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

ROSA ALVAREZ and COLLEEN
LESHER, individually and on behalf
of themselves and all others similarly
situated,

Plaintiffs,

v.

NBTY, INC., *et al.*,

Defendants.

Case No. 17-cv-00567-BAS-BGS

ORDER:

**(1) GRANTING PARTIES’
REQUESTS TO FILE
SUPPLEMENTAL AUTHORITY
(ECF Nos. 28, 29)**

AND

**(2) GRANTING IN PART AND
DENYING IN PART
DEFENDANTS’ MOTION TO
DISMISS (ECF No. 20)**

I. INTRODUCTION

Plaintiffs Rosa Alvarez and Colleen Leshar bring this putative class action lawsuit against Defendants NBTY, Inc. and Nature’s Bounty, Inc. alleging that Defendants misled them and similarly situated consumers by falsely representing health benefits from Defendants’ biotin supplements. They claim that the labels on Defendants’ biotin vitamin supplement products contain false representations in violation of California and Illinois consumer protection laws. Defendants now move to dismiss the First Amended Complaint (ECF No. 15 (“FAC”)). (ECF No. 20 (“Mot.”).) The Court finds this motion suitable for determination on the papers and

1 without oral argument. *See* Fed. R. Civ. P. 78(b); Civ. L.R. 7.1(d)(1). For the reasons
2 stated below, the Court **GRANTS IN PART** and **DENIES IN PART** Defendants’
3 motion to dismiss. (ECF No. 20.)

4 Additionally, both parties filed unopposed ex parte motions for leave to file
5 notices of supplemental authority. (ECF Nos. 28, 29.) Having reviewed these
6 motions and the supplemental case law, the Court **GRANTS** the motions.

7
8 **II. BACKGROUND**

9 Plaintiffs Alvarez and Leshner are individual consumers who purchased biotin
10 vitamin supplements (“Biotin Product” or “Products”) distributed by Defendants,
11 nutritional supplement manufacturing companies. Plaintiffs allege that the
12 representations on the Products’ labels, which state that these products “support[]
13 healthy hair, skin, and nails” and energy, constitute false advertising and violate
14 California and Illinois consumer protection laws. (FAC ¶¶ 1, 11-15.) Specifically,
15 Plaintiffs’ FAC alleges violations of the California’s Unfair Competition Law,
16 Business & Professions Code §§ 17200, *et seq.*, (“UCL”); the Consumer Legal
17 Remedies Act, Civil Code §§ 1750, *et seq.*, (“CLRA”); and the Illinois Consumer
18 Fraud and Business Practices Act, 815 ILCS §§ 502/1, *et seq.* (“ICFA”). (*Id.* at 11-
19 15.)

20 The FAC alleges the following material facts:

21 1. Defendants manufacture, market, sell, and distribute biotin supplements
22 under the Nature’s Bounty brand. The Products at issue are: “Biotin 5000
23 micrograms [“mcg”], SUPER POTENCY Biotin 5000 mcg, QUICK DISSOLVE
24 Biotin 5000 mcg, Biotin 10,000 mcg rapid release softgels, and Biotin 10,000 mcg
25 HEALTH & BEAUTY rapid release liquid.” (FAC ¶¶ 1, 19.) The Products retail for
26 approximately \$10.00 to \$25.00 per container. (*Id.* ¶ 19.)

27 2. The Products’ labels make statements such as the Products “Support[]
28 Healthy Hair, Skin, and Nails” and provide “Energy Support.” (FAC ¶¶ 1, 21.) These

1 representations are false, misleading, and reasonably likely to deceive the public. (*Id.*
2 ¶¶ 1-3, 21-22.)

3 3. The Products’ “mega-dose amounts are far beyond any conceivable
4 range that would ever be beneficial” because the average healthy person is not biotin
5 deficient and because any surplus biotin in the body is not used. (FAC ¶¶ 4, 5-8.)
6 “Once there is sufficient biotin in the body, saturation occurs and the body just does
7 not use this surplus biotin.” (*Id.* ¶ 3.) The Institute of Medicine has set the daily
8 intake for biotin at 30 mcg, and the U.S. population has an average daily biotin intake
9 of 35 mcg to 75 mcg per day from their diet. (*Id.* ¶¶ 3-4.) Thus, the Products are
10 “unneeded and . . . do not support the health of hair, skin, and nails,” nor provide
11 increased energy. (*Id.* ¶¶ 6 8.)

12 4. On numerous occasions from approximately 2014 through 2015,
13 Plaintiff Alvarez relied on the Products’ representations when purchasing
14 Defendants’ Products, specifically the 10,000 mcg “HEALTH & BEAUTY rapid
15 release liquid softgels.” (FAC ¶ 15.) She purchased this product “at several stores in
16 San Diego, California, including CVS, Walgreens and Bed, Bath and Beyond,” and
17 paid approximately \$20.00 for each bottle. (*Id.* ¶ 15.) If she had known the truth
18 about the Products, Plaintiff Alvarez would not have made these purchases. (*Id.* ¶
19 15.) And she stopped purchasing the Products in August 2015 once she learned about
20 the alleged misrepresentations. (*Id.*)

21 5. Plaintiff Leshar was “exposed to, saw, and relied” on Defendants’
22 representations in Illinois and purchased an unspecified Product at retail price.
23 (FAC ¶ 16.) If Plaintiff Leshar had known the Products did not provide the
24 represented health benefits, she would not have purchased the Products. (*Id.* ¶ 16.)

25 Additionally, Plaintiffs seek to represent a multi-state class consisting of all
26 consumers who purchased the Products in California, Illinois, Massachusetts,
27 Michigan, Minnesota, Missouri, New Jersey, New York, and Washington. (FAC ¶
28 23.) Alternatively, Plaintiff Alvarez seeks to represent California consumers of the

1 Products in a California-only class and Plaintiff Lesher seeks to represent an Illinois-
2 only class consisting of Illinois consumers. (*Id.* ¶¶ 24-25.) Plaintiffs seek monetary
3 and injunctive relief. (*Id.* at 15.)

4 On May 26, 2017, Defendants moved to dismiss Plaintiffs’ claims pursuant to
5 the Federal Rules of Civil Procedure 12(b)(1), 12(b)(6), and 9(b). (ECF No. 20.) In
6 their Reply to Plaintiffs’ Opposition to the Motion to Dismiss, Defendants moved to
7 dismiss Plaintiff Lesher’s claims pursuant to Federal Rule of Civil Procedure
8 12(b)(2). (ECF No. 25 (“Reply”).)

9 10 **III. LEGAL STANDARD**

11 A pleading that states a claim for relief must contain “a short and plain
12 statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P.
13 8(a)(2). The complaint must plead sufficient factual allegations to “state a claim to
14 relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)
15 (internal quotation marks and citations omitted). “A claim has facial plausibility
16 when the plaintiff pleads factual content that allows the court to draw the reasonable
17 inference that the defendant is liable for the misconduct alleged.” *Id.*

18 Federal Rule of Civil Procedure 9(b) states that when alleging fraud, a party
19 must “state with particularity the circumstances constituting fraud or mistake.” Rule
20 9(b) requires that the allegations state the “who, what, when, where, and how of the
21 misconduct charged.” *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1124 (9th Cir.
22 2009). When a party does not comply with these requirements, a court must dismiss
23 for failure to state a claim. *Zucco Partners, LLC v. Digimarc Corp.*, 552 F.3d 981,
24 1008 (9th Cir. 2009).

25 Under Federal Rule of Civil Procedure 12(b)(1), a party may move to dismiss
26 an action based on a lack of subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1).
27 “Federal courts are courts of limited jurisdiction.” *Kokkonen v. Guardian Life Ins.*
28 *Co. of Am.*, 511 U.S. 375, 377 (1994). “They possess only that power authorized by

1 Constitution and statute, which is not to be expanded by judicial decree.” *Id.*
2 (citations omitted). “It is to be presumed that a cause lies outside this limited
3 jurisdiction, and the burden of establishing the contrary rests upon the party asserting
4 jurisdiction.” *Id.* (citations omitted). Thus, “[w]hen subject matter jurisdiction is
5 challenged under the Federal Rule of Procedure 12(b)(1), the plaintiff has the burden
6 of proving jurisdiction in order to survive the motion.” *Kingman Reef Atoll Invs.,*
7 *L.L.C. v. United States*, 541 F.3d 1189, 1197 (9th Cir. 2008), quoting *Tosco Corp. v.*
8 *Communities for a Better Env’t*, 236 F.3d 495, 499 (9th Cir. 2001), abrogated on
9 other grounds *Hertz Corp. v. Friend*, 559 U.S. 77 (2010).

10 A defendant may bring a Federal Rule of Civil Procedure 12(b)(2) defense if a
11 court lacks personal jurisdiction over that defendant. When a court lacks general
12 personal jurisdiction over a non-resident defendant, three requirements must exist for
13 a court to exercise specific personal jurisdiction. *See Dole Food Co., Inc. v. Watts*,
14 303 F.3d 1104, 1111 (9th Cir. 2002) (listing the three prong test as (1) a non-resident
15 defendant must purposefully direct his activities or avail himself in the forum state;
16 (2) the claim must arise out of or relate to these forum-related activities; and (3) the
17 exercise of jurisdiction must be reasonable). The plaintiff has the burden to establish
18 the first two prongs while the defendant has the burden to show the third prong has
19 not been met. *See Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 802
20 (9th Cir. 2004). However, a Rule 12(b)(2) defense may be waived if not timely raised
21 by the defendant. Fed. R. Civ. Pro. 12(h); *see ArchitectureArt, LLC v. City of San*
22 *Diego*, 2016 WL 1077124, at *3 n.3 (S.D. Cal. Mar. 18, 2016).

23 A motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil
24 Procedure tests the legal sufficiency of the claims asserted in the complaint. Fed. R.
25 Civ. P. 12(b)(6); *Navarro v. Block*, 250 F.3d 729, 731 (9th Cir. 2001). The court
26 must accept all factual allegations pleaded in the complaint as true and must
27 construe them and draw all reasonable inferences from them in favor of the
28 nonmoving party. *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir.

1 1996). To avoid a Rule 12(b)(6) dismissal, a complaint need not contain detailed
2 factual allegations, rather, it must plead “enough facts to state a claim to relief that
3 is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).
4 “A Rule 12(b)(6) dismissal may be based on either a ‘lack of a cognizable legal
5 theory’ or ‘the absence of sufficient facts alleged under a cognizable legal theory.’”
6 *Johnson v. Riverside Healthcare Sys., LP*, 534 F.3d 1116, 1121 (9th Cir. 2008)
7 (quoting *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir.1990)).

8 9 **IV. DISCUSSION**

10 **A. Request for Judicial Notice**

11 As an initial matter, Defendants request that the Court take judicial notice of
12 two Institute of Medicine reports (the “IOM Reports”): a 2000 report cited by
13 Plaintiffs in the FAC and an updated 2006 version of the same report, which Plaintiffs
14 did not cite. (ECF No. 20-2 at Exs. 1, 2.) Plaintiffs do not oppose this motion.

15 The Court finds that incorporating the IOM Reports into the FAC by reference
16 is more appropriate here than taking judicial notice of the documents. Even if a
17 document is not attached to the complaint, it may be incorporated by reference. *See*
18 *Fed. R. Civ. P. 10(c); United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003) (“[A
19 document] may be incorporated by reference . . . if the plaintiff refers extensively to
20 the document or if the document forms the basis of the plaintiff’s claim”); *Branch v.*
21 *Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994), *overruled on other grounds by Galbraith*
22 *v. County of Santa Clara*, 307 F.3d 1119 (9th Cir. 2002) (“We hold that documents
23 whose contents are alleged in a complaint and whose authenticity no party questions,
24 but which are not physically attached to the pleading, may be considered in ruling on
25 a Rule 12(b)(6) motion to dismiss.”).

26 Because Plaintiffs refer extensively to the 2000 IOM Report in the FAC, and
27 because neither party contests the authenticity of either report, the Court will
28 incorporate the IOM Reports into the FAC by reference.

1 **B. Lack Of Personal Jurisdiction**

2 For the first time in its Reply to Plaintiffs’ Opposition to the Motion to
3 Dismiss, Defendants argue that this Court lacks specific personal jurisdiction over
4 Defendants for the claims alleged by Plaintiff Leshar, a named class representative.
5 (Reply at 7-8 (noting that neither party alleges that the Court has general personal
6 jurisdiction over the non-resident Defendants).) Defendants allege they lack the
7 requisite contacts with California for specific jurisdiction relating to these claims
8 because Plaintiff Leshar is a “[n]onresident consumer[] who did not purchase, ingest,
9 or become injured by the Biotin Products in California.” (*Id.* at 8.) Defendants cite
10 to the recently decided *Bristol-Myers Squibb v. Superior Court of California*, 582 U.S.
11 ____ (2017), 137 S. Ct. 1773 (2017) (“*Bristol-Myers*”) to support their argument. (*Id.*
12 at 7-8.) In the supplemental briefing requested by the Court, Defendants argue that
13 their failure to include a lack of personal jurisdiction defense in their initial motion
14 is excusable because this defense was unavailable until the *Bristol-Myers* decision
15 created new law. *Bristol-Myers* was argued on April 25, 2017 and decided on June
16 19, 2017. In between those dates, Defendants filed their initial Motion to Dismiss
17 on May 26, 2017, and they filed their Reply after the decision on July 17, 2017.

18 In its supplemental briefing, Plaintiff Leshar argues that, as an initial matter,
19 Defendants waived their right to raise a lack of personal jurisdiction defense by not
20 asserting it in their initial briefing.¹ Plaintiff Leshar states that, even though *Bristol-*
21 *Myers* was decided after Defendants’ Motion to Dismiss was filed, this defense was

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¹ Throughout their supplemental briefing, Plaintiff Leshar includes argument relating the Court’s personal jurisdiction over Defendants for claims asserted by Plaintiff Alvarez and the related multi-state class members. (*See, e.g.*, ECF No. 31 at 2, 3-4, 5.) However, Defendants only raise a lack of personal jurisdiction defense for claims asserted by Plaintiff Leshar (Reply at 7-8 (“[T]his Court lacks personal jurisdiction over any claims brought by Plaintiff Leshar, an out-of-state plaintiff, and should dismiss her claims.”)), and the Court only ordered briefing related to this subset of claims (ECF No. 30). Accordingly, the Court will not consider these additional arguments.

1 available to Defendants at the time they filed their motion because *Bristol-Myers*
2 does not affect this case. (*Id.* at 2-4.)

3 Under Federal Rule of Civil Procedure 12(h), it is black letter law that a
4 defendant waives a lack of personal jurisdiction defense when it fails to raise this
5 defense in an initial motion to dismiss. Fed. R. Civ. Pro. 12(h)(1); *see also Glater v.*
6 *Eli Lilly & Co.*, 712 F.2d 735, 738 (1983) (“[Rule 12(h)(1)] provide[s] a strict waiver
7 rule with respect to [the lack of personal jurisdiction] defense. . . . It is clear under
8 this rule that defendants wishing to raise [this] defense[] must do so in their first
9 defensive move, be it a Rule 12 motion or a responsive pleading.”). Accordingly,
10 raising this defense in a reply to an opposition to a motion to dismiss does not cure
11 this deficiency; instead, the defense raised in a reply is deemed waived. *See United*
12 *States v. Anderson*, 472 F.3d 662, 668 (9th Cir. 2006) (recognizing the general
13 principle that arguments raised for the first time in a reply brief are waived);
14 *ArchitectureArt, LLC v. City of San Diego*, 2016 WL 1077124, at *3 n.3 (S.D. Cal.
15 Mar. 18, 2016) (finding that defendants waived various arguments not mentioned in
16 its initial Motion to Dismiss, but instead raised in its Reply). An exception to this
17 strict rule is when such a defense was unavailable to defendants at the time they filed
18 their initial motion. *See Fed. R. Civ. Pro. 12(g); Glater*, 712 F.2d at 738.

19 For the reasons below, the Court finds a lack of personal jurisdiction defense
20 was available to Defendants when they filed their initial briefing.² Accordingly,
21 Defendants waived this defense when they failed to include it in their initial motion.

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23 ² The Court does not dispute that exceptions can apply to the black letter law
24 regarding waiver, but the Court finds the cases cited by Defendants regarding waiver
25 (ECF No. 34 at 1) are distinguishable from this case or support that the defense was
26 waived. *See Hawknet, Ltd. v. Overseas Shipping Agencies*, 590 F.3d 87, 92 (2d Cir.
27 2009) (finding recent case law “overruled precedent” and that any earlier personal
28 jurisdiction defense “would have been directly contrary to controlling precedent”);
Glater, 712 F.2d at 738 (finding a lack of personal jurisdiction defense was originally
unavailable based on insufficient factual allegations in the complaint); *Ridgewood*
Assocs., Inc. v. Trumpower, No. 06-cv-1376 LKK/GGH, 2006 WL 3147439, at *3
(E.D. Cal. Oct. 31, 2006) (holding that defendant did waive a lack of personal
jurisdiction defense because he failed to raise it in his first defensive action, and
including inapplicable analysis on non-waiver relating to a venue transfer).

1 **1. Applicable Law Was Well Settled At Time Of Filing.**

2 First, a lack of personal jurisdiction defense was always available to
3 Defendants because it is well settled law that a defendant can challenge personal
4 jurisdiction relating to each named plaintiff in a class action. *See Abrams Shell v.*
5 *Shell Oil Co.*, 165 F. Supp. 2d 1096, 1107 n.5 (C.D. Cal. 2001) (finding that “it is by
6 now well settled that [personal jurisdiction] requirements to suit must be satisfied
7 for *each and every named plaintiff* for the suit to go forward” as well “each and every
8 named *defendant* must meet jurisdiction and venue criteria”) (emphasis in original)).
9 In fact, when Defendants make this argument in their Reply, they cite to cases
10 decided as early at 1978:

11 [P]ersonal jurisdiction must be obtained over class
12 representatives in a putative class action. *Brailsford v.*
13 *Jackson Hewitt Inc.*, No. C 06 00700 CW, 2007 WL
14 1302978, at *1 (N.D. Cal. May 3, 2007); *In re Gap Stores*
Sec. Litig., 79 F.R.D. 283, 291 (N.D. Cal. 1978).

15 (Reply at 8.) It is difficult to reconcile Defendants’ argument that this defense was
16 unavailable to them before the *Bristol-Myers* decision when they cite to case law that
17 provides otherwise.

18 Moreover, in their supplemental briefing, Defendants discuss two cases to
19 support their argument that a Rule 12(b)(2) defense was unavailable prior to the
20 *Bristol-Myers* decision, but these cases undercut Defendants’ position. (ECF No. 34
21 at 2-3.) In both cases, the defendants included personal jurisdiction defenses in their
22 initial briefs filed months before the *Bristol-Myers* decision. *See* Memorandum in
23 Support of Motion to Dismiss Second Consolidated Class Action Complaint at 4-14,
24 *In re Dental Supplies Antitrust Litigation*, No. 16-cv-696-BMC-GRB, 2017 WL
25 4217115 (E.D.N.Y. Sept. 20, 2017), ECF No. 137 (providing ten pages of argument
26 as to why the court lacked specific personal jurisdiction over a non-resident
27 defendant in a class action); Motion to Dismiss Plaintiffs’ Consolidated Class Action
28 Complaint at 22-24, *Broomfield v. Craft Brew Alliance, Inc.*, No. 17-cv-01027-BLF,

1 2017 WL 3838453 (N.D. Cal. Sept. 1, 2017), ECF No. 16. Thus, while those cases
2 may have considered the *Bristol-Myers* decision, the defendants already raised (and
3 thus did not waive) that available defense.

4 Additionally, neither party disputes that the facts relating to Plaintiff Leshner's
5 claims were available at the time of Defendant's initial motion. *Cf. Glater*, 712 F.2d
6 at 738 (finding a lack of personal jurisdiction defense was originally unavailable
7 when plaintiff failed to adequately plead her domicile).

8 At bottom, as in the cases discussed above, Defendants could have included a
9 personal jurisdiction defense in their initial motion and alerted the Court to the
10 pending decision in *Bristol-Myers* in its motion. In light of the well settled law and
11 clear facts in this case, the Court does not find that a lack of personal jurisdiction
12 defense was unavailable at the time of the initial briefing.

13 14 **2. *Bristol-Myers* Did Not Create New Applicable Law.**

15 Second, it is not clear that *Bristol-Myers* squarely applies to the facts of this
16 case, let alone so drastically change the landscape of applicable law as to excuse
17 Defendants' failure to raise a lack of personal jurisdiction defense. In the eight to
18 one *Bristol-Myers* decision, the Supreme Court held that a California state court
19 lacked specific personal jurisdiction over the claims asserted by 592 out-of-state
20 plaintiffs in a mass tort action with over 600 individual plaintiffs. 137 S.Ct. at 1778,
21 1781-82. Specifically, they found that a defendant's activities supporting personal
22 jurisdiction over one set of claims (a non-resident defendant's in-state activities
23 relating to the in-state plaintiffs) did not confer specific jurisdiction over the same
24 defendant for claims related to other activities (a defendant's out-of-state activities
25 relating to the out-of-state plaintiffs). *Id.* at 1781-82. The majority stated that this
26 holding was a "straightforward application . . . of settled principles of personal
27 jurisdiction" (*id.* at 1783) while only Justice Sotomayor in her dissent stated that this
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1 holding created new law (*id.* at 1789 (Sotomayor, J., dissenting) (concluding her
2 dissent by asserting that “[t]his is not a rule the Constitution has required before”)).

3 Courts have recognized two main distinctions when deciding whether to apply
4 *Bristol-Myers*: first, both the majority opinion and Justice Sotomayor’s dissent make
5 it clear that the holding left open whether the decision applied to federal courts; and
6 second, *Bristol-Myers* applied to a mass tort action with individually named
7 plaintiffs, and not a class action. Since the *Bristol-Myers* decision, courts have both
8 extended and declined to extend its holding in class actions law suits in federal courts.
9 *See, e.g., Fitzhenry-Russell v. Dr. Pepper Snapple Grp., Inc.*, No. 17-CV-00564 NC,
10 2017 WL 4224723, at *4 (N.D. Cal. Sept. 22, 2017) (finding that *Bristol-Myers* could
11 apply to federal courts, though did not apply to class actions).

12 Though *Bristol-Myers* is arguably instructive to federal courts handling class
13 actions, its holding did not create a new defense for Defendants that was not available
14 before its decision. In this case, Defendants argue that the Court lacks personal
15 jurisdiction over them for claims asserted by one of two *named* class representatives.
16 As discussed above, the law on that issue is well-settled, and it differs from any new
17 law *Bristol-Myers* may have created. The Court can see how *Bristol-Myers* may
18 have created a new defense if Defendants asserted for the first time in their Reply
19 that this Court lacked personal jurisdiction over the claims brought by the *unnamed*
20 members to Plaintiff Alvarez’s proposed multi-state class, i.e. Defendants’ in-state
21 activities relating to Plaintiff Alvarez cannot be used to support specific jurisdiction
22 for claims alleged by unnamed out-of-state class members. This factual pattern also
23 more closely resembles the cases where courts have applied *Bristol-Myers*.³ *See*
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25
26 ³ As discussed below, the Court notes that all of the defendants who filed their initial
27 motions before *Bristol-Myers* was decided included a personal jurisdiction defense
28 in their motions. *See* Defendant’s Motion to Dismiss For Failure To State A Claim,
McDonnell, 2017 WL 4864910, ECF No. 50 (filed on June 7, 2017); Defendant’s
Motion to Transfer Venue or for Partial Dismissal of the First Amended Complaint
at 6-9, *Wenokur*, 2017 WL 4357916, ECF No. 31 (filed on April 28, 2017).

1 *McDonnell v. Nature's Way Prod., LLC*, No. 16-cv-5011, 2017 WL 4864910, at *4
2 (N.D. Ill. Oct. 26, 2017) (addressing personal jurisdiction over claims asserted by
3 out-of-state *unnamed* class members who were included in a multi-state class
4 represented by a resident *named* plaintiff); *Wenokur v. AXA Equitable Life Ins. Co.*,
5 No. 17-cv-00165-PHX-DLR, 2017 WL 4357916, at *4 (D. Ariz. Oct. 2, 2017) (citing
6 to *Bristol-Myers* in a footnote to state that the court lacked personal jurisdiction for
7 claims by out-of-state class members, not a class representative); *cf. Fitzhenry-*
8 *Russell*, 2017 WL 4224723, at *4 (declining to extend *Bristol-Myers* to find a lack
9 of personal jurisdiction over claims asserted by unnamed, non-resident class
10 members). However, Defendants have not raised this argument in any of its briefing.

11 Defendants cite to a string of cases to show that courts have extended *Bristol-*
12 *Myers* to class actions, but none of these cases addressed personal jurisdiction for the
13 first time in a reply. (ECF No. 34 at 3.) In fact, all defendants raised personal
14 jurisdiction defenses in their initial briefs, which were filed before *Bristol-Myers*.
15 See Joint Memorandum of Law in Support of Foreign Defendants' Motion to Dismiss
16 All Claims for Lack of Personal Jurisdiction & Venue, *FrontPoint Asian Event*
17 *Driven Fund, L.P.*, 2017 WL 3600425, ECF No. 145 (filed on Nov. 18, 2016);
18 Memorandum in Support of Motion to Dismiss Second Consolidated Class Action
19 Complaint at 4-14, *In re Dental Supplies Antitrust Litig.*, 2017 WL 4217115, ECF
20 No. 137 (filed on Jan. 13, 2017); Motion to Dismiss for Lack of Personal Jurisdiction,
21 *Spratley*, 2017 WL 4023348, ECF No. 49 (filed on Feb. 17, 2017); Defendant's
22 Motion to Transfer Venue or for Partial Dismissal of the First Amended Complaint
23 at 6-9, *Wenokur*, 2017 WL 4357916, ECF No. 31 (filed on April 28, 2017). While
24 some of those cases found *Bristol-Myers* instructive, none of these cases addressed
25 whether *Bristol-Myers* excused the failure to raise a personal jurisdiction defense.⁴

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27 ⁴ Even after analyzing how these cases applied *Bristol-Myers*, they do not support
28 that a new defense was created. These cases either cited *Bristol-Myers* for
established law on personal jurisdiction or applied it to inapplicable facts. See, e.g.,
McDonnell, 2017 WL 4864910, at *4 (addressing personal jurisdiction in relation to

1 *See id.* And nothing in these cases suggests that Defendants could not have raised
2 this defense in its initial motion, which the other defendants did.

3 With or without *Bristol-Myers*, Defendants could have argued that this Court
4 lacks personal jurisdiction over non-resident Defendants for claims asserted by
5 named out-of-state Plaintiff Leshar with out-of-state claims in a class action.
6 Because of their failure to do so, Defendants waived this argument.

8 **C. Standing**

9 **1. Standing for Injunctive Relief**

10 Plaintiffs seek injunctive relief under the UCL, CLRA, and ICFA to enjoin
11 Defendants from engaging in the alleged misrepresentations regarding the Biotin
12 Products. (FAC ¶ 31.) Defendants contend that Plaintiffs lack standing to seek
13 prospective injunctive relief. The Court agrees with Defendants.

14 Article III of the Constitution limits the jurisdiction of the federal courts to
15 actual “cases” and “controversies.” *Clapper v. Amnesty Int’l USA*, 568 U.S. 398,
16 408 (2013). Federal courts require plaintiffs to demonstrate three elements to

18 out-of-state class members); *Wenokur v. AXA Equitable Life Ins. Co.*, No. 17-cv-
19 00165-PHX-DLR, 2017 WL 4357916, at *4 (D. Ariz. Oct. 2, 2017) (finding a lack of
20 personal jurisdiction for claims by out-of-state class members). In one case, a
21 court cited to *Bristol-Myers* only once to dispute the plaintiff’s erroneous use of its
22 holding and affirmed that “the Supreme Court merely applied its ‘settled principles
23 regarding specific jurisdiction’” in *Bristol-Myers*. *FrontPoint Asian Event Driven
24 Fund, L.P. v. Citibank, N.A.*, No. 16-cv-5263-AKH, 2017 WL 3600425, at *6
25 (S.D.N.Y. Aug. 18, 2017). The last case that Defendants cite in this string of cases
26 more closely mirrors the facts here. In *Spratley v. FCA US LLC*, No. 17cv0062-
27 MAD-DEP, 2017 WL 4023348 (N.D.N.Y. Sept. 12, 2017), the defendant, Chrysler,
28 argued that the court lacked the requisite specific personal jurisdiction for the six (out
of nine) named plaintiffs that resided out-of-state. This is analogous to this case
where there is a mix of in-state and one out-of-state *named* plaintiffs. Still, Chrysler
moved to dismiss for lack of personal jurisdiction in February 2017 (*id.* at *1), which
it later supplemented four months later with the *Bristol-Myers* decision (Notice of
Supplemental Authority In Support of Motion to Dismiss at 1, ECF No. 64 (June 19,
2017)). Thus, while *Bristol-Myers* supports finding a lack of personal jurisdiction,
these cases do not show that a new defense was created that Defendants could have
not asserted before its holding.

1 establish that they have “standing” to sue: (1) “injury in fact” that is “concrete and
2 particularized” and “actual and imminent”; (2) the injury must be fairly traceable to
3 defendant’s conduct; and (3) the injury can be redressed through adjudication. *See*
4 *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Where a plaintiff seeks
5 prospective injunctive relief, Article III has been interpreted to require plaintiff to
6 show “a sufficient likelihood that he will again be wronged in a similar way.” *City*
7 *of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983). A plaintiff invoking federal
8 jurisdiction must satisfy the standing requirements of Article III even if the plaintiff
9 only asserts state law claims. *See Birdsong v. Apple, Inc.*, 590 F.3d 955, 960 n.4 (9th
10 Cir. 2009).

11 By their own admission, Plaintiffs face no prospective injury. Plaintiff
12 Alvarez states that she “stopped purchasing Biotin Products . . . when she learned
13 that it did not and could not provide the represented health benefits” (FAC ¶ 15), and
14 both Plaintiffs allege that, had they “known the truth,” they would not have purchased
15 the product. (FAC ¶¶ 15, 16.) Instead, Plaintiffs point to a line of cases that have
16 allowed plaintiffs to sue for injunctive relief despite lack of intent to make another
17 purchase. *See Henderson v. Gruma*, No. 10-cv-04173 AHM (AJWx), 2011 WL
18 1362188 (C.D. Cal. Apr. 11, 2011).

19 This Court previously addressed this issue. Even after considering the policy
20 concerns raised in *Henderson*, this Court determined that:

21 As important as consumer protection may be as a policy
22 matter, the Court cannot lower the threshold for Article III
23 standing based on the imperatives of California’s
24 legislature. It is the Constitution and Congress that
determines the jurisdiction of the federal courts, not the
legislatures of the various states.

25 *Lucas v. Berg*, 212 F. Supp. 3d 950, 964 (S.D. Cal. 2016). Thus, as in *Lucas*,
26 Plaintiffs do not have standing to pursue injunctive relief because there is no threat
27 of future injury, and that relief is similarly unavailable to the proposed class.
28

1 Accordingly, the Court **GRANTS** Defendants’ Motion to Dismiss with respect to
2 Plaintiff’s claims for injunctive relief.

3 4 **2. Standing to Assert Claims on Behalf of Multi-State Class**

5 Defendants argue that Plaintiffs lack standing to assert claims on behalf of a
6 multi-state class for claims under consumer protection laws of states where Plaintiffs
7 neither resided nor purchased the disputed product. Specifically, they argue that
8 Plaintiff Alvarez lacks standing to assert claims on behalf of a multi-state class, and
9 Plaintiff Leshner can only assert ICFA claims on behalf of a class of Illinois consumers
10 who purchased the Products in Illinois. Plaintiffs argue that Plaintiff Alvarez may
11 properly pursue claims on behalf of a multi-state class consisting of states with
12 similar consumer protection statutes under the UCL. Plaintiffs argue further that the
13 conflict-of-law issues raised by a multi-state class is more properly resolved on the
14 motion for class certification. (ECF No. 24, Opp. at 19.)

15 While this Court recognizes that some courts find that standing is best
16 determined at the motion to dismiss stage, the Court declines to do so here. Plaintiff
17 Alvarez has met the threshold standing questions relating to her standing to assert
18 her claims. Thus, this secondary standing analysis relating to Plaintiff Alvarez’s
19 standing as it relates to multi-state class is best left for class certification and after
20 further discovery. *See Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 594 (9th Cir.
21 2012) (holding that a facts and circumstances analysis of each claim should be
22 “governed by the consumer protection laws of the jurisdiction in which the
23 transaction took place” at the class certification stage); *see also Won Kyung Hwand*
24 *v. Ohso Clean, Inc.*, No. 12-cv-06355, 2013 WL 1632697, at *21 (N.D. Cal. Apr. 16,
25 2013) (stating that a detailed choice-of-law analysis is most appropriate at the class
26 certification stage after parties have engaged in discovery).

1 Additionally, Plaintiff Leshar only alleges ICFA claims on behalf of the
2 Illinois-only class. (FAC at 14-15.) Any further issues with the scope of this class
3 are likewise best left to the class certification stage. *See Mazza*, 666 F.3d at 594.

4 Accordingly, Defendants’ motion to dismiss Plaintiffs’ multi-state class
5 claims is **DENIED**, and the Court will evaluate the multi-state class claims at the
6 class certification stage.

7 8 **3. Standing to Assert Claims for Products Not Purchased**

9 Defendants argue that, because Plaintiffs only specifically allege they
10 purchased one of the five products at issue, Plaintiffs lack standing to pursue claims
11 for the Products that they did not purchase. (Mot. at 13-16.)

12 A plaintiff has standing for claims relating to products that she did not
13 purchase if the “products are the same kind, . . . comprised of largely the same
14 ingredients, and . . . bear[] the same alleged mislabeling.” *See Hunter v. Nature’s*
15 *Way Prods., LLC*, No. 16-cv-532-WQH-BLM, 2016 WL 4262188, at *14 (S.D. Cal.
16 Aug. 12, 2016) (quoting *Wilson v. Frito-Lay N. Am.*, 961 F. Supp. 2d 1134, 1140-41
17 (N.D. Cal. 2013)). In other words, a plaintiff has standing when the products and
18 alleged misrepresentations are substantially similar. *Id.* Similarly, in *Vasic v.*
19 *Patenthealth, L.L.C.*, 171 F.Supp. 3d 1034, 1044 (S.D. Cal. 2016), this Court found
20 that when products share the same primary active ingredients, they are substantially
21 similar for purposes of standing to assert claims. *Compare id. with Dysthe v. Basic*
22 *Research LLC*, No. 09-8013 AG (SSx), 2011 WL 5868307, at *4-5 (C.D. Cal. June
23 13, 2011) (finding plaintiffs lacked standing for claims involving products with
24 “significant differences” from the products they purchased).

25 Here, Plaintiffs allege that each of the Biotin Products—whether the 5,000
26 mcg or the 10,000 mcg bottle—contain the same sole active ingredient and include
27 the same claim of false or misleading advertising. (FAC ¶¶ 2, 3-10, 15-16.) Thus,
28

1 because the products and misrepresentations are sufficiently similar, the Court finds
2 that Plaintiffs have standing to assert claims for the various alleged products.

3 Accordingly, the Court **DENIES** Defendants' motion to dismiss as it pertains
4 to Products not purchased by Plaintiffs.

5
6 **D. Lack-of-Substantiation Verses Actual Falsity Claims**

7 Defendants argue that Plaintiffs fail to allege actually false claims, and rather
8 Plaintiffs only allege lack of substantiation claims. Defendants state that these
9 allegations are insufficient to support Plaintiffs' UCL, CLRA, or ICFA claims, and
10 thus they must be dismissed. Defendants further argue that, even if the Court
11 considers Plaintiffs' use of the IOM Reports, these reports contain insufficient
12 information and should not be deemed "scientific literature" that sufficiently support
13 a falsity claim.

14 Private litigants must allege actual falsity or misrepresentation for their UCL,
15 CLRA, and ICFA⁵ claims. *See* Cal. Bus. ¶ Prof. Code § 17200; *Kwan v. SanMedica*
16 *Int'l, LLC*, 854 F.3d 1088, 1095-96 (9th Cir. 2017); *cf. Nat'l Council Against Health*
17 *Fraud, Inc. v. King Bio Pharms. Inc.*, 107 Cal. App. 4th 1336, 1345 (2003) (finding
18 only prosecuting authorities have the power to request advertisers to substantiate
19 advertising claims). Courts have noted that there is an intuitive difference "between
20 a claim that has no evidentiary support one way or the other and a claim that's
21 actually been disproved." *Eckler v. Wal-Mart Stores, Inc.*, No. 12-cv-727-LAB-

22
23 ⁵ The ICFA requires a similar standard as the UCL regarding pleading actually false
24 claims. *See Spector v. Mondelez Int'l, Inc.*, No. 15C4298, 2017 WL 4283711 (N.D.
25 Ill. Sept. 27, 2017) (stating that a plaintiff must plead a "reasonable, as opposed to a
26 speculative, inference" that advertisements are actually false) (emphasis in original).
27 Additionally, if a plaintiff has successfully stated a claim under the fraudulent prong
28 of the UCL, plaintiff has also sufficiently stated a claim under the CLRA. *See Elias*
v. Hewlett-Packard Co., 903 F.Supp 2d 843, 854 (N.D. Cal. 2012) (noting that the
CLRA and the fraudulent prong of the UCL apply the same standard and that "courts
often analyze these [two] statutes together.").

1 MDD, 2012 WL 5382218, at *3 (S.D. Cal. Nov. 1, 2012) (concluding that studies
2 “debunk[ing]” the purported health claims at issue support a claim of actual falsity).
3 The Ninth Circuit recently affirmed that plaintiffs must plead actual falsity, and
4 found that plaintiffs could do so by citing to “testing, scientific literature, or anecdotal
5 evidence.” *Kwan*, 854 F.3d at 1096-98 (quoting *King Bio Pharm., Inc.*, 107 Cal.
6 App. 4th at 1348). Additionally, *Kwan* find that plaintiffs could use this type of
7 evidence to sufficiently show that an advertised claim was impossible to achieve, and
8 thus false. *Id.* at 1091-92, 1096-98.

9 Here, Plaintiffs allege that the Products’ representations are actually false
10 because the majority of people cannot use an excessive amount of biotin, prohibiting
11 the Products from providing any benefits. Though the 2000 IOM Report cited by
12 Plaintiffs does not state specifically that the body can only absorb 30 mcg of biotin,
13 Plaintiffs argue that the report supports their allegations by showing that the body
14 does not require more than 30 mcg of biotin per day, let alone the 5,000 to 10,000
15 mcg of biotin provided in the Biotin Products. Thus, Plaintiffs allege that scientific
16 principles in the 2000 IOM Report supports that it is medically impossible to achieve
17 the Products’ advertised health benefits, and are, in turn, false.

18 The Court finds that Plaintiffs have adequately pled that the advertised claims
19 are actually false. While more scientific evidence in support of this claim may be
20 necessary going forward, the Court finds that the allegations are sufficient to survive
21 the motion to dismiss stage, and **DENIES** the motion to dismiss on this ground.

22 23 **E. Sufficient Pleading for Fraud Claims**

24 Defendants argue that Plaintiffs fail to plead their fraud claims with sufficient
25 particularity, especially for Plaintiff Leshar. (Reply at 9.) Plaintiffs dispute this
26 argument and state both Plaintiffs sufficiently plead their claims.

27 UCL, CLRA, and ICFA claims of fraudulent misrepresentation in labelling
28 sound in fraud and require the heightened pleading standard under Federal Rule of

1 Civil Procedure 9(b). *See Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125 (9th Cir.
2 2009) (stating heightened pleading applies to UCL and CLRA claims); *Camasta v.*
3 *Jos. A Bank Clothiers, Inc.*, 761 F.3d 732, 737 (7th Cir. 2014) (finding the heightened
4 Rule 9(b) pleading standard applies to ICFA claims). Rule 9(b) requires a plaintiff
5 to “state with particularity the circumstances constituting fraud,” and fraud claims
6 must include the “who, what, when, where, and how” of the fraudulent activity. *See*
7 *Kearns*, 567 F.3d at 1125; *see also Pom Wonderful LLC v. Ocean Spray Cranberries,*
8 *Inc.*, 642 F.Supp. 2d 1112, 1124 (C.D. Cal. 2009) (holding that plaintiff adequately
9 pled false advertising claims with particularity when the complaint alleged how the
10 drink was labelled and what was misleading about the label).

11 The Court finds that Plaintiff Alvarez has adequately pled her fraud claims,
12 but Plaintiff Lesher has not. Plaintiff Alvarez sufficiently pleads “who, what, when,
13 where, and how” elements of the fraud by alleging the specific product she purchased
14 and specific product label she relied on, listing at least three stores in San Diego
15 County where she bought the products, providing a sufficient time frame for when
16 she made these purchases (including the month and year when she learned of the
17 allegedly false information), submitting examples and pictures of the labels she saw,
18 explaining what was misleading about the labels, and alleging she would not have
19 purchased the products had they known the truth. While all of this information may
20 not be necessary, it sufficiently provides enough information for Defendants to
21 defend this fraud claim. *See Concha v. London*, 62 F.3d 1493, 1502 (9th Cir.1995)
22 (“Without such specificity, defendants in [fraud] cases would be put to an unfair
23 advantage, since at the early stages of the proceedings they could do no more than
24 generally deny any wrongdoing.”). Conversely, Plaintiff Lesher only provides a few
25 vague factual allegations relating to her purchase of the Products. She states she
26 resided in St. Charles, IL during “the relevant time period” (but does not provide
27 these dates); was “exposed to, saw, and relied on” the representations on “the Product
28 label in Illinois” (but does not provide a county, city, and/or store name); and

1 purchased the Product (but does not provide any information about where or how she
2 purchased the Product). Importantly, nowhere in the FAC does Plaintiff Lesher
3 identify which “Product” label she saw or which “Product” she purchased. This type
4 of pleading is insufficient, and fails to provide the “who, what, when, where, and
5 how” elements of Plaintiff Lesher’s fraud claims. *See Kearns*, 567 F.3d at 1126
6 (dismissing fraud claims when plaintiff failed to allege the particular circumstances
7 surrounding his fraud claims); *Camasta*, 761 F.3d at 738 (“By requiring the plaintiff
8 to allege the who, what, where, and when of the alleged fraud, the rule requires the
9 plaintiff to conduct a precomplaint investigation in sufficient depth to assure that the
10 charge of fraud is responsible and supported, rather than defamatory and
11 extortionate.” (quoting *Ackerman v. Nw. Mutual Life Ins. Co.*, 172 F.3d 467, 469 (7th
12 Cir.1999)).


13 Accordingly, the Court **DENIES** the motion to dismiss on this ground for
14 Plaintiff Alvarez’s claims and **GRANTS WITH LEAVE TO AMEND** the motion
15 to dismiss on this ground for Plaintiff Lesher’s claims.

16 17 **V. CONCLUSION**

18 For the foregoing reasons, Defendants’ Motion to Dismiss is granted in part
19 and denied in part. Specifically, the Court **GRANTS** the motion with regard to the
20 claims for prospective injunctive relief, **GRANTS WITH LEAVE TO AMEND**
21 Plaintiff Lesher’s claims, and **DENIES** the motion with regard to the remaining
22 claims. Accordingly, Plaintiffs may file a Second Amended Complaint that only
23 provides additional factual allegations relating to Plaintiff Lesher’s purchases of the
24 Products in support of her fraud claims **no later than December 20, 2017.**

25 **IT IS SO ORDERED.**

26
27 **DATED: December 6, 2017**

28

Hon. Cynthia Bashant
United States District Judge