

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

United States District Court
Northern District of California

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

FAITH NORMAN,

Plaintiff,

v.

GERBER PRODUCTS COMPANY,

Defendant.

Case No. 21-cv-09940-JSW

ORDER GRANTING, IN PART, AND DENYING, IN PART, DEFENDANT’S MOTION TO DISMISS, WITH LEAVE TO AMEND, AND SETTING CASE MANAGEMENT CONFERENCE

Re: Dkt. No. 30

Now before the Court for consideration is Gerber Products Company’s (“Defendant”) motion to dismiss Faith Norman’s (“Plaintiff”) First Amended Complaint (“FAC”). The Court has considered the parties’ papers, relevant legal authority, and the record in this case, and it hereby GRANTS, IN PART, and DENIES, IN PART, Defendant’s motion to dismiss, with leave to amend.

BACKGROUND

Defendant manufactures and sells baby food and infant formula nationwide. (FAC ¶ 9.) In 2021, Plaintiff purchased Defendant’s Gerber Good Start Soy 2 Powder Infant & Toddler Formula from various retail stores in San Jose. (*Id.* ¶¶ 7, 44.) The product Plaintiff purchased included the graphic depicted below on the front of the packaging (the “Image”):



1 In addition to the product she purchased, Plaintiff challenges the labelling on a number of
2 other products (the “Products”), which also include the Image on the front of the packaging. (*Id.* ¶
3 4.) On at least some of the Products, the Defendant includes the following statement on the rear of
4 the packaging above the ingredients list: “NON GMO Not Made With Genetically Engineered
5 Ingredients” (the “Statement”). (*See id.* ¶ 44; *see also e.g.*, ¶¶ 45-46.)¹ The Court refers to the
6 Image and the Statement collectively as the “Non GMO Claim.”

7 Plaintiff brings this putative class action to challenge Defendant’s Non GMO Claim on its
8 Products. (*Id.* ¶ 1.) Plaintiff alleges that although Defendant uses the Non GMO Claim, the
9 Products actually contain ingredients derived from genetically modified food sources and are,
10 therefore, not non-GMO. (*Id.* ¶ 3.) Plaintiff alleges she “reviewed the labeling, packaging, and
11 marketing materials of her Products and saw the . . . claims that . . . the Products are purportedly
12 ‘Non-GMO’” in deciding whether to purchase the Products. (*Id.* ¶ 7.) Plaintiff believed the
13 Products did not contain genetically modified ingredients or ingredients sourced from animals
14 derived on GMO feed and alleges she would not have purchased the Products if she had known
15 the truth. (*Id.*)

16 Plaintiff alleges nine causes of action against Defendant: (1) violation of California’s
17 Unfair Competition Law (“UCL”), Business and Professions Code sections 17200, *et seq.*; (2)
18 violation of California’s False Advertising Law (“FAL”), Business and Professions Code sections
19 17500, *et seq.*; (3) violation of California’s Consumers Legal Remedies Act (“CLRA”), Civil
20 Code sections 1750, *et seq.*; (4) breach of express warranty; (5) breach of the implied warranty of
21 merchantability; (6) unjust enrichment/restitution; (7) negligent misrepresentation; (8) fraud; and
22 (9) fraudulent misrepresentation. (*Id.* ¶ 6.)

23 The Court will address additional facts as necessary in the analysis.

24
25
26 _____
27 ¹ Plaintiff has not included a photograph of the rear side of the packaging for each Product
28 she is challenging and, instead, includes images of the ingredient lists. However, it is possible to
see portions of the Statement on many of the photographs Plaintiff has included in the FAC.
(*Compare* FAC ¶¶ 44-46, *with id.* ¶¶ 49-51, 54-56.)

1 ANALYSIS

2 **A. Applicable Legal Standards.**

3 Under Federal Rule of Civil Procedure 12(b)(1)², a district court must dismiss a complaint
4 if it lacks subject matter jurisdiction to hear the claims alleged in the complaint. Fed. R. Civ. P.
5 12(b)(1). In order for a district court to have subject matter jurisdiction over a plaintiff's claims, a
6 plaintiff must present a live case or controversy, as required by Article III of the U.S. Constitution.
7 *See* U.S. Const. art. III section 2, cl. 1. In order for there to be a case or controversy within the
8 meaning of Article III, a plaintiff must have standing to pursue their claims.

9 A motion to dismiss is proper under Rule 12(b)(6) where the pleadings fail to state a claim
10 upon which relief can be granted. A court's "inquiry is limited to the allegations in the complaint,
11 which are accepted as true and construed in the light most favorable to the plaintiff." *Lazy Y*
12 *Ranch Ltd. v. Behrens*, 546 F.3d 580, 588 (9th Cir. 2008). Even under the liberal pleading
13 standard of Rule 8(a)(2), "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to
14 relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a
15 cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citing
16 *Papasan v. Allain*, 478 U.S. 265, 286 (1986)).

17 Pursuant to *Twombly*, a plaintiff cannot merely allege conduct that is conceivable but must
18 instead allege "enough facts to state a claim to relief that is plausible on its face." *Id.* at 570. "A
19 claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw
20 the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*,
21 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 556). "The plausibility standard is not
22 akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant
23 has acted unlawfully." *Id.* (quoting *Twombly*, 550 U.S. at 556).

24 Where, as here, a plaintiff asserts a claim sounding in fraud, the plaintiff must "state with
25 particularity the circumstances regarding fraud or mistake." Fed. R. Civ. P. 9(b). A claim sounds
26 in fraud if the plaintiff alleges "a unified course of fraudulent conduct and rel[ies] entirely on that

27 _____
28 ² Unless otherwise noted, all further citations to a "Rule" are to the Federal Rules of Civil Procedure.

1 course of conduct as the basis of a claim.” *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1103
 2 (9th Cir. 2003). The particularity requirement of Rule 9(b) is satisfied if the complaint “identifies
 3 the circumstances constituting fraud so that a defendant can prepare an adequate answer from the
 4 allegations.” *Moore v. Kayport Package Exp., Inc.*, 885 F.2d 531, 540 (9th Cir. 1989); *see*
 5 *also Vess*, 317 F.3d at 1106. Accordingly, “[a]verments of fraud must be accompanied by ‘the
 6 who, what, when, where, and how’ of the misconduct charged.” *Vess*, 317 F.3d at 1106
 7 (quoting *Cooper v. Pickett*, 137 F.3d 616, 627 (9th Cir. 1997)).

8 If the allegations are insufficient to state a claim, a court should grant leave to amend
 9 unless amendment would be futile. *See, e.g., Reddy v. Litton Indus., Inc.*, 912 F.2d 291, 296 (9th
 10 Cir. 1990); *Cook, Perkiss & Liehe, Inc. v. Northern Cal. Collection Serv. Inc.*, 911 F.2d 242, 246-
 11 47 (9th Cir. 1990). If a plaintiff has previously amended a complaint, a court has “broad”
 12 discretion to deny leave to amend. *Allen v. City of Beverly Hills*, 911 F.2d 367, 373 (9th Cir.
 13 1990) (quoting *Ascon Props., Inc. v. Mobil Oil Co.*, 866 F.2d 1149, 1160 (9th Cir. 1989)).

14 **B. Standing.**

15 **1. Plaintiff’s allegations are not sufficient to establish standing to seek equitable** 16 **restitution.**

17 Defendant moves to dismiss Plaintiff’s claim for equitable restitution on the basis that she
 18 does not allege she lacks an adequate remedy at law. It is well-established that claims for relief
 19 under the FAL and the UCL are limited to restitution and injunctive relief. *See, e.g., Korea Supply*
 20 *Co. v. Lockheed Martin Corp*, 29 Cal. 4th 1134, 1146-49 (2003). In contrast, the CLRA provides
 21 for equitable relief and for damages. In *Sonner v. Premier Nutrition Corporation*, the Ninth
 22 Circuit held “that the traditional principles governing equitable remedies in federal courts,
 23 including the requisite inadequacy of legal remedies, apply when a party requests restitution under
 24 the UCL and CLRA in a diversity action.” 971 F.3d 834, 843-44 (9th Cir. 2020).

25 Here, Plaintiff fails to allege that she lacks an adequate remedy at law for her restitution
 26 claim. Plaintiff alleges that she “may lack an adequate remedy at law, if for instance, damages
 27 resulting from her purchase of the Product is determined to be in an amount less than the premium
 28 price of the Product.” (FAC ¶¶ 103, 112, 122, 153.) However, Plaintiff’s allegations do not show

1 how restitution would go beyond the damages available to her. Plaintiff fails to allege any specific
 2 facts showing that damages are “inadequate or incomplete.” *Sonner*, 971 F.3d at 844; *see also*
 3 *Nacarino v. Chobani, LLC*, No. 20-cv-07437-EMC, 2021 WL 3487117, at *12 (N.D. Cal. Aug. 9,
 4 2021). Further, Plaintiff’s allegations are conditional because Plaintiff claims she “may” lack an
 5 adequate remedy at law “if” damages are less than restitution. *See, e.g., Johnson v. Trumpet*
 6 *Behavioral Health, LLC*, No. 3:21-cv-03221-WHO, 2022 WL 74163, at *3 (N.D. Cal. Jan. 7,
 7 2022) (concluding conditional allegations insufficient to plead that plaintiffs actually lacked an
 8 adequate remedy of law). Plaintiff’s allegations are not enough to meet *Sonner*’s rule because
 9 Plaintiff does not allege she lacks adequate legal remedies. Instead, as in *Johnson*, Plaintiff
 10 alleges she “seek[s] equitable relief *to the extent* legal remedies are inadequate or *if* legal remedies
 11 are inadequate.” *Id.* (emphasis in original).

12 Accordingly, the Court GRANTS Defendant’s motion to dismiss Plaintiff’s claim for
 13 equitable restitution.³ Because it is possible that Plaintiff could plead that she lacks an adequate
 14 remedy at law, the Court GRANTS Plaintiff leave to amend.

15 **2. Plaintiff’s allegations are sufficient to establish standing to seek injunctive**
 16 **relief.**

17 In addition to seeking restitution, Plaintiff seeks prospective injunctive relief. In *Zeiger v.*
 18 *WellPet LLC*, the court reasoned that damages for past harm were not an adequate remedy for
 19 prospective harm caused by alleged false advertising because damages “would [not] ensure that
 20 [the plaintiff] (and other consumers) can rely on WellPet’s representations in the future.” 526 F.
 21 Supp. 3d 652, 687 (N.D. Cal. 2021); *see also Adams v. Cole Haan, LLC*, No. 8:20-CV-00913-
 22 JWH-DFMx, 2021 WL 4907248, at *4 (C.D. Cal. Mar. 1, 2021) (finding monetary damages
 23 “would not necessarily be sufficient to remedy” harm from alleged false advertising).

24 Plaintiff alleges that she lacks an adequate remedy at law because absent an injunction,
 25

26 ³ Plaintiff’s claim for unjust enrichment also seeks equitable restitution. (FAC ¶ 152.) As
 27 discussed above, Plaintiff fails to demonstrate that she lacks an adequate remedy at law for her
 28 restitution claim. Accordingly, the Court GRANTS Defendant’s motion to dismiss Plaintiff’s
 claim for unjust enrichment.

1 Defendant will continue to deceive consumers. Here, monetary damages would not necessarily be
2 sufficient to remedy the alleged harm insofar as Plaintiff alleges that she would like to keep
3 buying Defendant's Products but is deterred from doing so because she will be unable to
4 determine if the Products' labeling is truthful. (FAC ¶ 8.) The Court concludes that Plaintiff has
5 plausibly alleged that she lacks an adequate remedy at law for injunctive relief. *See Moran v.*
6 *Bondi Sands (USA) Inc.*, No. 21-cv-07961-JSW, 2022 WL 1288984, at *6 (N.D. Cal. Apr. 29,
7 2022); *see also Brooks v. Thomson Reuters Corp.*, No. 21-cv-01418-EMC, 2021 WL 3621837, at
8 *11 (N.D. Cal. Aug. 16, 2021) (declining to apply *Sonner* to bar UCL claims for prospective
9 injunctive relief because "the prospect of paying damages is sometimes insufficient to deter a
10 defendant from engaging in an alleged unlawful, unfair, or fraudulent business practice").

11 Accordingly, the Court DENIES Defendant's motion to dismiss Plaintiff's claim for
12 injunctive relief.

13 **3. Plaintiff sufficiently alleges she has Article III standing to pursue claims for**
14 **products she did not purchase.**

15 Plaintiff alleges she purchased one of the Products listed in the FAC, which did not contain
16 animal byproducts. Defendant argues that she lacks standing to pursue claims based on Products
17 she did not purchase, which would include Products that are derived from animals raised on GMO
18 feed. "[T]here is no controlling authority [in the Ninth Circuit] on whether Plaintiffs have
19 standing for products they did not purchase." *Miller v. Ghirardelli Chocolate Co.*, 912 F. Supp.
20 2d 861, 868 (N.D. Cal. 2012). Despite the lack of controlling authority, "[t]he majority of the
21 courts that have carefully analyzed the question hold that a plaintiff may have standing to assert
22 claims for unnamed class members based on products he or she did not purchase so long as the
23 products and alleged misrepresentations are substantially similar." *Id.* at 869; *see also Fity v.*
24 *Frito-Lay N. Am., Inc.*, 67 F. Supp. 3d 1075, 1082-83 (N.D. Cal. 2014) ("Courts in this district
25 have adopted three diverging approaches for analyzing standing to pursue claims for nonpurchased
26 products."). "[C]ourts look to a series of factors including whether the challenged products are of
27 the same kind, comprised of largely the same ingredients, and whether each of the challenged
28 products bears the same alleged mislabeling" when deciding whether products are substantially

1 similar. *Figy*, 67 F. Supp. 3d at 1083. Diverse products that bear similar labels have been
 2 considered “substantially similar.” *Maisel v. S.C. Johnson & Son, Inc.*, No. 21-CV-00413-TSH,
 3 2021 WL 1788397, at *4 (N.D. Cal. May 5, 2021) (collecting cases). Once a court determines the
 4 products are sufficiently similar, “any concerns regarding material differences in the products can
 5 be addressed at the class certification stage.” *Anderson v. Jamba Juice Co.*, 888 F. Supp. 2d 1000,
 6 1006 (N.D. Cal. 2012).

7 Here, Plaintiff alleges that the Products are substantially similar in the following ways: (1)
 8 all are manufactured at Defendant’s factories in Cincinnati, Ohio; (2) all contain the identical Non
 9 GMO Claim on the front of the packaging; and (3) the misleading effect of the Non GMO Claim
 10 is the same across all the Products in terms of what a reasonable consumer would understand
 11 “non-GMO” to mean. (FAC ¶ 41.) *See Maisel*, 2021 WL 1788397, at *5 (finding substantial
 12 similarity among diverse products because all products were manufactured by defendant, all
 13 products contained the plant-based representations on the front of the packaging, and all products
 14 had the same misleading effect).

15 Based on these allegations, the Court finds Plaintiff has sufficiently alleged that the
 16 Products she did not purchase are substantially similar to the Product she did purchase. The
 17 differences between the Products raised by Defendant in the motion may impact class certification
 18 or summary judgment, but the differences are not enough to defeat substantial similarity for the
 19 purposes of standing. *See Bohac v. Gen. Mills, Inc.*, No. 12-cv-05280-WHO, 2014 WL 1266848,
 20 at *12 (N.D. Cal. Mar. 26, 2014) (differences in ingredients and labeling on products did not
 21 render the products sufficiently dissimilar to defeat standing where the products contained similar
 22 “natural” representations and the challenged harm was the same).

23 Accordingly, the Court DENIES Defendant’s motion on this basis.

24 **C. Failure to State a Claim.**

25 **1. Plaintiff’s allegations satisfy Rule 9(b)’s heightened pleading standard.**

26 Defendant argues Plaintiff fails to meet Rule 9(b)’s heightened pleading standard. More
 27 specifically, Defendant argues that Plaintiff did not sufficiently allege “what” is false and “why” it
 28 is false. Plaintiff alleges she “reviewed the labeling, packaging, and marketing materials” on the

1 Gerber Good Start Soy 2 Powder Infant & Toddler Formula, and “saw the . . . claims that . . . the
2 Products are purportedly ‘Non-GMO’ infant formula” prior to purchasing the Product. (FAC ¶ 7.)
3 Plaintiff also alleges the various retail stores from which she purchased the Product. (*Id.*)
4 Plaintiff includes photographs of the Products she challenges, which include the Image and the
5 Statement. (*Id.* ¶¶ 44-75.) The Court concludes Plaintiff’s allegations satisfy Rule 9(b)’s
6 heightened pleading standard because she sufficiently “identifies the circumstances constituting
7 fraud so that [D]efendant can prepare an adequate answer from the allegations.” *Moore*, 885 F.2d
8 at 540. Plaintiff has alleged the “who, what, when, where, and how” of the challenged
9 misconduct. (FAC ¶¶ 78-84.) Further, as discussed below, the facts are sufficient to allege a
10 reasonable consumer would be deceived. Therefore, Plaintiff sufficiently alleges why Defendant’s
11 Non GMO Claim is false.

12 Accordingly, the Court DENIES Defendant’s motion on this basis.

13 **2. Plaintiff states a claim, in part.**

14 Plaintiff defines GMOs as organisms that have been altered through genetic modification,
15 which she alleges is “an artificial laboratory-based technique that is specifically designed to enable
16 the transfer of genes between unrelated or distantly related organisms,” and she sets forth a list of
17 ingredients she alleges are GMOs. (*Id.* ¶¶ 14, 42.)⁴ Defendant breaks down that list into three
18 categories: (1) ingredients allegedly derived from genetically modified crops or food sources; (2)
19 ingredients allegedly genetically engineered in a laboratory setting through the use of
20 biotechnologies; and (3) ingredients allegedly sourced from animals raised on GMO feed.
21 Defendant argues Plaintiff fails to state a claim because she does not plausibly allege that the
22 ingredients under Categories 2 and 3 fall within her definition of GMO.⁵

23
24
25 ⁴ Plaintiff also alleges that many of the ingredients are “identified as” GMOs by the Institute
26 for Responsible Technology. As Defendant notes, the guide Plaintiff references actually states the
27 ingredients “may be made from GMOs.” (*See id.* n.35 (citing
28 <https://www.pilgrimsmarket.com/pdf/Non-GMO-Shopping-Guide.pdf> at 14 (last visited Dec. 14,
2022).) Therefore, the Court has not accepted as true allegations that these ingredients are, in fact,
GMOs.

⁵ Defendant does not argue the ingredients under Category 1 do not plausibly fit Plaintiff’s
definition of GMO.

1 With respect to ingredients under Category 2, Defendant argues Plaintiff fails to allege
2 how the ingredients have been genetically modified from the required process outlined in her
3 definition of GMO. Plaintiff describes genetic modification as a “transfer of genes,” but Plaintiff
4 does not allege that the ingredients underwent this transfer of genes process. *See, e.g., Gallagher*
5 *v. Chipotle Mexican Grill, Inc.*, No. 15-cv-03952-HSG, 2016 WL 454083, at *4 (N.D. Cal. Feb. 5,
6 2016) (granting motion to dismiss and concluding plaintiff’s definition of GMO was “inconsistent
7 with her interpretation of defendant’s GMO claims” because she did not allege that the ingredients
8 had “been altered using . . . genetic engineering techniques”, as required under her definition of
9 GMO). Without these allegations, Plaintiff fails to allege the ingredients that would fall within the
10 scope of Category 2 are GMOs.

11 In regard to ingredients in Category 3, Defendant argues Plaintiff’s definition of GMO
12 would not include Category 3 ingredients, *i.e.* Plaintiff does not allege that animals which
13 produced the byproducts are genetically modified by eating GMO feed nor does she allege how
14 the resulting byproducts are genetically modified. In support of its argument, Defendant relies
15 upon *Gallagher*, 2016 WL 454083 and *Pappas v. Chipotle Mexican Grill*, No. 16-CV-612-MMA
16 (JLB), 2016 WL 11703770 (S.D. Cal. Aug. 31, 2016). In *Gallagher*, the court granted defendant’s
17 motion to dismiss because plaintiff did not allege that defendant’s meat and dairy ingredients were
18 derived from genetically modified animals despite plaintiff’s argument that a reasonable consumer
19 would interpret non-GMO to mean meat and dairy ingredients produced from animals that have
20 never consumed any genetically modified substances. 2016 WL 454083, at *4. Similarly, in
21 *Pappas*, the court found plaintiff’s definition of non-GMO to be implausible. There, the plaintiff
22 argued a reasonable consumer would believe the term non-GMO would include animals that have
23 not consumed feed containing GMOs. *Pappas*, 2016 WL 11703770, at *7. However, the plaintiff
24 did “not allege that by eating feed with genetically modified ingredients, animals themselves
25 become genetically modified organisms.” *Id.*

26 The Court finds *Gallagher* and *Pappas* distinguishable from the present case. In those
27 cases, the plaintiffs failed to explain how, under their definitions of GMO, a reasonable consumer
28 would understand “non-GMO” to mean meat and dairy ingredients from animals that did not

1 consume GMO feed. Here, Plaintiff alleges that reasonable consumers would understand the Non
2 GMO Claim on the front and rear of the packaging to mean that the Products “(1) [do] not contain
3 GMOs and [are] not sourced from, or derived from any GMOs; and (2) [do] not contain animal
4 products . . . that have a diet of GMO feed, GMO contaminated feed and/or genetically modified
5 or engineered feed.” (FAC ¶ 28.) Plaintiff sufficiently alleges a reasonable consumer would have
6 this understanding of the term non-GMO because of the prevalence and recognizability of the
7 Non-GMO Project, the efforts of the federal government, and market research into a reasonable
8 consumer’s interpretation of the term non-GMO. (*Id.* ¶¶ 24-27.)⁶

9 Additionally, Plaintiff’s specific theory of a reasonable consumer’s understanding of the
10 term is that non-GMO ingredients are not derived from animals fed genetically modified feed.
11 Plaintiff’s claims do not rest on a theory that the animals have themselves become genetically
12 modified from consuming GMO feed or that the byproducts derived from these animals are
13 genetically modified.⁷ Therefore, Plaintiff’s definition of non-GMO for Category 3 ingredients do
14 not require allegations of how animals are genetically modified from consuming GMO feed or
15 how the resulting byproducts are also genetically modified.

16 Accordingly, the Court GRANTS Defendant’s motion to dismiss claims based on the
17 “Category 2” ingredients, but will GRANT Plaintiff leave to amend. The Court DENIES
18 Defendant’s motion to dismiss claims based on the “Category 3” ingredients.

19 //

20
21
22
23
24 ⁶ Further analysis into the reasonable consumer standard is addressed in the following
section.

25 ⁷ Defendant also argues that no reasonable consumer would understand Category 3
26 ingredients to constitute GMOs because, under federal law, regulations on bioengineered food
27 “should exclude a bioengineered food solely because the animal consumed feed produced from,
28 containing, or consisting of a bioengineered substance.” 7 U.S.C. § 1639b(2)(A). Plaintiff,
however, alleges consumers have a broader understanding of the term “non-GMO.” (FAC ¶ 23.)
The Court concludes this argument is best addressed in the context of a motion for summary
judgment.

1 **3. Plaintiff has alleged that a reasonable consumer could be deceived by**
 2 **Defendant’s Non GMO Claim.**

3 Defendant also argues that no reasonable consumer could be misled by its Non GMO
 4 Claim. To state a claim under the FAL, CLRA, and UCL, Plaintiff must allege facts satisfying the
 5 “reasonable consumer” standard, *i.e.* that members of the public are likely to be deceived. *See*
 6 *Williams v. Gerber Prods. Co.*, 552 F.3d 934, 938 (9th Cir. 2008).

7 “Likely to deceive” implies more than a mere possibility that the
 8 advertisement might conceivably be misunderstood by some few
 9 consumers viewing it in an unreasonable manner. Rather, the phrase
 10 indicates that the ad is such that it is probable that a significant
 portion of the general consuming public or of targeted consumers,
 acting reasonably in the circumstances, could be misled.

11 *Lavie v. Procter & Gamble Co.*, 105 Cal. App. 4th 496, 508 (2003).

12 Whether a business practice is deceptive is an issue of fact not generally appropriate for
 13 decision on a motion to dismiss. *See, e.g., Williams*, 552 F.3d at 938-39 (citing *Linear Tech.*
 14 *Corp. v. Applied Materials, Inc.*, 152 Cal. App. 4th 115, 134-35 (2007)). However, courts have
 15 granted motions to dismiss under the UCL and similar statutes on the basis that the alleged
 16 misrepresentations were not false, misleading, or deceptive as a matter of law. *See, e.g., Freeman*
 17 *v. Time, Inc.*, 68 F.3d 285, 290 (9th Cir. 1995) (holding that reading flyer as a whole dispelled
 18 plaintiff’s allegation that a particular statement was deceptive); *see also In re Sony Gaming*
 19 *Networks & Customer Data Sec. Breach Litig.*, 996 F. Supp. 2d 942, 989 (S.D. Cal. 2014).

20 Plaintiff alleges that reasonable consumers would understand the Non GMO Claim on the
 21 front and rear of the packaging to mean that the Products “(1) [do] not contain GMOs and [are] not
 22 sourced from, or derived from any GMOs; and (2) [do] not contain animal products . . . that have a
 23 diet of GMO feed, GMO contaminated feed and/or genetically modified or engineered feed.”
 24 (FAC ¶ 28.) Plaintiff alleges reasonable consumers have this understanding because of
 25 educational efforts from third party verification agencies, such as the Non-GMO Project, which
 26 has the same definition of non-GMO used by Plaintiff, and from government authorities. (*Id.* ¶¶
 27 24-26.) Plaintiff points to market research that supports this consumer understanding of the claim
 28

1 “non-GMO.” (*Id.* ¶¶ 27-28.) Plaintiff further alleges that the inclusion of the Statement “not
2 made with genetically engineered ingredients” under the words “non-GMO” would not matter to a
3 reasonable consumer because consumers use these terms interchangeably and understand them to
4 be the same. (*Id.* ¶ 37.)

5 Defendant contends that Plaintiff’s theory of consumer deception fails because a
6 reasonable consumer would not interpret Defendant’s Non GMO Claim to be equivalent to the
7 Non-GMO Project’s definition of GMO. Defendant also contends no reasonable consumer would
8 confuse Defendant’s Image with the Non-GMO Project’s seal. In support of its argument,
9 Defendant relies on *Gordon v. Target Corp.*, No. 20-CV-9589 (KMK), 2022 WL 836773
10 (S.D.N.Y. Mar. 18, 2022).

11 In *Gordon*, the plaintiff challenged the graphic on the defendant’s product, which was
12 labeled “non-GMO” and contained the sub-heading: “ingredients not genetically engineered.” *Id.*
13 at *5. The plaintiff also alleged that the defendant included the graphic to mislead consumers into
14 believing the product was verified by the Non-GMO Project. *Id.* The district court explained that
15 the Non-GMO Project’s seal was highly distinctive because it included the organization’s name,
16 the word “verified,” the URL for the Non-GMO Project’s website, and a graphic of an orange
17 butterfly with a blade of grass. *Id.* at *12. The court found the product’s labeling was not
18 misleading and did not mimic the Non-GMO Project’s seal because the only similarity between
19 the Non-GMO Project’s seal and the product’s non-GMO graphic was the use of the term “non-
20 GMO.” *Id.* The court held that it was patently implausible and unrealistic for a reasonable
21 consumer to see the product’s non-GMO graphic and believe the product was verified by the Non-
22 GMO Project. *Id.*

23 The Court finds *Gordon* distinguishable on its facts. Unlike in *Gordon*, where there was
24 only one similarity between the Non-GMO Project’s seal and the defendant’s non-GMO graphic,
25 Defendant’s Image has more similarities to the Non-GMO Project’s seal. For example,
26 Defendant’s Image contains capitalized “NON GMO” text and a V-shaped leaf-like graphic in the
27 corner:
28



Non-GMO Project's Verified Seal



Target's Stamp



Gerber's Stamp

The Court concludes that Plaintiff sufficiently alleges similarities that could give reasonable consumers the impression that Defendants' products met the Non-GMO Projects' standards. (See FAC ¶ 37.) Cf. *Rankin v. Arca Cont'l S.A.B. de C.V.*, No. 20-CV-1756 (ENV) (TAM), 2022 U.S. Dist. LEXIS 103573, at *15 (E.D.N.Y. June 9, 2022) (finding a reasonable consumer could be misled with defendant's green, V-shaped graphic atop the capitalized sans serif "NON GMO" text). Further, Plaintiff cites to various sources to illustrate the prevalence of the Non-GMO Project. For example, Plaintiff alleges that the work of the Non-GMO Project is well known because the seal is found on over 50,000 food products and the Non-GMO Project website has over 200 million visits a year. (FAC ¶ 24.) A fact finder could conclude that the recognizability of the Non-GMO Project's seal "could actually be a source of . . . confusion" between Defendant's Image and the Non-GMO Project's seal. *Rankin*, 2022 U.S. Dist. LEXIS 103573, at *16.

Plaintiff also cites to the efforts by the federal government to adopt standards for non-GMO labeling and to market research into a reasonable consumer's interpretation of non-GMO. (FAC ¶¶ 26-27.) Other courts have found that these additional sources are enough to support an allegation that a reasonable consumer would be deceived. See *Schneider v. Chipotle Mexican Grill, Inc.*, No. 16-cv-02200-HSG, 2016 WL 6563348, at *2 (N.D. Cal. Nov. 4, 2016) (finding that plaintiff sufficiently alleged that a reasonable consumer would be deceived based on allegations of definitions used by the Non-GMO Project and the federal government, as well as market research and surveys in consumers' reasonable interpretations of the phrase).

Defendant also argues a reasonable consumer could review the Products' ingredient lists to determine whether the Products contain GMOs and argues the Statement serves as qualifying

1 language to signal to consumers that the Products do not contain genetically engineered
2 ingredients. The Ninth Circuit recently considered this issue in *Moore v. Trader Joe's*
3 *Corporation*, 4 F.4th 874, 883 (9th Cir. 2021). In *Moore*, the plaintiffs challenged the labeling of
4 the defendant's Manuka honey products, which stated the products contained "100% New Zealand
5 Manuka Honey" or "New Zealand Manuka Honey" on the front of the product and listed Manuka
6 honey as the sole ingredient. *Id.* at 876, 878-79. The plaintiffs alleged the labels were deceptive
7 because only 57.3% to 62.6% of the honey was derived from Manuka nectar. *Id.*; *see also id.* at
8 880. The defendant moved to dismiss and argued no reasonable consumer would be deceived by
9 its labels.

10 The Ninth Circuit agreed. It first noted that the defendant's front labels complied with the
11 FDA's labelling requirements. *Id.* at 881. The court then addressed the plaintiffs' argument that
12 the label could still "mislead consumers into thinking that the honey was '100%' derived from
13 Manuka flower nectar." *Id.* The court acknowledged there was some ambiguity in the label and
14 then discussed a case on which the district court relied, which set forth the principle that
15 "deceptive advertising claims should take into account all the information available to consumers
16 and the context in which that information is provided and used." *Id.* at 882 (quoting *Bell v. Publix*
17 *Super Markets, Inc.*, 982 F.3d 468, 477 (7th Cir. 2020)).

18 In *Bell*, the plaintiffs argued the labels on the defendant's products were deceptive because
19 they included a representation of "100% Grated Parmesan Cheese" on the front but actually
20 contained other ingredients. The defendant included the other ingredients on the rear of the
21 package. 982 F.3d at 473. In *Moore*, the Ninth Circuit reasoned that the court in "*Bell* was
22 justifiably concerned about the possible confusion created by manufacturers who claim (in an
23 arguably ambiguous fashion) that the product is 100% cheese," knowing it is not, "and who then
24 try to retain some 'level of deniability' by clarifying the front-label claim with back label
25 disclosures." *Moore*, 4 F.4th at 883. The court reasoned that the defendant in *Moore* did not
26 engage in such conduct because it did "not insert any additional ingredients to produce the product
27 or mix Manuka honey with other, non-Manuka honeys to dilute it[.]" *Id.* Therefore, "the potential
28 confusion" that concerned the Seventh Circuit in *Bell* "was not present in the same way" for the

1 defendant's label. *Moore*, 4 F.4th at 883. The court also reasoned that other factors would
2 preclude a reasonable consumer from adopting the plaintiffs' interpretation of the label, which
3 included not only the impossibility of creating honey from one source of nectar, as well as the low
4 price and a grading scale on the front of the label. *Id.* at 883-84.

5 The Court finds Defendant's argument that a reasonable consumer can review the
6 ingredient lists to determine whether they are or are not "Non GMO" unconvincing at this stage of
7 the case. Similar to *Bell*, but unlike *Moore*, Defendant is attempting to undermine the Image on
8 the front of the packaging with the Statement and ingredient list on the rear of the packaging.
9 Plaintiff has plausibly alleged that Defendant's Non GMO Claim is misleading, and that problem
10 is not necessarily cured by a disclosure somewhere else on the packaging. *See Williams*, 552 F.3d
11 at 939-40 ("We do not think the FDA requires an ingredient list so that manufacturers can mislead
12 consumers and then rely on the ingredient list to correct those misinterpretations and provide a
13 shield for liability for the deception. Instead, reasonable consumers expect the ingredient list
14 contains more detailed information about the product that confirms other representations on the
15 packaging.").

16 Further, the Statement does not clearly dispel the alleged confusion. As discussed above,
17 the prevalence of the Non-GMO Project's definition could lead a reasonable consumer to believe
18 Defendant's Non GMO Claim would not include genetically modified ingredients or byproducts
19 sourced from animals who are fed with genetically modified feed. Thus, the Statement would not
20 serve as an unambiguous disclaimer because consumers may already assume the Non GMO Claim
21 would encompass a lack of genetically engineered ingredients.

22 Defendant also argues Plaintiff did not allege sufficient facts to establish the widespread
23 presence of GMOs in certain domestically produced crops because Plaintiff makes conclusory
24 allegations based on generalized statistics and processes. *See Forsher v. J.M. Smucker Co.*, No.
25 5:19-CV-00194, 2020 WL 1531160, at *5 (N.D. Ohio Mar. 31, 2020) (finding plaintiff failed to
26 reach the bar of plausibility required at the pleading stage because generalized statistics were the
27 only piece of information plaintiff relied to allege the products contained sugar derived from GMO
28 beets). For example, Defendant notes that Plaintiff alleges that 92% of corn grown in the United

1 States is genetically modified, and therefore, cows who feed on corn are likely consuming
2 genetically modified corn. (FAC ¶ 16.) However, Plaintiff alleges other facts that, when taken in
3 combination with the generalized statistics, plausibly state a claim for relief.

4 For example, Plaintiff alleges independent testing from GMO Free USA, a 501(c)(3)
5 nonprofit organization, that confirms the presence of GMOs in at least one of Defendant's
6 Products. Furthermore, Plaintiff takes "general, but overwhelming, statistic[s] about genetically
7 modified crops in the United States and plausibly connect[s] [them] to the relevant ingredients
8 found in [Defendant's] [P]roducts." *In re KIND LLC "Healthy & All Natural" Litig.*, 287 F.
9 Supp. 3d 457, 467 (S.D.N.Y. 2018). "This is not an implausible inference to make on a motion to
10 dismiss." *Id.*; see also *Ault v. J.M. Smucker Co.*, No. 13 Civ. 3409 (PAC), 2014 WL 1998235, at
11 *5 n.4 (S.D.N.Y. May 15, 2014) (plaintiff's reliance on generalized statistics to demonstrate that
12 most vegetable oils contain GMOs allowed the court "to make a logical leap from 'some crops
13 grown in the United States are GMO' to 'the Crisco oils contain GMO ingredients'").

14 Accepting Plaintiff's allegations as true, and drawing all reasonable inferences in her favor,
15 the Court concludes that Plaintiff has plausibly stated that a reasonable consumer would be
16 deceived by the Non GMO Claim on the Products' labels. Accordingly, the Court DENIES
17 Defendant's motion to dismiss on this basis.

18 **4. Plaintiff plausibly alleges Defendant violated the UCL.**

19 Plaintiff also alleges Defendant violated the UCL, which prohibits any "unlawful, unfair or
20 fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any
21 act prohibited by" the FAL. Cal. Bus. & Prof. Code § 17200. Defendant argues that Plaintiff's
22 UCL claim fails because she does not allege any unlawful or unfair conduct. Defendant also
23 argues Plaintiff's UCL claim fails because she does not sufficiently allege a false or misleading
24 statement. For the reasons set forth above, Plaintiff sufficiently alleges the Non GMO Claim
25 would deceive a reasonable consumer. Accordingly, she has stated a claim under the UCL's
26 fraudulent prong and the Court DENIES Defendant's motion to dismiss this claim. Defendant
27 may renew its arguments about whether Plaintiff is able to prevail under each prong by way of a
28 motion for summary judgment.

United States District Court
Northern District of California

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

5. Plaintiff states a claim for breach of warranty.

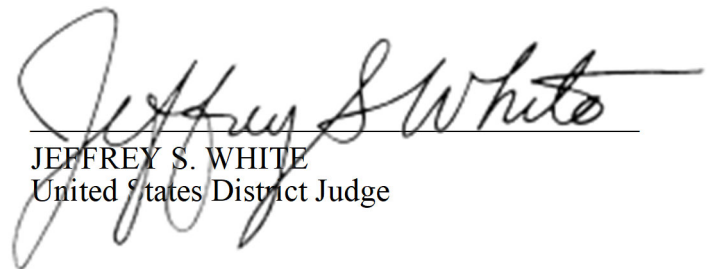
Defendant argues that Plaintiff fails to state a breach of warranty claim because she does not plausibly allege the Non GMO Claim was false or misleading. As discussed above, Plaintiff sufficiently alleges that a reasonable consumer could be deceived. Accordingly, the Court DENIES Defendant’s motion to dismiss this claim. *Moran*, 2022 WL 1288984, at *5 (after finding the consumer protection claims could proceed, the court denied defendant’s motion to dismiss plaintiff’s breach of warranty claims solely on the basis that they were derivative of plaintiff’s consumer protection claims).

CONCLUSION

For the foregoing reasons, the Court GRANTS, IN PART, and DENIES, IN PART, Defendant’s motion to dismiss. Plaintiff may file an amended complaint by no later than January 27, 2023, and Defendant shall answer or otherwise respond by February 17, 2023. The parties shall appear on March 17, 2023 at 11:00 a.m. for an initial case management conference, and they shall file a joint case management conference statement by March 10, 2023.

IT IS SO ORDERED.

Dated: January 6, 2023



JEFFREY S. WHITE
United States District Judge