

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

ANKUSH PURI,
Plaintiff,
v.

COSTCO WHOLESALE CORPORATION,
Defendant.

Case No. [5:21-cv-01202-EJD](#)

**ORDER GRANTING MOTION TO
DISMISS AMENDED COMPLAINT**

Re: Dkt. No. 23

Plaintiff Ankush Puri brings this putative false advertising class action against Defendant Costco Wholesale Corporation (“Costco”) related to Costco’s sale of ice cream bars. Before the Court is Costco’s motion to dismiss Puri’s amended complaint under Federal Rules of Civil Procedure 12(b)(6) and 9(b). Def. Costco Wholesale Corp.’s Notice of Mot. and Mem. in Supp. of Def.’s Mot. to Dismiss Pl.’s First Am. Compl. (“Mot.”), Dkt. No. 23. The Court finds the motion appropriate for decision without oral argument pursuant to Civil Local Rule 7-1(b). Having considered the parties’ written submissions, the Court GRANTS the motion with leave to amend.

I. BACKGROUND

Defendant Costco is a Washington corporation with its principal place of business in Issaquah, Washington. First Am. Class Action Compl. (“FAC”), Dkt. No. 18 ¶ 87. Costco operates approximately 600 stores in the United States, including a significant number in California. *Id.* ¶¶ 88-89. Costco offers under its Kirkland Signature brand “Chocolate Almond Dipped Vanilla Ice Cream Bars” (“the Product”), which are sold in packages of 18 bars in

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Costco's retail stores. *Id.* ¶¶ 1-3.

The Product's packaging includes the aforementioned name of the Product as well as pictures of the Product, two pieces of chocolate, three vanilla beans, a vanilla flower, and two almonds. *Id.* ¶ 3. The packaging also includes an ingredient list, which provides that the Product's "Milk Chocolate Flavored Coating With Almonds" consists of "Coating (Sugar, Coconut Oil, Nonfat Dry Milk, Unsweetened Chocolate, Soybean Oil, Unsweetened Chocolate Processed With Alkali, Soy Lecithin), Roasted Almonds (Almonds, Cottonseed Oil)." *Id.* ¶ 39.

Plaintiff Puri is a resident of Santa Clara, California and has been a Costco member for many years. *Id.* ¶¶ 86, 94. Puri purchased the Product several times in the last two years. *Id.* ¶¶ 97-98. Based on the Product's packaging and name, he "expected the Product's chocolate coating would be made from chocolate from cacao beans." *Id.* ¶¶ 63-70. This is because, according to Puri, chocolate is defined by the Food and Drug Administration ("FDA") and under California law as "prepared from ground roasted cacao bean," and it must be "made chiefly from cacao beans with a small amount of optional ingredients." *Id.* ¶¶ 3, 7-8. Based on this definition, he says the pictures and terminology on the packaging are misleading because the "Milk Chocolate Flavored Coating With Almonds" actually contains mostly vegetable oils and only "de minimis" or "negligible" amounts of ingredients derived from cacao beans. *Id.* ¶¶ 39-78. Therefore, Puri alleges, "the Product is not chocolate, or even mostly chocolate, because it is mainly made from vegetable oils." *Id.* ¶ 71. He says that he would not have purchased the Product had he known of the amount of vegetable oils present in the Product. *Id.* ¶¶ 67-75.

In support of his contention that the Product is mostly vegetable oils and not ingredients derived from cacao beans, Puri relies on the Product's ingredient list, which identifies the ingredients in order of predominance by weight in accordance with 21 C.F.R. § 101.4(a)(1). *Id.* ¶¶ 39-48. He assigns weights to the ingredients based on their placement in the ingredient list, ultimately concluding that the total amount of vegetable oils (the coconut oil and soybean oil) "are present in an amount greater than cacao bean ingredients" (presumably, the unsweetened chocolate and unsweetened chocolate processed with alkali). *Id.* ¶¶ 48. Furthermore, Puri says

that the Product contains even less chocolate than his weighting analysis suggests, because the ingredient list improperly uses the term “unsweetened chocolate processed with alkali.” *Id.* ¶¶ 49-56. He alleges that “unsweetened chocolate processed with alkali” is a misnomer, because only cocoa powder is processed with alkali, not chocolate. *Id.*

In addition to his main theory that the Product’s labeling is misleading because it contains more vegetable oils than cacao bean ingredients, Puri offers two other categories of reasons why the Product’s packaging is deceptive: (1) the Product does not have the same taste or “mouthfeel” as “real” chocolate, and (2) “real” chocolate is a natural ingredient that has health and nutrition benefits and satiety value that synthetic vegetable oils do not. *Id.* ¶¶ 21-38.

On February 18, 2021, Puri filed the instant action alleging the following claims: (1) unlawful, unfair, and fraudulent conduct in violation of California’s Unfair Competition Law (“UCL”), Cal. Bus. & Prof. Code §§ 17200 *et seq.*; (2) violation of the California False Advertising Law (“FAL”), Cal. Bus. & Prof. Code §§ 17500 *et seq.*; and (3) violation of the California Consumers Legal Remedies Act (“CLRA”), Cal. Civ. Code §§ 1750 *et seq.* *Id.* ¶¶ 113-151. On June 14, 2021, Costco filed the motion to dismiss now before the Court. Dkt. No. 23.

II. LEGAL STANDARD

A. Rule 12(b)(6)

Federal Rule of Civil Procedure 8(a) requires a plaintiff to plead each claim with enough specificity to “give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal quotations omitted). A complaint which falls short of the Rule 8(a) standard may therefore be dismissed if it fails to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). “Dismissal under Rule 12(b)(6) is appropriate only where the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory.” *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008). When deciding whether to grant a motion to dismiss, the Court must accept as true all “well pleaded factual allegations” and determine whether the allegations “plausibly give rise to an entitlement to relief.” *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). The Court must also

1 construe the alleged facts in the light most favorable to the plaintiff. *Love v. United States*, 915
 2 F.2d 1242, 1245 (9th Cir. 1989). While a complaint need not contain detailed factual allegations,
 3 it “must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is
 4 plausible on its face.’” *Iqbal*, 556 U.S. at 678 (quoting *Bell Atl. Corp.*, 550 U.S. at 570).

5 A court generally may not consider any material beyond the pleadings when ruling on a
 6 Rule 12(b)(6) motion. If matters outside the pleadings are considered, “the motion must be treated
 7 as one for summary judgment under Rule 56.” Fed. R. Civ. P. 12(d). However, documents
 8 appended to the complaint, incorporated by reference in the complaint, or which properly are the
 9 subject of judicial notice may be considered along with the complaint when deciding a Rule
 10 12(b)(6) motion. *Khoja v. Orexigen Therapeutics*, 899 F.3d 988, 998 (9th Cir. 2018); *see also Hal*
 11 *Roach Studios, Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1555 n.19 (9th Cir. 1990).
 12 Likewise, a court may consider matters that are “capable of accurate and ready determination by
 13 resort to sources whose accuracy cannot reasonably be questioned.” *Roca v. Wells Fargo Bank,*
 14 *N.A.*, No. 15-cv-02147-KAW, 2016 WL 368153, at *3 (N.D. Cal. Feb. 1, 2016) (quoting Fed. R.
 15 Evid. 201(b)).

16 **B. Rule 9(b)**

17 Consumer protection claims that sound in fraud are subject to the heightened pleading
 18 requirements of Federal Rule of Civil Procedure 9(b). *See Vess v. Ciba-Geigy Corp. USA*, 317
 19 F.3d 1097, 1102 (9th Cir. 2003); *San Miguel v. HP Inc.*, 317 F. Supp. 3d 1075, 1084 (N.D. Cal.
 20 2018). Rule 9(b) requires that “a party must state with particularity the circumstances constituting
 21 fraud.” Fed. R. Civ. P. 9(b). The circumstances constituting the fraud must be “specific enough to
 22 give defendants notice of the particular misconduct which is alleged to constitute the fraud
 23 charged so that they can defend against the charge and not just deny that they have done anything
 24 wrong.” *Semegen v. Weidner*, 780 F.2d 727, 731 (9th Cir. 1985). Therefore, a party alleging
 25 fraud must set forth “the who, what, when, where, and how” of the misconduct. *Vess*, 317 F.3d at
 26 1106 (quoting *Cooper v. Pickett*, 137 F.3d 616, 627 (9th Cir. 1997)). “[I]n a case where fraud is
 27 not an essential element of a claim, only allegations . . . of fraudulent conduct must satisfy the

heightened pleading requirements of Rule 9(b)” while “[a]llegations of non-fraudulent conduct need satisfy only the ordinary notice pleading standards of Rule 8(a).” *Id.* at 1104–05.

With respect to omissions-based fraud claims, “the pleading standard is lowered on account of the reduced ability in an omission suit ‘to specify the time, place, and specific content, relative to a claim involving affirmative misrepresentations.’” *Barrett v. Apple Inc.*, No. 5:20-CV-04812-EJD, 2021 WL 827235, at *7 (N.D. Cal. Mar. 4, 2021) (quoting *In re Apple & AT & TM Antitrust Litig.*, 596 F. Supp. 2d 1288, 1310 (N.D. Cal. 2008)); *see also Falk v. Gen. Motors Corp.*, 496 F. Supp. 2d 1088, 1099 (N.D. Cal. 2007).

III. DISCUSSION

Costco now moves to dismiss all claims on the grounds that Puri fails to state any claim because the Product is not misleading, Puri’s claims are preempted, Puri lacks standing to seek injunctive relief, and Puri has failed to comply with the requirements of the CLRA for seeking money damages. Mot. at 4–21.

A. Preemption

The Supremacy Clause grants Congress the power to preempt state law. U.S. Const. art. VI, cl. 2; *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 372 (2000). The Supreme Court has identified two cornerstones of its preemption jurisprudence: first, “the purpose of Congress is the ultimate touchstone in every preemption case,” and second, “[i]n all pre-emption cases, and particularly in those in which Congress has legislated in a field which the States have traditionally occupied, we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.” *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (citation and internal marks omitted). Where there is a “plausible alternative reading,” courts “accept the reading that disfavors pre-emption.” *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005).

The Food Drug and Cosmetics Act (“FDCA”) established a comprehensive federal scheme of food regulation to ensure food safety and proper labeling in an effort to avoid misleading consumers. 21 U.S.C. § 341 *et seq.* Congress amended the FDCA by enacting the Nutrition

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