

1 **WO**

2

3

4

5

6

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

7

8

9

David Lucas Burge; Alastair Dick; Lynda  
Forgette; Pamela Krause; Fred Anthony  
Reyes; David Strobel,

No. CV 09-1159-PHX-JAT

10

**ORDER**

11

Plaintiffs,

12

vs.

13

Freeliffe International, Inc.,

14

Defendant.

15

16

17

Pending before the Court is Defendant Freeliffe International, Inc.’s Motion to Dismiss the Amended Complaint (Doc. # 12). For the reasons that follow, the Court grants in part and denies in part Freeliffe’s motion.

20

Freeliffe is engaged in the business of developing and selling nutritional products such as vitamins and herbal remedies. Three of Freeliffe’s products are at issue in this case: Himalayan Goji Juice, GoChi Juice, and TAIslim. Each of the Plaintiffs have either used and/or sold at least one of these Freeliffe products. Plaintiffs bring this action, seeking redress for alleged acts of misrepresentation and deception in the marketing and sale of these products. In addition to seeking injunctive relief, Plaintiffs allege four claims for relief: unjust enrichment, breach of express warranty, breach of implied warranty, and violation of Arizona’s Consumer Fraud Act.

28

///

1 ANALYSIS

2 Freeliflife argues that Plaintiffs’ complaint should be dismissed for a lack of subject  
3 matter jurisdiction, a failure to plead fraud with particularity as required by Rule 9(b), and  
4 a failure to state a claim under Rule 12(b)(6). The Court will first address Freeliflife’s  
5 argument concerning this Court’s lacking subject matter jurisdiction over Plaintiffs’ claims,  
6 as granting Freeliflife’s motion on this ground would cause Freeliflife’s other objections to  
7 become moot.

8 Rule 12(b)(1)

9 In a Rule 12(b)(1) motion, “[t]he party asserting jurisdiction has the burden of proving  
10 all jurisdictional facts.” *Indus. Tectonics, Inc. v. Aero Alloy*, 912 F.2d 1090, 1092 (9th Cir.  
11 1990) (citing *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936)). In effect,  
12 the court presumes lack of jurisdiction until the plaintiff proves otherwise. *Stock West, Inc.*  
13 *v. Confederated Tribes*, 873 F.2d 1221, 1225 (9th Cir. 1989). The defense of lack of subject  
14 matter jurisdiction may be raised at any time by the parties or the court. *See Fed.R.Civ.P.*  
15 *12(h)(3).*

16 The rule regarding the amount in controversy for cases brought originally in federal  
17 court is the legal certainty rule:

18 The rule governing dismissal for want of jurisdiction in cases brought in the  
19 federal court is that, unless the law gives a different rule, the sum claimed by  
20 the plaintiff controls if the claim is apparently made in good faith. It must  
appear to a legal certainty that the claim is really for less than the jurisdictional  
amount to justify dismissal.

21 *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 288-89 (1938) (footnotes  
22 omitted). *See also Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992). “A claim in  
23 excess of the requisite amount, made in good faith in the complaint, satisfies the  
24 jurisdictional requirement.” *Budget Rent-A-Car, Inc. v. Higashiguchi*, 109 F.3d 1471, 1473  
25 (9th Cir. 1997) (citing *St. Paul Mercury*, 303 U.S. at 288).

26 A timely challenge by the opposing party to federal subject matter jurisdiction  
27 “shift[s] the burden to the [party invoking jurisdiction] to show that it does not appear to a  
28 legal certainty that their claims are for less than the required amount.” *U.S. v. S. Pac. Transp.*

1 Co., 543 F.2d 676 (9th Cir. 1976) (citing *Gibbs v. Buck*, 307 U.S. 66, 72 (1939); *St. Paul*  
2 *Mercury*, 303 U.S. at 288-89). The Ninth Circuit has described the application of the legal  
3 certainty test:

4       Generally speaking, the legal certainty test makes it very difficult to secure a  
5 dismissal of a case on the ground that it does not appear to satisfy the  
6 jurisdictional amount requirement. Only three situations clearly meet the legal  
7 certainty standard: 1) when the terms of a contract limit the plaintiff's possible  
8 recovery; 2) when a specific rule of law or measure of damages limits the  
9 amount of damages recoverable; and 3) when independent facts show that the  
10 amount of damages was claimed merely to obtain federal court jurisdiction.

11 *Pachinger v. MGM Grand Hotel-Las Vegas, Inc.*, 802 F.2d 362, 364 (9th Cir. 1986) (citing  
12 14A WRIGHT, MILLER, AND COOPER, FEDERAL PRACTICE AND PROCEDURE, JURISDICTION,  
13 § 3702 at 48-50 (2d ed. 1985)). Legal certainty is a high standard—the Ninth Circuit has  
14 “permitted a determination of ‘legal certainty’ when a rule of law or limitation of damages  
15 would make it virtually impossible for a plaintiff to meet the amount-in-controversy  
16 requirement.” *Id.* Other circuits commenting on this rule have stated that “even where [the]  
17 allegations leave grave doubt about the likelihood of a recovery of the requisite amount,  
18 dismissal is not warranted.” *Scherer v. Equitable Life Assurance Soc'y of the United States*,  
19 347 F.3d 394, 397 (2d Cir.2003) (quoting *Zacharia v. Harbor Island Spa, Inc.*, 684 F.2d 199,  
20 202 (2d Cir.1982)).

21       Plaintiffs allege that the Court has jurisdiction based upon 28 U.S.C. § 1332(d)(2)(A)  
22 because the amount in controversy exceeds \$5,000,000, and Plaintiffs' are seeking a class  
23 action suit “in which most members of the class of Plaintiffs are citizens of a state different  
24 from the state of incorporation or principal place of business of Defendant.” (Doc. # 10 at  
25 p. 10, ¶ 2.) Freelifie contests that the amount in controversy exceeds \$5,000,000. After  
26 reviewing Plaintiffs' complaint, the Court cannot conclude to a legal certainty that the  
27 amount in controversy does not exceed \$5,000,000.

28       Plaintiffs do not seek a specific dollar amount in their prayer for relief. Plaintiffs do  
allege, however, the wholesale and retail prices of the Freelifie products at issue. The  
wholesale and retail prices of the products will form the basis of damages for Plaintiffs'  
claims of unjust enrichment and breach of express and implied warranties. Moreover,

1 Plaintiffs also allege that Freeliflife’s revenues from the sale of the products at issue exceed  
2 \$100,000,000 per year. While revenue figures do not forecast the precise amount of  
3 Plaintiffs’ damages, such figures do shed some amount of light with respect to Plaintiffs’  
4 claims of unjust enrichment and breach of express and implied warranties. Additionally,  
5 Plaintiffs’ allege that the size of the class they are seeking to certify will include “most likely  
6 thousands of purchasers.” (Doc. # 10 at p. 27, ¶ 108.) When viewed in the aggregate, the  
7 Court cannot say that Plaintiffs’ claims do not exceed \$5,000,000. 28 U.S.C. § 1332(d)(6)  
8 (“In any class action, the claims of the individual class members shall be aggregated to  
9 determine whether the matter in controversy exceeds the sum or value of \$5,000,000,  
10 exclusive of interest and costs.”)

11 This case does not involve a contract the terms of which limit Plaintiffs’ possible  
12 recovery, nor is there a specific rule of law applicable in this case that would serve to limit  
13 the amount of damages recoverable. There are no independent facts before the Court to show  
14 that the amount of damages was claimed merely to obtain federal court jurisdiction. *See*  
15 *Pachinger*, 802 F.2d at 364. Given the high standard of the legal certainty test and the  
16 allegations in Plaintiffs’ complaint as discussed above, the Court cannot say to a legal  
17 certainty that Plaintiffs’ claims do not exceed \$5,000,000. As such, the Court must deny  
18 Freeliflife’s motion to the extent it urges that this Court lacks subject matter jurisdiction.

19 *Rule 9(b)*

20 Freeliflife contends that Plaintiffs failed to plead with particularity the circumstances  
21 of the fraudulent acts that form the basis of Plaintiffs’ claims for unjust enrichment, breach  
22 of warranty, and violation of the Arizona Consumer Fraud Act. The Court disagrees.

23 Rule 9(b) requires the party alleging fraud to “state with particularity the  
24 circumstances constituting fraud.” Rule 9(b) “requires the identification of the circumstances  
25 constituting fraud so that the defendant can prepare an adequate answer from the  
26 allegations.” *Bosse v. Crowell Collier & MacMillan*, 565 F.2d 602, 611 (9th Cir. 1977). The  
27 Ninth Circuit has “interpreted Rule 9(b) to mean that the pleader must state the time, place,  
28 and specific content of the false representations as well as the identities of the parties to the

1 misrepresentation.” *Schreiber Distributing Co. v. Serv-Well Furniture Co., Inc.*, 806 F.2d  
2 1393, 1401 (9th Cir. 1986) (citing  
3 *Semegen v. Weidner*, 780 F.2d 727, 731 (9th Cir. 1985).

4 Here, Plaintiffs have adequately identified the identities of the parties to the alleged  
5 misrepresentations; namely, Freeliflife and Plaintiffs. Plaintiffs have stated the time of the  
6 alleged misrepresentations by alleging when each of the Plaintiffs were solicited to purchase  
7 and/or distribute Freeliflife’s products. See Doc. # 10 at ¶¶ 68, 72, 75, 83, 95, 99. Although  
8 Plaintiffs have not alleged the exact place or location where the misrepresentations took  
9 place, the Court does not believe that place is in anyway integral to Plaintiffs’ claims. The  
10 most significant allegations with respect to Rule 9(b) are the specific content of the alleged  
11 misrepresentations so that Freeliflife may adequately defend Plaintiffs’ allegations. Plaintiffs  
12 have satisfied this requirement.

13 Plaintiffs allege that Freeliflife made several specific representations concerning the goji  
14 berry and Freeliflife’s products. See ¶¶ 31, 42, 54, 60. After identifying the representations  
15 made by Freeliflife concerning the products at issue, Plaintiffs then allege how and why these  
16 representations are false or misleading. See ¶¶ 32, 42, 46, 55, 61. Plaintiffs are not required  
17 to put on summary judgment type evidence to support their allegations. All that is required  
18 at this stage is that Plaintiffs “state with particularity the circumstances constituting fraud.”  
19 FED. R. CIV. P. 9(b). Plaintiffs have satisfied Rule 9(b).

20 *Rule 12(b)(6)*

21 To survive a 12(b)(6) motion for failure to state a claim, a complaint must meet the  
22 requirements of Federal Rule of Civil Procedure 8(a)(2). Rule 8(a)(2) requires a “short and  
23 plain statement of the claim showing that the pleader is entitled to relief,” so that the  
24 defendant has “fair notice of what the . . . claim is and the grounds upon which it rests.” *Bell*  
25 *Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S.  
26 41, 47 (1957)).

27 Although a complaint attacked for failure to state a claim does not need detailed  
28 factual allegations, the pleader’s obligation to provide the grounds for relief requires “more

1 than labels and conclusions, and a formulaic recitation of the elements of a cause of action  
2 will not do.” *Twombly*, 550 U.S. at 555 (internal citations omitted). The factual allegations  
3 of the complaint must be sufficient to raise a right to relief above a speculative level. *Id.*  
4 Rule 8(a)(2) “requires a ‘showing,’ rather than a blanket assertion, of entitlement to relief.  
5 Without some factual allegation in the complaint, it is hard to see how a claimant could  
6 satisfy the requirement of providing not only ‘fair notice’ of the nature of the claim, but also  
7 ‘grounds’ on which the claim rests.” *Id.* (citing 5 C. WRIGHT & A. MILLER, FEDERAL  
8 PRACTICE AND PROCEDURE §1202, pp. 94, 95(3d ed. 2004)).

9 Rule 8’s pleading standard demands more than “an unadorned, the-defendant-  
10 unlawfully-harmed-me accusation.” *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009) (citing  
11 *Twombly*, 550 U.S. at 555). A complaint that offers nothing more than naked assertions will  
12 not suffice. To survive a motion to dismiss, a complaint must contain sufficient factual  
13 matter, which, if accepted as true, states a claim to relief that is “plausible on its face.” *Iqbal*,  
14 129 S.Ct. at 1949. Facial plausibility exists if the pleader pleads factual content that allows  
15 the court to draw the reasonable inference that the defendant is liable for the misconduct  
16 alleged. *Id.* Plausibility does not equal “probability,” but plausibility requires more than a  
17 sheer possibility that a defendant has acted unlawfully. *Id.* “Where a complaint pleads facts  
18 that are ‘merely consistent’ with a defendant’s liability, it ‘stops short of the line between  
19 possibility and plausibility of ‘entitlement to relief.’” *Id.* (citing *Twombly*, 550 U.S. at 557).

20 In deciding a motion to dismiss under Rule 12(b)(6), the Court must construe the facts  
21 alleged in the complaint in the light most favorable to the drafter of the complaint and the  
22 Court must accept all well-pleaded factual allegations as true. *See Shwarz v. United States*,  
23 234 F.3d 428, 435 (9th Cir. 2000). Nonetheless, the Court does not have to accept as true  
24 a legal conclusion couched as a factual allegation. *Papasan v. Allain*, 478 U.S. 265, 286  
25 (1986).

### 26 **Unjust Enrichment Claim**

27 “To recover on a theory of unjust enrichment, [plaintiff] must allege and prove that  
28 [defendant] acquired the money under circumstances which renders [defendant’s] retention

1 of the money inequitable.” *Johnson v. Am. Nat. Ins. Co.*, 613 P.2d 1275, 1279 (Ariz. Ct.  
2 App. 1980). “To establish a claim for unjust enrichment, a party must show: (1) an  
3 enrichment; (2) an impoverishment; (3) a connection between the enrichment and the  
4 impoverishment; (4) the absence of justification for the enrichment and the impoverishment;  
5 and (5) the absence of a legal remedy.” *Trustmark Ins. Co. v. Bank One, Arizona, NA*, 48  
6 P.3d 485, 491 (Ariz. Ct. App. 2002). Plaintiffs’ complaint adequately alleges unjust  
7 enrichment for the purposes of a Rule 12(b)(6) motion.

8 Plaintiffs have essentially satisfied the first four elements in an unjust enrichment  
9 claim by alleging that they purchased and consumed Freelif’s products based upon  
10 representations that were false. That is, Freelif received enrichment and Plaintiffs  
11 impoverishment by paying value for a product the effects of which were fraudulently  
12 misrepresented and, based upon these misrepresentations, there is no justification for  
13 Freelif’s enrichment and Plaintiffs’ impoverishment. Nevertheless, Freelif argues that  
14 Plaintiffs have failed to allege the final element—absence of a legal remedy.

15 In Arizona, this element has been applied to preclude recovery under an unjust  
16 enrichment claim where there is an express contract that governs the relationship between  
17 the parties. *See, e.g., Brooks v. Valley Nat’l Bank*, 548 P.2d 1166, 1171 (Ariz. 1976)  
18 (“[W]here there is a specific contract which governs the relationship of the parties, the  
19 doctrine of unjust enrichment has no application”); *Trustmark*, 48 P.3d at 492 (“Because  
20 these contractual documents governed the relationship of the parties, the trial court properly  
21 granted [defendant’s] motion for JMOL on [plaintiff’s] unjust enrichment claim.”); *Johnson*,  
22 613 P.2d at 1279 (“The complaint and exhibits reflect that appellants are seeking to recover  
23 on a theory of unjust enrichment to relieve themselves of the effects of express provisions  
24 of the terms of the loan commitment. . . . Under these circumstances, the doctrine of unjust  
25 enrichment is not applicable.”); *Ashton Co., Inc., Contractors & Eng’rs v. State*, 454 P.2d  
26 1004, 1010 (Ariz. Ct. App. 1969) (“[Plaintiff] finally contends that it was entitled to recover  
27 under the doctrine of unjust enrichment. We summarily reject this contention for the reason  
28 that the doctrine has no application to a situation where there is an explicit contract which

1 has been performed.”). Freeliflife does not argue that there is an express contract between the  
2 parties that precludes recovery under an unjust enrichment theory. Indeed, Plaintiffs allege  
3 that Freeliflife sold the products to distributors at wholesale prices and the distributors then sold  
4 the products at retail prices to various consumers. Freeliflife nevertheless contends that  
5 Plaintiffs “may not recover under an express warranty and simultaneously seek to recover  
6 for the same obligation under an unjust enrichment theory.” (Doc. # 12 at p. 11) Freeliflife  
7 does not cite this Court to any Arizona cases so holding, and the only two cases Freeliflife  
8 cites, *White v. Microsoft Corp.*, 454 F.Supp.2d 1118 (S.D. Ala. 2006) and *In re General*  
9 *Motors Corp.*, 385 F.Supp.2d 1172 (W.D. Okla. 2005), are premised upon an express  
10 contract. Plaintiffs have not alleged that an express contract exists. At this stage of the  
11 proceedings, the Court cannot foreclose Plaintiffs’ claim for unjust enrichment based upon  
12 the presence of an express contract.

### 13 **Breach of Warranty Claims**

14 Freeliflife next argues that Plaintiffs’ breach of warranty claims should be dismissed for  
15 Plaintiffs’ failure to provide notice to Freeliflife within a reasonable time as required by  
16 Arizona law. The Arizona legislature has provided that “[w]here a tender has been accepted  
17 . . . [t]he buyer must within a reasonable time after he discovers or should have discovered  
18 any breach notify the seller of breach or be barred from any remedy.” ARIZ. REV. STAT. §  
19 47-2607 (2005). Ordinarily, whether notice was given within a reasonable time is a question  
20 of fact for the jury, “unless it appears that only one finding can legally be derived from the  
21 circumstances.” *Pace v. Sagebrush Sales Co.*, 560 P.2d 789, 792 (Ariz. 1977) (citing  
22 *Davidson v. Wee*, 379 P.2d 744, 749 (Ariz. 1963).

23 In this case, Plaintiffs did not provide direct notice to Freeliflife prior to the filing of this  
24 lawsuit, nor do Plaintiffs so allege. However, the requirement of providing notice may be  
25 fulfilled by the filing of a complaint. *Pace*, 560 P.2d at 792 (“[W]e agree with the defendant  
26 that the requirement of notice may indeed be fulfilled by the pleadings themselves.”). Thus,  
27 the question is whether Plaintiffs’ unreasonably delayed in giving notice to Freeliflife as a  
28 matter of law.



1           Plaintiffs filed this action in May 2009. Freeliflife argues that: Plaintiff Burge’s breach  
2 of warranty claim became, or should have become, apparent in at least September 2007 when  
3 he created a website that allegedly exposes Freeliflife’s misrepresentations concerning their  
4 products; Plaintiff Dick’s warranty claim became, or should have become, apparent in at least  
5 September 2007 when he stopped selling and consuming Freeliflife’s products; Plaintiff  
6 Forgette’s warranty claim became, or should have become, apparent in at least January 2007  
7 when she viewed the Canadian Broadcasting Company program concerning Freeliflife’s  
8 products and thereafter stopped promoting and selling the products; Plaintiff Krause’s  
9 warranty claim became, or should have become, apparent in at least August 2006 when she  
10 stopped using one of Freeliflife’s products; Plaintiff Reyes’ warranty claim became, or should  
11 have become, apparent in 2007 when he stopped selling and using Freeliflife’s products;  
12 Plaintiff Strobel’s warranty claim became, or should have become, apparent in at least  
13 September 2007 when he stopped consuming Freeliflife’s products after reading information  
14 contained on Plaintiff Burge’s website concerning Freeliflife’s alleged misrepresentations.

15           In response, Plaintiffs do not dispute Freeliflife’s proffered time-frames for when each  
16 individual Plaintiff’s warranty claim became apparent. Rather, Plaintiffs contend that  
17 Freeliflife was put on notice by a Canadian Broadcasting Company program that aired in  
18 January 2007, as well as through Plaintiff Burge’s website that went live in September 2007.  
19 However, such notice through a television program or an Internet website is foreclosed  
20 through the plain language of Section 47-2607, which provides that the *buyer* must notify the  
21 seller. ARIZ. REV. STAT. § 47-2607 (“Where a tender has been accepted . . . [t]he buyer must  
22 within a reasonable time after he discovers or should have discovered any breach notify the  
23 seller of breach or be barred from any remedy.”). The Arizona legislature did not provide  
24 for indirect notice through such means as a television or the Internet, nor has Plaintiff cited  
25 the Court to any Arizona case that so holds. Rather, the Arizona legislature placed the  
26 burden of giving notice squarely on the shoulders of the buyer. As such, Plaintiffs’ argument  
27 that they effectuated notice through the Canadian Broadcasting Company program and  
28 Plaintiff Burge’s website must fail.

1 Thus, the only notice proffered by Plaintiffs under Section 47-2607 was the filing of  
2 their complaint in May 2009. For Plaintiff Burge, the time from when his breach of warranty  
3 claim became apparent until the time of the filing of this suit is 20 months; for Plaintiff Dick,  
4 the time amounts to 20 months; for Plaintiff Forgette, the time amounts to 28 months; for  
5 Plaintiff Krause, the time amounts to 33 months; for Plaintiff Reyes, the time amounts to 17  
6 months; and for Plaintiff Strobel, the time amounts to 20 months. The Court finds that such  
7 delays are unreasonable as a matter of law.

8 Plaintiffs do not submit any reasons as to why they waited several months before  
9 providing notice to Freelif. Based upon Plaintiffs' own allegations, at the time that each  
10 individual Plaintiff stopped consuming Freelif's products, he or she was aware that the  
11 products were not performing as represented by Freelif. At that point, Plaintiffs should have  
12 given the required notice to Freelif under Section 47-2607. Plaintiffs' failure to do so  
13 requires this Court to find that Plaintiffs are "barred from any remedy," ARIZ. REV. STAT. §  
14 47-2607, under a breach of warranty theory. *See Pace*, 560 P.2d at 789 (holding as a matter  
15 of law that notice exceeding four months was unreasonably late, barring retailers' warranty  
16 claims); *Hearn v. R.J. Reynolds Tobacco Co.*, 279 F.Supp.2d 1096, 1115-16 (D. Ariz. 2003)  
17 (finding that two years constitutes unreasonably delayed notice as matter of law and, thus,  
18 dismissing plaintiffs' implied warranty claims).

### 19 **Arizona Consumer Fraud Act**

20 Freelif next argues that Plaintiffs' claims under the Arizona Consumer Fraud Act  
21 ("ACFA"), ARIZ. REV. STAT. § 44-1521 *et seq.*, are time-barred. The ACFA creates a private  
22 cause of action for statutory damages against those who practice fraud in connection with the  
23 sale of merchandise. *Haisch v. Allstate Ins. Co.*, 5 P.3d 940, 944 (Ariz. Ct. App. 2000).  
24 Under ARIZ. REV. STAT. § 12-541 (2003), an action based on liability created by an Arizona  
25 statute "must be initiated within one year after the cause of action accrues." *Alaface v. Nat'l*  
26 *Inv. Co.*, 892 P.2d 1375, 1380 (Ariz. Ct. App. 1994). Hence, an action under the ACFA must  
27 be filed within one year of the cause of action accruing. A cause of action under the ACFA  
28 accrues when the consumer discovered or with reasonable diligence could have discovered

1 both the “what” and “who” elements of the fraud. *Lawhon v. L.B.J. Institutional Supply, Inc.*,  
2 765 P.2d 1003, 1007 (Ariz. Ct. App. 1988).

3 As discussed above, all of the other plaintiffs involved either knew or should have  
4 known both the “what” and “who” elements of fraud. That is, Plaintiffs knew the  
5 “who”–Freelife–and they knew the “what”–that the Freelife products were not performing  
6 as Freelife represented–at the time they stopped selling and or consuming the products. In  
7 response, Plaintiffs assert only that the claims of Plaintiff Krause–who purchased TAIslim  
8 up until April 2009–and Plaintiff Forgette–who purchased GoChi up until February 2009–are  
9 not time-barred under Section 12-541. The Court agrees.

10 Therefore, with the exception of Plaintiff Krause’s claim based upon the TAIslim  
11 product and Plaintiff Forgette’s claim based upon the GoChi product, Plaintiffs’ claims under  
12 the ACFA are time-barred.

### 13 **Injunctive Relief**

14 Freelife asserts that Plaintiffs’ claim for injunctive relief should be dismissed because  
15 “an injunction is a remedy and not a separate and independent cause of action.” (Doc. # 12  
16 at p. 15.) That is, Freelife argues that because there is no underlying claim to support  
17 injunctive relief, Count V must be dismissed. The Court declines to grant Freelife’s motion  
18 with respect to Count V. Count V incorporates preceding claims by reference and alleges  
19 that unless Freelife is enjoined, they “will continue to engage in consumer fraud by the  
20 making of materially false and deceptive representations and affirmations of fact concerning”  
21 Freelife’s products. (Doc. # 10 at p. 35, ¶ 150.) Moreover, Plaintiffs also allege that unless  
22 Freelife is enjoined, they will continue to suffer irreparable harm for which there is no  
23 adequate remedy at law. At this stage of the proceedings, the Court cannot say that Plaintiffs  
24 will not suffer irreparable harm or that there is no adequate remedy at law. Given that certain  
25 of Plaintiffs claims survive Freelife’s motion to dismiss, it is possible that Plaintiffs will be  
26 able to show injury sufficient to warrant the requested relief. Plaintiffs’ organizational  
27 choice to locate the request for injunctive relief in a separate count of their complaint does  
28 not vitiate the merits of their request.

1 Freeliflife also maintains that the type of injunction Plaintiffs seek is an impermissible  
2 prior restraint on Freeliflife’s speech. Freeliflife fails to identify what protected constitutional  
3 freedoms would be prohibited by the Plaintiffs’ requested relief. The First Amendment does  
4 not shield a person committing a fraud on the public even where the purpose is protected by  
5 the First Amendment. *Am. Assoc. of State Troopers v. Preate*, 825 F.Supp. 1228, 1232 (M.D.  
6 Penn.) (“[F]alse speech is not protected by the First Amendment.”), *reconsideration denied*,  
7 532 F.Supp. 894 (1993); *Cantwell v. Connecticut*, 310 U.S. 296, 306 (1940) (narrowly-  
8 tailored restrictions against fraudulent and misleading speech fulfill the government’s  
9 compelling interest in protecting the public from fraudulent practices). “While commercial  
10 speech is protected by the First Amendment, ‘[t]he government may ban forms of  
11 communication more likely to deceive the public than to inform it . . . .’” *Preate*, 825 F.Supp  
12 at 1232 (quoting *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S.  
13 557, 563 (1980)).

14 As applied to Freeliflife, and assuming the facts alleged by Plaintiffs are true as the  
15 Court must do in a motion to dismiss, the injunctive relief here is not an impermissible prior  
16 restraint. *Auburn Police Union v. Carpenter*, 8 F.3d 886, 903 (1st Cir. 1993) (“An injunction  
17 that is narrowly tailored, based upon a continuing course of repetitive speech, and granted  
18 only after a final adjudication on the merits that the speech is unprotected does not constitute  
19 an unlawful prior restraint.”). As such, the Court denies Freeliflife’s motion with respect to  
20 Count V.

## 21 CONCLUSION

22 For the reasons discussed above, this Court has subject matter jurisdiction to consider  
23 Plaintiffs’ claims and Plaintiffs’ complaint satisfies the requirements of Rule 9(b). Freeliflife’s  
24 motion with respect to Count I– unjust enrichment–is denied. Freeliflife’s motion with respect  
25 to Counts II and III–breach of express warranty and breach of implied warranty,  
26 respectively–is granted. Freeliflife’s motion with respect to Count IV–violation of the Arizona  
27 Consumer Fraud Act–is granted except as it applies to Plaintiff Krause’s claim based upon  
28

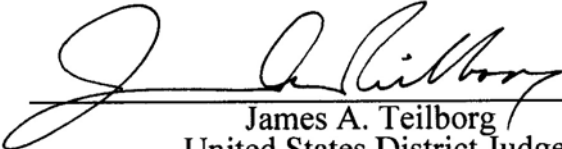
1 the TAIslim product and Plaintiff Forgette’s claim based upon the GoChi product. Finally,  
2 Freelifes motion with respect to Count V–injunctive relief–is denied.

3 Accordingly,

4 **IT IS ORDERED** that Defendant Freelifes International, Inc.’s Motion to Dismiss the  
5 Amended Complaint (Doc. # 12) is granted in part and denied in part consistent with this  
6 Order.

7 **IT IS FURTHER ORDERED** that Plaintiffs’ Request for Rule 16 Preliminary  
8 Pretrial Conference is granted. An Order setting a Rule 16 conference will follow.

9 DATED this 17<sup>th</sup> day of November, 2009.

10  
11   
12 \_\_\_\_\_  
13 James A. Teilborg  
14 United States District Judge  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28