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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

JESSICA AZAR, on behalf of herself and
all others similarly situated,

Plaintiff,

v.

GATEWAY GENOMICS, LLC dba
SNEAKPEEK; and DOES 1 through 20,
inclusive,

Defendants.

Case No.: 15cv2945 AJB (WVG)

ORDER:

**(1) GRANTING DEFENDANT’S
MOTION TO DISMISS; AND
(Doc. No. 34)**

**(2) DENYING DEFENDANT’S
MOTION TO STRIKE.**

This matter comes before the Court on Defendant Gateway Genomics, LLC’s (“Defendant”) motion to dismiss and motion to strike Plaintiff Jessica Azar’s¹ (“Plaintiff”) second amended complaint (“SAC”). (Doc. No. 34.) Plaintiff opposes the motion. (Doc. No. 37.) Having reviewed the parties’ arguments and controlling legal authority and pursuant to Civil Local Rule 7.1.d.1., the Court finds the matter suitable for decision on the papers and without oral argument. For the reasons set forth more fully below, the Court **DENIES** Defendant’s motion to strike Plaintiff’s class definition and **GRANTS**

¹ The initial Plaintiff in the instant matter was Kristine Main (“Ms. Main”), a resident of Ohio. (Doc. No. 21 ¶ 2.) However, as of August 1, 2016, Ms. Main is no longer a Plaintiff in this lawsuit. (*Id.*)

1 Defendant's motion to dismiss.

2 **I. BACKGROUND**

3 The following facts are taken from the SAC and construed as true for the limited
4 purpose of resolving the pending motion. *See Moyo v. Gomez*, 40 F.3d 982, 984 (9th Cir.
5 1994).

6 Defendant is a Delaware limited liability company with its principal place of
7 business in La Jolla, California. (Doc. No. 21 ¶ 5.) One of Defendant's products is
8 "SneakPeek," which is an early detection gender test that sells for \$99.00. (*Id.* ¶¶ 9, 12.)
9 Defendant advertises SneakPeek alleging that from a drop of blood, SneakPeek can detect
10 a baby's gender with 99% accuracy from as early as nine weeks into a woman's pregnancy.
11 (*Id.* ¶ 10.)

12 Based on Defendant's marketing materials, website, and claims that it could detect
13 a baby's gender earlier than a sonogram and with 99% accuracy, Plaintiff purchased
14 SneakPeek on December 9, 2015. (*Id.* ¶ 11.) At the time Plaintiff took the test, she was
15 approximately fourteen weeks pregnant. (*Id.* ¶ 13.) On December 17, 2015, Plaintiff
16 received an email from Defendant stating that she would be giving birth to a baby boy. (*Id.*
17 ¶ 14.) However, on February 1, 2016, following a sonogram, Plaintiff's doctor informed
18 her that she was pregnant with a baby girl. (*Id.* ¶ 15.) On June 10, 2016, Plaintiff gave birth
19 to a baby girl. (*Id.* ¶ 16.)

20 Plaintiff alleges that she is not the only one to have received a false test result. In
21 support of this allegation, Plaintiff provides nine online consumer complaints that refer to
22 SneakPeek as a "Scam," allege that SneakPeek is around 60% accurate, and contend that
23 SneakPeek is aware of its test's inaccuracies. (*Id.* at 7-10.) Plaintiff asserts that
24 SneakPeek's reliability is more akin to a "proverbial coin flip." (*Id.* ¶ 20.)

25 **II. PROCEDURAL BACKGROUND**

26 On December 29, 2015, Ms. Main filed a complaint. (Doc. No. 1.) On February 1,
27 2016, Plaintiff and Ms. Main filed an amended complaint. (Doc. No. 7.) On April 22, 2016,
28 Defendant filed a motion to dismiss for lack of jurisdiction, motion to dismiss for failure

1 to state a claim, and a motion to enforce arbitration. (Doc. No. 12.) On August 1, 2016, the
2 Court granted in part Defendant’s motion to dismiss for lack of standing, dismissed Ms.
3 Main’s claim for lack of standing, dismissed Plaintiff’s claim for injunctive relief, denied
4 Defendant’s request to compel arbitration, and granted in part and denied in part
5 Defendant’s motion to dismiss for failure to state a claim. (Doc. No. 20 at 32.)

6 On September 30, 2016, Plaintiff filed her SAC. (Doc. No. 21.) Plaintiff brings the
7 action on behalf of herself and others similarly situated claiming violations of: (1) the
8 California Unfair Competition Law (“UCL”); (2) the California False Advertising Law
9 (“FAL”); (3) Fraud; (4) Breach of Express Warranty; (5) Breach of Implied Warranty of
10 Merchantability; (6) Breach of Implied Warranty of Fitness; (7) Unjust Enrichment; and
11 (8) California Civil Code §§1750 (“CLRA”). (*Id.* at 14-24.) On October 14, 2016, the
12 parties filed a joint motion to stay the case pending settlement discussions, (Doc. No. 23),
13 which was granted on the same day. (Doc. No. 24.) On December 12, 2016, both parties
14 filed a joint statement informing the Court that the matter had not settled. (Doc. No. 31 at
15 2.) On February 6, 2017, Defendant filed the instant motion, its motion to dismiss and to
16 strike Plaintiff’s SAC. (Doc. No. 34.)

17 **III. LEGAL STANDARD**

18 **A. Motion to Dismiss**

19 A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of a plaintiff’s
20 complaint and allows a court to dismiss a complaint upon a finding that the plaintiff has
21 failed to state a claim upon which relief may be granted. *See Navarro v. Block*, 250 F.3d
22 729, 732 (9th Cir. 2001). “[A] court may dismiss a complaint as a matter of law for (1) lack
23 of a cognizable legal theory or (2) insufficient facts under a cognizable legal claim.”
24 *SmileCare Dental Grp. v. Delta Dental Plan of Cal.*, 88 F.3d 780, 783 (9th Cir. 1996)
25 (citations omitted). However, a complaint will survive a motion to dismiss if it contains
26 “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v.*
27 *Twombly*, 550 U.S. 544, 570 (2007). In making this determination, a court reviews the
28 contents of the complaint, accepting all factual allegations as true, and drawing all

1 reasonable inferences in favor of the nonmoving party. *Cedars-Sinai Med. Ctr. v. Nat'l*
2 *League of Postmasters of U.S.*, 497 F.3d 972, 975 (9th Cir. 2007).

3 Notwithstanding this deference, the reviewing court need not accept “legal
4 conclusions” as true. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). It is also improper for a
5 court to assume “the [plaintiff] can prove facts that [he or she] has not alleged.” *Associated*
6 *Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 526
7 (1983).

8 B. Motion to Strike

9 Under Rule 12 of the Federal Rules of Civil Procedure, on its own or by motion, the
10 court may strike from a pleading an “insufficient defense or any redundant, immaterial,
11 impertinent, or scandalous matter.” Fed. R. Civ. P. 12(f). The purpose of Rule 12(f) is to
12 “avoid the expenditure of time and money that must arise from litigating spurious issues
13 by dispensing with those issues prior to trial” *Sidney–Vinstein v. A.H. Robins Co.*, 697
14 F.2d 880, 885 (9th Cir. 1983). The Court must view the pleadings in the light most
15 favorable to the non-moving party, and the information will not be stricken unless it is
16 evident that it has no bearing on the subject matter of the litigation. *Cal. Dept. of Toxic*
17 *Substances Control v. Alco Pac., Inc.*, 217 F. Supp. 2d 1028, 1033 (C.D. Cal. 2002). “Any
18 doubt concerning the import of the allegations to be stricken weighs in favor of denying
19 the motion to strike.” *In re Wal-Mart Stores, Inc. Wage & Hour Litig.*, 505 F. Supp. 2d
20 609, 614 (N.D. Cal. 2007) (citation omitted).

21 **IV. DISCUSSION**

22 A. Plaintiff’s Class Definition

23 As an initial matter, Defendant contends that Plaintiff’s class definition is overbroad
24 and should thus be stricken under Federal Rule of Civil Procedure (“FRCP”) 12(f). (Doc.
25 No. 34-1 at 11.) In opposition, Plaintiff claims that Defendant’s motion is inappropriate at
26 this time as Plaintiff has not brought a motion for class certification. (Doc. No. 37 at 11.)

27 While the Court appreciates the ample briefing provided by both parties on this issue,
28 the Court agrees with Plaintiff and finds Defendant’s motion to strike Plaintiff’s class

1 allegation to be premature. Generally, courts review class allegations through a motion for
2 class certification. *See Moreno v. Baca*, No. CV007149ABCCWX, 2000 WL 33356835,
3 at *2 (C.D. Cal. Oct. 13, 2000) (finding defendants’ motion to strike the class allegation as
4 premature because no motion for class certification was before the court); *see also In re*
5 *NVIDIA GPU Litig.*, No. C 08-04312 JW, 2009 WL 4020104, at *13 (N.D. Cal. Nov. 19,
6 2009) (“A determination of the ascertainability and manageability of the putative class in
7 light of the class allegations is best addressed at the class certification stage of litigation.”);
8 *In re Jamster Mktg. Litig.*, No. 05CV0819 JM (CAB), 2009 WL 1456632, at *7 (S.D. Cal.
9 May 22, 2009). Accordingly, at this point in the litigation, the Court is not prepared to rule
10 on the propriety of Plaintiff’s class allegations. Consequently, Defendant’s motion to strike
11 the class allegations is **DENIED**, but **WITHOUT PREJUDICE** as to Defendant’s ability
12 to move to strike or dismiss the class allegations if and when class certification is sought.

13 B. Defendant’s Motion to Dismiss

14 Defendant contends that all of Plaintiff’s claims are incurably deficient and must be
15 dismissed with prejudice. (Doc. No. 34-1 at 7, 29.) Specifically, Defendant argues that
16 Plaintiff’s nationwide class action asserting only state consumer protection laws should be
17 dismissed pursuant to the Ninth Circuit’s holding in *Mazza v. Am. Honda Motor Co.*, 666
18 F.3d 581 (9th Cir. 2012). (*Id.*) In opposition, Plaintiff argues that each of her causes of
19 action are adequately pled, and that Defendant has not met its burden in proving that
20 Plaintiff’s nationwide claims under California state law should be dismissed. (Doc. No. 37
21 at 18-30.)

22 i. Plaintiff’s Nationwide Claims under Mazza

23 Applying the Ninth Circuit Court of Appeals’ holding in *Mazza*, Defendant contends
24 that Plaintiff’s UCL, FAL, and CLRA claims should be dismissed, because those claims
25 should be governed by the consumer protection laws of the jurisdiction in which the
26 transaction took place. (Doc. No. 34-1 at 18.) Plaintiff retorts and argues that *Mazza* is
27 inapplicable to the present matter as the court in *Mazza* was resolving a motion for class
28 certification. (Doc. No. 37 at 21.)

1 The Court first notes that courts within this district have declined to apply the type
2 of choice of law analysis proscribed in *Mazza* at the pleading stage, and instead have
3 deferred the issue until class certification. *See e.g., Doe v. Successfulmatch.com*, No. 13-
4 cv-03376-LHK, 2014 WL 1494347, at *7 (N.D. Cal. Apr. 16, 2014); *Clancy v. The*
5 *Bromley Tea Co.*, 308 F.R.D. 564, 572 (N.D. Cal. 2013); *In re iPhone 4S Consumer Litig.*,
6 No. C 1201127, 2013 WL 3829653, at *8–9 (N.D. Cal. July 23, 2013). In coming to this
7 conclusion, these courts have reasoned that the choice of law analysis is a fact-specific
8 inquiry, which requires a more developed factual record than is available at the motion to
9 dismiss stage.

10 On the other hand, other cases decided in this district disagree and found that
11 although *Mazza* was decided at the class certification stage, “the principle articulated in
12 *Mazza* applies generally and is instructive even when addressing a motion to dismiss.”
13 *Frezza v. Google Inc.*, No. 5:12-cv-00237-RMW, 2013 WL 1736788, at *6 (N.D. Cal. Apr.
14 22, 2013). Moreover, courts have held that even at the pleading stage, *Mazza* is “not only
15 relevant but controlling” *Id.* at 5. Thus, California district courts have applied *Mazza*
16 at the motion to dismiss stage. *See Granfield v. NVIDIA Corp.*, No. C 11-05403-JW, 2012
17 WL 2847575, at *3 (N.D. Cal. July 11, 2012).

18 In light of the legal principles established in *Mazza*, the Court agrees that *Mazza* can
19 be applied at the motion to dismiss stage. However, in the circumstances of this case, the
20 Court concludes that it is appropriate to delay the Court’s analysis of the choice of law
21 issue until Plaintiff files a motion for class certification. First, the Court notes that there
22 exist factual differences between *Mazza* and Plaintiff’s Complaint that preclude the Court
23 from applying *Mazza*’s fact specific inquiry in the present motion.² For example, the Court
24 highlights that the transaction that caused the alleged injury in *Mazza*, (i.e., the lease or
25 purchase of a Honda automobile), did not occur in California for the majority of the class
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27 ² Defendant argues that because *Mazza* encompasses the same claims Plaintiff asserts in her SAC that
28 *Mazza* is controlling authority and Defendant need not provide an analysis demonstrating that California
consumer laws differ from other states. (Doc. No. 38 at 9.)

1 members. *Mazza*, 666 F.3d at 590. Additionally, the plaintiffs purchased their vehicles in
2 Orlando, Florida, and Gaithersburg, Maryland. *Id.* at 587. In comparison, Plaintiff
3 purchased SneakPeek while in California, lives in California, and the resulting alleged
4 injury happened in California. (Doc. No. 21 ¶¶ 4-5, 11.) Second, the Court does not find
5 that this case is so clear that deferring a choice of law analysis until class certification
6 would be unconstructive. *See Frenzel v. AliphCom*, 76 F. Supp. 3d 999, 1008 (N.D. Cal.
7 2014) (holding that deferring choice of law issues until class certification is unwarranted
8 in cases where the plaintiff in the case is a nonresident who did not purchase the defendant’s
9 product in California) (emphasis added).

10 Furthermore, the Court finds the case law cited by Defendant to be inapplicable to
11 the present matter. For instance, in *Route v. Mead Johnson Nutrition Co.*, No. CV 12-7350-
12 GW (JEMx), 2013 WL 658251, at *8–9 (C.D. Cal. Feb. 21, 2013), defendant’s request to
13 strike plaintiff’s request for certification of a nationwide class was granted because
14 California had no connection to the case other than its interest in product sales.
15 Accordingly, the court held that deferring the choice of law issue until the motion for
16 certification would be a waste of judicial resources as the Court could not see how plaintiff
17 could ever demonstrate that California’s choice of law rules as set forth in *Mazza* could be
18 certified in California. *Id.* at *9. In comparison, the instant case has significant ties to
19 California, as the product was purchased in California, and Plaintiff is a resident of
20 California. (Doc. No. 21 ¶¶ 4-5, 11.) Moreover, in *Horvath v. L.G Elec. Mobilecomm*
21 *U.S.A., Inc.*, No. 3:11-CV-01576-H-RBB, 2012 WL 2861160, at *3 (S.D. Cal. Feb. 13,
22 2012), the court only dismissed claims of the named plaintiffs that were nonresidents of
23 California.

24 Ultimately, the Court finds that a choice of law analysis must be conducted on a case
25 by case basis that requires “analyzing various states’ laws under the circumstances of the
26 particular case and given the particular [legal] issue in question.” *See Bruno v. Eckhart*
27 *Corp.*, 280 F.R.D. 540, 545 (C.D. Cal. 2012). Accordingly, the Court is unable to determine
28 at this stage whether California’s choice of law rules apply to bar all, some, or none of

1 Plaintiff's claims. *See Forcellati v. Hyland's Inc.*, 876 F. Supp. 2d 1155, 1159 (C.D. Cal.
 2 2012) (concluding that *Mazza* did not purport to create a bright line rule that nationwide
 3 classes are "as a matter of law, uncertifiable under California's consumer protection
 4 laws."). Consequently, Defendant's motion to dismiss Plaintiff's nationwide claims under
 5 California Consumer State Law is **DENIED**.

6 *ii. Plaintiff's Claims under UCL, FAL, and CLRA*

7 Defendant also argues that Plaintiff's UCL, FAL, and CLRA claims fail pursuant to
 8 FRCP 8³, as Plaintiff's use of nine online consumer complaints does not adequately support
 9 her allegations. (Doc. No. 34-1 at 23.) In opposition, Plaintiff argues that the consumer
 10 complaints are sufficient evidence that Defendant knew or should have known that it was
 11 presenting false, misleading, or omitted material on the reliability of the SneakPeek test.
 12 (Doc. No. 37 at 25.)

13 The CLRA prohibits "unfair methods of competition and unfair or deceptive acts or
 14 practices in transaction for the sale or lease of goods to consumers." Cal. Civ. Code §
 15 1770(a). California's FAL makes it unlawful for a business to disseminate any statement
 16 "which is untrue or misleading, and which is known, or which by the exercise of reasonable
 17 care should be known, to be untrue or misleading." Cal. Bus & Prof. Code 17500.
 18 California's UCL provides a cause of action for business practices that are (1) unlawful,
 19 (2) unfair, or (3) fraudulent. Cal. Bus. & Prof. Code §§ 17200, *et seq.*

20 Plaintiff predicates her UCL, FAL, and CLRA claims on the allegation that
 21 Defendant's knew that SneakPeek was not 99% effective in determining a baby's gender.
 22 (Doc. No. 21 ¶¶ 35, 44, 85.) However, the shortcomings of this contention are twofold.
 23 First, the Court finds that Plaintiff does not allege where the online complaints were made.
 24 Thus, the Court is unable to determine if Defendant's had notice of the complaints. *See*
 25 *Wilson v. Hewlett-Packard Co.*, 668 F.3d 1136, 1148 (9th Cir. 2012) (rejecting plaintiff's
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 28 ³ FRCP 8 states that a pleading must contain "a short and plain statement of the claim showing that the
 pleader is entitled to relief" Fed. R. Civ. P. 8(a)(2).

1 use of customer complaints as they did not indicate how the complaints were made; thus
2 there was no factual basis to conclude that the manufacturer had knowledge of a defect.)
3 Second, and most detrimental to Plaintiff is that some courts have expressed doubt that
4 customer complaints by themselves can adequately support an inference that a
5 manufacturer was aware of a defect. *Id.* at 1147; *see Baba v. Hewlett-Packard Co.*, No. C
6 09-05946 RS, 2011 WL 317650, at *3 (N.D. Cal. Jan. 28, 2011) (“Awareness of a few
7 customer complaints, however, does not establish knowledge of an alleged defect.”). For
8 this reason, the Court concludes that at best the nine online customer complaints merely
9 allege that some consumers were complaining, but do not by themselves impute knowledge
10 on Defendant.

11 Thus, the Court turns to the rest of Plaintiff’s allegations to determine if Plaintiff has
12 sufficiently asserted violations of the UCL, FAL, and CLRA. As currently pled, Plaintiff’s
13 SAC in congruence with the nine online customer complaints does not adequately plead
14 how and why Defendant knew that SneakPeek was false, misleading, or deceptive. Plaintiff
15 repeatedly argues that the result of the test is not 99% accurate, but is much closer to a flip
16 of a coin. (Doc. No. 21 ¶ 17.) Plaintiff’s SAC then generically repeats the standard of law
17 for each cause of action. (*Id.* ¶¶ 35-36, 42, 82-85.) However, without more, Plaintiff’s bare
18 legal assertions are only “[t]hreadbare recitals of the elements of a cause of action,
19 supported by mere conclusory statements. . . .” *Iqbal*, 556 U.S. at 678. Moreover, without
20 an underlying factual premise that would justify Plaintiff’s alleged factual conclusion that
21 SneakPeek is not 99% accurate and that Defendant was aware of this, the SAC fails to
22 assert nothing more than an “unadorned, the-defendant-unlawfully-harmed-me
23 accusation.” *Id.*

24 Additionally, Plaintiff’s UCL, FAL, and CLRA claims sound in fraud, and are
25 therefore subject to the heightened pleading standard under FRCP 9(b). *See Kearns v. Ford*
26 *Motor Co.*, 567 F.3d 1120, 1125 (9th Cir. 2009) (holding that Rule 9(b)’s heightened
27 pleading standards apply to claims for violations of the CLRA and UCL). FRCP 9(b)
28 requires that the facts constituting the fraud be pled with specificity. Conclusory allegations

1 are insufficient. *See* Fed. R. Civ. P. 9(b); *see also Moore v. Kayport Package Exp., Inc.*,
2 885 F.2d 531, 540 (9th Cir. 1989) (“A pleading is sufficient under Rule 9(b) if it identifies
3 the circumstances constituting fraud so that a defendant can prepare an adequate answer to
4 the allegations.”).

5 Drawing all inferences in Plaintiff’s favor, the Court is unable to conclude that
6 Plaintiff has sufficiently pled her claims for violations of the UCL, FAL, and CLRA
7 pursuant to FRCP 9(b). Plaintiff’s SAC succinctly alleges that Defendant represented that
8 the SneakPeek test had characteristics and benefits that it did not have. (Doc. No. 21 ¶ 35.)
9 Plaintiff then tersely contends that Defendant knew or should have known that Defendant’s
10 advertising was false, misleading, or deceptive. (*Id.* ¶ 44.) The Court notes that FRCP 9(b)
11 “does not require nor make legitimate the pleading of detailed evidentiary matter.” *Walling*
12 *v. Beverly Enter.*, 476 F.2d 393, 397 (9th Cir. 1973). However, Plaintiff still must allege
13 the circumstances constituting the fraud, or the time, place, and specific content of the false
14 representations. As currently pled, Plaintiff’s SAC and its limited allegations fails to satisfy
15 this burden.

16 Accordingly, Plaintiff’s UCL, FAL, and CLRA causes of action are **DISMISSED**.
17 *Compare Eckler v. Wal-Mart Stores, Inc.*, No. 12-cv-727-LAB-MDD, 2012 WL 5382218,
18 at *7 (S.D. Cal. Nov. 1, 2017) (dismissing plaintiff’s complaint as plaintiff provided no
19 factual support other than her own limited pleadings about her experience with the
20 product), *with Rosales v. FitFlop USA, LLC*, 11-CV-00973 W (WVG), 2012 WL 3224311,
21 at *5 (S.D. Cal. Feb. 8, 2012) (rejecting defendant’s claim that plaintiffs fail to state a UCL
22 claim because “[p]laintiffs point to several studies involving toning fitness shoes that
23 support their contention that these shoes have no beneficial effect on exercise, intensity,
24 improved muscle strength, or toning.”).⁴

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27 ⁴ The Court notes that Plaintiff opposes Defendant’s argument that she must provide scientific evidence
28 to support her claim. (Doc. No. 37 at 27.) The Court agrees with Plaintiff that scientific evidence at the
pleadings stage is not required. However, despite this, Plaintiff still fails to meet the threshold pleading
requirements for her causes of action grounded in fraud.

1 iii. Breach of Express Warranty

2 To prevail on a breach of express warranty claim, a plaintiff must allege that the
3 seller: “(1) made an affirmation of fact or promise or provided a description of its goods;
4 (2) the promise or description formed part of the basis of the bargain; (3) the express
5 warranty was breached; and (4) the breach caused injury to the plaintiff.” *Rodarte v. Philip*
6 *Morris, Inc.*, No. 03-0353FMC, 2003 WL 23341208, at *7 (C.D. Cal. June 23, 2003).
7 Additionally, a buyer must also plead that notice of the alleged breach was provided to the
8 seller within a reasonable time after discovering the breach. *See Pollard v. Saxe & Yolles*
9 *Dev. Co.*, 12 Cal. 3d 374, 680 (1974) (“The requirement of notice of breach is . . . designed
10 to allow the defendant opportunity for repairing the defective item, reducing damages,
11 avoiding defective products in the future, and negotiating settlements.”).⁵

12 The parties do not appear to contest that Defendant’s statement that SneakPeek is
13 99% effective in determining gender is a warranty that is an affirmation of fact or promise,
14 or that it is the basis of Plaintiff’s bargain. The dispute instead focuses on Defendant’s
15 contention that part of its express warranty is that a consumer may receive a full refund if
16 the test result does not match the gender of his or her newborn baby. (Doc. No. 38 at 11.)

17 As currently pled, Plaintiff’s SAC is devoid of any allegations pertaining to what the
18 express warranty of SneakPeek encompassed. For instance, based on the SAC, the Court
19 is unsure of whether Defendant’s express warranty included providing a consumer a refund
20 if her test provided an erroneous result. Moreover, Plaintiff does not allege whether or not
21 she requested or received a refund for her allegedly faulty test. Additionally, Plaintiff and
22 Defendant’s briefs in support and opposition of the motion further conflate the issue as
23 they disagree over the terms of the express warranty. (*See* Doc. No. 34-1 at 19-20; Doc.
24 No. 37 at 22.) Accordingly, as the Court is unable to determine at this time what the terms

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27 ⁵ The Court takes note that Plaintiff argues that she only need to plead the causes of action for breach of
28 express warranty pursuant to California Civil Jury Instruction 1230. (Doc. No. 37 at 21.) Plaintiff is
mistaken. Though the jury instruction may be helpful in understanding the law, it is not law. Thus, the
Court declines to use the elements as pled by Plaintiff in her opposition.

1 of the express warranty were, the Court **DISMISSES** Plaintiff's claim for breach of express
2 warranty.

3 *iv. Breach of Implied Warranty of Merchantability*

4 Defendant argues that as there is no privity of contract between Plaintiff and
5 Defendant, Plaintiff's claim for breach of implied warranty of merchantability must be
6 dismissed. (Doc. No. 34-1 at 20.) Plaintiff retorts that her claim falls under an exception to
7 the privity requirement. (Doc. No. 37 at 22.)

8 A plaintiff asserting breach of warranty claims must stand in vertical contractual
9 privity with the defendant. *Anunziato v. eMachines, Inc.*, 402 F. Supp. 2d 1133, 1141 (C.D.
10 Cal. 2005). A buyer and seller stand in privity if they are in adjoining links of the
11 distribution chain. *Osborne v. Subaru of Am. Inc.*, 198 Cal. App. 3d 646, 656 n.6 (1988).
12 However, some particularized exceptions to this general rule exists. The exception that
13 Plaintiff argues applies is one that arises when a plaintiff relies on written advertisements
14 or labels from the manufacturer. (Doc. No. 37 at 22.)

15 Unfortunately for Plaintiff, the exception she wishes to use is not applicable to her
16 implied warranty of merchantability cause of action. *See Tapia v. Davol, Inc.*, 116 F. Supp.
17 3d 1149, 1159 (S.D. Cal. 2015) (noting that the exception where the purchaser of a product
18 relied on representations made by the manufacturer applies to an express warranty claim);
19 *see also Burr v. Sherwin Williams Co.*, 42 Cal. 2d 682, 696 (1954) ("Another possible
20 exception . . . is found in a few cases where the purchaser of a product relied on
21 representations made by the manufacturer . . . and recovery from the manufacturer was
22 allowed on the theory of express warranty."). Further, Plaintiff's SAC is devoid of any
23 allegations that she and Defendant are in privity. Accordingly, Plaintiff's claim for breach
24 of implied warranty is **DISMISSED**.

25 *v. Breach of Implied Warranty of Fitness*

26 Defendant claims that Plaintiff has failed to identify a "particular purpose" necessary
27 to sustain her claim for breach of implied warranty of fitness. (Doc. No. 34-1 at 21.)
28 Plaintiff opposes Defendant's contentions. (Doc. No. 37 at 23.)

1 To state a claim for breach of implied warranty of fitness, a plaintiff must allege:
2 “(1) the purchaser at the time of contracting intends to use the goods for a particular
3 purpose, (2) the seller at the time of contracting has reason to know of this particular
4 purpose, (3) the buyer relies on the seller’s skill or judgment to select or furnish goods
5 suitable for the particular purpose, and (4) the seller at the time of contracting has reason
6 to know that the buyer is relying on such skill and judgment.” *Frenzel*, 76 F. Supp. 3d at
7 1021. “A particular purpose differs from the ordinary purpose for which the goods are used
8 in that it envisages a specific use by the buyer which is peculiar to the nature of his business
9” *Am. Suzuki Motor Corp. v. Sup. Ct. of L.A. Cnty.*, 37 Cal. App. 4th 1291, 1295 n.2
10 (1995).

11 Based on the allegations in the SAC, the Court finds Plaintiff’s alleged particular
12 purpose and the ordinary purpose of the SneakPeek test to be one in the same. The Court
13 notes that Plaintiff asserts in her SAC that she purchased SneakPeek to determine the
14 gender of her baby. (Doc. No. 21 ¶ 11.) Plaintiff’s SAC then alleges that SneakPeek is
15 advertised as an early detection gender test. (*Id.* ¶ 9.)⁶ The Court finds no material
16 difference between these two purposes. Accordingly, Plaintiff’s claim for breach of implied
17 warranty of fitness is **DISMISSED**. See *Smith v. LG Elec. U.S.A., Inc.*, No. C 13-4351
18 PJH, 2014 WL 989742, at *8 (N.D. Cal. Mar. 11, 2014) (“[P]laintiff has identified no
19 particular purpose for which she purchased the washing machine. She purchased it to wash
20 her laundry, which is the ordinary purpose of the washing machine.”) (internal quotation
21 marks omitted). The Court finds that any further amendment of this claim would be futile.
22 Thus, this claim is dismissed **WITH PREJUDICE**. See *Eminence Capital, LLC v. Aspeon*,

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25 ⁶ Plaintiff in her Opposition argues that the ordinary purpose of SneakPeek is that it is a test with the
26 “statistical probability in correctly identifying the gender of a fetus . . . is based on laboratory testing
27 using property collected maternal blood samples.” (Doc. No. 37 at 23.) Plaintiff then alleges her
28 particular purpose is using this “at home” gender test based on “promised ‘99% accuracy’ of the ‘test’
which includes factors such as the portion of the test where the consumer obtains their own blood and
sends it in for testing.” (*Id.*) The Court finds Plaintiff’s argument not only nonsensical but also
unintelligible.

1 *Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003).

2 *vi. Fraud*

3 All claims of fraud must satisfy the heightened pleading standard of FRCP 9(b).
4 Specifically, the party alleging fraud must include the “who, what, when, where, and how”
5 of the misconduct charged. *Cooper v. Pickett*, 137 F.3d 616, 627 (9th Cir. 1997).
6 Defendant posits that Plaintiff’s claims of fraud are not pled with the particularity required
7 by FRCP 9(b). (Doc. No. 34-1 at 27.) The Court agrees with Defendant.

8 Under California law, the elements of a fraud claim include: (1) misrepresentation;
9 (2) knowledge of falsity; (3) intent to defraud or induce reliance; (4) justifiable reliance;
10 and (5) resulting damages. *Lazar v. Sup. Ct.*, 12 Cal. 4th 631, 638 (1996).

11 Here, similar to Plaintiff’s claims of violations of the UCL, FAL, and CLRA, *supra*
12 pp. 9-10, Plaintiff’s SAC also fails to plead her fraud claim with sufficient particularity
13 pursuant to FRCP 9(b). Although Plaintiff alleges that Defendant’s advertisements about
14 the accuracy of the test were false, and that Defendant’s knew it was false, (Doc. No. 21 ¶
15 49, 51), Plaintiff’s SAC fails to allege when she saw the allegedly fraudulent
16 advertisements, where she saw them, and under what circumstances. Similarly, Plaintiff
17 fails to provide reproductions of Defendant’s advertisements that contain the alleged
18 misrepresentations that serve as the basis of her claim. *See Rosales*, 882 F. Supp. 2d at
19 1175–76. Furthermore, Plaintiff’s SAC is devoid of any facts that demonstrate how
20 Defendant was aware that SneakPeek did not work as advertised, and why and how
21 Plaintiff believes SneakPeek to only be 50% effective. *See Edwards v. Marin Park, Inc.*,
22 356 F.3d 1058, 1066 (9th Cir. 2004) (“To avoid dismissal for inadequacy under Rule 9(b),”
23 a “complaint [must] state the time, place, and specific content of the false representations
24 as well as the identities of the parties to the misrepresentation.”) (internal citation omitted).
25 Consequently, Plaintiff’s vague and limited pleadings fail to meet her burden in alleging
26 fraud with particularity and for this reason, this cause of action is **DISMISSED**.

27 ///

28 ///

1 **V. CONCLUSION**


2 Based on the foregoing, the Court orders as follows:

- 3 (1) The Court **DENIES** Defendant's motion to strike Plaintiff's class definition;
4 (2) **GRANTS** Defendant's motion to dismiss; and
5 (3) **DENIES WITH PREJUDICE** Plaintiff's cause of action for breach of implied
6 warranty of fitness for a particular purpose.

7 Plaintiff is granted **fourteen (14) days** from the date of this Order to file a third amended
8 complaint correcting the deficiencies noted herein. Failure to do so will result in the Court
9 dismissing this case with prejudice.

10
11 **IT IS SO ORDERED.**

12 Dated: April 25, 2017

13 
14 Hon. Anthony J. Battaglia
United States District Judge