

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

DEREK SNARR, et al.,
Plaintiffs,
v.
CENTO FINE FOODS INC.,
Defendant.

Case No. [19-cv-02627-HSG](#)

**ORDER ON DEFENDANT'S MOTION
TO DISMISS**

Re: Dkt. No. 40

Pending before the Court is Defendant’s motion to dismiss Plaintiffs’ Amended Complaint, for which briefing is complete. Dkt. No. 40 (“Mot.”), 45 (“Opp.”), 51 (“Reply”). For the reasons articulated below, the Court **DENIES** Defendant’s motion to dismiss.

I. BACKGROUND

On July 22, 2019, Lead Plaintiffs Derek Snarr, J. Michael Duca, and Candace Goulette filed an amended class action complaint on behalf of a putative California and nationwide class, alleging violations of California’s Unfair Competition Law (“UCL”), Consumers Legal Remedies Act (“CLRA”), and False Advertising Law (“FAL”), as well as two common law claims. Dkt. No. 39 (“FAC”). Plaintiffs’ claims are based on Defendant Cento Fine Foods, Inc.’s packaging and labeling representations regarding its “Certified San Marzano” tomato products (the “Products”). *Id.* ¶ 1.

According to Plaintiffs, “[t]he term ‘San Marzano’ refers to canned tomatoes unique to a specific region of Italy which have been grown, harvested, and processed according to specific guidelines.” *Id.* ¶ 20. The tomatoes must be grown specifically in the “Agro Sarnese-Nocerino” region of Campania, Italy and “must have a Denominazione di Origine Protetta (“D.O.P.”) marking” from the Consortium, which is “the only entity which can certify and approve a San Marzano tomato.” *Id.* ¶¶ 22–26.

1 Lead Plaintiffs each allege that they purchased at least one Cento “Certified San Marzano”
2 Product from a grocery store in 2019, relying on the “Certified” marking on Defendant’s label.
3 *See id.* ¶¶ 75–76, 79, 81, 86, 88. Because Defendant’s Products do not have a D.O.P. marking nor
4 meet other criteria of “true San Marzano tomatoes,” Plaintiffs allege that “Defendant’s Products
5 are not ‘San Marzano tomatoes,’ “despite the Product packaging, which indicates to reasonable
6 consumers that the tomatoes contained in Defendant’s Products are authentic San Marzano
7 tomatoes.” *Id.* ¶ 54. Specifically, Plaintiffs allege that “Defendant attempts to confuse consumers
8 by stating that its tomatoes are grown in the Campania region of Italy” and by stating “that its
9 production facility is located in the Sarnese-Nocerino region,” because it is specifically the Agro
10 Sarnese-Nocerino region where true San Marzano tomatoes must be grown. *Id.* ¶¶ 48–49.
11 Additionally, Defendant’s use of the word “Certified” on the label “does not disclose that the
12 [Product] is not, in fact, a certified D.O.P. ‘San Marzano’ tomato.” *Id.* ¶ 63.

13 Based on these facts, Plaintiffs assert the following five causes of action against
14 Defendant: (1) California Business and Professional Code section 17200 (UCL); (2) California
15 Civil Code section 1750 (CLRA); (3) California Business and Professional Code section 17500
16 (FAL); (4) unjust enrichment; and (5) breach of express warranty. *Id.* ¶ 18–23.

17 **II. REQUEST FOR JUDICIAL NOTICE**

18 Before turning to the substance of the motion, the Court considers Defendant’s request that
19 the Court take judicial notice of seven documents under the doctrine of incorporation by reference.
20 Dkt. No. 41. “[A] defendant may seek to incorporate a document into the complaint ‘if the
21 plaintiff refers extensively to the document or the document forms the basis of the plaintiff’s
22 claim.’” *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 999 (9th Cir. 2018) (quoting *United*
23 *States v. Ritchie*, 342 F.3d 903, 907 (9th Cir. 2003)).

24 Defendant first requests judicial notice of statements contained on the Frequently Asked
25 Questions (“FAQ”) page of its website. *See* Dkt. No. 40 at 5 n.1. Plaintiff does not oppose
26 Defendant’s request and, in fact, expressly provides the link to the page in the FAC. FAC ¶ 61
27 n.3. Accordingly, the Court **GRANTS** Defendant’s request to take notice of the FAQ page.
28 Similarly, Defendant requests judicial notice of Plaintiffs’ letter titled “Consumer Legal Remedies

1 Act Notice and Demand,” dated May 15, 2019. Dkt. No. 40-4. Plaintiffs again do not oppose
 2 notice of the letter, and instead note that it “is explicitly referenced in the [FAC] and is directly
 3 relevant to Plaintiffs’ claims under the CLRA.” Dkt. No. 46 at 2 n.1. The Court agrees and
 4 **GRANTS** Defendant’s request to take judicial notice of the letter.

5 Defendant also seeks notice of the product label “utilized at all times relevant to this
 6 lawsuit” of Cento San Marzano Certified Peeled Tomatoes. Dkt. No. 40-3 (“Ciccotelli Ex. B.”).
 7 Plaintiffs oppose Defendant’s request arguing that the label differs from the one included in the
 8 FAC. Because the Court must draw all inferences in Plaintiffs’ favor at this stage, the Court
 9 **DENIES** Defendant’s request to take notice of Ciccotelli Ex. B.

10 Defendant next requests judicial notice of its trademark for the “San Marzano” design,
 11 Dkt. No. 40-6, and the abandoned “Pomodoro San Marzano Dell’ Agro Sarnese-Nocerino”
 12 trademark application. Dkt. No. 40-7. Neither document is specifically noted in the FAC nor
 13 relevant to the Court’s analysis. Therefore, Defendant’s request as to those exhibits is **DENIED**
 14 **AS MOOT**. Similarly, Defendant’s Agri-Cert certification in Italian and English, Dkt. Nos. 40-2,
 15 40-8, is not relevant to the Court’s analysis and notice as to both exhibits is **DENIED AS MOOT**.

16 **III. LEGAL STANDARD**

17 Federal Rule of Civil Procedure (“Rule”) 8(a) requires that a complaint contain “a short
 18 and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P.
 19 8(a)(2). A defendant may move to dismiss a complaint for failing to state a claim upon which
 20 relief can be granted under Rule 12(b)(6). “Dismissal under Rule 12(b)(6) is appropriate only
 21 where the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable
 22 legal theory.” *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008). To
 23 survive a Rule 12(b)(6) motion, a plaintiff must plead “enough facts to state a claim to relief that is
 24 plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is facially
 25 plausible when a plaintiff pleads “factual content that allows the court to draw the reasonable
 26 inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662,
 27 678 (2009).

28 Rule 9(b) imposes a heightened pleading standard for claims that “sound in fraud.” Fed.

1 R. Civ. P. 9(b) (“In alleging fraud or mistake, a party must state with particularity the
2 circumstances constituting fraud or mistake.”). A plaintiff must identify “the who, what, when,
3 where, and how” of the alleged conduct, so as to provide defendants with sufficient information to
4 defend against the charge. *Cooper v. Pickett*, 137 F.3d 616, 627 (9th Cir. 1997).

5 In reviewing the plausibility of a complaint, courts “accept factual allegations in the
6 complaint as true and construe the pleadings in the light most favorable to the nonmoving party.”
7 *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008). Nonetheless,
8 courts do not “accept as true allegations that are merely conclusory, unwarranted deductions of
9 fact, or unreasonable inferences.” *In re Gilead Scis. Secs. Litig.*, 536 F.3d 1049, 1055 (9th Cir.
10 2008) (quoting *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001)). The Court
11 also need not accept as true allegations that contradict matter properly subject to judicial notice or
12 allegations contradicting the exhibits attached to the complaint. *Sprewell*, 266 F.3d at 988.

13 If the court concludes that a 12(b)(6) motion should be granted, the “court should grant
14 leave to amend even if no request to amend the pleading was made, unless it determines that the
15 pleading could not possibly be cured by the allegation of other facts.” *Lopez v. Smith*, 203 F.3d
16 1122, 1127 (9th Cir. 2000) (en banc) (internal citations and quotation marks omitted).

17 **IV. DISCUSSION**

18 Defendant moves to dismiss under Rule 12(b)(1), 12(b)(2) and 12(b)(6). Defendant argues
19 that Plaintiffs fail to plausibly state a claim under the UCL, failed to provide notice under the
20 CLRA, lack standing to seek injunctive relief, and fail to state claims for unjust enrichment and
21 breach of warranty. Defendant additionally argues that the Court lacks personal jurisdiction over
22 it as to the nationwide class. *See generally* Mot. The Court addresses each argument in turn.

23 **A. UCL, FAL, CLRA**

24 The UCL prohibits unfair competition, broadly defined as including “any unlawful, unfair
25 or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising.”
26 Cal. Bus. & Prof. Code § 17200. Each prong of the UCL is a separate and distinct theory of
27 liability, and here, Plaintiffs argue that they have stated a valid claim under the fraudulent prong of
28 the UCL. Opp. at 5. “[T]o state a claim under the FAL, the CLRA, or the fraudulent prong of the

1 UCL, Plaintiff[s] must allege that the packaging for Defendant’s products is “likely to deceive” a
2 “reasonable consumer.” *Hadley v. Kellogg Sales Co.*, 243 F. Supp. 3d 1074, 1092 (N.D. Cal.
3 2017) (quoting *Williams v. Gerber Prod. Co.*, 552 F.3d 934, 938 (9th Cir. 2008)). “[T]hese laws
4 prohibit ‘not only advertising which is false, but also advertising which[,] although true, is either
5 actually misleading or which has a capacity, likelihood or tendency to deceive or confuse the
6 public.’” *Kasky v. Nike, Inc.*, 45 P.3d 243, 250 (Cal. 2002) (quoting *Leoni v. State Bar*, 704 P.2d
7 183, 194 (Cal. 1985)). To bring such a claim, a plaintiff must demonstrate that she “suffered
8 injury in fact and . . . lost money or property as a result of the unfair competition.” Cal. Bus. &
9 Prof. Code § 17204. In other words, Plaintiff must rely on the challenged misrepresentations. *See*
10 *Wilson v. Frito-Lay N. Am., Inc.*, 260 F. Supp. 3d 1202, 1208 (N.D. Cal. 2017).

11 Whether the challenged representations are “deceptive will usually be a question of fact
12 not appropriate for decision” at the motion to dismiss stage. *Gerber*, 552 F.3d at 938. However,
13 dismissal is appropriate where “the advertisement itself ma[kes] it impossible for the plaintiff to
14 prove that a reasonable consumer [is] likely to be deceived.” *Id.* at 939. Courts in this circuit have
15 granted motions to dismiss after finding that the challenged advertisements include qualifying
16 language which make the meaning of the representation clear. *See, e.g., Freeman v. Time, Inc.*, 68
17 F.3d 285, 289 (9th Cir. 1995) (affirming district court’s dismissal of California consumer claim
18 when “[n]one of the qualifying language is hidden or unreadably small” and appears “immediately
19 next to the representations it qualifies”); *Sponchiado v. Apple Inc.*, No. 18-CV-07533-HSG, 2019
20 WL 6117482, at *4 (N.D. Cal. Nov. 18, 2019) (finding “a reasonable consumer could not be
21 deceived by the iPhone Products’ screen size representation, given the qualifying language
22 expressly notifying the consumer that the actual screen area is less than indicated.”); *Dinan v.*
23 *Sandisk LLC*, No. 18-CV-05420-BLF, 2019 WL 2327923, at *7 (N.D. Cal. May 31, 2019)
24 (reasonable consumer could not be deceived regarding the number of bytes in the storage device,
25 given that the packaging disclosed exactly how many bytes consumer would receive); *Bobo v.*
26 *Optimum Nutrition, Inc.*, No. 14-CV-2408 BEN (KSC), 2015 WL 13102417, at *5 (S.D. Cal.
27 Sept. 11, 2015) (dismissing claims when language elsewhere on packaging clarified that “100%
28 WHEY” did not mean “100% protein,” as “a reasonable consumer, like the plaintiff in *Freeman*,

1 cannot look at only one statement to the exclusion of everything else and claim he has been
2 misled”).

3 Defendant first argues that Plaintiffs fail to state a claim based on the Products’ growing
4 region. Mot. at 10–11. Specifically, Plaintiffs fail to “allege reliance on any label statement
5 concerning where the Products are grown” and fail to allege with particularity that the Products
6 were not grown in the Agro Sarnese-Nocerino area. *Id.* While Defendant is technically correct
7 that Plaintiffs do not directly allege that they relied on representations about the region in which
8 the tomatoes were produced, each Lead Plaintiff alleges that he or she relied on the “Certified”
9 marking. FAC ¶¶ 76, 81, 89. The FAC further provides that “[t]he Consortium is the only entity
10 which can certify and approve a San Marzano tomato,” and “[a]uthentic San Marzano tomatoes
11 must have a [D.O.P.] marking, certifying that the tomato was grown in the correct region and
12 according to the correct specifications.” *Id.* ¶¶ 24, 26. Reading these allegations in the light most
13 favorable to the Plaintiffs, they sufficiently allege that they relied on the “Certified” marking,
14 which incorporates or stands as a proxy for the geographic region where these tomatoes were
15 grown. Similarly, Plaintiffs’ underlying allegation is that the Products’ label and packaging
16 misleads consumers into believing that they are authentic San Marzano tomatoes by referring to
17 geographic regions related to the “official” growing region of San Marzano tomatoes—the Agro
18 Sarnese-Nocerino region. Plaintiffs need not specifically allege that the Products were not grown
19 in this region, because they rely on Defendant’s representation that the Products are grown in the
20 Campania region of Italy and canned in the Sarnese-Nocerino region, thereby implying that the
21 tomatoes are not grown specifically within this smaller region or, at best, leaving their growing
22 region ambiguous. *Id.* ¶¶ 48–49. Plaintiffs allege that these representations, even if true, still have
23 the likelihood or tendency to deceive or confuse the public into believing that the tomatoes are
24 grown in the Agro Sarnese-Nocerino region. *Id.* The Court finds these allegations adequately
25 plead a UCL claim under the fraudulent prong.¹

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27 ¹ While Defendant argues that Plaintiffs have not alleged with particularity where or when
28 Plaintiffs purchased the products, Mot. at 11, the Court finds that it is enough that Plaintiffs have
alleged they purchased the products within the last year at a limited list of grocery stores. A
“pleading is sufficient under Rule 9(b) if it identifies the circumstances constituting fraud so that a

1 Defendant next argues that Plaintiffs fail to state a claim based on the Products'
 2 certification. Mot. at 11–14. Primarily, Defendant argues that Plaintiffs fail to “allege [any] facts
 3 that plausibly support [the] conclusory assertion” that all San Marzano tomato products must bear
 4 the Consortium’s D.O.P. marking. Mot. at 11–12. Second, Defendant argues that Plaintiffs fail to
 5 allege how they were misled by the “Certified” label claim given that Defendant “expressly states
 6 the name of its San Marzano certifier on its website, because Defendant does not use the ‘D.O.P.’
 7 markings on its label, and because the Products *are* certified,” by Agri-Cert. *Id.* at 13 (emphasis in
 8 original). The Court finds that Plaintiffs allege sufficient facts to survive the motion to dismiss
 9 stage, and further, that the disclosure noted on Defendant’s website does not preclude Plaintiffs’
 10 claims of deception.

11 Plaintiffs allege that “[t]he Consortium is the only entity which can certify and approve a
 12 San Marzano tomato,” and “[a]uthentic San Marzano tomatoes must have a [Consortium D.O.P.]
 13 marking, certifying that the tomato was grown in the correct region and according to the correct
 14 specifications.” FAC ¶¶ 24, 26. To support these allegations, Plaintiffs include that “[t]he
 15 Consortium was granted the right to certify and approve San Marzano tomatoes by the European
 16 Union [“EU”] in 1996.” *Id.* ¶ 25. Whether Plaintiffs can prove these facts through documentation
 17 of EU approval, an expert supporting these allegations, and/or laws or regulations of the EU, Italy,
 18 or the United States specifying this certification process is an issue properly addressed at the
 19 dispositive motion stage. At this stage, the Court must accept as true all factual allegations in the
 20 Complaint, and the Court finds that Plaintiffs have sufficiently met the requirements of Rule 9(b).

21 Finally, while Defendant argues that qualifying language on its website makes the
 22 “Certified” representation clear, this disclosure is not included on the packaging itself. Instead,
 23 the packaging states, “These San Marzano tomatoes are certified [by an] independent third-party
 24 agency and are produced with the proper method to ensure superior growth.” *Id.* ¶ 52. This

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 27 defendant can prepare an adequate answer from the allegations.” *Moore v. Kayport Package*
 28 *Express, Inc.*, 885 F.2d 531, 540 (9th Cir. 1989). Plaintiffs provide a label of the Products and
 specifically allege that each Lead Plaintiff purchased the Products from a few grocery stores,
 providing Defendants with sufficient information to identify the Products and prepare a responsive
 pleading.

1 language does not clearly disclose that the independent third-party agency is not the Consortium,
 2 and instead relies on consumers subsequently visiting its website to find such detail. These facts
 3 sufficiently distinguish this case from those granting a motion to dismiss due to qualifying
 4 language on the package itself which make the meaning of the representation clear.

5 Accordingly, the Court **DENIES** Defendant’s motion to dismiss the UCL, FAL, and
 6 CLRA claims based on a failure to plead sufficient facts regarding the Products’ growing region or
 7 certification.²

8 **B. Notice under the CLRA**

9 Defendant argues that Plaintiffs’ CLRA claim should be dismissed because Plaintiffs’
 10 demand letter failed to provide sufficient notice of the alleged defects. Mot. At 18–19. Plaintiffs
 11 sent a demand letter on May 15, 2019, stating:

12 Specifically, Plaintiffs hereby notify Cento that it has engaged in
 13 ongoing unlawful, fraudulent, and unfair business acts and practices
 14 in connection with the sales and marketing of its Cento Certified San
 15 Marzano Tomatoes (the “Products”) in the State of California. In its
 16 pricing, marketing, and advertising of the Products, Cento represents
 17 that Products are authentic San Marzano tomatoes knowing that
 18 reasonable consumers will rely on these representations and pay extra
 19 for the Products or purchase them instead of other tomatoes.

20 Dkt. No. 40-4 at 2. Plaintiffs filed the instant action on May 14, 2019, and initially sought only
 21 injunctive relief on the CLRA cause of action. *See* Dkt. No. 1 at 15. In their original complaint,
 22 Plaintiffs noted that “[i]f Defendant fail[ed] to respond to Plaintiffs’ letter or agree to rectify the

23 _____
 24 ² The Court further rejects Defendant’s argument that Plaintiffs may not seek equitable remedies
 25 given that they have alleged claims for damages under the CLRA and for breach of warranty.
 26 Mot. at 22. The UCL specifically provides that “[u]nless otherwise expressly provided, the
 27 remedies or penalties provided by this chapter are cumulative to each other and to the remedies
 28 available under all other laws of this state.” Cal. Bus. & Prof. Code § 17205. Similarly, the
 CLRA provides that “[t]he provisions of this title are not exclusive. The remedies provided herein
 for violation of any section of this title . . . shall be in addition to any other procedures or remedies
 for any violation or conduct provided for in any other law. Cal. Civ. Code § 1752; *see also*
Madani v. Volkswagen Grp. of Am., Inc., No. 17-CV-07287-HSG, 2019 WL 3753433, at *9 (N.D.
 Cal. Aug. 8, 2019) (“[A]t the pleading stage, theories of equitable remedies are not barred by a
 plaintiff adequately pleading theories supporting monetary relief.”); *Luong v. Subaru of Am., Inc.*,
 No. 17-CV-03160-YGR, 2018 WL 2047646, at *7 (N.D. Cal. May 2, 2018) (“The availability of
 monetary damages does not preclude a claim for equitable relief under the UCL and CLRA based
 upon the same conduct.”). Accordingly, the Court **DENIES** Defendant’s motion to dismiss
 Plaintiffs’ requests for equitable relief.

1 problems associated with the actions described above and give notice to all affected consumers
2 within 30 days of the date of written notice, then Plaintiffs [would] move to amend their
3 Complaint to pursue claims for actual, punitive, and statutory damages, as appropriate against
4 Defendant.” *Id.* The Plaintiffs did so in the FAC. *See* FAC ¶ 134.

5 The CLRA requires that a consumer provide notice of the “committed methods, acts, or
6 practices declared unlawful by Section 1770” at least thirty days prior to commencing an action
7 for damages. Cal. Civ. Code § 1782. The notice “requirement exists in order to allow a defendant
8 to avoid liability for damages if the defendant corrects the alleged wrongs within 30 days after
9 notice, or indicates within that 30–day period that it will correct those wrongs within a reasonable
10 time.” *Morgan v. AT&T Wireless Servs., Inc.*, 177 Cal. App. 4th 1235, 1261, 99 Cal. Rptr. 3d 768,
11 789 (2009). Plaintiffs argue that the letter made clear that Defendant’s representations regarding
12 the San Marzano certification were at issue. *Opp.* at 19–20. The Court agrees. Not only did the
13 letter provide notice that the Certified San Marzano Tomatoes were at issue, they specifically
14 noted that Defendants’ representations of authenticity were at issue. Additionally, Plaintiffs filed
15 their initial complaint prior to providing the letter seeking only injunctive relief (which did not run
16 afoul of the provision). *See* Dkt. No. 1. The initial complaint provided further detail regarding
17 Plaintiffs’ allegations that the Products’ labeling misled reasonable consumers to believe the
18 Products are authentic San Marzano tomatoes even though they were not grown in the specified
19 region and did not have the appropriate certification. *Id.* Thus, Plaintiffs sufficiently provided at
20 least thirty days of notice prior to amending their complaint to include an action for damages, and
21 the Court **DENIES** Defendant’s motion to dismiss CLRA claims due to insufficiency of notice.

22 **C. Standing for Injunctive Relief**

23 In addition to other forms of relief, Plaintiffs seek injunctive relief under the CLRA, UCL
24 and FAL. FAC ¶¶ 118, 131, 144. Defendant argues that Plaintiffs fail to allege facts sufficient to
25 confer Article III standing for injunctive relief. *Mot.* at 14–16. Article III of the Constitution
26 limits the jurisdiction of the federal courts to actual “cases” and “controversies.” U.S. Const., Art.
27 III, § 2. One element of this case-or-controversy requirement is that the plaintiff must have
28 standing to bring a claim. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547, *as revised* (May 24,

2016). To establish Article III standing, a plaintiff must show: (1) she “suffered an injury in fact”; (2) “that is fairly traceable to the challenged conduct of the defendant”; and (3) “that is likely to be redressed by a favorable judicial decision.” *Id.* at 1547 (citations omitted). In a false advertising suit, “a previously deceived consumer may have standing to seek an injunction against false advertising or labeling, even though the consumer now knows or suspects that the advertising was false at the time of the original purchase, because the consumer may suffer an ‘actual and imminent, not conjectural or hypothetical’ threat of future harm.” *Davidson v. Kimberly-Clark Corp.*, 889 F.3d 956, 969 (9th Cir. 2018) (quoting *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009)). Such “threat of future harm may be the consumer’s plausible allegations that she will be unable to rely on the product’s advertising or labeling in the future, and so will not purchase the product although she would like to,” or “the consumer’s plausible allegations that she might purchase the product in the future, despite the fact it was once marred by false advertising or labeling, as she may reasonably, but incorrectly, assume the product was improved.” *Id.* at 969–70.

Plaintiffs allege that they relied on the “Certified” representations on the Products’ labels and “[h]ad the tomatoes not displayed the ‘Certified’ marking, [Plaintiffs] either would not have purchased the tomatoes or would not have been willing to pay a premium for the tomatoes.” FAC ¶¶ 76–77, 81–83, 89–90. Plaintiffs additionally allege that “if [he or she] could rely upon the truthfulness of Defendant’s labeling, [he or she] would continue to purchase the Products in the future.” *Id.* ¶¶ 77, 84, 90. The Court finds that these allegations meet the requirements of *Davidson*. Plaintiffs establish threat of future harm by alleging that they would purchase the Products in the future only if they could rely on Defendant’s labeling, whether the “Certified” mark was substantiated as D.O.P. certification or if it was removed. This sufficiently alleges the first example of future harm noted in *Davidson*—Plaintiffs will not purchase the Products until they can rely on the Products’ representations.³ Thus, the Court holds that Plaintiffs have

³ Defendant cites *Broomfield v. Craft Brew All., Inc.* to argue that Plaintiffs do not allege future harm under *Davidson*. No. 17-CV-01027-BLF, 2017 WL 3838453, at *11 (N.D. Cal. Sept. 1, 2017). This case is distinguishable. There, plaintiffs alleged similar claims under the CLRA, UCL, and FAL for misleading consumers through their representations that their Kona beer was

1 standing to seek injunctive relief and **DENIES** Defendant’s motion to dismiss the claims for such
2 relief.

3 **D. Personal Jurisdiction**

4 A defendant may seek dismissal of an action for lack of personal jurisdiction under Federal
5 Rule of Civil Procedure 12(b)(2). In order for a nonresident defendant to be subject to the
6 personal jurisdiction of a court, “(1) the defendant must either purposefully direct his activities
7 toward the forum or purposefully avail himself of the privileges of conducting activities in the
8 forum; (2) the claim must be one which arises out of or relates to the defendant's forum-related
9 activities; and (3) the exercise of jurisdiction must comport with fair play and substantial justice,
10 i.e. it must be reasonable.” *Axiom Foods, Inc. v. Acerchem Int’l, Inc.*, 874 F.3d 1064, 1068 (9th
11 Cir. 2017) (internal quotation marks omitted). Relying on *Bristol-Myers Squibb Co. v. Superior*
12 *Court*, 137 S. Ct. 1773 (2017), Defendant argues this Court cannot establish personal jurisdiction
13 over it with regard to a possible nationwide class whose members are not residents of California.
14 Mot. at 16–18.

15 The Court finds Defendant’s reliance on *Bristol-Myers* misplaced. The Supreme Court did
16 not “confront the question [of] whether its opinion . . . would also apply to a class action in which
17 a plaintiff injured in the forum State seeks to represent a nationwide class of plaintiffs, not all of
18 whom were injured there.” *Bristol-Myers*, 137 S. Ct. 1773 at 1789 (Sotomayor, J., dissenting). In
19 fact, courts addressing this precise argument have found that *Bristol-Myers* does not extend to
20 absent class members. *See Santos v. CarMax Bus. Servs., LLC*, No. 17-CV-02447-RS, 2018 WL
21 7916823, at *5 (N.D. Cal. May 8, 2018) (“[I]n the absence of further guidance from the higher
22 courts on this question, *Bristol-Myers* will not be construed to bar this Court’s jurisdiction over
23 [defendant] with respect to the non-California putative nationwide class members.”); *Fitzhenry-*
24 *Russell v. Dr. Pepper Snapple Grp., Inc.*, No. 17-CV-00564 NC, 2017 WL 4224723, at *5 (N.D.

25 _____
26 brewed in Hawaii, when it was actually brewed in the continental United States. *Id.* Those
27 plaintiffs, however, only alleged that they would purchase the products, if defendants in fact
28 brewed the beer in Hawaii. *Id.* The *Broomfield* court noted that it “cannot issue a mandatory
injunction forcing [defendant] to alter its production process.” *Id.* Here, Plaintiffs allege that they
would purchase the tomatoes even without the allegedly misleading “Certified” mark, but would
not purchase them if they cannot rely on the label.

1 Cal. Sept. 22, 2017) (finding “*Bristol-Myers* [] meaningfully distinguishable based on that case
 2 concerning a mass tort action, in which each plaintiff was a named plaintiff” and ultimately
 3 refusing “to extend *Bristol-Myers* to the class action context. . . .”).

4 Defendant’s cited cases do little to support its argument. Both cases concerned a named
 5 plaintiff seeking to represent a nationwide class under non-forum law. *See Morrison v. Ross*
 6 *Stores, Inc.*, No. 18-CV-02671-YGR, 2018 WL 5982006, at *4 (N.D. Cal. Nov. 14, 2018)
 7 (dismissing an action where named Missouri plaintiff sought to represent a nationwide class in
 8 California under California law); *In re Samsung Galaxy Smartphone Mktg. & Sales Practices*
 9 *Litig.*, No. 16-CV-06391-BLF, 2018 WL 1576457, at *2 (N.D. Cal. Mar. 30, 2018) (dismissing a
 10 Maryland plaintiff seeking to represent a nationwide class under California’s long-arm statute).⁴
 11 Accordingly, the Court **DENIES** Defendant’s motion to dismiss for lack of personal jurisdiction.

12 **E. Unjust Enrichment**

13 Defendant next argues that Plaintiffs fail to state an independent cause of action for unjust
 14 enrichment. Mot. at 19–20. The Ninth Circuit “has construed the common law to allow an unjust
 15 enrichment cause of action through quasi-contract,” *ESG Capital Partners, LP v. Stratos*, 828 F.3d
 16 1023, 1038 (9th Cir. 2016); *see also Astiana v. Hain Celestial Grp., Inc.*, 783 F.3d 753, 762 (9th
 17 Cir. 2015) (“When a plaintiff alleges unjust enrichment, a court may construe the cause of action
 18 as a quasi-contract claim seeking restitution.” (internal quotations and citations omitted)). “To
 19 allege unjust enrichment as an independent cause of action, a plaintiff must show that the
 20 defendant received and unjustly retained a benefit at the plaintiff’s expense.” *ESG Capital*
 21 *Partners*, 828 F.3d at 1038. Restitution is not ordinarily available to a plaintiff unless “the
 22 benefits were conferred by mistake, fraud, coercion or request; otherwise, though there is
 23 enrichment, it is not unjust.” *Nibbi Bros., Inc. v. Home Federal Sav. & Loan Assn.*, 253 Cal. Rptr.

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 25 _____
 26 ⁴ Defendant also cited supplemental authority for this argument. Dkt. No. 55 (citing *Jackson v.*
 27 *Gen. Mills, Inc.*, No. 18-CV-2634-LAB (BGS), 2019 WL 4599845, at *3 (S.D. Cal. Sept. 23,
 28 2019)). The Court respectfully disagrees with the reasoning of *Jackson*. The *Jackson* court relied
 on *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581 (9th Cir. 2012), to vacate a class certification
 order that applied California’s consumer protection laws to a nationwide class. While *Mazza*’s
 holding is relevant to a choice of law analysis at the class certification stage, that is not the stage or
 question presented here.

1 289, 293 (Cal. Ct. App. 1988) (internal quotations and citations omitted). Here, Plaintiffs’ basis
 2 for their unjust enrichment claim sounds in fraud, just as with their other claims, and is thus
 3 subject to Rule 9(b)’s pleading requirements. *See In re Actimmune Mktg. Litig.*, No. C 08-02376
 4 MHP, 2009 WL 3740648, at *16 (N.D. Cal. Nov. 6, 2009), *aff’d*, 464 F. App’x 651 (9th Cir.
 5 2011).

6 Plaintiffs allege that they are entitled to relief under a quasi-contract cause of action
 7 because Defendant “accepted or retained non-gratuitous benefits conferred by Plaintiffs . . . with
 8 full knowledge and awareness that, as a result of Defendant’s deception, Plaintiffs . . . were not
 9 receiving a product of the quality nature, fitness or value that had been represented by Defendant
 10 and reasonable consumers would have expected.” FAC ¶ 147. The Court finds Plaintiffs’ unjust
 11 enrichment statement sufficient to state a quasi-contract cause of action. As noted above,
 12 Plaintiffs’ allegations sufficiently state a claim under the fraudulent prong of the UCL, meeting
 13 Rule 9(b)’s pleading requirements. For the same reasons, the Court similarly **DENIES**
 14 Defendant’s motion to dismiss the unjust enrichment cause of action.

15 **F. Breach of Express Warranty**

16 Defendant argues that “because the Amended Complaint does not identify which state’s
 17 law applies to [Plaintiffs’ breach of express warranty] claim,” it should be dismissed. Mot. at 20.
 18 Defendant correctly notes that for this claim, Plaintiffs list over forty different state statutes. FAC
 19 ¶ 154. Plaintiffs argue that addressing choice of law at this stage is premature and that this issue
 20 should instead be considered at class certification. Opp. at 17–18. However, none of the cases
 21 upon which Plaintiffs rely consider whether a plaintiff must identify the state law of a common
 22 law claim in its pleadings, but instead consider whether a motion to strike class claims under
 23 Federal Rule of Civil Procedure 12(f) is appropriate prior to class certification, *see CarMax* 2018
 24 WL 7916823, at *4, or whether a choice of law analysis is appropriate prior to class certification,
 25 *see Zapata Fonseca v. Goya Foods Inc.*, No. 16-CV-02559-LHK, 2016 WL 4698942, at *3 (N.D.
 26 Cal. Sept. 8, 2016). Plaintiffs also cite cases where courts resolved choice of law issues at the
 27 class certification stage, but those cases again are inapposite to the question presented here. *See*
 28 *e.g., Martinelli v. Johnson & Johnson*, No. 2:15-CV-01733-MCE-DB, 2019 WL 1429653, at *1

1 (E.D. Cal. Mar. 29, 2019); *Hart v. BHH, LLC*, No. 15CV4804, 2017 WL 2912519, at *1
 2 (S.D.N.Y. July 7, 2017) (certifying a multi-state breach of express warranty class under California
 3 law).

4 Instead, the Court must determine whether Plaintiffs have sufficiently alleged a breach of
 5 warranty claim. Notably, while the Ninth Circuit has yet to weigh in, the majority of courts in this
 6 district have held that in a putative class action, claims arising under the laws of states in which no
 7 named plaintiff resides should be dismissed for lack of standing at the motion to dismiss stage.
 8 *See Hindsman v. Gen. Motors LLC*, No. 17-CV-05337-JSC, 2018 WL 2463113, at *15 (N.D. Cal.
 9 June 1, 2018); *Johnson v. Nissan N. Am., Inc.*, 272 F. Supp. 3d 1168, 1175 (N.D. Cal. 2017);
 10 *Corcoran v. CVS Health Corp., Inc.*, No. 15-CV-3504 YGR, 2016 WL 4080124, at *2 (N.D. Cal.
 11 July 29, 2016); *In re Carrier IQ, Inc.*, 78 F. Supp. 3d 1051, 1069 (N.D. Cal. 2015). Here, all Lead
 12 Plaintiffs reside in California and purchased the Products in California. Accordingly, the Court
 13 **DISMISSES** the claims purportedly brought under the laws of jurisdictions other than California.

14 Defendant further argues that under California law, Plaintiffs' breach of warranty claim
 15 should be dismissed for failure to provide pre-suit notice and failure to sufficiently state a claim.
 16 Mot. at 21–22. “A plaintiff asserting a breach of express warranty claim must allege facts
 17 sufficient to show that (i) the seller’s statements constitute an affirmation of fact or promise or a
 18 description of the goods; (ii) the statement was part of the basis of the bargain; and (iii) the
 19 warranty was breached.” *Ham v. Hain Celestial Grp., Inc.*, 70 F. Supp. 3d 1188, 1195 (N.D. Cal.
 20 2014) (citing *Weinstat v. Dentsply Int’l, Inc.*, 103 Cal. Rptr.3d 614, 625–26 (Cal. Ct. App. 2010)).
 21 While the California Commercial Code section 2607 requires that a buyer give a seller notice of
 22 any breach of express warranty, it does not specifically require a buyer to give notice to a
 23 manufacturer. *See Cal. Com. Code § 2607; see also Rosales v. FitFlop USA, LLC*, 882 F. Supp.
 24 2d 1168, 1178 (S.D. Cal. 2012) (“[W]hen claims are against a defendant in its capacity as a
 25 manufacturer, not as a seller, plaintiff is not required to give notice.”) (citing *Greenman v. Yuba*
 26 *Power Prods.*, 377 P.2d 897, 899 (Cal. 1963)).

27 Here, Plaintiffs allege they purchased the products from third-party sellers and only sue
 28 Defendant, the manufacturer. FAC ¶¶ 75, 79, 86. Thus, notice was not required and Defendant’s


1 argument to the contrary fails. Plaintiffs also allege that the “Certified” and “San Marzano” marks
 2 on the label constituted an express warranty to provide authentic San Marzano tomatoes certified
 3 by D.O.P. *Id.* ¶ 151. Defendant argues that the express warranty is not breached because
 4 Plaintiffs later “*admit* that the Cento San Marzano Products are ‘certified.’” Mot. at 21 (emphasis
 5 in original). However, this is the same argument Defendant raises as to the misrepresentation-
 6 based claims addressed above. The motion to dismiss the breach of express warranty claim under
 7 California law is thus **DENIED** for the same reasons.⁵

8 **V. CONCLUSION**

9 For the reasons noted above, the Court **DISMISSES** the breach of express warranty claims
 10 brought under the laws of jurisdictions other than California. As for all remaining claims, the
 11 Court **DENIES** Defendant’s motion to dismiss.

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 13 **IT IS SO ORDERED.**

14 Dated: 12/23/2019

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 HAYWOOD S. GILLIAM, JR.
 United States District Judge

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 27 ⁵ Lastly, while Defendant raises a convoluted statute of limitations argument, the FAC only brings
 28 claims within the three-year statute of limitations for the CLRA and FAL, and the four-year statute
 of limitations for the UCL. FAC ¶¶ 74, 79, 86 (all alleging purchases within the year prior to
 filing the complaint). Thus, the Court **DENIES** Defendant’s motion to dismiss any claims falling
 outside of the statute of limitations period, because there are none.