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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

DAVID JOHNS, on behalf of himself and all
others similarly situated,

Plaintiff,

vs.

BAYER CORPORATION, et al.,

Defendants.

CASE NO. 09CV1935 DMS (JMA)

**ORDER: (1) GRANTING IN PART
AND DENYING IN PART
DEFENDANTS’ MOTION TO
STRIKE, AND (2) GRANTING
DEFENDANTS’ MOTION TO
DISMISS**

[Docs. 13-14]

Pending before the Court are Defendants’ motion to strike portions of Plaintiff’s First Amended Complaint (“FAC”), and Defendants’ motion to dismiss the FAC. Defendants also request judicial notice of several documents. For the reasons set forth below, Defendants’ motion to strike is granted in part and denied in part, and Defendants’ motion to dismiss is granted.

**I.
BACKGROUND**

Defendants Bayer Corporation and Bayer Healthcare, LLC, manufacture, distribute, and sell One A Day Men’s 50+ Advantage (“Men’s 50+”) and One A Day Men’s Health Formula (“Men’s Health”) vitamin products. (FAC ¶ 1.) Plaintiff David Johns filed a putative class action alleging that Defendants misrepresented on product packaging, commercial advertisements, their website, and in other marketing materials and media, that one of the products’ key ingredients, selenium, has “the

1 ability to reduce the risk of prostate cancer in men.” (*Id.* at ¶ 12.) Plaintiff alleges that Defendants
2 promoted the health benefits of selenium based on “emerging evidence,” but that selenium does not
3 in fact prevent or reduce the risk of prostate cancer and may actually cause diabetes. (*Id.* at ¶ 20.)

4 Plaintiff alleges Defendant Bayer Corporation was sued by the federal government in 2007 for
5 violations of the Federal Trade Commission Act (“FTCA”) stemming from marketing of its One a Day
6 Weightsmart product. (*Id.* at ¶ 18.) Plaintiff alleges Bayer settled the claim and entered into a Consent
7 Decree, which prohibits Bayer from claiming a product will “cure, treat, or prevent any disease” unless
8 such statement is supported by “competent and reliable scientific evidence.” (*Id.* at ¶ 19.) Plaintiff
9 further alleges that the Center for Science in the Public Interest (“CSPI”) sent a letter to the Federal
10 Trade Commission (“FTC”) complaining about Bayer’s statements regarding selenium. The CSPI
11 letter cites to multiple scientific studies that found selenium does not reduce or prevent prostate cancer
12 and can increase risk of diabetes. (*Id.* at ¶ 25.) The CSPI requested that the FTC take action against
13 Bayer. (*Id.* at ¶ 21.)

14 Plaintiff alleges he purchased one bottle of Men’s Health in July 2009 for approximately \$8.00.
15 (*Id.* at ¶ 37.) He alleges he read the information regarding selenium on the product packaging and
16 relied on those statements in making his purchasing decision. (*Id.* at ¶ 38.) Plaintiff consumed the
17 Men’s Health vitamins. (*Id.* at ¶ 39.) Thereafter, Plaintiff alleges he learned that Defendants’
18 statements regarding selenium were not supported by scientific studies and that selenium could lead
19 to increased risk of diabetes. (*Id.* at ¶ 40.) Based upon these events, Plaintiff seeks to bring a class
20 action on behalf of “all persons in the United States or, alternatively, all California residents who from
21 and after September 3, 2005, purchased One a Day Men’s 50+ Advantage or One a Day Men’s Health
22 Formula.” (*Id.* at ¶ 42.)

23 Plaintiff alleges claims for: (1) violation of California’s Unfair Competition Law, California
24 Business & Professions Code § 17200 (“UCL”), (2) violation of the Consumers Legal Remedies Act,
25 California Civil Code § 1750 (“CLRA”), and (3) unjust enrichment. Plaintiff filed his FAC on
26 October 16, 2009, (Doc. 10), and Defendants filed the instant motions on October 30, 2009. (Docs.
27 13 & 14.) Plaintiff filed an opposition to each motion (Docs. 15 & 16), and Defendants filed a reply.
28 (Docs. 17 & 18.)

1 **II.**

2 **DISCUSSION**

3 **A. Judicial Notice**

4 Judicial notice may be taken of facts “not subject to reasonable dispute in that it is either (1)
5 generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready
6 determination by resort to sources whose accuracy cannot reasonably be questioned.” Fed. R. Evid.
7 201(b). A court may take judicial notice of matters of public record. *Lee v. City of Los Angeles*, 250
8 F.3d 668, 690 (9th Cir. 2001). A court may also consider documents on which a plaintiff’s claims are
9 based, but which are not attached to the complaint, without converting a Rule 12(b)(6)¹ motion into
10 a motion for summary judgment. *Id.* In that instance, the authenticity of the documents must not be
11 contested. *Id.*

12 Defendants request judicial notice of: 1) a Complaint filed in *United States v. Bayer*, Case No.
13 07-CV-00001 (D. N.J. 2007), 2) the resulting FTC Consent Decree, 3) a “Memorandum Opinion and
14 Order on Defendant’s Motion to Dismiss and Motion to Strike Portions of the First Amended
15 Complaint,” issued in *Fraker v. Bayer Corp.*, Case No. 08-CV-1564 (E.D. Cal. Oct. 6, 2009), and 4)
16 the product packaging for Bayer One-A-Day Men’s Health Formula. (Def. Req. for Judicial Notice,
17 Doc. 13-3.) The first three documents are a matter of public record. The fourth document, the
18 packaging, serves as the basis for several of Plaintiff’s allegations and Plaintiff does not contest its
19 authenticity. Accordingly, Defendants’ request for judicial notice is granted.

20 **B. Motion to Strike**

21 *1. Legal Standard*

22 Rule 12(f) provides that a court “may strike from a pleading...any redundant, immaterial,
23 impertinent, or scandalous matter.” A motion to strike “should not be granted unless it is clear that
24 the matter to be stricken could have no possible bearing on the subject matter of the litigation.”
25 *Colaprico v. Sun Microsystems, Inc.*, 758 F. Supp. 1335, 1339 (N.D. Cal. 1991). The Court may strike
26 “requested relief [that] is not recoverable as a matter of law.” *Wilkerson v. Butler*, 229 F.R.D. 166,
27 172 (E.D. Cal. 2005).

28 _____
¹ All references are to the Federal Rules of Civil Procedure unless otherwise noted.

1 2. “Borrowed” Allegations

2 Defendants move to strike Paragraphs 17-32 of the FAC because the allegations are borrowed
3 from the FTC and the CSPI. Defendants argue these allegations violate Plaintiff’s duty under Rule
4 11(b) to conduct a reasonable factual investigation into the allegations made in a complaint. Plaintiff
5 argues the allegations are relevant to the litigation and that Plaintiff conducted an independent
6 investigation into the claims.

7 Attorneys have a duty to make a reasonable inquiry into whether the factual contentions made
8 in a complaint have evidentiary support. Fed. R. Civ. Pro. 11(b). Two cases are noteworthy on this
9 issue. In the first case, *In re Connectics*, 542 F. Supp. 2d 996, 1005-06 (N.D. Cal. 2008), the court
10 struck allegations from the plaintiffs’ complaint that were taken from a complaint the SEC had filed
11 against the defendants. The court found that the plaintiffs had relied solely on the SEC complaint as
12 the basis for the allegations and that they had not conducted an independent inquiry. *Id.* In the second
13 case, *In re New Century*, 588 F. Supp. 2d 1206, 1220-21 (C.D. Cal. 2008), the court declined to strike
14 allegations taken from a bankruptcy examiner’s report because the report was deemed to be a reliable
15 source for pleading purposes.

16 Here, Paragraphs 17-19 of the FAC involve a previous matter from 2007, in which Defendant
17 Bayer Corporation was sued by the government for alleged FTCA violations. That lawsuit resulted
18 in a settlement and consent decree; there was no adjudication on the merits and no admission of
19 wrongdoing or fault on the part of Bayer. Paragraphs 20-32 of the FAC involve a letter written by
20 CSPI to the FTC, which alleges that Bayer violated the earlier consent decree with misrepresentations
21 regarding selenium. The CSPI letter provided examples of Bayer’s alleged misrepresentations and
22 cited to several studies which indicate that scientific support for Bayer’s claims regarding selenium
23 may be lacking.

24 This matter is similar to *Fraker v. Bayer Corp.*, 08cv1564 AWI (GSA), (E.D. Cal. 2008), in
25 which Bayer was sued for false advertising regarding “Epigallocatechin Gallate,” a product involved
26 in a government lawsuit and consent decree. (RJN, Ex. C.) There, the court struck allegations which
27 were lifted from the consent decree and an FTC order because the court could not find any
28 independently investigated evidence that supported the plaintiff’s claims. (*Id.* at Ex. C, p. 56.) The

1 court noted that “the entirety of Plaintiff’s claims of *wrongdoing* are based on factual allegations made
2 in, or inferred from, either the Consent Decree or the FTC Order.” (*Id.*)(original emphasis). So it is
3 here. The only allegations that support a claim of wrongdoing are taken directly from the CSPI letter.
4 Because CSPI is an interest group, its allegations do not contain the same level of reliability as the
5 bankruptcy examiner’s report in *In re New Century*, 588 F. Supp. 2d at 1220-21. Accordingly,
6 Defendants’ motion to strike paragraphs 17-32 of the FAC is granted.

7 3. *Equitable Relief*

8 Defendants seek to strike portions of the FAC in which Plaintiff states he is seeking
9 “disgorgement of Defendants’ profits from sales of the Products.” (FAC ¶¶ 2, 45(d), 59, 74, Prayer
10 for Relief ¶ D.) Although Defendants are correct that nonrestitutionary disgorgement is unavailable
11 under the UCL, disgorgement is available to the extent it is restitutionary. *See Korea Supply Co. v.*
12 *Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1148 (2003) (“Under the UCL, an individual may recover
13 profits unfairly obtained to the extent that these profits represent monies given to the defendant or
14 benefits in which the plaintiff has an ownership interest.”). Defendants’ motion to strike on this
15 ground is denied.²

16 C. **Motion to Dismiss**

17 Because the Court grants Defendants’ motion to strike Paragraphs 17-32 of the FAC, there are
18 no factual allegations to support the claim that Defendants’ advertising was deceptive. Accordingly,
19 Defendants’ motion to dismiss is granted without prejudice. Nonetheless, the Court addresses several
20 of the issues raised in the motion to dismiss as guidance if Plaintiff chooses to file an amended
21 complaint.

22 1. *Legal Standard*

23 In two recent opinions, the Supreme Court established a more stringent standard of review for
24 12(b)(6) motions. *See Ashcroft v. Iqbal*, ___ U.S. ___, 129 S.Ct. 1937 (2009); *Bell Atlantic Corp. v.*
25 *Twombly*, 550 U.S. 544 (2007). To survive a motion to dismiss under this new standard, “a complaint
26 must contain sufficient factual matter, accepted as true, to ‘state a claim for relief that is plausible on
27 its face.’” *Iqbal*, 129 S.Ct. at 1949 (citing *Twombly*, 550 U.S. at 570). “A claim has facial plausibility

28 ² Defendants also move to strike several allegations on standing grounds. The standing issues are addressed in text below.

1 when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the
2 defendant is liable for the misconduct alleged.” *Id.* (citing *Twombly*, 550 U.S. at 556). “Determining
3 whether a complaint states a plausible claim for relief will ... be a context-specific task that requires
4 the reviewing court to draw on its judicial experience and common sense.” *Id.* at 1950 (citing *Iqbal*
5 *v. Hasty*, 490 F.3d 143, 157-58 (2d Cir. 2007)). The reviewing court must therefore “identify the
6 allegations in the complaint that are not entitled to the assumption of truth” and evaluate “the factual
7 allegations in [the] complaint to determine if they plausibly suggest an entitlement to relief.” *Id.* at
8 1951.

9 2. Standing

10 Defendants argue Plaintiff lacks statutory standing to bring a claim under the UCL and CLRA
11 for violations involving the Men’s 50+ vitamin because Plaintiff does not allege he purchased that
12 particular product. Defendants further argue that Plaintiff does not allege he relied on any radio,
13 television, or internet advertisements in conjunction with his purchase of Men’s Health.

14 Proposition 64, which was approved by California voters on November 2, 2004, amended
15 certain provisions of the UCL. To have standing under the UCL, as well as to serve as a class
16 representative, a plaintiff must plead and prove that he or she “has suffered injury in fact and has lost
17 money or property as a result of” a defendant’s unlawful, unfair, or fraudulent business practices. Cal.
18 Bus. & Prof. Code §§ 17203-04. *See In re Tobacco II Cases*, 46 Cal. 4th 298, 326, 326 n.17 (2009)
19 (“*Tobacco II*”) (Proposition 64 “imposes an actual reliance requirement” under which plaintiffs
20 seeking to represent a class of consumers must “plead and prove actual reliance” on the challenged
21 conduct).

22 Similarly, under the CLRA, an action may be brought by: “Any consumer who suffers any
23 damage as a result of the use or employment by any person of a method, act, or practice declared to
24 be unlawful by Section 1770....” Cal. Civ. Code § 1780(a). In order to have standing, a plaintiff must
25 allege he or she was damaged by an alleged unlawful practice. *Meyer v. Sprint Spectrum L.P.*, 45 Cal.
26 4th 634, 638 (2009.)

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1 Here, Plaintiff alleges Defendants violated the UCL by:

2 misrepresenting on Product packaging, in commercial advertisements, on their
3 website, and in other marketing materials and media that the Products' key ingredient
4 - selenium - has the ability to prevent or reduce the risk of prostate cancer, and failing
to warn of the increased risk of diabetes caused by consumption of their Products.

5 (FAC at ¶¶ 54-56.)

6 Plaintiff does not allege that he saw any advertisements for Men's 50+, that he read the
7 packaging on the product, or that he even considered purchasing the product. Plaintiff also does not
8 allege that he relied upon on any radio, television, or internet advertisement in connection with his
9 purchase of Men's Health. Nonetheless, Plaintiff argues he has standing to pursue his claims because
10 Defendants' conduct is not limited to the labeling of Men's Health, but rather stems from a uniform
11 advertising campaign designed to promote the health benefits of selenium.

12 Plaintiff argues he was the "direct object of some aspect of" Defendants' advertising campaign.
13 Citing *In re Tobacco II Cases*, 46 Cal. 4th 298, 326, 326 n.17 (2009) ("*Tobacco II*"), Plaintiff asserts
14 he need not allege actual reliance on all aspects of Defendants' advertising campaign: where "a
15 plaintiff alleges exposure to a long-term advertising campaign, the plaintiff is not required to plead
16 with an unrealistic degree of specificity that the plaintiff relied on particular advertisements or
17 statements." 46 Cal. 4th at 328. The problem with this argument is that Plaintiff does not allege
18 exposure to a long-term advertising campaign; rather, he has alleged injury based upon a specific
19 misrepresentation on Defendants' Men's Health product. He cannot expand the scope of his claims
20 to include a product he did not purchase or advertisements relating to a product that he did not rely
21 upon. The statutory standing requirements of the UCL and CLRA are narrowly prescribed and do not
22 permit such generalized allegations. Plaintiff, therefore, has standing under the UCL and CLRA to
23 pursue his claim regarding Men's Health product and the representations contained on that product;
24 but he lacks standing to pursue any other alleged claim under the UCL or CLRA.

25 3. *Rule 9(b)*

26 Defendants argue that the FAC sounds in fraud and therefore is subject to the particularized
27 pleading requirements of Rule 9(b). Fraud is not an essential element of a UCL or CLRA claim.
28 *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125 (9th Cir. 2009). Nonetheless, claims brought under

1 the UCL and CLRA may be subject to Rule 9(b) if the claim “sounds in fraud” or is “grounded in
 2 fraud.” *Id.* A claim is grounded in fraud where the plaintiff alleges a unified course of fraudulent
 3 conduct and relies on that course of conduct as the basis of a claim. *Vess v. Ciba-Geigy Corp. USA*,
 4 317 F.3d 1097, 1103 (9th Cir. 2003).

5 Defendants argue the present claims sound in fraud. The elements of fraud are: (1)
 6 misrepresentation, *i.e.* false representation, concealment, or nondisclosure; (2) knowledge of falsity;
 7 (3) intent to induce reliance; (4) justifiable reliance; and (5) damage. *Kearns*, 567 F.3d at 1126. Here,
 8 Plaintiff alleges that Defendants made misrepresentations and omissions on their product packaging,
 9 but does not allege knowledge of falsity or intent to induce reliance. Accordingly, Plaintiff’s claims
 10 are not “grounded in fraud” and Rule 9(b) does not apply.

11 4. Unjust Enrichment

12 Defendants correctly argue that Plaintiff’s claim for unjust enrichment fails as a matter of law.
 13 Unjust enrichment is a “general principle underlying various legal doctrines and remedies;” it is not
 14 an independent cause of action. *McBride v. Boughten*, 123 Cal. App. 4th 379, 387 (2004) (quoting
 15 *Melchior v. New Line Products, Inc.*, 106 Cal. App. 4th 779, 793 (2003)).³ Accordingly, Plaintiff’s
 16 claim for unjust enrichment fails.

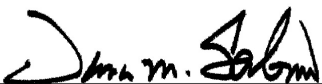
17 III.

18 CONCLUSION

19 For the reasons stated above, Defendants’ motion to strike is granted in part and denied in part.
 20 Defendants’ motion to dismiss is granted. Plaintiff may file a Second Amended Complaint within
 21 thirty (30) days of the date this order is electronically posted.

22 **IT IS SO ORDERED.**

23 DATED: February 9, 2010

24 
 25 _____
 26 HON. DANA M. SABRAW
 United States District Judge

27 _____
 28 ³ While a split of authority appears to exist on this issue, (*see, e.g., Nordberg v. Trilegiant Corp.*, 445 F. Supp. 2d 1082, 1100 (N.D. Cal. 2006) (“state and the federal courts appear to be unclear whether in California a court may recognize a claim for ‘unjust enrichment’ as a separate cause of action”), this Court agrees with those courts that conclude unjust enrichment is not a separate claim.