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4 FAITH NORMAN,
5 Plaintiff,
6 v.
7 GERBER PRODUCTS COMPANY,
8 Defendant.
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10 Case No. 21-cv-09940-JSW
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13 **ORDER GRANTING, IN PART, AND
14 DENYING, IN PART, DEFENDANT'S
15 MOTION TO DISMISS, WITH LEAVE
16 TO AMEND, AND SETTING CASE
17 MANAGEMENT CONFERENCE**

18 Re: Dkt. No. 30

19 Now before the Court for consideration is Gerber Products Company's ("Defendant")
20 motion to dismiss Faith Norman's ("Plaintiff") First Amended Complaint ("FAC"). The Court
21 has considered the parties' papers, relevant legal authority, and the record in this case, and it
22 hereby GRANTS, IN PART, and DENIES, IN PART, Defendant's motion to dismiss, with leave
23 to amend.

24 **BACKGROUND**

25 Defendant manufactures and sells baby food and infant formula nationwide. (FAC ¶ 9.) In
26 2021, Plaintiff purchased Defendant's Gerber Good Start Soy 2 Powder Infant & Toddler Formula
27 from various retail stores in San Jose. (*Id.* ¶¶ 7, 44.) The product Plaintiff purchased included the
28 graphic depicted below on the front of the packaging (the "Image"):



1 In addition to the product she purchased, Plaintiff challenges the labelling on a number of
2 other products (the “Products”), which also include the Image on the front of the packaging. (*Id.* ¶
3 4.) On at least some of the Products, the Defendant includes the following statement on the rear of
4 the packaging above the ingredients list: “NON GMO Not Made With Genetically Engineered
5 Ingredients” (the “Statement”). (*See id.* ¶ 44; *see also e.g.*, ¶¶ 45-46.)¹ The Court refers to the
6 Image and the Statement collectively as the “Non GMO Claim.”

7 Plaintiff brings this putative class action to challenge Defendant’s Non GMO Claim on its
8 Products. (*Id.* ¶ 1.) Plaintiff alleges that although Defendant uses the Non GMO Claim, the
9 Products actually contain ingredients derived from genetically modified food sources and are,
10 therefore, not non-GMO. (*Id.* ¶ 3.) Plaintiff alleges she “reviewed the labeling, packaging, and
11 marketing materials of her Products and saw the . . . claims that . . . the Products are purportedly
12 ‘Non-GMO’” in deciding whether to purchase the Products. (*Id.* ¶ 7.) Plaintiff believed the
13 Products did not contain genetically modified ingredients or ingredients sourced from animals
14 derived on GMO feed and alleges she would not have purchased the Products if she had known
15 the truth. (*Id.*)

16 Plaintiff alleges nine causes of action against Defendant: (1) violation of California’s
17 Unfair Competition Law (“UCL”), Business and Professions Code sections 17200, *et seq.*; (2)
18 violation of California’s False Advertising Law (“FAL”), Business and Professions Code sections
19 17500, *et seq.*; (3) violation of California’s Consumers Legal Remedies Act (“CLRA”), Civil
20 Code sections 1750, *et seq.*; (4) breach of express warranty; (5) breach of the implied warranty of
21 merchantability; (6) unjust enrichment/restitution; (7) negligent misrepresentation; (8) fraud; and
22 (9) fraudulent misrepresentation. (*Id.* ¶ 6.)

23 The Court will address additional facts as necessary in the analysis.

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26 ¹ Plaintiff has not included a photograph of the rear side of the packaging for each Product
27 she is challenging and, instead, includes images of the ingredient lists. However, it is possible to
28 see portions of the Statement on many of the photographs Plaintiff has included in the FAC.
(*Compare* FAC ¶¶ 44-46, *with id.* ¶¶ 49-51, 54-56.)

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ANALYSIS

2 A. Applicable Legal Standards.

3 Under Federal Rule of Civil Procedure 12(b)(1)², a district court must dismiss a complaint
4 if it lacks subject matter jurisdiction to hear the claims alleged in the complaint. Fed. R. Civ. P.
5 12(b)(1). In order for a district court to have subject matter jurisdiction over a plaintiff's claims, a
6 plaintiff must present a live case or controversy, as required by Article III of the U.S. Constitution.
7 See U.S. Const. art. III section 2, cl. 1. In order for there to be a case or controversy within the
8 meaning of Article III, a plaintiff must have standing to pursue their claims.

9 A motion to dismiss is proper under Rule 12(b)(6) where the pleadings fail to state a claim
10 upon which relief can be granted. A court's "inquiry is limited to the allegations in the complaint,
11 which are accepted as true and construed in the light most favorable to the plaintiff." *Lazy Y*
12 *Ranch Ltd. v. Behrens*, 546 F.3d 580, 588 (9th Cir. 2008). Even under the liberal pleading
13 standard of Rule 8(a)(2), "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to
14 relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a
15 cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citing
16 *Papasan v. Allain*, 478 U.S. 265, 286 (1986)).

17 Pursuant to *Twombly*, a plaintiff cannot merely allege conduct that is conceivable but must
18 instead allege "enough facts to state a claim to relief that is plausible on its face." *Id.* at 570. "A
19 claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw
20 the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*,
21 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 556). "The plausibility standard is not
22 akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant
23 has acted unlawfully." *Id.* (quoting *Twombly*, 550 U.S. at 556).

24 Where, as here, a plaintiff asserts a claim sounding in fraud, the plaintiff must "state with
25 particularity the circumstances regarding fraud or mistake." Fed. R. Civ. P. 9(b). A claim sounds
26 in fraud if the plaintiff alleges "a unified course of fraudulent conduct and rel[ies] entirely on that

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2 Unless otherwise noted, all further citations to a "Rule" are to the Federal Rules of Civil

1 course of conduct as the basis of a claim.” *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1103
2 (9th Cir. 2003). The particularity requirement of Rule 9(b) is satisfied if the complaint “identifies
3 the circumstances constituting fraud so that a defendant can prepare an adequate answer from the
4 allegations.” *Moore v. Kayport Package Exp., Inc.*, 885 F.2d 531, 540 (9th Cir. 1989); *see also*
5 *Vess*, 317 F.3d at 1106. Accordingly, “[a]verments of fraud must be accompanied by ‘the
6 who, what, when, where, and how’ of the misconduct charged.” *Vess*, 317 F.3d at 1106
7 (quoting *Cooper v. Pickett*, 137 F.3d 616, 627 (9th Cir. 1997)).

8 If the allegations are insufficient to state a claim, a court should grant leave to amend
9 unless amendment would be futile. *See, e.g., Reddy v. Litton Indus., Inc.*, 912 F.2d 291, 296 (9th
10 Cir. 1990); *Cook, Perkiss & Liehe, Inc. v. Northern Cal. Collection Serv. Inc.*, 911 F.2d 242, 246-
11 47 (9th Cir. 1990). If a plaintiff has previously amended a complaint, a court has “broad”
12 discretion to deny leave to amend. *Allen v. City of Beverly Hills*, 911 F.2d 367, 373 (9th Cir.
13 1990) (quoting *Ascon Props., Inc. v. Mobil Oil Co.*, 866 F.2d 1149, 1160 (9th Cir. 1989)).

14 **B. Standing.**

15 **1. Plaintiff’s allegations are not sufficient to establish standing to seek equitable
16 restitution.**

17 Defendant moves to dismiss Plaintiff’s claim for equitable restitution on the basis that she
18 does not allege she lacks an adequate remedy at law. It is well-established that claims for relief
19 under the FAL and the UCL are limited to restitution and injunctive relief. *See, e.g., Korea Supply*
20 *Co. v. Lockheed Martin Corp*, 29 Cal. 4th 1134, 1146-49 (2003). In contrast, the CLRA provides
21 for equitable relief and for damages. In *Sonner v. Premier Nutrition Corporation*, the Ninth
22 Circuit held “that the traditional principles governing equitable remedies in federal courts,
23 including the requisite inadequacy of legal remedies, apply when a party requests restitution under
24 the UCL and CLRA in a diversity action.” 971 F.3d 834, 843-44 (9th Cir. 2020).

25 Here, Plaintiff fails to allege that she lacks an adequate remedy at law for her restitution
26 claim. Plaintiff alleges that she “may lack an adequate remedy at law, if for instance, damages
27 resulting from her purchase of the Product is determined to be in an amount less than the premium
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1 how restitution would go beyond the damages available to her. Plaintiff fails to allege any specific
2 facts showing that damages are “inadequate or incomplete.” *Sonner*, 971 F.3d at 844; *see also*
3 *Nacarino v. Chobani, LLC*, No. 20-cv-07437-EMC, 2021 WL 3487117, at *12 (N.D. Cal. Aug. 9,
4 2021). Further, Plaintiff’s allegations are conditional because Plaintiff claims she “may” lack an
5 adequate remedy at law “if” damages are less than restitution. *See, e.g., Johnson v. Trumpet*
6 *Behavioral Health, LLC*, No. 3:21-cv-03221-WHO, 2022 WL 74163, at *3 (N.D. Cal. Jan. 7,
7 2022) (concluding conditional allegations insufficient to plead that plaintiffs actually lacked an
8 adequate remedy of law). Plaintiff’s allegations are not enough to meet *Sonner*’s rule because
9 Plaintiff does not allege she lacks adequate legal remedies. Instead, as in *Johnson*, Plaintiff
10 alleges she “seek[s] equitable relief *to the extent* legal remedies are inadequate or *if* legal remedies
11 are inadequate.” *Id.* (emphasis in original).

12 Accordingly, the Court GRANTS Defendant’s motion to dismiss Plaintiff’s claim for
13 equitable restitution.³ Because it is possible that Plaintiff could plead that she lacks an adequate
14 remedy at law, the Court GRANTS Plaintiff leave to amend.

15 **2. Plaintiff’s allegations are sufficient to establish standing to seek injunctive
16 relief.**

17 In addition to seeking restitution, Plaintiff seeks prospective injunctive relief. In *Zeiger v.
18 WellPet LLC*, the court reasoned that damages for past harm were not an adequate remedy for
19 prospective harm caused by alleged false advertising because damages “would [not] ensure that
20 [the plaintiff] (and other consumers) can rely on WellPet’s representations in the future.” 526 F.
21 Supp. 3d 652, 687 (N.D. Cal. 2021); *see also Adams v. Cole Haan, LLC*, No. 8:20-CV-00913-
22 JWH-DFMx, 2021 WL 4907248, at *4 (C.D. Cal. Mar. 1, 2021) (finding monetary damages
23 “would not necessarily be sufficient to remedy” harm from alleged false advertising).

24 Plaintiff alleges that she lacks an adequate remedy at law because absent an injunction,

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26 ³ Plaintiff’s claim for unjust enrichment also seeks equitable restitution. (FAC ¶ 152.) As
27 discussed above, Plaintiff fails to demonstrate that she lacks an adequate remedy at law for her
28 restitution claim. Accordingly, the Court GRANTS Defendant’s motion to dismiss Plaintiff’s
claim for unjust enrichment.

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