the pleading stage and are instead usually addressed at a motion for class
7 certification. Dkt. 40 at 3. Plaintiff also contends that she is not alleging a personal injury
8 class action, rather she is alleging that defendant's advertising is false, deceptive, and
9 misleading to consumers. Id. at 4.

10 In Sanders v. Apple Inc., 672 F. Supp. 2d 978, 991 (N.D. Cal. 2009), the district
11 court granted a motion to strike on the grounds that the plaintiff could not satisfy the
12 requirements of Rule 23(b)(3) because "fraud and warranty claims are difficult to maintain
13 on a nationwide basis and rarely are certified." Thus, it is conceivable that a class action
14 allegation could be stricken prior to a motion for class certification. Defendant argues
15 such a course of action is appropriate here because plaintiff's action is a personal injury
16 action and personal injury claims are rarely certified. However, as plaintiff points out, this
17 is not a personal injury action. Plaintiff alleges that she was deceived or misled by
18 defendant's advertisements. As a general matter, courts certify class actions alleging
19 violations of the FAL, UCL, and CLRA. See, e.g., Guido v. L'Oreal, USA, Inc., 284 F.R.D.
20 468 (C.D. Cal. 2012). The court makes no finding whether plaintiff's claims in this
21 instance are suitable for class certification. Rather, it is clear that striking the class
22 allegations at this time is not warranted.

23 For the foregoing reasons, defendant's motion to strike is DENIED.

24 **CONCLUSION**

25 For the foregoing reasons, defendant's motion to dismiss plaintiff's fifth cause of
26

27 _____
28 that defendant changed its advertising. Dkt. 31-1. Because defendant's motion can be
resolved without reference to the documents to be judicially noticed, the court DENIES
the request for judicial notice.

1 action is GRANTED, and the claim is DISMISSED WITH PREJUDICE, and the motion is
2 DENIED in all other respects. Defendant’s motion to strike is DENIED.

3 **IT IS SO ORDERED.**

4 Dated: August 14, 2020

5 /s/ Phyllis J. Hamilton
6 PHYLLIS J. HAMILTON
7 United States District Judge

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12 United States District Court
13 Northern District of California
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