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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MOCHA GUNARATNA, individually and on behalf of all others similarly situated,

Plaintiff,

vs.

DR. DENNIS GROSS SKINCARE, LLC, a New York Limited Liability Company,

Defendant.

Case No.: 2:20-cv-02311- MWF-GJS

NOTICE OF MOTION AND MOTION TO DISMISS COMPLAINT

Date: October 28. 2020
Time: 10:00 a.m.
Courtroom: 5A

Date Filed: March 10. 2020
Trial Date: N/A

PLEASE TAKE NOTICE that on October 28, 2020, at 10:00 a.m. in Courtroom 5A of the above-entitled court, located at 350 West First Street, Los Angeles, California, 90012, Defendant Dr. Dennis Gross Skincare, LLC will move the Court for an order dismissing the First Amended Complaint (ECF #27) with prejudice against it for failure to state a claim upon which relief can be granted pursuant to Federal Rules of Civil Procedure, Rules 8, 9(b), and 12(b)(6).

This motion is based upon this notice of motion, the attached memorandum of points and authorities, the Declaration of Steven W. Garff and the exhibits thereto, the Declaration of Jennifer Hargrove and the exhibits thereto, all pleadings and documents on file in the action, and upon such other and further evidence and argument as may be set forth at the time of the hearing of this motion.

PLEASE TAKE FURTHER NOTICE that your failure to file a timely and meaningful memorandum of points and authorities in opposition to this motion to dismiss may result, in the Court's discretion, in the granting of the relief sought.

Respectfully submitted,

Dated: September 25, 2020

EARLY SULLIVAN WRIGHT GIZER & McRAE LLP

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I. INTRODUCTION

This case is brought by a resident of California against Dr. Dennis Gross Skincare, LLC, a New York limited liability company ("Defendant") for alleged false advertising. Plaintiff Mocha Gunaratna ("Plaintiff") seeks to represent putative California and nationwide classes of persons who purchased what Plaintiff defines as the "Products." (First Amended Complaint ("FAC")(ECF #27) at ¶ 2.) Plaintiff alleges, however, that she purchased only two of the four Products. (*Id.* at ¶ 8.)

Plaintiff's entire FAC relies on an single implausible allegation—that one use of the word "collagen" on Defendant's packaging is misleading because consumers believe that Products with the word "collagen" contain animal by-products, including portions of "tendons and ligaments, as well as the cornea, cartilage, bones, gut, blood vessels and intervertebral disks." (FAC at ¶ 15.) But Defendant never claims that its products contain any animal by-products. Instead, the Products' packaging clearly states that they do not contain animal parts but rather contain "collagen amino acids" and are "vegan". No reasonable consumer could believe that a "vegan" product contains "cornea, cartilage, bones, gut, blood vessels and intervertebral disks." See an example of the packaging below:

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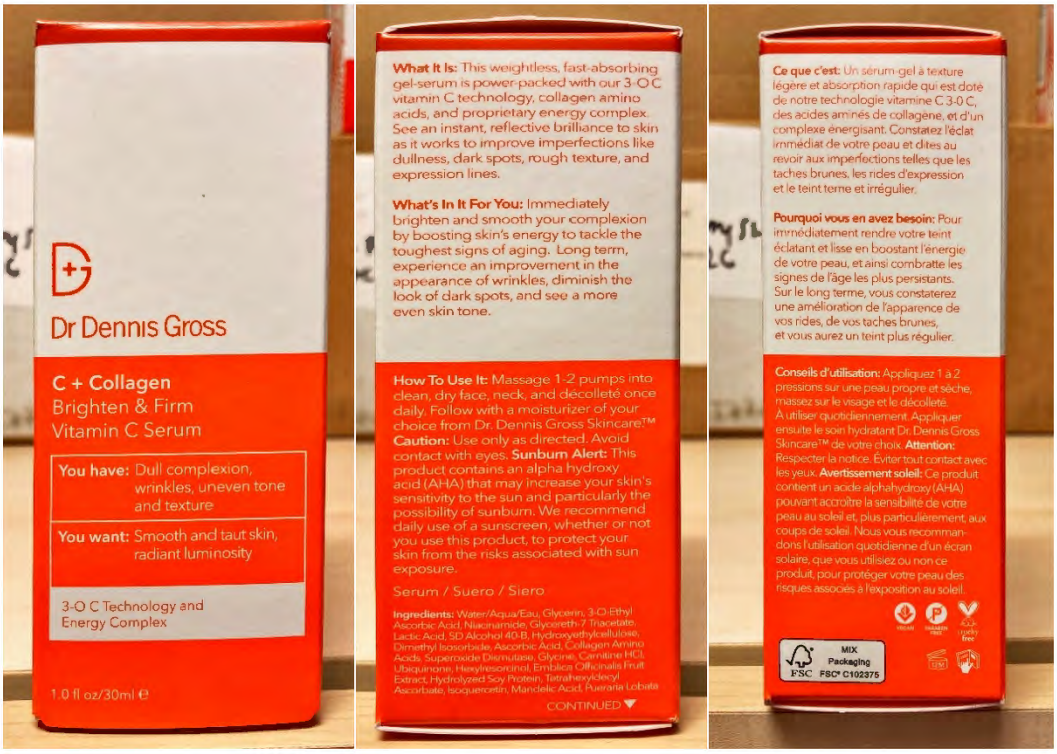

See the packaging photos and exemplars attached as Exhibit A to the Declaration of Jennifer Hargrove.

The label clearly states in two different places that it contains "collagen amino acids". This includes in the "Ingredients" and in the section entitled "What's In It For You", where it states:

> Delivers a boost of antioxidants, collagen amino acids, and energizing vitamin C to shield you from environmental damage and revive stressed skin.

Plaintiff's FAC concedes that the "collagen amino acid" claim is true. Collagen is a protein. (FAC at ¶ 15.) Amino acids are the building blocks of proteins. (FAC at ¶ 19). It is undisputed that the Defendant's Products contain the amino acids that are the building blocks of collagen and that the Products' labels clearly and accurately state in two different places that the Products contain "collage amino acids".

Plaintiff further concedes that there are many "collagen amino acid" products on the market. (FAC at ¶ 19.) And Plaintiff concedes that it is perfectly legal to sell such products when labeled, as is the Defendant's Products, "as containing

peptides or 'boosters'". (FAC at ¶ 17) (emphasis added). This is in fact exactly how the Defendant labels the Products. Peptides are short chains of two and fifty amino acids. *Hamley, I W (September 2020*). Introduction to Peptide Science. *Wiley*. *ISBN 9781119698173*.

Plaintiff claims that the names of the Products, C+Collagen Deep Cream, C+Collagen Brighten & Firm, C+Collagen Perfect Skin and C+Collagen Brighten & Firm Eye Cream are misleading because of the use of the word "Collagen" in the name. Plaintiff's argument ignores the rest of the packaging, which clearly states that the Products are "vegan" and therefore don't contain the "cornea, cartilage, bones, gut, blood vessels and intervertebral disks" Plaintiff claims exist in animal collagen and contain "collagen amino acids", which the Plaintiff concedes is the way that such products should be labeled. In the false advertising context, "it is necessary 'to consider the advertisement in its entirety and not to engage in disputatious dissection. The entire mosaic should be viewed rather than each tile separately.'" *Fed. Trade Comm'n v. Adept Mgmt. Inc*., No. 1:16-CV-00720-CL, 2018 WL 4623152, at *1 (D. Or. Sept. 25, 2018) (quoting *Bronson Partners, LLC*, 564 F. Supp. 2d at 125 (citing *FTC v. Sterling Drug, Inc*., 317 F.2d 669, 675 (2d Cir. 1963)). *See also Vitamins Online, Inc. v. HeartWise, Inc*., No. 2:13-CV-00982-DAK, 2019 WL 6682313, at *18 (D. Utah Sept. 24, 2019). Plaintiff's FAC is premised entirely on disputatious dissection, which should be rejected.

Plaintiff cannot bring any of her claims, all of which are premised on false advertising, because she does not actually allege facts showing that the actual representation of the product packaging is false. *See Jonathan Chuang v. Dr. Pepper Snapple Grp., Inc*., No. CV1701875MWFMRWX, 2017 WL 4286577, at *4 (C.D. Cal. Sept. 20, 2017) ("Where statements or depictions of ingredients on packaging are truthful, as demonstrated by a review of the packaging at issue here, courts may dismiss claims that those statements or depictions are misleading") (citing *Hadley v. Kellogg Sales Co*., 243 F. Supp. 3d 1074 (N.D. Cal. 2017)).

Furthermore, Plaintiff cannot bring nationwide class claims, fails to state claims for breach of warranty, violation of the Magnuson-Moss Warranty Act, and unjust enrichment, and lacks standing to bring this action for two Products which she does not allege she ever purchased.

II. ARGUMENT

A. The FAC Fails to State a Claim Under Rules 8 and 12(b)(6)

When considering a Rule 12(b)(6) motion to dismiss, courts "are not bound to accept as true a legal conclusion couched as a factual allegation." *Papasan v. Allain*, 478 U.S. 265, 286 (1986) (cited in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). And even when a complaint contains non-conclusory factual averments, it will survive a motion to dismiss only if it contains "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. As the Supreme Court has stated:

> Two working principles underlie our decision in *Twombly*. First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. . . . Rule 8 marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions. Second, only a complaint that states a plausible claim for relief survives a motion to dismiss.

Ashcroft v. Iqbal, 556 U.S. 662, 678–679 (2009) (citations omitted). A "pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555).

Here, to survive this Motion, the factual, non-conclusory allegations of each of the individual claims must set forth "more than a sheer possibility that

[Defendant] acted unlawfully." *Id.* Plaintiff's claims fail to meet this standard, and should be dismissed without leave to amend.

Plaintiff's attack on the label representations hinges on false statements about the label—false statements that are evidenced merely by reviewing the label that Plaintiff references. *See Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001) ("Though a court must accept as true all material allegations in the complaint when considering a Rule 12(b)(6) motion, 'a court need not ... accept as true allegations that contradict matters properly subject to judicial notice or by exhibit.'").

B. <u>The FAC Fails to State a Claim under Rule 9(b)</u>

"Allegations that a company made fraudulent misrepresentations are subject to Rule 9(b)'s requirement that the parties state their claims 'with particularity.'" *Aloudi v. Intramedic Research Grp., LLC*, 729 F. App'x 514, 516 (9th Cir. 2017). *See also Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125 (9th Cir. 2009). Rule 9(b) requires a plaintiff to "state with particularity the circumstances constituting fraud," including "the who, what, when, where, and how of the misconduct charged." *Kearns*, 567 F.3d at 1124. Claims for fraud must be based on facts "specific enough to give defendants notice of the particular misconduct ... so that they can defend against the charge." *Id.* "Allegations of fraud must meet both Rule 9(b)'s particularity requirement and *Iqbal*'s plausibility standard." *Aloudi*, 2015 WL 4148381, at *3 (citing *Cafasso v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1055 (9th Cir.2011)).). "It is not enough ... to simply claim that [an advertisement] is false—[the plaintiff] must allege facts showing ***why*** it is false." *Chuang*, at *3–4. (quoting *Davidson v. Kimberly–Clark Corp.*, 76 F. Supp. 3d 964, 974 (N.D. Cal. 2014)) (emphasis in original). Plaintiff fails to meet this standard because she fails to plead any facts showing that that the actual label and representations on the Products are false and fails to provide Defendant with any specific facts on which to base causes of action for each of the 50 states.

C. The FAC Fails State a Claim that is Plausible on its Face Because it Contradicts the Actual Product Label

Plaintiff's entire FAC hinges on the contention that Defendant's Product packaging claims that the Products contain animal collagen. (FAC ¶¶ 15-21). However, the actual label clearly and conspicuously states that the Products contain "collagen amino acids" and are "vegan". The actual representation on the label should control, not Plaintiff's conclusory allegation that contradicts the way the Product actually is labeled. *See Sprewell*, 266 F.3d at 988 ("Though a court must accept as true all material allegations in the complaint when considering a Rule 12(b)(6) motion, 'a court need not . . . accept as true allegations that contradict matters properly subject to judicial notice or by exhibit'"); *Amidax Trading Grp*. v. S.W.I.F.T. SCRL, 671 F.3d 140, 146–47 (2d Cir.2011) ("where a conclusory allegation in the complaint is contradicted by a document attached to the complaint, the document controls and the allegation is not accepted as true"). *See also Brockey v. Moore*, 107 Cal.App.4th 86, 100, 131 Cal.Rptr.2d 746 (Cal.App.2003) ("the primary evidence in a false advertising case is the advertising itself"). The FAC fails to state a claim because it is based on a misstatement of the advertising that Plaintiff allegedly read and relied on.

1. The Court may properly consider the contents of the Product packaging in deciding a Rule 12(b)(6) motion because they are integral documents to the FAC.

Although a court's analysis on a Rule 12(b)(6) motion generally is limited to the contents of the complaint, a court may nevertheless consider materials "attached to the complaint as an exhibit or incorporated in it by reference . . . , matters of which judicial notice may be taken . . . , or documents either in plaintiff['s] possession or of which plaintiff[] had knowledge and relied in bringing suit." *Brass v. Am. Film Techs., Inc.*, 987 F.2d 142, 150 (2d Cir. 1993). A court also may consider documents that are integral to a complaint's allegations. "Even

where a document is not incorporated by reference, the court may nevertheless consider it where the complaint relies heavily upon its terms and effect, which renders the document 'integral' to the complaint." *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 153 (2d Cir. 2002); *I. Meyer Pincus & Assoc., P.C. v. Oppenheimer & Co., Inc.*, 936 F.2d 759, 762 (2d Cir. 1991) (a plaintiff cannot "evade a properly argued motion to dismiss simply because plaintiff has chosen not to attach [an integral document] or to incorporate it by reference").

2. The FAC fails to state plausible facts because these facts are directly contradicted by the actual packaging.

Examining the advertising referenced in the FAC shows that Plaintiff has not stated plausible facts that can negate the veracity of the challenged advertising claims. The description of the ingredients on the packaging and the "What It Is" statements accurately state that the Products contain "collagen amino acids" and the labeling accurately states that the Products are "vegan." "Where statements or depictions of ingredients on packaging are truthful, as demonstrated by a review of the packaging at issue here, courts may dismiss claims that those statements or depictions are misleading." *Chuang*, 2017 WL 4286577, at *4 (C.D. Cal. Sept. 20, 2017) (citing *Hadley*, 243 F. Supp. 3d 1074).

The *Chuang* case is particularly instructive as it dealt with allegations and packaging that were functionally identical to those before the court in this case. There the plaintiff brought California false advertising claims against the producer of Mott's Fruit Snacks. The plaintiff pleaded that based on images of fruit and references to being "made with real fruit," the defendants' packaging and marketing "conveyed to him other reasonable consumers that the fruit snacks contain significant amounts of fruit and are nutritious." *Chuang*, 2017 WL 4286577 at *1. However, this Court rejected the claim and ruled that the complaint failed to comply with the requirements of Rule 9(b) "because an independent review of the product labels reveals that the statements are ***not*** false, as the products do contain

the fruits and vegetables depicted, are made with fruit and vegetable juice, and contain 100% of the daily value of Vitamin C." *Id.* at *4 (emphasis in original). The situation in this case is the same. The actual representation on the Product packaging that the Products contain "collagen amino acids" are not false and the FAC states as much. *See id* at *7 ("First, as discussed above and evidenced by the product labels themselves, the statements that the fruit snacks are made with 'Real FRUIT and VEGETABLE juice,' are true. And, Plaintiff does not allege the products are not made with fruit and vegetable juice").

In defense of the complaint, the plaintiff in *Chuang* made what amounts to the same argument made by the FAC in this case: "Plaintiff contended that the labels are not truthful because they depict images of fruits, but the products actually contain only fruit juices or purees." *Id.* at *4. However, the Court responded that "[t]he Court finds this unpersuasive. Just as cartons of orange juice might feature images of oranges, the fruit snacks labels feature images of the fruits whose juices or purees are ingredients in the fruit snacks." *Id.* Plaintiff's contention that the word "collagen" in the Product line name means that the Products contain animal collagen is similarly unpersuasive. The Products contain all of the amino acids that make up collagen, just as the Products' labels truthfully and prominently state. *See McKinnis v. Kellogg USA*, No. CV07-2611ABC(RCX), 2007 WL 4766060, at *4 (C.D. Cal. Sept. 19, 2007) ("The front panel of the box clearly and accurately describes the product as a 'SWEETENED MULTI-GRAIN CEREAL,' not any sort of fruit-based cereal, and the side panel lists all of the ingredients, which do not include fruit"). Indeed, as the FAC correctly alleges the label does not list animal collagen as an ingredient but instead lists "Collagen Amino Acids." (FAC ¶ 29.)

D. Plaintiff's Nationwide Class Allegations Fail as a Matter of Law

Plaintiff alleges "Defendant violates statutes enacted in each of the fifty states and the District of Columbia that are designed to protect consumers against unfair, deceptive, fraudulent, unconscionable trade and business practices, and false

advertising." (FAC ¶ 7.) Plaintiff then goes on to cite statutes in all 50 states but fails to explain how even a single one of them is violated or provide any facts that satisfy the elements and requirements of those statutes. *Id.* The pure conclusion of law should not be accepted by the court. *Twombly*, 550 U.S. at 555. Indeed, Plaintiff's effort here is in direct contravention of the Ninth Circuit's ruling in *Mazza v. Am. Honda Motor Co.*, where the court noted that differences between California consumer protection laws and laws of other jurisdictions in which class members resided were "material." 666 F.3d 581, 591 (9th Cir. 2012).[1] The court explained: "For example, the California laws at issue here have no scienter requirement, whereas many other states' consumer protection statutes do require scienter. California also requires named class plaintiffs to demonstrate reliance, while some other states' consumer protection statutes do not." *Id.* (citations omitted). Plaintiff, nevertheless, attempts to make its Claims under California Law apply to a nationwide class by including the following disclaimer in six of her eight[2] causes of causes of action:

> brought on behalf of the Nationwide Class, in conjunction with the substantively similar consumer protection laws of other states and the District of Columbia to the extent California consumer protection law is inapplicable to out-of-state Class members, or, in the alternative, on behalf of the California Class

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[1] Though, *Mazza* was decided at the class certification stage, it applies here as well. *See, e.g., Glenn v. Hyundai Motor Am.*, SACV 15-2052 DOC (KESx), 2016 WL 3621280, at *5 (C.D. Cal. June 24, 2016) ("The Court notes that while *Mazza* was decided at the class certification stage, the decision 'applies generally and is instructive when addressing a motion to dismiss'") (quoting *Frezza v. Google, Inc.*, No. 5:12-cv-00237-RMW, 2013 WL 1736788, at *6 (N.D. Cal. Apr. 22, 2013. *See also Shaw v. BRP US, Inc.*, No. EDCV191830PAKKX, 2020 WL 2141817, at *3 (C.D. Cal. Mar. 31, 2020).

[2] The only causes of action not to include this disclaimer are Plaintiff's two Magnuson-Moss claims.

(See FAC.) This however, is an inappropriate effort to circumvent the Ninth Circuit's holding in *Mazza* and does not even attempt to comply with the requirement of Rules 8 and 9(b) requiring specificity. *Kearns*, 567 F.3d at 1124. Claims for fraud must be based on facts "specific enough to give defendants notice of the particular misconduct ... so that they can defend against the charge." *Id*. "Allegations of fraud must meet both Rule 9(b)'s particularity requirement and *Iqbal*'s plausibility standard." *Aloudi*, 2015 WL 4148381, at *3. There is no explanation anywhere in the FAC as to how Defendant violated these consumer statutes, such that Defendant can defend against the charge. Indeed, as the Ninth Circuit observed, these statutes are so different in their requirements that it was an abuse of discretion for the district court to certify a class under California law "that contained class members who purchased or leased their car in different jurisdictions with materially different consumer protection laws." *Mazza*, 666 F.3d at 590. None of these differences are explained in the FAC. Nor does the FAC explain how Defendant even violated any of these statutes. Thus, the FAC fails to state a claim for relief and its nationwide class allegations fail as a matter of law under Rules 8 and 9(b).

E. <u>The FAC Fails to State a Claim for Breach of Warranty</u>

Because Plaintiff has failed to plead facts sufficient to show false advertising under Rules 8 and 9(b), Plaintiff's warranty causes of action automatically fail. In *Aloudi*, after determining that the plaintiff's claims for false advertising were insufficient to state a claim, the court noted:

> The Court assumes, without deciding, that Plaintiff has adequately pleaded the existence of express and implied warranties under California law and the Magnuson–Moss Warranty Act. For the same reasons described above, however, Plaintiff has not alleged sufficient facts to state a claim for the breach of any alleged warranty. Therefore, these claims must also be dismissed.

Aloudi, 2015 WL 4148381, at *6. Likewise, this Court cannot determine whether Defendants breached an alleged warranty because, as already detailed above, Plaintiff has alleged no facts which make Defendant's claims about the Products false. The Ninth Circuit has explained the elements of a breach of warranty claim as follows:

> Under California law, any affirmation of fact or promise relating to the subject matter of a contract for the sale of goods, which is made part of the basis of the parties' bargain, creates an express warranty. Cal. Com.Code § 2313(1)(a). California courts use a three-step approach to express warranty issues. *Keith v. Buchanan*, 173 Cal.App.3d 13, 220 Cal.Rptr. 392, 395 (1985). First, the court determines whether the seller's statement amounts to "an affirmation of fact or promise" relating to the goods sold. *Id.* Second, the court determines if the affirmation or promise was "part of the basis of the bargain." *Id*. Finally, if the seller made a promise relating to the goods and that promise was part of the basis of the bargain, the court must determine if the seller breached the warranty. *Id.*

McDonnell Douglas Corp. v. Thiokol Corp., 124 F.3d 1173, 1176 (9th Cir. 1997). This Court cannot determine whether Defendant breached an alleged warranty because, as already detailed above, Plaintiff has alleged no facts which make Defendant's claims about the Products false. Therefore, she has no basis on which to bring her breach of warranty claims:

> Under California Commercial Code § 2313, "[i]n order to plead a cause of action for breach of express warranty, one must allege the exact terms of the warranty, plaintiff's reasonable reliance thereon, and a breach of that warranty which proximately causes plaintiff injury."

Precht v. Kia Motors Am., Inc., No. SACV141148DOCMANX, 2014 WL 10988343, at *8 (C.D. Cal. Dec. 29, 2014) (quoting *Kearney v. Hyundai Motor Am*., No. SACV09–1298–JST MLGX, 2010 WL 8251077, at *7 (C.D.Cal. Dec. 17, 2010)).

Furthermore, in attempting to conjure a breach of warranty claim, the FAC resorts to misquoting and misrepresenting Defendant's advertising, by claiming that the Products claim to contain animal collagen, despite clear representations to the contrary. This kind of twisting of the advertising language to try to a create a false claim from these ads cannot serve as a basis for falsity. *See Kwan v. SanMedica Int'l, LLC*, No. 14-CV-03287-MEJ, 2014 WL 5494681, at *3 (N.D. Cal. Oct. 30, 2014) ("As a preliminary matter, the Court rejects Plaintiff's first contention outright. The SeroVital advertising does not state that the product was clinically tested to produce 'youthful skin integrity, lean musculature, elevated energy production, [and] adipose tissue distribution.' It merely states that peak growth hormone levels are associated with those benefits. Thus, it is irrelevant that the study upon which the advertising claims rely did not test for the presence of those benefits, and this alleged deficiency cannot serve as the basis for Plaintiff's false advertising claim"). Plaintiff's purported warranties contradict the actual advertising displayed in the FAC and should be ignored. *Sprewell*, 266 F.3d at 988 ("Though a court must accept as true all material allegations in the complaint when considering a Rule 12(b)(6) motion, 'a court need not . . . accept as true allegations that contradict matters properly subject to judicial notice or by exhibit'").

Indeed, the Product packaging, which Plaintiff claims she read and relied upon, expressly states that the Products contain "collagen amino acids." (FAC ¶ 8.) Thus, there is no basis on which Plaintiff can assert a breach of warranty claim. *McKinnis v. Kellogg USA*, No. CV07-2611ABC(RCX), 2007 WL 4766060, at *5 (C.D. Cal. Sept. 19, 2007) ("Absent a representation that Froot Loops contains actual fruit, Plaintiffs have failed to allege sufficient facts to make out a claim for breach of an express warranty").

Plaintiff cannot point to any warranty that has been breached because Plaintiff cannot point to any express claim that the Products contain collagen. *See Werbel v. Pepsico, Inc.*, No. CV 09–04456 SBA, 2010 WL 2673860, at *5 (N.D.

Cal. July 2, 2010) (dismissing breach of express warranty claim when the alleged warranties "contains berries" and "substantially fruit-based product deriving nutritional value from fruit" were not on product packaging) (as described in *Chuang*, 2017 WL 4286577, at *7). "Because Plaintiff fails to point to the terms of the warranty, he fails to state a claim for breach of express warranty." *Chuang*, 2017 WL 4286577, at *7

Finally, Plaintiff seeks to bring breach of warranty claims for consumers in all 50 states, in spite of the fact that these states have vastly divergent laws for what constitutes breach of warranty and Plaintiff fails to plead any facts showing how Defendant violated any of these divergent laws, or provide Defendant with any information "specific enough to give defendants notice of the particular misconduct ... so that they can defend against the charge." *Kearns*, 567 F.3d at 1124.

F. The FAC Fails to State a Claim under the Magnuson-Moss Warranty Act

In addition to the fact that all of Plaintiff's warranty claims fail for failure to show falsity[3], the FAC fails to state a claim under the Magnuson-Moss Warranty Act ("MMWA") because it fails to identify any warranty made as defined by the MMWA and fails to allege any breach of any such warranty. The MMWA "grants relief to a consumer 'who is damaged by the failure of a . . . warrantor . . . to comply with any obligation . . . under a written warranty. *Wilber v. Toyota Motor Sales, U.S.A., Inc.*, 86 F.3d 23, 26 (2d Cir. 1996) (quoting 15 U.S.C. §2310 (d)(1)). A written warranty under the MMWA is:

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[3] "Claims under the Magnuson-Moss Act 'stand or fall with [the plaintiff's] express and implied warranty claims under state law."' *Kahn v. FCA US LLC*, No. 2:19-CV-00127-SVW-SS, 2019 WL 3955386, at *8 (C.D. Cal. Aug. 2, 2019) (quoting *Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017, 1022 (9th Cir. 2008)).

> 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(d6)(A). *See also In re Frito-Lay N. Am., Inc. All Natural Litigation*, No. 12-MD-2413 RRM RLM, 2013 WL 4647512 *17 (E.D.N.Y. Aug. 29, 2013) "Therefore, to constitute a written warranty, a statement must either affirm or promise that such material or workmanship (1) is defect free, or (2) will meet a specified level of performance over a specified period of time." *Chin v. General Mills, Inc.*, 12-2150 MJD/TNL, 2013 WL 2420455, at *5 (D. Minn. June 3, 2013). Here, the FAC fails to identify any written statement or promise made by the Defendant that the Products are defect free. Nor does the FAC allege that Defendant's claims regarding the Products warrant a specified level of performance over a specified level of time.

Instead, Plaintiff alleges only the following written warranty by Defendant: "Defendant provided a 'written warranty' within the meaning of 15 U.S.C. § 2301(6) for the Products by prominently affirming and promising in writing on the labeling of the Products that they contain collagen." (FAC ¶ 123.) This allegation does not consist of a warranty of a specified performance over a specified time, nor does it constitute a warranty that the product is defect free. As such, the FAC alleges no warranty under the MMWA and Plaintiff fails to state a claim under the MMWA.

Finally, Plaintiff's efforts to bring MMWA claims for a nationwide class fail for the same reason her other nationwide class claims fail. Plaintiff does not provide Defendant with any information "specific enough to give defendants notice of the particular misconduct ... so that they can defend against the charge" for breach of warranty under the multitude of different requirements from state to state.

Kearns, 567 F.3d at 1124. The FAC alleges in support of one of its Magnusson-Moss Warranty claims that "Defendant was provided notice and a reasonable opportunity to cure the defects in the Products and remedy the harm to Plaintiff and the Class, but failed to do so, as set forth above." (FAC ¶ 136.) However, Defendant was not provided such notice. Plaintiff's July 27, 2020 Letter does not mention any breach of warranty or the MMWA but only the CLRA. *See* the Exhibit B to the Declaration of Steven W. Garff. Likewise, it does not mention a nationwide class, but only California consumers. This failure illustrates the fundamental problem with Plaintiff's nationwide breach of warranty and MMWA allegations. Plaintiff cannot possibly comply with the diverse and differing notice provision required by various states. For example, Michigan law provides "Where a tender has been accepted (a) the 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." MCL 440.2607(3). The FAC does not allege that all Michigan class members did this or that anyone did this on behalf of any Michigan class. Therefore, she cannot state claim for breach of warranty under state or federal law. And this is just one state as an example. Plaintiff has failed to explain whether she has complied with the notice requirements for breach of warranty in any other state or explain whether, much less how, these divergent elements are satisfied by Defendant's conduct.

G. The FAC Fails to State a Claim for Unjust Enrichment

To state a claim for unjust enrichment, the plaintiff must allege facts showing that Defendant "has been unjustly enriched at the expense of another." *In re Burke*, No. 1:09-BK-12469, 2019 WL 6332370, at *4 (B.A.P. 9th Cir. Nov. 25, 2019) (quoting H*artford Casualty Insurance Company v. J.R. Marketing, L.L.C.*, 61 Cal. 4th at 326 (2015). Because Plaintiff has failed to plead adequate facts showing that Defendant's advertising is false, she cannot show any inequity in any benefit that Plaintiff may have conferred on Defendant and her claim fails as a matter of law.

Furthermore, Plaintiff seeks to bring unjust enrichment claims for consumers in all 50 states, in spite of the fact that these states have vastly divergent laws for what constitutes unjust enrichment and Plaintiff fails to plead any facts showing how Defendant violated any of these divergent laws, or provide Defendant with any information "specific enough to give defendants notice of the particular misconduct ... so that they can defend against the charge." *Kearns*, 567 F.3d at 1124.

H. Plaintiff Lack's Standing Bring Claims for Products She Did Not Purchase

> To satisfy Article III's standing requirement, a plaintiff must demonstrate:
>
> (1) an injury that is concrete, particularized, and actual or imminent; (2) a causal connection between the injury and the challenged conduct, such that the injury may be fairly traceable to that conduct; and (3) a likelihood that the injury will be redressed by a favorable decision.

Dysthe v. Basic Research LLC, No. CV 09-8013 AG SSX, 2011 WL 5868307, at *3 (C.D. Cal. June 13, 2011) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61(1992)). The FAC alleges that "Plaintiff purchased the C + Collagen Deep Cream and C + Collagen Serum Products." (FAC at ¶ 8. However, the lawsuit defines the "Products" as "the Dr. Dennis Gross C + Collagen product line, including C + Collagen Deep Cream, C + Collagen Serum, C + Collagen Mist, and C + Collagen Eye Cream." (*Id.* at ¶ 2.) Plaintiff has not alleged that she purchased the C + Collagen Mist or C + Collagen Eye Cream. Thus, she has no standing to pursue claims for either of those Products, or any other products in the line that she did not purchase.[4] This is functionally the same situation that this District was

[4] Plaintiff uses the word "including" in her definition of the Products, indicating that perhaps there are other unnamed products that Plaintiff intends to include in her FAC. However, Plaintiff does not name any other products or provide any other descriptions or indications of false advertising that would allow any other products to be included as part of this litigation.

faced with in the *Dysthe* case. There, the defendants argued that the plaintiff only alleged that she purchased Relacore, but she actually purchased a different product, Relacore Extra and, thus, had not suffered any harm from the product at issue and lacked standing to pursue her claims. Court agreed. *Dysthe*, 2011 WL 5868307, at *3. The court held that "Plaintiff does not have standing to bring her CLRA, UCL, or warranty claim based on a product that she never purchased." *Id.* (citing *Johns v. Bayer Corp.*, Case No. 09–CV–1935 DMS (JMA), 2010 WL 2573493, at *3 (S.D.Cal. June 24, 2010)). Likewise, in *Johns*, the plaintiffs brought CLRA and UCL claims based on purchases of "One A Day Men's 50+ Advantage" and "One A Day Men's Health Formula" vitamin products. The *Johns* Court held that one of the plaintiffs did not have standing under the UCL or the CLRA to pursue his claims as to the Men's 50+ multivitamin without pleading that he had actually purchased that particular product. *Johns*, 2010 WL 2573493, at *3. *See also Chin v. Gen. Mills, Inc.*, No. CIV. 12–2150 MJD/TNL, 2013 WL 2420455, at *2–4 (D. Minn. June 3, 2013); *Lieberson v. Johnson & Johnson Consumer Companies, Inc.*, 865 F.Supp.2d 529, 536–37 (D.N.J.2011).

On the other hand, some other courts in this Circuit have held that "[w]here a class action complaint encompasses both a product the plaintiff purchased and a product he did not, the plaintiff sufficiently has [Article III] standing to proceed with claims on behalf of class members who purchased the latter if there is sufficient similarity between the products purchased and not purchased." *Glenn v. Hyundai Motor Am.*, No. SACV152052DOCKESX, 2016 WL 3621280, at *15 (C.D. Cal. June 24, 2016) (describing cases, citations Omitted). However, even where this line of reasoning has been followed, claims based on other products have been rejected where, as here, "besides the bald assertion that all the Class Vehicles contained the same defect, the FAC does not allege that anyone owning or leasing a 2010 Kia Optima manufactured after April 29, 2010 or a 2011 Kia Sedona manufactured after December 31, 2010 actually experienced the Defect as Plaintiff

did with his 2011 Kia Sportage." *Precht v. Kia Motors Am., Inc.*, No. SACV141148DOCMANX, 2014 WL 10988343, at *16 (C.D. Cal. Dec. 29, 2014)

Furthermore, the products in this case are dissimilar. This case is factually much more akin to *Dysthe*, which also involved a line of supplements, than it is to the cases allowing complaints to go forward, which generally involved automobile defects. The differences between the products that the *Dysthe* court found dispositive in dismissing the plaintiff's claims were: that the products contained differing ingredients and differing daily values, the products had different packaging and described different benefits, and that the plaintiff's complaint acknowledged that they were different products. *Dysthe*, 2011 WL 5868307, at *4-5. Each of these differences is present in this case. Each of the Products has differing ingredients. (*See* the labels attached as Exhibit A to the Declaration of Jennifer Hargrove.) Each of the Products challenged by the FAC are marketed to and apply to different parts of the body and different issues. For example, the C + Collagen Brighten & Firm Eye Cream states on the packaging "You have: Crows feet, dark circles, puffiness" and "You want: Firm, smooth, and refreshed eye area." Whereas the C + Collagen Brighten & firm Vitamin C Serum states "You have: Dull complexion, wrinkles, uneven tone and texture" and "You want: Smooth and taught skin, radiant luminosity." The Products are marketed to address different issues and advertise different results from each other. Finally, even Plaintiff's FAC acknowledges that these are different products. (*See e.g.* FAC ¶ 2.) Therefore, the commonalities that Plaintiff alleges in her FAC do not overcome these differences or give Plaintiff standing to bring her FAC with respect to the other products. As the court in *Dysthe* concluded:

> Having a few common ingredients is simply not enough to show the Products are the same or even "nearly identical." In fact, this is true for just about any type of product. After all, just because an Old Fashioned and a Manhattan both have bourbon doesn't mean they're the same drink. Relacore and Relacore Extra are different products, marketed and sold separately by Defendants.

Dysthe, 2011 WL 5868307, at *5. Therefore, Plaintiff's claims in the FAC as they pertain to the C + Collagen Mist or C + Collagen Eye Cream should be dismissed.

I. FDA Regulations Preempt Plaintiff's Labeling Claim

Congress has stated that the Federal Cosmetic Labeling statutes preempt any state law claim that would require anything different than nationally uniform labeling of "cosmetic." 21 U.S.C. § 379s "Preemption for labeling or packaging of cosmetics" states:

> Except as provided in subsection (b), (d), or (e), no State or political subdivision of a State may establish or continue in effect any requirement for labeling or packaging of a cosmetic that is different from or in addition to, or that is otherwise not identical with, a requirement specifically applicable to a particular cosmetic or class of cosmetics under this chapter, the Poison Prevention Packaging Act of 1970 (15 U.S.C. 1471 et seq.), or the Fair Packaging and Labeling Act (15 U.S.C. 1451 et seq.).

See also Turek v. General Mills, Inc., 662 F.3d 423 (7th Cir. 2011) (holding that state law false advertising claim was barred by express preemption where claim would require the addition of language on a label not required by federal regulations). As the *Turek* court noted while discussing nearly identical language in the Food Drug And Cosmetic Act regarding preemption with respect to food labeling,

> It is easy to see why Congress would not want to allow states to impose disclosure requirements of their own on packaged food products, most of which are sold nationwide. Manufacturers might have to print 50 different labels, driving consumers who buy food products in more than one state crazy.

Id. at 426. *See also Critcher v. L'Oreal USA, Inc.*, 959 F.3d 31, 35 (2d Cir. 2020) ("In enacting the FDCA in 1938, Congress set out to provide some national uniformity to the manufacture and sale of cosmetics—including skin creams—which until that point had been regulated exclusively by the various laws of the

states. The FDCA established a comprehensive regulatory scheme governing, among other things, the ingredients, packaging, and marketing of cosmetic products") (citations omitted).

One aspect of cosmetic labeling that the FDCA explicitly regulates, with specific delineated requirements, is the disclosure of ingredients, precisely what is at issue in Plaintiff's FAC. Specifically, § 701.13 "Declaration of net quantity of contents" requires that the "label of a cosmetic in package form shall bear a declaration of the net quantity of contents. This shall be expressed in terms of weight, measure, numerical count, or a combination of numerical count and weight or measure." 21 C.F.R. § 701.13(a). These rules explicitly specify where the declaration of the net quantity of contents should be placed on the label (701.13(e)), in what typeface it should be displayed (§ 701.13(h)), and in what units of measurement it should be calculated ((§ 701.13(j)-(p)), among other requirements. *See* 21 C.F.R. § 701.13 generally. *See also Critcher*, 959 F.3d at 35.

The FAC fails to allege that the Products' labeling fails to conform with these requirements. Nor could it plausibly do so. As the packaging themselves show, each of the Products contains the required declaration of net quantity of contents, in the right place, font, units, etc. Thus, Defendant is in compliance with the labeling requirements of the FDCA and any claims that are "different from" or "in addition to" those provided by the FDCA are preempted. *Critcher*, 959 F.3d at 38.

In *Critcher*, the plaintiffs argued that "mere compliance with that net-quantity disclosure requirement is not enough because it allegedly has the effect of making the packaging misleading." *Id.* at 36. The court held that plaintiff's theory that the packaging could be misleading, even though it technically complied with the provisions of 21 C.F.R. § 701.13, was necessarily preempted:

> If Plaintiffs were permitted to move forward with their claims, they would be using state law to impose labeling requirements on top of those already mandated in the FDCA and the regulations promulgated thereunder. These

> would be requirements "different from" or "in addition to"—or otherwise "not identical with"—those requirements that federal law already imposes. This is exactly what the FDCA does not permit.

Id. The situation here is essentially the same. Plaintiff does not contend that Defendant fails to comply with the requirements of 21 C.F.R. § 701.13, nor can she. Nevertheless, Plaintiff's theory is that the labeling misleadingly implies that the Product contains animal collagen, even though the labeling actually and accurately discloses that it contains "Collagen amino acids" in the FDCA required declaration of contents. (*See* FAC at ¶¶ 18-19.) In so doing, Plaintiff is imposing requirements that are "different from" or "in addition to" those provided by the FDCA and her claims are preempted. *Critcher*, 959 F.3d at 38. ("In short, Plaintiffs cannot avoid the sweeping preemptive force of the FDCA. Their state-law claims—all of which seek to impose labeling requirements that are additional to, or different from, those that federal law has established—are barred").

III. CONCLUSION

For the reasons explained above, Defendant respectfully requests that Plaintiff's FAC be dismissed with prejudice.

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LOCAL RULE 7-3

This motion is made following the conference of counsel pursuant to L.R. 7-3 which took place on September 11, 2020.

Respectfully submitted,

Dated: September 25, 2020

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