UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 18-9166-GW(MAAx)	Date	May 8, 2019
Title	*Richard Sotelo v. Rawlings Sporting Goods Company, Inc.*		

Present: The Honorable	GEORGE H. WU, UNITED STATES DISTRICT JUDGE	
Javier Gonzalez	None Present	
Deputy Clerk	Court Reporter / Recorder	Tape No.

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
None Present	None Present

PROCEEDINGS: IN CHAMBERS - RULING ON DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S AMENDED CLASS ACTION COMPLAINT [39]

Attached hereto is the Court's Ruling on Defendant's Motion to Dismiss. The Court would DENY Defendant's Motion to Dismiss claims one, two and four of Plaintiff's FAC. The Court would GRANT Defendant's Motion to Dismiss claim three as to claims related to products other than the Rawlings 5150 bat, but DENY Defendant's Motion to Dismiss claim three as to the Rawlings 5150 bat. The Court would GRANT Defendant's Motion to Dismiss as to claim five with leave to amend. The Court would GRANT Defendant's Motion to Dismiss as to claim six without prejudice.

The Court sets a scheduling conference for May 30, 2019 at 8:30 a.m.

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Initials of Preparer JG

I. Background

A. Factual Background

Plaintiff Richard Sotelo ("Plaintiff" or "Sotelo"), on behalf of himself and all other similarly situated consumers, sues Defendant Rawlings Sporting Goods Co., Inc. ("Defendant" or 'Rawlings") for: (1) violation of the California Unfair Competition Law ("UCL"), California Business and Professional Code § 17200, *et seq.*; (2) violation of the California False Advertising Law ("FAL"), California Business and Professional Code § 17500, *et seq.*; (3) violation of the Consumers Legal Remedies Act ("CLRA"), California Civil Code § 1750, *et seq.*; (4) breach of express warranty; (5) breach of implied warranty; and (6) unjust enrichment. *See generally* Amended Class Action Complaint for Damages & Injunctive Relief ("FAC"), Docket No. 37. Plaintiff alleges the following relevant facts:

Plaintiff is a citizen of California who purchased a baseball bat from Defendant Rawlings which is a manufacturer, marketer and seller of sporting goods. *Id.* ¶¶ 3, 9, 10. Rawlings is headquartered in Missouri. *Id.* ¶ 9.

Rawlings manufactures, distributes and sells youth baseball bats that are differentiated in part based on their weight and size. *Id.* ¶ 2. One of the primary measurements for baseball bats is "weight drop," which is the difference between a bat's length in inches and weight in ounces.[1] *Id.* ¶ 16 ("Weight drop = bat length (in.) – bat weight (oz.)"). Typically, a higher weight drop number is appropriate for less experienced players because the bat feels lighter. *Id.* ¶¶ 15-16. Both the weight and the weight drop are important factors consumers consider when purchasing a youth baseball bat. *Id.* ¶¶ 17-19. Each such Rawlings bat, including the 5150 bat, is labeled and advertised as being a specific length and weight. *Id.* ¶ 12.

On November 27, 2017, Plaintiff purchased a 2018 Rawlings Youth 5150 USA baseball bat ("5150 bat") for his son, which was labeled and advertised as being 27 inches long and weighing 16 ounces (which would give it a drop weight of -11). *Id.* ¶ 3. Plaintiff purchased the bat from www.baseballsavings.com, an authorized dealer of Rawlings bats. *Id.* Rawlings

[1] The drop weight is usually expressed in the negative of the bat length in inches minus the bat weight in ounces. *Id.* ¶ 3.

provided the bat's advertised specifications, including the bat's weight, to www.baseballsavings.com. *See id*. Plaintiff purchased this bat because he thought the relatively light weight would give his son better swing control. *Id.* ¶ 31. Plaintiff noticed that his son did not have better control with the 5150 bat. *Id.* When Plaintiff weighed the bat he found that it in fact weighed approximately 18.6 ounces (giving it a weight drop between -8 and -9), around 2.6 ounces more than labeled and advertised on the bat's handle and on www.baseballsavings.com . *Id.* ¶ 32. Had Plaintiff known the true weight of the 5150 bat, he would not have purchased the bat, or would have paid less for it. *Id.* ¶ 35.

Numerous Rawlings customers have posted complaints online commenting that the various Rawlings bats they purchased were between 2-3 ounces heavier than advertised and labeled. *Id.* ¶¶ 36-38. It is unclear whether the complaints were solely from purchasers of the 5150 bat. *Id.*

Plaintiff seeks to bring this action on behalf of: "a class of consumers who purchased in the United States, either in a retail store, on Rawlings' website, or through a third-party website that is an authorized dealer of Rawlings' products, any model of Rawlings baseball bat during the applicable limitations period that was misrepresented or falsely labeled as being a different weight than it actually is . . . ." *Id.* ¶ 39. He also wishes to bring the lawsuit on behalf of a subclass of "consumers who purchased [Defendant's bats] in California." *Id.* ¶ 40.

B. Procedural Background

Plaintiff filed a Complaint on October 25, 2018. *See* Class Action Complaint for Damages & Injunctive Relief, Docket No. 1. Plaintiff subsequently filed an amended complaint. *See* FAC. Defendant filed a motion to dismiss. *See* Defendant's Notice of Motion and Motion to Dismiss Plaintiff's Amended Class Action Complaint ("MTD"), Docket No. 39. Plaintiff filed an opposition to the MTD. *See* Plaintiff's Memorandum of Law in Opposition to Defendant's Motion to Dismiss Plaintiff's Amended Complaint ("Pl. Opp."), Docket No. 41. Defendant filed a reply in support of its MTD. *See* Defendant Rawlings Sporting Goods Company, Inc.'s Reply in Support of Motion to Dismiss Plaintiff's Amended Complaint ("Reply"), Docket No. 42.

II. Legal Standard

Under Federal Rule of Civil Procedure 12(b)(6), a defendant may move to dismiss for failure to state a claim upon which relief can be granted. A complaint may be dismissed for failure to state a claim for one of two reasons: (1) lack of a cognizable legal theory, or (2) insufficient facts under a cognizable legal theory. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *see*

also Mendiondo v. Centinela Hosp. Med. Ctr., 521 F.3d 1097, 1104 (9th Cir. 2008) ("Dismissal under Rule 12(b)(6) is appropriate only where the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory.").

In deciding a 12(b)(6) motion, a court "may generally consider only allegations contained in the pleadings, exhibits attached to the complaint, and matters properly subject to judicial notice." *Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007). The court must construe the complaint in the light most favorable to the plaintiff, accept all allegations of material fact as true, and draw all reasonable inferences from well-pleaded factual allegations. *Gompper v. VISX, Inc.*, 298 F.3d 893, 896 (9th Cir. 2002); *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir.), *amended on denial of reh'g*, 275 F.3d 1187 (9th Cir. 2001); *Cahill v. Liberty Mutual Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir. 1996). The court is not required to accept as true legal conclusions couched as factual allegations. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Where a plaintiff facing a 12(b)(6) motion has pled "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged," the motion should be denied. *Id.*; *Sylvia Landfield Trust v. City of Los Angeles*, 729 F.3d 1189, 1191 (9th Cir. 2013). But if "the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it has not show[n] . . . the pleader is entitled to relief." *Iqbal*, 556 U.S. at 679 (citations omitted).

III. Analysis

A. Standing

i. Standing to Assert Class Claims

Defendant argues that Plaintiff has not adequately alleged Article III standing to represent the purported class. *See* MTD at 4. Defendant claims that Plaintiff seeks to represent purchasers of products that he himself did not purchase and does not specifically identify the products at issue or make any allegations of similarity between the product the Plaintiff purchased and those he did not. *Id.* at 7-8.

In the Ninth Circuit, there is no controlling authority indicating the proper approach to standing challenges where a plaintiff bringing causes of action under the UCL, FAL or CLRA seeks to represent a class of buyers of products that he himself did not purchase. *See Min Sook Shin v. Umeken, U.S.A., Inc.*, Case No. SACV-17-00315-CJC-(SSx), 2017 WL 6885378, at *4, (C.D. Cal. June 6, 2017) (and cases cited therein). However, as stated in *Shin*, "[a]lthough some

courts have found that . . . plaintiffs lack standing to sue [based on misrepresentations appearing on products they did not purchase] and other courts reserve the analysis until a motion for class certification, the developing consensus in federal courts urges a close look at the similarity of the products." *Id.* quoting *In re 5-hour ENERGY Mktg. & Sales Practices Litig.*, No. 13-2438-PSG-(PLAX), 2017 WL 385042, at *13 (C.D. Cal. Jan. 24, 2017); *compare Wolf v. Hewlett Packard Co.*, Case No. 15-CV-01221-BRO-(GJSx), 2016 WL 8931307, at *6 (C.D. Cal. 2016) (the court found that a proposed class representative may not seek to represent a class claim arising out of products she never purchased, particularly where the plaintiff's complaint failed to identify the specific products at issue or explain the substantial similarities between those products and the product purchased by plaintiff). In *Bruno v. Quten Research Inst. LLC*, the court held that the issue of "whether a class representative may be allowed to present claims on behalf of others who have similar, but not identical interests depends not on standing, but on an assessment of typicality and adequacy of representation." 280 F.R.D. 524, 530-31 (C.D. Cal. 2011) (internal citations and quotations omitted). The court in *Bruno* found that treatment of class action claims for products that varied from the product purchased by the named plaintiff was appropriately considered under Rule 23, not as part of a standing analysis.[2] *Id.* at 530.

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[2] This Court has previously cited to the Ninth Circuit's decision in *Melendres v. Arpaio*, 784 F.3d 1254, 1262 (9th Cir. 2015), *cert. denied sub nom. Maricopa Cty., Ariz. v. Melendres*, 136 S. Ct. 799 (2016), and found that this issue should be resolved at the class certification stage rather than as a standing matter, once the standing of the named plaintiff has been established and the products are alleged to be similar. *See Stotz v. Mophie Inc.*, Case No. CV 16–8898–GW-(FFMx), 2017 WL 1106104, at *6 (C.D. Cal. Feb. 27, 2017). As held in *Melendres*:

> In the present case, Defendants do not dispute that the individually named plaintiffs, including the Rodriguezes, had individual standing to bring their own claims under the Fourth and Fourteenth Amendments . . . . Defendants argue only that no named plaintiff has "standing" to represent the claims of unnamed plaintiffs stopped during a non-saturation patrol. But this argument raises the question of class certification − i.e., whether the named plaintiffs are adequate representatives of the claims of the unnamed plaintiffs − not a question of standing. *See Falcon*, 457 U.S. at 156–58 & nn. 13, 15, 102 S.Ct. 2364 (holding that named plaintiff must prove "much more than the validity of his own claim"; the individual plaintiff must show that "the individual's claim and the class claims will share common questions of law or fact and that the individual's claim will be typical of the class claims," explicitly referencing the "commonality" and "typicality" requirements of Rule 23(a)).
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> Under the class certification approach, or the standing approach for that matter, the named plaintiffs in this case, with or without the Rodriguezes, are adequate representatives because the named plaintiffs' claims do not "implicate a significantly different set of concerns" than the unnamed plaintiffs' claims. *Gratz*, 539 U.S. at 265, 123 S.Ct. 2411; *see also id.* at 263, 265, 123 S.Ct. 2411 (holding that "[r]egardless of whether the requirement is deemed one of adequacy or standing, it is clearly satisfied in this case" because "the University's use of race in undergraduate transfer admissions does not implicate a significantly different set of concerns than does its use of race in undergraduate freshman admissions"); *Falcon*, 457 U.S. at 156, 102 S.Ct. 2364 (named plaintiffs can adequately represent claims that are "fairly encompassed by the named plaintiff's

Here, Plaintiff not only alleges that the bat he purchased weighed more than advertised, but also that other customers, including customers who purchased bats of different advertised sizes and weights, also complained that their bats were overweight. *See* FAC ¶ 36-38. All of the customer complaints indicate that, like Plaintiff, they discovered that the Rawlings bat they purchased was between 2-3 ounces heavier than indicated on the label. Plaintiff alleges facts which reasonably suggest that Plaintiff's bat was not the only model that weighed more than as labeled. However, without class discovery Plaintiff *could not know* which other bats are similarly mislabeled without purchasing one of every model and weighing the bats himself. Although discovery may lead to the conclusion that, in fact, no other model of bat had a substantially similar issue to the one raised in Plaintiff's complaint, it is equally possible that discovery will allow Plaintiff to specifically identify other Rawlings bat models with the same alleged problem as the 5150 bat. Therefore, the Court would find, in keeping with *Melendres, Stotz* and *Bruno*, that this issue is appropriate for resolution at the class certification stage and does not merit dismissal at this point in the litigation.

ii. Standing to Pursue Injunctive Relief

Defendant also argues that Plaintiff fails to plead Article III standing to seek injunctive relief. *See* MTD at 6-8. Defendant asserts that Plaintiff cannot, and does not, assert that he would like to purchase the exact same model of bat in the future and, therefore, Plaintiff cannot show likelihood that he will again be injured by the product at issue in the litigation. *Id.* at 8. *Cf. Wisdom v. Easton Diamond Sports, LLC*, No. CV-18-4078-DSF-(SSx), 2019 WL 580670, at *1 (C.D. Cal. Feb. 11, 2019).

Defendant's standing argument ignores the fact that Plaintiff has alleged numerous instances in which customers complained that bats of a different size than the one Plaintiff purchased also bore a label representing the bat was 2-3 ounces less than its actual weight. *See* FAC ¶ 36. The FAC pleads facts from which it is reasonable to conclude that several of Rawlings

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claims" (internal quotation marks omitted)). In determining what constitutes the same type of relief or the same kind of injury, "we must be careful not to employ too narrow or technical an approach. Rather, we must examine the questions realistically: we must reject the temptation to parse too finely, and consider instead the context of the inquiry." *Armstrong v. Davis*, 275 F.3d 849, 867 (9th Cir.2001).

784 F.3d at 1262-63. *See also Grimm v. APN Inc*, Case No. 8:17–cv–00356–JVS–(JCGx), 2017 WL 6398148, at *3 (C.D. Cal. Aug. 31, 2017) ("The Ninth Circuit has addressed this precise question and held that it is one for the class certification stage.").

bats are labeled and advertised using an incorrect weight. Therefore, it is completely reasonable for Plaintiff to assume that he could not depend on the accuracy of the Rawlings weight labels and advertisements in the future, even if for a slightly different model of bat. *See* FAC ¶ 63. Defendant seems to assert that any change at all in the model of the bat, even a change which has no bearing on the alleged defect, would bar Plaintiff from bringing a claim for injunctive relief. *See* MTD at 8 ("Plaintiff makes no claim that he would like to purchase this specific model again, nor would that be plausible. Rawlings offers a new line of baseball bats each year and already offers a 2019 5150 model."). Under Defendant's theory, a manufacturer could continually rebrand a product each year, without fixing a known defect, and never be subject to a claim for injunctive relief as to that problem. That would be a nonsensical application of the law. Thus, Defendant's argument that Plaintiff lacks standing to pursue injunctive relief fails.

Additionally, certain of the causes of action which Plaintiff raises herein provide for injunctive relief as a specified remedy that is entirely a function of the statute and that does not require any showing of the plaintiff's intention to purchase the product in the future. As noted in Stern, BUS & PROF. C. § 17200 PRACTICE § 8:2 at 8-1 (the Rutter Group 2018) ("§ 17200 PRACTICE"), "Two remedies are available to private litigants bringing claims under [Bus. & Prof. C.] §§ 17200 or 17500; injunction and restitution." Thus, once a plaintiff has shown individual injury, he or she can seek injunctive relief for the benefit of the public as to the defendant's improper conduct that caused the injury. "Sections 17204 and 17535 permit injunctions to be sought by 'any person acting for the interests of itself, its members, or the general public.' [*See Herr v. Nestle U.S.A., Inc.*, (2003) 109 Cal. App. 4th 779 . . . .]" *Id.* § 8:24 at 8-6. "Courts can protect the public's right to be protected from fraud and deceit and may enter injunctive relief on that basis alone." *Id.* § 8:29 at 8-8.

B. Claims for Violation of the UCL, FAL, or CLRA

Defendant asserts that Plaintiff has failed to state a claim for violations of the UCL, FAL, or CLRA because Plaintiff does not sufficiently allege that: (1) Plaintiff actually relied on any of Rawlings misrepresentations; or (2) Rawlings knew or should have known of the alleged misrepresentations regarding the bat. Both of Defendant's arguments fail.

First, Plaintiff clearly alleged actual reliance on Rawlings misrepresentations. Plaintiff averred that Rawlings printed the incorrect weight on the label of the bat *and* supplied www.baseballsavings.com with the same incorrect weight information which would be displayed

to customers on the retailer's website. *See* FAC ¶¶ 55-56. Plaintiff then relied on that information in making his purchase decision. *Id.* ¶ 55. Defendant seems to argue that the statements on www.baseball savings.com on which Plaintiff relied are not attributable to Defendant. *See* MTD at 11 ("It is insufficient to allege reliance on statements on a third party's web page for a particular product without sufficiently asserting that the defendant was responsible for the content."). But Plaintiff specifically alleges in the FAC that the displayed information was provided to the online retailer *by* Rawlings. *See* FAC ¶ 55. Therefore, Plaintiff has sufficiently alleged actual reliance on Rawlings' misrepresentations.

Second, as to the issue of whether Rawlings knew or should have known of the alleged misrepresentations regarding the bat, one must initially consider the underlying claim that is being brought. For example, the UCL prohibits five types of wrongful conduct: *i.e.* (1) unlawful business act or practice, (2) unfair business act or practice, (3) fraudulent business act or practice, (4) unfair, deceptive, untrue or misleading advertising, and (5) any act prohibited by Bus. & Prof. Code §§ 17500-17577.5. *See* § 17200 PRACTICE at § 3:13 at 3-2 to 3-3. Further, the UCL sometimes "borrows" violations of other federal or state laws or regulations and treats them as unlawful practices independently actionable under the UCL § 17200. *See Farmers Ins. Exch. v. Sup. Ct.*, 2 Cal. 4th 377, 383 (1992). Those other laws will normally delineate the elements necessary to establish an unlawful or deceptive practice; and, hence, whether intent or knowledge is an element of the UCL claim will depend on the underlying offense. *See e.g. Irwin v. Mascott*, 94 F. Supp. 2d 1052, 1057 (N.D. Cal. 2000).

Additionally, the third substantive prong of § 17200 covers fraudulent business practices. As used in this portion of the UCL in regards to false advertising and/or mislabeling, the term "fraudulent" is *not* tethered to the common law fraud elements of: (1) misrepresentation, (2) knowledge of falsity or scienter, (3) intent to defraud, (4) justifiable reliance and (5) resulting damages. *See* for the elements of fraud, *Conroy v. Regents of University of California*, 45 Cal. 4th 1244, 1255 (2009). A plaintiff can establish a prima facie case that a business practice as to product representation is "fraudulent" under the UCL without having to prove intent, scienter, actual reliance or damage (aside from damage to the individual plaintiff). *See* § 17200 PRACTICE at § 3:157 at 3-54; *see also Beyer v. Symantec Corp.*, 333 F. Supp. 3d 966, 981 (N.D. Cal. 2018) ("knowledge is not required under the UCL's fraudulent prong."). As stated in *Committee on Children's Television, Inc. v. General Foods Corp.*, 35 Cal. 3d 197, 211 (1983): "To state a cause

of action under these statutes for injunctive relief, it is necessary only to show that 'members of the public are likely to be deceived.' (*Chern v. Bank of America* (1976) 15 Cal. 3d 866, 876)."[3]

i. CLRA's Notice Requirements

Defendant argues that Plaintiff's CLRA claim fails to the extent Plaintiff brings claims on behalf of purchasers of bats other than the 5150 model because he only fulfilled the notice requirement under the CLRA for the specific model he purchased, not for any other product. The CLRA requires the consumer to notify the alleged violator of "the particular alleged violations of Section 1770 . . . [and] [d]emand that the person correct, repair, replace, or otherwise rectify the goods or services alleged to be in violation of Section 1770." The purpose of the CLRA notice requirement is to allow a manufacturer or vendor sufficient opportunity to correct or replace a deficient product. *See Herron v. Best Buy Stores*, No. 12-cv-02103-GEB-(JFM), 2014 WL 2462969, at *2 (E.D. Cal. May 29, 2014). "[L]iteral application of the [CLRA] notice provisions" is required. *Outboard Marine Corp. v. Sup. Ct.*, 52 Cal. App. 3d 30, 41 (1975). Courts have found that where a plaintiff brings a CLRA cause of action, damages claims for any product not specifically noticed must be dismissed. *See Herron*, 2014 WL 2462969, at *2; *Ang v. Bimbo Bakeries USA, Inc.*, No. 13–cv–01196–WHO, 2013 WL 5407039, at *12 (N.D. Cal. Sept. 25, 2013) (dismissing claims for "substantially similar products" raised in an amended complaint that were not identified in the CLRA notice); *Ruszecki v. Nelson Bach USA Ltd.*, No. 12-cv-495-L(NLS), 2015 WL 6750980, at*6 (S.D. Cal. June 25, 2015) (finding that where Plaintiff identified one specific product and made more vague allegations that other products suffered from the same defect, the CLRA notice requirement was only met as to the product expressly identified); *Frenzel v. AliphCom*, 76 F. Supp. 3d 999, 1016 (N.D. Cal. 2014) (where plaintiff alleged that he purchased the defendant's device without distinguishing between the product's three different generations, the court held that plaintiff's failure to designate which exact generation of the product he purchased constituted a failure to provide adequate notice). To the extent Plaintiff seeks to bring claims for damages under the CLRA for products other than the 5150 bat, those claims are dismissed with prejudice, because Plaintiff cannot recover for products he did not expressly

[3] Under the CLRA, where the claim is based on the *sale* of a defective product and *not* its being mislabeled or falsely advertised, knowledge of the defect is a required element of the cause of action which must be alleged. *See Wilson v. Hewlett-Packard Co.*, 668 F.3d 1136, 1145 (9th Cir. 2012).

The FAL makes a defendant liable for the false or misleading statements where the defendant knows of the falsity/misrepresentation *or* with the exercise of reasonable care should know of it. *See* Bus. & Prof. Code § 17500.

identify in the CLRA notice.[4]

C. Claim for Breach of Express Warranty

Defendant argues that Plaintiff has not alleged a claim for breach of an express warranty under either California or Missouri law. *See* MTD at 16-17. Under California law, to prevail on a breach of express warranty claim, a plaintiff must prove that the seller: "(1) made an affirmation of fact or promise or provided a description of its goods; (2) the promise or description formed part of the basis of the bargain; (3) the express warranty was breached; and (4) the breach caused injury to the plaintiff." *Rodarte v. Philip Morris*, No. 03-cv-03553-FMC-(CTx), 2003 WL 23341208, at *7 (C.D. Cal. June 23, 2003). Under Missouri law, "the elements for a breach of express warranty claim are: (1) the defendant sold goods to the plaintiff; (2) the seller made a statement of fact about the kind or quality of those goods; (3) the statement of fact was a material factor inducing the buyer to purchase the goods; (4) the goods did not conform to that statement of fact; (5) the nonconformity injured the buyer; and (6) the buyer notified the seller of the nonconformity in a timely fashion." *Renaissance Leasing, LLC v. Vermeer Mfg. Co.*, 322 S.W.3d 112, 122 (Mo. Sup. Ct. 2010).

Plaintiff has clearly alleged that Defendant provided a description of its goods, and that the description formed a basis of the bargain. Plaintiff's complaint states that "Sotelo relied on the representation contained on the website www.baseballsavings.com, which was provided to that online retailer by Rawlings . . . that the 5150 bat's weight was 16 ounces." *See* FAC ¶ 55. Given

[4] The Court appreciates that Plaintiff in his letter to Defendant referenced that (even though he only stated that he had purchased a 5150 bat) he did also indicate that he was bringing a putative class action as to Defendant's "baseball bats intended for consumers." *See* Docket No. 37-1 at page 2 of 3. An interesting issue is raised as to meeting the CLRA notice requirements in the context of a threatened class action. Does the named plaintiff have to list each of the types or models of the challenged goods, or can he or she simply identified the item he or she purchased and then aver that he or she is seeking to bring a class action as to all of defendant's products with the same or similar defects? The parties have not cited to any caselaw on this topic and the Court has found none. However, it has been observed that: "the CLRA does not distinguish between an individual action and a class action plaintiff in requiring that a 'consumer' who files an action for damages under the CLRA must give prior written notice in accordance with Cal. Civ. Code § 1782." *Stearns v. Ticketmaster Corp.*, No. CV 08-0117-DSF-(JTLx), 2008 WL 11383479, at *1 (C.D. Cal. May 28, 2008). Moreover, in *Frenzel*, it was held that a reference to the "Jawbone UP and subsequent replacements" was insufficient to provide the requisite notice where there were three generation of Jawbone UP devices. 76 F. Supp. 3d at 1016. As stated in *Frenzel:*

> A plaintiff seeking damages under the CLRA must advise the defendant of "the particular alleged violations" of the statute. Cal. Civ. Code § 1782(a)(1). Courts in this circuit have accordingly held that a plaintiff must provide notice regarding *each particular* product on which his CLRA damages claims are based, even where the products qualify as substantially similar.

Id. (emphasis added).

that Plaintiff alleges that the bat does not weigh 16 ounces, the express description of goods was false, and therefore the express warranty was breached. *See id.* Plaintiff was injured in that he purchased a bat for the exclusive use of his son, and his son "cannot use, and is not using, the bat for training or play."[5] *See id.* ¶ 34.

Defendant cites to Judge Dale Fischer's decision in *Wisdom v. Easton Diamond Sports, LLC*, No. CV-18-4078-DSF-(SSx), 2019 U.S. Dist. LEXIS 24500 (C.D. Cal. Feb. 11, 2019), which is a case based on very similar facts and claims involving another defendant manufacturer of youth baseball bats. In *Wisdom*, it was held that plaintiff failed to state a claim for breach of express warranty because he did not provide notice of the alleged defect to the defendant as required by Alabama law. *Id.* at *11. That is not the case here. *See* footnote 5, *supra.* Judge Fischer also found a failure to state such a claim under California law because an element of that cause of action is that "a plaintiff [must] identify a specific and unequivocal written statement from the manufacturer that demonstrates a guarantee that the manufacture[r] failed to uphold," and:

> Plaintiff argues that the bat's size and weight labeling constitutes an express warranty as to the bat's performance; i.e., the bat's label was an express warranty that a drop 10 bat would perform like a drop 10 bat. But such a promise does not constitute a specific and unequivocal promise to *preserve or maintain* the utility or performance of the bat. It is not an express warranty under California law.

Id. at *11-12 (emphasis in original). This Court would respectfully disagree with Judge Fischer's analysis on that latter issue. As noted in *Brady v. Bayer Corp.*, 26 Cal. App. 5th 1156, 1177-78 (2018), a breach of express warranty can be predicated on Section 2313 of the California Uniform Commercial Code. Section 2313(1) states:

> Express warranties by the seller are created as follows:
>
> (a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.
>
> (b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.

Plaintiff has alleged that extremely important specifications for a youth baseball bat are its length, weight, and drop weight. *See* FAC ¶¶ 14-21 (*e.g.* "The fact that the Rawlings bats come in various sizes that are only one inch and only one ounce apart demonstrates that even a single ounce difference is material to a purchase decision." *Id.* ¶ 17; "[E]ven variation of one ounce can make

[5] For purposes of Missouri law, Plaintiff alleges that he gave Defendant notice of the nonconformity. *See* FAC ¶ 85.

a significant difference in performance, as recognized by Rawlings' and third-party online websites . . . ." *Id.* ¶ 24). Because Defendant's delineated weight specifications − on its bats and in related avenues of communications with its customers − failed to conform to those descriptions and affirmations, Plaintiff has sufficiently alleged a claim for breach of express warranty under California law.

D. Claim for Breach of Implied Warranty

Defendant argues that Plaintiff has failed to state a claim for breach of implied warranty of merchantability and the implied warranty of fitness for a particular purpose. A plaintiff claiming breach of an implied warranty of merchantability must show that the product "did not possess even the most basic degree of fitness for ordinary use." *Mocek v. Alfa Leisure, Inc.*, 114 Cal. App. 4th 402, 406 (2003) (citing Cal. Com. Code § 2314(2)); *see also Pisano v. American Leasing*, 146 Cal. App. 3d 194, 198 (1983) ("Crucial to the inquiry is whether the product conformed to the standard performance of like products used in the trade"). The implied warranty of merchantability set forth in Cal. Civ. Code § 1791.1(a) requires only that a product be reasonably suited for ordinary use, however. Stated differently, it need not be perfect in every detail so long as it "provides for a minimum level of quality." *American Suzuki v. Sup. Ct.*, 37 Cal. App. 4th 1291, 1296 (1995) (quoting *Skelton v. General Motors Corp.*, 500 F. Supp. 1181, 1191 (N.D. Ill. 1980), *rev'd. on other grounds*, 660 F.2d 311 (7th Cir.1981)). The analysis is similar under Missouri law (as pled in the alternative by Plaintiff). *See Parker v. Wal-Mart Stores, Inc.*, No. 4:18-CV-00465-JAR, 2019 WL 585331, at *4-5 (E.D. Mo. Feb. 12, 2019) (holding that Missouri law imposes an implied warranty of merchantability that goods are "fit for the ordinary purposes for which they are used," and that dietary supplements that were fit for human consumption did not breach the implied warranty even where they did not perform exactly as the buyer expected).

The basic inquiry, therefore, is whether the bat was useable. Plaintiff does not claim that it was so defective as to be unusable, just that the weight of the bat made it ineffective for his son but not necessarily every youth who uses the bat. *See* FAC ¶ 34. Therefore, the Court would dismiss Plaintiff's claim for breach of implied warranty without prejudice. The Court would grant leave to amend to the extent that Plaintiff can allege that the bat was not suited for ordinary use.

E. Claim for Unjust Enrichment

Defendant asserts that Plaintiff's claim for unjust enrichment under California law fails because it cannot serve as a standalone claim for relief. This Court would agree. As stated in

Sacramento E.D.M., Inc. v. Hynes Aviation Indus., No. 2:13–cv–0288–KJN, 2017 WL 1383289, at *20 (E.D. Cal. Apr. 18, 2017), "Declaratory relief and unjust enrichment are not independent causes of action under California law; instead, they are forms of relief that may be requested in conjunction with a cognizable cause of action that permits a court to grant such relief." *See also Astiana v. Hain Celestial Grp., Inc.*, 783 F.3d 753, 762 (9th Cir. 2015) ("in California, there is not a standalone cause of action for 'unjust enrichment."); *Hill v. Roll Int'l Corp.*, 195 Cal. App. 4th 1295, 1307 (2011) ("Unjust enrichment is not a cause of action," therefore providing no basis for relief in the absence of an actionable wrong).

However, Missouri apparently does recognize unjust enrichment as an independent cause of action. *See e.g. Trapp v. O. Lee, LLC*, 918 F. Supp. 2d 911, 915 (E.D. Mo. 2013) ("the unjust enrichment claim represented 'a clearly independent claim aimed at redressing a different grievance' . . . . [citation omitted]").[6]

If this case proceeds as a nationwide class action, it would appear that a choice/conflict of law analysis would be required as to the applicable law that would govern as to each state where the class is prosecuted. *See generally, Mazza v. Am. Honda Motor Co.,* 666 F.3d 581, 594 (9th Cir. 2012). It might be that a particular jurisdiction (like Missouri) would have a cognizable cause of action for unjust enrichment by itself. Therefore, the Court would dismiss Plaintiff's unjust enrichment claim but without prejudice.

IV. Conclusion

In sum, the Court would DENY Defendant's MTD claims one, two and four of Plaintiff's FAC. The Court would GRANT Defendant's MTD claim three as to claims related to products other than the Rawlings 5150 bat, but DENY Defendant's MTD claim three as to the Rawlings 5150 bat. The Court would GRANT Defendant's MTD as to claim five with leave to amend. The Court would GRANT Defendant's MTD as to claim six without prejudice.

[6] Under Missouri law the elements of an unjust enrichment claim are: "(1) [the plaintiff] conferred a benefit on the defendant; (2) the defendant appreciated the benefit; and (3) the defendant accepted and retained the benefit under inequitable and/or unjust circumstances." *Hargis v. JLB Corp.*, 357 S.W.3d 574, 586 (Mo. Sup. Ct. 2011) quoting *Howard v. Turnbull*, 316 S.W.3d 431, 436 (Mo. App. 2010).