UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

KRISTINE MAIN, JESSICA AZAR on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

GATEWAY GENOMICS, LLC dba SNEAKPEEK; and DOES 1 through 20, inclusive,

Defendants.

Case No.: 15cv2945 AJB (WVG)

ORDER:

(1) GRANTING IN PART DEFENDANT'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION;

(2) DENYING DEFENDANT'S REQUEST TO COMPEL ARBITRATION;

(3) DENYING DEFENDANT'S MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM; AND

(4) ABATING PLAINTIFFS' CLAIM UNDER THE TEXAS DECEPTIVE TRADE PRACTICES ACT FOR FAILURE TO PROVIDE NOTICE

(Doc. No. 12)

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Presently before the Court is Defendant Gateway Genomic LLC's ("Defendant") motion to dismiss or alternatively compel arbitration. (Doc. No. 12.) Plaintiffs Kristine Main and Jessica Azar (referred to collectively as "Plaintiffs") oppose the motion. For the reasons set forth below, the Court: **GRANTS IN PART** Defendant's motion to dismiss for lack of standing; **DENIES** Defendant's alternate request to compel arbitration; **DENIES** Defendant's motion to dismiss for failure to state a claim; and **ABATES** Plaintiffs' claim under the Texas Deceptive Trade Practices Act.

I. BACKGROUND

A. GENERAL ALLEGATIONS

Defendant is a small genetics company that markets an early gender test, providing an expectant mother with the gender of her child earlier then that afforded through a sonogram. (Doc. No. 12-1 at 11.) The product, sold as the "SneakPeek Early Gender Test," is marketed as able to determine a baby's gender as early as nine weeks into a pregnancy with 99% accuracy. (*Id.* at 12); (Doc. No. 7 ¶ 12.)

On December 30, 2014, Defendant launched its first at home DNA gender test, SneakPeek 1.0. (Doc. No. 12-1 at 12.) SneakPeek 1.0 was available for purchase on Defendant's website. (*Id.*) After a customer purchased the product, Defendant would mail the customer a DNA sample collection kit, which included finger-prick lancets, alcohol swabs, bandages, a blood collection card, a consent form, sample collection instructions, and an envelope in which to return to the sample. (*Id.*) To obtain the DNA sample, the customer was required to prick her finger with a lancet and then place a few drops of blood onto a blood collection card. (*Id.*) Once the blood sample had dried, the customer would return the sample for processing at Defendant's laboratory. (*Id.*)

Upon receipt of the sample, Defendant would extract and purify the DNA from the sample and analyze the DNA mixture. (*Id.*) In analyzing the DNA sample, Defendant would identify the presence or absence of male Y-chromosome DNA. (*Id.*) If detectable levels of male DNA were found, then the customer was likely to be carrying a male fetus. (*Id.*) If no detectable levels of male DNA were found, then the customer was likely to be

carrying a female fetus. (*Id.*) Based on the laboratory results, Defendant would send the customer an email indicating the gender of the child. (*Id.*)

During the time SneakPeek 1.0 was available to customers online, Defendant was developing SneakPeek 2.0. (*Id.*) The SneakPeek 2.0 collection kit included a proprietary blood collection device instead of the blood collection card included with the SneakPeek 1.0 collection kit. (*Id.*) Although SneakPeek 2.0 used the same type of testing to determine the presence of male chromosome sequences in maternal blood, Defendant developed new DNA extraction and purification techniques and laboratory protocols to ensure more uniform blood volume was collected by test users. (*Id.*) On May 4, 2015, Defendant removed SneakPeek 1.0 from the market. (*Id.* at 13.) On the same date, Defendant launched SneakPeek 2.0. (*Id.*) SneakPeek 2.0 can be purchased from Defendant's website and other third party retailers, such as Amazon.com. (*See, e.g.*, Doc. No. 7 ¶¶ 23–25.)

Defendant charges approximately $99.00 for the SneakPeek test, with results available in five to seven days. (Doc. No. 7 ¶ 14.) A customer may also purchase Defendant's "Fast Track" service, which provides results in under seventy-two hours. (*Id.*) Any customer that does not receive accurate test results from a SneakPeek test can receive a full refund from Defendant. (Doc. No. 12-1 at 13.) To obtain a refund, the customer can provide Defendant with the birth certificate of her child indicating the child's gender was the opposite of that predicted by SneakPeek. (*Id.* at 14.)

B. PLAINTIFF KRISTINE MAIN

Plaintiff Kristine Main purchased the SneakPeek 1.0 test on February 5, 2015, after reviewing the representations regarding accuracy on Defendant's website and marketing materials. (Doc. No. 7 ¶ 12.) Ms. Main purchased the SneakPeek test for $169.00,[1] which

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[1] The parties dispute the amount of money that Ms. Main paid for her SneakPeek test. The amended complaint states SneakPeek charged Ms. Main $169.00, whereas

1 included Defendant's Fast Track Service that would provide Ms. Main's results in under
2 seventy-two hours. (*Id.* ¶ 14.) Ms. Main took the test when she was approximately
3 fourteen weeks pregnant, and returned the test for processing by Defendant. (*Id.* ¶ 15.) On
4 February 9, 2015, Ms. Main received an email from Defendant stating she was "having a
5 baby girl!" (*Id.* ¶ 16.) On July 25, 2015, Ms. Main gave birth to a baby boy. (*Id.* ¶ 17.)
6 On October 22, 2015, Ms. Main notified Defendant by email that she had given
7 birth to a boy and requested a full refund of the purchase price pursuant to Defendant's
8 refund policy. (Doc. No. 12-1 at 14.) After confirming that Ms. Main had given birth to a
9 boy, Defendant mailed Ms. Main a refund check on November 10, 2015, for the full
10 amount paid for the SneakPeek. (*Id.*) Ms. Main cashed the check shortly thereafter. (*Id.*);
11 (*see also* Doc. No. 12-3 at 2.)
12 **C. PLAINTIFF JESSICA AZAR**
13 Plaintiff Jessica Azar purchased the SneakPeek 2.0[2] test on December 9, 2015.
14 (Doc. No. 7 ¶ 18.) Ms. Azar paid $99.00 for the test, which arrived on December 12,
15 2015. (*Id.* ¶ 19.) Ms. Azar was approximately fourteen weeks pregnant when she took the
16 SneakPeek test. (*Id.* ¶ 20.) After processing her test results, Defendant emailed Ms. Azar
17 on December 17, 2015, stating Ms. Azar was "having a boy!" (*Id.* ¶ 21.) On December
18 18, 2015, Ms. Azar sent Defendant an email stating that the gender result she received
19 from the SneakPeek test did not match the gender result she received from a third party
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22 Defendant indicates Ms. Main used a $10.00 coupon, making the amount paid $159.00.
23 (Doc. No. 12-1 at 13 n.4.)
24 [2] Plaintiffs' amended complaint does not identify which SneakPeek test Ms. Azar
25 purchased. However, based on the date of purchase Ms. Azar likely purchased the
SneakPeek 2.0 test. (*See* Doc. No. 12-1 at 14–15) (stating Defendant began selling the
26 SneakPeek 2.0 test on May 4, 2015, and simultaneously removed SneakPeek 1.0 from the
market). Additionally, although the amended complaint appears to indicate that Ms. Azar
27 purchased the SneakPeek test through Defendant's website, (*see* Doc. No. 7 ¶¶ 18, 19),
28 Plaintiffs' opposition and supporting documents indicate Ms. Azar purchased the test
through Amazon.com, (Doc. No. 16 at 4).

test. (Doc. No. 12-1 at 15.) Defendant responded to Ms. Azar and included the terms of its refund policy. (*Id.*) On February 1, 2016, Ms. Azar had a sonogram that indicated she was having a girl. (*Id.* ¶ 22.) On June 10, 2016, Ms. Azar gave birth to a baby girl. (Doc. No. 19 at 2.)

D. PROCEDURAL BACKGROUND

On December 29, 2015, Ms. Main filed a class action complaint against Defendant asserting several claims for relief. (*See* Doc. No. 1.) On February 2, 2016, Ms. Main filed an amended class action complaint, which included Ms. Azar as a named Plaintiff. (Doc. No. 7.) The first amended complaint asserts the following claims against Defendant: (1) violations of California Business and Professions Code §§ 17200 *et seq.*; (2) violations of California Business and Professions Code §§ 17500, *et seq.*; (3) fraud; (4) breach of express warranty; (5) breach of implied warranty of merchantability; (6) breach of the implied warranty of fitness for a particular purpose; (7) unjust enrichment; (8) violations of California Consumer Legal Remedies Act, California Civil Code §§ 1750 *et seq.*; and (9) Texas Deceptive Trade Practices–Consumer Protection Act, Texas Business and Commercial Code § 1750. (Doc. No. 7.) Generally, Plaintiffs allege that SneakPeek test results are not 99% accurate, and that Defendant knowingly misstates the accuracy of the test in its marketing materials. According to Plaintiffs, the results of a SneakPeek early gender test are "akin to the proverbial coin flip" with an accuracy rate closer to 60%. (Doc. No. 7 ¶ 25.) Plaintiffs seek restitution and injunctive relief, as well as punitive damages and attorney's fees. (*Id.* at 29.)

Defendant has moved to dismiss Plaintiffs' claims as moot, arguing that Plaintiffs lack standing. Defendant also argues that Plaintiffs have failed to state a claim upon which relief may be granted as to several of the claims in the first amended complaint. Finally, Defendant argues that Ms. Azar's claims are subject to arbitration, and to the extent her claims are not dismissed, requests the Court compel arbitration.

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II. DISCUSSION

A. STANDING AND MOOTNESS

Article III of the Constitution limits the exercise of judicial power to "Cases" and "Controversies." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559 (1992). For a case to satisfy the case-or-controversy requirement, Article III, Section 2 requires an "irreducible" minimum of standing. *Id.* at 560. Three elements must be satisfied for a plaintiff to have standing under Article III: "(1) he or she has suffered an injury in fact that is concrete and particularized, and actual or imminent; (2) the injury is fairly traceable to the challenged conduct; and (3) the injury is likely to be redressed by a favorable court decision." *Salmon Spawning & Recovery Alliance v. Gutierrez*, 545 F.3d 1220, 1225 (9th Cir. 2008) (citing *Lujan*, 504 U.S. at 560–61). Article III standing is a threshold jurisdictional requirement that cannot be waived and can be raised at any time during a suit. *See* Fed.R.Civ.P. 12(h)(1),(3).

Similarly, a court lacks subject matter jurisdiction when the controversy before it becomes moot. *In re Burrell*, 415 F.3d 994, 998 (9th Cir. 2005). "[A] case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Los Angeles Cnty. v. Davis*, 440 U.S. 625, 631 (1979) (quoting *Powell v. McCormack*, 395 U.S. 486, 496 (1969)).

Defendant first argues that Ms. Main lacks standing to pursue her claims because she has received a full refund of the purchase price of the SneakPeek 1.0. (Doc. No. 12-1 at 16.) According to Defendant, since Ms. Main received a refund two months prior to filing suit, her claims are moot and she cannot represent the interests of the putative class. (*Id.*) Defendant also argues that Ms. Azar's claims are moot because Defendant offered to refund Ms. Azar the purchase price of her SneakPeek test. (*Id.* at 18.) Additionally, Defendant contends Plaintiffs do not have standing to seek injunctive relief because neither Plaintiff alleges a likelihood of continuing harm, or a likelihood of purchasing another SneakPeek test in the future.

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Plaintiffs argue their claims are not moot because the claims are "inherently transitory" and fall within an exception to the mootness doctrine. (Doc. No. 16 at 8–9.) Plaintiffs also argue that Ms. Azar's claim for restitution is not moot because she did not accept a refund from Defendant. (*Id.* at 10–12.) Plaintiffs also maintain they have standing to pursue injunctive relief. (*Id.* at 12–13.)

B. APPLICATION

1. <u>Ms. Main's Request for Restitution</u>

As set forth above, a claim becomes moot "when interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *Davis*, 440 U.S. at 631. One of the principal ways a claim becomes moot is when the opposing party has agreed to everything demanded by the other party. *GCB Commc'ns, Inc. v. U.S.S. Comm'ncs, Inc.*, 650 F.3d 1257, 1267 (9th Cir. 2011). If a claim becomes moot during the pendency of the litigation, the action can no longer proceed and must be dismissed. *See Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1528 (2013).

In support of its position that Plaintiffs' claims are moot, Defendant cites to *Luman v. Theismann*, a case from the Eastern District of California that raises facts similar to those presented in this matter. Case No. 2:13cv656, 2014 WL 443960 (E.D. Cal. Feb. 4, 2014).[3] *Luman* involved a putative class action of California consumers that purchased a drug marketed by the defendant. *Id.* at *1. Both of the named plaintiffs purchased the drug for personal use in reliance on the defendant's advertisements that the drug was safe and effective for the treatment of benign prostate hyperplasia. *Id.* Approximately two months before the plaintiffs filed suit, the defendant issued one of the named plaintiffs, Floyd Luman, a refund for the cost of his orders, which included the purchase price and shipping costs. *Id.* at *2.

[3] On appeal to the Ninth Circuit, an unrelated portion of the district court's decision was reversed based on intervening Supreme Court precedent. *See Luman v. Theismann*, No. 14-15385, 2016 WL 1393432 at *1 (9th Cir. 2016)

The defendant moved to dismiss Luman's claims for lack of standing, which the district court granted. *Id.* at *5. The court found Luman's individual claims for monetary relief were moot because "Luman was made whole before he filed the original complaint" and thus at the time the complaint was filed "he had already received monetary relief for the only compensatory damages suffered[.]" *Id.* On appeal, the Ninth Circuit affirmed, noting that Luman had filed his complaint after receiving a refund and therefore no longer met the injury-in-fact requirement for standing at the time he filed his complaint. *Luman v. Theismann*, 2016 WL 1393432 at *1. Accordingly, the Ninth Circuit concluded, "Luman never had standing to pursue monetary relief in the first place." *Id.*

In this matter, Ms. Main requested and received a full refund of the purchase price of the SneakPeek test on or about November 10, 2015, approximately two months before she filed the original complaint. (Doc. No. 12-3 at 2.)[4] Plaintiffs do not dispute this fact or otherwise address *Luman*'s application to Ms. Main's claims for restitution or monetary damages. (*See generally* Doc. No. 16.) As in *Luman*, Ms. Main recovered the monetary damages she seeks in this litigation prior to filing suit, thereby depriving Ms. Main of standing to pursue any claim for restitution. *Luman*, 2016 WL 1393432 at *1; *see also Davis v. Fed. Election Comm'n.*, 554 U.S. 724, 732–33 (2008) (noting that a plaintiff must satisfy the elements of standing, including an injury-in-fact, traceable to the defendant's behavior, that is redressable by the court); *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) ("The requisite personal interest that must exist at the commencement of the litigation must continue throughout its existence.") (internal citation and quotation marks omitted); *Becker v. Skype Inc.*, No.

[4] Defendant raises a factual attack on subject matter jurisdiction. In resolving such a challenge, the Court may review evidence beyond the complaint without converting the motion to dismiss into a motion for summary judgment. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). Thus, the Court properly considers documents attached to the parties' filings, including the refund check received and cashed by Ms. Main.

5:12CV06477, 2014 WL 556697, at *3 (N.D. Cal. Feb. 10, 2014) (dismissing named plaintiff's claim for lack of standing where the plaintiff received a refund prior to filing suit). Accordingly, Ms. Main does not have standing to pursue her claims for restitution.

2. Exception to Mootness Doctrine for Transitory Claims

Although Plaintiffs' opposition does not directly address Ms. Main's claims for restitution, Plaintiffs do argue that the mootness doctrine should be applied flexibly, particularly where a plaintiff's claims are transitory. (Doc. No. 16 at 8.) Plaintiffs contend their claims are capable of repetition but evade review, and therefore fall within an exception to the mootness doctrine.

Although mootness serves as a constitutional impediment to a federal court's exercise of Article III jurisdiction, the Supreme Court "has applied the doctrine flexibly, particularly where the issues remain alive, even if the plaintiff's personal stake in the outcome has become moot." *Pitts v. Terrible Herbist, Inc.*, 653 F.3d 1081, 1087 (9th Cir. 2011) (internal citation and quotation marks omitted). Accordingly, an exception exists for claims that are "capable of repetition, yet evading review." *Id.* at 1088. Under this exception, a court should decline to dismiss an otherwise moot action if (1) the challenged action is too short in duration to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again. *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1329 (9th Cir. 1992). The exception is limited however, with its application reserved for "exceptional" cases where the controversies are of "inherently limited duration." *Protectmarriage.com-Yes on 8 v. Bowen*, 752 F.3d 827, 836–37 (9th Cir. 2014).

While the facts giving rise to Plaintiffs' claims originated during pregnancy, which is inherently limited in duration, the wrong alleged by Plaintiffs is neither exceptional nor inherently limited in duration. Plaintiffs assert that approximately half of the women that use Defendant's SneakPeek early gender test will receive an incorrect gender determination. The birth of Ms. Main's child did not moot her claim stemming from the incorrect gender determination; it was Ms. Main's request, receipt, and acceptance of a

full refund from Defendant that rendered her claim for restitution moot. *Cf. id.* at 836 (recognizing claims that are inherently limited in duration). Accordingly, the Court cannot conclude the harm alleged by Plaintiffs is capable of repetition but evading review.

To the extent Plaintiffs contend Defendant's refund policy makes their claims capable of repetition but evading review, that argument is unpersuasive. The Ninth Circuit has recognized that claims may be "acutely susceptible to mootness" where a defendant employs a tactic of buying off the individual claims of named plaintiffs in a class action. *Pitts*, 653 F.3d at 1091. Here, however, Defendant's refund policy is available to all consumers regardless of whether litigation is anticipated or instituted. Thus, Defendant has not engaged in a litigation strategy that ensures Plaintiffs' claims evade judicial review. *Id.*; *Luman*, 2014 WL 443960 at *5. This exception to the mootness doctrine does not revive Ms. Main's claims.

3. Ms. Azar's Request for Restitution

Plaintiffs filed their first amended complaint on February 1, 2016, which included Ms. Azar as a named plaintiff. Defendant argues Ms. Azar's claim for restitution is moot because Defendant offered to refund Ms. Azar after she informed Defendant that the results of her SneakPeek test did not match the results of other early gender tests. (Doc. No. 12-1 at 18.) Plaintiffs dispute whether Defendant actually offered Ms. Azar a refund and assert that an unaccepted offer to settle does not moot a plaintiff's claims. (Doc. No. 16 at 9–10.)

Although the refund accepted by Ms. Main mooted her claims for restitution, the unaccepted offer to refund Ms. Azar does not result in the same outcome. The United States Supreme Court recently addressed this issue in the context of a Rule 68[5] offer to compromise in *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663 (2016). The issue in

[5] Federal Rule of Civil Procedure 68 governs offers of judgment made prior to trial.

Campbell-Ewald was whether "an unaccepted offer to satisfy the named plaintiff's individual claim was sufficient to render a case moot when the complaint seeks relief on behalf of the plaintiff and a class of persons similarly situated[.]" *Id.* at 666. Although the Court specifically considered an offer to settle made pursuant to Rule 68, the Court held that "an unaccepted settlement offer has no force" because "[l]ike other unaccepted contract offers, it creates no lasting right or obligation." *Id.* The Court reasoned that where a plaintiff rejects a settlement offer, "her interest in the lawsuit remains just what it was before." *Id.* at 670.

Campbell-Ewald governs the Court's analysis of whether Ms. Azar's claims for restitution are moot. Even if Defendant offered to fully refund Ms. Azar for her purchase of the SneakPeek test prior to when the first amended complaint was filed, that does not moot her claims.[6] Unlike Ms. Main, who accepted Defendant's refund, Ms. Azar and Defendant remain adverse and both retain the same stake in the litigation existent at the outset. *See id.* at 670–71; *see also Chen v. Allstate Ins. Co.*, 819 F.3d 1136, 1144 (9th Cir. 2016) ("As we read *Campbell–Ewald,* a lawsuit—or an individual claim—becomes moot when a plaintiff *actually receives* all of the relief he or she could receive on the claim through further litigation.") (emphasis in original); *O'Neal v. Am.'s Best Tire LLC*, No. CV-16-00056, 2016 WL 3087296, at *3 (D. Ariz. June 2, 2016) ("Plaintiffs have not accepted the checks tendered by Defendants. As a result, the parties remain adverse and retain the same stake in the litigation they had at the outset."). The cases relied upon by Defendant predate the Supreme Court's decision in *Campbell-Ewald*, and are unpersuasive to the extent they support a different outcome. For these reasons,

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[6] Plaintiffs dispute whether Defendant's inclusion of its refund policy in a responsive email communication to Ms. Azar constituted an offer to refund her claim. In light of *Campbell-Ewald*, the Court need not determine whether that response constituted an offer because Ms. Azar did not accept a refund from Defendant.

Defendant's unaccepted offer to refund Ms. Azar the purchase price of the SneakPeek test does not render Ms. Azar's claims for restitution moot.

4. Ripeness of Ms. Azar's Claim for Restitution

While not moot, Ms. Azar's claims raise the different, yet related issue of whether her claims were ripe for judicial resolution at the time she filed the first amended complaint. Defendant summarily suggests that because Ms. Azar had not given birth at the time the first amended complaint was filed, her claims were not ripe. (Doc. No. 12-1 at 18 n.8.)

Generally speaking, "the constitutional component of ripeness is synonymous with the injury-in-fact prong of the standing inquiry." *Cal. Pro–Life Council, Inc. v. Getman*, 328 F.3d 1088, 1094 n.2 (9th Cir. 2003). The ripeness doctrine is "a question of timing," *Reg'l Rail Reorg. Act Cases*, 419 U.S. 102, 140 (1974), designed "to separate matters that are premature for review because the injury is speculative and may never occur from those cases that are appropriate for federal court action," *Portman v. Cnty. of Santa Clara*, 995 F.2d 898, 902 (9th Cir. 1993) (internal quotation marks omitted). Through avoidance of premature adjudication, the ripeness doctrine prevents courts from becoming entangled in abstract disagreements. *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977).

As does the doctrine of standing, ripeness focuses on whether there is sufficient injury. *Portman*, 995 F.2d at 903. An injury-in-fact exists if there is an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical. *Lujan*, 504 U.S. at 560 (citations and quotation marks omitted). To the contrary, "[a] claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998) (citation and quotation marks omitted).

At the time the first amended complaint was filed, Ms. Azar had not given birth to her child and, arguably, did not have standing to pursue claims stemming from an

incorrect gender determination. Although Ms. Azar had received conflicting test results, she had not yet given birth and could not conclusively establish that her SneakPeek test results were incorrect. However, in ruling on a motion to dismiss for lack of subject matter jurisdiction, including challenges to the ripeness of a plaintiff's claim, the court must accept as true all material allegations of the complaint and construe the complaint in favor of the complaining party. *Levine v. Vilsack*, 587 F.3d 986, 991 (9th Cir. 2009). In addition, on a 12(b)(1) motion the Court may consider evidence outside the pleadings, including affidavits submitted by the parties. *See Safe Air for Everyone*, 373 F.3d at 1039.

The first amended complaint sufficiently alleges that Ms. Azar received conflicting test results from SneakPeek and from her doctor, which is presumably the harm alleged.[7] At the time the first amended complaint was filed, Ms. Azar had received conflicting sonogram results, the results of which were confirmed with a different early gender detection test. Moreover, on June 10, 2016, it became clear that Ms. Azar's SneakPeek test results were incorrect when she gave birth to a baby girl, thereby making her claims against Defendant ripe for judicial consideration. (*See* Doc. No. 19 at 2.) Accordingly, the Court finds Ms. Azar's claims are ripe as the injury alleged—incorrect gender determination—is sufficiently concrete and particularized such that her claims are appropriate for judicial resolution.

5. Plaintiffs' Claims for Injunctive Relief

Ms. Main and Ms. Azar also seek injunctive relief in the first amended complaint. Defendant argues Plaintiffs' claims for injunctive relief are moot because neither Plaintiff

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[7] In ascertaining the harm alleged, the Court resorted to the class definition provided in the first amended complaint. Notably, however, the class definition provided appears unrelated to the facts of this matter. (*See* Doc. No. 7 ¶ 28) (identifying class as "[a]ll consumers nationwide that purchased the SneakPeek Early Gender Test. . . consisting of All persons within the United States who received any telephone call from Defendant to said person's cellular telephone made through the use of any automatic telephone dialing system or an artificial or prerecorded voice . . . .").

has alleged an intent to purchase the SneakPeek early gender test in the future. (Doc. No. 12-1 at 19.) As such, Defendant contends there is no real and immediate threat that either Plaintiff will suffer future injury. (*Id.*) Defendant also contends Ms. Main's claim for injunctive relief is "doubly moot" as Defendant has discontinued its sale of the SneakPeek 1.0. (*Id.*)

In opposition, Plaintiffs argue their claims for injunctive relief are not moot because SneakPeek 2.0, the early gender test currently marketed by Defendant does not differ significantly from SneakPeek 1.0. (Doc. No. 16 at 12.) Plaintiffs further contend that Defendant has not provided a declaration or other evidence to support Defendant's claim that the SneakPeek 2.0 test is more accurate. (*Id.*) Lastly, Plaintiffs argue they are among the class of consumers that may purchase another version of the test hoping for greater accuracy in the results. (*Id.* at 13.)

A plaintiff seeking to obtain declaratory or injunctive relief must establish that he or she is "realistically threatened by a *repetition* of the violation" to establish the relief sought would redress the alleged injuries. *Gest v. Bradbury*, 443 F.3d 1177, 1181 (9th Cir. 2006) (emphasis in original); *see also Campion v. Old Republic Home Prot. Co.*, 861 F. Supp. 2d 1139, 1150 (S.D. Cal. 2012) ("Without a showing there is an actual and immediate threat that Plaintiff will be wronged again in the same way by Defendant, Plaintiff lacks standing under Article III to seek injunctive relief."). "Past exposure to harmful or illegal conduct does not necessarily confer standing to seek injunctive relief if the plaintiff does not continue to suffer adverse effects." *Mayfield v. United States*, 599 F.3d 964, 970 (9th Cir. 2010). Instead, a plaintiff must show that she faces imminent injury on account of the defendant's conduct. *Id.* In the context of a class action, the named plaintiffs may not represent a class seeking injunctive relief unless they are themselves entitled to injunctive relief. *Hodgers-Durgin v. de la Vina*, 199 F.3d 1037, 1045 (9th Cir. 1999).

Plaintiffs lack standing to pursue their claims for injunctive relief because, as conceded in their opposition, "Plaintiffs Main and Azar have not made any assertions

about their likeliness or unlikeliness of buying the product in the future[.]" (Doc. No. 16 at 13.) Absent allegations that Plaintiffs are likely to suffer continued harm, they do not have standing to seek injunctive relief. Even if Plaintiffs had alleged an interest in purchasing a SneakPeek test in the future, "[a]n interest in purchasing a product in the future, without more, isn't sufficient to establish standing if the plaintiffs are not 'realistically threatened by a repetition of the violation.'" *Lucas v. Jos. A. Bank Clothiers, Inc.*, No. 14CV1631, 2015 WL 2213169, at *4 (S.D. Cal. May 11, 2015) (quoting *Gest v. Bradbury*, 443 F.3d 1177, 1181 (9th Cir. 2006)); *see also Rahman v. Mott's LLP*, No CV 13-3482, 2014 WL 5282106, at *6 (N.D. Cal. Oct. 15, 2014) ("Absent showing a likelihood of future harm, a plaintiff may not manufacture standing for injunctive relief simply by expressing an intent to purchase the challenged product in the future.").

Accordingly, as Plaintiffs' complaint fails to allege a likelihood of continuing harm or repeated violation, Plaintiffs lack standing to sue for injunctive relief. Those claims are dismissed. In light of the above analysis, Ms. Main's claims, both for restitution and injunctive relief are **DISMISSED** for lack of standing. Ms. Azar's claims for restitution are not moot. However, she similarly lacks standing to sue for injunctive relief and those claims are **DISMISSED**. Thus, all that remains in the first amended complaint are Ms. Azar's claims for restitution as pleaded through several causes of action.

6. Diversity Jurisdiction Under the Class Action Fairness Act

Anticipating dismissal of Ms. Main's claims for lack of standing, Defendant contends that if Ms. Main's claims are dismissed, then the Court lacks subject matter jurisdiction over the matter because diversity is destroyed. (Doc. No. 17 at 7 n.2.)

"[P]ost-filing developments do not defeat jurisdiction if jurisdiction was properly invoked as of the time of filing." *United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union, AFL-CIO, CLC v. Shell Oil Co.*, 602 F.3d 1087, 1091–92 (9th Cir. 2010). Plaintiffs properly invoked jurisdiction under the Class Action Fairness Act ("CAFA") which requires only minimal diversity between the parties. *See* 28 U.S.C. § 1332(d). Ms. Main is a resident of Ohio, and when she purchased

the SneakPeek test she was residing in Texas. (Doc. No. 7 ¶ 4.) Ms. Azar currently resides in California and did so at the time she purchased the SneakPeek test. (*Id.* ¶ 5.) For jurisdictional purposes, Defendant is deemed a resident of the state of incorporation, Delaware, as well as the state in which it has its principal place of business, California. (*Id.* ¶ 6); *see also* 28 U.S.C. § 1332(c)(1). Although Ms. Main's claims have been dismissed leaving California parties as both the named Plaintiff and the Defendant, minimal diversity as required by CAFA existed at the outset of this action. Thus, dismissal of Ms. Main's claims does not deprive this Court of subject matter jurisdiction over the remaining claims.

In addition to its arguments regarding lack of subject matter jurisdiction, Defendant requests the Court compel arbitration as to Ms. Azar's remaining claims.

C. Request to Compel Arbitration

The Federal Arbitration Act ("FAA") provides that contractual arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The FAA liberally favors arbitration and "mandates that district courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Samson v. NAMA Holdings, LLC*, 637 F.3d 915, 923 (9th Cir. 2011) (quoting *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985)). The Act reflects a "national policy favoring arbitration," *Preston v. Ferrer*, 552 U.S. 346, 349 (2008), and emphasizes that valid arbitration agreements must be "rigorously enforced" according to their terms. *Am. Exp. Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013); *see also AT & T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011) ("The 'principal purpose' of the FAA is to 'ensure[e] that private arbitration agreements are enforced according to their terms.'") (citation omitted).

In light of this clear federal policy, and the mandatory terms of the Act itself, a district court has little discretion to deny an arbitration motion once it determines that a claim in litigation is covered by a written and enforceable arbitration agreement. *Republic*

of Nicar. v. Std. Fruit Co., 937 F.2d 469, 475 (9th Cir. 1991). The Court's role is therefore "limited to determining (1) whether a valid agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at issue." *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000). "If a party seeking arbitration establishes these two factors, the court must compel arbitration." *Fagerstrom v. Amazon.com, Inc.*, 141 F. Supp. 3d 1051, 1059 (S.D. Cal. 2015) (internal quotation marks and citation omitted). However, "the party seeking to enforce an arbitration agreement bears the burden of showing that the agreement exists and that its terms bind the other party." *Gelow v. Cent. Pac. Mortg. Corp.*, 560 F. Supp. 2d 972, 978 (E.D. Cal. 2008).

Defendant moves to compel arbitration with respect to Ms. Azar's claims under Defendant's terms of service (hereafter referred to as "Terms of Service") available on Defendant's website. (Doc. No. 12-1 at 27–29.) Defendant also contends Amazon.com's ("Amazon") conditions of use ("Conditions of Use") govern Ms. Azar's purchase of the SneakPeek test and similarly include an arbitration clause, which governs Ms. Azar's claims. (Doc. No. 17 at 2.) In opposition, Plaintiffs[8] argue that Defendant has waived its right to compel arbitration by litigating the merits of Plaintiffs' claims. (Doc. No. 16 at 5–6.) Plaintiffs also argue that Ms. Azar purchased the SneakPeek test through Amazon, and never consented to Defendant's Terms of Service and the arbitration clause contained therein. (*Id.* at 5.) Additionally, Plaintiffs contend Defendant cannot compel arbitration under Amazon's Conditions of Use as Defendant was not a party to the agreement and cannot benefit from Amazon's arbitration clause. (*Id.* at 6–8.)

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[8] Although Ms. Main's claims have been dismissed from the litigation, the Court continues to refer to Plaintiffs jointly for consistency.

B. Application

1. Waiver

"The right to arbitration, like any other contract right, can be waived." *United States v. Park Place Associates, Ltd.*, 563 F.3d 907, 921 (9th Cir. 2009). To demonstrate waiver of the right to arbitrate, a party must show: "(1) knowledge of an existing right to compel arbitration; (2) acts inconsistent with that existing right; and (3) prejudice to the party opposing arbitration resulting from such inconsistent acts." *In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, & Products Liab. Litig.*, 838 F. Supp. 2d 967, 975–76 (C.D. Cal. 2012).

As a contractual right, waiver of the right to arbitrate is not favored. *Shinto Shipping Co., Ltd. v. Fibrex & Shipping Co., Inc.*, 572 F.2d 1328, 1330 (9th Cir. 1978). A determination of whether the right to compel arbitration has been waived must consider the strong federal policy favoring enforcement of arbitration agreements. *Fisher v. A.G. Becker Paribas Inc.*, 791 F.2d 691, 694 (9th Cir. 1986). Thus, "any party arguing waiver of arbitration bears a heavy burden of proof." *Id.* (quoting *Belke v. Merrill Lynch, Pierce, Fenner & Smith*, 693 F.2d 1023, 1025 (11th Cir. 1982)).

Plaintiffs argue that Defendant has waived the right to arbitrate by requesting the Court "consider a great many issues of merit regarding Plaintiffs' first amended complaint" and only alternatively request arbitration. (Doc. No. 16 at 6.) Although Defendant moved to compel arbitration in connection with its motion to dismiss, Defendant has not waived its right to arbitrate. Plaintiffs have failed to demonstrate that Defendant took acts inconsistent with exercising its right to arbitrate or that Plaintiffs have been prejudiced as a result of any such inconsistent acts.

Additionally, the Ninth Circuit has rejected the contention that filing a motion to dismiss is sufficient to waive the right to arbitrate. *See Sovak v. Chugai Pharm. Co.*, 280 F.3d 1266, 1270–71 (9th Cir. 2002) (rejecting argument that defendant waived right to arbitrate because plaintiff failed to show how he was prejudiced by defendant's filing of a motion to dismiss for failure to state a claim); *Brown v. Dillard's, Inc.*, 430 F.3d 1004,

1012 (9th Cir. 2005) (noting that filing motion to dismiss does not waive right to move to compel arbitration). Thus, Defendant has not proceeded to litigate this case on the merits or otherwise acted inconsistent with the right to arbitration. *Cf. Freaner v. Valle*, 966 F. Supp. 2d 1068, 1085 (S.D. Cal. 2013) (finding right to arbitrate waived where case was litigated for nearly 18 months, including extensive discovery and dispositive motion work), *with Hill v. Ins. Co. of W.*, No. 10CV76, 2010 WL 1709325, at *2 (S.D. Cal. Apr. 26, 2010) (finding right to arbitrate not waived where the defendant timely notified the plaintiff of arbitration agreement).

Here, Defendant demanded arbitration immediately after receipt of Plaintiffs' complaint, and Plaintiffs have presented no facts to demonstrate Defendant has acted inconsistently with its intent to arbitrate Ms. Azar's claims. (*See* Doc. No. 12-8 at 2.) Thus, the Court concludes Defendant has not waived its right to seek arbitration.

2. Agreement to Arbitrate in Defendant's Terms of Service

Defendant argues Ms. Azar agreed to Defendant's Terms of Service, which includes an arbitration clause, and which customers must agree to when purchasing the SneakPeek test from Defendant's website. (Doc. No. 12-1 at 27.) The language of Defendant's Terms of Service states, "any dispute between us, including disputes by either of us . . . will be resolved exclusively and finally by binding arbitration." (*Id.*); (Doc. No. 12-6 at 15.) In opposition, Plaintiffs note that Ms. Azar purchased the SneakPeek test through Amazon and not through Defendant's website. (Doc. No. 16 at 5.) Thus, Plaintiffs contend Ms. Azar never agreed to Defendant's Terms of Service or the arbitration clause contained within the Terms of Service. (*Id.*) Plaintiffs accordingly assert there is not a valid agreement to arbitrate between Defendant and Ms. Azar. (*Id.*) In its reply brief, Defendant maintains that arbitration is appropriate given the Conditions of Use that Ms. Azar agreed to in utilizing Amazon to purchase the SneakPeek test and in creating an account with Amazon. (Doc. No. 17 at 8.)

As an initial matter, Defendant contends Plaintiffs' first amended complaint alleges that Ms. Azar reviewed the representations on Defendant's website prior to purchasing

the SneakPeek 2.0 test, and that Defendant charged Ms. Azar $99.00 for the test. (*Id.* at 8); (Doc. No. 7 ¶¶ 18, 19.) Defendant argues Plaintiffs' acknowledgement that Ms. Azar purchased the SneakPeek test through Amazon improperly asserts new factual allegations in opposing papers, and is therefore irrelevant for the purposes of a Rule 12 motion to dismiss. (Doc. No. 17 at 8.) Plaintiffs similarly argue that any attempt by Defendant to enforce the arbitration clause contained in Amazon's Conditions of Use would constitute "new evidence, inappropriately introduced in a reply document." (Doc. No. 16 at 6.)

Despite the parties' arguments in this regard, the Court will consider the fact that Ms. Azar purchased the test through Amazon for several reasons. First, Defendant's motion acknowledges the possibility that Ms. Azar purchased the test through a third party and not through Defendant directly. (*See* Doc. No. 12-1 at 15) (indicating Defendant does not have a record of purchase from Ms. Azar). Second, from the allegations in the first amended complaint, it is unclear where, or from whom, Ms. Azar purchased the SneakPeek test. (Doc. No. 7 at 18–19) (alleging only the date Ms. Azar purchased the test and that Defendant charged Ms. Azar for the test). Thus, the admission that the purchase occurred through Amazon lends clarity to the Court's analysis of whether there is an arbitration agreement that encompasses the dispute at issue. Lastly, Defendant was likely aware that Ms. Azar purchased the SneakPeek test through Amazon. Defendant included Amazon's Conditions of Use in its letter to Plaintiffs demanding arbitration immediately after the first amended complaint was filed. (*See* Doc. No. 12-8 at 5.) Thus, the Court properly considers the fact that Ms. Azar purchased the SneakPeek test through Amazon.

However, because Ms. Azar did not purchase the SneakPeek test from Defendant's website, she did not consent to Defendant's Terms of Service in making her purchase. Defendant has provided a screenshot of its webpage demonstrating that "by clicking 'Submit Order' a customer "agree[s] to SneakPeek's Terms of Service." (Doc. No. 12-7 at 2.) Consumers are only required to agree to SneakPeek's Terms of Service when they purchase products through SneakPeek's website. (*See* Doc. No. 12-2 ¶ 7.) Defendant has

presented no evidence to demonstrate customers must similarly agree to Defendant's Terms of Service when purchasing Defendant's product through a third party seller, such as Amazon. Accordingly, because Ms. Azar did not purchase the SneakPeek test through Defendant's website, she did not agree to the arbitration clause in Defendant's Terms of Service. Accordingly, Defendant cannot compel arbitration based on the arbitration clause in its Terms of Service.[9]

3. Agreement to Arbitrate in Amazon's Conditions of Use

Defendant also argues arbitration is appropriate based on the arbitration clause contained in Amazon's Conditions of Use, which individuals must agree to when creating an account with Amazon and when purchasing products through the retailer. Amazon's arbitration provision states as follows:

> **Any dispute or claim relating in any way to your use of an Amazon Service, or to any products of services sold or distributed by Amazon or through Amazon.com will be resolved by binding arbitration, rather than in court**, except that you may assert claims in small claims court if your claims qualify. The Federal Arbitration Act and federal arbitration law apply to this agreement.

(Doc. No. 12-8 at 10) (emphasis in original). In support of enforcing the above arbitration clause, Defendant argues: (1) it is a signatory to the Conditions of Use; (2) sales of the SneakPeek Test through Amazon are actually between Defendant and the buyer, in this case Ms. Azar; (3) Ms. Azar should be equitably estopped from arguing Amazon's arbitration clause does not apply to her claims against Defendant; and (4) Defendant is a

[9] The majority of Defendant's arguments regarding arbitration contained in its motion are directed at whether Defendant's Terms of Service constitute a valid agreement to arbitrate. Since Ms. Azar was not required to agree to Defendant's Terms of Service, the Court need not address arguments specific to Defendant's Terms of Service. Instead, as set forth below, the Court focuses its inquiry on whether Amazon's Conditions of Use support Defendant's request to compel arbitration.

third-party beneficiary to Amazon's Conditions of Use. (*See* Doc. No. 17 at 9–12.) The Court addresses each of Defendant's arguments below.

(a). *Defendant is Not a Signatory to the Arbitration Clause in Amazon's Conditions of Use*

Defendant asserts the arbitration clause contained in Amazon's Conditions of Use is valid and enforceable, and cites to cases where similar language was sufficient to compel arbitration. (Doc. No. 17 at 9–10.) Defendant also argues that it is a signatory to the Conditions of Use, and therefore it has standing to compel arbitration. (*See id.* at 11) (arguing "[e]ven assuming Gateway Genomics is held to be a non-signatory to the agreement—which is incorrect").

As a prerequisite to establishing an account with Amazon, Ms. Azar was required to acknowledge and agree to Amazon's Conditions of Use. Plaintiffs do not dispute this fact, or otherwise argue that Amazon's Conditions of Use and the arbitration clause contained within it are unenforceable. Plaintiffs take issue with Defendant, as a non-signatory to the Conditions of Use, invoking the arbitration clause to compel arbitration of Ms. Azar's claims.

Despite raising the argument in its reply brief, notably, Defendant does not expressly argue that it is a signatory to Amazon's Conditions of Use. Though Defendant is a signatory to a separate Participation Agreement with Amazon, there is no evidence that Defendant is a signatory to Conditions of Use. While the arbitration clause contained in the Conditions of Use is broad, governing "[a]ny dispute or claim relating in any way to your use of an Amazon Service, or to any products or services sold or distributed by Amazon or through Amazon.com," that does not afford a non-signatory standing to enforce the arbitration provision. Accordingly, finding Defendant is a non-signatory to the Conditions of Use, the Court next considers whether Defendant may enforce the arbitration provision as a non-signatory to the agreement.

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(b). *Enforcement of the Arbitration Clause by a Non-Signatory*

The right to compel arbitration is a contractual right, which generally may not be invoked by one who is not a party to the agreement and does not otherwise possess the right to compel arbitration. *Britton v. Co-op Banking Group*, 4 F.3d 742, 744 (9th Cir. 1993). The Ninth Circuit has recognized that "nonsignatories of arbitration agreements may be bound by the agreement under ordinary contract and agency principles." *Id.* at 745. Defendant presents two grounds for enforcing the arbitration provision as a non-signatory to Amazon's Conditions of Use—as a third-party beneficiary to the agreement and under the doctrine of equitable estoppel. Each are addressed in turn below.

(i). Defendant Cannot Enforce the Arbitration Clause as a Third-Party Beneficiary

In California,"[e]xceptions in which an arbitration agreement may be enforced by or against nonsignatories include where a nonsignatory is a third-party beneficiary of the agreement." *Nguyen v. Tran*, 157 Cal. App. 4th 1032, 1036 (2007); *Comer v. Micor, Inc.*, 436 F.3d 1098, 1101 (9th Cir. 2006) (noting "nonsignatories can enforce arbitration agreements as third party beneficiaries). "To sue as a third-party beneficiary of a contract, the third party must show that the contract reflects the express or implied intention of the parties to the contract to benefit the third party." *Comer*, 436 F.3d at 1102 (quoting *Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206, 1211 (9th Cir. 2000)).

Defendant bears the burden of proving that it is a third-party beneficiary of Amazon's Conditions of Use. *See Garcia v. Truck Ins. Exch.*, 36 Cal.3d 426, 436 (1984). A third party may only assert rights under a contract if the parties to the agreement intended the contract to benefit the third party; "[t]hus, the circumstance that a literal contract interpretation would result in a benefit to the third party is not enough to entitle that party to demand enforcement." *Hess v. Ford Motor Co.*, 27 Cal.4th 516, 524 (2002) (internal alteration and quotation marks omitted); *see also* Cal. Civ. Code § 1559 ("A contract, made expressly for the benefit of a third person, may be enforced by him at any

time before the parties thereto rescind it."). In other words, "[t]he mere fact that a contract results in benefits to a third party does not render that party a 'third party beneficiary'"; rather, the parties to the contract must have expressly intended that the third party would benefit. *Matthau v. Super. Ct.*, 151 Cal. App. 4th 593, 602 (2007).

There are no facts to suggest that Defendant was an intended third-party beneficiary of the Conditions of Use required by Amazon upon account creation and subsequent purchase of products through Amazon's website. The Conditions of Use do not reference Defendant, or any other merchant, or reflect an intent to benefit Defendant. *See Murphy v. DirecTV, Inc.*, 724 F.3d 1218, 1233–34 (9th Cir. 2013) ("The terms of the Customer Agreement do not demonstrate that DirecTV intended to benefit Best Buy through the contract, let alone that its customers did. For one thing, the Customer Agreement never mentions Best Buy."); *Mundi v. Union Sec. Life Ins. Co.*, 555 F.3d 1042, 1045 n.2 (9th Cir. 2009) (finding third party could not utilize third party beneficiary theory to compel arbitration because there was no evidence in the governing agreement that the signatories to the agreement intended to benefit third parties); *Balsam v. Tucows, Inc.*, 627 F.3d 1158, 1161 (9th Cir. 2010) (rejecting non-signatory's third party-beneficiary argument because nothing in the agreement supported argument that he was intended to benefit).

If the Court adopted the position advanced by Defendant, it would mean that any entity that sells products through Amazon could invoke Amazon's Conditions of Use to compel arbitration. This position is not only unreasonable, but rebuts any suggestion that Amazon or Ms. Azar specifically intended to benefit Defendant through requiring and agreeing to Amazon's Conditions of Use. Absent any facts to suggest that Defendant was an intended beneficiary of Amazon's Conditions of Use, Defendant cannot enforce the arbitration provision contained therein as a third party-beneficiary.

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(ii). Equitable Estoppel is Inapplicable as Grounds for Compelling Arbitration

Equitable estoppel "precludes a party from claiming the benefits of a contract while simultaneously attempting to avoid the burdens that contract imposes." *Comer*, 436 F.3d at 1101–02. In the arbitration context, this principle has generated two lines of cases. In the first line of cases, nonsignatories have been held to arbitration clauses where the nonsignatory knowingly exploits the agreement containing the arbitration clause despite having never signed the agreement. *Id.* at 1101. This line of cases is inapplicable to the facts of this matter as Defendant seeks to enforce an arbitration agreement to which it is not a party.

Under the second line of cases, signatories have been required to arbitrate claims brought by nonsignatories "at the nonsignatory's insistence because of the close relationship between the entities involved." *Id.* (internal quotation marks and citation omitted). The Ninth Circuit has specifically addressed this line of cases, noting that it had "never previously allowed a non-signatory defendant to invoke equitable estoppel against a signatory plaintiff" to compel arbitration. *Rajagopalan v. NoteWorld, LLC*, 718 F.3d 844, 847–48 (9th Cir. 2013). In *Rajagopalan*, the Ninth Circuit declined to extend the doctrine of estoppel to permit a non-signatory to compel arbitration against a signatory to the agreement. The court noted that other courts had applied equitable estoppel to compel arbitration on behalf of a non-signatory defendant against a signatory plaintiff where the subject matter of the dispute was "intertwined with the contract providing for arbitration." *Id.* Finding the claims at issue distinct from the contract providing for arbitration, the Ninth Circuit declined to permit the non-signatory defendant compel arbitration. *Id.* at 848.

The same rationale applies here. Plaintiffs' claims stem from Defendant's alleged misrepresentation of accuracy rates associated with its SneakPeek test. The operative statutes under which Plaintiffs seek redress prevent false advertising, deceptive, unfair, or unlawful business practices, and breach of warranty. (*See* Doc. No. 7.) None of Plaintiffs'

claims relate to the purchase of the SneakPeek test from Amazon or Amazon's subsequent delivery of the test to consumers. Notably, Amazon is not named as a defendant in this matter, and, as Defendant notes, "Amazon only provides the platform for third party sellers like Gateway Genomics." (Doc. No. 17 at 10.) Defendant maintained the Amazon listing and the representations regarding accuracy stated therein. Thus, Plaintiffs' claims against Defendant are separate from the contract governing Ms. Azar's creation and usage of her Amazon account. Accordingly, Plaintiffs' misrepresentation and breach of warranty claims are not intertwined with Ms. Azar or Amazon's underlying contractual obligations. *Rajagopalan*, 718 F.3d at 848 ("Because Rajagopalan's statutory claims "d[o] not arise out of or relate to the contract that contained the arbitration agreement," NoteWorld may not compel Rajagopalan to arbitrate his claims on the basis of equitable estoppel."); *see also Mundi*, 555 F.3d at 1047.

As detailed above, there is no evidence that Defendant is a third-party beneficiary of Amazon's Conditions of Use. Additionally, the doctrine of equitable estoppel is not applicable as Plaintiffs' claims are unrelated to Amazon's Conditions of Use. As a nonsignatory to the Conditions of Use, Defendant cannot compel arbitration. Having concluded its inquiry under the FAA, the Court concludes no valid agreement to arbitrate exists between the parties to this litigation. Accordingly, Defendant's request to compel arbitration is **DENIED**, and the Court turns to Defendant's arguments for failure to state a claim.

D. MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of a plaintiff's complaint. *See Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). "A court may dismiss a complaint as a matter of law for (1) lack of cognizable legal theory or (2) insufficient facts under a cognizable legal claim." *SmileCare Dental Grp. v. Delta Dental Plan of Cal.*, 88 F.3d 780, 783 (9th Cir. 1996) (internal citation omitted). However, a complaint will survive a motion to dismiss if it contains "enough facts to state a claim to

relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). In making this determination, a court reviews the contents of the complaint, accepting all factual allegations as true, and drawing all reasonable inferences in favor of the nonmoving party. *Cedars-Sinai Med. Ctr. v. Nat'l League of Postmasters of U.S.*, 497 F.3d 972, 975 (9th Cir. 2007).

Notwithstanding this deference, the reviewing court need not accept legal conclusions as true. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). It is also improper for a court to assume "the [plaintiff] can prove facts that [he or she] has not alleged." *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 526 (1983). However, "[w]hen there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Iqbal*, 556 U.S. at 679.

1. Plaintiffs' CLRA, UCL, and FAL Claims

Many of Defendant's arguments in favor of dismissal under Rule 12(b)(6) mirror those raised with respect to subject matter jurisdiction. For example, Defendant argues that Ms. Main's CLRA claims fail because she has received the relief requested. (Doc. No. 12-1 at 23–24.) Defendant also argues that Plaintiffs' Consumer Legal Remedies Act, unfair competition, and fair advertising claims fail because Plaintiffs have not suffered an injury in fact to substantiate a claim. (*Id.* at 24.) Both arguments are premised on Ms. Main's receipt of a complete refund, and Defendant's offer to refund Ms. Azar the purchase price associated with the SneakPeek test.

As the Court has already determined Ms. Main does not have standing to seek relief, Defendant's request for a 12(b)(6) dismissal of Ms. Main's claims is **DENIED AS MOOT**. Similarly, as the Court has already determined Ms. Azar does have standing to pursue her claims, Defendant's request for dismissal for failure to state a claim for lack of standing is **DENIED**.

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2. Plaintiffs' Breach of Warranty Claims

Defendant argues that Plaintiffs' breach of warranty claims fail because California law precludes the double recovery Plaintiffs seek through this litigation. (Doc. No. 12-1 at 24–25.) To the extent this argument is predicated on Defendant's offer to refund Ms. Azar, it is insufficient to support dismissal. Defendant next argues that California Commercial Code Section 2607 requires a buyer to provide a seller with pre-suit notice of any breach of an express warranty, and that Plaintiffs failed to comply with this requirement. (*Id.* at 25.) In opposition, Plaintiffs argue pre-suit notice was provided in a letter dated December 29, 2015. (Doc. No. 16 at 16.)

California Commercial Code requires that a buyer notify a seller of a breach within a reasonable time after he or she discovers or should have discovered a breach of warranty. *Cortina v. Goya Foods, Inc.*, 94 F. Supp. 3d 1174, 1196 (S.D. Cal. 2015). "To avoid dismissal of a breach of contract or breach of warranty claim in California, '[a] buyer must plead that notice of the alleged breach was provided to the seller within a reasonable time after discovery of the breach.'" *Alvarez v. Chevron Corp.*, 656 F.3d 925, 932 (9th Cir. 2011) (citing *Stearns v. Select Comfort Retail Corp.*, 763 F. Supp. 2d 1128, 1142 (N.D. Cal. 2010)).

Upon review of Plaintiffs' first amended complaint, the Court finds Plaintiffs have adequately alleged pre-suit notice was given to Defendant. The first amended complaint states that Plaintiffs and members proposed class took "reasonable steps to notify SneakPeek within a reasonable time that the Test was not as represented[.]" (Doc. No. 7 ¶ 67.) This is sufficient to satisfy the pleading requirement that notice was afforded within a reasonable time of the breach. Moreover, although the parties do not address it in their briefing, it is unclear whether the pre-suit notice requirements of Section 2607 apply as

Ms. Azar did not purchase the SneakPeek test from Defendant.[10] When claims are against a defendant in its capacity as a manufacturer, not as a seller, plaintiff is not required to give notice. *See Aaronson v. Vital Pharmaceuticals, Inc.*, 2010 WL 625337 at *5 (S.D. Cal. 2010) (citing *Greenman v. Yuba Power Prods.*, 59 Cal.2d 57 (1963)).

Here, since Ms. Azar purchased the SneakPeek test through Amazon and not from Defendant, the waiver requirement would not apply. *See Rosales v. FitFlop USA, LLC*, 882 F. Supp. 2d 1168, 1177–78 (S.D. Cal. 2012) (holding pre-suit notice was not required because the plaintiffs purchased footwear from third party retailers and asserted claims against the defendant in its capacity as a product manufacturer); *In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, & Products Liab. Litig.*, 754 F. Supp. 2d at 1180 (noting notice requirement was "excused as to a manufacturer with which the purchaser did not deal"). Regardless of whether the notice requirement is applicable to Plaintiffs' claims against Defendant, Plaintiffs have adequately alleged compliance with Section 2607 of the California Commercial Code. Defendant's request for dismissal on this ground is **DENIED**.

3. Unjust Enrichment

Next, Defendant moves to dismiss Plaintiffs' claim for unjust enrichment on the grounds that it is not a separate cause of action under California law. (Doc. No. 12-1 at 26.) Plaintiffs argue in opposition that Plaintiffs are permitted to plead in the alternative, and that the claim for unjust enrichment should remain in the first amended complaint. (Doc. No. 16 at 16.)

The Ninth Circuit recently foreclosed upon the argument advanced by Defendant. In *Astiana v. Hain Celestial Grp., Inc.*, 783 F.3d 753 (9th Cir. 2015), the Ninth Circuit reviewed a district court's dismissal of an unjust enrichment claim on the grounds that it

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[10] The parties may not have addressed this argument as it appears that only through briefing the pending motion did the parties clarify that Ms. Azar did not purchase the SneakPeek test from Defendant's website, but through Amazon.

was duplicative or superfluous of other contractual claims. In its review, the Ninth Circuit held that the allegations were sufficient to state a quasi-contractual cause of action and the duplicative nature of a quasi-contractual claim was insufficient grounds for dismissal. *Id.* at 762–63 (holding "there is not a standalone cause of action for unjust enrichment, which is synonymous with restitution" but "[w]hen a plaintiff alleges unjust enrichment, a court may construe the cause of action as a quasi-contract claim seeking restitution"); *see also Loop AI Labs Inc v. Gatti*, No. 15CV00798, 2015 WL 5158639, at *7 (N.D. Cal. Sept. 2, 2015) ("Several decisions in this District have permitted what were previously considered to be superfluous unjust enrichment claims to survive the pleading stage in light of the Ninth Circuit's decision in *Astiana*.). Accordingly, Defendant's request for dismissal as to Plaintiffs' claim for unjust enrichment is **DENIED**.

4. Texas Deceptive Trade Practices–Consumer Protection Act

Defendant also moves to dismiss Plaintiffs' claims under the Texas Deceptive Trade Practices–Consumer Protection Act ("DTPA") for failure to state a claim. Defendant contends Plaintiffs were required to give Defendant written notice of their specific complaint and the amount of economic damages at issue at least 60 days before filing suit, and that no such notice was provided. (Doc. No. 12-1 at 27.) Accordingly, Defendant contends Plaintiffs' claim under the DTPA must be abated. (*Id.*) Plaintiffs relies on the December 29, 2015, letter providing notice of Plaintiffs' intent to sue as satisfying the pre-suit notice requirement of the Texas Deceptive Trade Practices Act. (Doc. No. 16 at 17.)

The DTPA requires a plaintiff to provide a defendant with written notice of any DTPA claim at least sixty days prior to filing suit. Tex. Bus. & Com. Code § 17.505(a). There are only two exceptions to the notice requirement, which are (1) the sixty days notice would be impracticable because the statute of limitations would run, or (2) the consumer's DTPA claim is asserted by way of counterclaim. *Id.* § 17.505(b). The burden is on the plaintiff to plead that he gave the defendant notice. *Hines v. Hash*, 843 S.W.2d 464, 467 (Tex. 1992)). The proper remedy for a plaintiff's failure to comply with the

DTPA's notice requirement is abatement, and not dismissal. *Oppenheimer v. Prudential Sec., Inc.*, 94 F.3d 189, 194 (5th Cir. 1996) (citing *Hines*, 843 S.W.2d at 469).

Here, Plaintiffs allege a cause of action under the DTPA, but Plaintiffs have not pleaded that they provided Defendant with the required notice, nor have plaintiffs pleaded that either of the above-mentioned exceptions to providing notice apply. In opposition to Defendant's motion to dismiss, Plaintiffs argues they provided notice to Defendant in a letter dated December 29, 2015. That letter, however, was provided to Defendant on the same date Plaintiffs initiated litigation, and not sixty days prior to filing suit, as required by the DTPA. Accordingly, Plaintiffs have not complied with the notice requirement and Defendant is entitled to have this action held in abeyance until Plaintiffs comply with the DTPA notice requirements. *See Patel v. Holiday Hosp. Franchising, Inc.*, 172 F. Supp. 2d 821, 826 (N.D. Tex. 2001); *Hines*, 843 S.W.2d at 469 (concluding "that if a plaintiff files an action for damages under the DTPA without first giving the required notice, and a defendant timely requests an abatement, the trial court must abate the proceedings for 60 days").

Because abatement, as opposed to dismissal, is appropriate when a plaintiff fails to comply with the notice requirements of the DTPA, Plaintiffs are ordered to provide notice to Defendant within seven (7) days of the date of this order. If Plaintiffs fails to provide timely notice, the Court will dismiss the claim under the DTPA. The abatement will remain in effect until the sixtieth day after the date that written notice is served in compliance with § 17.505(a). Defendant's request for dismissal or alternatively abatement is **DENIED IN PART** and **GRANTED IN PART**.

E. Further Amendment of Plaintiffs' Complaint

In light of the Court's ruling on the present motion, the Court further orders Plaintiffs to file a second amended complaint omitting Ms. Main as a named Plaintiff and removing Ms. Azar's claims for injunctive relief. Alternatively, Plaintiffs may amend their claim for injunctive relief if they may properly plead a realistic threat through repetition of the alleged violation. The second amended complaint may also amend the

class definition to appropriately conform to the relevant facts of this matter. Plaintiffs must wait to file a second amended complaint until the sixty-day notice requirement mandated by the DTPA has passed.

III. CONCLUSION

For the reasons set forth in detail above, the Court orders as follows:

(1) Defendant's motion to dismiss for lack of standing is **GRANTED IN PART**.

(2) Ms. Main's claims are **DISMISSED** in their entirety for lack of standing.

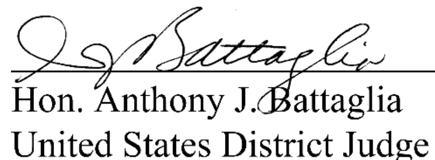
(3) Ms. Azar's claim for injunctive relief is **DISMISSED** for lack of standing.

(4) Defendant's request to compel arbitration is **DENIED**, as a valid agreement to arbitrate does not exist between the parties and Defendant cannot enforce the arbitration in Amazon's Conditions of Use as a nonsignatory.

(5) Defendant's motion to dismiss for failure to state a claim is **DENIED IN PART** and **GRANTED IN PART**. Plaintiffs' claim under the DTPA is abated until the sixtieth day after Plaintiffs provide notice as mandated by Texas Business and Commercial Code § 17.505(a). Plaintiffs may file a second amended complaint upon expiration of the sixty-day period mandated by section 17.505(a).

IT IS SO ORDERED.

Dated: August 1, 2016



Hon. Anthony J. Battaglia
United States District Judge