UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

DARREN CLEVENGER and DAVID BLOOM, individually and on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

WELCH FOODS INC., PIM BRANDS, INC., and DOES 1 through 25, inclusive,

Defendants.

Case No.: SACV 20-01859-CJC (JDEx)

ORDER GRANTING DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS [Dkt. 103]

I. INTRODUCTION

In this class action lawsuit, Plaintiffs Darren Clevenger and David Bloom allege that Defendants Welch Foods Inc. ("Welch"), PIM Brands, Inc. ("PIM"), and unnamed Does include nonfunctional "slack-fill" in boxes of their Welch's Reduced Sugar Fruit Snacks, Fruit 'n Yogurt Snacks, and certain boxes of Welch's Fruit Snacks (collectively,

the "Subject Products") in violation of California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code §§ 17200–10, and Consumer Legal Remedies Act ("CLRA"), Cal. Civ. Code §§ 1750–84. (*See* Dkt. 74 [Third Amended Complaint, hereinafter "TAC"].) Plaintiffs seek restitution under the UCL and restitution and monetary damages under the CLRA. (*Id.* ¶¶ 69, 77.) Now before the Court is Defendants' motion for judgment on the pleadings. (Dkt. 103 [Notice of Motion and Motion for Judgment on the Pleadings as to Equitable Claims, hereinafter "Mot."].) For the following reasons, Defendants' motion is **GRANTED**.[1]

II. BACKGROUND

Welch manufactures and sells boxes containing multiple pouches of fruit snacks, which PIM packages and distributes. (TAC ¶¶ 8, 14.) Plaintiffs allege that the Fruit n' Yogurt Snacks and Fruit Snacks with Reduced Sugar are sold in boxes containing only eight pouches, but other, non-premium varieties of Welch's Fruit Snacks are sold in same-sized boxes containing ten pouches. (*Id.* ¶ 5.) They further allege that boxes of Welch's Reduced Sugar Snacks sold at the department store Target contain only eighteen pouches, while same-sized boxes of Regular Fruit Snacks contain twenty-two pouches. (*Id.*) Finally, they allege that boxes of Welch's Fruit Snacks sold at the big-box retail store Costco contain only eighty or ninety pouches, but according to Plaintiffs can hold at least 110 pouches. (*Id.* ¶ 19.)

Plaintiffs assert that this practice of "substantially underfill[ing]" boxes violates the UCL and the CLRA. (*Id.* ¶ 18.) The UCL claims are based on violations of both the federal Food Drug and Cosmetic Act ("FDCA"), C.F.R. § 100.100, and California's Fair Packaging and Labeling Act ("FPLA"), Cal. Bus. & Prof. Code § 12606(b), which

[1] Having read and considered the papers presented by the parties, the Court finds this matter appropriate for disposition without a hearing. *See* Fed. R. Civ. P. 78; Local Rule 7-15. Accordingly, the hearing set for December 19, 2022, at 1:30 p.m. is hereby vacated and off calendar.

prohibit "misleading" food containers. Cal. Bus. & Prof. Code § 12606(b). Both acts provide that a container is misleading when it contains "nonfunctional slack fill" and "does not allow the consumer to fully view its contents." 21 C.F.R. § 100.100(a); Cal. Bus. & Prof. Code § 12606(b). "Slack fill" is defined as the "difference between the actual capacity of a container and the volume of product contained therein." 21 C.F.R. § 100.100(a); Cal. Bus. & Prof. Code § 12606(b). It is "nonfunctional" when the package is filled to "substantially less than its capacity for reasons other than" a list of enumerated exceptions. 21 C.F.R. § 100.100(a); Cal. Bus. & Prof. Code § 12606.2(c).

III. LEGAL STANDARD

"After the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings." Fed. R. Civ. P. 12(c). A Rule 12(c) motion asserting that a plaintiff has failed to state a claim, or that a defendant has failed to state a defense, is governed by the same standard as a Rule 12(b)(6) motion to dismiss. *See United States ex rel. Cafasso v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1054 n.4 (9th Cir. 2011); *Webb v. Trader Joe's Co.*, 999 F.3d 1196, 1201 (9th Cir. June 4, 2021) (explaining that motions for judgment on the pleadings are "functionally identical" to Rule 12(b)(6) motions). "Judgment is properly granted when, taking all the allegations in the pleadings as true, the moving party is entitled to judgment as a matter of law." *S.F. Taxi Coal. v. City & County of San Francisco*, 979 F.3d 1220, 1223 (9th Cir. 2020) (cleaned up). In deciding a motion for judgment on the pleadings, courts accept as true all of the nonmovant's factual allegations and construe them in the light most favorable to that party. *See Gen. Conf. Corp. of Seventh-Day Adventists v. Seventh-Day Adventist Congregational Church*, 887 F.2d 228, 230 (9th Cir. 1989).

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IV. DISCUSSION

Defendants contend that Plaintiffs' UCL claim and claim for restitution under the CLRA must be dismissed because Plaintiffs cannot allege that they lack an adequate remedy at law due to the availability of monetary damages under the CLRA. The Court agrees.

A. *Sonner v. Premier Nutrition Corp.*

Defendants first argue that Plaintiffs' complaint must allege that they lack an adequate remedy at law in order for Plaintiffs to bring claims for equitable relief under the UCL or CLRA. (*See* Mot. at 7.) This argument rests primarily on the Ninth Circuit's decision in *Sonner v. Premier Nutrition Corp.*, 971 F.3d 834 (9th Cir. 2020). In that case, the plaintiff had originally sought injunctive relief, restitution, and damages, but, on the eve of trial, voluntarily abandoned her claim for damages in order "to try the class action as a bench trial rather than to a jury." *Id.* The district court, applying California law, granted the defendant's motion to dismiss. *Id.* at 838.

The Ninth Circuit affirmed the dismissal, but on different grounds. *Id.* at 844. Relying on *Guaranty Trust Co. of New York v. York*, 326 U.S. 99 (1945), the panel held that "the 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." *Sonner*, 971 F.3d at 844. Under those principles, 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.* The panel held that the plaintiff failed to make such a showing because the operative complaint did not "allege that Sonner lack[ed] an adequate legal remedy," and, "[m]ore importantly," the plaintiff conceded that she sought "the same sum in equitable restitution . . . as she

requested in damages to compensate her for the past harm." *Id.* In other words, the Ninth Circuit affirmed the district court's dismissal of the plaintiff's claims for restitution under the UCL and CLRA because an adequate remedy at law (i.e., money damages) was available. *See id.* at 837.

Sonner thus leaves little room for debate as to whether Plaintiffs must plead that they lack an adequate legal remedy in order to bring their claims for equitable relief. Plaintiffs nonetheless make numerous arguments about why that requirement is not applicable in this case. None of them has merit.

1. Waiver

First, Plaintiffs argue that Defendants have waived any objection to the Court's exercise of equity jurisdiction because they failed to raise the issue in any of their prior motions to dismiss. (*See* Dkt. 112 [Opposition Re: Notice of Motion and Motion for Judgment on the Pleadings as to Equitable Claims, hereinafter "Opp"] at 2–6.) But the cases Plaintiffs cite in support of their argument that "challenges to equity jurisdiction can be waived," (*id.* at 2), are inapposite. They either deal with the issue of whether challenges to equity jurisdiction are waived on appeal if not raised with the court below, or they arise in the context of arbitration agreements and deal with a defendant's waiver of the right to arbitrate after extensive motion practice before the court. Because "arbitration agreements are subject to general contract principles such as waiver," *Newirth by & through Newirth v. Aegis Senior Communities, LLC*, 931 F.3d 935, 940 (9th Cir. 2019), and contractual principles of waiver are not applicable in this case, the holdings are not instructive.

Plaintiffs' argument that the stage of the proceedings should bar Defendants' motion, (*see* Opp. at 5), is similarly unpersuasive. The Ninth Circuit in *Sonner* affirmed

dismissal of the plaintiffs' equitable claims at a far later stage in the case than this. *See Sonner*, 971 F.3d at 838 (granting dismissal of equitable claims on the eve of trial despite the fact that that "[f]or years, the litigation proceeded in the typical fashion," and the parties "took discovery, engaged in motion practice, and prepared for the looming jury trial"). This case only recently moved past the class certification stage. While Plaintiffs may be frustrated that Defendants did not raise this issue sooner, that is not a sufficient basis for finding that it has been waived.

2. Judicial Estoppel

Alternatively, Plaintiffs assert that Defendants are judicially estopped from challenging equity jurisdiction. (*See* Opp. at 6–9.) To invoke the doctrine of judicial estoppel, "a party's later position must be 'clearly inconsistent' with its earlier position." *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001) (citation omitted). The court must also inquire into whether "the party persuaded the court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled." *Id.* (cleaned up). Finally, the court must consider "whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *Id.* at 751.

The "inconsistent" position that Defendants have allegedly taken is that they "have engaged extensive discovery and law and motion practice regarding the UCL equitable claims (including dismissing the injunctive relief claims) all of which *a fortiori* require the court to have (and exercise) jurisdiction over the UCL claims." (Opp. at 7.) In other words, according to Plaintiffs, the Court could not have ruled on any of Defendants' prior motions if it lacked equity jurisdiction over the claims, and thus Defendants have "invoke[ed] the court's jurisdiction" and are now "trying to escape it when the case is not

going well . . . ." (*Id.* at 8.) In support, Plaintiff cites language from *Guzman v. Polaris Industries, Inc.*, 49 F.4th 1308 (9th Cir. 2022), stating that "[b]ecause the district court lacked equitable jurisdiction over [the plaintiff's] UCL claim, it could not" make any decision on the merits. *Id.* at 1314. But the *Guzman* court was simply stating that once a court has determined that it lacks equity jurisdiction, it cannot continue on to rule on the merits of the claim. Nothing in *Guzman* supports Plaintiffs' argument that because the Court has previously ruled on Defendants' motions to dismiss based on issues such as Plaintiffs' Article III standing to seek injunctive relief, Defendants are now taking an inconsistent position by asking the Court to grant their motion for judgment on the pleadings due to Plaintiffs' failure to plead an inadequate remedy at law. And nothing in the substantive legal arguments in Defendants' prior motions is clearly inconsistent with their stance in the instant motion; Defendants simply moved for dismissal on subject matter jurisdiction grounds, without addressing the Court's equitable jurisdiction.

3. Legal Relief

Plaintiffs also argue that federal law would classify the restitution they seek under the UCL as legal rather than equitable. (*See* Opp. at 10.) According to Plaintiffs, "*Sonner* did not consider whether federal law would deem the restitution under the UCL as legal or equitable. Rather *Sonner* observed that state law characterized the remedy as equitable and [the plaintiff] did 'not dispute' she only sought equitable, not legal, restitution and expressly disavowed all legal remedies." (*Id.* at 9.) But even if there was room for ambiguity in this area before, any question has since been settled by the Ninth Circuit, which stated in *Guzman* that "[t]he UCL provides only for equitable remedies." 49 F.4th at 1313; *see also Gibson v. Jaguar Land Rover N. Am., LLC*, 2020 WL 5492990, at *4 (C.D. Cal. Sept. 9, 2020) (holding that UCL claims are equitable because "[r]emedies under the UCL are limited to restitution and injunctive relief, and do not

include damages" and also dismissing CLRA restitution claim as seeking equitable relief).

4. Pleading in the Alternative

Finally, Plaintiffs argue that they are permitted to plead equitable remedies in the alternative. (*See* Opp. at 13.) But this argument has been explicitly rejected by numerous courts post-*Sonner*. *See, e.g.*, *In re Cal. Gasoline Spot Mkt. Antitrust Litig.*, 2021 WL 1176645, at *8 (N.D. Cal. Mar. 29, 2021) (collecting cases and holding that post-*Sonner*, plaintiff was not permitted to plead alternative claims for relief); *In re MacBook Keyboard Litig.*, 2020 WL 6047253, at *2 (N.D. Cal. Oct. 13, 2020) ("[T]his is not an election of remedies issue. The question is not whether or when Plaintiffs are required to choose between two available inconsistent remedies, it is whether equitable remedies are available to Plaintiffs at all. In other words, the question is whether Plaintiffs have adequately pled their claims for equitable relief . . ."). Under *Sonner*, "the issue is not whether a pleading may seek distinct forms of relief in the alternative, but rather whether a prayer for equitable relief states a claim if the pleading does not demonstrate the inadequacy of a legal remedy." *Sharma v. Volkswagen AG*, 524 F. Supp. 3d 891, 907 (N.D. Cal. 2021). Accordingly, Plaintiffs' argument that they may proceed on their claims for equitable relief in the alternative is unpersuasive.

5. Moore v. Mars Petcare US, Inc.

Plaintiffs also argue that *Moore v. Mars Petcare US, Inc.*, 966 F.3d 1007 (9th Cir. 2020) supports their contention that they are not barred from pleading equitable claims in the alternative or from seeking equitable relief when they have an adequate remedy at law. (*See* Opp. at 13–14.) In *Moore*, the Ninth Circuit held that the district court had improperly dismissed the plaintiffs' claims under California's False Advertising Law

("FAL"), UCL, and CLRA. While the court's holding rested on other issues, a footnote stated that "Defendants' argument that Plaintiffs cannot seek equitable relief under the UCL or FAL, given an adequate legal remedy under the CLRA, is foreclosed by statute" because "[t]he UCL, FAL and CLRA explicitly provide that remedies under each act are cumulative to each other." *Moore*, 966 F.3d at 1021 n.13.

But nearly all district courts to consider the question have found that "[t]he *Moore* footnote did not hold that federal courts were no longer required to apply the equitable principles as prescribed by the *Sonner* Court for the exercise of diversity jurisdiction." *Sharma*, 524 F. Supp. 3d at 907; *see also Fan v. Home Depot USA, Inc.*, 2022 WL 16964099, at *2 (E.D. Cal. Nov. 16, 2022) ("The *Moore* footnote was merely a statement of California law that has no bearing on the issue of federal equitable jurisdiction, as 'state law cannot expand or limit a federal court's equitable authority.'"); *Integritymessageboards.com v. Facebook, Inc.*, 2020 WL 6544411, at *4 (N.D. Cal. Nov. 6, 2020) ("[B]y its terms, the *Moore* footnote addresses only the scope of remedies available under California state law.").

In sum, Plaintiffs have not demonstrated any reason why the holding in *Sonner*, that they must plead a lack of adequate relief at law in order to proceed with their claims for equitable relief, should not apply in this case.

B. Inadequate Remedy at Law

In light of the foregoing, Plaintiffs "must establish that [they] lack[ ] an adequate remedy at law before securing equitable restitution" under their UCL and CLRA claims.

Sonner, 971 F.3d at 844. The Court must therefore analyze whether the TAC alleges that Plaintiffs lack an adequate remedy at law.[2]

"[I]n order to assert a claim for equitable restitution under the UCL in federal court, the complaint must allege that the plaintiff lacks an adequate legal remedy." *Alvardo v. Wal-Mart Assocs., Inc.*, 2020 WL 6526372, at *4 (C.D. Cal. Aug. 7, 2020). To do this, courts generally require plaintiffs seeking equitable relief to allege some facts suggesting that damages are insufficient to make them whole. *See, e.g.*, *Duttweiler v. Triumph Motorcycles (Am.) Ltd.*, 2015 WL 4941780, at *8 (N.D. Cal. Aug. 19, 2015); *Huu Nguyen v. Nissan N. Am., Inc.*, 2017 WL 1330602, at *5 (N.D. Cal. Apr. 11, 2017).

Nowhere in the TAC do Plaintiffs clearly allege facts suggesting that monetary damages would not make them whole. Nor do they even facially assert that the legal remedies they seek are inadequate to fully compensate them for Defendants' alleged misconduct. Instead, the TAC is "devoid of substantive allegations showing Plaintiffs' legal claims would not provide them an adequate remedy." *Drake v. Toyota Motor Corp.*, 2020 WL 7040125, at *13 (C.D. Cal. Nov. 23, 2020). Plaintiffs have therefore failed to satisfy the pleading requirements necessary to bring claims for equitable relief. As a result, Defendants' motion for judgment on the pleadings must be granted.

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[2] Plaintiffs assert that despite the Ninth Circuit's analysis in *Sonner* of whether the complaint alleged that Plaintiffs "lacked an adequate legal remedy," *id.* at 844, the proper standard is whether the remedy is "plain, adequate and complete" such that it is "as complete, practical and efficient as that which equity could afford," *Terrace v. Thompson*, 263 U.S. 197, 214 (1923). But the Court need not address this, because Plaintiff has failed to make the requisite showing under either standard.

C. Leave to Amend[3]

Plaintiffs request leave to amend if the Court grants Defendants' motion. (*See* Opp. at 18.) Under Federal Rule of Civil Procedure 15(a), a party may amend its pleading with the court's leave, which should be "freely give[n] . . . when justice so requires." Generally, the Ninth Circuit has a liberal policy favoring amendments and thus, leave to amend should be freely granted. *See, e.g.*, *DeSoto v. Yellow Freight Sys., Inc.*, 957 F.2d 655, 658 (9th Cir. 1992). But a court need not grant leave to amend if permitting a plaintiff to amend would be an exercise in futility. *See Rutman Wine Co. v. E. & J. Gallo Winery*, 829 F.2d 729, 738 (9th Cir. 1987) ("Denial of leave to amend is not an abuse of discretion where the pleadings before the court demonstrate that further amendment would be futile."). "An amendment is futile when 'no set of facts can be proved under the amendment to the pleadings that would constitute a valid and sufficient claim or defense.'" *Missouri ex rel. Koster v. Harris*, 847 F.3d 646, 656 (9th Cir. 2017) (citation omitted).

Plaintiffs have failed to put forth in their opposition any additional facts that they could allege to state a viable claim for equitable relief against Defendants. Plaintiffs instead make numerous legal arguments about why, based on the current facts in the TAC, they lack an adequate remedy at law. First, they argue that because their UCL claim is based solely on a statutory violation, their remedies for it are "more certain, prompt or efficient" than their remedies under the CLRA. (Opp. at 16 [quoting *Ostrovskaya v. St. John Knits, Inc.*, 2022 U.S. Dist LEXIS 100861, at *11 (C.D. Cal. March 31, 2022)].) In other words, because there are different elements required to

[3] In *Guzman*, the Ninth Circuit held that dismissal of a UCL claim due to lack of equitable jurisdiction "is necessarily without prejudice because the court does not reach the merits of the claims." 49 F.4th at 1313. The court reasoned that while a "federal court's pre-merits determination to withhold relief is binding on other federal courts," it is not binding on "courts outside the federal system that might properly exercise their own jurisdiction over the claim." *Id.* at 1314. Accordingly, Plaintiffs' UCL claim and claim for restitution under the CLRA will be dismissed without prejudice.

prove the UCL and CLRA claims, and the remedy for the UCL claim is more easily proven, the UCL claim offers relief that is more adequate and complete. *See Coleman v. Mondelez Int'l Inc.,* 554 F.Supp.3d 1055 (C.D. Cal. 2021). But these cases were decided before *Guzman*, in which the Ninth Circuit stated that despite the plaintiff's UCL and CLRA claims not being perfectly interchangeable due to the different statutes of limitations, there was still no support for the plaintiff's argument that the CLRA claim did not provide an adequate legal remedy. 49 F.4th at 1313 n.2. Thus, even though the CLRA claim was time-barred, the district court lacked equitable jurisdiction to hear the UCL claim. *Id.* at 1313. The *Guzman* court's emphasis on the relief that could possibly be afforded under a claim, as opposed to possible hurdles the plaintiff might face in achieving that relief, indicates that mere differences in proof between the claims does not make the CLRA remedy inadequate.

Plaintiffs also assert that "the restitution provided by the UCL may greatly exceed the damages available under the CLRA," because "[a]lthough Plaintiffs argue for a full recovery of their purchase price under both causes of action, there is a distinct possibility the UCL would provide for a full recovery whereas the 'damages' under the CLRA would be limited to the percentage of unlawful slack-fill in Defendants' fruit snacks." (Opp. at 16.) In other words, Plaintiffs concede that it is possible that they will recover the same amount in restitution under the UCL as they would in damages under the CLRA—i.e., the full purchase price.[4] They argue, however, that achieving an award of the full purchase price under the UCL would be simpler than achieving an award of the full purchase price in damages under the CLRA. But as discussed above, the fact that one remedy may be simpler or easier to obtain does not demonstrate that Plaintiffs lack an adequate remedy at law.

[4] Indeed, in their motion for class certification, Plaintiffs "assert[ed] [that] the same recovery would apply, in this case, under the UCL and the CLRA . . . ." (Dkt. 82 [Notice of Motion and Motion to Certify Class] at 23.)

In short, Plaintiffs have not "explain[ed] how the same amount of money for the exact same harm is inadequate or incomplete, and nothing in the record supports that conclusion." *Sonner*, 971 F.3d at 844. Plaintiffs cannot allege that they have an inadequate remedy at law when their claim for monetary damages under the CLRA seeks redress for the exact same harm, in the exact same amount, as their claims for restitution.

As a result, the Court finds that amendment would be futile. Based on the foregoing analysis, the Court does not see—and Plaintiffs have not provided—any possible set of facts that could demonstrate that Plaintiffs lack an adequate remedy at law. *See Slick v. CableCom, LLC*, 2022 WL 4181003, at *4 (N.D. Cal. Sept. 12, 2022) (denying leave to amend UCL claim because plaintiff would be unable to plead that legal remedy was inadequate); *Franckowiak v. Scenario Cockram USA, Inc.*, 2020 WL 9071697, at *5 (C.D. Cal. Nov. 30, 2020) (same). Accordingly, Plaintiffs' request for leave to amend is denied.

V. CONCLUSION

For the foregoing reasons, Defendants' motion for judgment on the pleadings is **GRANTED**.[5] Plaintiffs' UCL claim and claim for restitution under the CLRA are **DISMISSED without leave to amend,** but **without prejudice** to Plaintiffs bringing the claims in state court.

DATED: December 14, 2022

CORMAC J. CARNEY
UNITED STATES DISTRICT JUDGE

[5] Plaintiffs' request for judicial notice of Defendants' Petition for Permission to Appeal Pursuant to FRCP 23(f) is **DENIED AS MOOT**, as the Court did not need to rely on that document. (*See* Dkt. 113.)