

United States District Court
For the Northern District of California

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

JAMES COLUCCI and KIMBERLY S.)	Case No. 12-2907-SC
SETHAVANISH, on behalf of)	
themselves and all others)	<u>ORDER RE MOTION TO DISMISS</u>
similarly situated,)	
)	
Plaintiffs,)	
)	
v.)	
)	
ZONEPERFECT NUTRITION COMPANY, a)	
Delaware corporation,)	
)	
Defendant.)	
_____)	

I. INTRODUCTION

Plaintiffs James Colucci and Kimberly S. Sethavanish (collectively, "Plaintiffs") bring this purported class action against Defendant ZonePerfect Nutrition Company ("Defendant"), a maker of nutritional snack bars ("nutrition bars"). The thrust of Plaintiffs' Complaint is that Defendant's nutrition bars, which bear on their labels the statement "All-Natural Nutrition Bars," are not all-natural and hence misleadingly labeled. Now pending before the Court is Defendant's fully-briefed motion to dismiss the Complaint. ECF Nos. 26 ("Mot."), 31 ("Opp'n"), 32 ("Reply"). The motion is suitable for decision without oral argument. Civ. L.R.

1 7-1(b). For the reasons set forth below, Defendant's motion to
2 dismiss is GRANTED IN PART and DENIED IN PART.

3
4 **II. BACKGROUND**

5 **A. Procedural History**

6 On September 14, 2011, months before Plaintiffs filed the
7 instant case, they filed a separate lawsuit against Defendant in
8 this Court, with the case number 11-cv-4561-SC. Defendant moved
9 for dismissal on February 10, 2012. Plaintiffs responded by filing
10 an amended complaint on March 2, 2012. On March 30, 2012,
11 Defendant moved again for dismissal. Plaintiffs did not oppose the
12 motion and, on April 27, 2012, filed a notice of voluntary
13 dismissal. On May 1, 2012, the Court dismissed the case.

14 On April 26, 2012, Plaintiffs had filed a new case against
15 Defendant, this time in the California Superior Court for Sonoma
16 County. ECF No. 1 (notice of removal ("NOR") Ex. A ("Compl.")).
17 The Complaint sets forth eight causes of action: (1) violation of a
18 written warranty under the Magnuson-Moss Warranty Act, 15 U.S.C. §
19 2301 et seq. ("MMWA"); (2) common-law fraud; (3-5) claims for
20 unlawful, unfair, and fraudulent business practices under
21 California's Unfair Competition Law, Cal. Bus. & Prof. Code §§
22 17200 et seq. ("UCL")¹; (6) false advertising in violation of
23 California's False Advertising Law, Cal. Bus. & Prof. Code §§ 17500

24
25 ¹ The UCL "establishes three varieties of unfair competition --
26 acts or practices which are unlawful, or unfair, or fraudulent."
27 Berryman v. Merit Prop. Mgmt., Inc., 152 Cal. App. 4th 1544, 1554
28 (Cal. Ct. App. 2007). Each "prong" of the UCL thus represents an
analytically distinct theory of recovery and imposes different
standards. See Boschma v. Home Loan Ctr., Inc., 198 Cal. App. 4th
230, 252-53 (2011) (distinguishing prongs, explaining standards).
Here, Plaintiffs assert a separate UCL claim under each prong.

1 et seq. ("FAL"); (7) violation of California's Consumers Legal
2 Remedies Act, Cal. Civ. Code §§ 1750 et seq. ("CLRA"); and, in the
3 alternative, (8) restitution based on quasi-contract.

4 Defendant received a copy of the state-court complaint no
5 earlier than May 7, 2012 and removed to this Court on June 5, 2012.
6 NOR ¶ 2.² On June 28, 2012, the parties stipulated that the
7 instant case is related to the earlier, voluntarily dismissed case.
8 ECF No. 19. On July 10, 2012, the Court deemed the cases related
9 and the case was transferred to the undersigned. ECF No. 23. On
10 July 25, 2012, Defendant filed the instant motion to dismiss.

11 **B. The Nutrition Bars' Labels and Ingredients**

12 In the procedural posture of this case, the Court takes its
13 account of the facts from the allegations of Plaintiffs' Complaint.

14 Defendant manufactures, distributes, and sells nutrition bars
15 through walk-in and online retailers. Compl. ¶ 9. There are
16 twenty varieties of Defendant's nutrition bars, and they are sold
17 and distributed nationwide in grocery stores, health food stores,
18 and other venues. Id. ¶ 10.

19 Plaintiffs include in their Complaint twenty color photographs
20 that purport to represent each of the twenty ZonePerfect-brand
21 nutrition bars. Id. ¶¶ 42(a)-(t). Each photograph shows a
22 brightly-colored, rectangular plastic wrapper emblazoned on the
23 left with (among other things) the ZonePerfect logo and the legend

24 _____
25 ² Defendant removed on the basis of this Court's federal-question
26 jurisdiction over Plaintiffs' MMWA claim and its supplemental
27 jurisdiction over Plaintiffs' other seven, state-law claims. NOR
28 ¶¶ 6-8 (citing 28 U.S.C. §§ 1331, 1367(a), 1441(a) & 1446). Having
reviewed the NOR, the Court determines that Defendant has satisfied
the jurisdictional and procedural requisites of §§ 1441(a) and
1446, respectively. The Court also concludes, as detailed at note
6 infra, that Defendant could have removed on diversity grounds.

1 "All-Natural Nutrition Bars," and, on the right, a line of text
2 announcing the bar's flavor (e.g., "Chocolate Mint") situated
3 beneath an image of an unpackaged rectangular food bar flanked by
4 food items representing its flavor (e.g., a sprig of mint leaves
5 and a bowl of chocolate pudding).

6 Plaintiffs allege that all of Defendant's nutrition bars
7 contain at least one of the following ten allegedly non-natural
8 ingredients: ascorbic acid; calcium pantothenate; calcium
9 phosphates; glycerine; potassium carbonate a/k/a "Cocoa [Processed
10 with Alkali]" or "Cocoa Powder [Processed with Alkali]"; pyridoxine
11 hydrochloride; disodium phosphate; sorbitan monostearate;
12 tocopherols; and xanthan gum. Id. ¶¶ 21-30. Plaintiffs allege
13 that, although the labels on nutrition bars' packages "did disclose
14 that [the nutrition bars] contained many of [these] synthetic and
15 artificial substances, the labels did not disclose that these
16 ingredients were synthetic or artificial, and in some cases did not
17 identify that these components existed in ZonePerfect's Nutrition
18 Bars at all (e.g., Potassium Carbonate)." Id. ¶ 40.

19 **C. Plaintiffs' Purchases of Nutrition Bars and Class**
20 **Allegations**

21 Mr. Colucci and Ms. Sethavanish are engaged but unmarried.
22 See generally id. ¶¶ 7-8. Both have been residents of Windsor,
23 California since December 2010. Prior to that, Mr. Colucci was an
24 active-duty member of the United States Marine Corps, stationed at
25 Camp Pendleton in San Diego County, California. Ms. Sethavanish
26 lived in Orange, California. From September 2009 through April
27 2010, Mr. Colucci was deployed as part of his military service.
28 Ms. Sethavanish would send him a monthly care package. At Mr.

1 Colucci's request, she would include in these care packages "two
2 multi-bar packs of ZonePerfect Nutrition Bars per month, including
3 its Classic ZonePerfect 'All-Natural' Nutrition Bars Chocolate
4 Peanut Butter flavor" (herein, "Chocolate Peanut Butter Bars").
5 Id. Plaintiffs allege that, beginning on September 14, 2007, Ms.
6 Sethavanish would purchase packs of Chocolate Peanut Butter Bars
7 every four to six weeks from retail stores near her home. See id.

8 Plaintiffs allege that Mr. Colucci believed and relied upon
9 the "all-natural" representation on the label of the nutrition bars
10 when he asked Ms. Sethavanish to purchase them for him. Id. ¶ 7.
11 They further allege that Mr. Colucci would not have asked Ms.
12 Sethavanish to buy, nor would she have agreed to buy, Defendant's
13 nutrition bars had they known the bars were not all-natural. Id.
14 ¶¶ 7-8. Instead, they allege, Ms. Sethavanish would have bought
15 either a "truly" all-natural bar or another non-natural bar with a
16 lower price. Id.

17 Plaintiffs purport to bring this action on behalf of a
18 nationwide class consisting of all persons who purchased any of
19 Defendant's nutrition bars on or after September 14, 2007. See id.
20 ¶ 52. The start of the class period corresponds with the date Ms.
21 Sethavanish allegedly first purchased nutrition bars for Mr.
22 Colucci. Compare id. ¶ 8 with id. ¶ 52.

24 **III. DISCUSSION**

25 **A. Standing**

26 Defendant challenges Mr. Colucci's constitutional standing to
27 bring any claim regarding Defendant's labeling practices because
28 the Complaint does not allege that Mr. Colucci personally bought

1 Defendant's nutrition bars, only that Ms. Sethavanish bought the
2 bars for him. Mot. at 5-6; Reply at 6-7. Defendant also
3 challenges the scope of Ms. Sethavanish's standing, arguing that,
4 while Ms. Sethavanish has standing to sue for mislabeling of the
5 Chocolate Peanut Butter Bars because she alleges that she purchased
6 that type of bar, she does not have standing to sue where the other
7 nineteen varieties of Defendant's nutrition bars are concerned
8 because she does not specifically allege that she purchased those
9 types. Mot. at 6-8; Reply at 7-9.

10 Article III of the United States Constitution provides that
11 the "judicial power of the United States" extends only to proper
12 "Cases" and "Controversies." The doctrine of standing which flows
13 from this language limits the federal courts' exercise of the
14 judicial power to those cases brought by plaintiffs who meet
15 certain minimum requirements. See Allen v. Wright, 468 U.S. 737,
16 750 (1984).

17 The irreducible constitutional minimum of
18 Article III standing contains three elements.
19 First, the plaintiff must have suffered an
20 "injury in fact" that is "concrete and
21 particularized" and "actual or imminent."
22 Second, there must be a causal connection
23 between the injury and the conduct complained
24 of, such that the injury is fairly traceable to
25 the action challenged. "Third, it must be
26 likely, as opposed to merely speculative, that
27 the injury will be redressed by a favorable
28 decision.

24 Renee v. Duncan, 686 F.3d 1002, 1012 (9th Cir. 2012) (quoting Lujan
25 v. Defenders of Wildlife, 504 U.S. 555, 560 (1992)) (internal
26 quotation marks, brackets, and citations omitted). "The party
27 invoking federal jurisdiction bears the burden of establishing
28 these elements." Lujan, 504 U.S. at 561. Defendant's standing

1 challenge focuses only on the injury-in-fact requirement: Defendant
2 argues that Ms. Sethavanish alleges no injury in fact concerning
3 nutrition bar flavors she did not actually purchase and that Mr.
4 Colucci alleges no injury at all since he does not allege that he,
5 personally, purchased any nutrition bars.

6 **1. Ms. Sethavanish**

7 The Complaint alleges that Ms. Sethavanish purchased nutrition
8 bars "including" Chocolate Peanut Butter Bars, but never identifies
9 any other flavor. Compl. ¶ 8. Both parties' moving papers appear
10 to assume that Ms. Sethavanish bought only that flavor, so the
11 Court assumes the same for purposes of this discussion.

12 Ms. Sethavanish obviously has standing to sue for alleged
13 mislabeling of the Chocolate Peanut Butter Bars that she allegedly
14 purchased. Both Article III standing requirements and the separate
15 statutory standing requirements imposed by California's UCL are
16 satisfied by allegations that a plaintiff would "not have purchased
17 the products in question had he known the truth about these
18 products and had they been properly labeled in compliance with the
19 labeling regulations" and that he "lost money or property when he
20 purchased the products in question because he did not receive the
21 full value of those products as advertised and labeled due to the
22 alleged misrepresentation." Khasin v. Hershey Co., 5:12-CV-01862
23 EJD, 2012 WL 5471153, at *6-7 (N.D. Cal. Nov. 9, 2012). Defendant
24 does not dispute Ms. Sethavanish's standing as to the Chocolate
25 Peanut Butter Bars she allegedly bought.

26 The issue, rather, is whether Ms. Sethavanish has standing to
27 sue for alleged mislabeling of differently flavored bars that she
28 did not allegedly buy. Defendant argues she does not. Mot. at 6-

1 8; Reply at 7-9. Plaintiffs argue that the nutrition bars Ms.
2 Sethavanish did not buy are similar enough to those she did that
3 this issue is not one of standing, but rather one of whether Ms.
4 Sethavanish can adequately represent the alleged purchaser class --
5 that is, a question appropriately raised in the context of a Rule
6 23 motion for class certification rather than a Rule 12(b)(1)
7 motion to dismiss for lack of standing. See Opp'n at 6.

8 As Judge Chen of this District recently observed, "there is
9 authority going both ways" on this issue. Astiana v. Dreyer's
10 Grand Ice Cream, Inc., C-11-2910 EMC, 2012 WL 2990766, at *11 (N.D.
11 Cal. July 20, 2012) (Chen, J.). Reviewing the cases, however, this
12 Court agrees with Judge Chen that "the critical inquiry seems to be
13 whether there is sufficient similarity between the products
14 purchased and not purchased." Id.³ Factors that other courts have

15 ³ It is difficult to identify with certainty how much similarity is
16 required. Courts have denied standing where a wide swath of
17 challenged products were purchased but one challenged product was
18 not. See Larsen v. Trader Joe's Co., C 11-05188 SI, 2012 WL
19 5458396 (N.D. Cal. June 14, 2012) (denying standing as to unbought
20 crescent rolls where plaintiff allegedly purchased a wide variety
21 of products, including cookies, apple juice, cinnamon rolls,
22 biscuits, and ricotta cheese). Courts also have denied standing as
23 to unbought products that differed from the purchased product in
24 only minor, arguably trivial ways. See Dysthe v. Basic Research
25 LLC, CV 09-8013 AG SSX, 2011 WL 5868307, at *5 (C.D. Cal. June 13,
26 2011) (denying standing as to an unbought weight-loss pill marketed
27 as "Relacore" where plaintiff bought only "Relacore Extra," which
28 had only minor differences in packaging and ingredients; "[J]ust
because an Old Fashioned and a Manhattan both have bourbon doesn't
mean they're the same drink."). But courts have also found
standing as to unbought products that differed only trivially from
the purchased product, see Dreyer's Grand, 2012 WL 2990766, at *13
(different flavors of the same brand of ice cream bearing the same
label), as well as to unbought products that differed fairly
substantially, see Koh v. S.C. Johnson & Son, Inc., C-09-00927 RMW,
2010 WL 94265 (N.D. Cal. Jan. 6, 2010) (two cleaning sprays, one a
window cleaner and the other carpet stain remover, both with the
same allegedly false badge of eco-friendliness). The Court need
not reconcile any tension that may exist in the cases, however,
because it determines, for the reasons set forth herein, that the
challenged products here are sufficiently similar under any test --

1 considered include whether the challenged products are of the same
2 kind, whether they are comprised of largely the same ingredients,
3 and whether each of the challenged products bears the same alleged
4 mislabeling. See Dreyer's Grand, 2012 WL 2990766, at *13.

5 Here, the Court concludes that there is more than enough
6 similarity between the Chocolate Peanut Butter Bars allegedly
7 purchased and the other nineteen varieties of nutrition bars
8 identified in the Complaint. The accused products are all of a
9 single kind, that is, they are all nutrition bars. They share a
10 uniform size and shape. On casual inspection, the only obvious
11 difference between the bars is their flavor. Closer inspection
12 reveals some difference between the ingredients used in different
13 flavors, but the similarities are more striking: six of the nine
14 challenged ingredients appear in all twenty nutrition bar flavors.
15 See Compl. ¶ 42. Most importantly, all twenty flavors bear the
16 same challenged label: "All-Natural Nutrition Bars."

17 The Court concludes that Ms. Sethavanish has standing for both
18 Article III and UCL purposes to sue for alleged mislabeling of all
19 twenty nutrition bar flavors identified in the Complaint.

20 2. Mr. Colucci

21 The Court concludes that Mr. Colucci lacks standing. As the
22 previous section's discussion suggests, standing in product
23 mislabeling cases is predicated on the purchase of at least some
24 product. See Hershey, 2012 WL 5471153, at *6-7. Here, Plaintiffs

25 more similar than the weight-loss pills in Dysthe and at least as
26 similar as the ice cream brands in Dreyer's Grand. The different
27 flavors of Defendant's nutrition bars are more or less fungible
28 when viewed from the perspective of a consumer considering buying
one or the other; any preference for one flavor versus another
could rest only on personal idiosyncrasies of taste, diet, or
allergy.

1 suggest that Mr. Colucci has standing despite the absence of
2 allegations that he personally purchased the products, or even that
3 they were purchased using money in which he had a legal interest
4 (as might have been the case if, for instance, he and Ms.
5 Sethavanish had been married at the time of the purchases rather
6 than engaged).

7 Plaintiffs argue that Mr. Colucci's standing flows from his
8 status as the "intended beneficiary" of the purchases. Opp'n at 5.
9 The Court disagrees. Mr. Colucci may have been a beneficiary in a
10 colloquial sense -- Ms. Sethavanish no doubt meant him to enjoy the
11 snacks she bought for him -- but Plaintiffs' argument misapprehends
12 third-party beneficiary law. Third-party beneficiary status turns
13 on the intent of both parties to a contract. See Spinks v. Equity
14 Residential Briarwood Apartments, 171 Cal. App. 4th 1004, 1023
15 (Cal. Ct. App. 2009). While it is not required for both parties to
16 intend to benefit the third party, it is required that the promisor
17 understand the promisee -- here, Ms. Sethavanish -- to have such
18 intent. Id. Even assuming that Defendant was the promisor (as
19 compared to the retailer who actually Ms. Sethavanish the bars),
20 nothing suggests that Defendant knew Ms. Sethavanish intended to
21 benefit Mr. Colucci when she bought the bars or, indeed, knew of
22 Mr. Colucci's existence. Mr. Colucci clearly was not an intended
23 beneficiary of the purchases in any legal sense. Plaintiffs'
24 argument that Mr. Colucci's intended beneficiary status gives him
25 Article III standing falters at the gate.⁴

26 _____
27 ⁴ The one case Plaintiffs cite in support of their argument,
28 Walters v. Fid. Mortg. of CA, 730 F. Supp. 2d 1185 (E.D. Cal.
2010), is distinguishable. In that case, a plaintiff who claimed
third-party beneficiary status alleged that a promisor (Ocwen) knew
that two promisees (Fidelity "and/or" HSBC) had "entered one or

1 The Court DISMISSES this action as to Mr. Colucci for lack of
2 standing. Because no amendment consistent with the current
3 allegations could cure the defect, the dismissal is WITH PREJUDICE.
4 The Clerk of the Court shall administratively terminate Mr. Colucci
5 as a party.

6 **B. Federal Claim (Magnuson-Moss Warranty Act)**

7 Plaintiffs bring only a single federal claim, one for breach
8 of written warranty under the federal Magnuson-Moss Warranty Act
9 ("MMWA"). Compl. ¶¶ 60-70. The MMWA creates a civil cause of
10 action for consumers to enforce the terms of implied or express
11 warranties. 15 U.S.C. § 2310(d).

12 As a threshold matter, the Court considers whether Plaintiffs
13 meet MMWA's jurisdictional requirements. Under § 2310(d)(1)(B),
14 private parties may bring a MMWA claim in federal district court.
15 Id. § 2310(d)(1)(B). However, if the action is brought on behalf
16 of a class, as this one is, a district court may not hear the claim
17 if "the number of named plaintiffs is less than one hundred." Id.
18 § 2310(d)(3)(C). Defendant argues that Plaintiffs' MMWA claim must
19 be dismissed because, here, the number of named plaintiffs is only
20 two. See Mot. at 10. Plaintiffs respond that "numerous courts
21 have found such prerequisites to be irrelevant when, as here, a
22 court has jurisdiction under the Class Action Fairness Act, 28
23 U.S.C. § 1332(d) ('CAFA')." Opp'n at 24. Though Plaintiffs do not
24 provide a citation to any of those "numerous" opinions or attempt
25 to demonstrate that this case satisfies CAFA's jurisdictional
26

27 more agreements requiring Ocwen to provide various services to
28 plaintiff." Id. at 1201. In the case at bar, nothing suggests
that Defendant entered any agreement with Ms. Sethavanish to
provide anything to Mr. Colucci.

1 prerequisites, their conclusion is correct. See Keegan v. Am.
2 Honda Motor Co., Inc., 838 F. Supp. 2d 929, 954-55 (C.D. Cal. 2012)
3 (collecting cases holding that Congress's passage of CAFA
4 supplanted the jurisdictional requirements of the earlier-enacted
5 MMWA). Plaintiffs need not satisfy the numerosity requirements of
6 the MMWA, only the jurisdictional requisites of CAFA, and they have
7 done so here.⁵

8 Proceeding, then, to the merits of Plaintiffs' MMWA claim, the
9 Court concludes that the claim fails as a matter of law.
10 Plaintiffs allege a breach of written warranty. Compl. ¶¶ 65-67.
11 The MMWA defines a written warranty as follows:

12 any written affirmation of fact or written
13 promise made in connection with the sale of a
14 consumer product by a supplier to a buyer which
15 relates to the nature of the material or
16 workmanship and affirms or promises that such
material or workmanship is defect free or will
meet a specified level of performance over a
specified period of time.

17 15 U.S.C. § 2301(6)(A) (emphasis added). The MMWA's disjunctive
18 language ("or") identifies two kinds of written warranties, the
19 first warranting a "defect free" product and the second warranting
20 a product that will "meet a specified level of performance over a
21 specified period of time." Plaintiffs allege only the first kind,
22 a "defect free" warranty; specifically, they allege that the
23 nutrition bars' "All-Natural" representation constitutes "a written
24 promise that the ingredients in the Nutrition Bars were free of a
25

26 ⁵ See 28 U.S.C. § 1332(d)(2) (provisions of CAFA giving district
27 courts jurisdiction over class actions where any class member is
28 diverse from any defendant and more than \$5 million is in
controversy); Compl. (alleging complete diversity of named parties
and placing in controversy more than \$5 million).

1 particular type of defect (i.e., that they were not synthetic or
2 artificial)." Compl. ¶ 66.

3 The Court concludes that Plaintiffs' claim fails as a matter
4 of law. Plaintiffs allege that the actionable defect here is the
5 artificiality or synthetic nature of the ingredients in the
6 nutrition bars. The identical argument has been rejected in many
7 other cases. E.g., Larsen v. Trader Joe's Co., C 11-05188 SI, 2012
8 WL 5458396, at *3 (N.D. Cal. June 14, 2012) ("[T]his Court is not
9 persuaded that being 'synthetic' or 'artificial' is a 'defect.'");
10 Dreyer's Grand Ice Cream, 2012 WL 2990766, at *2-4 (same, and
11 collecting cases). This Court finds the reasoning of those cases
12 persuasive and adopts it here. Plaintiffs fail to marshal any
13 persuasive authority that artificial or synthetic ingredients in
14 otherwise unobjectionable food products amount to an actionable
15 defect under the MMWA. Accordingly, Plaintiffs' MMWA claim is
16 DISMISSED. Because amendment could not save the claim, the
17 dismissal is WITH PREJUDICE.⁶

18 ⁶ In Defendant's Notice of Removal, the only stated grounds for
19 subject-matter jurisdiction are federal-question and supplemental
20 jurisdiction. See NOR ¶¶ 6-8. Hence, the Court's dismissal of
21 Plaintiffs' only federal claim raises the question of whether the
22 Court should exercise its discretion to remand Plaintiffs' seven
23 remaining state-law claims. The Court is plainly authorized to do
24 so. See 28 U.S.C. § 1362(c); Carnegie-Mellon Univ. v. Cohill, 484
25 U.S. 343 (1988). Cohill authorizes district courts to remand state
26 law claims over which it exercises only supplemental jurisdiction
27 after all federal claims have been dismissed. See Carlsbad Tech.,
28 Inc. v. HIF Bio, Inc., 556 U.S. 635, 637 (2009). Not only is
remand authorized in such cases, but usually "the balance of
factors to be considered [. . .] -- judicial economy, convenience,
fairness, and comity -- will point toward" remand. Cohill, 484
U.S. at 350 n.7. The Court concludes, however, that this is not
the usual case. As previously explained, this case satisfies
CAFA's jurisdictional requirements. Further, because the Complaint
alleges complete diversity between the parties and places more than
\$75,000 in controversy, Defendant could have removed on diversity
grounds. Given the existence of grounds for subject-matter
jurisdiction separate from those named in Defendant's Notice of

1 **C. State Law Claims**

2 **1. Preemption**

3 Defendant argues that Plaintiffs' state-law claims "stand[] as
4 an obstacle to federal law and policy, and so should be dismissed
5 as preempted." Mot. at 11. Preemption doctrine flows from the
6 Supremacy Clause of Article VI of the U.S. Constitution, which
7 provides that federal law is the "supreme law of the land." Under
8 this provision of the Constitution, "Congress has the power to
9 preempt state law." Crosby v. Nat'l Foreign Trade Council, 530
10 U.S. 363, 372 (2000). Thus, in all preemption cases, congressional
11 intent is the "ultimate touchstone" of preemption analysis. See
12 Altria Group, Inc. v. Good, 555 U.S. 70, 76 (2008). Congressional
13 intent to preempt state law may be found if the state law "stands
14 as an obstacle to the accomplishment and execution of the full
15 purposes and objectives of Congress." Kroske v. U.S. Bank Corp.,
16 432 F.3d 976, 981 (9th Cir. 2005) (quoting English v. Gen. Elec.
17 Co., 496 U.S. 72, 79 (1990)). This "implied obstacle" or
18 "conflict" preemption theory is the only one Defendant argues here.

19 The Court notes, however, that the Ninth Circuit opinion on
20 which Defendant rests its argument was vacated during the pendency
21 of this motion. See Degelmann v. Advanced Med. Optics, Inc., 659
22 F.3d 835 (9th Cir. 2011) vacated sub nom. Degelmann v. Advanced
23 Med. Optics Inc., 699 F.3d 1103 (9th Cir. 2012); see also Mot. at
24 11-12, Reply at 11-12 (arguing that Degelmann controls in this
25 case). In the absence of viable authority, the Court declines to
26

27 Removal, the Court declines to exercise its discretion to remand
28 Plaintiffs' remaining state-law claims. Nothing would stop
Defendant from simply removing again, and such a result would
hardly be economical, convenient, or fair.

1 entertain Defendant's preemption argument at this time -- without,
2 however, any prejudice to Defendant's right to raise preemption
3 arguments in further proceedings before this Court.

4 **2. Plausibility and Particularity**

5 Federal Rule of Civil Procedure 8(a)(2) requires a plaintiff
6 to set forth "a short and plain statement of the claim showing that
7 the pleader is entitled to relief." The Supreme Court has held
8 that Rule 8 requires that a complaint's well-pleaded allegations,
9 if taken as true, must "plausibly give rise to an entitlement to
10 relief." Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009) (emphasis
11 added). Determining the plausibility of allegations is "a context-
12 specific task that requires the reviewing court to draw on its
13 judicial experience and common sense." Id.

14 Rule 9(b) imposes a higher pleading standard on, inter alia,
15 claims that sound in fraud. For such claims, "the circumstances
16 constituting fraud" must be "state[d] with particularity." Fed. R.
17 Civ. P. 9(b). This "particularity" standard means that a plaintiff
18 "must identify the who, what, when, where, and how of the
19 misconduct charged, as well as what is false or misleading about
20 the purportedly fraudulent statement, and why it is false."
21 Cafasso, U.S. ex rel. v. Gen. Dynamics C4 Sys., Inc., 637 F.3d
22 1047, 1055 (9th Cir. 2011) (internal quotation marks and brackets
23 omitted). States of mind, however, including intent, "may be
24 alleged generally." Fed. R. Civ. P. 9(b).

25 In the case at bar, Defendant argues that the Court should
26 dismiss Plaintiffs' state-law claims as implausible or, to the
27 extent they sound in fraud, as lacking particularity. Mot. at 14-
28 21; Reply at 2-6. The argument is unavailing. First, as to

1 plausibility, the Ninth Circuit has made plain that UCL, FAL, and
2 CLRA claims, like those asserted by Plaintiffs here, turn on the
3 application of a "reasonable consumer" standard. See Williams v.
4 Gerber Products Co., 552 F.3d 934, 938-40 (9th Cir. 2008).
5 Defendant's argument as to plausibility is, at bottom, an argument
6 that no reasonable consumer is likely be deceived by the labeling
7 of its nutrition bars. But, as the Ninth Circuit and numerous
8 courts have held, that issue is generally not amenable to
9 resolution on the pleadings because it involves issues of fact.
10 See id.; see also, e.g., Dreyer's Grand, 2012 WL 2990766, at *11;
11 Hershey, 2012 WL 5471153, at *7; Vicuna v. Alexia Foods, Inc., C
12 11-6119 PJH, 2012 WL 1497507, at *2 (N.D. Cal. Apr. 27, 2012);
13 Astiana v. Ben & Jerry's Homemade, Inc., C 10-4387 PJH, 2011 WL
14 2111796, at *4 (N.D. Cal. May 26, 2011). The questions of (1)
15 whether it would be reasonable for a consumer to believe the
16 nutrition bars' claim to be "All-Natural" and (2) whether the
17 nutrition bars' labels are "likely to deceive," are both factual
18 inquiries beyond the scope of the present inquiry into the "legal
19 sufficiency" of the Complaint. Cf. APL Co. Pte. Ltd. v. UK
20 Aerosols Ltd., Inc., 452 F. Supp. 2d 939, 942 (N.D. Cal. 2006)
21 (Rule 12(b)(6) motion tests sufficiency of pleading, not merits).

22 The Court also rejects Defendant's arguments that the
23 Complaint's allegations of fraud are insufficiently particular.
24 Defendant argues first that Plaintiffs have failed to allege the
25 required element of "specific intent" with particularity. The
26 argument fails because Rule 9(b) permits states of mind, including
27 intent, to be pled generally. Second, Defendant cites a recent
28 case from this District where the Court dismissed similar legal

1 claims as having been pled with insufficient particularity, but the
2 case is distinguishable. See Wang v. OCZ Tech. Group, Inc., 276
3 F.R.D. 618 (N.D. Cal. 2011). In Wang, the plaintiff failed to
4 allege how the challenged product -- a computer storage drive --
5 "f[ell] short of its advertised qualities, e.g., actual versus
6 expected capacity of his drive and actual versus expected
7 performance speed." Id. at 628. By citing to this case, Defendant
8 appears to suggest that Plaintiffs, too, have not alleged with
9 particularity how the purchased nutrition bars fell short of their
10 advertised qualities, in other words, how the advertising was
11 false. The suggestion is unavailing. Plaintiffs allege that the
12 bars were labeled "All-Natural" but in fact were not.

13 The Court is cognizant of Defendant's argument which purports
14 to show how the Complaint's "central premise" -- that the "All-
15 Natural" statement on the nutrition bars is deceptive because
16 federal regulations describe some of the bars' ingredients as
17 "synthetic" -- is false. See Mot. at 15-17; Reply at 3-4.
18 Defendant explains at length why "synthetic" ingredients are not in
19 fact unnatural, in the sense of being found "in nature." Defendant
20 points out that Plaintiffs admit that certain of the challenged
21 ingredients are naturally occurring compounds (for instance,
22 vitamins) or "common and normally expected to be in foods" like the
23 nutrition bars. Defendant asserts that this makes the ingredients,
24 if not quite "natural," then not unnatural, and concludes that,
25 therefore, "there is no basis for concluding that the [nutrition]
26 bars are mislabeled." Defendant may be correct as a matter of
27 fact, but factual matters are not amenable to resolution at the
28 pleading stage.

1 In a similar vein, Defendant submits a request for judicial
2 notice with six exhibits, the first five of which are screenshots
3 of the websites of purportedly health-conscious grocery stores.
4 ECF No. 27 ("RJN") Exs. 1-5. In the screenshots, the grocery
5 stores mention ingredients which are also used in Defendant's
6 nutrition bars. Defendant points to these representations by the
7 non-party grocery stores to "show[] the implausibility of any
8 reasonable consumer being deceived" by the "All-Natural" claim on
9 Defendant's packaging, since products containing the same
10 ingredients are sold at the purportedly health-conscious grocery
11 stores. Mot. at 18-19. The Court rejects this argument as
12 untenable at the pleading stage. The Court is not inclined to
13 assume the role of fact-finder in the guise of determining
14 plausibility. "The plausibility standard is not akin to a
15 probability requirement" Iqbal, 556 U.S. at 678 (internal
16 quotation marks omitted). Because Defendant's RJN essentially asks
17 the Court to make a factual finding at the pleading stage, the RJN
18 is DENIED as to Exhibits 1 through 5.

19 Defendant presents no reason to dismiss Plaintiffs' state-law
20 claims as implausible or lacking particularity. Accordingly, the
21 Court DENIES Defendant's motion to dismiss the state-law claims on
22 those grounds. Because those are the only grounds on which
23 Defendant challenged Plaintiffs' common-law fraud, UCL, and FAL
24 claims (claims 2 through 6), those claims remain undisturbed.

25 3. CLRA Notice

26 Defendant argues that Plaintiffs' seventh claim, asserting
27 violations of the CLRA, must be dismissed as procedurally
28 deficient. Section 1782(a) of the CLRA requires that "[t]hirty

1 days or more prior to the commencement of an action for damages
2 pursuant to this title, the consumer shall . . . [n]otify the
3 person alleged to have" violated the CLRA "of the particular
4 alleged violations" and "[d]emand that the person correct, repair,
5 replace, or otherwise rectify" the violations. Cal. Civ. Code §
6 1782(a). Defendant argues that Plaintiffs failed to comply with
7 this pre-suit notice provision because they sent a demand letter to
8 Defendant on August 30, 2011 but then filed a suit for damages in
9 California Superior Court on September 14, 2011. See RJN Ex. 6
10 ("Aug. 30, 2011 Letter").⁷ Defendant argues that even if the
11 letter had been timely, it failed to detail the CLRA violations
12 with sufficient particularity. Lastly, Defendant argues that
13 failure to provide proper notice requires dismissal with prejudice
14 of Plaintiffs' CLRA claim, because later notice and amendment
15 cannot, as a matter of law, cure the initial failure to provide
16 notice. Mot. at 23-24.

17 Defendant's position is unavailing. Plaintiffs sent their
18 CLRA notice letter on August 30, 2011, and filed the action now at
19 bar on April 26, 2012 -- nearly eight months later. Defendant
20 makes much of the fact that Plaintiffs are on their third complaint
21 in their second case against Defendant. The first case only
22 matters to the second, however, if it has some sort of preclusive
23

24 ⁷ Defendant asks the Court to take judicial notice of the August
25 30, 2011 Letter. The Court declines to do so because it is neither
26 a fact generally known nor is it the type of source whose accuracy
27 "could not reasonably be questioned." Fed. R. Evid. 201. The
28 Court will, however, consider the letter under the doctrine of
incorporation by reference. Under that doctrine, it is sufficient
that no party questions the authenticity of the document and that
the document's contents are alleged in the complaint. Knieval v.
ESPN, 393 F.3d 1068, 1076 (9th Cir. 2005). Those conditions are
satisfied here. See Compl. ¶¶ 45-47.

1 effect. Here, it does not, whether one looks to federal preclusion
2 law or to the preclusion rules of the California state court where
3 the instant case was initially filed.⁸ Accordingly, the Court
4 gives no preclusive effect to the first, voluntarily dismissed
5 lawsuit. The CLRA notice letter was sent eight months before
6 commencement of the case now before this Court and thus was not
7 untimely for purposes of section 1782(a).

8 Defendant's argument that the letter lacked sufficient detail
9 is similarly unavailing. Notice need only "give the manufacturer
10 or vendor sufficient notice of alleged defects to permit
11 appropriate corrections or replacements." Stickrath v. Globalstar,
12 Inc., 527 F. Supp. 2d 992, 1001-02 (N.D. Cal. 2007) (quoting
13 Outboard Marine Corp. v. Superior Court, 52 Cal. App. 3d 30, 40
14 (Cal. Ct. App. 1975)). Defendant, challenged on this point in
15 Plaintiffs' opposition, essentially concedes it by declining to
16 respond in the reply brief. Having reviewed the August 30, 2011
17 Letter, the Court concludes that it adequately notified Defendant

18 _____
19 ⁸ As to federal law, "[c]laim preclusion, or res judicata, bars
20 successive litigation of the very same claim following a final
21 adjudication on the merits involving the same parties or their
22 privies." Amadeo v. Principal Mut. Life Ins. Co., 290 F.3d 1152,
23 1159 (9th Cir. 2002) (internal quotation marks omitted). However,
24 voluntary dismissals are not judgments "on the merits" unless
25 specifically so stated or the claim has been voluntarily dismissed
26 more than once. See Fed. R. Civ. P. 41(a)(1)(B). As to the
27 preclusive effect of California law, under 28 U.S.C. § 1738, this
28 Court "must give the same preclusive effect to a state court
judgment as the state courts of that state would themselves give to
that judgment," Noel v. Hall, 341 F.3d 1148, 1159 (9th Cir. 2003),
and California courts do not give preclusive effect to voluntary
dismissals without prejudice, see In re Estate of Redfield, 193
Cal. App. 4th 1526, 1534 (Cal. Ct. App. 2011) ("Application of the
doctrine of res judicata requires an affirmative answer to" the
question "Was there a final judgment on the merits?"); Syufy
Enterprises v. City of Oakland, 104 Cal. App. 4th 869, 879 (Cal.
Ct. App. 2002) ("By definition, a voluntary dismissal without
prejudice is not a final judgment on the merits.").

1 of the alleged defect, which was the use of allegedly synthetic or
2 artificial ingredients in Defendant's nutrition bars.

3 **4. Restitution Based on Quasi-Contract**

4 Plaintiffs' eighth and final claim is pled in the alternative.
5 Compl. ¶¶ 114-16. Plaintiffs style this claim as one for
6 "Restitution Based On Quasi-Contract." Id. Defendant seeks
7 dismissal of this claim on two grounds. First, Defendant argues
8 that Plaintiffs have failed to plausibly plead that Defendant's
9 nutrition bars are not natural and hence have failed to plead the
10 existence of a fraud that would make Defendant's enrichment
11 "unjust." Second, Defendant argues that Plaintiffs cannot bring a
12 claim for unjust enrichment, even in the alternative, because they
13 have already sued in tort. See Mot. at 24-25; Reply at 14-15.

14 Defendant's first argument fails because it is predicated on
15 plausibility arguments that the Court already rejected. See
16 Section III.C.2 supra. Defendant's second argument, however,
17 presents a closer question. Defendant begins its discussion with
18 the observation that "courts have inconsistently dealt" with
19 restitution claims. Mot. at 24. "Inconsistent" is an
20 understatement. Some of the cases emphasize that unjust enrichment
21 or restitution -- the terms are synonymous⁹ -- is not a cause of
22 action, but rather a remedy. Some state that unjust enrichment is
23 neither a claim nor a remedy, but a "principle." Some state that
24 unjust enrichment is indeed a cause of action, but one that may not
25 be pled alongside claims for breach of contract or tort. Yet

26 _____
27 ⁹ Cf. McBride v. Boughton, 123 Cal. App. 4th 379, 387 (Cal. Ct.
28 App. 2004) ("Unjust enrichment is not a cause of action . . . or
even a remedy, but rather a general principle, underlying various
legal doctrines and remedies[.] It is synonymous with
restitution." (internal quotation marks and citations omitted)).

1 others come to the slightly different conclusion that these claims
2 may be pled alongside contract and tort claims, but only as an
3 alternative, "fallback" claim in the event that the contract or
4 tort claims fail. Finally, some courts appear to elide the issue
5 entirely and simply analyze whether the plaintiff has adequately
6 pled the "elements" of the "claim." The outcome of some motions
7 appears to have turned on the words used in the caption to describe
8 the cause of action.

9 Having reviewed numerous discussions, this Court is persuaded
10 by, and adopts the reasoning of, the cases which hold that claims
11 for restitution or unjust enrichment may survive the pleading stage
12 when pled as an alternative avenue of relief, though the claims, as
13 alternatives, may not afford relief if other claims do. E.g.,
14 Alexia Foods, 2012 WL 1497507, at *3; Trader Joe's, 2012 WL
15 5458396, at *7; Ben & Jerry's, 2011 WL 2111796, at *11.
16 Accordingly, the Court declines to dismiss Plaintiffs' alternative
17 "claim" for restitution based on quasi-contract. However, "to the
18 extent that plaintiffs are ultimately able to prevail under a tort
19 theory, they will be precluded from also recovering under a claim
20 of unjust enrichment." Trader Joe's, 2012 WL 5458396, at *7.

21

22 **IV. CONCLUSION**

23 The Court ORDERS Plaintiff James Colucci dismissed from this
24 action for lack of standing. The Clerk shall administratively
25 terminate Mr. Colucci in ECF. Plaintiff Kimberly S. Sethavanish
26 has standing to pursue the claims set forth in the Complaint with
27 respect to all twenty brands of Defendant ZonePerfect Nutrition
28 Company's nutrition bars identified in the Complaint.

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As to the merits, the Complaint's first claim for relief, arising under the Magnuson-Moss Warranty Act, is DISMISSED WITH PREJUDICE. The other seven claims set out in the Complaint remain undisturbed.

IT IS SO ORDERED.

Dated: December 28, 2012


UNITED STATES DISTRICT JUDGE