

1 BRYAN A. MERRYMAN (SBN 134357)
bmerryman@whitecase.com
2 KATHERINE GODAR (SBN 343096)
katherine.godar@whitecase.com
3 WHITE & CASE LLP
555 South Flower Street, Suite 2700
4 Los Angeles, CA 90071-2433
Telephone: (213) 620-7700
5 Facsimile: (213) 452-2329

6 Attorneys for Defendant
GERBER PRODUCTS COMPANY
7

8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA
10 OAKLAND DIVISION
11

12 FAITH NORMAN, individual, on behalf of
herself and others similarly situated,

13 Plaintiff,

14 v.
15

16 GERBER PRODUCTS COMPANY,
17 Defendant.

Case No. 4:21-cv-09940-JSW

**DEFENDANT GERBER PRODUCTS
COMPANY'S MOTION TO DISMISS
PLAINTIFF'S FIRST AMENDED
COMPLAINT; AND MEMORANDUM
OF POINTS AND AUTHORITIES**

[Request for Judicial Notice Filed
Concurrently]

Date: May 20, 2022
Time: 9:00 a.m.
Place: Courtroom 5
Judge: Hon. Jeffrey S. White

NOTICE OF MOTION AND MOTION TO DISMISS

NOTICE IS HEREBY GIVEN that on May 20, 2022, at 9:00 a.m., or as soon thereafter as this motion may be heard, in the United States District Court, Northern District of California, Oakland Division, in Courtroom 5, before the Honorable Jeffrey S. White, defendant Gerber Products Company (“Gerber”) will and hereby does move the Court for an order dismissing plaintiff Faith Norman’s (“Plaintiff”) First Amended Complaint (“FAC”), and each claim alleged therein, without leave to amend, pursuant to Federal Rules of Civil Procedure 8, 9(b), 12(b)(1), and 12(b)(6).

Gerber moves the Court to dismiss the FAC on the following grounds: (1) Plaintiff predicates some allegations entirely upon generalized statistics and processes without alleging facts specific to Gerber; (2) Plaintiff’s added allegation specific to one Gerber product relates only to one category of claims and does not render that category of claims sufficiently pled; (3) Plaintiff fails to plausibly allege a reasonable consumer would be misled by Gerber’s label; (4) Plaintiff fails to plausibly allege a reasonable consumer would share her interpretation of genetically modified organisms; (5) Plaintiff fails to plausibly define genetically modified organisms; and (6) Plaintiff alleges the same theory of liability for her common law claims, which fails to plausibly allege a reasonable consumer is likely to be deceived by Gerber’s label. Gerber respectfully requests the Court dismiss all of Plaintiff’s claims.

This motion is based on this notice of motion, the memorandum of points and authorities, the request for judicial notice, the pleadings and documents on file in this lawsuit, and argument and other matters as may be presented to the Court at the hearing.

STATEMENT OF THE ISSUES TO BE DECIDED

1. **Federal Rule of Civil Procedure 8’s Pleading Requirements.** Does Plaintiff state a claim when some of her allegations rely solely on generalized statistics and processes without alleging facts specific to Gerber’s products or manufacturing practices? Does one allegation specific to one Gerber product render the relevant category of claims sufficiently pled?
2. **Federal Rule of Civil Procedure 9(b)’s Pleading Requirements.** Because Plaintiff’s claims “sound in fraud,” do they meet Rule 9(b)’s

heightened pleading standard?

3. **Standing For Equitable Relief.** Does Plaintiff have standing to sue for equitable relief when she does not allege she lacks an adequate remedy at law?
4. **UCL/FAL/CLRA.** If Plaintiff does not plausibly allege a reasonable consumer would be misled by Gerber's "NON GMO" claim, does she state a claim under Cal. Bus. & Prof. Code §§ 17200 and 17500, or Cal. Civ. Code § 1750? If Plaintiff's definition of "GMO" is implausible, does she state a claim under Cal. Bus. & Prof. Code §§ 17200 and 17500, or Cal. Civ. Code § 1750?
5. **Standing For Products Not Purchased.** Does Plaintiff have standing to assert claims based on products she did not purchase, particularly when the product purchased and the products not purchased are not "substantially similar?"
6. **Unjust Enrichment.** Is there a cause of action in California for unjust enrichment? If so, is Plaintiff's unjust enrichment claim duplicative and therefore barred when it is supported by the same misrepresentation theory underlying her statutory claims? Does Plaintiff state an unjust enrichment claim when she does not allege she lacks an adequate remedy at law?

Dated: April 14, 2022

WHITE & CASE LLP

By: /s/ Bryan A. Merryman
Bryan A. Merryman

Attorneys for Defendant
GERBER PRODUCTS COMPANY

TABLE OF CONTENTS

| | <u>Page(s)</u> |
|--|-----------------------|
| I. INTRODUCTION AND SUMMARY OF ARGUMENT | 1 |
| II. FACTUAL BACKGROUND | 2 |
| III. THE COURT SHOULD DISMISS THE FIRST AMENDED COMPLAINT | 2 |
| A. Plaintiff Lacks Standing to Sue for Equitable Relief | 2 |
| B. Plaintiff's Claims are Pled Insufficiently | 3 |
| C. Plaintiff's Claims Based on Ingredients Allegedly Genetically Engineered in a Laboratory Setting Through the Use of Biotechnologies (Category (2)) and Ingredients Sourced from Animals Raised on GMO Feed (Category (3)) Fail | 5 |
| 1. Gerber's "NON GMO" Stamp is Unlikely to Deceive a Reasonable Consumer | 6 |
| a. A Reasonable Consumer Would Not Interpret Gerber's "NON GMO" Claim to be the Same as the Non-GMO Project's | 6 |
| b. Plaintiff's Definition of GMO is Implausible | 9 |
| 2. Plaintiff Lacks Standing For Claims Based on Ingredients Allegedly Derived from Animals Raised on GMO Feed (Category (3)) Because She Does Not Allege She Purchased a Gerber Product Containing Animal Byproducts | 11 |
| D. Plaintiff's Claim under the UCL's "Unlawful" Prong Should Be Dismissed Because She Fails To Establish a Predicate Violation of Law | 13 |
| E. Plaintiff's Claim under the UCL's "Unfair" Prong Should Be Dismissed Because She Fails To Plausibly Allege False or Misleading Conduct | 13 |
| F. Plaintiff Fails to State Breach of Warranty Claims | 14 |
| G. Plaintiff Fails to Plead Fraud | 14 |
| H. Plaintiff Fails to State an Unjust Enrichment / Restitution Claim | 15 |
| IV. CONCLUSION | 16 |

TABLE OF AUTHORITIES**Page(s)****CASES**

| | |
|---|--------|
| <i>Ault v. J.M. Smucker Co.</i> , No. 13 Civ. 3409 (PAC), 2014 U.S. Dist. LEXIS 67118 (S.D.N.Y. May 5, 2014)..... | 5 |
| <i>Baranco v. Ford Motor Co.</i> , 294 F. Supp. 3d 950 (N.D. Cal. Mar. 12, 2018)..... | 7 |
| <i>Berryman v. Merit Prop. Mgmt., Inc.</i> , 152 Cal. App 4th 1544 (2007) | 13 |
| <i>Brockey v. Moore</i> , 107 Cal. App. 4th 86 (2003) | 8 |
| <i>In re Cal. Gasoline Spot Mkt. Anitrust Litig.</i> , No. 20-cv-03131-JSC, 2021 U.S. Dist. LEXIS 59875 (N.D. Cal. Mar. 29, 2021)..... | 3 |
| <i>Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co.</i> , 20 Cal. 4th 163 (1999) | 13, 14 |
| <i>Davis v. HSBC Bank Nev., N.A.</i> , 691 F.3d 1152 (9th Cir. 2012)..... | 8 |
| <i>Decker v. GlenFed, Inc.</i> , 42 F.3d 1541 (9th Cir. 1994)..... | 15 |
| <i>Elias v. Hewlett-Packard Co.</i> , 950 F. Supp. 2d 1123 (N.D. Cal. 2013) | 13 |
| <i>Figy v. Frito-Lay N. Am., Inc.</i> , 67 F. Supp. 3d 1075 (2014)..... | 12 |
| <i>Freeman v. Time, Inc.</i> , 68 F.3d 285 (9th Cir. 1995)..... | 8 |
| <i>Gallagher v. Chipotle Mexican Grill</i> , No. 15-cv-03952-HSG, 2016 U.S. Dist. LEXIS 14479 (N.D. Cal. Feb. 5, 2016)..... | 10, 11 |
| <i>Gordon v. Target Corp.</i> , No. 20-CV-9589 (KMK), 2022 U.S. Dist. LEXIS 48769 (S.D.N.Y. Mar. 18, 2022) | 6, 7 |
| <i>Granfield v. Nvidia Corp.</i> , No. C 11-05403 JW, 2012 U.S. Dist. LEXIS 98678 (N.D. Cal. July 11, 2012)..... | 12 |
| <i>Gunaratna v. Dennis Gross Cosmetology LLC</i> , No. CV 20-2311-MWF, 2020 U.S. Dist. LEXIS 249995 (C.D. Cal. Nov. 13, 2020) | 12 |

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.