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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

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

Plaintiff,

v.

GERBER PRODUCTS COMPANY,

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

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiff's FAC should be dismissed because it fails, as a matter of law, to allege Gerber mislabeled its products in a way that would likely mislead a reasonable consumer. Plaintiff's claims hinge on two contentions. First, reasonable consumers confuse Gerber's "NON GMO" label with the Non-GMO Project's Verified seal and standard, which another district court held last month was "patently implausible" when considering the same Non-GMO Project Verified seal and a seal analogous to Gerber's. Second, reasonable consumers share Plaintiff's interpretation of Gerber's label, which reads "NON GMO" with the explanatory statement "NOT MADE WITH GENETICALLY ENGINEERED INGREDIENTS" directly below it. Plaintiff, however, disregards the distinct aesthetic differences between these two labels, the label's definition of GMO, every federal, state, and regulatory body's definition of GMO, and even her own definition of GMO. She instead alleges a "significant portion of the general consuming public" would reasonably believe Gerber's "NON GMO" label represents the Non-GMO Project's standard that the products do not contain three categories of ingredients:

Category (1): ingredients allegedly derived from genetically modified crops or food sources;

Category (2): ingredients allegedly genetically engineered in a laboratory setting through the use of biotechnologies; and

Category (3): ingredients allegedly sourced from animals raised on GMO feed.

To support her allegations regarding category (1) and (3) ingredients, Plaintiff relies on generalized statistics, and exclusively so for category (3) ingredients. Her argument for these two categories of ingredients is Gerber's products must contain genetically modified ingredients because a certain percentage of crops in the U.S. are genetically modified or a certain percentage of cows in the U.S. are fed genetically modified feed.

Plaintiff's allegations concerning category (2) ingredients also fail because she neglects to plead the processes alleged for creating these ingredients involve a "transfer of genes," as her own definition of GMO mandates, or actually render the ingredients genetically modified. She further fails to plead that those processes are the only methods for creating the challenged

ingredients or that Gerber, in fact, utilizes those processes. Plaintiff's primary addition to her FAC – that an organization found one of the challenged products contains GMO corn – supports only her category (1) claims and still does not move those claims over the plausibility threshold required to survive a motion to dismiss. Plaintiff does not include, as she must, sufficient allegations specific to Gerber or its practices.

While Plaintiff also attempts to state common law claims, they, too, are predicated on this same theory of misrepresentation on which she bases her statutory claims. These glaring deficiencies in Plaintiff's claims, which "sound in fraud," must be tested under Rule 9(b)'s heightened pleading standard and, therefore, Plaintiff's claims should be dismissed.

II. FACTUAL BACKGROUND

Plaintiff Faith Norman seeks to represent a nationwide class and a California subclass of purchasers of "all Gerber-branded food or drink products that purport to be 'NON GMO' on the labeling and/or packaging," including at least 37 "product lines, products, and/or flavors." ("Products"). FAC ¶¶ 4, 44-75, 85. Plaintiff identifies only one product she allegedly purchased: "Gerber Good Start Soy 2 Powder Infant & Toddler Formula." FAC ¶ 44.

Plaintiff's single theory of liability is Gerber "cheat[s] consumers by uniformly advertising, marketing, and selling nutritional food products . . . , each of which prominently features the representations 'Non-GMO,' . . . . However, . . . [the] Products do, in fact, contain ingredients that are derived from genetically modified food sources and therefore constitute GMOs." FAC ¶ 1. Plaintiff asserts nine causes of action: (1) California's Unfair Competition Law ("UCL") (Cal. Bus. & Prof. Code §§ 17200, *et seq.*); (2) California's False Advertising Law ("FAL") (Cal. Bus. & Prof. Code §§ 17500, *et seq.*); (3) California's Consumers Legal Remedies Act ("CLRA") (Cal. Civ. Code §§ 1750, *et seq.*); (4) breach of express warranty; (5) breach of implied warranty of merchantability; (6) unjust enrichment / restitution; (7) negligent misrepresentation; (8) fraud; and (9) fraudulent misrepresentation. FAC ¶ 6.

III. THE COURT SHOULD DISMISS THE FIRST AMENDED COMPLAINT

A. Plaintiff Lacks Standing to Sue for Equitable Relief

First, Plaintiff lacks standing to seek equitable relief because she does not allege she lacks

an adequate remedy at law, as she must. *See Sonner v. Premier Nutrition Corp.*, 971 F.3d 834, 844 (9th Cir. 2020) (establishing plaintiffs must "lack[] an adequate remedy at law before securing equitable restitution"); *In re MacBook Keyboard Litig.*, No. 5:18-cv-02813-EJD, 2020 U.S. Dist. LEXIS 190508, at *11-14 (N.D. Cal. Oct. 13, 2020) (applying *Sonner* to the pleading stage and injunctive relief). Instead, Plaintiff seeks equitable relief in addition to damages. *See, e.g.*, FAC ¶¶ 102-104. Accordingly, Plaintiff's equitable claims must be dismissed. *See Nguyen v. Nissan N. Am., Inc.*, No. 16-CV-05591-LHK, 2017 U.S. Dist. LEXIS 55501, at *15-16 (N.D. Cal. Apr. 11, 2017) (dismissing CLRA injunctive relief, unjust enrichment, and UCL claims because monetary damages were adequate); *In re Cal. Gasoline Spot Mkt. Anitrust Litig.*, No. 20-cv-03131-JSC, 2021 U.S. Dist. LEXIS 59875, at *30 (N.D. Cal. Mar. 29, 2021) ("Plaintiffs' citation to a pre-*Sonner* case for the proposition that they are permitted to plead alternative claims for relief is unavailing. Several courts have rejected this same argument.").

B. Plaintiff's Claims are Pled Insufficiently

Plaintiff predicates her claims on generalized statistics and processes. Plaintiff bases her category (1) and (3) claims that Gerber's products must contain genetically modified ingredients on percentages of genetically modified crops grown in the U.S. or the practice of manufacturing animal feed using crops frequently genetically modified. FAC ¶¶ 16-17, 30. Plaintiff bases her category (2) claims on general practices for processing ingredients and does not even allege those processes render the ingredients genetically modified. Speculation without sufficient allegations specific to Gerber's Products does not meet the plausibility standard, let alone the heightened pleading standard under Rule 9(b).

In *Robie v. Trader Joe's Co.*, the plaintiff alleged Trader Joe's representation of a product with "vanilla" was false or misleading because the product allegedly contained artificial vanillin not derived exclusively from the vanilla plant. No. 20-cv-07355-JSW, 2021 U.S. Dist. LEXIS 117336, at *9 (N.D. Cal. June 14, 2021) (White, J.). In the complaint, the plaintiff alleged the vanillin in Trader Joe's products was artificial rather than natural. *Id.* at 12-15. The court dismissed plaintiff's FAL, CLRA, and UCL claims, holding plaintiff's "conclusory allegations" were insufficient to state a claim, as they were based on generalized manufacturing practices and

not specific to the product at issue. *Id.* Here, Plaintiff makes the same conclusory allegations in her FAC. First, when discussing the challenged ingredients, Plaintiff never actually alleges the ingredients are genetically modified. FAC ¶ 42. She only alleges the Products contain such ingredients and references "GMO crops" or "dairy" sourced from animals fed GMO feed, basing her support on generalized statistics.[1] FAC ¶¶ 16-17, 30, 42.

For example, Plaintiff speculates Gerber's "NON GMO" representation must be false because allegedly 92% of corn grown in the U.S. is genetically modified, and therefore "any of the ingredients derived from domestically produced . . . corn . . . [is] highly likely to contain GMOs." FAC ¶¶ 16-17. This includes ingredients that *may* have been exposed to a *potentially* GMO crop *at some point*.[2] Plaintiff repeats this logic for soybeans, sugar beets, and canola. *Id.* She also applies this logic to her category (3) claims, except she adds links to this chain. Plaintiff alleges a percentage of a crop grown in the U.S. is genetically modified; certain crops sometimes genetically modified are common in animal feed; therefore, most cows eat feed with genetically modified ingredients, and therefore Gerber's products with or derived from animal byproducts must contain GMOs. FAC ¶ 30. Her category (2) claims are similarly deficient.[3] Plaintiff alleges processes for creating the challenged ingredients and the Products contain these ingredients, but she does not actually allege these processes render the Products genetically modified, these are the only processes for creating those ingredients, or Gerber, in fact, uses the

[1] Plaintiff alleges only soy protein and soy protein isolate are genetically modified, again basing her support on general statistics regarding soybean production in the U.S. FAC ¶ 42.

[2] For example, Plaintiff alleges the following process with respect to citric acid: "[c]itric acid-producing microorganisms grow on culture media that usually contain molasses (which is derived from sugar beet . . .) and/or glucose (which usually comes from corn . . .)." FAC ¶ 42.

[3] In FAC ¶ 42, Plaintiff attempts to allege why each challenged ingredient is genetically modified. She alleges the ingredients derive from allegedly GMO crops (category (1)) or animals allegedly fed GMO feed (category (3)). She also alleges methods for creating these ingredients disconnected from her category (1) or (3) claims. For example, she alleges mixed tocopheryls is "a synthetic, water-soluble form of Vitamin E, [which] is often found in processed foods as a preservative." FAC 20:1-4. It is unclear why Plaintiff includes these allegations. She does not allege a "transfer of genes" has occurred, as required by her own definition of GMO, or even allege those processes render the ingredient genetically modified. *See* discussion *infra* Section III.C.1.b. Gerber assumes Plaintiff includes these allegations to support her category (2) claims (ingredients allegedly genetically engineered in a laboratory setting by use of biotechnologies) and thus addresses them as such.

described processes.[4] FAC ¶ 42. These conclusory allegations are insufficient.

Plaintiff's additions to her FAC do not cure these deficiencies in her initial complaint. First, Plaintiff adds the ingredients are "included on the Institute for Responsible Technology's list of GMO ingredients." FAC ¶ 42. This is inconsequential and misleading. It is a bare assertion the ingredients are GMO, as the source – a 2012 "Non-GMO Shopping Guide" – merely states the ingredients "*may* be made from GMOs."[5] Second, one test indicating one of 37 products allegedly contains GMO corn relates only to her category (1) claims and does not elevate her allegations to those deemed sufficient in cases in which courts accepted generalized statistics to supplement defendant-specific allegations.

For example, in *Schneider v. Chipotle Mexican Grill*, the plaintiff also alleged Chipotle made in-store "non-GMO" representations, despite representations on their website indicating otherwise. No. 16-cv-02200-HSG, 2016 U.S. Dist. LEXIS 153579 (N.D. Cal. Nov. 4, 2016); Complaint at ¶ 45, *Schneider*, 2016 U.S. Dist. LEXIS 153579. In *Ault v. J.M. Smucker Co.*, the plaintiff alleged how Smuckers sourced its ingredients and a statement made by Smuckers that its "products may contain ingredients derived from biotechnology." No. 13 Civ. 3409 (PAC), 2014 U.S. Dist. LEXIS 67118, at *3-4 (S.D.N.Y. May 15, 2014).

Plaintiff's new allegations do not cure her category (1) claims, and her category (2) and (3) claims still rely on generalized statistics and processes, which the court in *Robie* found did not state a claim. Therefore, Plaintiff's claims must be dismissed.

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

Plaintiff's category (2) and (3) claims fail for three additional reasons. First, Plaintiff fails to plausibly allege a reasonable consumer would be misled by Gerber's "NON GMO" label and would believe it means the Products do not contain category (3) ingredients. Second, Plaintiff's definition of GMO is implausible, as it does not include category (3) ingredients and, when

[4] *See supra* note 1.

[5] *Non-GMO Shopping Guide*, The Institute for Responsible Technology, at 17 (2012). *See* RJN, Ex. 12 at 20.

alleging processes for creating the challenged ingredients (category (2)), she does not allege a "transfer of genes" occurred, as her GMO definition requires. Third, Plaintiff lacks standing for category (3) Products because the Product she purchased does not contain animal byproducts. Therefore, Plaintiff's claims based on category (2) and (3) ingredients fail.

1. Gerber's "NON GMO" Stamp is Unlikely to Deceive a Reasonable Consumer

To state a claim under the FAL, CLRA, and UCL, a plaintiff must show the advertising is "likely to deceive a reasonable consumer." *Williams v. Gerber Prods. Co*., 552 F.3d 934, 938 (9th Cir. 2008). "Likely to deceive" requires more than a "mere possibility that the advertisement might conceivably be misunderstood by some few consumers viewing it in an unreasonable manner. Rather, . . . the ad is such that it is probable that a *significant portion of the general consuming public* . . . , acting reasonably in the circumstances, could be misled." *Lavie v. Proctor & Gamble Co*., 105 Cal. App. 4th 496, 508 (2003) (emphasis added). Plaintiff's allegations do not meet this standard and thus must be dismissed.

a. A Reasonable Consumer Would Not Interpret Gerber's "NON GMO" Claim to be the Same as the Non-GMO Project's

Plaintiff alleges a reasonable consumer would likely be deceived by Gerber's "NON GMO" stamp because a reasonable consumer interprets any "Non-GMO" representation as synonymous with the definition established by the Non-GMO Project. *See* FAC ¶¶ 23-25. Recent case law and Plaintiff's allegations support the opposite conclusion.

Another district court considered nearly identical claims and held it was "patently implausible" or "unrealistic" for a reasonable consumer to confuse the Non-GMO Project's Verified seal with Target's "Non-GMO" label. *Gordon v. Target Corp.*, No. 20-CV-9589 (KMK), 2022 U.S. Dist. LEXIS 48769, at *35-37 (S.D.N.Y. Mar. 18, 2022). In *Gordon*, the court, in granting Target's motion to dismiss claims based on byproducts from animals fed GMO crops, emphasized the Non-GMO Project's seal is "highly distinctive," including the "name of the organization, the word 'VERIFIED,' and the URL to the Non-GMO Project's website alongside a graphic of an orange butterfly on a blade of grass." *Id*. The court found the "only similarity

between the Non-GMO Project's seal and the Product's non-GMO graphic is the use of the term 'non-GMO.'" Here, Plaintiff asks the Court to consider the same Non-GMO Project Verified seal and an analogous "NON GMO" label:

Non-GMO Project's Verified Seal

Target's Stamp

Gerber's Stamp

Plaintiff similarly alleges Gerber's "NON GMO" claims and seal are "intended to fool consumers into believing that Defendant's Products satisfy the Non-GMO Project's stringent standards." FAC ¶ 37. For the same reasons set forth in *Gordon*, it is "patently implausible" a reasonable consumer would confuse Gerber's label with the Non-GMO Project's Verified seal. As the court in *Gordon* stated, "accepting Plaintiff's premise would prohibit a company from ever including the information that the ingredients in its products were non-GMO on labels unless the products were verified by the Non-GMO Project." 2022 U.S. Dist. LEXIS 48769, at *36.

A "significant portion of the general consuming public" would not confuse these claims, particularly considering Plaintiff's allegations emphasizing consumers' familiarity with the Non-GMO Project, its definition of "Non-GMO," and its Verified seal. The FAC alleges the "Non-GMO Project Verified seal is now found on over 50,000 food products and with 3,000 participating brands . . . . [and its] websites are host to over 200 million visits a year." FAC ¶ 24. Plaintiff also alleges Gerber made statements on its website that some products include Gerber's Non-GMO stamp or the Non-GMO Project Verified seal.[6] Taking these allegations as true, a reasonable consumer would not interpret Gerber's distinct stamp as a claim the product comports with the Non-GMO Project's definition of "non-GMO" (specifically, the product does not contain ingredients sourced from animals fed GMO feed (category (3))). Otherwise, the Products would contain a Non-GMO Project Verified seal. Indeed, Gerber's and the Non-GMO Project's seals

[6] Plaintiff does not allege she saw and relied on any statement regarding non-GMO claims on Gerber's website, thus the Court may not consider the alleged statements. FAC ¶¶ 5, 22, 35; *see Baranco v. Ford Motor Co.*, 294 F. Supp. 3d 950, 967 (N.D. Cal. Mar. 12, 2018).

contain distinct differences precisely because they do not represent the same standard. Plaintiff even admits the alleged statements on Gerber's website make this delineation clear. FAC ¶ 36.

Plaintiff's bare contention that *she* was deceived is insufficient to allege a reasonable consumer is likely to be deceived. *Hill v. Roll Int'l Corp.*, 195 Cal. App. 4th 1295, 1304 (2011). Courts look to the claims themselves. The "primary evidence in a false advertising case is the advertising itself" and the Ninth Circuit has affirmed dismissal when it "defie[d] common sense" a reasonable consumer would be deceived by the advertising. *Brockey v. Moore*, 107 Cal. App. 4th 86, 100 (2003); *Davis v. HSBC Bank Nev., N.A.*, 691 F.3d 1152, 1162 (9th Cir. 2012); *see also Freeman v. Time, Inc.*, 68 F.3d 285, 287-89 (9th Cir. 1995) (holding no reasonable reader could ignore the qualifying language putting the consumer "on notice" of the condition of winning a prize, despite plaintiff's interpretation otherwise).

Gerber's "NON GMO" stamp includes qualifying language a reasonable consumer could not ignore: "NOT MADE WITH GENETICALLY ENGINEERED INGREDIENTS."[7] FAC ¶ 36. A reasonable consumer would interpret Gerber's "NON GMO" stamp to mean exactly what Gerber discloses as its definition – "not made with genetically engineered ingredients" – especially because it appears both *next to and above the ingredient list* on the Product Plaintiff alleges she purchased. FAC ¶ 44. This qualifying language and the distinct, aesthetic differences between the Non-GMO Project's Verified seal and Gerber's stamp alone put the consumer "on notice" the two do not claim the same standard. Moreover, a consumer may review a product's ingredient list and messaging, or lack thereof, to confirm her understanding of a claim.[8] Here, a consumer may review the Products' ingredient lists, Gerber's qualifying language, and other information to confirm her understanding of the claim (specifically, whether the Products include byproducts from animals fed GMO feed). For example, the Products lack an "organic" claim, the commonly understood term for products not sourced from animals fed GMO feed. Plaintiff's

[7] *See Mantikas v. Kellogg Co.*, 910 F.3d 633, 636 (2d Cir. 2018) (emphasizing courts "consider the challenged advertisement as a whole, including disclaimers and qualifying language").

[8] *See, e.g.*, *Moore v. Trader Joe's Co.*, 4 F.4th 874, 881-85 (9th Cir. 2021) (considering "all the information available to consumers" and holding a reasonable consumer is not likely to be deceived because the ingredient list, contextual inferences, and front-label claim are consistent).

allegation a reasonable consumer would be misled is even more implausible considering every authority has declined to include category (3) ingredients in its definition of GMO.[9] The Court, applying common sense, may conclude a reasonable consumer would not be deceived.

b. Plaintiff's Definition of GMO is Implausible

Plaintiff's own definition of GMO also renders implausible her allegation a reasonable consumer would be misled by (a) believing the Products include category (2) ingredients because Plaintiff does not actually allege the Products' ingredients underwent a "transfer of genes" in a laboratory setting and (b) understanding Gerber's "NON GMO" claim to include category (3) ingredients, as her own definition does not include these ingredients. Before determining whether a reasonable consumer would be misled, a court first determines the "threshold issue" of whether the plaintiff plausibly defined "non-GMO." *Stewart v. Kodiak Cakes*, 537 F. Supp. 3d 1103, 1148 (S.D. Cal. 2021). The court asks whether it can assess how the challenged ingredients are plausibly genetically modified and whether a reasonable consumer would share Plaintiff's interpretation of GMO. The answer here is "no" for the reasons stated above and because Plaintiff's own definition of GMO is not consistent with her category (2) or (3) allegations.

First, Plaintiff fails to allege how the processes she describes for creating the challenged ingredients (category (2)) relate to her definition of GMO. In *Kodiak Cakes*, the plaintiffs alleged the defendant's baking mixes contained genetically modified ingredients because they included synthesized forms of soy lecithin, soy protein, and corn starch. 537 F. Supp. 3d at 1148. The court granted the defendant's motion to dismiss claims based on "non-GMO" allegations, reasoning the plaintiffs did not provide a plausible definition of "non-GMO" or "GMO" with

[9] No definition of GMO used by the federal agencies that regulate GMOs in the U.S. (FDA, USDA, and EPA) includes category (3) ingredients. *See Voluntary Labeling Indicating Whether Foods Have or Have Not Been Derived from Genetically Engineered Plants: Guidance for Industry*, U.S. Food and Drug Administration, at 4 (revised Mar. 2019); 7 C.F.R. § 66.1(1)(i) (2022); 7 U.S.C. § 1639b(b)(2)(A) (2021); 15 C.F.R. § 774.2, Supp. No. 1 at 965 (2021). *See* RJN, Exs. 1-4. Every state that has passed a mandatory GMO labeling law explicitly excludes byproducts from animals fed genetically modified feed. *See* 9 V.S.A. §§ 3042(4), 3044 (2016); 2013 Me. HP 490, §§ 1592(3), 2593(3)(B) (2014); Me. Rev. Stat. Ann. tit. 7 § 1051(2) (2009); Conn. Gen. Stat. §§ 21a-92b, 21a-92c(b) (2015). *See* RJN, Exs. 5-8. The EU also excludes byproducts from animals fed genetically modified feed from GMO labeling requirements. *See* Regulation (EC) 1829/2003, 2003 O.J. (L268) 16; Council Directive 2001/18/EC, art. 2, 2001 O.J. (L 106) 2. *See* RJN, Exs. 9-10.

which the court could assess "*how* the at-issue ingredients are plausibly genetically modified or how a reasonable consumer would be misled." *Id.* In other words, "[p]laintiffs fail[ed] to allege how this 'synthesized' allegation connect[ed] to their 'non-GMO' claim," leaving the court with "only a blanket statement that the three ingredients are genetically modified." *Id.*

Plaintiff's category (2) allegations fail to state a claim because of a gap like the one described in *Kodiak Cakes*. Plaintiff defines "genetic modification" as "an artificial laboratory-based technique that is specifically designed to enable the *transfer of genes* between unrelated or distantly related organisms." FAC ¶ 14 (emphasis added). Plaintiff alleges some Products are not "NON GMO" because they contain ingredients "genetically engineered in a laboratory setting through the use of biotechnologies." FAC ¶ 3. Yet, she does not allege a "transfer of genes" occurred when discussing the methods for creating the challenged ingredients. FAC ¶ 42. For example, Plaintiff's allegations regarding mixed tocopheryls only state it is "a synthetic, water-soluble form of Vitamin E, [which] is often found in processed foods as a preservative." FAC 20:1-4. For each ingredient, Plaintiff similarly alleges a process by which that ingredient may be created but does not allege *how* that renders, or the process does render, the ingredient genetically modified.[10] As in *Kodiak Cakes*, here, Plaintiff merely makes a blanket statement that these ingredients are genetically modified and leaves the Court without a means for assessing *how* they are plausibly genetically modified or how a reasonable consumer would be misled.

Plaintiff fails to state a claim as to her category (3) claims for the same reason. The plaintiffs in *Gallagher v. Chipotle Mexican Grill* also defined GMO as "any organism whose genetic material has been altered using . . . genetic engineering techniques." No. 15-cv-03952-HSG, 2016 U.S. Dist. LEXIS 14479, at *2 (N.D. Cal. Feb. 5, 2016). As Plaintiff does here, the plaintiff in *Gallagher* alleged a "reasonable consumer would interpret 'non-GMO ingredients' to mean meat and dairy ingredients produced from animals that never consumed any genetically modified substances." *Id.* at *10-12. Granting Chipotle's motion to dismiss, the court held plaintiff's definition of GMO was implausible because it did not include the processes the

[10] For example, Plaintiff alleges corn starch "is derived from the white endosperm at the heart of a corn kernel. To get to the endosperm, the kernels are processed to remove the outer layers and shell. The endosperms are then ground into a fine, white, gritty powder." FAC 19:4-9.

plaintiff claimed rendered Chipotle's products non-GMO. *Id*. The plaintiff did not allege Chipotle's ingredients had "been altered using . . . genetic engineering techniques" or the "animals from Defendant's meat and dairy ingredients . . . were genetically modified." *Id*.

Plaintiff even admits this gap with her category (3) claims: "While the abbreviated term 'GMO' may generally refer to genetically modified organisms, . . . 'non-GMO' and 'GMO free' . . . have a broader meaning to consumers in that they convey food products that do not contain and are not sourced or derived from . . . a cow that was raised on a diet of genetically engineered or modified food." FAC ¶ 23. As was the plaintiff's downfall in *Gallagher*, here, Plaintiff does not allege animal byproducts were then altered using genetic engineering techniques or the cows producing the byproducts were themselves genetically modified. FAC ¶ 30. Plaintiff does not allege cows themselves become genetically modified when they consume genetically modified feed or eating genetically modified feed incorporates the feed into the DNA of a cow.[11] This is because she cannot plausibly make such an allegation.[12] Instead, Plaintiff alleges animals eating genetically modified feed is a "process . . . employ[ing] GM . . . inputs." FAC ¶ 25.

Because Plaintiff neither provides the Court with a means for assessing how her category (2) ingredients are genetically modified nor includes category (3) ingredients in her definition of GMO, her definition is implausible and her claims based on these categories must be dismissed.

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

Plaintiff lacks standing to assert her category (3) claims based on the Products' alleged inclusion of ingredients derived from animals raised on GMO feed because the single Product

[11] *See Pappas v. Chipotle Mexican Grill*, No. 16CV612-MMA (JLB), 2016 U.S. Dist. LEXIS 202524, at *19 (S.D. Cal. Aug. 31, 2016) (holding reasonable consumer test was not met because plaintiff interpreted a "non-GMO" claim to mean not derived from animals fed GMO-containing feed, but did not allege animals become genetically modified by eating GMO feed or the products necessarily contain GMOs because some ingredients derived from animals fed GMO feed).

[12] "The DNA in the GMO food does not transfer to the animal that eats it. This means that animals that eat GMO food do not turn into GMOs. If it did, an animal would have the DNA of any food it ate, GMO or not. . . . Similarly, the DNA from GMO animal food does not make it into the meat, eggs, or milk from the animal." *GMO Crops, Animal Food, and Beyond*, U.S. Food and Drug Administration (Feb. 17, 2022). *See* RJN, Ex. 11 at 5-6.

Plaintiff purchased does not contain animal byproducts. *See* FAC ¶ 44; *Granfield v. Nvidia Corp.*, No. C 11-05403 JW, 2012 U.S. Dist. LEXIS 98678, at *18-19 (N.D. Cal. July 11, 2012) (holding when a plaintiff asserts claims based both on products purchased and products not purchased, "claims relating to products not purchased must be dismissed for lack of standing").[13]

To establish standing for a false advertising claim, a plaintiff must show (1) she suffered economic or reputational injury (2) caused by the defendant's deceptive advertising. *Gunaratna v. Dennis Gross Cosmetology LLC*, No. CV 20-2311-MWF (GJSx), 2020 U.S. Dist. LEXIS 249995, at *10 (C.D. Cal. Nov. 13, 2020). Plaintiff purchased only Gerber's "Good Start Soy 2 Powder Infant & Toddler Formula," and she does not allege either the Product or its ingredients contain animal byproducts.[14] FAC ¶¶ 42, 44. In fact, its label featured in the FAC states the Product is "Milk Free." FAC ¶ 44. Plaintiff could not have been harmed by Gerber's alleged inclusion of GMO-containing animal byproducts in products she did not purchase.

Courts sometimes permit plaintiffs to plead claims based on products not purchased if the products are "substantially similar."[15] *Figy v. Frito-Lay N. Am., Inc.*, 67 F. Supp. 3d 1075, 1083 (2014). A court may consider "whether the challenged products are of the same kind, comprised of largely the same ingredients, and . . . bear[] the same alleged mislabeling." *Id.* The Products here do not resemble products in cases in which a court found products to be substantially similar.

First, the number of, and differences in, ingredients, products, and products across product lines is substantial. The FAC identifies at least 37 Products across at least 8 product lines that allegedly contain 16 genetically modified ingredients. FAC ¶¶ 4, 44-75. Plaintiff only purchased one soy product in Gerber's "Good Start" line, which does not contain animal byproducts, as she alleges the rest of the Products do. FAC ¶¶ 41(a), 44. Second, Plaintiff alleges the Products

[13] *See also Kodiak Cakes,* 537 F. Supp. 3d at 1124 (agreeing with the "growing trend" addressing standing at the pleading stage and dismissing claims in which no plaintiff purchased products).

[14] Despite Plaintiff's allegation "*each* of the Products at issue . . . contains whey-based protein sources," the *soy* product Plaintiff purchased does not. FAC ¶¶ 41(a), 44.

[15] *See Mlejnecky v. Olympus Imaging Am., Inc.*, No. 2:10-CV-02630 JAM-KJN, 2011 U.S. Dist. LEXIS 42333, at *12-13 (E.D. Cal. Apr. 18, 2011) (finding case law holding no standing for products not purchased more persuasive because the "reasoning is more in line with the recent standard delineated by the California Supreme court in *Kwikset*").

contain three distinct categories of ingredients, not all of which apply to each Product. Third, many Products contain ingredient differences affecting the nature of the Product, who purchases it, and for what purpose. For example, the Products vary from "Milk Free," "Lactose Free," hypoallergenic, soy-based, with prebiotics, with probiotics, with iron, or with "2g Protein," and range from infant formula, to baby snacks, to toddler food. FAC ¶¶ 44-75. Even though the Products all include Gerber's "NON GMO" stamp, that alone is not dispositive.[16] Therefore, Plaintiff's claims based on category (3) ingredients should be dismissed for lack of standing.

D. Plaintiff's Claim under the UCL's "Unlawful" Prong Should Be Dismissed Because She Fails To Establish a Predicate Violation of Law

Plaintiff also alleges Gerber violated the "unlawful" prong of the UCL by violating the CLRA, FAL, and Cal. Com. Code § 2607. FAC ¶ 99. The UCL's "unlawful" prong "borrows violations of other laws and treats them as unlawful practices," which the UCL then "makes independently actionable." *Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co.*, 20 Cal. 4th 163, 180 (1999). To state a claim under the "unlawful" prong, a plaintiff must establish a predicate violation of law. *Berryman v. Merit Prop. Mgmt., Inc*., 152 Cal. App 4th 1544, 1554 (2007). However, Plaintiff fails to state a claim under the CLRA or FAL, or a breach under Cal. Com. Code § 2607. *See Elias v. Hewlett-Packard Co*., 950 F. Supp. 2d 1123, 1140 (N.D. Cal. 2013) ("Because the Court finds that Plaintiff did not plausibly allege any statutory violations, it concurrently finds that Plaintiff fails to plausibly allege violation of the unlawful prong of the UCL."); *Sud v. Costco Wholesale Corp*., 229 F. Supp. 3d 1075, 1088 (N.D. Cal. 2017) (White, J.) (dismissing claim under the UCL's "unlawful" prong because plaintiff failed to establish Costco's actions violated FAL or CLRA). Therefore, Plaintiff's "unlawful" prong UCL claim fails.

E. Plaintiff's Claim under the UCL's "Unfair" Prong Should Be Dismissed Because She Fails To Plausibly Allege False or Misleading Conduct

Plaintiff also alleges Gerber violated UCL's "unfair" prong. FAC ¶ 100. When determining whether a plaintiff sufficiently pled a violation of the "unfair" prong, two tests may

[16] *See Kane v. Chobani, Inc*., No. 12-CV-02425-LHK, 2013 U.S. Dist. LEXIS 134385, at *37-38 (N.D. Cal. Sept. 19, 2013) (holding no standing for yogurt products not purchased bearing the same label as the yogurt products purchased because plaintiffs did "not allege facts sufficient to show that the *products* . . . not purchase[d] are 'substantially similar' to those that they did").

apply. The first is a balancing test, where a court weighs "the utility of the defendant's conduct against the gravity of the harm to the alleged victim." *South Bay Chevrolet v. Gen. Motors Acceptance Corp.*, 72 Cal. App. 4th 861, 886 (1999). The second requires a UCL claim to be "tethered to some legislatively declared policy." *Cel-Tech*, 20 Cal. 4th at 186-87. Plaintiff's "unfair" prong UCL claim fails under both.

Applying the *South Bay* balancing test, courts have held when a plaintiff fails to allege sufficiently a false or misleading statement, a claim under the UCL's "unfair" prong fails, too, because the plaintiff has not made the requisite showing the conduct "offends an established public policy or . . . is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers." *Spiegler v. Home Depot U.S.A.*, Inc., 552 F. Supp. 2d 1036, 1045-46 (C.D. Cal. 2008). In *Janda v. T-Mobile, USA, Inc.*, for example, the court dismissed plaintiffs' UCL "unfair" prong claim because they did not plausibly identify a false or misleading statement made by T-Mobile. No. C 05-03729 JSW, 2009 U.S. Dist. LEXIS 24395, at *30 (N.D. Cal. Mar. 13, 2009) (White, J.). Here, Plaintiff fails to allege sufficiently Gerber's "NON GMO" claim was false or misleading. For the same reason, Plaintiff's claim fails under the "legislative" test. *See id.* (finding plaintiffs also failed to show T-Mobile's conduct violated a "legislatively declared policy" where they failed to state claims under CLRA, FAL, and UCL's "fraudulent" and "unlawful" prongs). Therefore, Plaintiff's claim under the UCL's "unfair" prong fails.

F. Plaintiff Fails to State Breach of Warranty Claims

Plaintiff's breach of express warranty and breach of implied warranty of merchantability claims fail for the same reason her UCL, FAL, and CLRA claims fail: she does not plausibly allege Gerber's "NON GMO" stamp was false or misleading. *See Robie*, 2021 U.S. Dist. LEXIS 117336, at *17 ("[W]arranty and fraud claims rise and fall on whether [a] [p]laintiff has been able plausibly to allege false or misleading representations."). All of Plaintiff's claims hinge on this same misrepresentation theory, which she fails to plead sufficiently. FAC ¶¶ 130, 142. Therefore, Plaintiff's warranty claims fail along with her statutory claims.

G. Plaintiff Fails to Plead Fraud

Plaintiff bases her fraud, fraudulent misrepresentation, and negligent misrepresentation

claims on the same theory, i.e., that the Products are not "NON GMO," as the label states. FAC ¶¶ 157, 166, 175. To plead fraud, a plaintiff must allege a misrepresentation, knowledge of falsity, intent to defraud, actual justifiable reliance, and resulting damage. *Lazar v. Superior Court*, 12 Cal. 4th 631, 638 (1996). Rule 9(b)'s heightened pleading standard applies, and requires a plaintiff "set forth what is false or misleading about a statement, and why it is false." *Decker v. GlenFed, Inc.*, 42 F.3d 1541, 1548 (9th Cir. 1994). Plaintiff fails to allege Gerber made such a "misrepresentation" or her reliance on Gerber's "NON GMO" stamp aligns with how a consumer acting reasonably under the circumstances would interpret it. Plaintiff has certainly not pled as much under Rule 9(b)'s heightened pleading standard or sufficiently pled Gerber had *intent* to defraud. Therefore, Plaintiff's fraud claims must be dismissed.

H. Plaintiff Fails to State an Unjust Enrichment / Restitution Claim

Plaintiff's unjust enrichment / restitution claim must be dismissed for three reasons.

First, unjust enrichment is not a cause of action, but a general principle underlying legal theories and remedies. *See Myers-Armstrong v. Actavis Totowa, LLC*, 382 F. App'x 545, 548 (9th Cir. 2010) (finding there is no cause of action for unjust enrichment under California law).

Second, even if the Court construes Plaintiff's unjust enrichment claim as a quasi-contract claim seeking restitution, her claim still fails because it is "merely duplicative of [her statutory] claims." *Robie*, 2021 U.S. Dist. LEXIS 117336, at *17 (dismissing unjust enrichment claim because plaintiff "fails to identify any independent theory of unjust enrichment that does not rise or fall with her statutory claims or are merely duplicative of those claims"). It is inconsequential that Plaintiff pleads her claim in the alternative because "where the unjust enrichment claim relies upon the same factual predicates as a plaintiff's legal causes of action, it is not a true alternative theory of relief." *Licul v. Volkswagen Grp. of Am., Inc*., No. 13-61686-CIV, 2013 U.S. Dist. LEXIS 171627, at *19 (S.D. Fla. Dec. 5, 2013).

Third, Plaintiff does not allege monetary damages are inadequate. *See Robie*, 2021 U.S. Dist. LEXIS 117336, at *15-16 (dismissing equitable claims because "[p]laintiff has not alleged that she lacks an adequate remedy at law"). Therefore, Plaintiff's unjust enrichment claim fails.

IV. CONCLUSION

For the foregoing reasons, Gerber respectfully requests the Court dismiss Plaintiff's FAC.

Dated: April 14, 2022

WHITE & CASE LLP

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

Attorneys for Defendant
GERBER PRODUCTS COMPANY

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was filed in the Court's CM/ECF System this 14th day of April, 2022, and thereby served on all counsel of record.

/s/ Bryan A. Merryman
Bryan A. Merryman