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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

NATALIA BRUTON,  
Plaintiff,  
v.  
GERBER PRODUCTS COMPANY,  
Defendant.

Case No. 12-CV-02412-LHK

**ORDER GRANTING IN PART WITH  
PREJUDICE AND DENYING IN PART  
MOTION TO STRIKE IMPROPER  
ALLEGATIONS AND MOTION TO  
DISMISS SECOND CLAIM FOR  
RELIEF FOR UNJUST ENRICHMENT  
IN FOURTH AMENDED COMPLAINT**

Re: Dkt. No. 193

Plaintiff Natalia Bruton (“Bruton”) brings this lawsuit against Gerber Products Company (“Gerber”), alleging that Gerber violated state law by making unlawful claims on its food products. Before the Court is Gerber’s Motion to Strike improper allegations and Motion to Dismiss Bruton’s second claim for relief for unjust enrichment in the Fourth Amended Complaint, which Bruton opposes, and Gerber replied. For the reasons set forth below, Gerber’s motion to strike is **GRANTED IN PART** with prejudice and **DENIED IN PART**. Gerber’s motion to dismiss is **GRANTED IN PART** with prejudice and **DENIED IN PART**.

1 **I. BACKGROUND**

2 **A. Factual Background**

3 Gerber is a private corporation with its principal place of business in Fremont, Michigan.  
4 ECF No.159 (“MSJ Order”) at 2. Gerber’s Fourth Amended Complaint (hereafter “4AC”) claims  
5 that Gerber is “the world’s most trusted name in baby food,” and reportedly controls between 70  
6 and 80 percent of the baby food market in the United States. ECF No. 192 (“4AC”) ¶ 14. Gerber  
7 packages and sells retail food products, such as puree baby food, snacks, yogurts, side dishes, and  
8 beverages, specifically intended for infants and children under the age of two. *Id.* ¶ 15. Gerber  
9 organizes its products by “stages,” including: “Birth+,” “Supported Sitter,” “Sitter,” “Crawler,”  
10 “Toddler,” and “Preschooler.” *Id.* All of the Gerber product categories other than “Preschooler”  
11 describe children under two years of age. *Id.*

12 Burton is a California resident who is “concerned about the nutritional content of the food  
13 she purchased for her child’s consumption.” *Id.* ¶¶ 8, 65. Bruton purchased many of Gerber’s food  
14 products that are intended for children under the age of two. *Id.* ¶¶ 8, 66. Specifically, Bruton  
15 purchased the following products (“Purchased Products”):

- 16 (1) Gerber Nature Select 2nd Foods Fruit—Banana Plum Grape;
- 17 (2) Gerber Nature Select 2nd Foods Fruit—Apple and Cherries;
- 18 (3) Gerber Nature Select 2nd Foods Vegetables—Carrots;
- 19 (4) Gerber Nature Select 2nd Foods Spoonable Smoothies—Mango;
- 20 (5) Gerber Nature Select 2nd Foods Vegetables—Sweet Potatoes & Corn;
- 21 (6) Gerber Organic SmartNourish 2nd Foods—Banana Raspberry Oatmeal;
- 22 (7) Gerber Organic SmartNourish 2nd Foods—Butternut Squash & Harvest Apple  
with Mixed Grains; and
- 23 (8) Gerber Organic SmartNourish 2nd Foods—Farmer’s Market Vegetable Blend  
with Mixed Grains.

24 *See* ECF No. 184 (“Class Cert. Order”) at 2.<sup>1</sup>

25 Bruton alleges that the Purchased Products are misbranded in violation of federal  
26 and California labeling laws. 4AC ¶ 2. More specifically, Bruton alleges that Gerber made

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27 <sup>1</sup> On May 5, 2014, the parties jointly filed a Stipulated Chart of the Products at Issue in this Case  
28 to clarify which products were still at issue. *See* Exh. A to ECF No. 117.

1 two types of unlawful and misleading claims on its product labels: (1) “nutrient content  
2 claims,” and (2) “sugar-related claims.” *Id.* ¶¶ 44, 53.

3 First, Bruton challenges Gerber’s use of “nutrient content claims,” which are claims  
4 about specific nutrients contained in a product that, pursuant to Section 403 of the Food,  
5 Drug, and Cosmetic Act (“FDCA”), must be made in accordance with federal regulations.  
6 *Id.* ¶¶ 36–38; *see* 21 U.S.C. § 343(r)(1)(A). California expressly adopted the requirements  
7 of Section 403 of the FDCA in Section 110670 of the Sherman Food, Drug, and Cosmetic  
8 Law (the “Sherman Law”). *See* Cal. Health & Safety Code § 110670 (“Any food is  
9 misbranded if its labeling does not conform with the requirements for nutrient content or  
10 health claims as set forth in Section 403(r) (21 U.S.C. Sec. 343(r)) of the [FDCA] and the  
11 regulations adopted pursuant thereto.”). Bruton alleges that Gerber makes nutrient content  
12 claims on virtually all Gerber food products, despite the fact that the Food and Drug  
13 Administration (“FDA”) only authorizes nutrient content claims on foods for adults and  
14 does not permit such claims on foods for children under the age of two. *See* 4AC ¶¶ 44–46;  
15 21 C.F.R. § 101.13(b)(3). Bruton specifically asserts that Gerber makes the following  
16 unlawful nutrient content claims: (1) claims that a product is an “Excellent Source” or  
17 “Good Source” of various vitamins and minerals, 4AC ¶ 44(a); (2) claims that a product is  
18 “As Healthy As Fresh,” provides “Nutrition for Healthy Growth & Natural Immune  
19 Support,” and “Supports Healthy Growth & Development,” *id.* ¶ 44(b); and (3) claims that  
20 a product contains “No Added Sugar” or “No Added Refined Sugar” (“No Added Sugar  
21 Statements”), *id.* ¶ 44(c).

22 Second, Bruton alleges that many of Gerber’s products that are labeled with No  
23 Added Sugar Statements contain sufficiently high levels of calories that federal law  
24 requires that the claims be accompanied by a disclosure statement warning of the high  
25 caloric value of the products. *Id.* ¶ 53 (citing 21 C.F.R. § 101.60(c)(2)). Because Gerber  
26 does not place a disclosure statement on these food products, Bruton asserts that Gerber’s

1 product labels violate federal and California law. *Id.* ¶¶ 53–61.

2 In all, Bruton contends that by manufacturing, advertising, distributing, and selling  
3 misbranded food products, Gerber has violated California Health and Safety Code Sections  
4 109885, 110390, 110395, 110398, 110400, 110660, 110665, 110670, 110705, 110760,  
5 110765, and 110770. *Id.* ¶¶ 75–82. In addition, Bruton asserts that Gerber has violated the  
6 standards set by 21 C.F.R. §§ 101.13, 101.54, 101.60, 101.65, which have been adopted by  
7 reference into the Sherman Law. *Id.* ¶ 83. Consequently, the 4AC alleges the following  
8 causes of action: (1) violation of California’s Unfair Competition Law (“UCL”), Cal. Bus.  
9 & Prof. Code § 17200, *et seq.*, for unlawful business acts and practices, *id.* ¶¶ 85–93; and  
10 (2) Restitution Based on Unjust Enrichment/Quasi-Contract, *id.* ¶¶ 94–98.

11 **B. Procedural History**

12 Bruton filed her initial Complaint against Gerber, Nestlé Holdings, Inc., and Nestlé USA,  
13 Inc. on May 11, 2012. ECF No. 1. On July 2, 2012, Bruton filed a Notice of Voluntary Dismissal  
14 of Defendant Nestlé Holdings, Inc. ECF No. 9. Gerber and Nestlé USA, Inc. then filed a Motion to  
15 Dismiss on August 31, 2012. ECF No. 18. Rather than responding to the Motion to Dismiss,  
16 Bruton filed a First Amended Complaint (“FAC”) on September 21, 2012. ECF No. 26.

17 Gerber and Nestlé USA, Inc. subsequently withdrew their Motion to Dismiss the initial  
18 Complaint as moot, ECF No. 27, and filed a Motion to Dismiss the FAC, ECF No. 28. On  
19 September 6, 2013, the Court granted in part and denied in part Gerber and Nestlé USA, Inc.’s  
20 Motion to Dismiss the FAC. ECF No. 57. Of relevance here, the Court’s order dismissed Bruton’s  
21 claim for restitution based on unjust enrichment/quasi-contract. *Id.* at 41.

22 On October 7, 2013, Bruton filed her Second Amended Complaint (“SAC”), this time  
23 naming Gerber as the sole defendant. ECF No. 62. The SAC alleged the following causes of  
24 action: (1) violation of California’s UCL, Cal. Bus. & Prof. Code § 17200, *et seq.*, for unlawful,  
25 unfair, and fraudulent business acts and practices, *id.* ¶¶ 114–40; (2) violation of California’s False  
26 Advertising Law (“FAL”), Cal. Bus. & Prof. Code § 17500, *et seq.*, for misleading, deceptive, and

1 untrue advertising, *id.* ¶¶ 141–156; and (3) violation of the Consumers Legal Remedies Act  
2 (“CLRA”), Cal. Civ. Code § 1750, *et seq.*, *id.* ¶¶ 157–73. On October 31, 2013, Gerber filed a  
3 Motion to Dismiss the SAC, ECF No. 65, which the Court granted in part and denied in part on  
4 January 15, 2014, ECF No. 83. On November 8, 2013, the parties stipulated to the dismissal of  
5 Nestlé USA, Inc. with prejudice. ECF No. 75.

6 On January 10, 2014, Bruton moved for class certification for the first time and sought to  
7 certify both a damages and an injunctive relief class. ECF No. 82. On March 11, 2014, Gerber  
8 filed its opposition, ECF No.88, and Bruton replied on April 3, 2014, ECF No. 110. Because  
9 Bruton had filed her Motion for Class Certification on January 10, 2014, ECF No. 82, several days  
10 before the Court issued its Order Granting in Part and Denying in Part Defendant’s Motion to  
11 Dismiss Plaintiff’s SAC, in which the Court dismissed certain products, ECF No. 83, Bruton’s  
12 original proposed class definition referred to an overinclusive set of products. *See* ECF No. 82.  
13 Accordingly, the Court directed the parties to file an updated list of the products still at issue. ECF  
14 No. 116. In response, the parties file a Stipulated Chart of Products at Issue in this Case. ECF No.  
15 117. On June 23, 2014, the Court concluded that neither proposed class was ascertainable and  
16 denied class certification. *See* ECF No. 128.

17 On October 24, 2014, Bruton filed a Motion for Summary Judgment, *see* ECF No. 140,  
18 and Gerber filed a Motion for Summary Judgment, *see* ECF No. 141. The parties filed their  
19 respective oppositions on November 14, 2014. ECF Nos. 147, 150. Gerber replied on November  
20 25, 2014, ECF No. 152, and Bruton replied on November 26, 2014, ECF No. 154. On December  
21 18, 2014, the Court granted Gerber’s Motion for Summary Judgment on all of Bruton’s UCL,  
22 FAL, and CLRA claims. MSJ Order.

23 On July 17, 2017, the Ninth Circuit affirmed in part and reversed in part. *Bruton v. Gerber*  
24 *Prod. Co.*, 703 F. App’x 468 (9th Cir. July 17, 2017).<sup>2</sup> The Ninth Circuit reversed the Court’s

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26 <sup>2</sup> The Ninth Circuit’s decision withdrew and replaced a previous memorandum disposition and  
27 partial dissent. *Bruton v. Gerber Prod. Co.*, 2017 WL 1396221 (9th Cir. Apr. 19, 2017), *opinion*

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1 denial of class certification because the decision was based on a lack of ascertainability, and in the  
2 subsequently decided *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121 (9th Cir. 2017), the Ninth  
3 Circuit “—using different terminology for what the district court called ‘ascertainability’—held  
4 that there was no separate ‘administrative feasibility’ requirement for class certification.” *Bruton*,  
5 703 F. App’x at 470 (quoting *Briseno*, 844 F.3d at 1123). The Ninth Circuit affirmed the grant of  
6 summary judgment for Gerber on Bruton’s claims that Gerber’s labels were deceptive in violation  
7 of the UCL, FAL, and CLRA. *Id.* at 470–71. However, the Ninth Circuit reversed the grant of  
8 summary judgment for Gerber on Bruton’s claims that the labels were unlawful under the UCL.  
9 *Id.* at 471–72. The Ninth Circuit found the Court had erred in applying the reasonable consumer  
10 test to the UCL’s unlawful prong because the UCL’s unlawful prong borrows predicate legal  
11 violations, and California’s Sherman Law, which is the predicate violation in this case,  
12 incorporates FDA regulations which do not include the reasonable consumer test. *Id.* at 472. The  
13 Ninth Circuit also reversed the Court’s dismissal of Bruton’s claim for unjust enrichment/quasi-  
14 contract because after the Court dismissed the claim, the California Supreme Court allowed “an  
15 independent claim for unjust enrichment to proceed in an insurance dispute.” *Id.* at 470 (citing  
16 *Hartford Cas. Ins. Co. v. J.R. Mktg., L.L.C.*, 61 Cal. 4th 988, 1000 (2015)). The Ninth Circuit  
17 remanded “for consideration of whether there are other grounds on which Bruton has failed to  
18 state a claim for unjust enrichment.” *Id.* Thus, Bruton’s remaining claims are (1) that Gerber’s  
19 labels were unlawful under the UCL, and (2) a claim for unjust enrichment/quasi-contract.

20 On August 8, 2017, the Ninth Circuit issued its mandate. *See* ECF No. 171. On October 4,  
21 2017, the Court instructed the parties to file supplemental cross briefs on class certification. ECF  
22 No. 175. On November 1, 2017, Bruton and Gerber both filed their briefs. ECF Nos. 176. 177. On  
23 November 15, 2017, Bruton and Gerber both filed their replies. ECF Nos. 179, 180. On February  
24 13, 2018, the Court denied Bruton’s Motion for Class Certification. *See* Class Cert. Order. The

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25  
26 *withdrawn and superseded by* 703 F. App’x 468 (9th Cir. July 17, 2017).

1 Court first denied certification of the Rule 23(b)(2) class because Bruton lacked standing to pursue  
2 injunctive relief. *Id.* at 8–12. Next, the Court denied certification of the Rule 23(b)(3) class  
3 because Bruton’s damages theory failed to satisfy the predominance requirement. *Id.* at 12–21.  
4 First, because Bruton raised the issue of the applicability of nonrestitutionary disgorgement for the  
5 first time in her supplemental reply brief, *see* ECF No. 179, the Court denied Bruton’s request to  
6 file additional briefing on the issue because Bruton had waived the issue. *See* Class Cert. Order at  
7 13. Second, as to restitutionary damages, the Court rejected Bruton’s damages expert’s model’s  
8 proposals for measuring the price premium attributable to Gerber’s use of the misleading labels  
9 because the models failed to satisfy *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013). *See id.* at 20–  
10 21.

11 On September 27, 2017, Bruton requested in the Joint Case Management Statement leave  
12 to file a Third Amended Complaint (“TAC”) to re-assert her unjust enrichment claim. *See* ECF  
13 No. 173 at 2. On February 21, 2018, the Court held a further Case Management Conference. *See*  
14 ECF No. 186. In the Case Management Order, the Court ordered Bruton to file a TAC that  
15 included Bruton’s unjust enrichment claim from her FAC and Bruton’s claim arising under the  
16 unlawful prong of the UCL from Bruton’s SAC. *See* ECF 187.

17 On March 2, 2018, Bruton filed her TAC. ECF No. 188. On March 19, 2018, the parties  
18 filed a Joint Stipulation informing the Court that Bruton’s TAC “inadvertently included a number  
19 of allegations that have already been rejected in this case and/or failed to comport with the Court’s  
20 instructions,” and therefore Bruton sought leave to file a 4AC. ECF No. 189 at 2. On March 20,  
21 2018, the Court granted Bruton leave to file a 4AC, ECF No. 191, and on March 29, 2018, Bruton  
22 filed her 4AC, ECF No. 192. In her 4AC, Bruton asserted only two causes of action: (1) violation  
23 of California’s UCL, Cal. Bus. & Prof. Code § 17200, *et seq.*, for unlawful business acts and  
24 practices, 4AC at 20; and (2) restitution based on unjust enrichment/quasi-contract, *id.* at 21.

25 On April 19, 2018, Gerber filed the instant Motion to Strike allegations contained in the  
26 4AC and Motion to Dismiss Gerber’s claim for relief for unjust enrichment/quasi-contract. ECF

1 No. 193 (“Mot”). On May 18, 2018, Bruton filed an opposition. ECF No. 197 (“Opp’n”). On June  
2 1, 2018, Gerber filed a reply. ECF No. 198 (“Reply”).

3 **II. LEGAL STANDARD**

4 **A. Motion to Strike Pursuant to Federal Rule of Civil Procedure 12(f)**

5 Federal Rule of Civil Procedure 12(f) permits a court to “strike from a pleading an  
6 insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.” Fed. R. Civ.  
7 P. 12(f). “[T]he function of a 12(f) motion to strike is to avoid the expenditure of time and money  
8 that must arise from litigating spurious issues by dispensing with those issues prior to trial.”  
9 *Sidney-Vinsein v. A.H. Robins Co.*, 697 F.2d 880, 885 (9th Cir. 1983). Motions to strike are  
10 generally disfavored and “should not be granted unless the matter to be stricken clearly could have  
11 no possible bearing on the subject of the litigation. If there is any doubt whether the portion to be  
12 stricken might bear on an issue in the litigation, the court should deny the motion.” *Platte Anchor*  
13 *Bolt, Inc. v. IHI, Inc.*, 352 F. Supp. 2d 1048, 1057 (N.D. Cal. 2004) (internal citations omitted).  
14 “With a motion to strike, just as with a motion to dismiss, the court should view the pleading in  
15 the light most favorable to the nonmoving party.” *Id.* “Ultimately, whether to grant a motion to  
16 strike lies within the sound discretion of the district court.” *Cruz v. Bank of New York Mellon*, No.  
17 12-CV-00846-LHK, 2012 WL 2838957, at \*2 (N.D. Cal. July 10, 2012) (citing *Whittlestone, Inc.*  
18 *v. Handi-Craft Co.*, 618 F.3d 970, 973 (9th Cir. 2010)).

19 **B. Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 12(b)(6)**

20 Pursuant to Federal Rule of Civil Procedure 12(b)(6), a defendant may move to dismiss an  
21 action for failure to allege “enough facts to state a claim to relief that is plausible on its face.” *Bell*  
22 *Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). “A claim has facial plausibility when the  
23 plaintiff pleads factual content that allows the court to draw the reasonable inference that the  
24 defendant is liable for the misconduct alleged. The plausibility standard is not akin to a  
25 ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted  
26 unlawfully.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal citations omitted). For purposes



1 of ruling on a Rule 12(b)(6) motion, the Court “accept[s] factual allegations in the complaint as  
2 true and construe[s] the pleadings in the light most favorable to the nonmoving party.” *Manzarek*  
3 *v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008).

4 **C. Leave to Amend**

5 If the Court determines that a complaint should be dismissed, it must then decide whether  
6 to grant leave to amend. Under Rule 15(a) of the Federal Rules of Civil Procedure, leave to amend  
7 “shall be freely given when justice so requires,” bearing in mind “the underlying purpose of Rule  
8 15 to facilitate decisions on the merits, rather than on the pleadings or technicalities.” *Lopez v.*  
9 *Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (en banc) (alterations and internal quotation marks  
10 omitted). When dismissing a complaint for failure to state a claim, “a district court should grant  
11 leave to amend even if no request to amend the pleading was made, unless it determines that the  
12 pleading could not possibly be cured by the allegation of other facts.” *Id.* at 1130 (internal  
13 quotation marks omitted). Accordingly, leave to amend generally shall be denied only if allowing  
14 amendment would unduly prejudice the opposing party, cause undue delay, or be futile, or if the  
15 moving party has acted in bad faith. *Leadsinger, Inc. v. BMG Music Publ’g*, 512 F.3d 522, 532  
16 (9th Cir. 2008).

17 **III. DISCUSSION**

18 Bruton’s 4AC asserts only two causes of action: (1) violation of California’s UCL, Cal.  
19 Bus. & Prof. Code § 17200, *et seq.*, for unlawful business acts and practices, 4AC at 20; and (2)  
20 restitution based on unjust enrichment/quasi-contract, *id.* at 21. Gerber filed the instant Motion to  
21 Strike and Motion to Dismiss. Gerber complains first that Bruton “attempts to revive claims and  
22 issues the Court already resolved, or (without justification), simply refuses to strike.” Mot. at 1.  
23 Gerber complains second that Bruton’s unjust enrichment claim must be dismissed because it is  
24 redundant and not plausible. *Id.* The Court discusses the Motion to Strike first and the Motion to  
25 Dismiss second.

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**A. Motion to Strike**

Gerber first argues that the Court should strike from the 4AC “allegations that have already been rejected in this case.” Mot. at 4. In particular, Gerber asks the Court to strike the following allegations in the 4AC:

- Page 6, ¶ 18, line 5: “misleading, and/or false”;
- Page 6, ¶ 24, lines 26–28; page 7, lines 1–2: “California Health & Safety Code § 110390 (unlawful to disseminate false or misleading food advertisements that include statements on products and product packaging or labeling or any other medium used to directly or indirectly induce the purchase of a food product); California Health & Safety Code § 110395 (unlawful to manufacture, sell, deliver, hold or offer to sell any falsely advertised food)”;
- Page 7, ¶ 24, lines 2–5: “and 110400 . . . or to deliver or proffer for delivery any food that has been falsely advertised); California Health & Safety Code § 110660 (misbranded if label is false and misleading)”;
- Page 12, line 8: “and Misleading”;
- Page 15, line 14: “and Misleading”;
- Page 18, ¶ 72, lines 22–26: “Defendant’s labeling, advertising, and marketing as alleged herein are false and misleading and designed to increase sales of the products at issue. Defendant’s misrepresentations are part of an extensive labeling, advertising and marketing campaign, and a reasonable person would attach importance to Defendant’s representations in determining whether to purchase the products at issue.”;
- Page 19, ¶76, lines 10–13: “including those which make it unlawful to disseminate false or misleading food advertisements that include statements on products and product packaging or labeling or any other medium used to directly or indirectly induce the purchase of a food product. *See* §§ 109885 and 110390.”;
- Page 19, ¶ 77, lines 14–15: “Defendant has violated California Health & Safety Code § 110395 which makes it unlawful to manufacture, sell, deliver, hold, or offer to sell any falsely advertised food.”;
- Page 19, ¶ 78, lines 16–18: “and 110400 . . . or to deliver or proffer for delivery any food that has been falsely advertised.”;
- Page 20, ¶ 84, lines 15–21: “Defendant’s labeling, advertising, and marketing as alleged herein are false and misleading and designed to increase sales of the products at issue. Defendant’s misrepresentations are part of an extensive labeling, advertising and marketing campaign, and a reasonable person would attach importance to Defendant’s representations in determining whether to purchase the products at issue. A reasonable person would attach importance to whether Defendant’s products were legally salable and to Defendant’s representations about these issues in determining whether to purchase the products at issue.”;
- Page 21, ¶90, lines 8–9: “Defendant’s business practices are unlawful under

1 § 17200, *et seq.* by virtue of Defendant’s violations of § 17500, *et seq.*, which  
forbids untrue and misleading advertising.”;

- 2 • Page 21, ¶ 91, lines 10–11: “Defendant’s business practices are unlawful under  
§ 17200, *et seq.* by virtue of Defendant’s violations of the Consumer Legal  
3 Remedies Act, Cal. Civ. Code § 1750 *et seq.*”;
- 4 • Page 21, ¶ 93, lines 17–18: “and to restore any money paid for the Purchased  
Products.”;
- 5 • Page 21, ¶ 95, line 23: “and misleading”;
- 6 • Page 22, ¶ 97, lines 4–7: “Thus, it would be unjust and inequitable for  
Defendant to retain the benefit without restitution to Plaintiff of all monies paid  
7 to Defendant for the products at issue.”
- Page 22, ¶ A, line 15: “or disgorgement.”

8 Exh. B to Mot. In short, the allegations in the 4AC that Gerber seeks to strike fall into two  
9 different categories: (1) deception-based allegations (4AC ¶¶ 18, 24, 72, 76–78, 84, 90–91, 95, and  
10 12:8, 15:14), and (2) request for nonrestitutionary disgorgement (4AC ¶¶ 93, 97, A). *See* Mot. at 9.  
11 The Court discusses each in turn.

### 12 **1. Deception-Based Allegations**

13 Gerber contends that the Court should strike Plaintiff’s deception-based allegations  
14 because the Court already resolved Bruton’s deception-based claims in Gerber’s favor. Mot. at 4.  
15 In particular, Gerber states that this Court granted summary judgment “to the extent [Bruton]  
16 based her claims on Gerber’s labels allegedly misleading consumers,” including “deception-based  
17 violations of the CLRA and FAL.” Mot. at 4. Bruton provides only minimal response to this and  
18 suggests that “12(f) is not designed for this purpose;” that Gerber’s Motion to Strike “is a waste of  
19 time and money;” and that “[e]ven if granted in part, [Bruton’s] claims remain the same.” Opp’n at  
20 3. The Court agrees with Gerber and GRANTS Gerber’s Motion to Strike Bruton’s deception-  
21 based allegations.

22 Rule 12(f) provides that “[t]he Court may strike from any pleading an insufficient defense  
23 or any redundant, immaterial, impertinent, or scandalous matter.” The Ninth Circuit has said that  
24 motions to strike, while normally disfavored, are favored where they streamline the ultimate  
25 resolution of the action and “avoid the expenditure of time and money that must arise from  
26 litigating spurious issues by dispensing with those issues prior to trial.” *Whittlestone, Inc.*, 618

1 F.3d at 973 (citation omitted). Here, the parties have already spent significant time and money  
2 litigating these issues in this case that was first filed in May of 2012. This case has a lengthy  
3 procedural history, including two previous motion to dismiss orders, ECF Nos. 57, 83; two orders  
4 denying class certification, ECF Nos. 128, 184; one summary judgment order, ECF No. 159; one  
5 appeal, *see* ECF No. 170; and one complaint that has been amended four times, *see* ECF Nos. 1,  
6 26, 62, 188, 192. In the course of this time, many issues have been resolved, including the  
7 deception-based allegations that Bruton attempts to continue to assert in her 4AC. As Gerber  
8 points out, Bruton’s 4AC contains deception-based allegations that Bruton pled in her SAC, and  
9 on which the Court granted Gerber summary judgment. Reply at 2; *see also* MSJ Order. The Ninth  
10 Circuit affirmed this Court’s grant of summary judgment to Gerber on Bruton’s claims that the  
11 labels were deceptive in violation of the UCL, FAL, and CLRA. *Bruton*, 704 F. App’x at 472. In  
12 short, Bruton has already had her shot at these allegations. The Court will not allow Bruton to  
13 continue to pursue these allegations because such action would not be in the interest of avoiding  
14 “the expenditure of [further] time and money that must arise from litigating spurious issues.” *See*  
15 *Whittlestone, Inc.*, 618 F.3d at 973. Gerber’s Motion to Strike the deception-based allegations  
16 contained in Bruton’s 4AC is therefore GRANTED. The Motion to Strike these allegations is  
17 granted with prejudice, as the Court finds that any attempt to plead additional deception-based  
18 allegations would unduly prejudice Gerber, cause undue delay, and be futile. *See Leadsinger, Inc.*,  
19 512 F.3d at 532.

## 20 **2. Request for Nonrestitutionary Disgorgement**

21 Next, Gerber argues that the Court should strike Bruton’s allegations requesting  
22 nonrestitutionary disgorgement. Nonrestitutionary disgorgement is a form of relief that “focuses  
23 on the defendant’s unjust enrichment.” *In re Tobacco Cases II*, 240 Cal. App. 4th 779, 800 (2015).  
24 Gerber argues that in alleging that Bruton now seeks nonrestitutionary disgorgement, Bruton  
25 “contradict[s] the Court’s Order of February 21, 2018, which expressly prohibited new  
26 allegations.” Mot. at 5 (citing ECF No. 187). Gerber further contends that Bruton’s attempts to

1 seek nonrestitutionary disgorgement should be stricken because “the Court has already rejected  
2 [Bruton’s] attempts to seek nonrestitutionary disgorgement and has made clear that the proper  
3 measure of damages in this case is the alleged price premium.” Mot. at 5. Bruton responds by  
4 stating only that “nonrestitutionary disgorgement is a remedy available to [Bruton], measured by  
5 [Gerber’s] wrongful gain.” Opp’n at 3. The Court explores each of Gerber’s arguments.

6 As an initial matter, Gerber is incorrect in its assertion that by seeking nonrestitutionary  
7 disgorgement, Bruton contradicts the Court’s February 21, 2018 order. *See* Mot. at 5. The  
8 February 21, 2018 order directed Bruton to file an amended complaint that included Bruton’s  
9 unjust enrichment claim from the FAC. *See* ECF No. 187. Bruton’s unjust enrichment claim  
10 originally raised in the FAC included a request for nonrestitutionary disgorgement. *See* FAC ¶ 188  
11 (alleging that “it would be unjust and inequitable for Defendants to retain the benefit without  
12 restitution to Plaintiff . . . of all monies paid to Defendants for the products at issue”). Thus,  
13 Bruton did not raise any new “allegations” by requesting nonrestitutionary disgorgement, and  
14 therefore, Bruton did not contradict the Court’s February 21, 2018 order by seeking  
15 nonrestitutionary disgorgement.

16 Second, the Court must also reject Gerber’s assertion that this Court already decided the  
17 nonrestitutionary disgorgement issue in its February 13, 2018 order denying class certification.  
18 Instead, at that juncture, this Court merely refused Bruton the opportunity to provide supplemental  
19 briefing on the applicability of nonrestitutionary disgorgement as it relates to Bruton’s Federal  
20 Rule of Civil Procedure 23(b)(3) predominance showing at the class certification stage because  
21 Bruton had waived that issue. *See* Class Cert. Order at 13. This decision did not speak to Bruton’s  
22 applicability to seek nonrestitutionary disgorgement relief herself.

23 Courts have held that a motion to strike a matter from a complaint simply for being  
24 redundant, immaterial or scandalous “should only be granted if ‘the matter has no logical  
25 connection to the controversy at issue *and* may prejudice one or more of the parties to the suit.’”  
26 *N.Y. City Emps.’ Ret. Sys. v. Berry*, 667 F. Supp. 2d 1121, 1128 (N.D. Cal. 2009) (quoting *Rivers*

1 v. *Cnty. of Marin*, No. C 05-4251, 2006 WL 581096, at \*2 (N.D. Cal. 2007). “Where the moving  
2 party cannot adequately demonstrate such prejudice, courts frequently deny motions to strike  
3 ‘even though the offending matter literally [was] within one or more of the categories set forth in  
4 Rule 12(f).’” *Id.* (quoting *Rivers*, 2006 WL 581096, at \*2). Because the Court finds that it has not  
5 already expressly rejected Bruton’s request for nonrestitutionary disgorgement, Gerber will not be  
6 prejudiced by Bruton’s further request. Accordingly, Gerber’s Motion to Strike Bruton’s requests  
7 for nonrestitutionary disgorgement is DENIED. This holding, however, does not mean that  
8 Bruton’s request for nonrestitutionary disgorgement relief in her 4AC survives because, as is  
9 discussed below, nonrestitutionary disgorgement is not a proper remedy for an unjust enrichment  
10 claim in a consumer product mislabeling case.

11 **B. Motion to Dismiss**

12 Gerber argues second that Bruton’s unjust enrichment/quasi-contract claim should be  
13 dismissed with prejudice pursuant to Rule 12(b)(6). Mot. at 6. In support of its Motion to Dismiss  
14 Bruton’s unjust enrichment claim, Gerber makes two arguments: (1) that Bruton’s unjust  
15 enrichment claim is duplicative of her UCL claim; and (2) Bruton’s unjust enrichment claim is not  
16 plausible on its face. Mot. at 6, 9. In addition, Gerber also argues specifically against the  
17 nonrestitutionary disgorgement remedy and states that the nonrestitutionary disgorgement remedy  
18 should be dismissed because restitution is the only available remedy under Bruton’s UCL claim  
19 and any unjust enrichment claim that Bruton may allege. Mot. at 5 n.1, 8. The Court explores each  
20 of these arguments in turn.

21 **1. Redundancy**

22 Gerber first argues that Bruton’s unjust enrichment claim/quasi-contract cannot stand  
23 because it is “duplicative of [Bruton’s] single remaining claim for violation of the UCL’s unlawful  
24 prong.” Mot. at 8. Gerber insists that *Attebury Grain Ltd. Liab. Co. v. Grayn Co.*, 721 F. App’x  
25 669, 672 (9th Cir. Jan. 16, 2018), supports its argument because there, the Ninth Circuit directed  
26 the district court to dismiss the unjust enrichment claim because “[u]njust enrichment is a valuable

1 basis for a claim to ‘fill in the cracks’ where other causes of action fail to achieve justice, but  
 2 because the [statutory] fraudulent transfer claim could be presented here, and was presented  
 3 successfully, there were no cracks to be filled by this unjust enrichment claim.” *See* Mot. at 6–7.  
 4 Gerber also cites a string of district court cases that it maintains demonstrate that unjust  
 5 enrichment claims are not permitted where the relief sought is duplicative of a UCL claim because  
 6 “[t]here is no right to equitable relief or an equitable remedy when there is an adequate remedy at  
 7 law.” Mot. at 7–8 (quoting *Nguyen v. Nissan N. Am. Inc.*, No. 16-CV-05591-LHK, 2017 WL  
 8 1330602, at \*4 (N.D. Cal. Apr. 11, 2017)).

9 In response, Bruton asserts first that the Ninth Circuit ruled that her unjust enrichment  
 10 claim was viable when it reversed this Court’s original dismissal that found no distinct cause of  
 11 action for unjust enrichment under California law. *See* Opp’n at 4. But as Gerber points out, the  
 12 Ninth Circuit merely held that an unjust enrichment claim was theoretically viable as a standalone  
 13 claim. *See Bruton*, 703 F. App’x at 470. Specifically, the Ninth Circuit stated: “In light of this  
 14 [California Supreme Court] clarification, we reverse the district court’s dismissal and remand for  
 15 consideration of whether there are other grounds on which Bruton has failed to state a claim for  
 16 unjust enrichment, or if that claim must proceed to resolution.” *Id.* Thus this Court may again  
 17 review the viability of Bruton’s unjust enrichment claim at the motion to dismiss stage.

18 Turning next to *Attebury*, Bruton argues that *Attebury* is distinguishable from this case  
 19 because the district court there had entered summary judgment against the defendants on claims of  
 20 intentional fraudulent transfer, the alternative claim of constructive fraudulent transfer, and unjust  
 21 enrichment. Opp’n at 4–5 (citing *Attebury*, 721 F. App’x at 671). The Ninth Circuit found  
 22 plaintiff’s relationship with the company in question to be “defined by contract,” such that  
 23 plaintiff could not “advance a quasi-contract action premised on [the company’s] breach of  
 24 contract.” *Attebury*, 721 F. App’x at 672. Finally, Bruton states that “[i]n this case,” in contrast to  
 25 *Attebury*, “the proceeding has not yet reached the point where [Bruton’s] UCL claim can be  
 26 ‘presented successfully’ and so therefore it is unknown whether there may be ‘cracks to be filled

1 by this unjust enrichment claim.” Opp’n at 5.

2 To the extent Bruton reads *Attebury* as not requiring this Court to dismiss her unjust  
3 enrichment claim as duplicative, the Court agrees with Bruton. In any event, this Court need not  
4 weigh too far into the impact of *Attebury* because the Ninth Circuit in *Astiana* decided that the  
5 duplicative nature of an unjust enrichment/quasi-contract claim is *not* a valid reason to dismiss it.  
6 *See Astiana v. Hain Celestial Grp., Inc.*, 783 F.3d 753, 762 (9th Cir. 2015). The Court therefore  
7 rejects Gerber’s argument that Bruton’s unjust enrichment claim should be dismissed as  
8 duplicative. Thus, the Court DENIES Gerber’s Motion to Dismiss Bruton’s unjust enrichment  
9 claim for redundancy.

10 **2. Plausibility**

11 Gerber also argues that Bruton’s unjust enrichment/quasi-contract claim is not plausible on  
12 its face. *See* Mot. at 9. But Gerber’s arguments are effectively summary judgment arguments that  
13 go to proof and whether Bruton “create[d] a genuine issue of material fact,” not Bruton’s ability to  
14 state a claim.<sup>3</sup> *See* Mot. at 9. Further, Gerber cites to no authority for its argument besides  
15 *Twombly*’s pleading standard. Unjust enrichment describes the theory “that a defendant has been  
16 unjustly conferred a benefit ‘through mistake, fraud, coercion, or request.’” *Astiana*, 783 F.3d at  
17 761 (citing 55 Cal. Jur. 3d Restitution § 2). “The return of that benefit is the remedy ‘typically  
18 sought in a quasi-contract cause of action.’” *Id.* (citing 55 Cal. Jur. 3d Restitution § 2). Bruton  
19 plead that as a result of Gerber’s unlawful labeling, Gerber “was enriched at the expense of  
20 [Bruton].” 4AC ¶ 95. The Court finds that Bruton has stated a claim for unjust enrichment and  
21 DENIES Gerber’s Motion to Dismiss Bruton’s unjust enrichment claim for implausibility.

22 **3. Nonrestitutionary Disgorgement**

23 Finally, Gerber argues that to the extent Bruton’s unjust enrichment and UCL claims seek  
24 the remedy of nonrestitutionary disgorgement, they should be dismissed because “Ninth Circuit  
25

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26 <sup>3</sup> Because of the unique procedural posture of this case, the Court has not yet considered Bruton’s  
unjust enrichment claim at the summary judgment stage. *See* MSJ Order.



1 authority confirms that restitution is the remedy for an unjust enrichment claim arising from  
2 product mislabeling.” Mot. at 5 n.1, 8 (citing *Astiana*, 783 F.3d at 762–63). Gerber maintains that  
3 the Court should dismiss the nonrestitutionary disgorgement remedy on this ground. Bruton makes  
4 no specific reply to this argument.

5 The Court agrees with Gerber. The Ninth Circuit in *Astiana* confirmed that “[w]hen a  
6 plaintiff alleges unjust enrichment, a court may ‘construe the cause of action as a quasi-contract  
7 claim seeking restitution.’” 783 F.3d at 762 (quoting *Rutherford Holdings, LLC v. Plaza Del Rey*,  
8 223 Cal. App. 4th 221 (2014)). Furthermore, several courts have specifically held that  
9 nonrestitutionary disgorgement is not an available remedy for an unjust enrichment/quasi-contract  
10 claim based on the alleged mislabeling of a consumer product. *See, e.g., Belli v. Nestle USA, Inc.*,  
11 No: 5:14-cv-00286-PSG, 2015 WL 4197045 (N.D. Cal. July 10, 2015) (holding that  
12 “nonrestitutionary disgorgement is not the appropriate remedy for a quasi-contract claim based on  
13 alleged mislabeling of a consumer product” and that “[t]here is no reason to go beyond the price  
14 premium, and doing so would result in a windfall to plaintiff” (citations omitted)); *Samet v.*  
15 *Procter & Gamble Co.*, No. 5:12-cv-01891-PSG, 2015 WL 5012828 (N.D. Cal. Aug. 24, 2015)  
16 (same); *Trazo v. Nestle USA, Inc.*, 113 F. Supp. 3d 1047 (N.D. Cal. 2015) (same); *see also Brazil*  
17 *v. Dole Packaged Foods, LLC.*, No. 5:12-cv-01831-LHK, 2014 WL 5794873, at \*5 (N.D. Cal.  
18 2014) (citing *Colgan v. Leatherman Tool Grp., Inc.*, 135 Cal. App. 4th 663, 694 (2006)) (finding  
19 that “[t]he proper measure of restitution in a mislabeling case is the amount necessary to  
20 compensate the purchaser for the difference between a product as labeled and the product as  
21 received”); *Ivie v. Kraft Foods Glob., Inc.*, No. 5:12-cv-02554-RMW, 2015 WL 183910, at \*2  
22 (N.D. Cal. Jan. 14, 2015) (concluding that “restitutionary damages [in a mislabeling case should]  
23 be the price premium attributable to the offending labels, and no more”).

24 Therefore, to the extent Bruton’s unjust enrichment claim requests the remedy of  
25 nonrestitutionary disgorgement, the Court GRANTS Gerber’s Motion to Dismiss. The Motion to  
26 Dismiss the unjust enrichment claim to the extent it requests nonrestitutionary disgorgement is

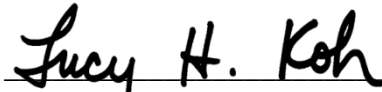
1 GRANTED with prejudice, as the Court finds that additional leave to amend would be futile. *See*  
2 *Leadsinger, Inc.*, 512 F.3d at 532. To the extent that Bruton seeks nonrestitutionary disgorgement  
3 as to her UCL claim, the Court also dismisses with prejudice that specific relief. *See* Mot. at 8. It is  
4 well established that nonrestitutionary disgorgement is unavailable under the UCL. *See In re*  
5 *Tobacco Cases II*, 240 Cal. App. 4th at 800 (“The California Supreme Court has held that, while  
6 restitutionary disgorgement may be an available remedy under the UCL, nonrestitutionary  
7 disgorgement is not available in a UCL individual action or in a UCL representative action . . . .”  
8 (citations omitted)).

9 **IV. CONCLUSION**

10 For the foregoing reasons, the Court rules as follows. The Motion to Strike Bruton’s  
11 deception-based allegations is GRANTED with prejudice. The Motion to Strike the request for  
12 nonrestitutionary disgorgement is DENIED. The Motion to Dismiss the unjust enrichment/quasi-  
13 contract claim in full is DENIED, however, to the extent Bruton’s unjust enrichment and UCL  
14 claims seek nonrestitutionary disgorgement, the Motion to Dismiss is GRANTED with prejudice.

15 **IT IS SO ORDERED.**

16  
17 Dated: August 31, 2018



18 \_\_\_\_\_  
19 LUCY H. KOH  
20 United States District Judge