UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES – GENERAL

Case No.	**2:21-cv-04296-MCS-KS**	Date	August 19, 2021
Title	***Lozano v. Bowmar Nutrition LLC***		

Present: The Honorable	Mark C. Scarsi, United States District Judge

Stephen Montes Kerr	Not Reported
Deputy Clerk	Court Reporter

Attorney(s) Present for Plaintiff(s):	Attorney(s) Present for Defendant(s):
None Present	None Present

Proceedings: (IN CHAMBERS) ORDER RE: MOTION TO DISMISS (ECF NO. 15)

Defendant Bowmar Nutrition LLC moves to dismiss Plaintiff Deana Lozano's Second Amended Complaint (SAC, ECF No. 13). (Mot., ECF No. 15.) Plaintiff filed an opposition brief, and Defendant filed a reply. (Opp'n, ECF No. 18; Reply, ECF No. 20.) The Court deems the motion appropriate for decision without oral argument. *See* Fed. R. Civ. P. 78(b); C.D. Cal. R. 7-15.

I. BACKGROUND

This is a putative class action concerning purportedly false and misleading representations Defendant made about its protein-fortified powders, bars, nut spreads, frostings, and other consumable products. Plaintiff purchased eleven types of Defendant's products, and she alleges all the products contain substantially less protein than stated on the products' labels and in Defendant's advertising. (SAC ¶¶ 1–7, 22–39.) Plaintiff seeks to certify a nationwide class and a California subclass of purchasers of Defendant's products. (*Id.* ¶¶ 40–57.) Plaintiff asserts seven claims: (1) violation of the unfair prong of the California Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code § 17200 *et seq.*; (2) violation of the fraudulent prong of the UCL; (3) violation of the unlawful prong of the UCL; (4) violation of the California

False Advertising Law ("FAL"), Cal. Bus. & Prof. Code § 17500 *et seq.*; (5) violation of various states' laws governing unfair and deceptive trade practices; (6) unjust enrichment; and (7) violation of the California Consumer Legal Remedies Act ("CLRA"), Cal. Civ. Code § 1750 *et seq.* (*Id.* ¶¶ 58–122.)

II. LEGAL STANDARDS

A. Rule 12(b)(1)

Federal Rule of Civil Procedure 12(b)(1) authorizes a party to seek dismissal of an action for lack of subject-matter jurisdiction. "Because standing and ripeness pertain to federal courts' subject matter jurisdiction, they are properly raised in a Rule 12(b)(1) motion to dismiss." *Chandler v. State Farm Mut. Auto. Ins. Co.*, 598 F.3d 1115, 1122 (9th Cir. 2010). In the context of a 12(b)(1) motion, the plaintiff bears the burden of establishing Article III standing to assert the claims. *Id.*

Rule 12(b)(1) jurisdictional challenges can be either facial or factual. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). When a motion to dismiss attacks subject-matter jurisdiction on the face of the complaint, as here, the court assumes the factual allegations in the complaint are true and draws all reasonable inferences in the plaintiff's favor. *Doe v. Holy See*, 557 F.3d 1066, 1073 (9th Cir. 2009). Moreover, the standards set forth in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), apply with equal force to Article III standing when it is being challenged on the face of the complaint. *See Terenkian v. Republic of Iraq*, 694 F.3d 1122, 1131 (9th Cir. 2012) (applying *Iqbal*). Thus, in terms of Article III standing, the complaint must allege "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570).

B. Rule 12(b)(6)

Federal Rule of Civil Procedure 12(b)(6) allows an attack on the pleadings for "failure to state a claim upon which relief can be granted." "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678.

The determination of whether a complaint satisfies the plausibility standard is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 679. Generally, a court must accept the factual allegations in the pleadings as true and view them in the light most favorable to the plaintiff. *Park v. Thompson*, 851 F.3d 910, 918 (9th Cir. 2017); *Lee v. City of Los Angeles*, 250 F.3d 668, 679 (9th Cir. 2001). But a court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555).

III. DISCUSSION

The Court considers Defendant's jurisdictional challenges first. *See Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 578 (1999) ("Customarily, a federal court first resolves doubts about its jurisdiction over the subject matter . . . .").

A. Standing to Bring Claims under Other States' Laws

Defendant argues Plaintiff lacks standing to bring claims under the law of any state but California, the state where she resides. (Mot. 9–11.) "Courts in the Ninth Circuit have consistently held that a plaintiff in a putative class action lacks standing to assert claims under the laws of states other than those where the plaintiff resides or was injured." *Jones v. Micron Tech. Inc.*, 400 F. Supp. 3d 897, 908 (N.D. Cal. 2019) (collecting cases). A plaintiff must provide at least a prima facie showing that the other states' laws apply such that the plaintiff would have standing to bring the claim. *Carpenter v. PetSmart, Inc.*, 441 F. Supp. 3d 1028, 1038 (S.D. Cal. 2020).

Plaintiff contends the Court should treat Defendant's standing challenge as a disguised argument pertaining to class certification. (*See* Opp'n 10–12.) Because "[t]he Court should address standing prior to class certification," the Court finds the issue appropriate for decision here. *Carpenter*, 441 F. Supp. 3d at 1038 (internal quotation marks omitted).

Plaintiff does not provide a prima facie showing that she has standing to proceed under the laws of states other than California. Plaintiff's allegations indicate she is a California citizen who suffered her injury in California. (*E.g.*, SAC ¶ 6.) Plaintiff emphasizes that her "claims under California law are materially identical" to claims available to class members in other states. (*Id.* ¶ 93; *accord id.* ¶ 106; Opp'n 12–14.) These allegations do not provide a basis for Plaintiff to rest claims based on other states' laws. *See Jones*, 400 F. Supp. 3d at 909 ("Plaintiffs must show they have standing for each claim they raise, and Plaintiffs do not have standing to bring claims under the laws of states where they have alleged no injury, residence, or other pertinent connection."); *e.g.*, *Herrera v. Wells Fargo Bank, N.A.*, No. SACV 18-332 JVS (MRWx), 2020 U.S. Dist. LEXIS 187621, at *30 (C.D. Cal. Sept. 1, 2020) (rejecting argument that plaintiffs had standing to request declaratory judgment under laws of states in which plaintiffs did not live because plaintiffs would be typical of class members in those states).

The fifth claim is dismissed in its entirety, and the sixth claim is dismissed to the extent Plaintiff asserts it under the laws of states other than California. Because Plaintiff lacks standing to pursue these claims, the Court declines to consider Defendant's personal jurisdiction challenge to the claims of out-of-state putative class members. (Mot. 11–13.)

B. Standing to Bring Claims as to Unpurchased Products

Defendant challenges Plaintiff's constitutional and statutory standing to bring claims as to products Defendant makes that Plaintiff did not purchase. (Mot. 7–8.) As Defendant acknowledges, courts in the Ninth Circuit are split on whether a named plaintiff in a putative class action has standing to assert claims based on products the plaintiff has not purchased. One district court identified three diverging approaches:

> The first approach holds that when a plaintiff asserts claims based both on products that she purchased and products that she did not purchase, claims relating to products not purchased must be dismissed for lack of standing. Other courts have adopted a "middle-ground" position, holding that sufficient or substantial similarity between the purchased and non-purchased products satisfies the standing requirement for the non-purchased products. Finally, some courts have concluded that so long as a named plaintiff has individual standing to sue for the products they did purchase, any inquiry into products they did not purchase is best left for the class certification stage.

Figy v. Frito-Lay N. Am., Inc., 67 F. Supp. 3d 1075, 1083 (N.D. Cal. 2014) (alterations, internal quotation marks, and citations omitted). The "prevailing view" is the second, middle-ground approach. *Cordes v. Boulder Brands U.S., Inc.*, No. CV 18-6534 PSG (JCx), 2019 U.S. Dist. LEXIS 42906, at *5 (C.D. Cal. Jan. 30, 2019) (internal quotation marks omitted).

The Court declines to adopt the third approach given that courts "should address standing prior to class certification." *Carpenter*, 441 F. Supp. 3d at 1038 (internal quotation marks omitted); *accord Ruhrgas*, 526 U.S. at 578. The Court need not decide between the other two approaches at this time. Even if Plaintiff has standing to predicate her claims on substantially similar unpurchased products, Plaintiff here pleads no facts indicating the unpurchased products are substantially similar to the eleven she did. *See Cordes*, 2019 U.S. Dist. LEXIS 42906, at *6 (approving middle-ground approach but granting motion to dismiss because plaintiff did not "plausibly allege that the non-purchased products were substantially similar to the product he purchased"). Plaintiff brings claims on behalf of a putative class of purchasers of *all* of Defendant's "protein-fortified nut spreads, powders, frostings, and bars." (SAC ¶ 40.) She does not identify the other products by name, let alone present facts indicating those products are substantially similar to the eleven she purchased. In her brief, Plaintiff merely highlights her allegations that the products share protein fortification in common. (Opp'n 7–8 (citing SAC ¶¶ 2–3, 7, 32).) But she states no facts indicating that the products are fortified with a common protein source or other facts indicating those products are substantially similar to the ones she purchased. *See Martin v. Tradewinds Beverage Co.*, No. CV 16-9249 PSG (MRWx), 2017 U.S. Dist. LEXIS 72698, at *12 (C.D. Cal. Apr. 27, 2017) ("Having a few common ingredients is simply not enough . . . . In fact, this is true for just about any type of product. After all, just because an Old Fashioned and a Manhattan both have bourbon doesn't mean they are the same drink." (quoting *Dysthe v. Basic Rsch. LLC*, No. CV 09-8013 AG (SSx), 2011 U.S. Dist. LEXIS 137315, at *13 (C.D. Cal. June 13, 2011))). As Defendant persuasively notes, Plaintiff "seeks to represent a class of all persons who purchased protein *bars*, even though Plaintiff does not claim to have purchased any protein bars at all." (Reply 3.) Plaintiff fails to establish constitutional standing to pursue claims concerning products she did not purchase.

The Court also agrees with Defendant that Plaintiff lacks statutory standing to assert claims based on products she did not purchase. To have standing under the UCL, FAL, and CLRA, a plaintiff must allege she suffered an injury in fact and lost money or property as a result of the defendant's alleged conduct. *Lorentzen v. Kroger Co.*, __ F. Supp. 3d __, No. 2:20-cv-06754-SB-RAO, 2021 U.S. Dist. LEXIS 79931, at *11 n.4 (C.D. Cal. Apr. 2, 2021) (citing Cal. Bus. & Prof. Code §§ 17204, 17535 and Cal. Civ. Code § 1780(a)); *see TrafficSchool.com, Inc. v. Edriver Inc.*, 653 F.3d 820, 825 n.1 (9th Cir. 2011) ("Plaintiffs filing an unfair competition suit must prove a pecuniary injury and immediate causation. Neither is required for Article III standing." (internal quotation marks and citations omitted)). Responding to this argument, Plaintiff rests on her insufficient contentions regarding the substantial similarity of the unpurchased products. (Opp'n 10 n.3.) These allegations are not enough to confer statutory standing. *See Johns v. Bayer Corp.*, No. 09CV1935 DMS (JMA), 2010 U.S. Dist. LEXIS 10926, at *13 (S.D. Cal. Feb. 9, 2010) ("[Plaintiff] cannot expand the scope of his claims to include a product he did not purchase or advertisements relating to a product that he did not rely upon. The statutory standing requirements of the UCL and CLRA are narrowly prescribed and do not permit such generalized allegations."); *see also Smedt v. Hain Celestial Grp., Inc.*, No. 5:12-CV-03029-EJD, 2014 U.S. Dist. LEXIS 74291, at *16–22 (N.D. Cal. May 30, 2014) (combining discussion of constitutional and statutory standing, and granting motion to dismiss because pleading did not show "how the unpurchased products are substantially similar to the purchased products").

The Court dismisses Plaintiff's claims as to products she did not purchase for failure to allege constitutional and statutory standing.

C. Rule 9(b)

Defendant contends the SAC does not meet the heightened pleading standard of Rule 9(b) as to ten of the eleven products Plaintiff purchased.[1] (Mot. 4–6.) Plaintiff does not respond to Defendant's Rule 9(b) arguments. (*See generally* Opp'n.) The Court deems them conceded. *See, e.g.*, *John-Charles v. California*, 646 F.3d 1243, 1247 n.4 (9th Cir. 2011) (deeming issue waived where party "failed to develop any argument"); *City of Arcadia v. EPA*, 265 F. Supp. 2d 1142, 1154 n.16 (N.D. Cal. 2003) ("[T]he implication of this lack of response is that any opposition to this argument is waived.").

The Court finds Defendant's argument persuasive. For nine of the products, the SAC states the names of the products, the dates Plaintiff purchased them, and the prices. (SAC ¶ 7.) Plaintiff has not stated with particularity the "who, what, when, where, and how" of the fraudulent misconduct pertaining to these nine products, "as

[1] These products are Apple Pie Almond Spread, Birthday Cake Protein Powder, Hazelnut Coffee Protein Powder, Crunch Berry Almond Spread, Lemon Cookie Almond Spread, Blueberry Cheesecake Protein Sampler, Chocolate Hazelnut Almond Spread, Pecan Pie Almond Spread, Pumpkin Pie Almond Spread, and Confetti Cake Frosting. (*See* SAC ¶ 7.) Defendant does not challenge the sufficiency of the allegations of fraud pertaining to the eleventh product Plaintiff purchased, Pumpkin Spice Protein Powder, or the other products Plaintiff does not allege she purchased.

well as what is false or misleading about" it, and "why it is false." *Cafasso v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1055 (9th Cir. 2011) (internal quotation marks omitted). Plaintiff's minimal pleading of facts pertaining to these nine products is not enough. *See Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1126 (9th Cir. 2008) (affirming Rule 9(b) dismissal where plaintiff did not specify "when he was exposed to" sales materials, "which ones he found material," and "which sales material he relied upon in making his decision to buy"). For the tenth product, Apple Pie Almond Spread, Plaintiff asserts a purportedly false representation without alleging facts showing the representation "was false when it was made." *Ahern v. Apple Inc.*, 411 F. Supp. 3d 541, 552 (N.D. Cal. 2019) (citing *In re GlenFed, Inc. Sec. Litig.*, 42 F.3d 1541, 1549 (9th Cir. 1994)). (*See* SAC ¶ 32.)

The claims pertaining to these ten products are dismissed for failure to comply with Rule 9(b).

D. Preemption

Defendant contends Plaintiff's claims concerning six products[2] subjected to independent laboratory testing are preempted by FDA regulation of product labeling and nutrition testing. (Mot. 14–15.) Under the Supremacy Clause of the United States Constitution, "state laws that conflict with federal law are without effect." *Altria Grp., Inc. v. Good*, 555 U.S. 70, 76 (2008) (internal quotation marks omitted). "Federal preemption occurs when: (1) Congress enacts a statute that explicitly pre-empts state law; (2) state law actually conflicts with federal law; or (3) federal law occupies a legislative field to such an extent that it is reasonable to conclude that Congress left no room for state regulation in that field." *Chae v. SLM Corp.*, 593 F.3d 936, 941 (9th Cir. 2010) (internal quotation marks omitted). There is a presumption against finding preemption, particularly when Congress legislates "in a field which the States have traditionally occupied," including advertising, health, and safety. *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (internal quotation marks omitted); *see Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541 (2001) (characterizing advertising as a "field of traditional state regulation" (internal quotation marks omitted)); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)

[2] These products are Halloween Egg Cashew Spread, Cake Pop Cashew Spread, Caramel Apple Almond Spread, Sugar Cookie Cashew Spread, Apple Pie Almond Spread, and Pumpkin Spice Protein Powder. (SAC ¶¶ 31–32; *id.* Ex. A, ECF No. 13-1.) Of these, the only products Plaintiff alleges she purchased are the Apple Pie Almond Spread and Pumpkin Spice Protein Powder. (*Id.* ¶ 7.)

(recognizing "the historic primacy of state regulation of matters of health and safety").

As relevant here, the Federal Food, Drug, and Cosmetic Act ("FDCA") preempts state laws that impose requirements on nutrition labeling of food not identical to its requirements. 21 U.S.C. § 343-1(a)(4)–(5); *see Durnford v. MusclePharm Corp.*, 907 F.3d 595, 600–01 (9th Cir. 2018) (discussing scope of FDCA preemption). The FDCA provides that food is "'misbranded' unless its nutrition panel includes a statement of the product's 'total protein,'" and "FDA regulations provide guidance as to the acceptable means of calculating 'total protein.'" *Durnford*, 907 F.3d at 600 (quoting 21 U.S.C. § 343(q)(1)(D)). Sampling for nutritional analysis "shall consist of a composite of 12 subsamples (consumer units), taken 1 from each of 12 randomly chosen shipping cases, to be representative of a lot." 21 C.F.R. § 101.9(g)(2).

Plaintiff appends to the SAC laboratory reports which purportedly support her allegations that six of Defendant's products lack the protein content presented on the products' labels. (SAC Ex. A, ECF No. 13-1; *see* SAC ¶¶ 30–32.) Defendant contends that "[t]he SAC does not contain any facts establishing that the testing of the six products identified . . . was conducted in compliance with FDA-mandated methodology," and that the reports indicate the laboratory tested only one or two samples of each product. (Mot. 15.)

Defendant's argument is unpersuasive for two reasons. First, federal pleading standards do not require Plaintiff to affirmatively allege that her laboratory testing comports with the FDA sampling regulation. Discussing preemption based on FDCA testing protocols, a Ninth Circuit panel advised that "plaintiffs are generally not expected to provide evidence in support of their claims at the pleading stage." *Durnford*, 907 F.3d at 603 n.8. As Defendant's brief tacitly concedes, preemption would not be at issue on the pleadings if Plaintiff omitted the reports from her pleading and stood solely on allegations that the products contain less protein than Defendant represented. (*See* Mot. 14–15 (asserting the preemption challenge only as to products Plaintiff subjected to laboratory testing, but not as to other products named in the SAC).) Though Defendant would prefer more information about the testing protocols the laboratory employed, additional allegations are not required to avoid preemption. *See Amavizca v. Nutra Mfg., LLC*, No. 8:20-cv-01324-RGK-MAA, 2020 U.S. Dist. LEXIS 251947, at *15 (C.D. Cal. Oct. 20, 2020) ("Plaintiff's failure to specifically allege that he tested the Product in conformance with 21 C.F.R.

§ 101.9(g) does not expressly preempt Plaintiff's misbranding claims at the pleading stage.").

The Court respectfully declines to follow a contravening vein of authority. *E.g.*, *Rubio v. Orgain, Inc.*, No. EDCV 18-2237-MWF (SHKx), 2019 U.S. Dist. LEXIS 65214, at *7–8 (C.D. Cal. Mar. 5, 2019) (collecting cases for the proposition that "district courts in this Circuit have routinely granted motions to dismiss false labeling claims where the plaintiff failed to allege that product testing was conducted in accordance with [21 C.F.R. §] 101.9(g)"); *Forouzesh v. CVS Pharm., Inc.*, No. 2:18-CV-04090-ODW (AFMx), 2019 U.S. Dist. LEXIS 25307, at *13 (C.D. Cal. Feb. 15, 2019) (collecting cases on either side of this intracircuit split). Requiring a pleading to affirmatively allege testing compliant with 21 C.F.R. § 101.9(g)(2) would offend Rule 8(a)(2). *See Smith v. Allmax Nutrition, Inc.*, No. 1:15-cv-00744-SAB, 2015 U.S. Dist. LEXIS 171897, at *22 (E.D. Cal. Dec. 23, 2015) ("Rule 8 requires a plaintiff to state sufficient factual detail to allow the Court to reasonably infer that each named defendant is liable for the misconduct alleged. Based upon the allegations in the complaint, the Court can plausibly infer that tests conducted in compliance with the 12 sample methodology would support Plaintiff's allegations that the Product is mislabeled. [¶] Plaintiff has not pled a different methodology that would impose a different or more burdensome requirement upon a defendant than those set forth by the FDA."); *Amavizca*, 2020 U.S. Dist. LEXIS 251947, at *15 (observing that decisions requiring allegations of testing methodology "appear to be in tension with the proposition 'that plaintiffs are generally not expected to provide evidence in support of their claims at the pleadings stage'" (quoting *Durnford*, 907 F.3d at 603 n.8)). A complaint silent on testing methodology does not "admit[] all the ingredients of an impenetrable defense," as is required to grant dismissal based on preemption. *Durnford*, 907 F.3d at 603 n.8 (quoting *Xechem, Inc. v. Bristol-Myers Squibb Co.*, 372 F.3d 899, 901 (7th Cir. 2004)).

Second, accepting all reasonable inferences in favor of Plaintiff, as the Court must do on a motion to dismiss, the reports do not admit noncompliance with FDA sampling methodology. Defendant appears to infer from the reports that the laboratory tested only one or two samples of each product. (*See* Mot. 15.) Defendant does not convincingly explain this interpretation of the reports. *See Wyeth*, 555 U.S. at 569 (noting that defendant bears the burden to establish a preemption defense). The reports indicate that some products were subjected to multiple trials, and four reports provide the lot numbers for the products tested. Crucially, however, the reports do not state how many samples within those lots the laboratory tested. (*See* SAC Ex. A.) Dismissal on the pleadings based on the affirmative defense of preemption is appropriate "[o]nly when the plaintiff pleads itself out of court—that is, admits all the ingredients of an impenetrable defense." *Durnford*, 907 F.3d at 603 n.8 (quoting *Xechem*, 372 F.3d at 901). Defendant fails to substantiate its perception that the laboratory employed a sampling methodology inconsistent with FDA testing protocols.

However, the Court acknowledges that the accuracy of Defendant's nutrient content claims "must be challenged under the 12-sample test method established by 21 C.F.R. § 101.9(g)" to avoid the preemptive effect of the FDCA. *Salazar v. Honest Tea, Inc.*, 74 F. Supp. 3d 1304, 1313 (E.D. Cal. 2014). If Plaintiff were to prosecute her claims under different protocols, "the state law claims would impose liability inconsistent with the FDCA." *Id.* The Court rejects Plaintiff's assertion that the FDA testing methodology has no bearing on her action. (Opp'n 20–24.) *See Rubio*, 2019 U.S. Dist. LEXIS 65214, at *8–9 (rejecting argument that the FDA sampling method is "not applicable to actions brought by consumers," reasoning that 21 C.F.R. § 101.9(g)(2) "'is not just an internal guidance, it is an interpretation of the statutory provision requiring that manufacturers disclose a product's protein content, a concept that requires federal agency clarification if there is to be national uniformity in labeling'" (quoting *Durnford*, 907 F.3d at 602)). Thus, the Court declines to dismiss the claims on this motion because the SAC does not squarely present a preemption problem, but Defendant may renew its preemption challenge if Plaintiff's claims prove inconsistent with the FDCA.

On this motion, the Court rejects Defendant's preemption argument.

E. Leave to Amend

Generally, leave to amend dismissed claims should be freely granted unless it is clear the claim could not be saved by any amendment. Fed. R. Civ. P. 15(a); *Manzarek v. St. Paul Fire & Marine Ins. Co*., 519 F.3d 1025, 1031 (9th Cir. 2008).

Based on the facts alleged and the arguments Plaintiff presents in her brief, the Court doubts Plaintiff can allege facts giving her standing to bring claims under the laws of states other than California. Nonetheless, on this limited record, the Court declines to conclude that amendment would be futile. Given the Ninth Circuit policy of granting leave to amend with "extreme liberality," *Brown v. Stored Value Cards, Inc.*, 953 F.3d 567, 574 (9th Cir. 2020) (internal quotation marks omitted), the Court gives Plaintiff leave to amend.

IV. CONCLUSION

The motion to dismiss is granted in part and denied in part. The fifth claim is dismissed in its entirety, and the sixth claim is dismissed to the extent Plaintiff brings it under the laws of states other than California. The remaining claims are dismissed to the extent Plaintiff predicates them on any product other than Pumpkin Spice Protein Powder. The motion is denied in all other respects.

Plaintiff may file an amended complaint no later than 14 days from the date of this Order, if she can do so consistent with Federal Rule of Civil Procedure 11(b) and this Order. Failure to file a timely amended complaint will waive the right to do so. Leave to add new parties or claims must be sought by a separate, properly noticed motion.

IT IS SO ORDERED.