UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

PHILLIP WHITE,

Plaintiff,

v.

GLAXOSMITHKLINE CONSUMER HEALTHCARE HOLDINGS (US) LLC,

Defendant.

Case No. 20-cv-04048-SVK

ORDER ON DEFENDANT'S (1) MOTION TO TRANSFER VENUE PURSUANT TO 28 U.S.C. § 1404(a) AND (2) MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT

Re: Dkt. Nos. 33, 34

In this putative class action, Plaintiff Phillip White alleges that Defendant GlaxoSmithKline Consumer Healthcare Holdings (US) LLC ("GSK") deceptively labels its Benefiber Original 100% Natural Fiber Supplement and Benefiber Healthy Shape 100% Natural Fiber Supplement (collectively, the "products") as "natural" even though those products are created using a multi-step chemical process that alters the source ingredient (wheat grain) into a "non-natural, synthetic ingredient" (wheat dextrin). Dkt. 23 (First Amended Complaint ("FAC")) ¶¶ 3, 5, 20. On behalf of a putative class of California residents who purchased the products, Plaintiff asserts causes of action for: (1) violation of California Unfair Competition Law, Business & Professions Code § 17200 *et seq.* ("UCL claim"); (2) false and deceptive advertising practices in violation of Business & Professions Code § 17500 *et seq.* ("FAL claim"); (3) violation of the California Consumers Legal Remedies Act, Civil Code § 1750 *et seq.* ("CLRA claim"); (4) breach of express warranty; and (5) unjust enrichment. All parties have consented to the jurisdiction of a magistrate judge. Dkt. 9, 18.

Now pending are GSK's motion to transfer this case to the District of New Jersey (Dkt. 34) and its motion to dismiss the FAC (Dkt. 33). The Court heard oral argument on November 3, 2020. For the reasons that follow, the Court **DENIES** GSK's motion to transfer and **GRANTS IN PART AND DENIES IN PART** GSK's motion to dismiss.

I. BACKGROUND

This summary of background facts is based on the allegations of the FAC. Defendant GSK is a Delaware corporation with its principal place of business in Warren, New Jersey. FAC ¶ 12. GSK manufactures, markets, advertises, labels, and sells the products at issue in this case: Benefiber Original 100% Natural Fiber Supplement and Benefiber Healthy Shape 100% Natural Fiber Supplement. FAC ¶¶ 3-4. The products are sold throughout California, including within this judicial District. FAC ¶¶ 10, 13. The labels of the products include the statement "100% Natural." FAC ¶¶ 3, 5, 15-16. The products' only listed ingredient is wheat dextrin. FAC ¶ 17. According to the FAC, wheat dextrin is created by processing wheat starch (which is the processed endosperm of the wheat grain) by using hydrochloric acid and added enzymes. FAC ¶¶ 17-18.

Plaintiff Phillip White is a resident of Santa Clara County, California, which is within this judicial District. FAC ¶ 11. He purchased one of the products at a Target store in or near Santa Clara, California for approximately $12 in January 2020. *Id.*

II. MOTION TO TRANSFER

GSK seeks to transfer this case to the United States District Court for the District of New Jersey under 28 U.S.C. § 1404(a) for two reasons: (1) that district would be the only one with personal jurisdiction over GSK with respect to the claims made in three separate class actions concerning Benefiber's "natural" label that are pending (this case and two actions before separate judges in the Southern District of New York), which GSK argues should be consolidated; and (2) transfer to the District of New Jersey would be more convenient for the parties and witnesses and would promote the interests of justice. Dkt. 34. For the reasons that follow, the Court **DENIES** GSK's motion to transfer.

A. Legal Standard

A district court in which venue is proper "may transfer any civil action to any other district or division where it might have been brought" for "the convenience of parties and witnesses" and "in the interest of justice." 28 U.S.C. § 1404(a). The section aims "to prevent the waste of time, energy and money and to protect litigants, witnesses and the public against unnecessary inconvenience and

expense." *Van Dusen v. Barrack*, 376 U.S. 612, 616 (1964) (internal quotation marks and citation omitted). It also gives "discretion [to] the district court to adjudicate motions for transfer according to an 'individualized, case-by-case consideration of convenience and fairness.'" *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 29 (1988) (quoting *Van Dusen*, 376 U.S. at 622).

In making this determination, the Court considers the three factors identified by section 1404(a): (1) the convenience of the parties, (2) the convenience of witnesses and (3) the interest of justice. 28 U.S.C. § 1404(a); *Commodity Futures Trading Comm'n v. Savage*, 611 F.2d 270, 279 (9th Cir. 1979). The Court may also consider and weigh:

> (1) the location where the relevant agreements were negotiated and executed, (2) the state that is most familiar with the governing law, (3) the plaintiff's choice of forum, (4) the respective parties' contacts with the forum, (5) the contacts relating to the plaintiff's cause of action in the chosen forum, (6) the differences in the costs of litigation in the two forums, (7) the availability of compulsory process to compel attendance of unwilling non-party witnesses, and (8) the ease of access to sources of proof.

Jones v. GNC Franchising, Inc., 211 F.3d 495, 498–99 (9th Cir. 2000). The Court need not consider all these factors, and it "has the broad discretion to address some of these or other factors based on the particular facts of each case." *Johansson v. Cent. Garden & Pet Co.*, No. C 10-03771 MEJ, 2010 WL 4977725, at *2 (N.D. Cal. Dec. 2, 2010) (citation omitted). Lastly, the moving party has the burden of showing that the proposed transferee district is the more appropriate venue. *See Jones*, 211 F.3d at 499.

B. Analysis

In arguing for transfer, GSK focuses largely on the potential for consolidation of this case with two other class actions currently pending before different judges in the Southern District of New York in the event all three cases are transferred to the District of New Jersey. Dkt. 34 at 4-9. GSK argues that consolidation is possible only in the District of New Jersey because under *Bristol-Myers Squibb Co. v. Super. Ct.*, 137 S. Ct. 1773 (2017), only that district court would have personal jurisdiction over GSK in all three cases. Dkt. 34 at 5-9.[1] Plaintiff does not dispute that

[1] Plaintiff argues that GSK "could always choose to waive personal jurisdiction in order to seek consolidation elsewhere." Dkt. 36 at 11. GSK responds that this possibility is "irrelevant to the

this action "might have been brought" in the District of New Jersey, but argues that transfer to that district should not occur. Dkt. 36 at 4 n.1.

As a general rule, "[t]he feasibility of consolidation is a significant factor in a transfer decision … although even the pendency of an action in another district is important because of the positive effects it might have in possible consolidation of discovery and convenience to witnesses and parties." *A. J. Indus., Inc. v. U.S. Dist. Ct.*, 503 F.2d 384, 389 (9th Cir. 1974). Nevertheless, at this stage, the possibility of consolidation in the District of New Jersey of the three pending Benefiber class actions is purely speculative and does not warrant upsetting Plaintiff's choice of forum. None of the class actions are currently pending in New Jersey. Nor is transfer of either of the New York cases imminent.[2] Accordingly, the Court concludes that transfer is not warranted due to the current posture of the cases.

Moreover, the potential for consolidation is only one factor to be considered on a motion to transfer under section 1404(a). *See Imram v. Vital Pharm., Inc.*, Case Nos. 18-cv-05758-JST and 18-cv-06300-JST, 2019 WL 1509180, at *7 (N.D. Cal. Apr. 5, 2019). GSK has failed to show that other considerations of convenience or the interest of justice favor transfer. Plaintiff is a resident of this District, he purchased the product at issue here, he seeks to represent a class of California purchasers, he sues under California law, and his action was filed before the class actions in New York. *See* FAC ¶¶ 11, 39. GSK argues that because this is a class action, Plaintiff's choice of forum is entitled to minimal, if any, deference. Dkt. 34 at 10. However, even in a class action, "[i]n judging the weight to be accorded [plaintiff's] choice of forum, consideration must be given to the extent of both [plaintiff's] and [defendant's] contacts with the forum, including those relating to [plaintiff's] cause of action." *Lou v. Belzberg*, 834 F.2d 730, 739 (9th Cir. 1987)

---

due process standards of general and specific jurisdiction and would not further § 1404's objectives." Dkt. 39 at 2 n.1.

[2] As of November 17, 2020, the PACER dockets for the two cases pending in the Southern District of New York indicated that in S.D.N.Y. Case No. 7:20-4731-NSR, briefing on the motion to transfer to the District of New Jersey will be completed on January 8, 2021 (Dkt. 13); and in S.D.N.Y. Case No 1:20-cv-06883-ER, no briefing schedule has been set, although counsel stated at the November 3 hearing that the opening brief would be filed that day.

(citation omitted). A class action plaintiff's choice of forum is entitled to at least some deference where, as here, the plaintiff has chosen his "home forum" and has not engaged in forum shopping. *In re Ferraro Litig.*, 768 F. Supp. 2d 1074, 1078-79 (S.D. Cal. 2011) (citing *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 256 (1981)).

GSK offers only conclusory statements regarding evidence that it claims could be more conveniently accessed if the case was transferred. "To evaluate witness convenience, courts must consider not only the number of witnesses, but also the nature and quality of their testimony." *Doe v. Epic Games, Inc.*, 435 F. Supp. 3d 1024, 1042 (N.D. Cal. 2020) (internal quotation marks and citation omitted). Moreover, courts give greater weight to non-party witnesses than party witnesses, whose testimony can be compelled regardless of their location. *See id.* A declaration submitted by GSK states only that "[t]he employees in the United States with knowledge about manufacturing, labeling, marketing, and branding responsibilities for the Benefiber products at issue are not located in California" and "[m]ost employees in the United States with such knowledge" and "[n]early all the documentary evidence in the United States relevant to this case" are located in Warren, New Jersey. *See* Dkt. 34-1 (Huang Decl.) at ¶¶ 13-14. GSK has not specifically identified any party witnesses, much less any non-party witnesses, that have relevant information. In addition, despite GSK's evidence that unspecified relevant documentary evidence is located in New Jersey, "[i]n the age of electronically stored information, the ease of access to evidence is neutral because much of the evidence in this case will be electronic documents, which are relatively easy to obtain in any district." *Epic Games*, 435 F. Supp. 3d at 1042 (citation omitted). Because GSK has failed to specifically identify relevant witnesses or documentary evidence that can be more conveniently produced in the District of New Jersey, it has not carried its burden of showing that district is the more convenient venue.

Accordingly, GSK's motion to transfer is **DENIED**.

III. MOTION TO DISMISS

A. Legal Standard[3]

1. Rule 12(b)(1)

GSK challenges Plaintiff's standing to sue in several respects. *See* Dkt. 33 at 13-15. Standing to sue pertains to the federal courts' subject matter jurisdiction over an Article III case or controversy, and therefore it is properly raised in a Rule 12(b)(1) motion to dismiss. *Yothers v. JFC Int'l, Inc.*, No. 20-cv-01657-RS, 2020 WL 5015262, at *1 (N.D. Cal. May 14, 2020) (citation omitted). If a court's subject matter jurisdiction is challenged, the party asserting jurisdiction bears the burden of establishing it. *Id.* (citation omitted).

2. Rule 12(b)(6)

Under Rule 12(b)(6), a district court must dismiss a complaint if it fails to state a claim upon which relief can be granted. In ruling on a motion to dismiss, the court may consider only "the complaint, materials incorporated into the complaint by reference, and matters of which the court may take judicial notice." *Metzler Inv. GmbH v. Corinthian Colls., Inc.*, 540 F.3d 1049, 1061 (9th Cir. 2008). In deciding whether the plaintiff has stated a claim, the court must assume the plaintiff's allegations are true and draw all inferences in the plaintiff's favor. *Usher v. City of L.A.*, 828 F.2d 556, 561 (9th Cir. 1987). However, the court is not required to accept as true "allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008) (citation omitted).

To survive a motion to dismiss under Rule 12(b)(6), the plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). This "facial plausibility" standard requires the plaintiff to allege facts that add up to "more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

Leave to amend must be granted unless it is clear that the complaint's deficiencies cannot

[3] In addition to Rules 12(b)(1) and 12(b)(6), which are discussed in this section, GSK's Notice of Motion to Dismiss cites Rule 9(b). Dkt. 33 at PDF page 2 of 23. However, GSK's motion does not contain any substantive argument as to why Plaintiff's FAC does not comport with the pleading standards of Rule 9(b).

be cured by amendment. *Lucas v. Dept' of Corr.*, 66 F.3d 245, 248 (9th Cir. 1995).

B. Primary Jurisdiction Doctrine

GSK asks the Court to dismiss or stay this action under the primary jurisdiction doctrine in light of "ongoing FDA regulatory proceedings to define the term 'natural.'" Dkt. 33 at 7. Plaintiff counters that there is no evidence that the FDA will imminently regulate the term "natural," any guidance the FDA ultimate issues about the term natural will not conflict with the outcome the court reaches in this case because the FDA does not apply a "reasonable consumer" standard, and there is only "rank speculation" that any FDA definition of the term "natural" would encompass the ingredient at issue in this case. Dkt. 37 at 6-7.

"The primary jurisdiction doctrine allows courts to stay proceedings or to dismiss a complaint without prejudice pending the resolution of an issue within the special competence of an administrative agency." *Clark v. Time Warner Cable*, 523 F.3d 1110, 1114 (9th Cir. 2008). It is a "prudential" doctrine "under which a court determines that an otherwise cognizable claim implicates technical and policy questions that should be addressed in the first instance by the agency with regulatory authority over the relevant industry rather than by the judicial branch." *Id.* The determination of whether to stay an action pursuant to the primary jurisdiction doctrine is a matter for the court's discretion. *Syntek Semiconductor Co. Ltd. v. Microchip Tech. Inc.*, 307 F.3d 775, 781 (9th Cir. 2002).

According to GSK, the FDA opened a notice and comment period in November 2015 "to receive information and comments on the use of the term 'natural' in the labeling of human food products." Dkt. 33 at 4 (citing 80 Fed. Reg. 69905, 69905 (Nov. 12, 2015)). Questions the FDA is considering include the nature and extent of processing that would be permissible for a "natural" product. Dkt. 33 at 4. The FDA received 7,690 comments by the end of the comment period on May 10, 2016. *Id.* GSK cites a statement by the FDA Commissioner on March 29, 2018, that "[w]e'll have more to say on the issue soon." *Id.* GSK also cites a letter dated December 19, 2018 from the FDA Commissioner to Congress stating that the "FDA recognizes this is an important matter for consumers and the food industry" and that the "FDA is actively working on this issue."

Id. at 5 (citing Ex. A to Declaration to Franco A. Corrado (Dkt. 33-2)).[4] GSK further cites a statement from an FDA official at a public meeting on September 27, 2019 that the FDA had been "working diligently on" defining the term "natural." Dkt. 33 at 5 (citation omitted).

After considering the evidence provided by GSK concerning the FDA proceedings, the Court concludes that a stay is not warranted in this case. At most, the Court would consider a stay of only a limited period, rather than in indefinite stay. *See, e.g., Yu v. Dr. Pepper Snapple Group*, No. 18-cv-06664-BLF, 2019 WL 2515919, at *6 (ordering stay of approximately 8.5 months). However, GSK has not shown that FDA action can be expected in the near future. GSK cites a number of instances dating back to 2015 in which courts stayed cases pending FDA guidance on the term "natural." *See* Dkt. 33 at 8-9. Notably, however, in the five years since the first of those cases was stayed, the FDA has not yet issued guidance on the issue. The most recent FDA statement regarding forthcoming action cited by GSK is from over a year ago. *See id.* at 5. GSK has not identified any more recent developments that demonstrate that FDA action can be expected in the time frame during which the Court would consider staying this case.

Accordingly, GSK's motion to stay or dismiss the case pursuant to the primary jurisdiction doctrine is **DENIED** without prejudice to renewal in the event that the FDA expressly indicates that relevant guidelines on the term "natural" are imminent.

C. Claim for damages under CLRA

GSK argues that the Court should dismiss Plaintiff's claim for CLRA damages on the ground that Plaintiff failed to provide notice before filing suit, as required under California Civil Code § 1782(a). Dkt. 33 at 10-11. That section requires that 30 days or more before commencing an action for damages under the CLRA, the consumer must (1) notify the person alleged to have violated the CLRA of the particular alleged violations of Civil Code § 1770, and (2) demand that the person correct, repair, replace, or otherwise rectify the goods or services alleged to be in violation of section 1770. Cal. Civ. C. § 1782(a). "The notice shall be in writing and shall be sent by certified or registered mail, return receipt requested, to the place where the transaction occurred

[4] The Court grants GSK's request for judicial notice of Exhibit A to the Corrado declaration because that document is a matter of public record. *See Yu*, 2019 WL 2515919, at *3.

or to the person's principal place of business within California." *Id.* Failure to provide the required pre-suit notice bars the consumer from maintaining an action for damages under Civil Code § 1781 under most circumstances. Cal. Civ. C. § 1781(b)-(c). However, section 1782(d) allows a consumer to commence an action for injunctive relief without complying with section 1782(a)'s notice requirement and then "[n]ot less than 30 days of the commencement of an action for injunctive relief, and after compliance with [the notice requirement of] subdivision (a), the consumer may amend his or her complaint without leave of court to include a request for damages." Cal. Civ. C. § 1782(d). The CLRA notice requirement is not jurisdictional, but compliance is necessary to state a claim. *In re Easysaver Rewards Litig.*, 737 F. Supp. 2d 1159, 1178 (S.D. Cal. 2010).

The original complaint in this case, filed on June 17, 2020, included a claim for damages for GSK's alleged violation of the CLRA. Dkt. 1 (original complaint) at ¶ 93 (asserting that in addition to injunctive relief on CLRA claim, "Defendant should be compelled to provide restitution and damages to consumers who paid for Products that are not what they are expected to receive due to Defendant's misrepresentation."). GSK asserts, and Plaintiff does not dispute, that Plaintiff did not provide the notice required under Civil Code § 1782(a) before filing the original complaint. *See* Dkt. 33 at 11; Dkt. 37 at 10-12. However, Plaintiff argues that he may nevertheless make a CLRA damages claim because Plaintiff served a CLRA notice the day after he filed his original complaint, and GSK had nearly 60 days between the notice and the filing of the FAC—and 100 days between the notice and GSK's filing of its answer to the FAC—which provided GSK adequate opportunity to comply with the CLRA's requirements before responding to the FAC. Dkt. 37 at 10; *see also* FAC ¶ 93. Plaintiff also characterizes his original complaint as "[a] request for restitutionary damages [that] does not amount to a request for statutory damages so as to preclude an amendment under section 1782(d)." Dkt. 37 at 10. According to Plaintiff, he "complied with the CLRA pre-lawsuit notice requirement pursuant to Civil Code section 1782(d), authorizing a party to initiate suit, serve a CLRA notice, and subsequently amend thirty days later." *Id.* Plaintiff further argues that if his CLRA notice is found to be defective, dismissal should be without prejudice and he should be given leave to amend following compliance. *Id.*

Plaintiff has not established that he is entitled as a matter of right to the benefit of the amendment procedure set forth in Civil Code § 1782(d). By its terms, that section allows a consumer to amend his complaint to add a claim for CLRA damages only in situations where the original complaint sought only injunctive relief. Here, however, Plaintiff's original complaint sought both "restitution *and damages*," not just restitution. Dkt. 1 ¶ 93 (emphasis added). Most of the cases cited by Plaintiff in support of his argument that the FAC cured the pre-suit notice defect are distinguishable because they involved original complaints that did not include a claim for damages. *See Rosales v. FitFlop USA, LLC*, 882 F. Supp. 3d 1168, 1177 (S.D. Cal. Feb. 8, 2012) ("Plaintiffs' first complaint sought only injunctive relief, restitution, and disgorgement, but not monetary damages"); *In re Apple In-App Purchase Litig.*, 855 F. Supp. 2d 1030, 1038 (N.D. Cal. 2012) ("[the] original complaint sought only injunctive relief, and such a claim may be commenced without compliance with the notice requirements"); *Morgan v. AT&T Wireless Servs., Inc.*, 177 Cal. App. 4th 1235, 1260 (2009) ("In the present case, plaintiffs did not allege a claim for damages under the CLRA until they filed their second amended complaint-the original and first amended complaints sought only injunctive relief under the CLRA"). Moreover, a number of cases cited by Plaintiff where courts have permitted amendment of a complaint seeking damages to cure a lack of pre-suit notice involved at least some effort (albeit defective) by the Plaintiff to give the requisite notice. *See, e.g., Prescott v. Bayer HealthCare LLC*, No. 20-CV-00102-NC, 2020 WL 4430958, at *9 (N.D. Cal. July 31, 2020) (several presuit letters sent to entities that were related to defendants). Here, by contrast, Plaintiff made no attempt to give notice before filing the original complaint.

The Court therefore concludes that Plaintiff made a premature claim for CLRA damages in his original complaint. Courts disagree on "whether dismissal of a CLRA claim for violation of section 1782(a)'s notice requirement should be granted with or without prejudice." *Trabakoolas v. Watts Water Techs., Inc.*, No. 12-cv-001172-YGR, 2012 WL 2792441, at *7 (N.D. Cal. July 9, 2012). Some courts strictly adhere to the pre-suit notice requirement. *See, e.g., Frenzel v. Aliphcom*, 76 F. Supp. 3d 999, 1016 (N.D. Cal. 2014) *and cases cited therein*. Such courts generally rely on the reasoning of the California Court of Appeal in *Outboard Marine Corp. v.*

Sup. Ct., which stated that the "clear intent" of the act, which is "to provide and facilitate precomplaint settlements of consumer actions wherever possible and to establish a limited period during which such settlement may be accomplished," requires "a literal application of the notice provisions." 52 Cal. App. 3d 30, 40-41 (1975). Other courts, however, dismiss such claims without prejudice. *See, e.g., Dietz v. Comcast Corp.*, No. C 06-0632 WHA, 2006 WL 3782902, at *5 (N.D. Cal. Dec. 21, 2006) (striking allusion to damages in complaint as premature, without prejudice to amendment after plaintiff shows compliance with notice requirement and 30-day period). Such courts often point to the California Court of Appeals decision in *Morgan v. AT&T Wireless Servs.*, which held that dismissal of a premature damages claim with prejudice is unnecessary to meet the purpose of the notice requirement and stated that such claims can simply be dismissed until at least 30 days after the plaintiff complies with the notice requirement. 177 Cal. App. 4th at 1261.

This Court finds more persuasive those cases that have allowed amendment. "Given that the legislature specifically contemplated that an action seeking injunctions can be amended to include a damages claim after the thirty days have run, the goal of the legislature would best be served by allowing amendment" in cases prematurely seeking damages before notice is given. *Dietz*, 2006 WL 3782902, at *6. The Court finds that further amendment of Plaintiff's CLRA claim is unnecessary under the facts of this case because Plaintiff already amended the complaint after sending notice to GSK, and GSK had a generous extension of time to answer the FAC. Specifically, Plaintiff filed the original complaint on June 17, 2020 and gave notice to GSK the next day. Dkt. 1; FAC ¶ 93. The parties stipulated to extensions to respond such that GSK's original motion to dismiss was filed on August 13, 2020, almost 60 days after notice was given. Dkt. 11, 15. Plaintiff promptly filed the FAC, and after a further stipulated extension of time, GSK filed a motion to dismiss the FAC on September 24, 2020. Dkt. 23, 28, 33. By any calculation, GSK had ample time to address and resolve Plaintiff's claim for damages before taking any action in the litigation, thus satisfying the goal of the legislature in requiring pre-suit notice of CLRA damages claims. Moreover, "[t]here are other disciplinary ways to deal with any willful disregard of the law." *Dietz*, 2006 WL 3782902, at *6. The Court will not hesitate to

employ such tools if necessary.

Accordingly, GSK's motion to dismiss Plaintiff's CLRA damages claim is **DENIED.**

D. Claims seeking restitution

GSK seeks to dismiss Plaintiff's attempt to seek restitution in connection with his UCL, FAL, and CLRA claims. Dkt. 33 at 11; *see also* Dkt. 23 at ¶ 54 (on UCL claim, requesting "restitution of the amounts Defendant acquired through the unfair, unlawful, and fraudulent business practices described herein"); ¶ 76 (on FAL claim requesting "an order requiring Defendant to disgorge its ill-gotten gains and/or award full restitution of all monies wrongfully acquired by Defendant by means of such acts of false advertising"); ¶ 94 (on CLRA claim, stating that "Defendant should be compelled to provide restitution and damages to consumers who paid for Products that are not what they expected to receive due to Defendant's misrepresentations"); ¶ 108 (on unjust enrichment claim, arguing that "restitution and/or disgorgement of such economic enrichment is required"). GSK argues that Plaintiff cannot seek restitution because he has not pleaded facts demonstrating that he lacks an adequate remedy at law. Dkt. 33 at 11-12. In response, Plaintiff argues that: (1) the Court cannot dismiss the CLRA claim for damages, while at the same time dismissing all claims for equitable relief; (2) he is allowed at this early stage of the case to plead alternative forms of relief; (3) the UCL and CLRA expressly contemplate alternative forms of relief; (4) the CLRA is an inadequate legal remedy where its statute of limitations is shorter than the UCL; and (5) monetary damages are inadequate in comparison to injunctive relief because they only redress past, not future, harm. Dkt. 37 at 12-13.

Many of Plaintiff's arguments are undercut by the Ninth Circuit's recent decision in *Sonner v. Premier Nutrition Corp.*, which held that "a federal court must apply traditional legal principles before awarding restitution under the UCL and CLRA" and "state law cannot expand or limit a federal court's equitable authority." 971 F.3d 834, 841 (9th Cir. 2020). Applying this principle, the Ninth Circuit held that "traditional principles governing equitable remedies in federal courts, including the requisite inadequacy of legal remedies, apply when a party requests restitution under the UCL and CLRA in a diversity action." *Id.* at 844. Accordingly, a plaintiff "must establish that she lacks an adequate remedy at law before securing equitable restitution for

past harm under the UCL and CLRA." *Id.* As another court in this District recently explained in a similar case, "this is not an election of remedies issue" but is instead a question of "whether equitable remedies are available to Plaintiff[] at all." *In re MacBook Keyboard Litig.*, No. 5:18-cv-02813-EJD, 2020 WL 6047253, at *2 (N.D. Cal. Oct. 13, 2020) (granting motion to dismiss).

In the FAC, Plaintiff seeks both damages under the CLRA and restitution under other causes of action. FAC ¶¶ 54, 76, 94, 108. However, Plaintiff has failed to allege facts that establish that his remedies at law are inadequate. The Court cannot conclude at this time that amendment to address this deficiency would be futile. *See Krommenhock v. Post Foods, LLC*, 16-cv-04958-WHO, 2020 WL 6074107, at *1 (N.D. Cal. Sep. 29, 2020) (granting leave to amend claims seeking equitable restitution because "Plaintiffs raise a number of significant arguments demonstrating that their remedies at law would be inadequate with respect to at least some of the products/statements at issue, considering both the broad scope of the UCL's unfair prong and the four-year statute of limitations under the UCL as compared to the three-year statute of limitations under the CLRA and FAL (and as the warranty claims do not cover all of the products/statements remaining at issue in this case)"). Accordingly, the Court **GRANTS** GSK's motion to dismiss Plaintiff's claims for restitution **WITH LEAVE TO AMEND**.

E. Unjust enrichment claim

In addition to attacking Plaintiff's claim for restitution in connection with his unjust enrichment claim, GSK seeks dismissal of Plaintiff's unjust enrichment claim on the additional ground that "California does not recognize an independent cause of action for unjust enrichment," citing cases in the District from 2013 and 2014. Dkt. 33 at 12-13 (citations omitted). However, more recently, the Ninth Circuit held in a food labeling case that it is error to dismiss a claim for unjust enrichment on this ground. *See Bruton v. Gerber Prods. Co.*, 703 Fed. Appx. 468, 470 (9th Cir. 2017) (stating that in *Hartford Cas. Ins. Co. v. J.R. Mktg., L.C.C.*, 61 Cal. 4th 988, 100 (2015), "the California Superior Court has clarified California law, allowing an independent claim for unjust enrichment to proceed in an insurance dispute"); *see also Yothers*, 2020 WL 5015262, at *6 (in food labeling case, rejecting argument that unjust enrichment is a remedy rather than an independent claim under California law, citing *Hartford*). There is some disagreement among

Ninth Circuit cases on this issue. *See Cottrell v. AT&T, Inc.*, Case No. 19-cv-07672-JCS, 2020 WL 4818606, at *4 n.4 (N.D. Cal. Aug. 19, 2020) *and cases cited therein*.

This Court finds the more persuasive approach to be that plaintiffs can plead a standalone claim for unjust enrichment under California law, but to do so "plaintiffs are required to plead that defendants 'ha[ve] been unjustly conferred a benefit through mistake, fraud, coercion, or request.'" *Yothers*, 2020 WL 5015262, at *6 (citing *Astiana v. Hain Celestial Grp., Inc.*, 783 F.3d 753, 762 (9th Cir. 2015)). If an unjust enrichment claim is predicated on fraudulent conduct, it must be pleaded with specificity. *Yothers*, 2020 WL 5015262, at *6. Here, Plaintiff alleges that the "benefit was obtained by Defendant's fraudulent and misleading representations and omissions" (FAC ¶ 107), and the FAC provides the specificity required to support such a claim (*see generally* FAC ¶¶ 15-20, 27-31). Accordingly, GSK's argument that the unjust enrichment cause of action should be dismissed on the grounds that it is an impermissible standalone claim is **DENIED.**

F. Standing

1. Standing to seek injunctive relief

GSK argues that Plaintiff lacks standing to seek injunctive relief because he is not under threat of future injury. Dkt. 33 at 13-14. Specifically, GSK argues that there is no threat of future injury because Plaintiff has admitted he no longer purchases Benefiber and because now that he understands how the sole ingredient in Benefiber is processed, there is no likelihood that he can be misled by the product label in the future. Dkt. 33 at 13; Dkt. 38 at 6.

Article III of the United States Constitution authorizes federal courts to adjudicate only "case" and "controversies." The doctrine of standing is "an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The minimum standing requirements are injury-in-fact, causation, and redressability. *Davidson v. Kimberly-Clark Corp.*, 889 F.3d 956, 967 (9th Cir. 2018). A plaintiff must have standing for each remedy sought. *Id*. In order to establish standing to seek an injunction, a consumer must allege plausibly he faces an "actual and imminent, not conjectural or hypothetical" threat of future harm. *Id.* (citation omitted).

To the extent that GSK argues that a plaintiff can never face a threat of future harm once he or she knows a product label is misleading, that argument runs counter to *Davidson*, which stated that the future harm necessary to support standing to seek injunctive relief may be that the consumer "will not purchase the product although she would like to" since "she will be unable to rely on the product's advertising or labeling," or "that she might purchase the product in the future, despite the fact it was once marred by false advertising or labeling, as she may reasonably, but incorrectly, assume the product was improved." *Id*. at 969-70.

Here, the FAC alleges that "Plaintiff would like to purchase the Products in the future if they were properly labeled, and/or the ingredients complied with the labeling and advertising statements" and "[s]pecifically, Plaintiff would consider purchasing the Products again if the Products did not contain non-natural, synthetic, artificial, and/or highly processed ingredients." FAC ¶ 38. This allegation plausibly suggests that Plaintiff faces an actual threat of future harm absent injunctive relief. *See Prescott*, 2020 WL 4430958, at *6 (plaintiffs may rely in the future on "mineral-based" label on sunscreens to mistakenly believe that defendants eliminated chemical active ingredients because "Plaintiffs have no way of knowing whether, for example, Defendants will change the formula for the [sunscreens] to only contain zinc oxide or other mineral active ingredients."). As in *Prescott*, even if the Benefiber labels continue to list wheat dextrin as the sole ingredient, Plaintiff has no way of knowing whether GSK will change the processing method by which it makes this ingredient.[5] In this respect, this case is distinguishable from cases such as *Yothers*, in which the court held that the plaintiff did not have standing to seek injunctive relief in connection with a food product labeled as wasabi peas that actually contained horseradish rather than wasabi. 2020 WL 5015262, at *5. In that case, the court emphasized that "Plaintiffs now know … that 95-99% of wasabi products sold in North America do not actually contain wasabi" and "plaintiffs can simply read the packaging [which disclosed that the peas contained horseradish and not wasabi], before purchasing, and make an informed decision." *Id*. Here, by contrast, the relevant qualities of the products at issue are neither apparent from the label or widely understood.

[5] Whether there may be alternative processes to create wheat dextrin is beyond the scope of the present motion.

See, e.g., *Davidson*, 889 F.3d at 967 (plaintiff had no way of knowing whether wipes were flushable, as labeled).

Although the Court concludes that Plaintiff has standing to seek injunctive relief, his claims for injunctive relief suffer from the same defect noted in Section III.D. above with respect to his claims for restitution: he fails to allege that his legal remedies are inadequate. "[U]nder *Sonner*, Plaintiffs are required to allege that they lack an adequate remedy at law in order to seek injunctive relief." *In re MacBook Keyboard Litig.*, 2020 WL 6047253, at *3. Accordingly, the Court **DISMISSES** Plaintiff's claims for injunctive relief **WITH LEAVE TO AMEND** to address this deficiency.

2. Standing to pursue claims related to website representations

GSK argues that Plaintiff also lacks standing to pursue claims related to website representations that he did not see or rely upon when making his purchasing decision. Dkt. 33 at 15. If a plaintiff did not see specified representations upon which his claims rely before purchasing the defendant's products or services, that plaintiff does not have standing because he did not rely on these representations and suffered no injury. *Morizur v. Seaworld*, No. 15-cv-02172-JSW, 2020 WL 6044043, at *16 (N.D. Cal. Oct. 13, 2020).

Specifically, in its motion, GSK points to Paragraph 15 of the FAC, which states:

> In an effort to convince consumers that certain of its products are "natural," Defendant prominently and uniformly labels the Products as "100% Natural." In fact, Defendant places the "100% Natural" claim on the top center portion of the Products' label.[4] In addition, Defendant reinforces a consumer's understanding that the Products are "natural" using various natured-themed imagery. For example, the "100% Natural" claim is framed by a plant stem and leaves. Further, the Products' labeling uses various shades of green as its coloring scheme.

See Dkt. 33 at 15. The Court **DENIES** GSK's request that the Court strike Paragraph 15 in its entirety. That paragraph contains general allegations about the labels, which Plaintiff alleges that he saw when he purchased the product. See FAC ¶ 11 ("In making his purchase, Plaintiff relied upon the claims made on the Product's advertising and label.").

However, Footnote 4 to Paragraph 15 states:

> Defendant also claims on its website that "Benefiber® contains a 100% natural

> prebiotic fiber that fits into any lifestyle." See https://www.benefiber.com/about/ (last visited August 27, 2020). And "Benefiber is a 100 percent natural prebiotic fiber[.]". See https://www.benefiber.com/amp/what-are-probiotics-benefits.html#disclaimer1 (last visited August 27, 2020). Similarly, Defendant states on its website: "Think all fiber supplements are equal? Think again. Benefiber products are . . . "100% natural." See https://www.benefiber.com/fiber-in-your-life/daily-fiber-intake/the-benefiber-difference/ (last visited August 27, 2020).

Thus, footnote 4 refers to statements made on GSK's website, not the products' labels. The FAC does not allege that Plaintiff viewed the product website before purchasing Benefiber, and Plaintiff does not appear to dispute GSK's claim that Plaintiff did not visit the website. *See* Dkt. 37 at 19-20. The Court therefore **STRIKES** footnote 4 in the FAC as superfluous. It adds nothing to Plaintiff's claims and is not an independent basis for a claim of false advertising because Plaintiff does not contend that he saw it.

IV. CONCLUSION AND DISPOSITION

For the foregoing reasons, the Court **ORDERS** as follows:

1. GSK's motion to transfer this case to the District of New Jersey is **DENIED**.
2. GSK's motion to dismiss or stay the case pursuant to the primary jurisdiction doctrine is **DENIED**.
3. GSK's motion to dismiss Plaintiff's CJRA claim for damages is **DENIED.**
4. GSK's motion to dismiss Plaintiff's claims for restitution is **GRANTED WITH LEAVE TO AMEND.**
5. GSK's motion to dismiss the unjust enrichment cause of action on the grounds that it is not a standalone cause of action is **DENIED**.
6. GSK's motion to dismiss Plaintiff's claims for injunctive relief is **DENIED** with respect to the issue of standing to seek injunctive relief but **GRANTED WITH LEAVE TO AMEND** with respect to Plaintiff's failure to allege the lack of an adequate legal remedy**.**
7. GSK's motion to dismiss or strike Plaintiff's allegations regarding website statements is **GRANTED IN PART and DENIED IN PART**. The Court **STRIKES** footnote 4 of the FAC.

8. If Plaintiff wishes to attempt to address the deficiencies identified in this order, he may file a Second Amended Complaint ("SAC") no later than **November 30, 2020.**
9. Following the filing of a SAC, Defendant must file a response no later than **December 21, 2020.**
10. If Defendant responds by filing a motion to dismiss the SAC, the normal briefing schedule of Civil Local Rule 7-3 will apply. The Court will inform the parties if a hearing is necessary.
11. The Case Management Conference currently scheduled for December 8, 2020 is **CONTINUED** to **January 12, 2021 at 9:30 a.m.**, with a Joint Case Management Statement due on **January 5, 2021.**

SO ORDERED.

Dated: November 17, 2020

SUSAN VAN KEULEN
United States Magistrate Judge

United States District Court
Northern District of California