

United States District Court  
Northern District of California

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

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

LUIS DIEGO ZAPATA FONSECA,  
Plaintiff,  
v.  
GOYA FOODS INC.,  
Defendant.

Case No. 16-CV-02559-LHK

**ORDER GRANTING IN PART AND  
DENYING IN PART MOTION TO  
DISMISS**

Re: Dkt. No. 16

Plaintiff Luis Fonseca (“Plaintiff”) brings this putative class action against Goya Foods Inc. (“Defendant”). Before the Court is Defendant’s motion to dismiss Plaintiff’s complaint. ECF No. 16 (“Mot.”). The Court finds this matter suitable for decision without oral argument pursuant to Civil Local Rule 7-1(b) and thus VACATES the motion hearing set for September 15, 2016, at 1:30 p.m. The initial case management conference, currently set for September 15, 2016, at 1:30 p.m., remains as set. Having considered the submissions of the parties, the relevant law, and the record in this case, the Court GRANTS in part and DENIES in part Defendant’s motion to dismiss

**I. BACKGROUND**

**A. Factual Background**

This case concerns the divergent fates of the octopus and the squid. “In recent years, the

1 cost of octopus has increased rapidly as octopus populations have dwindled around the world due  
 2 to over-fishing.” ECF No. 1 (“Compl.”) ¶ 5. SeafoodSource.com reported a 45% drop in octopus  
 3 supplies between 2013 and 2014, and the United Nations has stated that “octopus populations [are]  
 4 overexploited.” *Id.* On the other hand, while “octopus populations have been declining,” the  
 5 jumbo squid population has “been thriving.” *Id.* ¶ 6. According to biologists, the jumbo squid “is  
 6 thriving due to its ability to adapt to changing ocean conditions caused by global warming.” *Id.*

7 Both the octopus and squid are culinary delicacies. Plaintiff avers that, “due to similarities  
 8 in texture, squid can easily be substituted for octopus without the consumer being able to tell the  
 9 difference,” particularly if the product is “sold in a sauce like a garlic sauce or marinara sauce.”  
 10 *Id.* ¶ 7. Defendant offers four products to consumers that it labels and sells as octopus: Octopus in  
 11 Garlic, Octopus in Olive Oil, Octopus in Pickled Sauce (Marinara), and Octopus in Hot Sauce  
 12 (collectively, the “Octopus Products”). *Id.* ¶ 8. Plaintiff contends, however, that these products  
 13 actually contain squid instead of octopus, and that Defendant “intentionally replaced the octopus .  
 14 . . with squid . . . to save money because it knew an ordinary consumer would have trouble  
 15 distinguishing the difference.” *Id.* ¶ 9.

16 Plaintiff avers that he purchased Defendant’s Octopus Products on Amazon.com “in  
 17 reliance on the representation that [the products] contained octopus.” *Id.* ¶ 11. “Independent  
 18 DNA testing [has] determined,” however, that Defendant’s “Octopus Products [were] actually  
 19 jumbo squid and not octopus.” *Id.* ¶ 12. Plaintiff alleges that he would not have purchased  
 20 Defendant’s Octopus Products had he known that they were made of squid.

## 21 **B. Procedural History**

22 Plaintiff filed the complaint in this action on May 11, 2016. The complaint asserts nine  
 23 causes of action: (1) breach of express warranty, (2) breach of the implied warranty of  
 24 merchantability, (3) breach of the implied warranty of fitness, (4) unjust enrichment, (5) violation  
 25 of California’s Consumer Legal Remedies Act (“CLRA”), (6) violation of California’s Unfair  
 26 Competition Law (“UCL”), (7) violation of California’s False Advertising Law (“FAL”), (8)  
 27 negligent misrepresentation, and (9) fraud.

1 Plaintiff brings his CLRA, UCL, and FAL claims on behalf of himself and a putative  
 2 subclass of all persons who purchased Octopus Products in California. *See id.* ¶ 50. Plaintiff  
 3 brings his other claims on behalf of himself and a putative class of all persons in the United States  
 4 who purchased Octopus Products. Defendant moved to dismiss the complaint on July 11, 2016.  
 5 Plaintiff filed a response on August 15, 2016, and Defendant filed a reply on August 25, 2016.  
 6 ECF No. 21 (“Opp’n”); ECF No. 22 (“Reply”).

## 7 **II. LEGAL STANDARD**

### 8 **A. Motion to Dismiss**

9 Pursuant to Federal Rule of Civil Procedure 12(b)(6), a defendant may move to dismiss an  
 10 action for failure to allege “enough facts to state a claim to relief that is plausible on its face.” *Bell*  
 11 *Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). “A claim has facial plausibility when the  
 12 plaintiff pleads factual content that allows the court to draw the reasonable inference that the  
 13 defendant is liable for the misconduct alleged. The plausibility standard is not akin to a  
 14 ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted  
 15 unlawfully.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal citations omitted). For  
 16 purposes of ruling on a Rule 12(b)(6) motion, the Court “accept[s] factual allegations in the  
 17 complaint as true and construe[s] the pleadings in the light most favorable to the nonmoving  
 18 party.” *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008).

19 Nonetheless, the Court is not required to “assume the truth of legal conclusions merely  
 20 because they are cast in the form of factual allegations.” *Fayer v. Vaughn*, 649 F.3d 1061, 1064  
 21 (9th Cir. 2011) (quoting *W. Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981)). Mere  
 22 “conclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to  
 23 dismiss.” *Adams v. Johnson*, 355 F.3d 1179, 1183 (9th Cir. 2004); *accord Iqbal*, 556 U.S. at 678.  
 24 Furthermore, “a plaintiff may plead [him]self out of court” if he “plead[s] facts which establish  
 25 that he cannot prevail on his . . . claim.” *Weisbuch v. Cnty. of L.A.*, 119 F.3d 778, 783 n.1 (9th Cir.  
 26 1997) (quoting *Warzon v. Drew*, 60 F.3d 1234, 1239 (7th Cir. 1995)).

### 27 **B. Leave to Amend**

1 Under Rule 15(a) of the Federal Rules of Civil Procedure, leave to amend “shall be freely  
2 granted when justice so requires,” bearing in mind “the underlying purpose of Rule 15 to facilitate  
3 decision on the merits, rather than on the pleadings or technicalities.” *Lopez v. Smith*, 203 F.3d  
4 1122, 1127 (9th Cir. 2000) (en banc) (ellipses omitted). Generally, leave to amend shall be denied  
5 only if allowing amendment would unduly prejudice the opposing party, cause undue delay, or be  
6 futile, or if the moving party has acted in bad faith. *Leadsinger, Inc. v. BMG Music Publ’g*, 512  
7 F.3d 522, 532 (9th Cir. 2008).

### 8 **III. DISCUSSION**

9 The contentions in Defendant’s motion fall into two categories: arguments that apply to all  
10 causes of action, and arguments that apply only to specific causes of action.

11 As to the first category, Defendant contends (1) that Plaintiff’s claims fail because  
12 California law does not apply to conduct that has no connection to California, (2) that Plaintiff can  
13 not bring claims for products that he did not purchase, and (3) that Plaintiff has failed to allege  
14 facts sufficient to warrant relief.

15 As to the second category, Defendant contends (1) that Plaintiff’s express warranty claim  
16 fails because Plaintiff did not provide pre-suit notice, (2) that Plaintiff can not seek equitable relief  
17 under the UCL, FAL, CLRA, and doctrine of unjust enrichment, and (3) that Plaintiff has failed to  
18 satisfy the heightened pleading standards for his claims sounding in fraud.

19 The Court addresses these categories in turn.

#### 20 **A. Arguments Pertaining to All Causes of Action**

##### 21 **1. Putative Classes and Application of California Law**

22 Defendant’s argument that Plaintiff can not bring a nationwide class action on behalf of  
23 non-California residents proceeds in two parts. First, Defendant contends that Plaintiff can not  
24 assert “claims under the CLRA, UCL, and FAL” on behalf of “non-California residents,” because  
25 these California statutes do not apply to conduct which occurs outside California. *Id.* at 5.

26 Plaintiff, however, does not assert his CLRA, UCL, and FAL claims on behalf of non-  
27 California residents. Rather, Plaintiff brings these claims “individually and on behalf of the

1 proposed Subclass,” Compl. ¶¶ 50, 58, 65, which the complaint expressly defines as all persons  
 2 “who purchased the Octopus Products in California,” *id.* ¶ 17. Hence, as Defendant acknowledges  
 3 in its Reply, whether or not the CLRA, UCL, and FAL applies to conduct outside of California is  
 4 irrelevant: “Plaintiff [has] limit[ed] his CLRA, UCL, and FAL claims to a California subclass.”  
 5 Reply at 1–2. Consequently, Defendant’s motion to dismiss Plaintiff’s CLRA, UCL, and FAL  
 6 claims insofar as they seek relief on behalf of non-California residents is DENIED.

7 Second, Defendant argues that Plaintiff’s remaining claims “fail under California’s  
 8 governmental interests test.” Mot. at 5. According to Defendant, under *Mazza v. American*  
 9 *Honda Motor Co., Inc.*, 666 F.3d 581 (9th Cir. 2012), “each foreign state has an interest in  
 10 applying its law to transactions within its borders.” Mot. at 5 (citing 666 F.3d at 593). Thus, “if  
 11 California law were applied to [a nationwide] class, foreign states would be impaired in their  
 12 ability to calibrate liability to foster commerce.” 666 F.3d at 593. Accordingly, in *Mazza*, the  
 13 Ninth Circuit reversed the district court’s decision to certify a nationwide class, and concluded  
 14 that, “[u]nder the facts and circumstances of this case,” certain choice-of-law rules dictated that  
 15 “each class member’s consumer protection claim should be governed by the consumer protection  
 16 laws of the jurisdiction in which the transaction took place.” *Id.* at 594.

17 Defendant’s reliance upon *Mazza* is unavailing. This Court has consistently declined to  
 18 apply *Mazza* at the motion to dismiss stage to strike nationwide class allegations. As the Court  
 19 explained in *Brazil v. Dole Foods Co., Inc.*, 2013 WL 5312418, \*11 (N.D. Cal. Sept. 23, 2013),  
 20 another food mislabeling case, “the Ninth Circuit’s opinion in *Mazza*—which was itself decided at  
 21 the class certification stage and not on a motion to dismiss—depended heavily on a detailed  
 22 choice-of-law analysis that compared how various states’ consumer protection laws applied to the  
 23 facts of the plaintiffs’ claims.” Defendants in *Dole* presented no such choice of law analysis in  
 24 their motion to dismiss briefing. “Absent the sort of detailed choice-of-law analysis that guided  
 25 the Ninth Circuit in *Mazza*,” the Court was unable in *Dole* to determine . . . whether California’s  
 26 choice-of-law rules apply to bar all, some, or none of [plaintiff’s] class claims.” *Id.*; *see also Doe*  
 27 *v. Successfulmatch.com*, 2014 WL 1494347, \*7 (N.D. Cal. Apr. 16, 2014) (following *Dole* and

1 stating that “numerous other courts within the Ninth Circuit . . . have declined, even  
 2 after *Mazza*, to conduct the choice-of-law analysis at the pleading stage.”); *Werdebaugh v. Blue*  
 3 *Diamond Growers*, 2013 WL 5487236, \*15–\*16 (N.D. Cal. Oct. 2, 2013) (same).

4 As in *Dole*, Defendant’s briefing does not include a choice of law analysis, and there is no  
 5 evidence in the record that the conflict between California’s law and foreign law “is so severe as  
 6 to preclude applying California law to [Plaintiff’s nationwide] class claims.” *Id.* at \*16. Thus,  
 7 consistent with this Court’s prior decisions, the Court declines to dismiss Plaintiff’s nationwide  
 8 class action claims at this time. Defendant’s motion to dismiss Plaintiff’s claims because Plaintiff  
 9 can not assert them on behalf of a nationwide class is DENIED without prejudice.

## 10 **2. Substantial Similarity of Products**

11 Next, Defendant claims that Plaintiff has improperly grouped Defendant’s Octopus  
 12 Products—Octopus in Garlic, Octopus in Olive Oil, Octopus in Pickled Sauce, and Octopus in Hot  
 13 Sauce—together. According to Defendant, Plaintiff does not have standing to assert “claims for . .  
 14 . products [that] he did not purchase.” Mot. at 10. Consequently, Plaintiff may be able to assert  
 15 his claims against some, but not all, of Defendant’s Octopus Products.

16 Defendant’s arguments fail for two reasons. First, paragraph 8 of the complaint defines  
 17 Octopus Products as including the four varieties described above. Compl. ¶ 8. Next, paragraph 11  
 18 states that “Plaintiff purchased [Defendant’s] Octopus Products from Amazon.com,” and that “he  
 19 would not have purchased [Defendant’s] Octopus Products . . . if he had known that they  
 20 contained squid instead of octopus.” *Id.* ¶ 11. Taking these allegations in the “light most  
 21 favorable to” Plaintiff, which the Court must do on a motion to dismiss, it is plausible that Plaintiff  
 22 purchased all four types of Octopus Products. *Manzarek*, 519 F.3d at 1031. Thus, Defendant’s  
 23 argument—that Plaintiff does not have standing to assert claims for products that he did not  
 24 purchase—lacks merit.

25 Second, even if Plaintiff only purchased one or two types of Octopus Products,  
 26 Defendant’s contentions would still be unavailing. The Ninth Circuit has never held that a  
 27 plaintiff must buy every product in a product line in order to have standing to bring a class action

1 lawsuit. Instead, as the district court explained in *Miller v. Ghirardelli Chocolate Co.*, 912 F.  
2 Supp. 2d 861, 869 (N.D. Cal. 2012), “[t]he majority of the courts that have carefully analyzed the  
3 question hold that a plaintiff may have standing to assert claims for unnamed class members based  
4 on products he or she did not purchase so long as the products and alleged misrepresentations are  
5 substantially similar.” The *Miller* court went on to note that “substantial similarity” could be  
6 ascertained by examining “product composition” and “whether the alleged misrepresentations are  
7 sufficiently similar across product[s].” *Id.*

8 Consistent with *Miller*, this Court has “applied the ‘substantial similarity’ approach when  
9 analyzing standing challenges in the food-misbranding context.” *Brazil*, 2013 WL 5312418, \*7;  
10 *see also id.* (citing cases). As the Court has explained, “the entire point of the substantially similar  
11 approach” is to serve two goals: to “ensure that the plaintiff is seeking to represent only those  
12 individuals who have suffered essentially the same injury as the plaintiff,” and to “recognize[] that  
13 the definition of the plaintiff’s injury is not so narrow as to encompass only the exact set of  
14 circumstances that led to the plaintiff’s suit.” *Id.* (internal quotation marks omitted).

15 In the instant case, the same Defendant manufactures all of the Octopus Products. The  
16 product packaging for the Octopus Products is substantially similar. According to Plaintiff,  
17 Defendant has implemented a common scheme to use squid rather than octopus. Plaintiff further  
18 alleges that “due to similarities in texture, squid can easily be substituted for octopus without the  
19 consumer being able to tell the difference[,] *particularly when sold in a sauce like garlic sauce or*  
20 *marinara sauce.*” Compl. ¶ 7 (emphasis added). All four of the Octopus Products—Octopus in  
21 Garlic, Octopus in Olive Oil, Octopus in Pickled Sauce, and Octopus in Hot Sauce—are sold in  
22 some type of sauce. Considering these circumstances, the Court finds that the Octopus Products  
23 are substantially similar to one another. Accordingly, Defendant’s motion to dismiss Plaintiff’s  
24 causes of action insofar as they pertain to Octopus Products which Plaintiff did not purchase is  
25 DENIED.

### 26 **3. Facts Sufficient to Warrant Relief**

27 Defendant next contends that Plaintiff has not alleged facts sufficient to merit relief.

1 Defendant's makes three specific arguments. First, "Plaintiff has not alleged . . . that Amazon is a  
2 pass-through distributor of [Octopus Products] such that representations made on the Amazon  
3 website can be attributed to [Defendant]." Mot. at 6. Second, Plaintiff "fails to provide facts  
4 showing when he purchased" the Octopus Products, "so any claims may be barred by the  
5 applicable statute of limitations." *Id.* Third, Plaintiff alleges that "independent DNA testing"  
6 demonstrated that Defendant used squid instead of octopus. According to Defendant, "[a] mere  
7 reference to a test result, without more, is devoid of the factual allegations required by the federal  
8 pleading standards." *Id.* at 6–7.

9 Defendant's first two arguments can be addressed in short order. As Plaintiff points out,  
10 Plaintiff did "not rely [up]on representations made on Amazon's website." Opp'n at 5. Plaintiff  
11 purchased the Octopus Products from Amazon, but Plaintiff "relied [up]on [Defendant's]  
12 representation on the box that the product contained octopus." *Id.*; see also Compl. ¶ 8 (describing  
13 how Octopus Products are packaged in boxes and showing pictures of the box for each type of  
14 Octopus Product). Defendant's argument as to representations made on Amazon's website is  
15 therefore inapposite.

16 Next, under Federal Rule of Civil Procedure 8(a)(2), Plaintiff's complaint must, in general,  
17 provide "a short and plain statement of the claim showing that the pleader is entitled to relief."  
18 Fed. R. Civ. P. 8(a)(2). Based on the parties' briefing and the Court's research, the case law is  
19 unclear as to whether Rule 8(a)(2) requires Plaintiff to state the time period that he purchased the  
20 Octopus Products. Moreover, in Defendant's Reply, Defendant focuses entirely upon Plaintiff's  
21 citation to "independent DNA testing." Finally, as discussed below, Plaintiff failure to provide  
22 detail on when he purchased an Octopus Product is fatal for Plaintiff's negligent misrepresentation  
23 and fraud claims, because these claims are subject to Federal Rule of Civil Procedure 9(b).  
24 Federal Rule of Civil Procedure 9(b) imposes heightened pleading requirements, which includes a  
25 requirement that plaintiffs specify when they purchased a certain product. For all of these reasons,  
26 for Plaintiff's causes of action subject to Rule 8(a)(2) and not Rule 9(b), the Court need not reach  
27 the issue of whether Plaintiff's failure to specify when he purchased the Octopus Products

1 warrants dismissal.

2 Finally, Defendant's complaints about "[i]ndependent DNA testing," Compl. ¶ 2, is  
3 essentially an argument that Plaintiff should have provided more information: "[t]here are no  
4 allegations" in the complaint "of when this testing was done, who performed the testing, what  
5 were the results of the testing, where the testing took place, or the type of equipment or scientific  
6 method used," Reply at 5. Plaintiff, for instance, does not state whether "the testing . . . followed  
7 the protocol established by the U.S. Food and Drug Administration ['FDA'] for DNA testing of  
8 seafood." *Id.*

9 In support of its position, Defendant relies entirely upon the U.S. Supreme Court's  
10 decisions in *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662  
11 (2009), and Ninth Circuit opinions interpreting these two cases. *See, e.g.*, Reply at 5. *Twombly*  
12 and *Iqbal*, however, are inapposite to the instant case.

13 As the U.S. Supreme Court has explained, "[t]wo working principles underlie our  
14 decision[s]" in *Twombly* and *Iqbal*. 556 U.S. at 678. "First, the tenet that a court must accept as  
15 true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare  
16 recitals of the elements of a cause of action, supported by mere conclusory statements, do not  
17 suffice." *Id.* "Second, only a complaint that states a plausible claim for relief survives a motion to  
18 dismiss. Determining whether a complaint states a plausible claim for relief will . . . be a context-  
19 specific task that requires the reviewing court to draw on its judicial experience and common  
20 sense." *Id.* (citation omitted).

21 The U.S. Supreme Court applied these principles in *Twombly* to dismiss plaintiffs'  
22 complaint, as plaintiffs' complaint contained "merely legal conclusions" rather than plausible  
23 factual allegations of an antitrust conspiracy. 550 U.S. at 564. Similarly, the U.S. Supreme Court  
24 dismissed the complaint in *Iqbal* because plaintiff had simply made "bare assertions" which  
25 "amount[ed] to nothing more than a formulaic recitation of the elements of a constitutional  
26 discrimination claim." 556 U.S. at 681. In accord with *Twombly* and *Iqbal*, the Ninth Circuit has  
27 held that a "court need not . . . accord an assumption of truthfulness to *legal conclusions* that are

1 not supported by factual allegations in the Complaint or that are contradicted by documents  
2 referred to in the Complaint.” *Colony Cove Properties, LLC v. City of Carson*, 640 F.3d 948, 957  
3 (9th Cir. 2011) (emphasis added).

4 However, in the instant case, Plaintiff’s allegations are not legal conclusions, and the  
5 complaint does not simply recite the elements of a cause of action. Rather, the complaint alleges  
6 that “[i]ndependent DNA testing determined that [Defendant’s] Octopus Products are actually  
7 jumbo squid and not octopus.” Compl. ¶ 2. This is a factual assertion, not a legal conclusion  
8 disguised as a factual assertion. Put another way, whether a product labeled as “Octopus” contains  
9 squid instead of octopus is a question of fact, not a question of law, and asserting that DNA testing  
10 found that the Octopus Products contained squid is a plausible factual allegation.

11 As the U.S. Supreme Court explained in *Twombly*, “[a]sking for plausible grounds to infer  
12 [illegal conduct] does not impose a probability requirement at the pleading stage; it simply calls  
13 for enough fact to raise a reasonable expectation that discovery will reveal evidence of  
14 illegal[ity].” 550 U.S. at 556. “[A] well-pleaded complaint may proceed even if it strikes a savvy  
15 judge that actual proof of those facts [in the complaint] is improbable, and that a recovery is very  
16 remote and unlikely.” *Id.* (internal quotation marks omitted). Here, Plaintiff’s statements about  
17 DNA testing are “plausible on their face,” and would, if true, entitle Plaintiff to relief. *Blantz v.*  
18 *Cal. Dep’t of Corr. & Rehab., Div. of Corr. Health Care Servs.*, 727 F.3d 917, 923 (9th Cir.  
19 2013).

20 As a final point, Defendant’s argument regarding whether the independent DNA testing in  
21 this case comports with FDA standards is unavailing. Such questions are inquiries that the parties  
22 should explore in discovery. Dismissal, however, is not warranted. Accordingly, Defendant’s  
23 motion to dismiss Plaintiff’s complaint for failing to allege facts sufficient to warrant relief is  
24 DENIED.

## 25 **B. Arguments Pertaining to Specific Causes of Action**

### 26 **1. Pre-Suit Notice (breach of express warranty cause of action)**

27 Plaintiff alleges that Defendant “expressly warranted that its Octopus Products contained  
28

1 octopus”—a warranty that Defendant breached when it used squid instead of octopus. Compl. ¶  
 2 25. Defendant moves to dismiss Plaintiff’s express warranty claim because Plaintiff failed “to  
 3 provide pre-suit notice of any alleged breach.” Mot. at 12.

4 In general, California law requires buyers to provide sellers with pre-suit notice before  
 5 bringing a breach of express warranty claim. Cal. Com. Code § 2607(3)(A). However, this notice  
 6 requirement does not apply if “injured consumers” assert a breach of express warranty claim  
 7 “against manufacturers with whom they have not dealt.” *Greenman v. Yuba Power Prods., Inc.*,  
 8 377 P.2d 897, 900 (Cal. 1963). A car buyer need not, for instance, provide pre-suit notice to the  
 9 manufacturer if the car was purchased at a third party dealership. *Mui Ho v. Toyota Motor Corp.*,  
 10 931 F. Supp. 2d 987, 994–95 (N.D. Cal. 2013).

11 Here, Plaintiff alleges that he purchased an Octopus Product from a third party retailer,  
 12 Amazon. Compl. ¶ 11. Thus, under *Greenman* and *Mui Ho*, Plaintiff did not need to provide  
 13 Defendant pre-suit notice. Indeed, Defendant acknowledges this point in its Reply, and concedes  
 14 that its arguments regarding pre-suit notice are unavailing. *See* Reply at 8 n.2 (noting that,  
 15 because Plaintiff purchased an Octopus Product from a third party, Defendant “withdraws its  
 16 argument that pre-suit notice is required”). Accordingly, Defendant’s motion to dismiss Plaintiff’s  
 17 breach of express warranty claim is DENIED.

18 **2. Equitable Relief (CLRA, UCL, FAL, and unjust enrichment causes of action)**

19 Next, Defendant asserts that Plaintiff’s CLRA, UCL, FAL, and unjust enrichment claims  
 20 fail for two reasons. First, Defendant argues that Plaintiff does not have “standing to seek  
 21 injunctive relief” under these causes of action because Plaintiff does not allege that he “intends to  
 22 purchase [Defendant’s] Octopus Products again.” Reply at 3. Second, Defendant argues that  
 23 Plaintiff can not seek equitable relief, including an injunction, under these causes of action  
 24 because “an adequate remedy exists at law.” Mot. at 11. The Court need not address Defendant’s  
 25 first argument—standing to seek future injunctive relief—because, as discussed below, the Court  
 26 finds that Plaintiff has an adequate remedy at law, and thus can not seek an injunction at all.

27 In seeking redress for a wrong, a litigant may obtain equitable or legal remedies. The

1 “traditional” equitable remedy is an injunction. *eBay v. MercExchange, L.L.C.*, 547 U.S. 388, 390  
 2 (2006). The “traditional” legal remedy is monetary damages. *Curtis v. Loether*, 415 U.S. 189,  
 3 196 (1974).

4 As this Court has stated, “[a] plaintiff seeking equitable relief in California must establish  
 5 that there is no adequate remedy at law available.” *Philips v. Ford Motor Co.*, 2015 WL 4111448,  
 6 \*16 (N.D. Cal. July 7, 2015). Similarly, in *In re Ford Tailgate Litigation*, 2014 WL 1007066, \*5  
 7 (N.D. Cal. Mar. 12, 2014), the district court dismissed certain equitable relief claims and noted  
 8 that, where an equitable relief claim “relies upon the same factual predicates as a plaintiff’s legal  
 9 causes of action, it is not a true alternative theory of relief but rather is duplicative of those legal  
 10 causes of action.” These statements in *Philips* and *In re Ford* are consistent with well-established  
 11 U.S. Supreme Court and Ninth Circuit precedent: “it is axiomatic that a court should determine the  
 12 adequacy of a remedy in law before resorting to equitable relief.” *Franklin v. Gwinnett Cnty. Pub.*  
 13 *Sch.*, 503 U.S. 60, 75–76 (1992); *accord Mort v. United States*, 86 F.3d 890, 892 (9th Cir. 1996)  
 14 (“It is a basic doctrine of equity jurisprudence that courts of equity should not act when the  
 15 moving party has an adequate remedy at law.”).

16 In the instant case, Plaintiff seeks only equitable relief under the CLRA, UCL, FAL, and  
 17 doctrine of unjust enrichment. Indeed, although plaintiff may seek equitable and legal relief under  
 18 the CLRA, Plaintiff in the instant case “only seeks injunctive relief” under the CLRA. Compl. ¶  
 19 56. Next, “[a]part from civil penalties, which are not at issue here, the UCL and FAL provide for  
 20 only equitable relief.” *Duttweiler v. Triumph Motorcycles (Am.) Ltd.*, 2015 WL 4941780 (N.D.  
 21 Cal. Aug. 19, 2015). Finally, “unjust enrichment applies only in the absence of an adequate  
 22 remedy at law.” *Vicuna v. Alexia Foods, Inc.*, 2012 WL 1497507 (N.D. Cal. Apr. 27, 2012).

23 Plaintiff’s request for equitable relief under the CLRA, UCL, FAL, and doctrine of unjust  
 24 enrichment, however, is unavailing because Plaintiff has an adequate remedy at law. The parties  
 25 do not dispute that Plaintiff’s other five causes of action—for breach of express warranty, breach  
 26 of the implied warranty of fitness, breach of the implied warranty of merchantability, negligent  
 27 misrepresentation, and fraud—allow Plaintiff to recover monetary damages and thus provide

1 Plaintiff a remedy at law. Plaintiff, moreover, does not contend that these five causes of action  
2 provide him an inadequate remedy. Thus, because Plaintiff’s CLRA, UCL, FAL, and unjust  
3 enrichment causes of action “rel[y] upon the same factual predicates as . . . [P]laintiff’s legal  
4 causes of action”—that Defendant used squid instead of octopus—they must be dismissed.

5 Plaintiff’s citation to *Hendricks v. Starkist Co.*, 30 F. Supp. 3d 917 (N.D. Cal. 2014),  
6 *Forcellati v. Hyland’s, Inc.*, 876 F. Supp. 2d 1155 (C.D. Cal. 2012), and *Keiholtz v. Superior*  
7 *Fireplace Co.*, 2009 WL 839076 (N.D. Cal. Mar. 20, 2009), is inapposite. Defendants in these  
8 three cases did not argue, and the district court did not consider, whether plaintiffs had an adequate  
9 remedy at law. In fact, in one of these cases—*Keiholtz*—plaintiffs did not even plead an adequate  
10 remedy at law. Plaintiffs instead asserted claims only for equitable relief under the UCL, CLRA,  
11 and doctrine of unjust enrichment. *Id.* at \*1.

12 Accordingly, because Plaintiff has an adequate remedy at law, Defendant’s motion to  
13 dismiss Plaintiff’s CLRA, UCL, FAL, and unjust enrichment claims is GRANTED. Plaintiff,  
14 however, shall have leave to amend, as amendment would not be futile. Under the CLRA, for  
15 instance, a plaintiff may only seek damages after providing defendant with 30 days “prefiling  
16 notice.” *Corra v. Energizer Holdings, Inc.*, 962 F. Supp. 2d 1207, 1219 (E.D. Cal. 2013). In the  
17 complaint, Plaintiff alleges that he sent Defendant a CLRA notice letter on May 11, 2016, and that  
18 Plaintiff “will amend this complaint to include a request for damages as permitted by” the CLRA.  
19 Compl. ¶ 55. Similarly, Plaintiff may be able to distinguish his UCL, FAL, and unjust enrichment  
20 claims by demonstrating that they are not rooted in a common factual predicate as Plaintiff’s other  
21 causes of action. Plaintiff’s CLRA, UCL, FAL, and unjust enrichment claims are DISMISSED  
22 WITHOUT PREJUDICE.

### 23 **3. Rule 9(b) (fraud and negligent misrepresentation causes of action)**

24 Claims sounding in fraud or mistake are subject to the heightened pleading requirements of  
25 Federal Rule of Civil Procedure 9(b), which require that a plaintiff alleging fraud “state with  
26 particularity the circumstances constituting fraud.” Fed. R. Civ. P. 9(b); *see also Kearns v. Ford*  
27 *Motor Co.*, 567 F.3d 1120, 1124 (9th Cir. 2009). To satisfy Rule 9(b)’s heightened pleading

1 standard, the allegations must be “specific enough to give defendants notice of the particular  
2 misconduct which is alleged to constitute the fraud charged so that they can defend against the  
3 charge and not just deny that they have done anything wrong.” *Semegen v. Weidner*, 780 F.2d  
4 727, 731 (9th Cir. 1985). Thus, claims sounding in fraud must allege “an account of the time,  
5 place, and specific content of the false representations as well as the identities of the parties to the  
6 misrepresentations.” *Swartz v. KPMG LLP*, 476 F.3d 756, 764 (9th Cir. 2007) (per curiam)  
7 (internal quotation marks omitted).

8 Here, Plaintiff’s first three causes of action, for breach of express warranty, breach of the  
9 implied warranty of merchantability, and breach of the implied warranty of fitness do not sound in  
10 fraud. Plaintiff’s next four causes of action, under the UCL, FAL, CLRA, and the doctrine of  
11 unjust enrichment, have already been dismissed. Thus, only Plaintiff’s eighth and ninth causes of  
12 action, for negligent misrepresentation<sup>1</sup> and fraud, sound in fraud and are subject to Rule 9(b)’s  
13 heightened pleading requirements.

14 As noted above, under Rule 9(b), Plaintiff must allege an account of the (1) time, (2) place,  
15 (3) the specific content of the false representations, and (4) the identities of the parties to the  
16 misrepresentations. *Swartz*, 476 F.3d at 764. The complaint appears to satisfy at least some of  
17 these requirements. As to the content of the misrepresentations, for example, the complaint  
18 alleges that Defendant’s Octopus Products are mislabeled—the box states that they are octopus  
19 when they are squid.

20 However, the complaint suffers from a critical flaw: it does not specify when Plaintiff saw  
21 the alleged misrepresentations, when Plaintiff purchased the Octopus Products, and when  
22 Defendant began using squid instead of octopus in its Octopus Products. Instead, the complaint  
23 states only that Plaintiff purchased the Octopus Products during the “class period,” without  
24 providing dates defining this “class period” in the complaint. Compl. ¶ 11.

25

26 <sup>1</sup> Although “[t]he Ninth Circuit has not yet decided whether Rule 9(b)’s heightened pleading  
27 standard applies to a claim for negligent misrepresentation, . . . most district courts in California  
28 hold that it does.” *Villegas v. Wells Fargo Bank, N.A.*, 2012 WL 4097747, \*7 (N.D. Cal. Sept. 17,  
2012).

United States District Court  
Northern District of California

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

In a similar context, this Court dismissed a fraud claim in *In re Anthem, Inc. Data Breach Litigation*, 2016 WL 589760, \*23 (N.D. Cal. Feb. 14, 2016). In *In re Anthem*, a data privacy case, plaintiffs had failed to provide information on when certain data “privacy notices were received or when certain [privacy] statements were made” by defendants. *Id.* Thus, it was not possible to “establish that [p]laintiffs relied upon or were deceived by promises that [d]efendants made to [p]laintiffs prior to the data breach.” *Id.*

Consistent with *In re Anthem*, Defendant’s motion to dismiss Plaintiff’s negligent misrepresentation and fraud causes of action is GRANTED. Plaintiff, however, shall have leave to amend. It is possible that, after amendment, Plaintiff will be able to allege facts sufficient to satisfy Rule 9(b). Accordingly, Plaintiff’s negligent misrepresentation and fraud causes of action are DISMISSED WITHOUT PREJUDICE.

**IV. CONCLUSION**

For the foregoing reasons, Defendant’s motion to dismiss is GRANTED in part and DENIED in part. In particular:

1. Defendant’s motion to dismiss Plaintiff’s first cause of action, for breach of express warranty, is DENIED. Thus, Plaintiff’s first cause of action for breach of express warranty survives dismissal.
2. Defendant did not specifically move to dismiss Plaintiff’s second cause of action, for breach of the implied warranty of merchantability. Thus, Plaintiff’s second cause of action for breach of the implied warranty of merchantability therefore survives dismissal.
3. Defendant did not specifically move to dismiss Plaintiff’s third cause of action, for breach of the implied warranty of fitness. Thus, Plaintiff’s second cause of action for breach of the implied warranty of fitness therefore survives dismissal.
4. Defendant’s motion to dismiss Plaintiff’s fourth cause of action, for violation of the CLRA, is GRANTED with leave to amend.
5. Defendant’s motion to dismiss Plaintiff’s fifth cause of action, for violation of the UCL, is GRANTED with leave to amend.

United States District Court  
Northern District of California

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

6. Defendant’s motion to dismiss Plaintiff’s sixth cause of action, for violation of the FAL, is GRANTED with leave to amend.

7. Defendant’s motion to dismiss Plaintiff’s seventh cause of action, for unjust enrichment, is GRANTED with leave to amend.

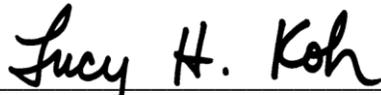
8. Defendant’s motion to dismiss Plaintiff’s eighth cause of action, for negligent misrepresentation, is GRANTED with leave to amend.

9. Defendant’s motion to dismiss Plaintiff’s ninth cause of action, for fraud, is GRANTED with leave to amend.

Should Plaintiff elect to file an amended complaint curing the deficiencies identified herein, Plaintiff shall do so within thirty days of this Order. Failure to meet this thirty-day deadline or failure to cure the deficiencies identified herein will result in a dismissal with prejudice of the deficient claims or theories. Plaintiffs may not add new causes of actions or parties without leave of the Court or stipulation of the parties pursuant to Federal Rule of Civil Procedure 15.

**IT IS SO ORDERED.**

Dated: September 8, 2016.



\_\_\_\_\_  
LUCY H. KOH  
United States District Judge