

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

FAITH NORMAN,  
Plaintiff,

v.

GERBER PRODUCTS COMPANY,  
Defendant.

Case No. 21-cv-09940-JSW

**ORDER GRANTING, IN PART, AND  
DENYING, IN PART, DEFENDANT'S  
MOTION TO DISMISS, WITH LEAVE  
TO AMEND, AND SETTING CASE  
MANAGEMENT CONFERENCE**

Re: Dkt. No. 30

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

**BACKGROUND**

Defendant manufactures and sells baby food and infant formula nationwide. (FAC ¶ 9.) In 2021, Plaintiff purchased Defendant's Gerber Good Start Soy 2 Powder Infant & Toddler Formula from various retail stores in San Jose. (*Id.* ¶¶ 7, 44.) The product Plaintiff purchased included the 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.)<sup>1</sup> 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.

24  
25  
26 <sup>1</sup> 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.)

## ANALYSIS

## A. Applicable Legal Standards.

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

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

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

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

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

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

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

## **B. Standing.**

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

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

Here, Plaintiff fails to allege that she lacks an adequate remedy at law for her restitution claim. Plaintiff alleges that she “may lack an adequate remedy at law, if for instance, damages resulting from her purchase of the Product is determined to be in an amount less than the premium

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.<sup>3</sup> 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,  
 25

26 <sup>3</sup> 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  
 29 claim for unjust enrichment.

# 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.