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8 UNITED STATES DISTRICT COURT  
9 WESTERN DISTRICT OF WASHINGTON  
10 AT SEATTLE

11 PLASTWOOD SRL, et al.,

12 Plaintiffs,

13 v.

14 ROSE ART INDUSTRIES, INC., et al.,

15 Defendants.  
16  
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CASE NO. C07-0458JLR

ORDER GRANTING IN PART  
AND DENYING IN PART  
MOTION TO DISMISS

18 **I. INTRODUCTION**

19 This matter comes before the court on Defendants' motion to dismiss pursuant to  
20 Federal Rules of Civil Procedure 12(b)(2) and 12(b)(6) (Dkt. # 6) and Defendants'  
21 motion to stay discovery pending the resolution of their motion to dismiss (Dkt. # 28).  
22 Having reviewed the motion together with all documents filed in support and in  
23 opposition, the court GRANTS Defendant MEGA Brands, Inc.'s ("MEGA Brands")  
24 12(b)(2) motion to be dismissed for lack of personal jurisdiction. The court also  
25 GRANTS in part and DENIES in part Defendant Rose Art Industries, Inc.'s ("Rose Art")  
26 12(b)(6) motion to dismiss the complaint for failure to state a claim. The court also  
27 DENIES Defendants' motion to stay as moot (Dkt. # 28).  
28

## II. BACKGROUND

Plaintiffs PlastWood SRL and its wholly-owned subsidiary, PlastWood Corporation, allege false advertising and unjust enrichment claims against Defendants MEGA Brands and its wholly-owned subsidiary, Rose Art. Compl. ¶¶ 11-14, 44-52. PlastWood SRL is an Italian corporation, and its subsidiary is a Delaware corporation with its principal place of business in New York. *Id.* at ¶¶ 11-12. MEGA Brands is a Canadian corporation with its principal place of business in Montreal, and its subsidiary, Rose Art, is incorporated in and maintains its principal place of business in New Jersey. *Id.* at ¶¶ 13-14.

Plaintiffs (collectively, “PlastWood”) compete with Rose Art in the sale of magnetic construction toy sets. *Id.* at ¶ 1. Rose Art’s product, Magnetix, is comprised of small plastic building blocks that are held together by magnetic force. *Id.* at ¶¶ 17-18. Rose Art’s advertising and product packaging state that a wide variety of structures (“500 designs”) can be built by assembling Magnetix blocks in certain described manners. *Id.* at ¶¶ 3, 18. PlastWood contends that many of those structures cannot be built and collapse under their own weight. *Id.* at ¶¶ 4, 19. PlastWood also asserts that the phrase “Ages 3 to 100,” which appears on Magnetix packaging, misrepresents that the blocks are safe for children three and older. *Id.* at ¶¶ 5, 20. PlastWood alleges that Magnetix blocks are dangerous to small children because the magnetic beads spontaneously release and can cause severe injury if inhaled or ingested. *Id.* at ¶¶ 5, 20, 24. PlastWood claims that Rose Art has engaged in false advertising in violation of the Lanham Act, 15 U.S.C. § 1125, and also asserts a separate claim for unjust enrichment.<sup>1</sup> *Id.* at ¶¶ 44-52.

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<sup>1</sup>The complaint contains a third claim for violation of the Delaware Deceptive Trade Practices Act, 6 Del. C. § 2532. Compl. ¶¶ 53-56. PlastWood conceded that this claim should be dismissed. Resp. at 17. The court, accordingly, dismisses PlastWood’s Delaware Deceptive Trade Practices Act claim.

1 MEGA Brands moves to be dismissed from this action pursuant to Rule 12(b)(2)  
2 of the Federal Rules of Civil Procedure for lack of personal jurisdiction based on  
3 insufficient Washington contacts. Mot. at 4-5, 18-21. PlastWood asks the court to deny  
4 the motion arguing that the court has both general and specific jurisdiction over MEGA  
5 Brands. Resp. at 8-9.

6  
7 Rose Art moves to dismiss the complaint pursuant to Rule 12(b)(6) arguing that  
8 PlastWood has failed to state a claim under the Lanham Act because the Child Safety  
9 Protection Act (“CSPA”) preempts PlastWood’s age-labeling claim. Mot. at 11-14. Rose  
10 Art also argues that PlastWood has failed to state a claim under the Lanham Act because  
11 the complaint does not identify the Magnetix structures that cannot be built. *Id.* at 14-16.  
12 In addition, Rose Art moves to dismiss PlastWood’s claim for unjust enrichment for  
13 failure to allege sufficient facts. *Id.* at 16-17. PlastWood responds that the CSPA does  
14 not preempt its age-labeling claim because it is not seeking to enforce any safety standard.  
15 Resp. at 14. PlastWood also contends that it has pleaded requisite factual allegations in  
16 relation to its “collapsing structures” claim, and that dismissal is unwarranted. *Id.* at 15.  
17 Finally, PlastWood argues that the complaint properly states a claim for unjust  
18 enrichment. *Id.* at 15-17.

### 20 III. ANALYSIS

#### 21 A. Motion to Dismiss MEGA Brands for Lack of Personal Jurisdiction

22 When a defendant moves to dismiss under Federal Rules of Civil Procedure  
23 12(b)(2), the plaintiff must make a prima facie showing of personal jurisdiction to survive  
24 the motion.<sup>2</sup> *Harris Rutsky & Co. Ins. Servs., Inc. v. Bell & Clements Ltd.*, 328 F.3d  
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27 <sup>2</sup>A preponderance of evidence standard applies where the court holds an evidentiary  
28 hearing to address personal jurisdiction. *Data Disc, Inc. v. Sys. Tech. Assoc.’s, Inc.*, 557 F.2d  
1280, 1284-85 (9th Cir. 1977). Neither PlastWood nor MEGA Brands has requested an  
evidentiary hearing.

1 1122, 1128-29 (9th Cir. 2003). The plaintiff must provide evidence that, if believed,  
2 would support the court's exercise of jurisdiction over the defendant. *Id.* at 1129. The  
3 court need not accept the plaintiff's bare allegations if the defendant controverts them  
4 with evidence. *See AT&T v. Compagnie Bruxelles Lambert*, 94 F.3d 586, 588 (9th Cir.  
5 1996). If both parties provide evidence supporting different versions of a fact, however,  
6 the court must resolve competing inferences in the plaintiff's favor. *Harris Rutsky*, 328  
7 F.3d at 1129.

8  
9 Where no federal statute governs personal jurisdiction, the district court must  
10 apply the long-arm statute of the state in which the court sits. Fed. R. Civ. P. 4(k)(1)(A);  
11 *Core-Vent Corp. v. Nobel Indus. AB*, 11 F.3d 1482, 1484 (9th Cir. 1993). The  
12 Washington long-arm statute reaches the full extent of the due process clause of the  
13 United States Constitution. *Easter v. Am. West Fin.*, 381 F.3d 948, 960 (9th Cir. 2004);  
14 *Werner v. Werner*, 526 P.2d 370, 374 (Wash. 1974).

15  
16 A court can exercise its power over a non-resident defendant (absent the  
17 defendant's consent) only if it has general or specific jurisdiction. *Bancroft & Masters,*  
18 *Inc. v. Augusta Nat'l, Inc.*, 223 F.3d 1082, 1086 (9th Cir. 2000). Where a defendant has  
19 "substantial" or "continuous and systematic" contacts with the forum state, it is subject to  
20 general jurisdiction and can be haled into court on any action, even one unrelated to its  
21 contacts. *Id.* If a defendant is not subject to general jurisdiction, it may be subject to  
22 specific jurisdiction if the action upon which it is sued arises from its contacts within the  
23 forum state. *Id.* In either case, the critical factor in determining personal jurisdiction is  
24 the extent of the defendant's contacts with the forum state. The court, therefore, must  
25 examine MEGA Brands' contacts with Washington to determine if they support the  
26 exercise of either general or specific jurisdiction.  
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1           **1.       General Jurisdiction**

2           A plaintiff asserting general jurisdiction must meet an “exacting standard.”  
3           *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 801 (9th Cir. 2004). A  
4           defendant is not subject to general jurisdiction unless its contacts are so “substantial or  
5           continuous and systematic” that they “approximate physical presence” in the forum state.  
6           *Bancroft & Masters*, 223 F.3d at 1086. The Ninth Circuit “regularly [has] declined to  
7           find general jurisdiction even where the [defendant’s] contacts were quite extensive.”  
8           *Amoco Egypt Oil Co. v. Leonis Navigation Co.*, 1 F.3d 848, 851 n.3 (9th Cir. 1993).<sup>3</sup>

9           General jurisdiction requires a much more substantial connection to the forum than  
10          does specific jurisdiction. *Ballard v. Savage*, 65 F.3d 1495, 1500 (9th Cir. 1995). A  
11          court must consider “all of the defendant’s activities that impact the state, including  
12          whether the defendant makes sales, solicits or engages in business, serves the state’s  
13          markets, designates an agent for service of process, holds a license, has employees, or is  
14          incorporated there.” *Hirsch v. Blue Cross, Blue Shield of Kansas City*, 800 F.2d 1474,  
15          1478 (9th Cir. 1986). A mere showing that a defendant has systematic business contacts  
16          with the forum, however, is insufficient. *Bancroft & Masters*, 223 F.3d at 1086. A  
17          plaintiff must show that the defendant’s activities transcend doing business “with” the  
18          forum state such that it is fair to say that it is actually doing business “in” the forum state.  
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22                               <sup>3</sup>The court notes that general jurisdiction is rarely available, even with substantial contacts  
23                               in the forum. *See, e.g., Shute v. Carnival Cruise Lines*, 897 F.2d 377, 381 (9th Cir. 1990)  
24                               (finding no general jurisdiction despite continuous sales to Washington residents, ongoing  
25                               advertising in Washington, and ongoing business relationships with Washington agents), *rev’d on*  
26                               *other grounds*, 499 U.S. 585 (1991); *see also Helicopteros Nacionales de Colombia, S. A. V.*  
27                               *Hall*, 466 U.S. 408, 411 (1984) (finding no general jurisdiction despite purchase of more than 80  
28                               percent of helicopter fleet, parts, and accessories from forum state over an eight-year period, plus  
                                  numerous related business trips to forum); *Bancroft & Masters*, 223 F.3d at 1086 (finding no  
                                  general jurisdiction despite continuous business relationship with two television networks and a  
                                  handful of California vendors).

1 *Id.*; see also *Helicopteros*, 466 U.S. at 418 (1984) (stating that “mere purchases, even if  
2 occurring at regular intervals, are not enough” to support general jurisdiction). It is not  
3 enough to show that the defendant has “stepped through the door” of the forum through  
4 ongoing business contacts; the plaintiff must show that the defendant “has sat down and  
5 made itself at home.” *Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co.*,  
6 284 F.3d 1114, 1125 (9th Cir. 2002).

7  
8 PlastWood has failed to make a prima facie showing of general personal  
9 jurisdiction over MEGA Brands. PlastWood alleges that MEGA Brands has  
10 manufactured and sold Magnetix in the state of Washington. Compl. ¶ 17. MEGA  
11 Brands’ evidence establishes otherwise. According to the Declaration of Peter Ferrante,  
12 Vice President of Finance for MEGA Brands, MEGA Brands has never sold Magnetix in  
13 the United States. Ferrante Decl. ¶¶ 7-8. Rose Art is, and has always been, the exclusive  
14 seller of Magnetix construction sets. *Id.* The court need not accept PlastWood’s bare  
15 allegations of jurisdiction if MEGA Brands controverts them with evidence. See *AT&T*,  
16 94 F.3d at 588. MEGA Brands is a Canadian corporation with its principal place of  
17 business in Montreal. Compl. ¶ 14. PlastWood has not pleaded any facts indicating that  
18 MEGA Brands has engaged in “substantial” or “continuous and systematic” contacts with  
19 Washington.  
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21 PlastWood has also failed to establish any grounds for imputing Rose Art’s  
22 Washington contacts to MEGA Brands. A domestic corporation’s contacts with the  
23 forum state do not automatically establish jurisdiction over its parent corporation. See  
24 *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781, n.13 (1984); *Doe v. Unocal Corp.*,  
25 248 F.3d 915, 926 (9th Cir. 2001); *AT&T*, 94 F.3d at 591. A subsidiary’s contacts with  
26 the forum state may be imputed to the parent only when the subsidiary (1) is the parent’s  
27 alter ego; or (2) acts as the parent’s general agent. *Doe*, 248 F.3d at 926; *Harris Rutsky*,  
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328 F.3d at 1134-35; *AT&T*, 94 F.3d at 591. PlastWood has not alleged facts sufficient to make a prima facie case under either scenario.

## **2. Specific Jurisdiction**

The Ninth Circuit applies a three-part test to determine specific jurisdiction. First, the nonresident defendant must “do some act or consummate some transaction with the forum or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws[.]” *Data Disc*, 557 F.2d at 1287. Second, the plaintiff’s claim must “arise[ ] out of or result[ ] from the defendant’s forum-related activities. . . .” *Id.* Third, the “[e]xercise of jurisdiction must be reasonable.” *Id.* If the plaintiff meets his burden on the first two parts of the test, the burden shifts to the defendant to satisfy the third part by presenting a “compelling case” that the exercise of jurisdiction is unreasonable. *Schwarzenegger*, 374 F.3d at 802 (citation omitted).

### **a. Purposeful Availment**

Under the first prong of the three-part specific jurisdiction test, PlastWood must establish that MEGA Brands either purposefully availed itself of the privilege of conducting activities in Washington, or purposefully directed its activities toward Washington. The Ninth Circuit uses the phrase “purposeful availment” in shorthand fashion to include both purposeful availment and purposeful direction, *see, e.g., Harris Rutsky*, 328 F.3d at 1130 (citing *Haisten v. Grass Valley Med. Reimbursement Fund Ltd.*, 784 F.2d 1392, 1397 (9th Cir. 1986)), but availment and direction are two distinct concepts.

Purposeful availment analysis examines whether the defendant’s contacts with the forum are attributable to his own actions or solely the actions of the plaintiff. *Sinatra v. Nat’l Enquirer, Inc.*, 854 F.2d 1191, 1195 (9th Cir. 1988) (citations omitted). In order to

1 have purposefully availed oneself of conducting activities in the forum, the defendant  
2 must have performed some type of affirmative conduct that allows or promotes the  
3 transaction of business within the forum state. *Id.* The purposeful availment requirement  
4 ensures that a defendant will not be haled into a jurisdiction solely as a result of random,  
5 fortuitous, or attenuated contacts, or of the unilateral activity of another party or third  
6 person. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985) (citations and  
7 internal quotations omitted).  
8

9 The first prong is also satisfied where nonresident defendants purposefully direct  
10 their activities toward forum residents and such out-of-state acts have an effect in the  
11 forum. *Calder v. Jones*, 465 U.S. 783, 789-90 (1984). Thus, activity by the defendant  
12 need not physically take place in the forum state so as to constitute sufficient contact  
13 under the due process test. *Haisten*, 784 F.2d at 1397. The fundamental issue is whether  
14 a defendant's conduct and connection with the forum state are such that he should  
15 reasonably anticipate being haled into court there. *Id.* (citation omitted).  
16

17 PlastWood failed to demonstrate that MEGA Brands committed some act or  
18 transaction by which it purposefully availed itself of the privilege of conducting activities  
19 in Washington, or that it purposefully directed its activities toward Washington.<sup>4</sup> The  
20 evidence indicates that MEGA Brands has never sold Magnetix construction sets in the  
21 United States. Ferrante Decl. ¶¶ 7-8. Furthermore, MEGA Brands' participation in  
22 certain Magnetix product liability negotiations, Resp. at 8, is the type of attenuated  
23 contact that would not justify haling the Canadian corporation into a Washington  
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26 <sup>4</sup>The court did not consider the terms of the "Master Settlement Agreement," Exhibit A,  
27 attached to the Declaration of Simeon J. Osborn (Dkt. # 16). The terms of the agreement are  
28 subject to a strict confidentiality clause and cannot be disclosed except in a proceeding to enforce  
it. MEGA Brands moved to strike the Master Settlement Agreement. Reply at 11. Accordingly,  
the court grants MEGA Brands' motion to strike.



1 courtroom. Even if MEGA Brands' role in the settlement was sufficient to satisfy the  
2 first prong for specific jurisdiction, PlastWood failed to establish the second prong.

3 **b. Forum-Related Activities**

4 PlastWood has not established that its claims arise out of or are related to MEGA  
5 Brands' forum-related activities. The Ninth Circuit follows a "but for" test in  
6 determining whether the claim "arises out of" the nonresident's forum-related activities.  
7 *Ballard*, 65 F.3d at 1500. Thus, the issue is whether but for MEGA Brands' contacts  
8 with Washington, would PlastWood's claims against MEGA Brands have arisen. The  
9 only forum-related contact that PlastWood alleges<sup>5</sup> is MEGA Brands' participation in the  
10 settlement negotiation of several Magnetix product liability suits in Washington. Resp. at  
11 8. This contact is not a "but for" cause of PlastWood's false advertising claims.  
12 Moreover, PlastWood did not make a prima facie showing that MEGA Brands'  
13 participation in the settlement was related to claims of false advertising.  
14

15 Because PlastWood failed to meet its burden on the first two prongs, the court  
16 need not address the third prong related to reasonableness. PlastWood failed to make a  
17 prima facie showing of either general or specific jurisdiction. Accordingly, the court  
18 grants MEGA Brands' motion to dismiss under Rule 12(b)(2) for lack of personal  
19 jurisdiction.  
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24 <sup>5</sup>PlastWood also alleged that MEGA Brands directly sold Magnetix construction sets in  
25 the state of Washington. Compl. ¶ 17, Resp. at 8-9. PlastWood attempted to support the  
26 allegation with a MEGA Brands pleading statement in an unrelated Indiana lawsuit. Resp. at 8-9.  
27 The statement does not describe any Washington contacts. In addition, the press release  
28 statements that PlastWood relies on, Resp. at 9, do not speak of any Washington contacts.  
MEGA Brands, however, offers evidence that it has never sold Magnetix in the United States.  
Ferrante Decl. ¶¶ 7-8. The court need not accept PlastWood's bare allegations if MEGA Brands  
controverts them with evidence. *See AT&T*, 94 F.3d at 588.

1           **3.       PlastWood’s Request for Jurisdictional Discovery**

2           A trial court is vested with broad discretion in deciding whether to grant further  
3       discovery in order to determine personal jurisdiction. *Wells Fargo & Co. v. Wells Fargo*  
4       *Express Co.*, 556 F.2d 406, 430 n.24 (9th Cir. 1977); *see also Terracom v. Valley Nat’l*  
5       *Bank*, 49 F.3d 555, 562 (9th Cir. 1995) (stating “[w]here a plaintiff’s claim of personal  
6       jurisdiction appears to be both attenuated and based on bare allegations in the face of  
7       specific denials made by defendants, the Court need not permit even limited discovery”).  
8       This court, finding only bare allegations of jurisdiction over MEGA Brands, declines to  
9       grant PlastWood leave to conduct additional discovery in an attempt to establish personal  
10      jurisdiction over MEGA Brands.

11           **B.       Motion to Dismiss the Complaint for Failure to State a Claim**

12           Rose Art moves to dismiss the Complaint pursuant to Rule 12(b)(6) arguing that  
13       PlastWood has failed to state a claim under the Lanham Act and failed to state a claim for  
14       unjust enrichment. Mot. at 11-14, 16-17. Rose Art also contends that PlastWood’s  
15       “collapsing structures” claim is impermissibly indefinite. *Id.* at 14-16.

16           When considering a motion to dismiss under Federal Rules of Civil Procedure  
17       12(b)(6), the court construes the complaint in the light most favorable to the non-moving  
18       party. *Livid Holdings Ltd. v. Salomon Smith Barney, Inc.*, 416 F.3d 940, 946 (9th Cir.  
19       2005). The court must accept all well-pleaded facts as true and draw all reasonable  
20       inferences in favor of the plaintiff. *Wylar Summit P’ship v. Turner Broad. Sys.*, 135 F.3d  
21       658, 661 (9th Cir. 1998). Dismissal under Rule 12(b)(6) can be based on the lack of a  
22       cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal  
23       theory. *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990).

24           While a complaint need not contain detailed factual allegations, a plaintiff’s  
25       obligation to provide the grounds of his entitlement to relief requires more than labels and  
26

1 conclusions, and a formulaic recitation of the elements of a cause of action will not do.  
2 *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1964-65 (2007) (citations omitted). The  
3 factual allegations must be enough to raise a right to relief above the speculative level on  
4 the assumption that all the allegations in the complaint are true (even if doubtful in fact).  
5 *Id.* at 1965 (citations omitted). The complaint must plead “enough facts to state a claim  
6 to relief that is plausible on its face.” *Id.* at 1974. Thus, a 12(b)(6) motion to dismiss  
7 should be granted when plaintiffs fail to “nudge[] their claims across the line from  
8 conceivable to plausible.” *Id.* In the event dismissal is warranted, however, leave to  
9 amend should be granted unless amendment would be futile. *Lopez v. Smith*, 203 F.3d  
10 1122, 1127 (9th Cir. 2000).

12 **1. Lanham Act Claim Based on “Ages 3 to 100”**

13 PlastWood claims that Rose Art has violated the Lanham Act because the phrase  
14 “Ages 3 to 100” appearing on Magnetix packaging is a representation that the blocks are  
15 safe for children three years and older when, in reality, the blocks are highly dangerous to  
16 small children. Compl. ¶¶ 3, 20, 24. Section 43(a) of the Lanham Act imposes liability  
17 on “any person who, on or in connection with any goods or services, or any container for  
18 goods . . . uses in commerce any word, term, name, symbol, or device . . . or any false or  
19 misleading description of fact, or false or misleading representation of fact, which . . . in  
20 commercial advertising or promotion, misrepresents the nature, characteristics, qualities,  
21 or geographic origin of his or her or another person’s goods, services, or commercial  
22 activities.” 15 U.S.C. § 1125(a)(1)(B). PlastWood essentially contends that the label  
23 “Ages 3 to 100” is false or misleading because it fails to adequately warn consumers of  
24 certain alleged dangers that Magnetix toy sets pose to “small children.” *See* Compl. ¶¶ 5,  
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1 20, 24. For the following reasons, the court finds that PlastWood’s claim is precluded<sup>6</sup> by  
2 the CSPA.

3 The CSPA establishes requirements for products intended for children. *See* Pub.  
4 L. No. 103-267, 108 Stat. 722 (1994). Section 101(a) of the CSPA amended the Federal  
5 Hazardous Substances Act (“FHSA”), 15 U.S.C. §§ 1261-1278, by adding a new section,  
6 codified at 15 U.S.C. § 1278, which lists the requirements for labeling certain toys and  
7 games. The FHSA does not authorize a private cause of action. *IQ Prods. Co. v.*  
8 *Pennzoil Prods. Co.*, 305 F.3d 368, 373 (5th Cir. 2002). Instead, the Consumer Product  
9 Safety Commission (“CPSC”) is responsible for enforcing the FHSA and promulgating,  
10 interpreting, and enforcing regulations under the FSHA. *See* 16 CFR §§ 1500.1-  
11 1500.231. Furthermore, the FHSA regulations contain an explicit preemption provision  
12 that “prohibits any state from enacting or enforcing any requirement relating to cautionary  
13 labeling relating to small parts hazards . . . unless the state or local requirement is  
14 identical to a requirement established by section 24 of the FHSA or by 16 C.F.R. §  
15 1500.19.” 16 C.F.R. § 1500.19(h).

16 The instant case is analogous to the facts of *IQ Prods.*, where the court prohibited  
17 the plaintiff from using the Lanham Act to circumvent the FHSA. *See* 305 F.3d at 372.  
18 The plaintiff, IQ Products Company (“IQ”), alleged that its competitor failed to label its  
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22 <sup>6</sup>The parties refer to this issue as “preemption.” Preemption, however, is based on the  
23 Supremacy Clause, Article VI, and involves the relationship between federal and state laws.  
24 Preclusion involves the relationship between two federal laws. *See CSX Transp., Inc. v. Miller*,  
25 858 A.2d 1025, 1047-1050 (Md. Ct. Spec. App. 2004) (explaining the difference between  
26 preemption and preclusion). The difference in the use of terms may only be academic as many  
27 courts have relied on preemption analysis in preclusion cases. *See, e.g., Waymire v. Norfolk & W.*  
28 *Ry.*, 218 F.3d 773 (7th Cir. 2000) (finding preemption analysis instructive in a case dealing with  
the interaction of two federal statutes); *Rice v. Cincinnati, New Orleans & Pac. Ry.*, 955 F. Supp.  
739 (D. Ky. 1997) (holding that the same rationale that supports preemption also indicates that  
railroad speed regulations adopted pursuant to Federal Railway Safety Act should supersede an  
unsafe speed argument in this Federal Employers’ Liability Act case).

1 tire inflation product as “flammable,” and that the omission of the word violated the  
2 Lanham Act because it mislead consumers into believing that the product was  
3 “non-flammable.” *Id.* at 370. The district court granted partial summary judgment  
4 against IQ for impermissibly attempting to use the Lanham Act as a vehicle to enforce the  
5 FHSA. *Id.* at 372. The Fifth Circuit affirmed by holding that the FHSA did not create a  
6 private right of action and precluded IQ from attempting to usurp the regulatory function  
7 of the CPSC. *Id.* at 374. The defendants’ failure to label its product, even if true, did not  
8 constitute a false or misleading statement that was actionable under the Lanham Act. *Id.*

10 Likewise, PlastWood’s claim, which contends that the label “Ages 3 to 100” is a  
11 false or inadequate safety statement, is precluded because PlastWood cannot use the  
12 Lanham Act as a vehicle to enforce or enact FHSA safety requirements. Moreover,  
13 PlastWood’s claim is precluded because it is essentially asking this court to enforce a  
14 labeling requirement that is not identical to 16 C.F.R. § 1500.19. PlastWood asserts that  
15 the phrase “Ages 3 to 100” appearing on Magnetix packaging is a representation that the  
16 blocks are safe for children three years and older when, in reality, the blocks are highly  
17 dangerous to small children. Compl. ¶¶ 3, 20, 24. PlastWood improperly requests this  
18 court to enforce safety labeling that would be incongruent with the safety labeling  
19 requirements set forth by the CPSC. Accordingly, the court dismisses PlastWood’s  
20 Lanham Act claim related to the label “Ages 3 to 100.”

## 22 **2. Lanham Act Claim Based on Collapsing Structures**

23 PlastWood alleges a second Lanham Act claim. It asserts that Magnetix  
24 advertising and packaging conveyed that a wide variety of structures (“500 designs”)  
25 could be built by assembling Magnetix blocks in certain described manners when, in  
26 reality, many of those structures collapse of their own weight. Compl. ¶¶ 3, 4, 18, 19.  
27 Rose Art contends that because PlastWood did not identify which depicted structures  
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1 collapse, PlastWood has failed to satisfy certain pleading requirements; therefore, the  
2 claim should be dismissed. Mot. at 14-16.

3 As an initial matter, the court finds that the heightened pleading requirements of  
4 Federal Rules of Civil Procedure 9(b) do not apply to this claim. The cases applying  
5 Rule 9(b) to Lanham Act claims, on which Rose Art relies, have done so where the  
6 complaint specifically alleged fraud or alleged facts that necessarily constituted fraud.  
7 *See, e.g., Collegenet, Inc. v. XAP Corp.*, No. CV-03-1229-HU, 2004 WL 2303506, \*4 (D.  
8 Or. Oct. 12, 2004) (applying Rule 9(b) to a Lanham Act claim where the plaintiff alleged  
9 “knowing” and “intentional” conduct); *Pestube Sys., Inc. v. HomeTeam Pest Def., LLC*,  
10 No. Civ.-05-2832-PHX-MHM, 2006 U.S. Dist. LEXIS 34337, at \*14-15 (D. Ariz. May  
11 24, 2006) (applying Rule 9(b) to plaintiff’s Lanham Act claim that was “grounded” or  
12 “sounding” in fraud when the complaint alleged “knowing” misrepresentations);  
13 *Volunteer Firemen’s Ins. Servs., Inc. v. McNeil & Co., Inc.*, 221 F.R.D. 388, 393  
14 (W.D.N.Y. 2004) (applying Rule 9(b) to a false advertising counterclaim in which the  
15 defendant alleged that “the plaintiff ‘brazenly, willfully and wantonly’ misrepresented the  
16 nature of the parties’ products in order to defraud potential customers”). Here,  
17 PlastWood’s Complaint falls short of alleging fraud or facts necessarily constituting fraud  
18 because it never averred that Rose Art engaged in any knowing or intentional conduct in  
19 relation to collapsing structures.<sup>7</sup> Accordingly, the lower pleading standard set forth in  
20 Rule 8(a) applies.  
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24  
25 <sup>7</sup>Under Washington law, the nine fraud elements are: (1) a representation of an existing  
26 fact; (2) the fact is material; (3) the fact is false; (4) the defendant knew the fact was false or was  
27 ignorant of its truth; (5) the defendant intended the plaintiff to act on the fact; (6) the plaintiff did  
28 not know the fact was false; (7) the plaintiff relied on the truth of the fact; (8) the plaintiff had a  
right to rely on it; and (9) the plaintiff had damages. *Baertschi v. Jordan*, 413 P.2d 657, 660  
(Wash. 1966). PlastWood alleges some facts indicating certain levels of “knowledge” in  
connection with its safety claim (“Ages 3 to 100”). *See* Compl. ¶¶ 22, 25, 29, 40. These factual  
allegations, however, have no relation to PlastWood’s collapsing structures claim.

1 PlastWood has pleaded sufficient facts to make out a plausible cause of action  
2 under the Lanham Act. Rule 8(a) requires a “short and plain statement of the claim  
3 showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). PlastWood’s  
4 complaint places Rose Art on notice of the wrong that it is accused of committing. The  
5 complaint states that Rose Art has informed consumers through its published advertising  
6 and product packaging that a wide variety of Magnetix structures (“500 designs”) can be  
7 built. Compl. ¶¶ 3, 18. PlastWood contends that such messages are false or misleading  
8 because many of these structures cannot be built and collapse. *Id.* at ¶¶ 4, 19. PlastWood  
9 essentially argues that Rose Art has overstated the qualities or capabilities of its product  
10 in violation of the Lanham Act. These allegations provide Rose Art with fair notice of the  
11 nature of claim. *See Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002) (stating  
12 “[s]uch a statement must simply give the defendant fair notice of what the plaintiff’s  
13 claim is and the grounds upon which it rests”). More specific facts may be determined by  
14 discovery. PlastWood has pleaded sufficient facts to state a claim that is plausible on its  
15 face. *See Twombly*, 127 S. Ct. at 1974. Accordingly, the court denies Rose Art’s Rule  
16 12(b)(6) motion to dismiss PlastWood’s collapsing structures claim.

### 19 **3. Unjust Enrichment Claim**

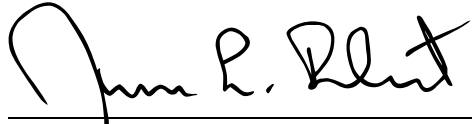
20 Rose Art also moved to dismiss PlastWood’s claim for unjust enrichment under  
21 Rule 12(b)(6) for failure to state a claim. Mot. at 16-17. Under Washington law, an  
22 unjust enrichment claimant must establish that (1) he conferred a benefit on the  
23 defendant; (2) the defendant appreciated or knew of the benefit; and (3) the defendant’s  
24 acceptance or retention of the benefit under the circumstances make it inequitable for the  
25 defendant to retain the benefit without paying its value. *Bailie Commc’ns v. Trend Bus.*  
26 *Sys.*, 810 P.2d 12, 18 (Wash. Ct. App. 1991). PlastWood has pleaded no facts  
27 establishing that it conferred a benefit upon Rose Art, that Rose Art knew of such benefit,  
28

1 or that Rose Art's acceptance or retention under the circumstances is inequitable.  
2 PlastWood has failed to state a claim for relief that is plausible on its face. *See Twombly*,  
3 127 S. Ct. at 1974. Therefore, the court grants Rose Art's motion to dismiss PlastWood's  
4 unjust enrichment claim.<sup>8</sup> Plaintiffs will not be granted leave to amend because such  
5 amendment would be futile. *See Lopez*, 203 F.3d at 1127.

#### 6 7 **IV. CONCLUSION**

8 For the foregoing reasons the court GRANTS the motion to dismiss MEGA Brands  
9 for lack of personal jurisdiction pursuant to Federal Rules of Civil Procedure 12(b)(2)  
10 (Dkt. # 6). The court GRANTS in part and DENIES in part Rose Art's motion to dismiss  
11 the complaint for failure to state a claim pursuant to Rule 12(b)(6) (Dkt. # 6).  
12 Specifically, the court grants Rose Art's motion to dismiss the following claims: (a) the  
13 Lanham Act "Ages 3 to 100" claim; (b) the unjust enrichment claim; and (c) the Delaware  
14 Deceptive Trade Practices Act claim. The court denies Rose Art's motion to dismiss the  
15 Lanham Act "collapsing structures" claim. Finally, the court DENIES Defendants'  
16 motion to stay discovery (Dkt. # 28).  
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18 DATED this 22nd day of October 2007.

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20   
21 JAMES L. ROBART  
22 United States District Judge  
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28 <sup>8</sup>The dismissal of PlastWood's unjust enrichment claim does not limit the type of damages  
that may be available for PlastWood's surviving Lanham Act claim.