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8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA  
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11 ANDREA NATHAN, on behalf of  
12 herself, all others similarly situated,  
13 Plaintiff,  
14 v.  
15 VITAMIN SHOPPE, INC.,  
16 Defendant.

Case No.: 3:17-cv-01590-BEN-KSC

**ORDER GRANTING DEFENDANT’S  
MOTION TO DISMISS**

17 Before the Court is the motion to dismiss filed by Defendant Vitamin Shoppe, Inc.  
18 (“Vitamin Shoppe”). (Docket No. 6.) The motion is fully briefed. For the reasons that  
19 follow, Defendant’s motion is **GRANTED**.

20 **BACKGROUND<sup>1</sup>**

21 Defendant Vitamin Shoppe distributes, markets, and sells “Garcinia Cambogia  
22 Extract” (the “Product”) nationwide, including the State of California. In February 2017,  
23 Plaintiff Andrea Nathan purchased a 180-caplet bottle of the Product from Defendant in  
24 San Diego, California for approximately \$20. The Product’s label stated “Weight  
25 Management” and “Appetite Control,” which led Nathan to believe “the Product was an  
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28 <sup>1</sup> The following overview of the facts are drawn from the allegations of Plaintiff’s  
Complaint (Docket No. 1-2, Ex. C, “Compl.”). The Court is not making factual findings.

1 effective dietary aid that would provide weight-loss benefits and would help her lose  
2 weight and help her control her appetite.” (Compl. ¶¶ 74-75.) At the time she purchased  
3 the Product, Nathan “was seeking a product . . . that aids in weight loss.” (*Id.* ¶ 76.)

4 Nathan alleges “[t]he representations on the Product’s label were and are false and  
5 misleading, and had the capacity, tendency, and likelihood to confuse or confound  
6 Plaintiff and other consumers acting reasonably (including the putative Class) because . .  
7 . the Product cannot deliver the purported benefits and is no more effective than a  
8 placebo.” (*Id.* ¶ 77.) This lawsuit followed.

### 9 **PROCEDURAL HISTORY**

10 On June 26, 2017, Plaintiff filed this action in the San Diego Superior Court<sup>2</sup>  
11 asserting individual and putative class state-law claims for violation of California’s  
12 Unfair Competition Law, False Advertising Law, Consumer Legal Remedies Act, and for  
13 breach of express and implied warranties. On August 25, 2017, Defendant removed the  
14 action to this Court based on diversity jurisdiction. (Docket No. 1.) Defendant now  
15 moves to dismiss.<sup>3</sup> (Docket No. 6.)

### 16 **LEGAL STANDARD**

17 Under Federal Rule of Civil Procedure 12(b)(6), a court may dismiss a complaint  
18 if, taking all factual allegations as true, the complaint fails to state a plausible claim for  
19 relief on its face. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atl. Corp. v.*  
20 *Twombly*, 550 U.S. 544, 556-57 (2007). Dismissal is appropriate if the complaint fails to  
21 state enough facts to raise a reasonable expectation that discovery will reveal evidence of  
22 the matter complained of, or if the complaint lacks a cognizable legal theory under which  
23 relief may be granted. *Twombly*, 550 U.S. at 556.

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25 <sup>2</sup> Case No. 37-2017-00023258-CU-BT-CTL.

26 <sup>3</sup> Defendant also asks the Court to take judicial notice of various documents in  
27 support of its position, of which Plaintiff objects to some, but not all. (*See* Docket Nos.  
28 6-1, 6-2, 7-1.) The Court does not rely on any of the materials for which judicial notice is  
sought and therefore all requests for judicial notice are denied as moot.

1 “A claim is facially plausible ‘when the plaintiff pleads factual content that allows  
2 the court to draw the reasonable inference that the defendant is liable for the misconduct  
3 alleged.’” *Zixiang Li v. Kerry*, 710 F.3d 995, 999 (9th Cir. 2013) (quoting *Iqbal*, 556  
4 U.S. at 678). While the Court must draw all reasonable inferences in the non-movant’s  
5 favor, it need not “necessarily assume the truth of legal conclusions merely because they  
6 are cast in the form of factual allegations.” *Warren v. Fox Family Worldwide, Inc.*, 328  
7 F.3d 1136, 1139 (9th Cir. 2003) (internal quotations omitted). “Threadbare recitals of the  
8 elements of a cause of action, supported by mere conclusory statements, do not suffice.”  
9 *Iqbal*, 556 U.S. at 678.

## 10 DISCUSSION

### 11 A. “Lack of Substantiation” Claims

12 In essence, the theory of liability for each of Plaintiff’s claims under California’s  
13 Unfair Competition Law (“UCL”), False Advertising Law (“FAL”), and Consumer Legal  
14 Remedies Act (“CLRA”) is the general assertion that Defendant’s Product is incapable of  
15 providing weight-loss benefits, and therefore the Product label’s phrases “Weight  
16 Management” and “Appetite Control” are false and misleading. Defendant argues that  
17 these claims must be dismissed because they are based entirely upon substantiation  
18 allegations for which there exists no private right of action. The Court agrees.<sup>4</sup>

19 The UCL prohibits “any unlawful, unfair or fraudulent business act or practice and  
20 unfair, deceptive, untrue or misleading advertising.” Cal. Bus. & Prof. Code § 17200.  
21 The FAL makes it unlawful for a business to disseminate any statement “which is untrue  
22 or misleading, and which is known, or which by the exercise of reasonable care should be  
23 known, to be untrue or misleading.” Cal. Bus. & Prof. Code § 17500. The CLRA  
24 prohibits any “unfair methods of competition and unfair or deceptive acts or practices  
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28 <sup>4</sup> Because the Court agrees with this argument, it does not reach Defendant’s  
alternative arguments for dismissal of Plaintiff’s UCL, FAL, and CLRA claims.

1 undertaken by any person in a transaction intended to result or which results in the sale or  
2 lease of goods or services to any consumer.” Cal. Civ. Code § 1770.

3 Private litigants may not bring suit under the UCL, FAL, or CLRA alleging only  
4 that advertising claims lack substantiation. *See Nat’l Council Against Health Fraud, Inc.*  
5 *v. King Bio Pharm., Inc.*, 107 Cal. App. 4th 1336, 1342 (2003); *Stanley v. Bayer*  
6 *Healthcare LLC*, 2012 WL 1132920, at \* 3 (S.D. Cal. 2012). That right is reserved to  
7 “the Director of Consumer Affairs, the Attorney General, any city attorney, or any district  
8 attorney.” Cal. Bus. & Prof. Code § 17508. As a result, private litigants must allege  
9 actual falsity or misrepresentation for their UCL, FAL, and CLRA, and may do so by  
10 citing to “testing, scientific literature, or anecdotal evidence.” *Alvarez v. NBTY, Inc.*, No.  
11 17-CV-00567-BAS-BGS, 2017 WL 6059159, at \*8 (S.D. Cal. Dec. 6, 2017) (quoting  
12 *Kwan v. SanMedica Int’l, LLC*, 854 F.3d 1088, 1095-96 (9th Cir. 2017)).

13 In the false advertising context, an advertising claim is false if it has “actually been  
14 disproved,” that is, if the plaintiff can point to evidence that directly conflicts with the  
15 claim. *Eckler v. Wal-Mart Stores, Inc.*, 2012 WL 5382218, at \*3 (S.D. Cal. Nov. 1,  
16 2012). By contrast, an advertising claim that merely lacks evidentiary support is said to  
17 be unsubstantiated. *Id.* (“There is a difference, intuitively, between a claim that has no  
18 evidentiary support one way or the other and a claim that’s actually been disproved. In  
19 common usage, we might say that both are ‘unsubstantiated,’ but the caselaw (and  
20 common sense) imply that in the context of a false advertising lawsuit an  
21 ‘unsubstantiated’ claim is only the former.”).

22 Plaintiff alleges the Product contains false and misleading statements because the  
23 phrases “Weight Management” and “Appetite Control” appear on the label, in spite of the  
24 fact that its only active ingredients Garcinia Cambogia Extract/Hydroxycitric Acid  
25 (“HCA”) and chromium “are scientifically proven to be incapable of providing such  
26 weight-loss benefits.” (Compl. ¶ 1.) The first problem with Plaintiff’s complaint is her  
27 assertion that the phrases “Weight Management” and “Appetite Control” equate to  
28 representations that the Product provides weight-loss benefits. “Weight Management”

1 suggests management or control of one’s weight, whose upward or downward departure  
2 may differ depending on an individual person’s goals, *i.e.*, to gain, lose, or maintain one’s  
3 weight. “Appetite Control” indicates control of one’s appetite, which may or may not  
4 ultimately result in weight-loss. Thus, it is irrelevant whether the alleged studies  
5 disprove that the active ingredients in the Product can produce weight-loss benefits  
6 because the phrases themselves do not inherently promise weight-loss benefits.  
7 Moreover, Plaintiff does not allege any other statements, advertising, or other  
8 communications by Defendant promoting the Product as a weight-loss supplement.  
9 Instead, she merely provides her own subjective belief of the type of supplement and  
10 benefits she was looking for at the time she purchased the Product and attributed the  
11 same to the product. As a result, this alleged deficiency cannot serve as the basis for  
12 Plaintiff’s UCL, FAL, or CLRA claims.

13         The second problem with Plaintiff’s complaint is that the only study that directly  
14 addresses the representations at issue (*i.e.* “weight management” and “appetite control”)  
15 merely states that its results “*did not support* the hypothesis that HCA supplementation  
16 *may be* effective on appetite and weight control by increasing fat oxidation.” (Compl. ¶  
17 38) (emphasis added.) The Court finds this qualifying language is not sufficient to raise a  
18 plausible claim or falsity or a misrepresentation.<sup>5</sup> *Alvarez*, 2017 WL 6059159, at \*8. All  
19 other studies referenced in Plaintiff’s complaint discuss the effectiveness of Garcinia  
20 Cambogia Extract/Hydroxycitric Acid (“HCA”) or chromium supplementation for  
21 weight-loss only. In other words, the studies do not discuss the overall effectiveness of  
22 weight management or appetite control from all perspectives, *i.e.*, weight gain, loss, and  
23 maintenance.

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26         <sup>5</sup> The Court notes that Plaintiff further quoted this study as stating: “HCA was not  
27 effective.” (Compl. ¶41.) By not providing context for this quotation (*i.e.*, what HCA  
28 was supposed to be effective at), the Court is left to speculate whether the study actually  
rendered a conclusion to support her claim, which is also insufficient to state a claim.

1 Therefore, the Court finds Plaintiff has not alleged sufficient facts to state plausible  
2 claims under the UCL, FAL, or CLRA, and Defendant’s motion to dismiss these claims  
3 is **GRANTED**.

4 **B. Breach of Warranties Claims**

5 In addition to state consumer protection claims, Plaintiff alleges two breach of  
6 warranty claims: (1) breach of express warranty and (2) breach of the implied warranty of  
7 merchantability. Defendants also move to dismiss each of these claims, which the Court  
8 addresses in turn.

9 1. Breach of Express Warranty

10 California Commercial Code § 2313, which defines express warranty, applies to  
11 “transactions in goods.” *Viggiano v. Hansen Nat. Corp.*, 944 F. Supp. 2d 877, 893 (C.D.  
12 Cal. 2013) (quoting Cal. Com. Code § 2102). To prevail on a breach of express warranty  
13 claim, a plaintiff must prove that the seller “(1) made an affirmation of fact or promise or  
14 provided a description of its goods; (2) the promise or description formed part of the  
15 basis of the bargain; (3) the express warranty was breached; and (4) the breach caused  
16 injury to the plaintiff.” *Id.* at 893 (quoting *Rodarte v. Philip Morris, Inc.*, No. 03–  
17 0353FMC, 2003 WL 23341208, \*7 (C.D. Cal. June 23, 2003)).

18 Here, Plaintiff ambiguously alleges “Defendant breached the express warranties by  
19 selling a product that does not and cannot provide the promised benefits.” (Compl. ¶  
20 132.) However, looking at Plaintiff’s complaint in its entirety, the only “promised  
21 benefits” Plaintiff identifies are “weight-loss benefits,” which the Court explained above  
22 is not reasonably inferred from the standalone phrases “Weight Management” and  
23 “Appetite Control.” Finding the complaint deficient of a plausible actionable promise,  
24 the Court **GRANTS** Defendant’s motion to dismiss Plaintiff’s breach of express warranty  
25 claim.

26 2. Breach of Implied Warranty of Merchantability

27 “Unless excluded or modified [ ], a warranty that goods shall be merchantable is  
28 implied in a contract for their sale if the seller is a merchant with respect to goods of that

1 kind.” *Viggiano*, 944 F. Supp. 2d at 895 (quoting Cal. Comm. Code § 2314(1)). “The  
2 [California] Commercial Code does not ‘impose a general requirement that goods  
3 precisely fulfill the expectation of the buyer. Instead, it provides for a minimum level of  
4 quality.’” *Id.* at 896 (quoting *Hauter v. Zogarts*, 14 Cal. 3d 104, 117 (1975)). “A  
5 plaintiff who claims a breach of the implied warranty of merchantability must show that  
6 the product ‘did not possess even the most basic degree of fitness for ordinary use.’” *Id.*  
7 (quoting *Mocek v. Alfa Leisure, Inc.*, 114 Cal. App. 4th 402, 406 (2003)).

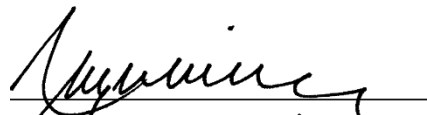
8 Similar to its breach of express warranty claim, Plaintiff’s claim for breach of the  
9 implied warranty of merchantability relies on its vague allegation that “the Product does  
10 not aid in weight management and appetite control.” (Compl. ¶138.) However, as  
11 discussed above, Plaintiff’s complaint does not allege that the product does not aid in  
12 weight management or control. Rather, the gravamen of Plaintiff’s complaint is that the  
13 Product fails to provide allegedly promised “weight-loss benefits.” Thus, dismissal for  
14 failure to state a plausible claim is also appropriate for Plaintiff’s breach of the implied  
15 warranty of merchantability claim because she has not identified a plausible actionable  
16 promise. Defendant’s motion to dismiss this claim is **GRANTED**.

### 17 CONCLUSION

18 For all of the foregoing reasons, the Court finds Plaintiff has failed to allege  
19 sufficient facts for each of her claims, and Defendant’s motion to dismiss Plaintiff’s  
20 complaint is **GRANTED**. However, the Court shall provide Plaintiff with an opportunity  
21 to amend her pleading to correct the deficiencies identified in this Order. Therefore,  
22 Plaintiff’s complaint is **DISMISSED without prejudice**. If Plaintiff elects to amend her  
23 pleading, it must be filed by no later than **seven (7) days** from the date of this Order.

24 **IT IS SO ORDERED.**

25 Dated: February 12, 2018

26   
27 Hon. Roger T. Benitez  
28 United States District Judge