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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

EDISON CORPUZ,  
  
Plaintiff,  
  
v.  
  
WALMART, INC.  
  
Defendant.

Case No.: 3:22-cv-00901-RBM-AHG

**ORDER DENYING DEFENDANT  
WALMART INC.’S MOTION TO  
DISMISS COMPLAINT**

**[Doc. 7]**

On September 2, 2022, Defendant Walmart, Inc. (“Defendant”) filed a Motion to Dismiss Complaint (“Motion”). (Doc. 7.) Plaintiff Edison Corpuz (“Plaintiff”) filed an opposition on September 26, 2022 (Doc. 10), and Defendant filed a reply on October 10, 2022 (Doc. 11). For the reasons discussed below, Defendant’s Motion is **DENIED**.

**I. BACKGROUND**

A. Factual Background

Plaintiff is an individual alleging he purchased Defendant’s Spring Valley 1000 mg Fish Oil dietary supplement (the “Product”) “on several occasions over the past 3 years, including most recently in or around December 2021.” (Doc. 1 at 6.) Plaintiff contends Defendant engaged in “deceptive practices associated with the advertising, labeling and sale of” the Product. (*Id.* at 2.)

1 Defendant markets, labels and sells its Product as “Fish Oil” consisting of 600 mg  
2 of Eicosapentaenoic Acid (“EPA”) and 400 mg of Docosahexaenoic Acid (“DHA”). (*Id.*)  
3 EPA and DHA are described as the essential omega-3 fatty acids that naturally occur in  
4 fish. (*Id.*) The Product’s principal display panel (“PDP”) explains the Product contains  
5 1,000 mg of fish oil, consisting of the aforementioned 600 mg EPA and 400 mg DHA. (*Id.*  
6 at 3.) The supplemental facts panel (“SFP”) on the back of the Product reaffirms that the  
7 Product contains 1,000 mg of fish oil while also claiming to provide 1,060 mg of Omega-  
8 3 Fatty Acids as Triglycerides including EPA as EE and DHA as EE. (*Id.*)

9 Plaintiff argues that “[c]ontrary to what is represented on both the front and back of  
10 its label, this Product is not Fish Oil, nor does it contain a single milligram of the principal  
11 Omega-3s found in fish oil (i.e., EPA and DHA).” (*Id.*) Rather, “Defendant’s Product is  
12 a lab synthesized solution – the result of a chemical process known as trans-esterification,  
13 whereby an industrial solvent and ethanol are used to molecularly alter and substantially  
14 transform otherwise unmarketable fish waste into a consumable product.” (*Id.* at 3–4.)  
15 Plaintiff alleges that this process “eliminates the majority of fish oil’s constituent  
16 ingredients and substantially transforms its Omega-3s (i.e., DHA and EPA) into fatty acid  
17 ethyl esters – a substance that is materially distinct from the fish oil reasonably expected  
18 by consumers.” (*Id.* at 4.)

19 Plaintiff explains “it is mathematically impossible for 1,000 mg of fish oil to consist  
20 of 1,060 mg of Omega-3 Fatty Acids . . . .” (*Id.* at 4.) Additionally, despite claiming that  
21 the Omega-3 content is in triglyceride form, Defendant indicates the Omega-3 content to  
22 be “as EE” but does not define what the terms “EE” means.<sup>1</sup> (*Id.* at 4–5.)

23 Thus, it is Plaintiff’s position that “Defendant falsely represented the fundamental  
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26 <sup>1</sup> The briefing for this Motion confirms that “EE” represents fatty acid ethyl esters. (*See*  
27 Doc. 7–1 at 7; Doc. 10 at 3.) It is Plaintiff’s position that fatty acid ethyl esters are a  
28 substance that is materially distinct from fish oil, which will be discussed in detail below.  
(*See* Doc. 1 at 4.) The Court will adopt the “EE” abbreviation when referring to fatty acid  
ethyl esters.

1 nature of its Product, and as a result of this false and misleading labeling, was able to sell  
2 this Product to tens of thousands of unsuspecting consumers throughout California and the  
3 United States” and that this conduct constitutes a breach of warranty. (*Id.* at 5.)

#### 4 B. Procedural Background

5 On June 21, 2022, Plaintiff filed a class action complaint (“Complaint”) against  
6 Defendant on behalf of himself and others similarly situated. (Doc. 1.) The Complaint  
7 asserts seven causes of action. (*Id.* at 36–44.) The first through third causes of action  
8 allege violations of California’s Unfair Competition Law (“UCL”), CAL. BUS. & PROF.  
9 CODE §§ 17200, et seq., the fourth cause of action alleges violation of California’s False  
10 Advertising Law (“FAL”), CAL. BUS. & PROF. CODE §§ 17500, et seq., the fifth cause of  
11 action alleges violation of California’s Consumers Legal Remedies Act (“CLRA”), CAL.  
12 CIV. CODE §§ 1750, et seq., the sixth cause of action alleges violation of breach of express  
13 warranty, and the seventh cause of action asserts a claim for restitution based on quasi-  
14 contract/unjust enrichment. (*Id.*) On September 2, 2022, Defendant filed the instant  
15 Motion requesting the Court dismiss Plaintiff’s Complaint with prejudice and without  
16 leave to amend. (Doc. 7–1 at 7, 11, 25–26.) Plaintiff filed an opposition on September 26,  
17 2022 (Doc. 10), and Defendant filed a reply on October 10, 2022 (Doc. 11).

## 18 II. LEGAL STANDARD

19 Pursuant to Federal Rule of Civil Procedure (“Rule”) 12(b)(6), an action may be  
20 dismissed for failure to allege “enough facts to state a claim to relief that is plausible on its  
21 face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). “A claim has facial  
22 plausibility when the plaintiff pleads factual content that allows the court to draw the  
23 reasonable inference that the defendant is liable for the misconduct alleged. The  
24 plausibility standard is not akin to a ‘probability requirement,’ but it asks for more than a  
25 sheer possibility that a defendant acted unlawfully.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678  
26 (2009) (internal citations omitted). For purposes of ruling on a Rule 12(b)(6) motion, the  
27 Court “accept[s] factual allegations in the complaint as true and construe[s] the pleadings  
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1 in the light most favorable to the nonmoving party.” *Manzarek v. St. Paul Fire & Marine*  
2 *Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008).

3 However, the Court is “not bound to accept as true a legal conclusion couched as a  
4 factual allegation.” *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555). Nor is the  
5 Court “required to accept as true allegations that contradict exhibits attached to the  
6 Complaint or matters properly subject to judicial notice, or allegations that are merely  
7 conclusory, unwarranted deductions of fact, or unreasonable inferences.” *Daniels-Hall v.*  
8 *Nat’l Educ. Ass’n*, 629 F.3d 992, 998 (9th Cir. 2010). “In sum, for a complaint to survive  
9 a motion to dismiss, the non-conclusory factual content, and reasonable inferences from  
10 that content, must be plausibly suggestive of a claim entitling the plaintiff to relief.” *Moss*  
11 *v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009) (quotation marks omitted).

12 When a Rule 12(b)(6) motion is granted, “a district court should grant leave to amend  
13 even if no request to amend the pleading was made, unless it determines that the pleading  
14 could not possibly be cured by the allegation of other facts.” *Cook, Perkiss & Liehe v. N.*  
15 *Cal. Collection Serv.*, 911 F.2d 242, 247 (9th Cir. 1990) (citations omitted).

### 16 III. DISCUSSION

#### 17 A. Request for Judicial Notice

18 A court generally cannot consider materials outside the pleadings on a motion to  
19 dismiss for failure to state a claim. FED. R. CIV. P. 12(d). A court may, however, consider  
20 materials subject to judicial notice without converting the motion to dismiss into one for  
21 summary judgment. *Barron v. Reich*, 13 F.3d 1370, 1377 (9th Cir. 1994). Under Federal  
22 Rule of Evidence 201(b), a court may take judicial notice, either on its own accord or by a  
23 party’s request, of facts that are not subject to reasonable dispute because they are (1)  
24 “generally known within the trial court’s territorial jurisdiction; or (2) can be accurately  
25 and readily determined from sources whose accuracy cannot reasonably be questioned.”  
26 FED. R. EVID. 201(b). A court may also take judicial notice of “matters of public record.”  
27 *Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2001) (internal citations omitted).  
28 Finally, under the incorporation by reference doctrine, courts may “take into account

1 documents whose contents are alleged in a complaint and whose authenticity no party  
2 questions, but which are not physically attached to the [plaintiff's] pleading.” *Davis v.*  
3 *HSBC Bank Nevada, N.A.*, 691 F.3d 1152, 1160 (9th Cir. 2012) (internal quotations and  
4 citations omitted). The incorporation by reference doctrine “treats certain documents as  
5 though they are part of the complaint itself,” *Khoja v. Orexigen Therapeutics, Inc.*, 899  
6 F.3d 988, 1002 (9th Cir. 2018), so long as “the plaintiff refers extensively to the document  
7 or the document forms the basis of the plaintiff’s claim.” *United States v. Ritchie*, 342 F.3d  
8 903, 907 (9th Cir. 2003).

9 Defendant requests the Court take judicial notice of the following exhibit: a copy of  
10 the Global Organization for EPA and DHA Omega-3’s Voluntary Monograph, Version 8.1  
11 (Exhibit D)<sup>2</sup>. (*See* Doc. 7–2 at 2–3; Doc. 7–4.) Additionally, Defendant requests the court  
12 incorporate by reference the following four exhibits: (1) a copy of Anthony P. Bimbo,  
13 *Marine Oils: Edible Oil Processing* (Exhibit A); (2) a copy of Douglas MackKay, *A*  
14 *Comparison of Synthetic Ethyl Ester form Fish Oil vs. Natural Triglyceride Form 2*  
15 (Exhibit B); (3) a copy of *Triglycerides vs. Ethyl Ester Forms of Fish Oil Omega-3’s*,  
16 Science Based Health (Exhibit C); and (4) a copy of the Global Organization for EPA and  
17 DHA Omega-3’s Voluntary Monograph, Version 7.2 (Exhibit E). (*See id.*)

18 The Court takes judicial notice of the copy of the Global Organization for EPA and  
19 DHA Omega-3’s Voluntary Monograph, Version 8.1 in Exhibit D. However, the Court  
20 notes it is not bound to take judicial notice of the truth of the matters asserted therein. *See*  
21 *Spy Optic, Inc. v. Alibaba.Com, Inc.*, 163 F. Supp. 3d 755, 762 (C.D. Cal. 2015) (“Courts  
22 may take judicial notice of the fact that an internet article is available to the public, but it  
23 may not take judicial notice of the truth of the matters asserted in the article.”); *see also*  
24 *Khoja*, 899 F.3d at 999 (“Just because the document itself is susceptible to judicial notice  
25 does not mean that every assertion of fact within that document is judicially noticeable for  
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28 <sup>2</sup> The Court adopts the exhibit identifiers used by Defendant. (*See* Docs. 7–2, 7–3.)

1 its truth.”); *Bruce v. Chaiken*, No. 215CV00960TLNKJN, 2019 WL 645044, at \*1 (E.D.  
2 Cal. Feb. 15, 2019) (“While [a court] may take judicial notice of the fact that the internet,  
3 Wikipedia, and journal articles are available to the public, it may not take judicial notice  
4 of the truth of the matters asserted therein.”).

5 The Court incorporates: (1) the copy of Anthony P. Bimbo, *Marine Oils: Edible Oil*  
6 *Processing* in Exhibit A; (2) the copy of Douglas MackKay, *A Comparison of Synthetic*  
7 *Ethyl Ester form Fish Oil vs. Natural Triglyceride Form 2* in Exhibit B; (3) the copy of  
8 *Triglycerides vs. Ethyl Ester Forms of Fish Oil Omega-3’s*, Science Based Health in  
9 Exhibit C; and (4) the copy of the Global Organization for EPA and DHA Omega-3’s  
10 Voluntary Monograph, Version 7.2 in Exhibit E. Plaintiff’s claims rely on the above  
11 referenced exhibits for support, and they may be considered by the Court. *See Khoja*, 899  
12 F.3d at 1002 (incorporation by reference “prevents plaintiffs from selecting only portions  
13 of documents that support their claims, while omitting portions of those very documents  
14 that weaken—or doom—their claims”); *United States v. Ritchie*, 342 F.3d at 908 (“A court  
15 may . . . consider certain materials—documents attached to the complaint, documents  
16 incorporated by reference in the complaint, or matters of judicial notice—without  
17 converting the motion to dismiss into a motion for summary judgment.); *Coto Settlement*  
18 *v. Eisenberg*, 593 F.3d 1031, 1038 (9th Cir. 2010) (“We have extended the doctrine of  
19 incorporation by reference to consider documents in situations where . . . the contents of  
20 the document are alleged in a complaint . . . and there are no disputed issues as to the  
21 document’s relevance.”). However, the Court again notes it is not bound by the truth of  
22 the matters asserted therein. *See Khoja*, 899 F.3d at 1003 (“[I]t is improper to assume the  
23 truth of an incorporated document if such assumptions only serve to dispute facts stated in  
24 a well-pleaded complaint.”).

## 25 B. Preemption

26 As an initial matter, Defendant contends Plaintiff’s Complaint is both expressly and  
27 impliedly preempted because “the labelling at issue is regulated under the Federal Food,  
28 Drug, and Cosmetic Act, 21 U.S.C. §§ 301-392 (the “FDCA”) and the subsequently

1 enacted Nutritional Labeling and Education Act, § 21 U.S.C. 343-1(a) [(“NLEA”)].” (Doc.  
2 7–1 at 13.)

3 **a. Statutory and Regulatory Background**

4 The United States Constitution includes the Supremacy Clause which empowers  
5 Congress to enact legislation that preempts state law. *See Gibbons v. Ogden*, 22 U.S. 1,  
6 211 (1824). “Federal preemption occurs when: (1) Congress enacts a statute that explicitly  
7 pre-empts state law; (2) state law actually conflicts with federal law; or (3) federal law  
8 occupies a legislative field to such an extent that it is reasonable to conclude that Congress  
9 left no room for state regulation in that field.” *Chae v. SLM Corp.*, 593 F.3d 936, 941 (9th  
10 Cir. 2010). In assessing whether Plaintiff’s claims are preempted, the court is mindful of  
11 the presumption against preemption. *See Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485  
12 (1996); *see also In re Farm Raised Salmon Cases*, 42 Cal.4th 1077, 1088 (2008) (noting  
13 that consumer protection laws such as the UCL, FAL, and CLRA, are within the states’  
14 historic police powers and therefore subject to the presumption against preemption);  
15 *Corbett v. PharmaCare U.S., Inc.*, 567 F. Supp. 3d 1172, 1188 (S.D. Cal. 2021) (“In the  
16 area of proper marketing and labeling of food products, the presumption against  
17 preemption is strong.”).

18 By way of background, the FDCA “was enacted in 1938 as a successor to the 1906  
19 Pure Food and Drugs Act, the first comprehensive federal legislation designed to protect  
20 consumers from fraud or misrepresentation in the sale of food and drugs.” *Viggiano v.*  
21 *Hansen Nat. Corp.*, 944 F. Supp. 2d 877, 887 (C.D. Cal. 2013). In 1990, Congress  
22 amended the FDCA by enacting the NLEA “to ‘clarify and to strengthen the Food and  
23 Drug Administration’s [(“FDA”)] legal authority to require nutrition labeling on foods, and  
24 to establish the circumstances under which claims may be made about the nutrients in  
25 foods.’” *Id.* at 887–88 (quoting *Nutritional Health Alliance v. Shalala*, 144 F.3d 220, 223  
26 (2d Cir.1998)). In conjunction with other changes, the NLEA added an express preemption  
27 provision to the FDCA. *See* 21 U.S.C. § 343–1(a)(5) (“Except as provided in subsection  
28 (b), no State or political subdivision of a State may directly or indirectly establish under

1 any authority or continue in effect as to any food in interstate commerce . . . (3) any  
2 requirement for the labeling of food of the type required by section . . . 343(k) of this title  
3 that is not identical to the requirement of such section”).

4 Among other functions, “[t]he FDCA grants authority to the Secretary of Health and  
5 Human Services to ‘promulgate regulations fixing and establishing for any food, under its  
6 common or usual name so far as practicable, a reasonable definition and standard of  
7 identity.’” *Rodriguez v. Target Corp.*, No. 22 CIV. 2982 (LGS), 2022 WL 18027615, at  
8 \*3 (S.D.N.Y. Dec. 30, 2022) (quoting 21 U.S.C. § 341)). “Under the FDCA, food is  
9 ‘misbranded’ if, among things, ‘its labeling is false or misleading in any particular.’”  
10 *Rodriguez*, 2022 WL 18027615, at \*3 (quoting 21 U.S.C. § 343(a)). Moreover, “[i]f it  
11 purports to be or is represented as a food for which a definition and standard of identity has  
12 been prescribed by regulations as provide by [§ 341],” such food is misbranded if it fails  
13 to “conform[ ] to such definition and standard.” 21 U.S.C. § 343(g). “The regulations  
14 promulgated under the FDCA require that food packaging bear ‘a statement of the identity  
15 of the commodity.’” *Rodriguez*, 2022 WL 18027615, at \*3 (quoting 21 C.F.R. § 101.3(a)).  
16 That “statement of identity” must be the name specified by federal law or, if no such name  
17 is specified, “[t]he common or usual name of the food.” 21 C.F.R. § § 101.3(b)(1)-(2).

### 18 1. *Express Preemption*

19 Defendant explains that “any claim based on [Defendant’s] identification of the  
20 Product as a ‘Fish Oil’ product is barred by the FDCA’s applicable express preemption  
21 provision” because under the NLEA, “state law cannot be employed to alter or vary the  
22 standards of identity for regulated supplements that are ‘not identical’ to the FDA’s  
23 standards.” (Doc. 7–1 at 13 (citing 21 U.S.C. § 343(a)(1); § 343(g); 21 C.F.R. § 100.1).)  
24 It is Defendant’s position that “the Complaint fails to plausibly allege that a dietary  
25 supplement derived from the oil of fish should be called anything other than ‘fish oil.’  
26 Indeed, the term ‘fish oil’ provides consumers vital information about the source of the  
27 oil.” (Doc. 7–1 at 14.) Defendant contends that “case law and facts” favor calling the  
28 Product fish oil in accordance with “practical considerations like the fact that the ingredient



1 is extracted from fish and provides health benefits” because referring to the Product as  
2 “fatty acid ethyl ester” would convey “no meaningful information to reasonable  
3 consumers.” (*Id.* at 14–15.)

4 Plaintiff argues federal preemption is not applicable and explains Defendant’s  
5 argument is contradictory. (Doc. 10 at 9.) Defendant tells the Court “there is no FDA  
6 regulation that establishes a ‘common or usual name’ for fish oil” while also asking the  
7 Court to conclude that the common or unusual name of the Product is fish oil. (*Id.* (quoting  
8 Doc. 7–1 at 16).) Additionally, “Defendant attempts to convince this Court that trans-  
9 esterification is nothing more than a mere processing step which has no effect on the  
10 underlying nature of the product” which “ignores the Complaint’s detailed allegations  
11 which clearly differentiates between standard processing.” (*Id.* at 13.)

12 In reviewing the Complaint, the Court finds Plaintiff’s assertions regarding the  
13 Product’s “common or unusual name” are plausible. The Complaint explains that the  
14 “trans-esterification process substantially and irrevocably transforms the Omega-3s in fish  
15 oil from their natural triglyceride form into Omega-3 [EE]” and that these substances “are  
16 distinguishable on a molecular level such that it is impossible as a matter of law or logic  
17 for them to share a common or usual name.” (Doc. 1 at 16.) Thus, Plaintiff contends that  
18 “[a]long with their molecular differences, they have different common or usual names  
19 which must be properly represented on labeling of any dietary supplement in which they  
20 are contained.” (*Id.*) The Court takes note of Defendant’s contention that the dictionary  
21 definition, among other considerations, qualify the Product as fish oil. (Doc. 7–1 at 14–  
22 15.) However, the Court declines to make such a determination at this juncture. *See*  
23 *Rodriguez*, 2022 WL 18027615, at \*5 (“[T]he Court cannot weigh the evidence or choose  
24 between competing inferences at the motion to dismiss stage.) In accepting all factual  
25 allegations in the complaint as true and construing the pleadings in the light most favorable  
26 to Plaintiff, the nonmoving party, the Court concludes Plaintiff’s claims are not expressly  
27 preempted by the FDCA.

28 ///

1                   2.     *Implied Preemption*

2             Defendant argues Plaintiff’s claims are impliedly preempted because “Plaintiff’s  
3 UCL claim exists solely by virtue of the FDCA and Plaintiff’s enforcement of the same is  
4 preempted.” (Doc. 7–1 at 17.)

5             Plaintiff counters that his claims are not impliedly preempted and explains  
6 “Defendant’s implied preemption argument is predicated on the erroneous contention that  
7 absent an underlying violation of the FDCA, Plaintiffs would not have a claim. This is  
8 glaringly untrue as each of Plaintiff’s state law claims would exist in the absence of the  
9 FDCA.” (Doc. 10 at 8.) Plaintiff clarifies that Defendant’s decision in naming the Product  
10 as “fish oil” and affirmative representations relating to the product, such as the contention  
11 that “the Product is in Triglyceride form and promise to provide 600mg EPA / 400mg  
12 DHA, are each falsehoods that independently give rise to claims under the UCL, CLRA,  
13 FAL and express warranty theories.” (*Id.* at 8–9.)

14             Here, it does not appear Plaintiff’s UCL claim exists solely by virtue of the FDCA.  
15 Plaintiff’s state law claims would proceed whether or not the regulations enacted by the  
16 FDCA existed. The Court notes that “[d]istrict courts have routinely rejected arguments  
17 that state-law UCL, FAL, and CLRA food-labeling claims and related claims under the  
18 [Sherman Food, Drug, and Cosmetic Law (the “Sherman Law”)] are impliedly preempted  
19 under § 337(a) . . . .” *Sandoval v. PharmaCare US, Inc.*, 145 F. Supp. 3d 986, 995 (S.D.  
20 Cal. 2015) (citing *Vassigh v. Bai Brands, LLC*, Case No. 14-cv-05127-HSG, 2015 WL  
21 4238886, at \*4–5 (N.D. Cal. July 13, 2015) (collecting cases)); *see also Hesano v. Iovate*  
22 *Health Scis., Inc.*, No. 13CV1960-WQH-JMA, 2014 WL 197719, at \*7 (S.D. Cal. Jan. 15,  
23 2014) (“The FDCA . . . does not preclude states from adopting their own parallel laws and  
24 adopting a different mechanism for enforcing those laws. California chose to exercise this  
25 right by enacting the Sherman Law and allowing private plaintiffs to enforce that law  
26 through the UCL.”) (quoting *Trazo v. Nestle USA, Inc.*, No. 5:12-CV-2272 PSG, 2013 WL  
27 4083218, at \*6 (N.D. Cal. Aug. 9, 2013), *on reconsideration*, 113 F. Supp. 3d 1047 (N.D.  
28 Cal. 2015)). Accordingly, the Court finds Plaintiff’s claims are not impliedly preempted.

1 C. Whether the Complaint Should be Dismissed for Failure to State a Claim

2 a. **California Consumer Protection Statutes**

3 The UCL, CLRA, and FAL, which are the basis of Plaintiff's first through fifth  
4 causes of action, are California consumer protection statutes. The UCL prohibits "unfair  
5 competition," which includes "any unlawful, unfair or fraudulent business act or practice."  
6 CAL. BUS. & PROF. CODE § 17200. California's CLRA prohibits "unfair methods of  
7 competition and unfair or deceptive acts or practices." CAL. CIV. CODE § 1770.  
8 California's FAL prohibits any "unfair, deceptive, untrue or misleading advertising." CAL.  
9 BUS. & PROF. CODE § 17500. "Because the same standard for fraudulent activity governs  
10 all three statutes, courts often analyze the three statutes together." *Hadley v. Kellogg Sales*  
11 *Co.*, 243 F. Supp. 3d 1074, 1089 (N.D. Cal. 2017); *see, e.g., In re Sony Gaming Networks*  
12 *& Customer Data Sec. Breach Litig.*, 996 F. Supp. 2d 942, 985 (S.D. Cal. 2014) ("[c]ourts  
13 often analyze these statutes together because they share similar attributes"); *Consumer*  
14 *Advocates v. Echostar Satellite Corp.*, 113 Cal. App. 4th 1351, 1360 (2003) (analyzing the  
15 UCL, CLRA, and FAL together).

16 1. "Reasonable Consumer" Standard

17 Claims made under the UCL, CLRA, and FAL are governed by the "reasonable  
18 consumer" standard. *Williams v. Gerber Prods. Co.*, 552 F.3d 934, 938 (9th Cir. 2008);  
19 *Ebner v. Fresh, Inc.*, 838 F.3d 958, 965 (9th Cir. 2016). Under this standard, a plaintiff  
20 must "show that 'members of the public are likely to be deceived.'" *Ebner*, 838 F.3d at  
21 965 (quoting *Williams*, 552 F.3d at 938). This standard "requires more than a mere  
22 possibility that [the] label 'might conceivably be misunderstood by some few consumers  
23 viewing it in an unreasonable manner.'" *Becerra v. Dr. Pepper/Seven Up, Inc.*, 945 F.3d  
24 1225, 1228 (9th Cir. 2019) (quoting *Lavie v. Procter & Gamble Co.*, 105 Cal. App. 4th  
25 496, 508 (2003)). Rather, it must be "probable that a significant portion of the general  
26 consuming public or of targeted consumers, acting reasonably in the circumstances, could  
27 be misled." *Lavie*, 105 Cal. App. 4th at 508; *see also White v. Kroger Co.*, No. 21-CV-  
28 08004-RS, 2022 WL 888657, at \*1 (N.D. Cal. Mar. 25, 2022). In general, "[t]he question

1 of whether a business practice is deceptive in most cases presents a question of fact not  
2 amenable to resolution on a motion to dismiss.” *Hairston v. S. Beach Beverage Co.*, No.  
3 CV 12-1429-JFW DTBX, 2012 WL 1893818, at \*4 (C.D. Cal. May 18, 2012)  
4 (citing *Williams*, 552 F.3d at 938). In rare situations, however, “a court may determine, as  
5 a matter of law, that the alleged violations of the UCL, FAL, and CLRA are simply not  
6 plausible.” *Cheslow v. Ghirardelli Chocolate Co.*, 445 F. Supp. 3d 8, 16 (N.D. Cal. 2020)  
7 (quoting *Ham v. Hain Celestial Grp., Inc.*, 70 F. Supp. 3d 1188, 1193 (N.D. Cal. 2014)).

8 Defendant argues Plaintiff’s claims fail because a reasonable consumer is unlikely  
9 to be misled by the Product’s labeling. (Doc. 7–1 at 18.) It is Defendant’s position that  
10 reasonable consumers do not define fish oil based on the “chemical bonds or molecular  
11 weights” of such products and that the SFP on the back panel of the Product makes it clear  
12 that the EPA and DHA contained in the Product are EE. (*Id.* at 19.) Defendant explains  
13 that “Plaintiff – and fish oil consumers – are expected to know basic facts about fish oil.  
14 This is especially true when presented with the EE information on the actual label.” (*Id.* at  
15 20.) Moreover, in response to the Complaint’s argument that Product contains 1,000 mg  
16 of fish oil while also claiming to provide 1,060 mg of Omega-3 Fatty Acids as  
17 Triglycerides, Defendant argues that “[t]he label, as Plaintiff’s Complaint acknowledges,  
18 makes clear that the product contains 1,000 mg per servings with 600 mg EPA and 400mg  
19 DHA . . . . In light of these disclosures, no reasonable consumer could ever reach the  
20 conclusion that 600[ ]mg plus 400 mg equates to anything other than 1,000” and “no  
21 reasonable consumer could or would be misled by what may be a de minimis typo . . . .”  
22 (*Id.* at 21.)

23 Plaintiff counters that whether a reasonable consumer would be misled is generally  
24 “question of fact, rarely appropriate on a motion to dismiss.” (Doc 10 at 15 (citing  
25 *Williams*, 552 F.3d 934).) However, it is Plaintiff’s position that a reasonable consumer is  
26 likely to be deceived by the Product’s labeling because “Defendant’s Product is produced  
27 by a chemical alteration of fish waste wherein the originating material is broken apart at a  
28 molecular level by the introduction of an industrial chemical catalyst (e.g., sodium

1 hydroxide) and re-bonded to a foreign substance (i.e., ethanol) to create a new and distinct  
2 compound” known as EE. (Doc. 10 at 15.) Plaintiff explains that the material distinctions  
3 between the substances are “reflected in scientific fact”, “confirmed by Plaintiff’s  
4 analytical testing”, and are “universally acknowledged by scientific authorities”. (*Id.*)  
5 Plaintiff argues that consumers of dietary supplements are usually reliant on manufacturers  
6 to accurately describe the contents therein, and lab synthesized EE is not what a reasonable  
7 consumer expects when they purchase fish oil. (*Id.* at 16–17.) The Product’s PDP “clearly  
8 states the Product is Fish Oil and contains 600mg EPA and 400mg DHA. It does not. As  
9 detailed in the Complaint, the Product is an [EE] (not fish oil) which contains no EPA and  
10 DHA.” (*Id.*) Moreover, Plaintiff contends “the term ‘EE’ buried on the back of the Product  
11 label does not provide clarity to a reasonable consumer” because “[n]otwithstanding the  
12 fact that ‘EE’ is neither defined or explained on the label . . . [Defendant] cannot explain  
13 how such a reference is consistent with the name of the Product or its affirmative promise  
14 that the Omega-3 content of the Product is ‘as Triglycerides.’ Indeed it is not.” (*Id.* at 20.)

15 The Court finds that, accepting all allegations in the Complaint as true, this is not  
16 one of the rare situations where “a court may determine, as a matter of law, that the alleged  
17 violations of the UCL, FAL, and CLRA are simply not plausible.” *See Cheslow*, 445 F.  
18 Supp. 3d at 16 (quoting *Ham*, 70 F. Supp. 3d at 1193); *see also Williams*, 552 F.3d at 940  
19 (“Appellants have stated a claim and could plausibly prove that a reasonable consumer  
20 would be deceived by the Snack[’]s packaging.”). Therefore, whether or not a reasonable  
21 person would be misled by the Product’s label is not fit for determination on a motion to  
22 dismiss in this case. *See Pelayo v. Nestle USA, Inc.*, 989 F. Supp. 2d 973, 978 (C.D. Cal.  
23 2013) (“[t]he question of whether a business practice is deceptive in most cases presents a  
24 question of fact not amenable to resolution on a motion to dismiss”); *see also Linear*  
25 *Technology Corp. v. Applied Materials, Inc.*, 152 Cal. App. 4th 115, 134–35  
26 (2007) (“[w]hether a practice is deceptive, fraudulent, or unfair is generally a question of  
27 fact which requires ‘consideration and weighing of evidence from both sides’ and which  
28 usually cannot be made on demurrer”) (quoting *McKell v. Washington Mutual, Inc.*, 142

1 Cal. App. 4th 1457, 1472 (2006)); *Rooney v. Cumberland Packing Corp.*, No. 12-CV-  
2 0033-H DHB, 2012 WL 1512106, at \*3 (S.D. Cal. Apr. 16, 2012) (“it is a ‘rare situation’  
3 where granting a motion to dismiss claims under the UCL is appropriate”) (quoting  
4 *Williams*, 552 F.3d at 939). Accordingly, the Court cannot conclude, as a matter of law,  
5 that a reasonable consumer would not be deceived by labeling the Product as “Fish Oil”  
6 consisting of 600 mg of EPA and 400 mg of DHA. *Pelayo*, 989 F. Supp. 2d at 978 (where  
7 a court “can conclude as a matter of law that members of the public are not likely to be  
8 deceived by the product packaging, dismissal is appropriate”).

## 9 2. *Plaintiff’s UCL Causes of Action*

10 As previously noted, Plaintiff’s first through third causes of action allege violations  
11 of the UCL which prohibits “unfair competition,” which includes “any unlawful, unfair or  
12 fraudulent business act or practice.” (Doc. 1 at 36–40); CAL. BUS. & PROF. CODE §17200.  
13 In addition to its other arguments, Defendant contends Plaintiff’s UCL claims fail as a  
14 matter of law because: (1) Plaintiff lacks standing, (2) Plaintiff cannot show an “unlawful”  
15 practice under the UCL, (3) Plaintiff’s allegations of an “unfair” business practice are  
16 deficient, and (4) there is no “fraudulent” business practice. (Doc. 7–1 at 21–25.) Each  
17 argument will be addressed in turn.

### 18 i. Standing

19 Defendant argues Plaintiff lacks standing to assert any claims under the UCL. (Doc.  
20 7–1 at 22.) In order to establish UCL standing, a plaintiff must show economic injury and  
21 establish that the “injury was the result of, i.e., *caused by*, the unfair business practice or  
22 false advertising that is the gravamen of the claim.” *Kwikset Corp. v. Superior Ct.*, 51 Cal.  
23 4th 310, 322 (2011). Defendant explains that “[h]ere, Plaintiff is unable to establish either  
24 element” because the label Plaintiff relied upon identifies the DHA and EPA contained in  
25 the Product as EE, and Plaintiff received the product he paid for. (Doc. 7–1 at 22.) Thus,  
26 there was no economic injury. (*Id.*) Moreover, even assuming Plaintiff had suffered  
27 economic injury, Defendant contends the injury “was not caused by an unfair business  
28 practice or false advertising” and “because the label clearly identified the product as EE,

1 [Plaintiff’s] claims fail and no reasonable consumer would be misled by the Products’  
2 labeling.” (*Id.*)

3 The Court finds that, at this stage, Plaintiff does have standing to assert the instant  
4 causes of action. The Complaint alleges that “Plaintiff believed that the Product purchased  
5 contained real fish oil” but that the Product “is not Fish Oil, nor does it contain a single  
6 milligram of the principal Omega-3s found in fish oil . . . .” (Doc. 1 at 3, 32.) Moreover,  
7 Defendant markets the Omega-3 content to be in triglyceride form “as EE”, however, the  
8 Complaint alleges Omega-3 content “cannot be both a triglyceride and [EE]”. (*Id.* at 4–  
9 5.) Accordingly, “Plaintiff lost money and thereby suffered injury as he would not have  
10 purchased this Product and/or paid as much for it absent the misrepresentation.” (*Id.* at  
11 32.) These allegations are sufficient to establish standing at this juncture. *See Kwikset*  
12 *Corp.*, 51 Cal. 4th at 330 (“A consumer who relies on a product label and challenges a  
13 misrepresentation contained therein can satisfy the standing requirement of section 17204  
14 by alleging, as plaintiffs have here, that he or she would not have bought the product but  
15 for the misrepresentation.”).

16 ii. Unlawful, Unfair, or Fraudulent Under the UCL

17 The UCL provides a cause of action for “any unlawful, unfair, or fraudulent business  
18 act or practice.” CAL. BUS. & PROF. CODE § 17200. Defendant argues Plaintiff’s  
19 allegations of unlawful, unfair, and fraudulent business practices are deficient. (Doc. 7–1  
20 at 23–35.)

21 “A ‘business act or practice’ is ‘unlawful’ under the unfair competition law if it  
22 violates a rule contained in some other state or federal statute.” *Sandoz Inc. v. Amgen Inc.*,  
23 582 U.S. 1, 12 (2017) (quoting *Rose v. Bank of America, N. A.*, 57 Cal.4th 390, 396 (2013)).  
24 Defendant argues Plaintiff cannot show an “unlawful” business practice because Plaintiff’s  
25 claims are preempted by the FDCA, and “[n]o state law . . . can be employed to alter or  
26 vary the standards of identity for regulated supplements under the FDA.” (*Id.* at 23.) The  
27 Complaint explains “Defendant’s acts, omissions, misrepresentations, practices, and/or  
28 non-disclosures concerning the Products alleged herein, constitute ‘unlawful’ business acts

1 and practices in that they violate” the FDCA, the Sherman Law, the FAL, and the CLRA.  
 2 (Doc. 1 at 36–38.) As the Court previously explained (*see supra* pp. 6–10), Plaintiff’s  
 3 claims are not preempted by the FDCA and, thus, the Complaint alleges facts sufficient to  
 4 show an “unlawful” practice under the UCL.

5 In determining whether a business act or practice is unfair, “courts consider either:  
 6 (1) whether the challenged conduct is ‘tethered to any underlying constitutional, statutory  
 7 or regulatory provision, or that it threatens an incipient violation of an antitrust law, or  
 8 violates the policy or spirit of an antitrust law,’ (*Durell v. Sharp Healthcare*, 183 Cal. App.  
 9 4th 1350, 1366 (2010)); (2) whether the practice is ‘immoral, unethical, oppressive,  
 10 unscrupulous or substantially injurious to consumers,’ (*Morgan v. AT&T Wireless Servs.,*  
 11 *Inc.*, 177 Cal. App. 4th 1235, 1254 (2009)); or (3) whether the practice’s impact on the  
 12 victim outweighs ‘the reasons, justifications and motives of the alleged wrongdoer’” (*Id.*).  
 13 *Doe v. CVS Pharmacy, Inc.*, 982 F.3d 1204, 1214–15 (9th Cir. 2020). Defendant argues  
 14 Plaintiff’s claims cannot withstand any of these tests. (Doc. 7–1 at 24.) Plaintiff counters  
 15 by explaining the Product label:

16 (a) mischaracterizes a lab-synthesized [EE] as fish oil; (b) claims to have  
 17 DHA/EPA when it has none; (c) claims to provide its [Omega-3] in the form  
 18 of triglycerides, when in reality it is an [EE] and (d) claims to provide 400mg  
 19 DHA and 600mg EPA when it actually contains much less. In so doing,  
 20 Defendant deceived Plaintiff and class members into purchasing a product  
 they did not want and/or paying a premium price for the Product and  
 damaging them thereby.

21 (Doc 10 at 22.) In light of the foregoing allegations, and as discussed in detail *supra*, the  
 22 Court finds the Complaint contains plausibly alleges that Defendant has engaged  
 23 “deceptive practices associated with the advertising, labeling and sale of [the Product].”  
 24 (Doc. 1 at 2.) Thus, the Complaint sufficiently states a claim under the “unfair” prong of  
 25 the UCL.<sup>3</sup>

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26  
 27  
 28 <sup>3</sup> The Court notes its understanding of Defendant’s contention that a serving size is two capsules. (Doc. 7–1 at 10, 12.)



1           Lastly, a business practice is fraudulent under the UCL if members of the public are  
2 likely to be deceived. *Davis v. HSBC Bank Nevada, N.A.*, 691 F.3d 1152, 1169 (9th Cir.  
3 2012). Defendant argues Plaintiff cannot show that a reasonable consumer would be  
4 deceived by the Product’s labeling. (Doc. 7–1 at 25.) Moreover, it is Defendant’s position  
5 that Plaintiff cannot satisfy Federal Rule of Civil Procedure 9(b)’s heightened pleading  
6 standard, which applies to state claims “grounded in fraud.” (*Id.* (citing *Vess v. Ciba-Geigy*  
7 *Corp. USA*, 317 F.3d 1097, 1102–06 (9th Cir. 2003)); *see Vess v. Ciba-Geigy Corp. USA*,  
8 317 F.3d 1097, 1106 (9th Cir. 2003) (“Averments of fraud must be accompanied by ‘the  
9 who, what, when, where, and how’ of the misconduct charged.”) (quoting *Cooper v.*  
10 *Pickett*, 137 F.3d 616, 627 (9th Cir.1997)). Plaintiff counters that he has sufficiently  
11 alleged Defendant “made a series of misleading labeling claims related to the identity of  
12 the product, its ingredients and its amounts [] on the labels of its Product [] during the  
13 applicable class periods [] in violation of the provisions of the Sherman Law, UCL[, and]  
14 CLRA” and, thus, “Plaintiff has unquestionably satisfied 9(b).” (Doc. 10 at 23–24 (citing  
15 Doc. 1 at 2–5, 24–31, 33, 35–44).) The Court finds the allegations in the Complaint  
16 sufficient to state a claim under the “fraudulent” prong of the UCL. Moreover, the  
17 discussion of whether or not the Product’s labeling is likely to deceive the public is  
18 discussed at length above. (*See supra* pp. 11–14.)

19           In light of the foregoing, the Court finds the Complaint sufficiently alleges “enough  
20 facts to state a claim to relief that is plausible on its face” in regard to Plaintiff’s UCL  
21 claims. *See Twombly*, 550 U.S. at 570; *Iqbal*, 556 U.S. at 678. Thus, in considering the  
22 reasonable consumer standard, as well as the three prongs of the UCL, the Court **DENIES**  
23 Defendant’s Motion insofar as it requests dismissal of Plaintiff’s first through fifth causes  
24 of action.

#### 25           **b. Breach of Express Warranty**

26           Plaintiff’s sixth cause of action alleges breach of express warranty. (Doc. 1 at 43–  
27 44.) Defendant argues that Plaintiff’s breach of warranty claim fails because a reasonable  
28 consumer is not likely to be misled by the Product’s labeling. (Doc. 7–1 at 18.)

1 California Commercial Code § 2313 provides that “(a) [a]ny affirmation of fact or  
2 promise made by the seller to the buyer which relates to the goods and becomes part of the  
3 basis of the bargain creates an express warranty that the goods shall conform to the  
4 affirmation or promise,” and “(b) [a]ny description of the goods which is made part of the  
5 basis of the bargain creates an express warranty that the goods shall conform to the  
6 description.” CAL. COM. CODE § 2313. To plead a claim for breach of express warranty,  
7 the plaintiff “must allege the exact terms of the warranty, plaintiff’s reasonable reliance  
8 thereon, and a breach of that warranty which proximately causes plaintiff injury.” *Williams*  
9 *v. Beechnut Nutrition Corp.*, 185 Cal. App. 3d 135, 142 (Ct. App. 1986).

10 The Complaint alleges that: (1) Defendant made express warranties that the Product  
11 “consisted of real fish oil in its natural triglyceride form; that its principal constituent  
12 components were DHA and EPA (as opposed to DHA-EE and EPA-EE); and that the  
13 Product contained DHA/EPA in specified amounts”; (2) these express warranties became  
14 the basis of the bargain; (3) Plaintiff and proposed class members relied on these warranties  
15 and purchased the Product in the belief that they conformed to the express warranties; (4)  
16 Defendant breached the express warranties by “failing to supply goods that conformed to  
17 the warranties it made”; and (5) Plaintiff and proposed class members paid money for the  
18 Product and did not obtain the full value of the Product. (Doc. 1 at 43.) It is Plaintiff’s  
19 position that if he and the proposed class members “had known of the true nature of the  
20 Product, they would not have purchased them or paid less for them.” (*Id.* at 44.)

21 The Court finds these allegations sufficient to state a claim for breach of express  
22 warranty. *See Iqbal*, 556 U.S. at 678. Therefore, the Court **DENIES** Defendant’s Motion  
23 to dismiss Plaintiff’s sixth cause of action for breach of express warranty.

### 24 **c. Restitution Based on Quasi-Contract/Unjust Enrichment**

25 Similarly, Defendant argues Plaintiff’s seventh cause of action for restitution based  
26 on quasi-contract/unjust enrichment fails because a reasonable consumer is not likely to be  
27 misled by the Product’s labeling. (Doc. 7–1 at 18.) The Motion lacks any further  
28 discussion of this cause of action.

1 The Complaint contends that the Product includes false and misleading labeling  
2 which enticed Plaintiff and proposed class members to purchase the Product. (Doc. 1 at 5,  
3 44.) As such, Defendant has been “unjustly enriched at the expense of Plaintiff and the  
4 Class as result of their unlawful conduct alleged herein, thereby creating a quasi-  
5 contractual obligation on Defendant to restore these ill-gotten gains to Plaintiff” and  
6 proposed class members. (*Id.* at 45.)

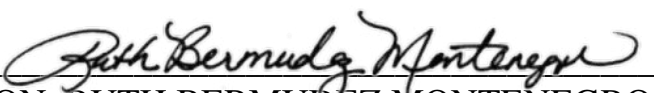
7 Given that the Court has found it plausible that statements on the Product’s  
8 packaging could deceive a reasonable consumer (*see supra* p. 14), it declines to dismiss  
9 Plaintiff’s seventh cause of action for restitution at this stage of the proceedings. *See*  
10 *Sanchez v. Nurture, Inc.*, 626 F. Supp. 3d 1107, 1120 (N.D. Cal. 2022), *reh’g denied* (Sept.  
11 27, 2022) (finding the plaintiff’s unjust enrichment claim may proceed because “Plaintiff .  
12 . . has adequately stated a claim for their UCL ‘unlawful’ claim. Further, Defendant does  
13 not make any argument about the substance of the unjust enrichment claim itself.”); *see*  
14 *also Lopez v. Abbott Lab’ys*, No. 3:22-CV-00421-L-RBB, 2023 WL 2657627, at \*4 (S.D.  
15 Cal. Mar. 27, 2023) (“Because Plaintiff adequately alleged that Defendant was unjustly  
16 enriched through false advertising, she has sufficiently alleged a quasi-contract claim for  
17 restitution.”). Therefore, Defendant’s Motion is **DENIED** as to Plaintiff’s seventh cause  
18 of action.

19 **IV. CONCLUSION**

20 Accepting all factual allegations in the Complaint as true and construing the  
21 pleadings in the light most favorable to Plaintiff, the Court concludes Defendant’s Motion  
22 (Doc. 7) is **DENIED**.

23 **IT IS SO ORDERED.**

24 DATE: August 10, 2023

25  
26   
27 HON. RUTH BERMUDEZ MONTENEGRO  
28 UNITED STATES DISTRICT JUDGE