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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

RICHARD SOTELO, on behalf of himself and all others similarly situated,

Plaintiff,

vs.

RAWLINGS SPORTING GOODS COMPANY, INC.,

Defendant.

Case No. 2:18-cv-09166-GW-MAA

Hon. George H. Wu

DEFENDANT RAWLINGS SPORTING GOODS COMPANY, INC.'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF FED. R. CIV. P. 12(b)(1) AND 12(B)(6) MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT

Date: May 2, 2019
Time: 8:30 a.m.
Place: Courtroom 9D

Trial Date: None

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I. INTRODUCTION

Plaintiff Richard Sotelo alleges in his Amended Class Action Complaint ("Complaint" or "Compl.") that he purchased, from a third-party website, a single youth baseball bat purportedly manufactured by defendant Rawlings Sporting Goods Company, Inc. ("Rawlings" or "Defendant"). Plaintiff alleges that he understood the specific bat he purchased—a 27-inch, "drop 11" (or "-11"), 5150 model from Rawlings' 2018 line of youth baseball bats—to weigh 16 ounces. Plaintiff alleges he weighed his bat sometime after purchase and determined it actually weighed 2.6 ounces more than the 16 ounces he believed it weighed. This 2.6-ounce difference is now the basis for Plaintiff's six-count lawsuit that seeks relief on behalf of an putative class that includes all California and nationwide consumers who purchased "any model of Rawlings baseball bat."

But the Complaint is deficient. It omits essential allegations necessary to state viable claims. For example, the Complaint purports to encompass "any model of Rawlings baseball bat" without alleging that any other Rawlings bats bore similar alleged misrepresentations. Further, Plaintiff fails to sufficiently allege that he relied on a statement by Rawlings in purchasing his bat or that Rawlings knew or should have known that his bat weighed more than what Plaintiff claims was represented.

These pleading defects, among others, are crucial. Plaintiff has alleged neither that he has Article III standing to represent the massively overbroad class of consumers he purports to, nor that he has Article III standing to pursue injunctive relief. Further, Plaintiff has failed to sufficiently state claims or class claims under California's consumer protection laws or under common law. Accordingly, Rawlings respectfully requests that this Court dismiss the Complaint.

II. STATEMENT OF FACTS

Rawlings sells a wide range of sports equipment, including baseball bats. (Compl. ¶ 10.) Each year, Rawlings offers a line of youth baseball bats comprised

of various models, though the models may change as Rawlings continually adjusts its bats, introduces new ones to the market, or retires them.

Generally, each Rawlings model each year is sold with a specific set of certifications, lengths, and/or "drops." (*Id.* ¶¶ 15 & n.8, 17 & n.10 (citing Rawlings web page specifying various 2018 Rawlings baseball bat models, certifications, lengths, and drops).) "Drop" is a number Rawlings and other baseball bat merchants have used to indicate how heavy or light a bat feels relative to its length, with "higher" drops (such as a -10) feeling generally lighter and "lower" drops (such as a -5) feeling generally heavier. (*See id.* ¶ 16 & n.9.) By way of example, in its 2018 youth bat line, Rawlings offered (among several others) a model called the "5150." (*See id.* ¶¶ 15 n.8, 17.) Rawlings sold the 5150 youth bat under two different bat certification standards, one of which was "USA Baseball." (*Id.* ¶ 15 n.8 (referencing www.rawlings.com/bats/bat-guide, which lists specifications and certifications for the 2018 5150 bat, among several others).) Within that standard, Rawlings offered the 5150 in six different lengths (from 27 to 32 inches). (*Id.*) For each of these lengths, Rawlings offered three "drops": -5 (relatively heavier), -10 (relatively lighter), and -11 (lightest relative to the prior two options). (*Id.*)

Plaintiff's allegations identify only the shortest and lightest 5150 bat in the USA Baseball-certified 2018 line: the 27-inch, -11 model. (*Id.* ¶¶ 26, 28.) Plaintiff alleges that he purchased this bat because "he thought the relatively light weight would give his son better swing control." (*Id.* ¶ 31.) Significantly, Plaintiff alleges that he purchased the bat not directly from Rawlings but from a third-party website called www.baseballsavings.com. (*Id.* ¶¶ 28, 30.) Plaintiff alleges that the sole representation of the bat's weight he relied upon in purchasing the bat was a statement on www.baseballsavings.com, which stated the specific Rawlings bat Plaintiff purchased weighed 16 ounces (meaning it had a drop of -11). (*Id.* ¶ 30.) The Complaint nowhere states that Plaintiff ever viewed or relied on a single statement *by Rawlings* pre-purchase. Rather, Plaintiff attempts to sweep aside this

critical deficit in his claim by alleging that www.baseballsavings.com states it is an "authorized dealer" of Rawlings—though Plaintiff does not explain what "authorized dealer" means—and that "Rawlings [allegedly] provided the information as to the weight of the bat to this online retailer"—though Plaintiff does not clarify who, when, or how and why Rawlings had any control over the third-party retailer's marketing or product descriptions. (*Id.* ¶¶ 13, 28.)

Plaintiff alleges he weighed the bat on his own scale sometime after purchase and purportedly determined that it weighed 18.6 ounces. (*Id.* ¶ 32.) Plaintiff alleges that, had he known the bat weighed 18.6 ounces, he would not have purchased the bat or would have paid less for it. (*Id.* ¶ 35.) And Plaintiff summarily alleges that Rawlings knew or should have known his specific bat weighed more than 16 ounces, but aside from a cursory assumption that Rawlings has quality control processes and puts labels on its bats, Plaintiff does not say how. (*Id.* ¶¶ 59, 61.) Notably, the Complaint also lists six comments—all dated long after Plaintiff purchased his bat—alleged to have been posted by consumers on a different third-party website about the 2018 5150 model, as well as a single, undated comment alleged to have been posted by a consumer on Rawlings' website about that model. (*Id.* ¶¶ 36-37.)

Plaintiff filed his initial complaint on October 25, 2018, and following a meet and confer with Defendant, Plaintiff filed the amended Complaint on January 31, 2019. The Complaint asserts claims on behalf of Plaintiff and both a nationwide class (the "Class") and a California subclass (the "Subclass"). Counts I, II, and III are claims on behalf of Plaintiff and the Subclass for violations of (I) California's unfair competition law ("UCL"), Cal. Bus. & Prof. Code § 17200; (II) the false advertising law ("FAL"), *Id.* § 17500; and (III) the Consumer Legal Remedies Act ("CLRA"), Cal. Civ. Code § 1770(a). (*Id.* ¶¶ 53-90.) Counts IV, V, and VI are common law claims alleged on behalf of Plaintiff and the Class (or, alternatively, the Subclass) for (IV) breach of express warranty; (V) breach of implied warranty;

and (VI) unjust enrichment. (*Id*. ¶¶ 91-123.) Plaintiff purports to include in the Class and Subclass any consumers either nationwide (the Class) or in California (the Subclass) who purchased a Rawlings baseball bat that was "labeled as being a different weight than it actually is." (*Id*. ¶¶ 39-40.) On behalf of the Class and Subclass, Plaintiff seeks damages under Counts III, IV, and V; equitable relief under Counts I-III and VI; and injunctive relief—claiming that he will continue to purchase bats for his son "as he grows"—for Counts I-III. (*See generally id*. ¶¶ 53-123.)

III. PLAINTIFF LACKS STANDING TO REPRESENT PURCHASERS OF OTHER RAWLINGS BATS OR TO PURSUE INJUNCTIVE RELIEF

Plaintiff has not adequately alleged Article III standing to represent the class he purports to represent or to pursue injunctive relief. To the extent Plaintiff brings claims on behalf of purchasers of Rawlings bats other than the one he purchased or seeks injunctive relief, the Complaint should be dismissed for lack of subject matter jurisdiction under Rule 12(b)(1).

A. Plaintiff Fails to Allege Standing to Represent Purchasers of Bats Other Than the Specific Bat He Purchased

Plaintiff's class definition encompasses buyers of "any model of Rawlings baseball bat" during the applicable limitations period that was "labeled as being a different weight than it actually is," regardless of the year, the certifying entity, the model, the length, or the drop, and regardless of the size of any such alleged difference. But Plaintiff only alleges that he purchased a single Rawlings bat: the 2018, USA Baseball-certified, 27-inch, -11 5150 model, which he alleges weighed 2.6 ounces more than he believed it did. Conspicuously absent from Plaintiff's pleading is any clear reference to another Rawlings bat that may have been sold during the applicable limitations period, much less any allegation that any other Rawlings bat is at all similar to the one Plaintiff purchased or was sold with a similar alleged misrepresentation. Plaintiff therefore lacks standing to represent

purchasers of bats other than the one he allegedly purchased, and his claims should be dismissed under Rule 12(b)(1) to the extent he purports to do so.

Article III of the U.S. Constitution requires that any plaintiff in federal court demonstrate he suffered an "injury in fact," caused by the defendant's conduct, which would be redressed by a favorable court decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-60 (1992). Standing challenges crystallize in class actions brought under the UCL, FAL, and CLRA (among other claims) where the purported class representative seeks, as Plaintiff does here, to represent purchasers of products he himself did not purchase. In this Circuit, where "[t]here is no controlling authority" on this question, *Min Sook Shin v. Umeken, U.S.A., Inc.*, No. SACV 17-00315-CJC, 2017 WL 6885378, at *4 (C.D. Cal. June 1, 2017), district courts have taken various approaches. *Compare, e.g., Bruno v. Quten Research Inst., LLC*, 280 F.R.D. 524, 530-31 (C.D. Cal. 2011) (holding that the question of whether a class action plaintiff had standing to represent purchasers of specified products he did not purchase was to be addressed at the class certification stage of litigation), *with, e.g., Wolf v. Hewlett Packard Co.*, No. CV 15-01221-BRO, 2016 WL 8931307, at *6-7 (C.D. Cal. Apr. 18, 2016) (***dismissing*** claims to the extent plaintiff purported to represent purchasers of products he did not purchase); *Route v. Mead Johnson Nutrition Co.*, No. CV 12-7350-GW, 2013 WL 658251, at *3 (C.D. Cal. Feb. 21, 2013) (Wu, J.) (same); *Granfield v. NVIDIA Corp.*, No. C 11-05403 JW, 2012 WL 2847575, at *6 (N.D. Cal. July 11, 2012) (same). But "even cases that defer the question to class certification require ***some allegation of similarity*** between the products and the advertisements the named plaintiff encountered and those he or she did not encounter." *Min Sook Shin*, 2017 WL 6885378, at *4 (emphasis added) (collecting cases).[1] In other words, even if a court entertains the

[1] This Court has addressed this question multiple times in putative class actions (footnote continued)

idea that a plaintiff may represent purchasers of products he did not purchase, courts routinely require ***some plausible allegations of similarity*** between the products the plaintiff purchased and those he did not. *See, e.g.*, *Shank v. Presidio Brands, Inc.*, No. 17-cv-00232-DMR, 2018 WL 510169, at *6-7 (N.D. Cal. Jan. 23, 2018); *In re 5-hour ENERGY Marketing & Sales Practices Litig.*, No. MDL 13-2438 PSG, 2017 WL 385042, at *13 (C.D. Cal. Jan. 24, 2017).

Here, Plaintiff alleges that he purchased a single Rawlings bat. Plaintiff directly identifies no other Rawlings bats, nor does Plaintiff offer any non-speculative basis to infer that ***any other*** of Rawlings' various bats bears a similar alleged misrepresentation as the bat Plaintiff purchased. Plaintiff thus fails to allege his standing to represent purchasers of bats other than his own. Plaintiff instead hopes that the Court will allow him to engage in a fishing expedition into many years of Rawlings' products based on the singular allegation that he purchased one type of 2018 bat. Article III requires more. Plaintiff's claims must therefore be dismissed for lack of standing to the extent Plaintiff purports to represent purchasers of Rawlings bats other than the specific bat he purchased.

B. <u>Plaintiff Lacks Standing to Pursue Injunctive Relief</u>

Plaintiff purports to seek injunctive relief for his UCL, FAL, and CLRA

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brought under the UCL, FAL, and CLRA. *Compare, e.g.*, *Route*, 2013 WL 658251, at *3 (dismissing class action claims with prejudice as a matter of standing to the extent plaintiff sought to represent purchasers of products she did not purchase), *with Stotz v. Mophie, Inc.*, No. CV 16-8898-GW, 2017 WL 1106104, at *5-6 (C.D. Cal. Feb. 27, 2017) (Wu, J.) (deferring to the class certification stage the question of whether plaintiff could represent purchasers of products he did not purchase). But as another court of this District has acknowledged in analyzing the differing approaches to this question (including this Court's opinion in *Stotz*), these cases still require as a matter of standing plausible allegations of similarity between products or advertisements the plaintiff purchased or encountered and products or advertisements the plaintiff did not. *See Min Sook Shin*, 2017 WL 6885378, at *4. Plaintiff offers no such allegations here.

claims. But Plaintiff has failed to plead Article III standing to seek injunctive relief. These claims should also be dismissed under Rule 12(b)(1).

To have standing to pursue injunctive relief, a plaintiff must demonstrate "a 'real and immediate threat of repeated injury' in the future." *Chapman v. Pier 1 Imports (U.S.) Inc.*, 631 F.3d 939, 946 (9th Cir. 2011) (quoting *Fortyune v. Am. Multi-Cinema, Inc.*, 364 F.3d 1075, 1081 (9th Cir. 2004)); *Haley v. Macy's, Inc.*, 263 F. Supp. 3d 819, 824 (N.D. Cal. 2017). This "real and immediate threat" allegation "requires a plaintiff to show 'a sufficient likelihood that he will again be wronged in a similar way.'" *Lucas v. Breg, Inc.*, 212 F. Supp. 3d 950, 962 (S.D. Cal. 2016) (quoting *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983)). Rote "[a]llegations of a ***possible*** future injury do not satisfy" standing requirements. *Id.* at 963 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990)) (emphasis added). In UCL, FAL, and CLRA cases, a plaintiff must plausibly allege a **sufficiently *concrete*** likelihood of harm from ***the product at issue***. *See Arroyo v. TP-Link USA Corp.*, No. 5:14-cv-04999-EJD, 2015 WL 5698752, at *5 (N.D. Cal. Sept. 29, 2015) (dismissing claims for injunctive relief where "it is not credible for Plaintiff to assert he will purchase the ***exact same product*** which prompted his Complaint" (emphasis added)); *accord Davidson v. Kimberly-Clark Corp.*, 889 F.3d 956, 969 & n.5 (9th Cir. 2018), *cert. denied*, 139 S.Ct. 640 (2018) (holding that a plaintiff has standing to pursue injunctive relief by alleging an intent to purchase the product at issue in the future, but acknowledging and distinguishing cases from other circuits in which plaintiffs lacked standing because they failed to "sufficiently allege their intention to repurchase ***the product at issue***" (emphasis added)); *Tryan v. Ulthera, Inc.*, No. 2:17-cv-02036-MCE, 2018 WL 3955980, at *10 (E.D. Cal. Aug. 17, 2018) (analyzing *Davidson* and dismissing claim for injunctive relief for lack of standing where plaintiff had failed to "plausibly" allege a likelihood that she would use the particular service at issue in the future).

Plaintiff's allegations regarding injunctive relief, recited in three materially

identical paragraphs, miss the mark. Plaintiff alleges that he "must purchase new bats" so "his son can play with a bat that is the appropriate weight for his size." (Compl. ¶¶ 63, 73, 88.) He says he "would buy a Rawlings 5150 bat (and other Rawlings bats)" if Rawlings would "correctly identify the weight on the bat," but as of now, he "is currently unable to rely on the accuracy of the labeling and advertising of the weights." (*Id.*) But the product at issue in this case is the 27-inch, -11 5150 from Rawlings' 2018 line and certified for USA Baseball leagues. 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. (*See id.* ¶ 13 n.3.) And based on Plaintiff's allegations, as his son grows and gains experience, he would look to longer, heavier models anyway. (*See id.* ¶¶ 15-16 (quoting Rawlings' website and explaining that "[m]ore experienced players" should use heavier bats and that "higher" competition or league levels require bats with a lower drop)). At most, Plaintiff's claim is that he would like to buy unspecified Rawlings bats ***other than*** the one he already purchased. The Complaint is devoid of facts that plausibly show Plaintiff would be re-injured by the product at issue—last year's 27-inch, -11 5150 model—or that he faces any concrete likelihood of injury by any other Rawlings bat. Plaintiff has therefore failed to allege standing to bring claims for injunctive relief, and this basis for relief should be dismissed under Rule 12(b)(1) as to Plaintiff, the Class, and the Subclass. *Haley*, 263 F. Supp. 3d at 824-25 ("Classwide injunctive relief is not available '[u]nless the named plaintiff[is himself] entitled to seek injunctive relief." (quoting *Hodgers-Durgin v. de la Vina*, 199 F.3d 1037, 1045 (9th Cir. 1999))).

IV. PLAINTIFF'S CLAIMS SHOULD BE DISMISSED UNDER RULE 12(b)(6) FOR FAILURE TO STATE A CLAIM

To survive a motion to dismiss under Rule 12(b)(6), the complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atl.*

Corp. v. Twombly, 550 U.S. 544, 570 (2007)). And where a claim sounds in fraud, a plaintiff must go beyond these basic pleading standards and comply with the heightened requirement under Rule 9(b) to plead with particularity the circumstances giving rise to the claim. *See Weiss v. Trader Joe's Co.*, No. 8:18-cv-01130-JLS, 2018 WL 6340758, at *7 (C.D. Cal. Nov. 20, 2018) ("Rule 9(b) applies to claims sounding in fraud, which includes false representation allegations in the CLRA, FAL, and UCL context." (citing *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125 (9th Cir. 2009))); *see also Puri v. Khalsa*, 674 F. App'x 679, 690 (9th Cir. 2017) (applying Rule 9(b) standards to common law claims, such as unjust enrichment, that are "based on fraud" (citing *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1103-04 (9th Cir. 2003))). A claim "sounds in fraud" or is "grounded" in fraud where a plaintiff alleges a "unified course of fraudulent conduct and rel[ies] entirely on that course of conduct as the basis for that claim." *Kearns*, 567 F.3d at 1125. Because Plaintiff's claims each sound in fraud by alleging a "widespread" course of fraudulent or deceptive conduct by Rawlings in allegedly misrepresenting the weight of one of its bats, Plaintiff must "sufficiently allege," among other elements, "an actionable misrepresentation and reliance on that misrepresentation." *Yastrab v. Apple Inc.*, 173 F. Supp. 3d 972, 978 (N.D. Cal. 2016).

A. The Complaint Fails to State Claims for Violations of the UCL, FAL, or CLRA

Pleading UCL, FAL, and CLRA claims sounding in fraud requires, *inter alia*, a plaintiff to plead allegations of reliance with specificity and to allege that a defendant had knowledge of information rendering the alleged misrepresentation false or misleading. Plaintiff's UCL, FAL, and CLRA (**Counts I-III**) fall short on both fronts and must be dismissed.

1. *Plaintiff Has Failed to Allege Actual Reliance on Any Rawlings Misrepresentation to Support His UCL, FAL, or CLRA Claims*

The UCL, FAL, and CLRA each require a plaintiff to demonstrate their

statutory "standing", without which they have failed to state a claim under the statutes. Standing under any of these statutes requires a plaintiff to establish, at a minimum, that he actually relied on an alleged misrepresentation made ***by the defendant*** in purchasing the product at issue. *See Swearingen v. Santa Cruz Nat., Inc.*, No. 13-cv-04291-SI, 2016 WL 4382544, at *3 (N.D. Cal. Aug. 17, 2016) ("Standing under the FAL or CLRA requires a plaintiff to allege that he relied on the ***defendant's*** purported misrepresentation and suffered economic injury as a result." (citing *Kwikset Corp. v. Super. Ct.*, 51 Cal. 4th 310, 326 (2011)) (emphasis added)); *Marolda v. Symantec Corp.*, 672 F. Supp. 2d 992, 1003 (N.D. Cal. 2009) ("To state a claim under the UCL, a plaintiff must plead that: (1) defendant engaged in one of the practices prohibited by the statute; and (2) plaintiff suffered actual injury in fact as a result of ***defendant's*** actions." (emphasis added)); *accord Haskins v. Symantec Corp.*, 654 F. App'x 338, 338 (9th Cir. 2016) (affirming dismissal of UCL and CLRA claims under Rule 9(b) for failure to plead with particularity where a plaintiff "did not allege that she read and relied on a specific misrepresentation ***by [defendant] Symantec***" (emphasis added)).

A plaintiff cannot survive dismissal without detailing exactly which of the defendant's statements or representations he observed, when he observed them, and how he relied on them to purchase the product at issue. *See Andren v. Alere, Inc.*, 207 F. Supp. 3d 1133, 1141 (S.D. Cal. 2016) ("A plaintiff must specify what the [alleged] misrepresentations stated, when he or she was exposed to the misrepresentation and which ones he or she found material [to his or her purchasing decision]." (citing *Kearns*, 567 F.3d at 1125-26)). As an example, where a plaintiff merely details statements on a defendant's labels or website without alleging that the plaintiff actually viewed those statements, either at all or at least prior to purchasing the allegedly mislabeled product, the plaintiff has failed to state a claim under the UCL, FAL, and CLRA. *See, e.g., McVicar v. Goodman Glob., Inc.*, 1 F. Supp. 3d 1044, 1052-53 (C.D. Cal. 2014) (holding that a plaintiff failed to establish actual

reliance necessary for standing by referencing several statements on a defendant's website without alleging that he had actually viewed them); *accord Boris v. Wal-Mart Stores, Inc.*, 35 F. Supp. 3d 1163, 1174-75 (C.D. Cal. 2014) (explaining that a plaintiff cannot merely "invite[] the reader to infer [plaintiff] viewed" alleged misstatements but instead must allege that he actually viewed such statements prior to and in connection with a purchase). Similarly, reliance on statements on a third-party website do not equate to reliance on statements by the defendant, even if materially identical or similar or even if based on information received from the defendant, given the multitude of ways that third-party websites may represent information. *See, e.g.*, *Reed v. NBTY, Inc.*, No. EDCV 13-0142 JGB, 2014 WL 12284044, at *7-8 (C.D. Cal. Nov. 18, 2014). 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. *See Beyer v. Symantec Corp.*, 333 F. Supp. 3d 966, 975-76 (N.D. Cal. 2018) (dismissing under Rule 9(b) where the plaintiff failed to attribute statements on a third-party retailer's website to a defendant manufacturer).

Here, Plaintiff's allegations are insufficient to allege reliance on any statement ***by Rawlings***. Plaintiff alleges that Rawlings makes representations as to the weight of at least the 5150 model at issue—and, purportedly, an unspecified group of other bats—in three locations: on the bat itself, on Rawlings' website, and "through third-party online retailers to which Rawlings provided the bat specifications." (*E.g.*, Compl. ¶ 2.) But Plaintiff claims to have relied ***exclusively*** on third-party website representations pre-purchase. Indeed, despite listing several statements from Rawlings' website and generically alleging that consumers rely on these representations, (*see id.* ¶¶ 14-19), Plaintiff nowhere claims he personally visited Rawlings' website. These statements are therefore entirely irrelevant to Plaintiff's attempt to allege actual reliance under the UCL, FAL, and CLRA because Plaintiff cannot have relied on statements he does not profess to have ever viewed.

See *Reed*, 2014 WL 12284044, at *8; *McVicar*, 1 F. Supp. 3d at 1052-53.

Plaintiff's sole reliance claim is that he viewed and relied on representations on the third-party website from which he purchased his bat. By itself, this allegation does not plead a viable reliance claim as against Rawlings. Plaintiff instead attempts to attribute statements on third-party websites to Rawlings by alleging the bat he purchased was sold by a third-party "authorized dealer" that "us[ed] the information" Rawlings provided regarding bat weight. (Compl. ¶¶ 2, 13.) But Plaintiff's efforts to plead reliance fall short of the Rule 9(b) requirements. Plaintiff does not explain what "authorized dealers" of Rawlings products are, discuss how Rawlings chooses or governs "authorized dealers," or give the Court any reason to believe that Rawlings had any control over the methods this third-party website chose to market its products. Without particularized allegations that address these issues, Plaintiff cannot equate his alleged reliance on third-party website statements to reliance on a statement by Rawlings. *See Beyer*, 333 F. Supp. 3d at 975-76. Thus, Plaintiff has failed to allege with sufficient particularity under Rule 9(b) that he relied on any misrepresentation by Rawlings, and he therefore lacks statutory standing to bring his claims against Rawlings under the UCL, FAL, and CLRA.

2. *Plaintiff Fails to Allege that Rawlings Knew or Should Have Known of the Alleged Misrepresentation Regarding His Bat*

Even if Plaintiff had sufficiently alleged reliance, the Complaint fails to plausibly show that Rawlings knew about the alleged misrepresentation at the time Plaintiff purchased his bat.

Knowledge is a required element for omission or misrepresentation claims under the UCL, FAL, and CLRA. *Resnick v. Hyundai Motor Am., Inc.*, No. CV 16-00593-BRO, 2017 WL 1531192, at *14 (C.D. Cal. Apr. 13, 2017); *Coleman-Anacleto v. Samsung Elec. Am., Inc.*, No. 16-CV02941-LHK, 2017 WL 86033, at *7, 10 (N.D. Cal. Jan. 10, 2017). Failure to plausibly allege a defendant's knowledge is fatal to a plaintiff's claim based in fraud under these statutes. *See,*

e.g., *Coleman-Anacleto*, 2017 WL 86033, at *7, 10; *Kowalsky v. Hewlett-Packard Co.*, 771 F. Supp. 2d 1156, 1159-64 (N.D. Cal. 2011).

Here, the Complaint does not allege facts that plausibly show Rawlings knew the bat Plaintiff purchased weighed anything other than what Plaintiff believed it weighed. At most, Plaintiff summarily alleges that Rawlings "knew or should have known" about the alleged misrepresentation on Plaintiff's bat because Rawlings has unspecified quality control processes by which "it determines the weight of each bat and how to label it." (Compl. ¶ 61.) Even putting aside the implausibility of the allegation that Rawlings could feasibly inspect or measure every single bat it manufactures, this perfunctory speculation does not sufficiently attribute knowledge that Plaintiff's bat weighed anything other than its label suggested. *See Resnick*, 2017 WL 1531192, at *14 ("[W]hile Plaintiffs now allege that [defendant] had significant quality-monitoring processes in place … a reorganized quality control department, … and 'ongoing communication' with customers, they have not sufficiently alleged how any of these quality control mechanisms placed Defendants on notice … .").

The six consumer complaints that Plaintiff allegedly reproduces from Amazon's third-party website and the single complaint allegedly posted on Rawlings' website do not cut it either. (Compl. ¶¶ 36-37.) These alleged complaints are either undated or dated long after Plaintiff purchased his bat and thus do not plausibly show Rawlings had knowledge of any purported issue at the time of Plaintiff's purchase. *See, e.g.*, *Wilson v. Hewlett-Packard Co.*, 668 F.3d 1136, 1147-48 (9th Cir. 2012) (affirming a district court's refusal to impute knowledge of a defect to a defendant based on customer complaints that were either undated or dated after the plaintiff made his purchase). And at any rate, six comments from purchasers of thousands of bats posted on third-party retailer's website and a lone undated comment allegedly posted to Rawlings' website fall well short of the complaint volume Circuit law requires for a credible knowledge allegation. *See,*

e.g., *Deras v. Volkswagen Grp. of Am., Inc.*, No. 17-cv-05452-JST, 2018 WL 2267448, at *4 (N.D. Cal. May 17, 2018) (explaining that a plaintiff must allege that a defendant in a UCL or CLRA claim received an unusually high number of complaints to attribute knowledge of a specific defect to the defendant); *see also Williams v. Yamaha Motor Co.*, 851 F.3d 1015, 1027 n.8 (9th Cir. 2017) (describing cases dealing with only a "handful" of complaints, which was an "insufficiently small" volume to attribute knowledge of an alleged issue). Plaintiff has therefore failed to plausibly attribute knowledge to Rawlings of the misrepresentation he alleges, and his claims under the UCL, FAL, and CLRA should be dismissed accordingly.

3. *Plaintiff Cannot Maintain Claims on a Classwide Basis*

Even if Plaintiff had stated a claim for violations of the UCL, FAL, and CLRA on behalf of himself, his class allegations are subject to dismissal for many of the same reasons Plaintiff failed to allege standing to represent purchasers of other Rawlings bats, discussed *supra*. A court may dismiss class allegations where it is "clear from the complaint that the class claims cannot be maintained." *Castillo v. Bank of Am. Nat'l Ass'n*, No. SA CV 17-0580-DOC, 2018 WL 1409314, at *9 (C.D. Cal. Feb. 1, 2018). And in a case involving similar allegations and many of the same claims against a bat manufacturer, a court in this District recently analyzed—at the pleading stage—very similar class allegations and class definition to Plaintiff's here and struck them. *Wisdom v. Easton Diamond Sports, LLC*, No. CV 18-4078 DSF, 2019 WL 580670, at *6 (C.D. Cal. Feb. 11, 2019). That court explained that the proposed class definition would require a trier of fact "to determine many factual questions not susceptible to common answers"—including whether "each model of bat (and each specific bat) … was overweight" or whether any differential between a particular bat's weight and its label was "material"—making it "obvious" at the pleadings stage "that classwide relief is not available." *Id.* at *6 & n.5. Here, Plaintiff has defined his class to include purchasers of any

Rawlings bat during the limitations period "labeled as being a different weight than it actually is." But given the multitude of questions raised by this definition inappropriate for resolution on a classwide basis, Plaintiff's inability to maintain his classwide claims is "obvious" at this stage, and his class allegations should be dismissed. *See Wisdom*, 2019 WL 580670, at *6.

B. Plaintiff Has Failed to State a CLRA Claim Because He Failed to Comply with the CLRA's Notice Requirements

Plaintiff's CLRA claim (**Count III**), to the extent it encompasses claims by purchasers of any other baseball bat, fails for an additional reason: his CLRA notice letter to Rawlings only focused on the specific bat Plaintiff purchased. Before bringing an action for damages under the CLRA, a consumer must 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." Cal. Civ. Code § 1782(a). Courts in this Circuit have consistently held that the CLRA's notice provision contains the requirement to name in the required notice each particular product for which the plaintiff is seeking damages—and failure to name each product results in dismissal of the CLRA claim with respect to the products left out. *See, e.g.*, *Ruszecki v. Nelson Bach USA Ltd.*, No. 12-cv-495-L, 2015 WL 6750980, at *5-6 (S.D. Cal. June 25, 2015) (dismissing with prejudice plaintiff's CLRA claim "insofar as [it is] based on products and alleged misrepresentations that were not specified" in the statutory notice). And a plaintiff may not skirt this requirement by making broad statements of belief about other of a defendant's products in the CLRA notice letter. *See Frenzel v. AliphCom*, No. 14-CV-03587-WHO, 2014 WL 7387150, at *6 (N.D. Cal. Dec. 29, 2014) ("[These] general statement[s do] not comport with the rigid compliance courts have consistently required … .").

Plaintiff's CLRA notice letter, attached as Exhibit A to the Complaint (Doc. 37-1), lacks the specificity required by the CLRA. The letter states only that

Plaintiff purchased a 27-inch, -11 5150 certified for USA Baseball. (*Id.*) Plaintiff's CLRA letter neither directly nor indirectly identifies any other Rawlings baseball bat as potentially at issue—yet Plaintiff now purports to represent purchasers of any Rawlings baseball bat "labeled as being a different weight than it actually is," if any. Plaintiff's CLRA claim therefore should be dismissed for failure to comply with the CLRA's notice requirement.

C. Plaintiff Fails to State a Claim for Breach of Express Warranty

Plaintiff purports to bring his claim for breach of express warranty (**Count IV**) under California and Missouri law. His claim fails.

As an initial matter, Plaintiff's claim fails under California law because Plaintiff has not even identified an express warranty. An "express warranty" under California law is a "written statement arising out of a sale" to a consumer that the manufacturer "undertakes to preserve or maintain the utility or performance" of a good. *Wisdom*, 2019 WL 580670, at *4 (quoting Cal. Civ. Code § 1791.2). A weight label on a bat "is not an express warranty under California law" because that label was not a "specific and unequivocal promise to preserve or maintain the utility or performance of the bat." *Id*. (dismissing breach of express warranty claim with prejudice). For those reasons, Plaintiff has failed to identify an express warranty at all under California law.

Even if Plaintiff had identified an express warranty, he must allege that the statement representing the alleged warranty was a "basis of the bargain." *See* Mo. Stat. Rev. § 400.2-313(1); Cal. Comm. Code § 2313. In other words, Plaintiff must allege that he relied on ***the seller's*** alleged warranty or that it was a "material factor" inducing the plaintiff to purchase. See *Zaccarello v. Medtronic, Inc.*, 38 F. Supp. 3d 1061, 1070 (W.D. Mo. 2014); *accord Asghari v. Volkswagen Grp. of Am.*, 42 F. Supp. 3d 1306, 1335 (C.D. Cal. 2013) (dismissing claim for breach of express warranty under California law where the complaint failed to "allege that any plaintiff relied on the express warranty").

Here, Plaintiff has not stated a claim for breach of an express warranty under either California or Missouri law. As explained in previous sections, Plaintiff has failed to sufficiently allege that he relied on any statement that could be construed as a warranty ***by Rawlings*** in deciding to purchase his baseball bat. As stated in the Complaint, the only alleged misrepresentation Plaintiff observed was that of a third-party retailer that Plaintiff has not credibly attributed to Rawlings. And Plaintiff's conclusory allegation that he and other putative class members "relied on Rawlings' express warranty that its bats were of a certain weight and this formed a part of the basis of the bargain," (Compl. ¶ 96), is a perfunctory recitation of an element of his claim that does not constitute a plausible statement that Plaintiff relied on any such warranty by Rawlings prior to purchasing his bat. Plaintiff has thus failed to allege that any express warranty by Rawlings became a basis of the bargain as required under California or Missouri law. Plaintiff's claim for breach of express warranty should be dismissed.

Even if Plaintiff had stated a claim for breach of express warranty on behalf of himself, his class allegations should be dismissed because Plaintiff has failed to allege claims capable of being maintained on a classwide basis for the reasons set forth in Part IV.A.3 herein. *See Wisdom*, 2019 WL 580670, at *6.

D. Plaintiff Fails to State a Claim for Breach of an Implied Warranty

Plaintiff also asserts his claim for breach of the implied warranty (**Count V**) under California and Missouri law. California and Missouri recognize both an implied warranty of merchantability and an implied warranty of fitness for a particular purpose. The Complaint apparently attempts to allege violations of both. (Compl. ¶¶ 104-14.) It fails.

To state a claim for breach of the implied warranty of merchantability, a plaintiff must allege that a product was not "fit for the ordinary purpose for which such goods are used," because a breach of this warranty "means the product did not possess even the most basic degree of fitness for ordinary use." *Hauck v. Advanced*

Micro Devices, Inc., No. 18-CV-00447-LHK, 2018 WL 5729234, at *8 (N.D. Cal. Oct. 29, 2018); *see also Williams v. FCA US LLC*, No. 17-CV-00844-W-DW, 2018 WL 3973075, at *5 (W.D. Mo. Apr. 16, 2018). Plaintiff has not alleged with any specificity or plausibility that the bat was somehow fundamentally unfit for its ordinary use—*i.e.*, that the bat cannot be used to play or practice baseball—and simply because his son no longer uses it does not render the bat unfit for use at all. *See Wisdom*, 2019 WL 580670, at *5 (dismissing claim with prejudice). Plaintiff's claim for breach of the implied warranty of merchantability therefore fails to state a plausible claim. And to the extent Plaintiff alleges that his bat does not conform to a statement on its label, these allegations both (A) are insufficient to state a claim, *see id.* ("[A]llegations that the bat's weight was mislabeled are, by themselves, not sufficient under California law [to state a claim for breach of the implied warranty]."); (B) fail for the same reasons Plaintiff's express warranty claim fails, see *Hadley v. Kellogg Sales Co.*, 273 F. Supp. 3d 1052, 1096 (N.D. Cal. 2017) (dismissing implied warranty of merchantability claim because this claim "rises and falls with express warranty claims brought for the same product"); and (C) fail because Plaintiff does not allege he relied on the bat's label when purchasing the bat.

As for a claim for breach of the implied warranty of fitness for a particular purpose, a plaintiff must allege that the purchaser intends to use the goods for a "particular purpose," that the purchaser relies on the seller's skill or judgment to furnish suitable goods for that purpose, and that the seller knows at the time of contracting that the purchaser both has a particular purpose and relies on the seller to furnish suitable goods. *Hauck*, 2018 WL 5729234, at *9 (California law); *see also Kinder v. Midwest Marine, Inc.*, No. 14-4133-CV-C-MJW, 2015 WL 12835687, at *3-4 (W.D. Mo. Mar. 20, 2015) (Missouri law). And fundamentally, a plaintiff must allege a ***particular purpose*** for the goods that is not the same as the product's ordinary purpose. "A 'particular purpose' differs from 'the ordinary purpose for

which the goods are used' in that it 'envisages a specific use by the buyer which is peculiar to the nature of his business, whereas the ordinary purposes for which goods are used are those envisaged in the concept of merchantability … .'" *Hauck*, 2018 WL 5729234, at *9 (quoting *Smith v. LG Elecs. U.S.A., Inc.*, No. C 13-4361 PJH, 2014 WL 989742, at *7 (N.D. Cal. Mar. 11, 2014)); *accord Kinder*, 2015 WL 12835687, at *3-4. Here, Plaintiff alleges nothing more than he purchased the bat for his son to use in playing and practicing baseball—the ordinary purpose of the bat. The Complaint thus fails to state any "particular purpose" for the bat, and the Complaint additionally fails to allege with anything beyond formulaic recitation that he relied on Rawlings' skill or judgment to furnish suitable goods for such a purpose, or that Rawlings knew or had any reason to know of such a purpose or of Plaintiff's reliance on Rawlings for that purpose. *See Wisdom*, 2019 WL 580670, at *5 (holding that "Plaintiff's conclusory allegations and allegations about the particular intended use of this particular bat by his son" failed to state a claim).

Whether couched under merchantability or fitness for a particular purpose, Plaintiff's claim for breach of the implied warranty should be dismissed. And again, even if Plaintiff had stated a claim for breach of implied warranty on behalf of himself, his class allegations should be dismissed for the reasons set forth in Part IV.A.3 herein. *See Wisdom*, 2019 580670, at *6.

E. Plaintiff Fails to State a Claim for Unjust Enrichment.

Like his other common law claims, Plaintiff pleads his unjust enrichment claim (**Count VI**) under California and Missouri law. As an initial matter, California has no standalone cause of action for "unjust enrichment." *BASF Corp. v. Waterpaper, Inc.*, No. 2:18-cv-04415-ODW, 2018 WL 5816098, at *4 (C.D. Cal. Nov. 5, 2018). And though courts in this Circuit may construe such an alleged claim as a quasi-contract claim seeking restitution, such a reading is appropriate, if at all, only where other remedies are inadequate. *Strumlauf v. Starbucks Corp.*, 192 F. Supp. 3d 1025, 1032-33 (N.D. Cal. 2016). So where a plaintiff has already pled

claims seeking legal remedies, such as claims for violation of the CLRA or breach of express warranty, or seeking restitution, such as a claim under the UCL, courts in this Circuit have deemed an "unjust enrichment" claim seeking restitution either unavailable or superfluous. *See, e.g.*, *Strumlauf*, 192 F. Supp. 3d at 1032-33 (N.D. Cal. 2016) (dismissing restitution claim because plaintiff had alleged the existence of an express contract—and therefore the availability of legal relief—by asserting a claim for breach of an express warranty). Dismissal for such duplicative claims is proper even in light of the general permissibility of alternative pleadings under Rule 8(a). As courts in this Circuit have recognized, equitable claims that "rel[y] on the same factual predicates as a plaintiff's legal cause of action" are not "true alternative theor[ies] of relief but rather [are] duplicative of those legal causes of action," because "[s]hould plaintiffs ultimately be unable to recover … it does not mean a legal remedy was unavailable (thereby justifying an equitable remedy[)], but only that their claim lacks merit." *Madrigal v. Hint, Inc.*, No. CV 17-02095-VAP, 2017 WL 6940534, at *4 (C.D. Cal. Dec. 14, 2017) (quoting *In re Ford Tailgate Litig.*, No. 11-CV-2953-RS, 2014 WL 1007066, at *5 (N.D. Cal. Mar. 12, 2014)).

Here, Plaintiff has pled claims under the UCL, FAL, and CLRA seeking restitution and disgorgement. (Compl. ¶¶ 56, 65, 80.) Plaintiff has also pled claims under the CLRA and common law for breach of express and implied warranties, seeking legal relief. (*Id.* ¶¶ 80, 91, 99.) Count VI thus amounts to, at best, a duplicative and superfluous claim for equitable relief that his other claims already seek; more plausibly (and fatally), Plaintiff has alleged entitlement to an equitable remedy despite admitting to the availability of remedies at law. Either way, Plaintiff's "unjust enrichment" claim should be dismissed.

Even if Plaintiff could state a claim for restitution in Count VI, he has not done so. Under either California or Missouri law, there are common elements to this claim: Plaintiff must allege that he conferred a benefit on Rawlings, that Rawlings received the benefit, and that Rawlings' receipt and retention of the

benefit was unjust. *See Peterson v. Cellco P'ship*, 164 Cal. App. 4th 1583, 1593 (2008); *Bratton v. Hershey Co.*, No. 2:16-CV-4322-C-NKL, 2018 WL 934899, at *4 (W.D. Mo. Feb. 16, 2018) (stating the elements for an unjust enrichment claim under Missouri law) (citing *Gerke v. City of Kan. City*, 493 S.W.3d 433, 438 (Mo. App. 2016)). As stated herein, Plaintiff has failed to plausibly allege that he relied on any specific representation ***by Rawlings*** to purchase a baseball bat or that Rawlings had any knowledge that of an alleged misrepresentation. Plaintiff has failed to sufficiently allege that Rawlings was enriched in any unjust way in Plaintiff's transaction. Plaintiff's claim for unjust enrichment should be dismissed.

Finally, even if Plaintiff had stated a claim for unjust enrichment on behalf of himself, his class allegations should be dismissed for the reasons set forth in Part IV.A.3 herein. *See Wisdom*, 2019 580670, at *6.

V. CONCLUSION

For the foregoing reasons, Rawlings respectfully requests that the Court dismiss Plaintiff's Complaint with prejudice under Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6).

Dated: February 15, 2019

Respectfully submitted,

By: /s/ Eric Y. Kizirian

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