

1 **FACTUAL BACKGROUND**

2 On June 9, 2009, Plaintiff filed his initial Complaint. (Doc. 1.) In the Complaint, Plaintiff, on
3 behalf of himself and an alleged nationwide class of Nordstrom customers, asserted two causes of
4 action: (1) declaratory judgment; and (2) unjust enrichment. Plaintiff claimed that Defendant issued
5 “Nordstrom Notes” (“Notes”) to customers throughout the United States. (Compl. ¶ 3.) The Notes
6 are earned by spending certain amounts of money at Nordstrom and may be redeemed at any
7 Nordstrom store. (*Id.*) Plaintiff alleged that the Notes should be deemed “gift certificates” under
8 California law and throughout the remaining states. (*Id.* at ¶¶ 3, 4, 6.) More specifically, Plaintiff
9 alleged that Notes issued between October 1, 2005 and March 14, 2008, contained an expiration date
10 in eight-point font, in violation of California Civil Code § 1749.5. (Compl. ¶¶ 5-7.) On July 15, 2009,
11 Defendant filed a motion to dismiss and strike the original complaint arguing, *inter alia*, that this
12 Court lacked subject matter jurisdiction over Plaintiff’s claims. (Doc. No. 7.) On March 11, 2010,
13 the Court granted Defendant’s motion to dismiss finding that Plaintiff failed to establish subject matter
14 jurisdiction based on diversity of citizenship or federal question. (Order Granting Mot. to Dismiss at
15 3:9-10, 5:13-15.)

16 On March 16, 2010, Plaintiff filed his First Amended Complaint (“FAC”). (Doc. No. 13.)
17 Plaintiff’s FAC attacks Nordstrom’s loyalty rewards program referred to as the Nordstrom Fashion
18 Rewards Program (“Rewards Program”). (FAC ¶ 3.) The Rewards Program rewards customers who
19 shop at Nordstrom using a Nordstrom credit card with a Note. (*Id.*) The Notes have a dollar value
20 on their face. (*Id.* at Ex. A.) Plaintiff alleges that he and other Nordstrom customers incurred specific
21 financial expenses in order to “earn” Notes. (FAC ¶ 4.) Plaintiff alleges many states require
22 expiration dates on gift certificates to be in a minimum of 10-point font so as to adequately put
23 consumers on notice of the expiration date. (FAC ¶ 5.) Plaintiff further alleges that Notes issued with
24 expiration dates in less than 10-point font are unreasonable and an unfair burden upon Nordstrom
25 customers in violation of its agreements with Nordstrom customers. (FAC ¶ 7.) Plaintiff alleges that
26 because he opted out of a prior settlement of “a California class action alleging the same essential
27 violations,” he is in a unique position in comparison with all the remaining purported class members.
28 (FAC ¶ 8.)

1 Plaintiff claims that there are common questions of law and fact concerning whether an
2 expiration date in eight-point font is “clear and conspicuous,” whether Nordstrom was unjustly
3 enriched, and whether it breached its contract with customers. (FAC ¶ 13.) Plaintiff alleges the class
4 of persons to be benefitted by the class action are Nordstrom customers who received and were unable
5 to use their Notes with expiration dates in less than 10-point font with the exception of those
6 California customers who participated in the *Ulloa* settlement. (FAC ¶ 14.) Plaintiff alleges that
7 because of the potential number of prospective class members adversely affected by Notes with
8 inconspicuous expiration dates, a class action would be the appropriate approach to ensure a fair and
9 efficient adjudication of this matter. (FAC ¶ 15.)

10 Plaintiff’s first claim for declaratory relief seeks an order from the Court declaring “that all
11 expiration dates which appeared on Notes in less than 10-point font failed to adequately apprise the
12 Nordstrom customer of the expiration date in a clear and conspicuous manner.” (FAC ¶ 23.)
13 Plaintiff’s second claim for relief for unjust enrichment alleges that Nordstrom’s prior practices
14 unjustly enriched Nordstrom by the value of the Nordstrom’s unused Notes. (FAC ¶ 25.) Plaintiff’s
15 third claim for relief for breach of contract alleges that failure to provide notice of Notes expiration
16 dates in a clear and conspicuous manner constitutes a breach of contract with each potential class
17 member resulting in damages in excess of \$5,000,000 to the class. (FAC ¶ 31.)

18 DISCUSSION

19 Nordstrom’s moves to dismiss: (1) Plaintiff’s first claim for declaratory relief due to lack of
20 subject matter jurisdiction; (2) Plaintiff’s second claim for “unjust enrichment” because it fails to state
21 a claim upon which relief may be granted; and (3) Plaintiff’s third claim because he has failed to state
22 facts sufficient to allege the basic elements of breach of contract. (Mtn. to Dismiss FAC at 1.) Having
23 considered the parties’ submissions and applicable law, the Court finds Plaintiff lacks standing under
24 Article III of the United States Constitution because he has not suffered an “injury in fact.” *Lujan v.*
25 *Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992) (citations omitted). Thus, Defendant’s motion
26 to dismiss the FAC is **GRANTED** without prejudice.

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1 whether the required amount in controversy is met, the claims of individual class members are to be
2 aggregated. 28 U.S.C. § 1332(d)(6).² However, the Court must first determine if the Plaintiff has
3 alleged sufficient facts to confer standing to bring the suit. “In the class action context, Article III
4 standing simply requires that the class representatives satisfy standing individually.” *In re Verisign,*
5 *Inc.*, 2005 U.S. Dist. Lexis 10439, 2005 WL 88969, *4 (N.D. Cal. 2005); *Stanford v. Home Depot*
6 *U.S.A., Inc.*, No. 07cv2193 LAB (WMC), U.S. Dist. 2008 WL 7348181, at *7 (S.D. Cal. May 27,
7 2008) (dismissing putative class action under CAFA because class representative lacked Article III
8 standing).

9 B) Rule 12(b)(1)

10 Rule 12(b)(1) of the Federal Rules of Civil Procedure provides an avenue by which a party may
11 move to dismiss an action for lack of subject matter jurisdiction. When considering a motion to
12 dismiss under Rule 12(b)(1), a court is not restricted to the face of the pleadings, but may review any
13 evidence to resolve factual issues relevant to the jurisdictional determination. *McCarthy v. United*
14 *States*, 850 F.2d 558, 560 (9th Cir. 1988). Consideration of material outside the pleadings does not
15 convert the motion into one for summary judgment. *Biotics Research Corp. v. Heckler*, 710 F.2d
16 1375, 1379 (9th Cir. 1983). Once challenged, the burden of establishing the existence of subject
17 matter jurisdiction rests on the party asserting jurisdiction. *Thomson v. Gaskill*, 315 U.S. 442, 446
18 (1942).

19 A motion under Rule 12(b)(1) is appropriate when the jurisdictional issue is separable from the
20 merits of the case, i.e., jurisdiction and substantive facts are not intertwined. *Roberts v. Corrothers*,
21 812 F.2d 1173, 1177 (9th Cir. 1987). A Rule 12(b)(1) jurisdictional attack may be facial or factual.
22 *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000). “In a facial attack, the challenger asserts that the
23 allegations contained in the complaint are insufficient on their face to invoke federal jurisdiction.”
24 *Safe Aire for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). “By contrast, in a factual

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26 ² A plaintiff satisfies this burden by claiming the requisite amount on the face of the
27 complaint, unless it appears to a legal certainty that the plaintiff cannot actually recover the requisite
28 amount. *Sanchez v. Monumental Life Ins. Co.*, 102 F.3d 398, 402 (9th Cir. 1996). The “legal
certainty” test applies: (1) to any complaint filed in state court alleging damages above the requisite
amount; and (2) to “good faith” complaints filed in federal court alleging damages above the requisite
amount. (*Id.*)

1 attack, the challenger disputes the truth of the allegations that, by themselves, would otherwise involve
2 federal jurisdiction... In such circumstances, a court may examine extrinsic evidence without
3 converting the motion to one for summary judgment, and there is no presumption of the truthfulness
4 of the [p]laintiff’s allegations.” *Id.*; see also *Land v. Dollar*, 330 U.S. 731, 735 n.4 (1947) (“[W]hen
5 a question of the District Court’s jurisdiction is raised . . . the court may inquire by affidavits or
6 otherwise, into the facts as they exist.”).

7 **II. Analysis**

8 A) **Injury In Fact**

9 Nordstrom first asserts that Plaintiff’s declaratory relief claim fails for lack of an actual
10 controversy.³ (Mtn. to Dismiss FAC at 5.) Plaintiff seeks the issuance of an order “declaring that all
11 expiration dates which appeared on Nordstrom Notes in less than 10-point font failed to adequately
12 apprise the average consumer of the pertinent expiration dates.”⁴ (FAC ¶ 23.) As a result, Plaintiff
13 alleges that he has suffered pecuniary injury capable of monetary valuation.⁵

14 First, Plaintiff alleges that Nordstrom’s customers earn notes by shopping at Nordstrom.⁶ As
15 such “[C]ustomers thus incur specific financial expense in order to earn Nordstrom Notes, pursuant
16 to the agreement between Nordstrom and each customer.” (*Id.* ¶ 3.) Second, Plaintiff alleges that
17 when “Plaintiff shopped at Nordstrom after the expiration date of his Nordstrom Note he was required
18 to incur, and did incur, an additional expense, which would not have occurred but for Nordstrom using

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20 ³ To maintain a claim under the Declaratory Judgment Act, “a plaintiff must establish standing
21 by showing ‘that there is a substantial controversy, between parties having adverse interests, of
22 sufficient immediacy and reality to warrant issuance of a declaratory judgement.’” *Scott v. Pasadena
Unified Sch. Dist.*, 306 F.3d 646, 658 (9th Cir. 2002); see also *Aydin Corp. v. Union of India*, 940 F.2d
527, 529 (9th Cir. 1991).

23 ⁴ Under the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202, a court “*may* declare the
24 rights and other legal relations of any interested party seeking such declaration.” (emphasis added).
25 Requests for declaratory judgment orders that merely impose the remedies provided for in other claims
are duplicative and may be dismissed on that basis. *Swartz v. KPMG LLP*, 476 F.3d 756, 766 (9th Cir.
2007) (adopting the opinion of *Swartz v. KPMG LLP*, 401 F. Supp. 2d 1146, 1154-55 (W.D. Wash.
2004)).

26 ⁵ “[C]oncrete economic injury is sufficient to establish injury in fact for standing purposes.”
27 *Sierra Club v. Morton*, 405 U.S. 727, 731 (1972).

28 ⁶ Customers earn 2 “Points” for every dollar spent at Nordstrom; 2,000 points earns a \$20
Nordstrom Note, 4,000 points earns a \$40 Nordstrom Note, etc. (FAC ¶ 3.)

1 less than 10-point font to identify the subject expiration date.” (*Id.* ¶ 7.)

2 As to both allegations, the Defendant argues Plaintiff cannot make an individualized showing
3 of actual injury, and his attempts to do so are based on factually inaccurate assertions such as “he paid
4 money for a Nordstrom Note.” (Mtn. to Dismiss FAC at 3.) Additionally, “Plaintiff does not explain
5 any circumstances under which he was required to make a purchase at Nordstrom or where Nordstrom
6 refused to accept the return of merchandise.” (*Id.*) In essence, Nordstrom argues that Plaintiff did not
7 suffer an actual injury, and that any economic injury he hypothesizes is purely speculative.

8 In an attempt to establish that he personally suffered an economic injury, Plaintiff alleges that
9 the expiration dates were not set forth conspicuously, Nordstrom breached its contract with each class
10 member resulting in damages in excess of \$5,000,000. (FAC ¶ 31.) In an effort to further illustrate
11 the disparity of the situation, Plaintiff asserts that “Nordstrom’s realizes substantial increased profits
12 as the result of its Fashion Rewards Program. When customers fail to redeem their Nordstrom Notes,
13 Nordstrom generates even more in profits, in that the ‘reward’ for the induced additional shopping by
14 a given customer is never paid.” (*Id.* at 22.)

15 Nordstrom also contends that Plaintiff’s assertions are inaccurate, misleading and “cannot
16 establish an ‘actual controversy’ upon which this court could grant ‘specific relief through a decree
17 of a conclusive character.’” *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-241 (1937). Nor has
18 he made an actual, non-speculative showing of injury in fact required in order to have constitutional
19 standing.

20 As noted above, a plaintiff’s injury must be real and concrete, not conjectural or hypothetical.
21 *Monsanto*, 130 S. Ct. at 2752; *O’Shea v. Littleton*, 414 U.S. 488, 494 (1974). The Court finds that
22 Plaintiff does not satisfy this standard and therefore lacks constitutional standing.

23 Plaintiff asserts that he and other members of the class “endured, for the class period,
24 Nordstrom’s unlawful, deceptive and/or misleading practice of including on its Nordstrom Notes
25 unreasonably small print setting forth the applicable expiration dates, i.e. utilized 8-point font, in faint
26 type and placed so as to minimize the likelihood that the expiration date would be noticed.” (FAC
27 ¶ 18.) As a result, he and other members of the class were unable to use the expired Notes for
28 purchases requiring the Plaintiff to suffer financial loss in order to complete the sale.

1 However, Plaintiff fails to set out facts describing his injury. For example, he does not describe
2 the face value of any Notes he holds. He does not say whether his Notes were worth one dollar or 100
3 dollars. He does not state whether he is able or unable to read the smaller font used for the expiration
4 dates. He does not allege whether he looked for an expiration date on his Notes. He does not detail
5 whether any expiration dates have passed. Plaintiff does not describe whether he attempted to redeem
6 expired Notes, and if so, whether Nordstrom honored or rejected the expired Notes. If Notes were
7 rejected, Plaintiff does not say whether the value lost was substantial or *de minimis*. At present,
8 Plaintiff's argument is based on conjecture. Plaintiff neglects to state when he received his Notes,
9 when they expired, or when he discovered they had expired. By failing to do so, this Court has no
10 basis on which to determine whether Plaintiff has suffered a financial loss sufficient to constitute an
11 injury in fact.

12 Although a lead plaintiff can assert claims on behalf of a class of plaintiffs similarly situated, he
13 first must establish standing in his own right. *In re VeriSign*, 2005 U.S. Dist. LEXIS 10349, at *16-17.
14 Thus, even if it were accepted as true that other members of the purported class suffered a financial
15 loss, Plaintiff has not demonstrated that he (as an individual) has suffered an actual economic injury
16 which would enable him to serve as a class representative.

17 Because Plaintiff has not described an actual, concrete injury, he lacks Article III standing. The
18 two additional elements of the standing analysis need not be addressed, since all three must be
19 satisfied in order to have constitutional standing. However, even if Plaintiff was able to establish an
20 injury in fact and that his injury is "fairly traceable" to the challenged action in this case, he has not
21 established that there is a substantial likelihood that the relief he requests will redress his injury.

22 B.) Redressability

23 In order to having standing under Article III, a plaintiff must show that the injury in fact is able
24 to be redressed by an order of the court. Plaintiff seeks an order "declaring that all expiration dates
25 which appeared on Nordstrom Notes in less than 10-point font failed to adequately apprise the average
26 consumer of the pertinent expiration dates, in that said expiration dates were not set forth in clear and
27 conspicuous language." (FAC at 23.)

28 Here, if the Court were to grant the declaratory relief requested, it would result in numerous

1 entanglement issues between the individual states and federal government. Many states already have
2 statutes and regulations on the books to deal with these types of issues.⁷ Further, Nordstrom is no
3 longer producing Notes with expiration dates in 8-point font. Therefore, the conduct the Plaintiff is
4 seeking to redress with the declaration has ceased. Thus, Plaintiff lacks standing to pursue his
5 declaratory relief claim not only because he has not described an actual injury, but also because he
6 cannot show his alleged injuries are able to be redressed by this Court.

7 **III. Conclusion**

8 To satisfy the Article III standing requirements, a plaintiff must demonstrate that: (1) he or she
9 has suffered an “injury in fact” – an invasion of a legally protected interest which is (a) concrete and
10 particularized, and (b) actual or imminent, not conjectural or hypothetical”; (2) there is a causal
11 connection between the injury and the conduct complained of – the injury is “fairly traceable” to the
12 challenged action of Defendants, and not the result of the independent action of some third party not
13 before the court; and (3) it is “likely,” as opposed to merely “speculative,” that the injury will be
14 redressed by a favorable judicial decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561
15 (1992) (citations omitted). For the reasons stated above, the Court finds that Plaintiff lacks
16 constitutional standing sufficient to state a case or controversy within this Court’s subject matter
17 jurisdiction. Accordingly, the Court **GRANTS** Nordstrom’s motion to dismiss Plaintiff’s FAC.

18 **LEAVE TO AMEND**

19 The Court grants Plaintiff leave to file a second amended complaint. “Defective allegations of
20 jurisdiction may be amended, upon terms, in the trial or appellate courts.” *Blue Ridge Ins. Co. v.*
21 *Stonewich*, 142 F.2d 1145, 1148 (9th Cir. 1998) (citing 28 U.S.C. § 1653). Plaintiff is cautioned that
22 while leave is granted, a second amended complaint that fails to cure the deficiencies identified herein
23 shall be dismissed without further leave to amend.

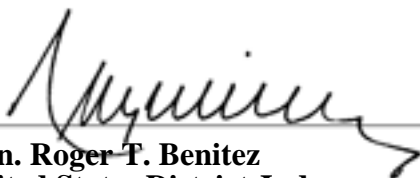
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25 ⁷ “For example, several states specifically have legislated that a reward for which a customer
26 does not pay, like the Note, is not a gift certificate. As described *infra*, in Arizona, a certificate or card
27 issued pursuant to a rewards program for which no money is exchanged is **not** subject to the
28 requirement that expiration dates on gift cards appear “clearly and conspicuously.” Ariz. Rev. Stat.
§ 44-7402(A), (D) (2010); *see also* Mich. Comp. Laws § 445.903e(3)(h) (2010); 815 Ill. Comp. Stat.
§ 505/2SS(c) (2010); Minn. Stat. § 325G.53(3) (2010); Ark. Code Ann. § 4-88-702(5)(A) (2010);
N.M. Stat. § 57-12-26(A)(1) (2010); N.D. Cent. Code § 51-29-02 (2010); Ohio Rev. Code Ann. §
1349.61(C)(1) (2010).” (Mtn. to Dismiss FAC at 7.)

CONCLUSION

Based on the foregoing, the Court **GRANTS** Defendant Nordstrom's Motion to Dismiss. Plaintiff's FAC is **DISMISSED without prejudice**. Plaintiff may file a second amended complaint on or before **January 3, 2011**.

IT IS SO ORDERED.

DATED: December 8, 2010



Hon. Roger T. Benitez
United States District Judge

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