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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

ROBERT DONOVAN, on behalf of himself and all others similarly situated,

Plaintiff,

v.

DIESTEL TURKEY RANCH,

Defendant.

Case No: 20-cv-07125-RS

NOTICE OF MOTION AND MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT

Date: February 25, 2021
Time: 1:30 PM
Crtrm: 3, 17th Floor

The Honorable Richard Seeborg

NOTICE OF MOTION AND MOTION TO DISMISS

TO THE HONORABLE COURT, ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on Thursday, February 25, 2021 at 1:30 PM, or as soon thereafter as counsel may be heard in Courtroom 3, 17th Floor, of the above-entitled Court, located in the United States District Court – San Francisco Courthouse, 450 Golden Gate Avenue, San Francisco, California 94102, defendant Diestel Turkey Ranch ("DTR"), will and does move to dismiss plaintiff Robert Donovan's ("Plaintiff") First Amended Complaint [ECF No. 30] ("FAC") pursuant to Federal Rules of Civil Procedure ("Fed. R. Civ. P.") 9(b), 12(b)(1) and 12(b)(6).

DTR moves for dismissal of Plaintiff's FAC pursuant to Fed. R. Civ. P. 12(b)(1) on the grounds that Plaintiff lacks standing to assert claims based on other states' laws and therefore his nationwide class claims should be dismissed. Absent a nationwide class, the FAC does not allege minimal diversity and is subject to the home-state exception to the exercise of original jurisdiction under the Class Action Fairness Act of 2005 ("CAFA"), 28 USC § 1332(d)(2), (4). DTR further moves to dismiss the Plaintiff's claims under Fed. R. Civ. P. 9(b) and 12(b)(6), on the grounds that the FAC does not plausibly allege Plaintiff's claims and his equitable claims should be dismissed because he has an adequate remedy at law.

This Motion is based upon this Notice of Motion and Motion, the attached Memorandum of Points and Authorities, the Request for Judicial Notice submitted in support of DTR's first motion to dismiss (ECF No. 26), all other pleadings, papers, records and documentary materials on file in this action, and such further evidence and argument as the Court may allow at the hearing on this Motion.

Dated: January 19, 2021

BLAXTER | BLACKMAN LLP

By */s/ Brian R. Blackman*

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3. Whether Plaintiff has stated a claim based on products he never purchased and advertising statements or claims he never saw nor alleged with particularity?

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

In this copycat litigation, Plaintiff Robert Donovan ("Plaintiff") seeks to succeed where an animal rights advocacy organization failed, asserting nearly identical false advertising claims against defendant Diestel Turkey Ranch ("DTR") – based on the same facts and evidence – that were rejected following an eight-day court trial in Alameda County and for which judgment was entered in favor of DTR in November 2020. Plaintiff Donovan is not entitled to relief from this Court and his First Amended Complaint ("FAC") should be dismissed for any one of the following reasons.

First, The FAC only alleges facts supporting purchases of DTR products in California and subject to California law. Plaintiff, therefore, does not have standing to assert claims under other states laws that would govern purchases in those states and, therefore, does not have standing to assert his claims on behalf of a nationwide class of consumers. Further, absent a nationwide class, the FAC does not allege the facts needed to establish this Court's subject matter jurisdiction.

Plaintiff alleges diversity jurisdiction under the Class Action Fairness Act of 2005, which only requires minimal diversity, but absent his proposed nationwide class he has not alleged any facts establishing minimal diversity. Even if he had, however, because his proposed class should be limited to a class of California purchasers, the home-state controversy exception to CAFA jurisdiction requires the Court decline to exercise subject matter jurisdiction over this local action.

Second, Plaintiff lacks both Article III and statutory standing to assert false advertising claims based on advertisements that he does not allege he ever saw, let alone relied upon in making his purchases, and DTR products he never purchased. This is not some idle concern. The FAC challenges numerous different statements communicated through a variety of advertising mediums over the last four years. DTR's advertising and label statements have changed during that time. DTR is entitled to know what Plaintiff saw, when and where he saw it, and why it was material to him in order to defend properly itself against these alleged claims. For these reasons, Plaintiff's claims also fail to satisfy the heightened pleading standards for claims based in fraud under Rule 9(b) and should be dismissed.

Third, the United States Department of Agriculture's ("USDA") complex federal regulatory scheme governing poultry labeling preempts Plaintiff's challenges based on DTR's USDA-approved labels and containers. The federal labeling requirements expressly preempt state-law challenges based on DTR's product labels, which includes the boxes in which Plaintiff's DTR products came.

Fourth, assuming Plaintiff is able to bypass all of these deficiencies, he has not alleged sufficient facts to state any of his seven claims. His false advertising claims fail because they challenge non-specific and non-measurable statements of opinion. His fraud and intentional misrepresentation claims fail because he has not alleged reliance on a specific statement nor a duty to disclose facts he contends were concealed. His warranty claims fail for lack of a specifically defined and enforceable warranty. California law does not recognize a standalone claim for unjust enrichment. And his unlawful practices claim fails because Plaintiff has not alleged facts demonstrating DTR does not provide its turkeys with food, drink, shelter or protection from the elements.

Finally, even if the Court does not dismiss Plaintiff's claims outright, it should dismiss his UCL, FAL and restitution claims because he has not alleged that he lacks an adequate remedy at law. In the end, Plaintiff's FAC is a far cry from the short, plain statement required under Federal Rules of Civil Procedure 8 that includes the facts necessary to assert his claims and provide DTR with sufficient notice of those claims so that it can mount a defense. The Court should dismiss the FAC in its entirety.

II. BACKGROUND

DTR is no stranger to the claims and allegations set forth in Plaintiff's FAC. In 2017, the animal rights organization Direct Action Everywhere SF Bay Area ("DxE") and a California consumer, Barbara Elliott, sued DTR for false and misleading advertising and breach of warranty, in the case entitled *Direct Action Everywhere SF Bay Area v. Diestel Turkey Ranch*, Alameda County Superior Court, Case No. RG17847475 (the "DxE Action"). *See* ECF No. 30, fn. 15 & ¶98; *see also* ECF No. 26-1 [DxE's Second Amended Complaint]. After a series of demurrers (which resulted, in part, in the dismissal of all consumer claims), three amended complaints and more than two and a half years of discovery, DxE's false advertising claims were tried to the court in an eight-day bench trial. On September 28, 2020, Judge Julia Spain issued her tentative statement of decision, finding for DTR on all causes of action.[1] Two weeks later, on October 13, 2020, Plaintiff – represented by at least one of the lawyers who also represented DxE (and Elliott prior to her dismissal) in the DxE Action – filed this copycat lawsuit. ECF No. 1.

The FAC, in the present action, challenges the same advertising and labeling statements based on the same theories of deception and falsity that were ultimately rejected in the DxE Action.[2] Specifically, as in the DxE action, Plaintiff contends that DTR's labels and advertising statements uniformly communicate to consumers that its products are: from its "family run turkey ranch in Sonora, California," "thoughtfully raised," "range grown," "slow grown," "thoughtfully raised on

[1] The decision became final on November 23, 2020 when Judge Spain entered her Statement of Decision and Final Judgment. *See* ECF No. 26-3.

[2] Plaintiff Donovan's FAC also relies on the same supposed "undercover investigation" as the factual support for all of his claims. *See* ECF No. 30, ¶38 & Fns. 9 & 15-17.

sustainable family farms," raised without antibiotics or chemicals and raised in conformance with the highest animal welfare standards under the Global Animal Partnership's ("GAP") 5-Step Animal Welfare Program. *See e.g.,* ECF No. 30, ¶¶2-3, 15-16, 18, 29-33. Plaintiff asserts that these advertising statements are false and misleading because they mislead consumers as to the origin of DTR's turkeys and suggest to consumers that its turkeys are raised in a manner more humane than typical factory farms or agro-industrial conditions. *Id.*, ¶¶2-4, 6-7, 9, 18, 29, 31, 41, 57 & 74.

Plaintiff alleges DTR communicates these supposedly deceptive statements to consumers across several advertising mediums – including product labels, product packaging, website pages, brochures, social media posts and online videos. *See e.g.,* ECF No. 30, ¶¶2, 16, 29-32, 43-50, 60, 64, 67 & 70. Despite the length and breadth of his allegations, however, Plaintiff does not allege which, if any, of these supposedly deceptive labeling and advertising statements he reviewed and relied on when purchasing DTR products. Instead, Plaintiff merely alleges that he purchased DTR whole body turkey products and ground turkey logs on several occasions over the last ten or more years, has viewed DTR's website "in years past," and saw DTR brochures "like" (in form and design) the one depicted in his FAC. ECF No. 30, ¶¶11-14.

III. ARGUMENT

A. Plaintiff Lacks Standing to Assert Claims on Behalf of Absent Class Members Residing Outside of California.

The FAC seeks to expand the scope of Plaintiff's putative class from a class of California residents, as alleged in his Complaint (ECF No. 24, ¶85), to a nationwide class of consumers. *See* ECF No. 30, ¶87. Specifically, Plaintiff now seeks to represent a class of "[a]ll purchasers in the United States on or after October 13, 2016 of any of [DTR's] Turkey Products marketed with any of the challenged representations." *Id*. The Court, however, should dismiss any claims brought on behalf of class member who purchased DTR products outside of California for lack of standing. *See Carpenter v. PetSmart, Inc.*, 441 F. Supp. 3d 1028, 1040-1041 (S.D. Cal. 2020) ("Plaintiffs must show they have standing for each claim they raise, and Plaintiffs do not have standing to bring claims under the laws of states where they have alleged no injury, residence, or other pertinent

connection.")

1. Each Putative Class Member's Claims Are Governed by the Laws of Their Home States.

California law presumes the legislature did not intend a statute to govern conduct occurring outside the state unless such intention was clearly expressed, or can be reasonably inferred, from the statute. *See Sullivan v. Oracle Corp.,* 51 Cal. 4th 1191, 1207 (2011). Numerous courts have held that neither the language nor the legislative history of California's CLRA, UCL or FAL provide a reasonable inference the legislature intended these statutes to operate extraterritorially and, therefore, "the presumption against extraterritoriality applies to the UCL in full force." *Id.*; *see also Wilson v. Frito-Lay N. Am.*, 961 F. Supp. 2d 1134, 1148 (N.D. Cal. 2013) (dismissing UCL, FAL and CLRA claims on behalf of putative nationwide class relating to activities occurring in other states).

In the present action, Plaintiff brings both statutory and common law claims for consumer deception under the UCL, FAL and CLRA, breach of express warranty, unjust enrichment, fraud and misrepresentation. *See* ECF No. 30, ¶¶99-160. He brings these claims on behalf of himself and his alleged class of nationwide purchasers. *Id.* He seeks to apply California law to his entire putative nationwide class irrespective of where each class member resides, purchased the product, or was allegedly injured. A nationwide class, however, is inappropriate because California laws differ from the law of others states, and because each state has an interest in regulating commerce within its borders. Thus, the statutory and common law claims of Plaintiff's alleged nationwide class should be governed by the laws of the states where they purchased their DTR turkey products.

In *Mazza v. American Honda Motor Co*., the Ninth Circuit reviewed the application of California consumer protection laws, specifically the UCL, FAL and CLRA, to a nationwide class. The Ninth Circuit *vacated* the class certification order because the district court "erroneously concluded that California law could be applied to the entire nationwide class, and because it erroneously concluded that all consumers who purchased or leased the Acura RL can be presumed to have relied on defendant's advertisements, which were misleading and omitted material

information." *Mazza v. American Honda Motor Co.*, 666 F.3d 581, 594 (9th Cir. 2012). The Ninth Circuit explained:

> The district court did not adequately recognize that each foreign state has an interest in applying its law to transactions within its borders and that, if California law were applied to the entire class, foreign states would be impaired in their ability to calibrate liability to foster commerce. That this concept was missed or given inadequate weight was error. The district court's reasoning elevated all states' interests in consumer protection to a subordinate level, while ignoring or giving too little attention to each state's interest in promoting business. This presents a mode of analysis that the Class Action Fairness Act was aimed at stopping. See Findings, Class Action Fairness Act § 2(a)(4), Pub. L. No. 109-2, 119 Stat. 4, 5 (2005) (categorizing as an "abuse[]" of the class action system the practice of state courts "making judgments that impose their view of the law on other States and bind the rights of the residents of those States.").

Mazza, 666 F.3d at 593-94; *see also Castaneda v. FILA USA, Inc.*, No. 11-cv-1033, 2011 WL 7719013, *2 (S.D. Cal. Aug. 10, 2011) (allegations of misconduct based on purchases outside of California made by non-California residents "cannot be actionable under California's Unfair Competition Law").

In reaching its conclusion, the Ninth Circuit performed California's choice-of-law analysis and determined the following: (1) there are material differences between California consumer protection laws and the laws of other states, including requirements of scienter, reliance, and available remedies; (2) foreign jurisdictions have a significant interest in regulating interactions between their citizens and corporations doing business within their state, insofar as consumer protection laws affect a state's ability to attract industry; and (3) applying California law to those jurisdictions would significantly impair their "ability to calibrate liability to foster commerce," while "California interest in applying its law to residents of foreign states is attenuated." *Id.* at 591-94. Under this analysis, the court held that "each class member's consumer protective claim should be governed by the consumer protection laws of the jurisdiction in which the transaction took place." *Id.* at 594. This reasoning applies with equal force to the present matter.

Plaintiff's claims involve application of the same consumer protection laws as *Mazza* (UCL, FAL, and CLRA). As such, the material differences that dissuaded the Ninth Circuit from applying California law to the claims of putative class members from other states are similarly present here.

Plaintiff has not alleged any facts from which the Court could conclude the purchasing decisions of out-of-state purchasers emanated from California. Nothing in the FAC alleges that any out-of-state purchases were directed from California or had anything to do with California. Thus, while non-California citizens who made purchases in California could assert the same claims based on California law that Plaintiff asserts, there is no plausible way for a non-California citizen who purchased a challenged turkey product outside of California to bring these claims. As such, Plaintiff's UCL, FAL and CLRA claims on behalf of a nationwide class should be dismissed.

The same is true of the alleged putative class claims for breach of warranty, unjust enrichment, fraud and misrepresentation. California's choice-of-law rules direct this Court to apply the substantive law of "the state where the last event necessary to make the actor liable occurred." *Mazza*, 666 F.3d at 593-594. For each putative class member, this place is where he or she received the alleged misrepresentation related to DTR's turkey products, i.e., the state where they viewed the advertising and purchased the DTR product. *Id*. (choice-of-law was where "communication of the advertisements to the claimants" occurred). Thus, the substantive laws of the 49 other states where nationwide purchasers allegedly viewed some DTR advertising and purchased their turkey products apply to their claims. As detailed below, Plaintiff lacks standing to assert claims under the laws of those other 49 states.

2. Plaintiff Lacks Article III Standing to Bring Claims on Behalf of Consumers from Other States.

'"[S]tanding is not dispensed in gross.' It 'is claim specific and a plaintiff must demonstrate standing for each claim he seeks to press.'" *Harris v. CVS Pharmacy, Inc.*, No. 13-cv-02329, 2015 WL 4694047, *4 (C.D. Cal. Aug. 6, 2015) (quoting *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352, 126 S.Ct. 1854, 164 L. Ed. 2d 589 (2006)). "[S]tanding is claim- and relief-specific, such that a plaintiff must establish Article III standing for each of her claims and for each form of relief sought." *In re Carrier IQ, Inc., Consumer Privacy Litig.*, 78 F. Supp. 3d 1051, 1064-65 (N.D. Cal. 2015) (citation and internal quotation marks omitted). In a class action, "at least one named plaintiff must have standing with respect to each claim the class representatives seek to bring." *In*

re Ditropan XL Antitrust Litig., 529 F. Supp. 2d 1098, 1107 (N.D. Cal. 2007). Thus, when "a representative plaintiff is lacking for a particular state, all claims based on that state's laws are subject to dismissal." *In re Flash Memory Antitrust Litig.*, 643 F. Supp. 2d 1133, 1164 (N.D. Cal. 2009) (citing *Ditropan*, 529 F. Supp. 2d at 1106-07).

In *Carpenter v. PetSmart, Inc.*, the court held that the plaintiff lacked Article III standing to pursue three common law claims on behalf of a putative nationwide class, even though the complaint ostensibly listed "one generic 'fraud by omission' claim, one generic breach of implied warranty claim, and one generic unjust enrichment claim." *Carpenter,* 2020 WL 996947, at *8. The court reasoned that plaintiff improperly attempted to "assert fifty fraud by omission claims, fifty breach of implied warranty claims, and fifty unjust enrichment claims - one of each claim for each state - on behalf of fifty separate state-specific classes." *Id*. Because Carpenter was a California resident who purchased the relevant product in California, the Court held that he lacked "standing to assert a claim against [Defendant] under any state's law but California's because [he] did not suffer any injuries in fact traceable to any alleged violations of any other states' laws. Labeling the putative class as a 'nationwide class' [did] not overcome this fatal deficiency." *Id*. This same reasoning applies to the present matter.

Plaintiff is and has been a resident of California since at least 1967 and only alleges facts demonstrating purchases of DTR products in California.[3] ECF No. 30, ¶¶11, 13. Because Plaintiff does not reside in and has not suffered an injury in any other state, he "lack[s] standing to assert claims based on those states' laws." *Fenerjian v. Nongshim Co.*, 72 F. Supp. 3d 1058, 1082-83 (N.D. Cal. 2014); *see also Jones v. Micron Tech. Inc.*, 400 F. Supp. 3d 897, 908 (N.D. Cal. 2019) ("Courts in the Ninth Circuit have consistently held that a plaintiff in a putative class action lacks standing to assert claims under the laws of states other than those where the plaintiff resides or was injured."); *In re Packaged Seafood Prods. Antitrust Litig*., 242 F. Supp. 3d 1033, 1095 (S.D. Cal.

[3] Plaintiff also alleges he purchased DTR products in other states (EFC No. 30, ¶¶11, 13), but does not identify in what city, county or state those purchases occurred or whether they occurred on or after October 13, 2016 (the cutoff date based on the longest statute of limitations appliable to Plaintiff's claims). Accordingly, any alleged purchases from other states lack substance.

2017) ("The overwhelming majority of courts have held that Article III standing for state law claims is necessarily lacking when no plaintiff is alleged to have purchased a product within the relevant state.").

Moreover, the appropriate time for dismissal is now, on the pleadings. As detailed below, the answer to this question has a direct impact on the Court's subject matter jurisdiction under CAFA. Further, the *Carpenter* court reasoned that it "should address standing prior to class certification ... [because,] when a plaintiff's lack of standing is plain enough from the pleadings, it can form appropriate grounds for dismissal even if it overlaps with issues regarding whether the named plaintiffs are adequate representatives under Rule 23." *Carpenter,* 2020 WL 996947, at *7 (citations omitted); *see also Johnson v. Nissan N. Am., Inc.*, 272 F. Supp. 3d 1168, 1176 (N.D. Cal. 2017) (determining at the pleadings stage that plaintiffs lacked standing to bring nationwide claims, and opting "to require that plaintiffs present named class representatives who possess individual standing to assert each state law's claims"); *Ditropan*, 529 F. Supp. 2d at 1106-07 (dismissing claims brought under the laws of 24 states and requiring that "named plaintiffs who represent a class must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class").

The fact that Plaintiff also asserts common law claims for fraud, misrepresentation and unjust enrichment does not preclude dismissal of the Plaintiff's nationwide class because Article III standing requirements apply with equal force to both statutory and common law claims. *See Corcoran v. CVS Health Corp.*, No. 15-cv-3504, 2016 WL 4080124, at *3 (N.D. Cal. July 29, 2016) ("Plaintiffs do not have standing to bring the common law claims under the laws of the . . . states to which they have alleged no connection. The common law claims brought based on the laws of those states are therefore dismissed."); *Flash Memory*, 643 F. Supp. 2d at 1163-64 (dismissing unjust enrichment claims asserted under laws of states in which no named plaintiff resided). This Court should therefore dismiss Plaintiff's claims on behalf of putative class members outside of California for lack of standing.

B. The FAC Fails to Allege Sufficient Facts to Demonstrate Subject Matter Jurisdiction.

Plaintiff alleges subject matter jurisdiction under the Class Action Fairness Act of 2005, Pub. No. 109-2, 119 Stat. 4 (2005), amending 28 U.S.C. § 1332 ("CAFA"). *See* ECF No. 30, ¶21. As the party invoking diversity jurisdiction, Plaintiff "bears the burden of establishing that jurisdiction exists." *See Diva Limousine, Ltd. v, Uber Technologies, Inc.*, 392 F. Supp. 3d 1074, 1082 (N.D. Cal. 2019) (quoting *Scott v. Breeland*, 792 F.2d 925, 927 (9th Cir. 1986).

CAFA "vests the district court with 'original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interests and costs, and is a class action in which' the parties satisfy, among other requirements, minimal diversity." *Abrego Abrego v. The Dow Chem. Co.*, 443 F.3d 676, 680 (9th Cir. 2006) (quoting 28 U.S.C. § 1332(d)). Minimal diversity exists where "any member of a class of plaintiffs is a citizen of a State different from any defendant." 28 U.S.C. § 1332(d)(2)(A). Absent Plaintiff's alleged nationwide class, the FAC does not, on its face, allege minimal diversity. Plaintiff and DTR (as a California corporation with its principal place of business in Sonora) are both citizens of California. ECF No. 30, ¶¶11, 19. Further, because Plaintiff's nationwide class claims should be dismissed for lack of standing, the FAC does not allege facts establishing that any member of a class of California purchasers is a citizen of any state other than California.

Regardless, even if a class of California purchasers established minimal diversity, the Court must decline to exercise subject matter jurisdiction because the home-state controversy exception to CAFA jurisdiction plainly applies. Under the home-state controversy exception, a federal district court "***shall*** decline to exercise jurisdiction under" 28 U.S.C. § 1332(d)(2) when "two-thirds or more of the class members of all proposed plaintiff classes in the aggregate, and the primary defendants, are citizens of the State in which the action was originally filed." 28 U.S.C. § 1332(d)(4)(B) (emphasis added). Plaintiff alleges that DTR (the only defendant) is a citizen of California. ECF No. 30, ¶19. Accordingly, the only real question with respect to the application of the home-state exception is whether two-thirds or more of Plaintiff's proposed class are citizens of California. Common sense and Plaintiff's allegations dictate that they are.

"[W]here plaintiff's own characterization demonstrates the action's local nature, no further discovery or proof is necessary." *Rodriguez v. Instagram, LLC*, No. 12-cv-06482, 2013 WL 3732883, at *3 (N.D. Cal. Jul. 15, 2013) (citations omitted). While the FAC alleges a "nationwide" class of purchaser, for the reasons discussed in Section III.A.2 above, Plaintiff only has standing to assert claims on behalf of a putative class of California purchasers. The most reasonable interpretation of a class of California purchasers is that it consists almost entirely of California residents. *See e.g., Cortez v. McClatchy Newspapers, Inc.*, No. 15-cv-01891, 2015 WL 3181200, at **5-6 (E.D. Cal. Jun. 7, 2016) (reasonable interpretation of "all persons in California who subscribed" is that it refers to people currently in California…"); s*ee also Quesada v. Herb Thyme Farms, Inc.*, No. 11-cv-00016, 2011 WL 1195952, at *4 (C.D. Cal. Mar. 28, 2011) ("definition indicates that Plaintiff's proposed Class is limited to purchasers within California").

Several courts in the Ninth Circuit have held that when a complaint alleges a class of California residents or California purchasers, then "greater than two-thirds of the members" are citizens of California. *See Rodriguez v. Instagram, LLC*, 2013 WL 3732883, *3 (holding home-state controversy exception applies and that "for a class of consumers residing in California, at least two out of three are also California citizens."); *see also Quesada v. Herb Thyme Farms, Inc.*, 2011 WL 1195952, *4 (finding class defined as "all persons within the state of California" satisfies the two-thirds element needed to establish local controversy exception to CAFA); *Walker v. Apple, Inc.*, No. 15-cv-1147, 2015 WL 12699871, *3 (S.D. Cal. Sep. 17, 2015) (same); *Flores v. Chevron Corp.*, No. 11-cv-02551, 2011 WL 2160420, at *3 (S.D. Cal. May 31, 2011) (same); *Rotenberg v. Brain Research Labs, LLC*, No. 09-cv-2914, 2009 WL 2984722, *3 (N.D. Cal. Sep. 15, 2009) (same). Indeed, as one court has noted, it is common sense that a class of "all persons in California" likely consists of at least two-thirds California citizens. *Cortez v. McClatchy Newspapers*, 2015 WL 3181200, **5-6 ("Courts in this Circuit have not shied from making common sense judgments as to the citizenship of purported class members."). Thus, absent a putative nationwide class, the two-thirds requirement under the home-state exception is satisfied and the Court must decline to exercise subject matter jurisdiction over this matter.

C. Plaintiff Has Not Alleged a Plausible Claim of Deception Against DTR.

To survive a motion to dismiss, a complaint "must 'contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.'" *Viggiano v. Hansen Natural Corp.,* 944 F. Supp. 2d 877, 883-884 (C.D. Cal. 2013) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009)). Facts indicating the "mere *possibility* of misconduct" fall short of meeting the plausibility standard. *Iqbal*, 556 U.S. at 678 (emphasis added). Furthermore, Plaintiff's statutory consumer fraud claims (UCL, FAL and CLRA), as well as his claims for fraud and misrepresentation, must also satisfy Rule 9(b)'s heightened pleading.[4] *See Kearns v. Ford Motor Co.,* 567 F.3d 1120, 1125 (9th Cir. 2009) ("[W]e have specifically ruled that Rule 9(b)'s heightened pleading standards apply to claims for violations of the CLRA and UCL.")

1. Plaintiff Cannot State Claims Based on Advertising or Marketing Statements He Neither Saw nor Alleges with Particularity.

At the threshold, Plaintiff lacks standing to pursue his claims because the FAC does not allege that he ever saw or actually relied upon the vast majority of the advertisements and/or advertising statements challenged in his FAC. Specifically, Plaintiff "is required to establish standing in [his] own right to bring substantially similar claims on behalf of others. *Mohamed v. Kellogg Co.*, No. 14-cv-02449, 2015 WL 12469107, *5 (S.D. Cal. Aug. 19, 2015). Plaintiff, however, cannot show that he suffered an "injury in fact," – i.e., "an invasion of a legally protected interest which is (a) concrete and particularized; and (b) actual or imminent, not conjectural or hypothetical[,]'" *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (internal citations omitted) – nor a "causal connection" between his alleged injury and DTR's advertising. *Id.*

Further, in addition to the Article III standing requirements, Plaintiff must also satisfy the specific standing requirements under the UCL, FAL, and CLRA to assert claims under those statutes. *Kane v. Chobani, Inc.*, 973 F. Supp. 2d 1120, 1129 (N.D. Cal. 2014). To assert a UCL or FAL claim, a private plaintiff needs to have "suffered injury in fact and . . . lost money or property

[4] So too must claims for express warranty and unjust enrichment "based on the same allegedly misleading advertising upon which Plaintiff's UCL … and CLRA claims are based." *In re Arris Cable Modem Consumer Litig.*, No. 17-cv-01834, 2018 WL 288085, *10 (N.D. Cal. Jan. 4, 2018).

as a result of the unfair competition." Cal. Bus. & Prof. Code §§ 17204 & 17535; *Kwikset Corp. v. Sup. Ct.*, 51 Cal. 4th 310, 321-322 (2011). Because Plaintiff alleges DTR made deceptive statements, Plaintiff must also allege he "purchased the product in reliance on the misrepresentation" and "would not have purchased the product otherwise." *Hinojos v. Kohl's Corp.*, 718 F.3d 1098, 1109 (9th Cir. 2013) (citing *Kwikset*, 51 Cal. 4th 310 (2011)). To establish standing under the CLRA, Plaintiff similarly must allege that he relied on DTR's alleged misrepresentations and suffered economic injury as a result. *Durell v. Sharp Healthcare*, 183 Cal. App. 4th 1350, 1367 (2010) (finding plaintiff's CLRA claim failed because he did not allege facts showing that he "relied on any representation by" defendant).

Numerous cases addressing alleged UCL and CLRA claims have confirmed that "[a] party does not have standing to challenge statements or advertisements that [he] never saw." *Palmer v. Apple Inc.*, No. 15-cv-05808, 2016 WL 1535087, *3 (N.D. Cal. Apr. 15, 2016) (quoting *Ham v. Hain Celestial Grp., Inc.*, 70 F. Supp. 3d 1188, 1197 (N.D. Cal. 2014)); *see also, e.g., Lanovaz v. Twinings N. Am., Inc.*, No. 12-cv-2646, 2014 WL 46822, *6 (N.D. Cal. Jan. 6, 2014) (plaintiff "cannot base a claim on content on [defendant's] website that she never saw or relied on"); *McCrary v. Elations Co.,* No. 13-cv-0242, 2013 WL 6403073, *8 (C.D. Cal. July 12, 2013) ("Plaintiff did not actually rely on any website statements and does not have standing to bring [UCL/CLRA] claims based on those statements."); *Brownfield v. Bayer Corp*., No. 09-cv-0444, 2009 WL 1953035, *4 (E.D. Cal. July 6, 2009) (dismissing UCL/CLRA claims where plaintiffs had not alleged they "viewed either of the Ads at issue prior to purchasing [the product] or that they purchased [it] in reliance on the challenged aspects of the Ads"); *Durell*, 183 Cal. App. 4th at 1363 (affirming dismissal of UCL claim where plaintiff did not claim he ever visited defendant's website containing alleged misrepresentations). Plaintiff's claims fail for the same reasons.

Plaintiff here fails to allege that he ever saw or read any of the specific website, brochure, flyer or social media statements identified and challenged in the FAC, or relied on them in making his purchases. *See* ECF No. 30, ¶¶11-16. The most Plaintiff alleges is that he purchased DTR's whole body turkeys, which came in boxes he kept and reused, and ground turkey packaged in

plastic-wrapped logs. ECF No. 30, ¶16 & 14(d). Thus, this case is about the labeling Plaintiff would have seen on the products he purchased. *Id*. The FAC, however, is riddled with references to DTR's representations and advertisements beyond labeling, including numerous statements taken from DTR's websites, press releases, brochures, social media postings, and videos. *See e.g.*, ECF No. 30, ¶¶29-31, 43-44, 46-50, 60, 64, 67. Plaintiff, however, never alleges that he saw or read those things pre-purchase.

The most the FAC alleges is that Plaintiff "viewed the [DTR] website *in years past*" and "saw [DTR] brochures, including ones *like* the brochure reproduced at ¶31." *See* ECF No. 30, ¶¶14(a),(b) (emphasis added). Plaintiff, however, admits that DTR's website has changed over time and only alleges that the brochure displayed in paragraph 31 was available at Whole Foods Markets (but does *not* allege Plaintiff ever shopped at or purchased a DTR product from Whole Foods Market). *Id.* at fn. 5 & ¶31. He also does not allege he ever followed DTR on social media, nor reviewed any of its online videos. *Id*., ¶¶11-16. As such, these advertising videos, postings and statements are irrelevant. *See In re Ferrero Litig*., 794 F. Supp. 2d 1107, 1112 (S.D. Cal. 2011) (plaintiff cannot pursue claims based on false advertisements on which he did not rely).

Nor may Plaintiff "expand the scope of [his] claims to include products [he] did not purchase." *Johns v. Bayer Corp*., No. 09-cv-1935, 2010 WL 476688, at *5 (S.D. Cal. Feb. 9, 2010); *see also Zwart v. Hewlett-Packard Co*., No. 10-cv-03992, 2011 WL 767750, at *8-11 (N.D. Cal. Feb. 25, 2011) (dismissing claims based on products plaintiff never bought on grounds no injury, reliance or causation.) The FAC specifically identifies twenty-one different DTR products, including several product types Plaintiff does not allege ever purchasing (e.g., turkey breast products, sliced products, chorizo and natural burgers). *See* ECF No. 30, ¶¶ 11 & 28. The FAC does not allege Plaintiff ever saw advertising specific to the products he did not purchase, read their packaging, or even considered purchasing those products. Thus, the Court must dismiss Plaintiff's claims, as a matter of law, to the extent they are based on either products he did not purchase or advertising he never alleges he saw nor relied upon in completing the purchases he did make.

2. Plaintiff Fails to Allege Deceptive Advertising with Particularity.

Plaintiff also fails to satisfy Rule 9(b)'s "heightened pleading requirement" applicable to his CLRA, UCL, FAL and similar claims that are "premised on misleading advertising or labeling." *Tabler v. Panera LLC*, No. 19-cv-01646, 2019 WL 5579529, *11 (N.D. Cal. Oct. 29, 2019). Rule 9(b) requires Plaintiff "state with particularity the circumstances constituting fraud" – or, in other words, to identify the who, what, when, where and how of the misconduct charged, as well as what is false or misleading about [the allegedly fraudulent] statement, and why it is false." *Cafasso v. Gen. Dynamics C4 Sys., Inc.,* 637 F.3d 1047, 1054-1055 (9th Cir. 2011) (alteration original) (internal quotations and citations omitted).

The courts of this circuit "have held that a plaintiff does not satisfy Rule 9(b) when the plaintiff generally identifies allegedly misleading statements but fails to specify which statements the plaintiff actually saw and relied upon." *Tabler*, 2019 WL 5579529, at *12 (brackets and internal quotation marks omitted); *see also In re Arris Cable Modem Consumer Litig.*, No. 17-cv-01834, 2018 WL 288085, **8-9 (N.D. Cal. Jan. 4, 2018) (dismissing complaint under Rule 9(b) where it identified "a range of statements" that were allegedly misleading, but did not specify "which statements any of [the plaintiffs] saw or relied on in deciding to buy" defendant's products). Plaintiff's allegations fall well short of these Rule 9(b)'s requirements.

Who: The FAC is devoid of any facts articulating Plaintiff's specific understanding and reliance. He fails to allege adequately what advertising statements he reviewed prior to his purchases, what those statements meant to him and if the statement was material to his purchases. ECF No. 30, ¶¶11-16, 109, 130.

What: Plaintiff alleges he purchased DTR's whole body turkeys and ground turkey. ECF No. 30, ¶110. He, however, does not allege which of the seven different whole body turkeys (identified in paragraph 28 of the FAC) he purchased or what statement(s) on the labeling of those products caused him to purchase that particular product. *Id.*, ¶¶11, 28. This is significant given the labels on each of the whole body turkey products is different and has changed over time. Plaintiff also does not plead any specific advertising statements he saw that caused his purchases. *Id.*, ¶¶11-

16. Allegations that Plaintiff viewed DTR's website "in the past," saw brochures "like" the one alleged in the FAC, generally relied on DTR's advertising or that the advertising was uniformly communicated are insufficient and negate his claims. *See Pirozzi v. Apple, Inc.*, 913 F. Supp. 2d 840, 850 (N.D. Cal. 2012) (dismissing UCL and CLRA claims where plaintiff "failed to provide the particular of her own experience reviewing and relying upon any of [defendant's] statements").

When: Plaintiff does not allege when he saw the various pieces of advertising that he now alleges are misleading. *See Boris v. Wal-Mart Stores, Inc.*, 35 F. Supp. 3d 1163, 1174-75 (C.D. Cal. 2014) (dismissing claims under Rule 9(b) where plaintiff did "not specify when he viewed Wal-Mart's website or when he relied on it"), aff'd, 649 F. App'x 424 (9th Cir. 2016). This is particularly necessary here, where Plaintiff's claims are based in part on DTR's website and packaging, which change in the ordinary course of its business. Plaintiff admits he has been purchasing DTR products for more than ten years. ECF No. 30, ¶11. Thus, "[DTR] needs to know when [Plaintiff] viewed the website in order to defend against [his] claim[s], rather than simply deny any wrongdoing." *Id*.

In summary, Plaintiff's FAC fails to allege plausible injury, reliance or deception.

D. The PPIA Preempts Plaintiff's Claims Based on Product Labels and Boxes.

Plaintiff's state law false advertising, fraud, misrepresentation and breach of warranty claims center, in part, on alleged misstatements on DTR's product labels. *See e.g.,* ECF No. 30, ¶¶2, 14(d), 15, 29, 30, 41, 45, 57, 77 & 111. For example, paragraphs 2, 16 and 44 of the FAC reproduce pictures of USDA-approved DTR whole body turkey labels and boxes, and ground turkey labels. Any allegations premised on DTR's labeling—including a challenge to the box's and label's description of DTR's turkey as "Thoughtfully Raised"—are expressly preempted.

The Poultry Products Inspection Act ("PPIA") regulates the distribution, sale and labeling of poultry products such as DTR's turkey products. 21 U.S.C. §§ 451, 453(e),(f); *see also* 9 C.F.R. § 381.1(b) (defining poultry and poultry products to include turkey products). Congress enacted the PPIA, in part, to regulate the distribution and prevent the sale of misbranded poultry products: "[i]t is essential in the public interest that the health and welfare of consumers be protected by assuring

that poultry products distributed to them are … properly marked, labeled, and packaged." 21 U.S.C. §§ 451, 452.

To that end, the PPIA prohibits a party from distributing or offering any poultry products for sale that are "misbranded at the time of such sale … [or] offer for sale…." 21 U.S.C. § 458(a). Determining whether a product is "misbranded" requires, among other things, an examination of whether the "labeling is false or misleading in any particular." 21 U.S.C. § 453(h)(1); *see also* 9 C.F.R. § 381.1(b). The PPIA also prohibits a party from selling or offering for sale any poultry products "under any name or other marking or labeling which is false or misleading, …but established trade names and other marking and labeling and containers which are not false or misleading and which are approved by the Secretary are permitted." 21 U.S.C. § 457(c); *see also* 9 C.F.R. § 381.129(a).

Congress and the USDA have established uniform national requirements, in the form of detailed regulations, for the labeling and approval of labels on poultry products under the PPIA. *See* 9 C.F.R. §§ 381.129, 412.1. These regulations cover substantive labeling requirements and include a requirement that the USDA's Food Safety and Inspection Service ("FSIS") examine the labeling on any poultry product or container and approve the labeling when compliant.[5] *Id*. A label cannot be used in commerce without approval. *Id.* Under the labeling application process, distributors submit labels and information about the poultry product and processing procedures, as well as documentation for any special statements or claims. *See* ECF No. 26-4..

The PPIA explicitly requires the FSIS review and approve all "special statements and claims," including those regarding the "raising of the animals."[6] 9 C.F.R. § 412.1(c)(3),(e). Thus, pursuant to the regulatory authority granted to it under the PPIA, the FSIS reviews product labels

[5] The term "labeling" includes "all labels and other written, printed, or graphic matter (1) upon any article or any of its containers or wrappers, or (2) accompanying such article." 21 U.S.C. §453(s); *see also* 9 C.F.R. § 381.1(b). "The term 'container' includes any box, can, tin, cloth, plastic, or any other receptacle, wrapper or cover." 9 C.F.R. § 381.1(b).

[6] Labels that must be submitted to the Labeling and Program Delivery Staff of the FSIS for specific approval include those bearing the special claim or statement "Humanely Raised," "raised without antibiotics," "no hormones added," and/or third-party raising claim programs (e.g., Global Animal Partnership). *See* ECF No. 26-4 at pp. 13-16.

and the supporting material, considers whether they are false or misleading, and approves or disapproves them. 21 U.S.C. §§ 451, 457(c). The FSIS's approval is definitive and cannot be displaced by operation of state law. *See Meaunrit v. ConAgra Foods Inc.,* No. 09-cv-02220, 2010 WL 2867393, *7 (N.D. Cal., Jul. 20, 2010) (holding defendant did not use false or misleading labels because its chicken pot pies labeling received pre-approval from FSIS); *Reigal v. Medtronic, Inc.*, 552 U.S. 312, 321 (2008) (holding federal law preempted plaintiff's state law claims because FDA provided pre-approval of the pharmaceutical label in dispute).

The PPIA includes an express preemption provision barring any "[m]arking, labeling, packaging, or ingredient requirements . . . in addition to, or different than, those" imposed by the USDA. *See* 21 U.S.C. §§ 467e. As a result, federal courts have routinely dismissed complaints brought under state law (including, specifically, the UCL, FAL, CLRA and warranty claims under California's Commercial Code) alleging that a meat product label is false or misleading. *See, e.g., Brower v. Campbell Soup Co.*, 243 F. Supp. 3d 1124, 1129 (S.D. Cal. 2017) (dismissing UCL, FAL CLRA and Commercial Code claims as preempted because "a jury could conclude that the labels should disclose more information or employ different language, in which case it would introduce requirements in addition to or different from those imposed by the USDA" (citations omitted)); *Barnes v. Campbell Soup Co.*, No. 12-cv-05185, 2013 WL 5530017, *5 (N.D. Cal. July 25, 2013) (dismissing UCL/CLRA claims against Campbell's "100% Natural Mexican-Style Chicken Tortilla" soup as preempted because the labels had been approved by the USDA); *Webb v. Trader Joe's Co.*, 418 F. Supp. 3d 524, 529 (S.D. Cal. 2019) (finding UCL, FAL, CLRA and warranty claims expressly preempted by the PPIA because plaintiff's liability theory centered on misleading label statements); *Meaunrit v. The Pinnacle Foods Grp., LLC*, No. 09-cv-04555, 2010 WL 1838715, *7 (N.D. Cal. May 5, 2010) (dismissing UCL claim as preempted because "the USDA has reviewed the labels, considered whether they were false or misleading and approved of them"). In fact, the Alameda County Superior Court sustained DTR's demurrer in the DxE Action to these same consumer deception claims brought under the UCL, FAL and CLRA based on DTR's product labels and labeling. *See* ECF No. 26-2.

When "conducting a preemption analysis, a court must consider the theory of each claim and determine whether the legal duty that is the predicate of that claim is inconsistent with federal law." *Metrophones Telecomm'ns, Inc. v. Global Crossing Telecomm'ns Inc.*, 423 F. 3d 1056, 1075 (9th Cir. 2005). "The question then is whether the state law requirements are additional to or different than the federal requirements." *Webb*, 418 F. Supp. 3d at 528. Plaintiff's allegations lay plain that his label claims seek to impose requirements in addition to those imposed by the USDA and FSIS.

Specifically, he challenges the use of DTR's trade name (i.e., "Diestel Turkey Ranch") and label statements, including "Thoughtfully Raised," "Range Grown," "Slow Grown," "Thoughtfully Raised on Sustainable Family Farms," raised without antibiotics, and raised in conformance with third party animal welfare standards, as the basis for DTR's liability. *See* ECF No. 30, ¶¶2, 16, 29, 45, 56, 77 & 111. The FSIS, however, has approved each of these claims for use on DTR's product labels, containers and packaging. Thus, the FSIS has already determined these statements are not false or misleading in any particular in accordance with its standards and processes. Plaintiff, however, contends the FSIS's processes and standards are not good enough because, *inter alia*, they do not "independently verify [label statements] through on-site inspections," and lacks independent oversight. *See* ECF No. 30, ¶¶79-86. Such allegations clearly demonstrate that Plaintiff's labeling claims seek to impose additional requirements above and beyond those already imposed by the USDA and FSIS. As such, Plaintiff's labeling claims are preempted.

E. Plaintiff's FAC Fails to State a Claim.

Even if Plaintiff could show subject matter jurisdiction and that his labeling claims are not preempted and that he has alleged his advertising claims with particularity, the FAC should be dismissed on the independent ground that it fails to state a claim upon which relief can be granted.

1. Plaintiff's Claims Based on Non-Actionable Puffery Should Be Dismissed.

To state a cause of action for false or misleading advertising under the FAL, UCL, or CLRA, Plaintiff must allege facts demonstrating that DTR's statements are "likely to deceive a reasonable consumer." *Williams v. Gerber Products, Co.*, 552 F.3d 934, 938 (9th Cir. 2008); *Lavie*

v. Procter & Gamble Co., 105 Cal. App. 4th 496, 508 (2003). "The reasonable consumer standard requires a probability 'that a significant portion of the general consuming public or of targeted consumers, acting reasonably under the circumstances, could be misled." *Ebner v. Fresh, Inc.*, 838 F.3d 958, 965 (9th Cir. 2016) (quoting *Lavie*, 105 Cal. App. 4th at 508). Moreover, the alleged statement must be an objectively quantifiable or material statement of fact capable of deceiving or misleading a reasonable consumer. *See Salazar v. Honest Tea, Inc.*, 74 F. Supp. 3d 1304, 1316 (E.D. Cal. 2014) ("Non-specific, non-measurable assertions are classic non-actionable puffery.") (citing *Bronson v. Johnson & Johnson, Inc.,* No. 12-cv-4184, 2013 WL 1629191, *11 (N.D. Cal. Apr. 16, 2013)).

There is nothing false or misleading about referring to DTR's turkey products as "Thoughtfully Raised," "Thoughtfully Raised on Sustainable Family Farms," or "Slow Grown." These are nonactionable, subjective statements. *L.A. Taxi Cooperative, Inc. v. Uber Technologies, Inc*., 114 F.Supp.3d 852, 860 (N.D. Cal. 2015) ("Puffing is exaggerated advertising, blustering, and boasting upon which no reasonable buyer would rely.") They are not the type of objectively measurable statements of fact likely to deceive a reasonable consumer that are required to state a claim for false or misleading advertising. *Id.* at 860-61 ("[A] statement that is quantifiable, that makes a claim as to the specific or absolute characteristics of a product, may be an actionable statement of fact while a general, subjective claim about a product is non-actionable puffery.") Because Plaintiff challenges DTR's non-specific, non-measurable statements, his false advertising claims based on these statements should be dismissed.

2. Plaintiff's Fraud and Intentional Misrepresentation Claims Fail.

To state a claim for deceit, plaintiff must specifically plead facts showing actual reliance on the alleged misrepresentation. "It is settled that a plaintiff, to state a cause of action for deceit based on a misrepresentation, must plead that he or she actually relied on the misrepresentation." *Mirkin v. Wasserman*, 5 Cal. 4th 1082, 1088 (1993); *see also Welk v. Beam Suntory Import Co.*, 124 F. Supp. 3d 1039, 1044 (S.D. Cal. 2015) (intentional misrepresentation requires "plaintiff [have] reasonably relied on the representation."). "[T]he mere assertion of "reliance" is insufficient. The

plaintiff must allege the specifics of his or her reliance on the misrepresentation to show a bona fide claim of actual reliance." *Cadlo v. Owens-Illinois, Inc.*, 125 Cal. App. 4th 513, 519 (2004) (internal citations omitted). Moreover, because Plaintiff asserts a claim for fraud by concealment, he must allege facts demonstrating DTR concealed a material fact and had a duty to disclose that fact. *Smith v. Ramis*, 647 Fed. App.'x 679, 681 (9th Cir. 2016) (listing elements of fraudulent concealment).

As discussed in Section III.C above, Plaintiff fails to allege which of DTR's purported misrepresentations he viewed, where and when he viewed them and upon which statement(s) he relied in making his purchases. This has particular significance to Plaintiff's concealment claim because he alleges DTR's duty to disclose arises from its superior knowledge and affirmative misrepresentation. ECF No. 30, ¶153. DTR cannot prepare its defense without knowing what specific statement(s) Plaintiff saw that gave rise to a duty to disclose. Accordingly, the Court should dismiss Plaintiff's claims for fraud and intentional misrepresentation.

3. Plaintiff's Express Warranty and Unjust Enrichment Claims Fail.

Plaintiff also fails to adequately plead claims for unjust enrichment or breach of express warranty. As an initial matter, because Plaintiff alleges a "unified course of fraudulent conduct and rel[ies] entirely on that course of conduct as the basis of" all of his claims, these claims are subject to—and fail to meet—the same heightened pleading requirements described in Section III.C.2 above, and should be dismissed for that reason alone. *See Vess v. Ciba-Geigy Corp USA,* 317 F.3d 1097, 1103-04 (9th Cir. 2003); *see also In re Arris,* 2018 WL 288085, *10. Regardless, these claims fail for independent reasons.

a. Plaintiff's Express Warranty Claim Fails.

"To plead an action for breach of express warranty under California law, a plaintiff must allege: (1) the exact terms of the warranty; (2) reasonable reliance thereon; and (3) a breach of warranty which proximately caused plaintiff's injury."[7] *Sanders v. Apple Inc.*, 672 F. Supp .2d 978,

[7] "A plaintiff also must plead that he provided the defendant with pre-suit notice of the breach." *Sanders,* 672 F. Supp .2d at 986–87. Plaintiff claims he satisfied this notice requirement through his March 2019 CLRA letter. *See* ECF No. 30, ¶142. His CLRA letter, however, makes no

986–87 (N.D. Cal. 2009) (citation omitted). The Court should dismiss this claim because Plaintiff does not "identify the particular commercial or advertisement upon which he relied and [does not] describe with the requisite specificity the content of that particular commercial or advertisement.'" *Chuang v. Dr. Pepper Snapple Grp., Inc.*, No. 17-cv-01875, 2017 WL 4286577, *6-7 (C.D. Cal. Sept. 20, 2017) (quoting *Nabors v. Google, Inc.*, No. 10-cv-03897, 2011 WL 3861893, *4 (N.D. Cal. Aug. 30, 2011)).

The law is clear that a plaintiff must "indicate the exact terms of the warranty for each product at issue," *Hadley v. Kellogg Sales Co.*, 243 F. Supp. 3d 1074, 1105-06 (N.D. Cal. 2017), and "[g]eneral assertions about representations or impressions given by [the defendant]. . . are not equivalent to a recitation of the exact terms of the underlying warranty." *Nabors*, 2011 WL 3861893, *4. Plaintiff's warranty claim fails in this regard for all the reasons set forth in Section III.C above. Furthermore, absent the identification of a specific statement by DTR creating the contours of a purported warranty as to a specific product Plaintiff actually purchased, Plaintiff is unable to allege reasonable reliance, as required under California law. *See Nabors*, 2011 WL 3861893, *4; *see also Sanders*, 672 F. Supp. 2d at 988 (dismissing breach of express warranty claim where plaintiff failed to allege "reasonable reliance" on any specific representations actually made by defendant). This failure to allege reliance also merits dismissal of Plaintiff's warranty claim.

b. Plaintiff's Unjust Enrichment Claim Should Be Dismissed.

Unjust enrichment is not a cause of action, but a general principle underlying various legal theories and remedies that is synonymous with restitution. *See 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,' which is synonymous with 'restitution.'"). Further, because Plaintiff's unjust enrichment claim is predicated on the same facts and allegations as his other claims, which fail for the reasons detailed above, the Court should not construe the claim as a quasi-contract claim. *Choi*

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mention of a warranty claim, nor does it identify a specific warranty stated on a product he purchased. *See* ECF No. 26-5.

v. Kimberly-Clark Worldwide, Inc., No. 19-cv-0468, 2019 WL 4894120, *13 (C.D. Cal. Aug. 28, 2019) ("there must be an underlying claim that a defendant has been unjustly conferred a benefit through mistake, fraud, coercion, or request.").

4. Plaintiff Fails to State a Claim for Unlawful Business Practices.

In order to circumvent the reliance requirement of a UCL claim based on false or misleading advertising, Plaintiff alleges DTR has also violated the UCL by engaging in business practices that violate California Penal Code sections 597(b), 597.1(a)(1) and 597f(a).[8] ECF No. 30, ¶128(g). To state such claims, Plaintiff must allege facts showing how DTR's practices violate each of those Penal Code sections. The FAC, however, fails to allege these foundational facts.[9]

Penal Code section 597(b) makes it a felony to fail to provide an animal, in one's custody or care, "with proper food, drink or shelter or protection from the weather." *See* Cal. Pen. Code, § 597(b); ECF No. 30, ¶128(g). The FAC does not allege that DTR does not provide its turkeys with water, food or shelter.[10] Rather, Plaintiff alleges that DTR's turkeys are raised in "typical agro-industrial conditions." ECF No. 30, ¶57. While DTR disputes this allegation, the FAC does not allege any factual basis for believing that typical agro-industrial conditions do not include proper food, drink, shelter or protection from the weather.

Penal Code sections 597.1(a)(1) and 597f (a) make it a misdemeanor for an owner, keeper or possessor of an animal to permit that animal "to be in any building, enclosure, lane, street, square, or lot of any city, county, city and county, or judicial district without proper care and attention." *See* Pen. Code, §§ 597.1, 597f; ECF No. 30, ¶128(g). These sections, however, only

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[8] Plaintiff further claims that DTR's actions violate the PPIA, California Meat and Poultry Inspection Act, FAL, CLRA, Magnusson-Moss Warranty Act, and California Commercial Code. ECF No. 30, ¶128(a)-(f). For the reasons discussed in Section III.C.-E.1-3 above, these claims for unlawful business practices fail because Plaintiff has not alleged the facts needed to demonstrate an underlying violation of these statutes.

[9] These same alleged Penal Code violations were rejected on the merits, following an eight-day bench trial, by the court in the DxE Action. *See* ECF No. 26-3.

[10] To the extent that Plaintiff contends that section 597(b) imposes additional or more restrictive standards for the production and slaughter of turkeys than those imposed by the PPIA, it is expressly preempted. *National Meat Ass'n v. Harris,* 565 U.S. 452, 459-60 (2012); *Association des Eleveurs de Canards et D'Oies du Quebec v. Harris*, 79 F. Supp. 3d 1136, 1144 (C.D. Cal. 2015).

apply to stray or abandoned animals. *People v. Untiedt,* 42 Cal. App. 3d 550, 553 (1974) (Section 597f only applies to abandoned or neglected animals). The FAC does not allege that DTR's turkeys are neglected, strays or abandoned. Accordingly, the FAC fails to state sufficient facts to support a claim that DTR has engaged in unlawful business practices in violation of Penal Code sections 597(b), 597.1 or 597f.

F. Plaintiff Cannot Seek Restitution Because He Has an Adequate Legal Remedy.

If this Court does not dismiss Plaintiff's lawsuit outright, it should nonetheless dismiss his claims for restitution under the UCL, FAL, and CLRA. Plaintiff's claims under the UCL and FAL sound in equity, *see Nationwide Biweekly Admin., Inc. v. Superior Court of Alameda Cty.*, 9 Cal. 5th 279, 292 (2020), and Plaintiff has requested restitution as part of his CLRA and unjust enrichment claims. ECF No. 30, ¶¶102, 114 & 151. As the Ninth Circuit recently made clear in *Sonner v. Premier Nutrition Corp.*, 971 F.3d 834, 844 (9th Cir. 2020), a plaintiff cannot seek restitution under these statutory claims without establishing that he lacks an adequate remedy at law. Plaintiff makes no effort at such a showing in his FAC. Accordingly, this provides an alternative basis for dismissal of his UCL and FAL claims and his request for restitution under the CLRA and unjust enrichment.

In *Sonner*, the plaintiff initially asserted claims for both restitution and damages, but later abandoned her damages claim under the CLRA in favor of her claims for equitable restitution. *Sonner,* 971 F.3d at 834. The district court subsequently dismissed the plaintiff's remaining claims for restitution, holding that she "failed to establish that she lacked an adequate legal remedy for the same past harm for which she sought equitable restitution." *Id*. at 838. The Ninth Circuit affirmed, agreeing 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." *Id*. at 844. And because the plaintiff had not alleged — let alone demonstrated — that she lacked an adequate legal remedy, the court held that she could not seek restitution. *Id*.

Several district courts in this circuit, following *Sonner*, have granted motions to dismiss claims for equitable relief under the UCL, FAL and CLRA. For example, in *Zaback v. Kellogg Sales Co.*, No. 20-cv-00268, 2020 WL 6381987, at *4 (S.D. Cal. Oct. 29, 2020), the court concluded that *Sonner* "require[d]" dismissal of the entire case because all the claims sounded in equity and the plaintiff failed to allege that he lacks an adequate remedy at law. The *Zaback* court also cited a number of district court decisions that have applied *Sonner* to dismiss similar claims at early stages of the litigation. *Zaback*, 2020 WL 6381987, at *4, citing *In re MacBook Keyboard Litig.*, No. 18-cv-2813, 2020 WL 6047253, at *3 (N.D. Cal. Oct. 13, 2020); *Krommenhock v. Post Foods, LLC*, No. 16-cv-4958, 2020 WL 6074107, at *1 (N.D. Cal. Sep. 29, 2020); *Gibson v. Jaguar Land Rover N. Am., LLC*, No. 20-cv-769, 2020 WL 5492990, at *3 (C.D. Cal. Sep. 9, 2020).

Sonner precludes Plaintiff's demand for restitution and equitable relief in this case. As the Ninth Circuit made clear, a plaintiff seeking restitution must "plead 'the basic requisites of the issuance of equitable relief' including 'the inadequacy of remedies at law.'" *Sonner,* 971 F.3d at 844 (quoting *O'Shea v. Littleton*, 414 U.S. 488, 502 (1974)) (emphasis added). Plaintiff has not alleged that he lacks an adequate remedy at law, nor could he since the CLRA (one of the three statutes under which he proceeds) authorizes "actual damages" in addition to equitable restitution. *See* Cal. Civ. Code § 1780(a)(1). Absent any plausible allegation that the CLRA's damages remedy is inadequate to compensate Plaintiff for his alleged harm, *Sonner* bars him from seeking restitution — or any other equitable remedy.

IV. CONCLUSION

For the reasons stated herein, DTR requests the Court grant its motion and dismiss Plaintiff's FAC with prejudice.

Dated: January 19, 2021

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By */s/ Brian R. Blackman*

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