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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

ADAM PEREZ, on behalf of himself and
the general public,

Plaintiff,

vs.

COSTCO WHOLESALE
CORPORATION,

Defendant.

CASE NO. 13CV1687-LAB (BGS)
**ORDER GRANTING MOTION TO
DISMISS**

Plaintiff Adam Perez brought this action on behalf of himself and the general public, alleging that Defendant Costco Wholesale Corporation unfairly profits by selling foods containing trans fats to restaurants. This is not a class action or mass action. Perez is bringing his own claims only, but is seeking attorney’s fees under California’s Private Attorney General Act. His claims arise under state law only, and the complaint invokes diversity jurisdiction.

The Court, mindful of its obligation to examine its own jurisdiction and raise the issue, see *Moore v. Maricopa Cnty. Sheriff's Office*, 657 F.3d 890, 894 (9th Cir. 2011), raised the issue of Article III standing in two orders to show cause (Docket nos. 4, 13), to which Perez filed responses without amending his complaint. The Court discharged its orders to show cause, noting that defects in standing or other complaints in the defect could be tested by adversarial proceedings. Costco then moved to dismiss, both for lack of standing and on the

1 merits. The Court received briefing and held a hearing on that motion, and now issues its
2 decision.

3 **Perez's Claims**

4 Perez is suing Costco under California's Unfair Competition Law, Cal. Bus. & Prof.
5 Code §§ 172000, *et seq.* for selling certain trans fat-containing foods that, in turn, he alleges
6 are served in restaurants. California Health & Safety Code § 114377 forbids food facilities
7 to sell food containing artificial trans fat.¹ But under § 114377(b) and (c), food sold or served
8 in a manufacturer's original, sealed package is not subject to the ban. The complaint
9 identifies five particular brands and varieties of food products sold in Costco's four Business
10 Center locations in California, which it alleges contain trans fat. These products are types of
11 clam chowder, butter flavored shortening, cream puffs, margarine, and chocolate chunk
12 cookies (collectively, the "Products"). All are sold in their original manufacturer's packaging.

13 While the Court looks first to the complaint to determine what Perez's claims are, it
14 has also had the benefit of his responses to the orders to show cause, and his argument at
15 the hearing. Although he never formally amended the complaint, he did clarify the nature of
16 his claims and abandon some theories in the course of briefing and argument.

17 The complaint pursues two theories of liability. First, it argues that Costco should be
18 treated as falling in the same category as restaurants, because its business locations have
19 snack bars. But the regulations applicable to grocery stores or supermarkets, the definition
20 of "food facility" set forth in Cal. Health & Safety Code § 113789, would seem to include both:
21 "'Food facility' means an operation that stores, prepares, packages, serves, vends, or
22 otherwise provides food for human consumption at the retail level" § 113789(a). The
23 meaningful distinction appears to be whether the products are sold in manufacturer's
24 packaging, not what kind of business the facility is engaged in. See § 114377(b) and (c). Of

25
26 ¹ Although some trans fats occur naturally in food, the statute is concerned only with
27 artificial trans fats. Throughout this order, "trans fats" will be used to refer to the trans fats the
28 statute is aimed at, *i.e.*, artificial trans fats. The complaint does not always observe this
distinction, but at this stage of litigation, the Court draws all reasonable inferences in Perez's
favor. The Court therefore infers that the complaint's references to "trans fats" means
artificial trans fats.

1 course, given the large size of the Products, it is likely that buyers would use them rather
2 than reselling them in their original packages, but that does not shed light on the statute
3 itself.

4 Perez's argument also fails because he is not alleging any kind of harm as a result of
5 eating at the snack bars, and also because the snack bars do not serve any of the Products.
6 Furthermore, the statute exempts all sales of products in original manufacturer's packaging
7 without regard to where they are sold.

8 Perez's second theory of liability is that Costco is liable because it is causing or
9 assisting in violation of § 114377 by restaurants, possibly including restaurants where he
10 might be eating. This, he argues, results in the likelihood that he will eat trans fats.
11 Alternatively, he argues that the statute was intended to enable people to eat out without
12 worrying that they might be served food containing trans fats.

13 **Discussion**

14 Before proceeding to the merits, the Court is obligated to confirm its own jurisdiction.
15 See *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 95 (1998). The most obvious
16 jurisdictional issue is standing, although Costco also argues the amount in controversy is not
17 met.

18 For purposes of ruling on a motion to dismiss for lack of standing, the Court accepts
19 all the complaint's material allegations as true. See *Metropolitan Washington Airports*
20 *Authority v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 264 (1991) (citing
21 *Warth v. Seldin*, 422 U.S. 490, 501 (1975)). Although Costco asked the Court to take notice
22 of its product labels, these labels are not properly the subject of judicial notice. Costco made
23 the request in its reply to Perez's opposition to the motion to dismiss, and Perez had no
24 opportunity to oppose it. At argument, Perez's counsel was uncertain whether the labels
25 were the ones his client had seen, and it appeared they may have come from different
26 products than the ones identified in the complaint.

27 To show standing, Perez must show he suffered an injury in fact, *i.e.*, an invasion of
28 a legally-protected interest that is concrete and particularized, actual or imminent, and not

1 conjectural or hypothetical. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). The
2 injury must be fairly traceable to the defendant’s conduct, and likely, as opposed to merely
3 speculative, that the injury would be redressed by a favorable decision. *Id.*

4 **Risk as Injury**

5 The complaint alleges that artificial trans fats are harmful, and there is no safe level
6 of them. Eating any trans fats, it is alleged, increases the risk of heart disease, diabetes,
7 certain types of cancer, Alzheimer’s disease, cognitive decline, and other health conditions.
8 Although the complaint speaks in broad terms, it refers to an increased *risk* of disease, not
9 actual or imminent disease. (See Compl., ¶¶ 10, 23, 31, 34, 35, 38, 41, 47, 48 (alleging risk
10 of disease)). In other words, while some people who eat trans fats will develop these
11 diseases as a result, eating trans fats would not inevitably cause Perez to develop one or
12 more of these diseases. Perez cites *Stauber v. Shalala*, 895 F. Supp. 1178 (W.D.Wis., 1995)
13 for the principle that an increased risk of harm from dangerous substances can give rise to
14 standing. *Stauber’s* holding is more nuanced than this, however.

15 *Stauber* dealt with claims that the Food and Drug Administration had not properly
16 approved a drug intended to enhance milk production in dairy cattle. The court found the
17 drug’s approval created two harms, sufficient to show standing under two different statutes.
18 895 F. Supp. at 1188. Alleged violation of the Food, Drug, and Cosmetic Act’s required drug
19 approval process made it impossible for the plaintiffs to know if the milk they were drinking
20 was potentially dangerous, a right the Act was intended to safeguard. 895 F. Supp. at
21 1187–88. Second, the court found a "reasonable risk" that dairy farmers would treat the
22 drug’s side effects with other dangerous drugs, increasing the risk of harmful drug residues
23 in milk the plaintiffs drank. *Id.* at 1188.

24 The first of these two harms is superficially similar to Perez’s contention that he is
25 suffering an injury because, when he eats out, he does not know whether he is eating trans
26 fats. This will be discussed in connection with that theory of standing. The second harm —
27 the one Perez cites *Stauber* for — is significantly different from the harm Perez alleges. In
28 *Stauber*, the plaintiffs were drinking milk, and approval of the drug made it reasonably likely

1 the milk they were drinking would contain harmful residues. This is not a novel holding; other
2 courts have reached the conclusion that a known increase of risk of harm can amount to a
3 concrete injury. *See, e.g., Metropolitan Washington Airports*, 501 U.S. at 264–65 (relying in
4 part on allegation that increased air traffic resulted in an increase in risks of accidents to
5 show standing); *Krottner v. Starbucks Corp.*, 628 F.3d 1139, 1142–43 (9th Cir. 2010)
6 (holding that the increased risk of identity theft was sufficient to confer standing); *Ocean*
7 *Advocates v. U.S. Army Corps of Engineers*, 402 F.3d 846, 859–60 (9th Cir. 2005) (finding
8 sufficient injury where pier’s expansion increased risk of oil spills). This is particularly true
9 with regard to health risks. *See Sierra Club v. E.P.A.*, 754 F.3d 995, 1001 (D.C. Cir. 2014)
10 (quoting *Natural Res. Def. Council v. E.P.A.*, 464 F.3d 1, 6 (D.C. Cir. 2006)) (noting that
11 "health injuries often are purely probabilistic").

12 At the same time, for the standing requirement to mean anything, courts have
13 recognized that remote or attenuated risks do not amount to a sufficient injury. In *Lujan*, for
14 example, the increased risk that the challenged action might have injured the plaintiffs in the
15 future was not enough. 504 U.S. at 564. The Ninth Circuit has made clear that the threat
16 must be credible, *Krottner*, 628 F.3d at 1142–43, and substantial. *Central Delta Water*
17 *Agency v. United States*, 306 F.3d 938, 949 (9th Cir. 2002). *See also Sierra Club*, 754 F.3d
18 at 1001 (explaining that increased risk will only give rise to standing if it is nontrivial,
19 substantial, and sufficient to take the suit out of the category of the hypothetical). Risks that
20 rely on an attenuated chain of possibilities are not enough. *Id.* (citing *Clapper v. Amnesty Int’l*
21 *USA*, 133 S.Ct. 1138, 1148 (2013)). *See also Nelson v. King County*, 895 F.2d 1248,
22 1251–52 (9th Cir. 1990) (holding that a determination of standing could not be based on
23 "naked statistical assertion," but must be based on a "credible threat" of future harm).

24 **Degree of Risk**

25 The degree of risk that Perez, as a result of Costco’s actions, will consume trans fats
26 while eating out depends on two contingencies. First, restaurants in his area or where he is
27 likely to go must buy one or more of the Products from Costco and use it in food. Second,
28 he must order and eat foods containing one or more of the Products.

1 Perez argues that he might travel anywhere in the state and eat out, and therefore a
2 statewide injunction is necessary. But without any basis for showing this to be reasonably
3 likely, he is in the same category as the *Lujan* plaintiffs who intended some day to visit parts
4 of the world where they might be injured by alleged violations. See *Lujan*, 504 U.S. at 564.

5 The restaurants local to Perez, however, are a different story, because he alleges that
6 he regularly eats out. But here, he asks the Court to accept an attenuated chain of
7 contingencies as creating a substantial or reasonable probability. The Court brought this to
8 Perez's attention when it pointed out it would not be enough merely to show that Costco sells
9 to restaurants and Perez eats at restaurants. (See Docket no. at 2:23–24.) Perez responded
10 by arguing that because Perez lives and eats out near a Costco business center, the
11 "geographic nexus" creates a reasonable probability. (Response, Docket no. 14, at 3:12–20.)
12 While this is possible, it is difficult to say it is likely, given that the complaint says nothing
13 about other options available to these restaurants. The complaint did allege Perez eats at
14 restaurants supplied by Costco, but did not allege that any of those restaurants purchased
15 or used the Products. Bearing in mind that Costco's business centers sell a wide variety of
16 business-oriented merchandise (see Complaint at 1 n.1), the fact that a restaurant purchases
17 some things from Costco does not create a substantial likelihood it buys any of the Products
18 at issue here from Costco. And at the hearing, Perez's counsel admitted he could not allege
19 how many restaurants were supplied by Costco.

20 It should also be remembered that the market for Costco's food items is not entirely
21 made up of restaurants, and also the statute applies only to "food facilities" and not other
22 businesses or organizations. While the complaint suggests that most of its business center's
23 customers are businesses, and Perez's response to the first order to show cause suggests
24 the business center is "strongly targeted toward restaurant owners," (Docket no. 10 at 1 n.1),
25 it does not even indirectly attempt to allege what percentage of Costco business center's
26 customers are restaurants or other food facilities, nor how many of those customers have
27 bought the Products. Looking at the definition of "food facility" given in § 113789, there are
28 many types of businesses or entities that are considered food facilities, but many others that

1 serve food yet are not. Looking at §§ 113789 and 114377 together, it is easy to conceive of
2 businesses or organizations that might purchase the Products at Costco that give rise to no
3 legally cognizable injury to Perez. These include, for instance, those that legally resell the
4 Products, those that are legally permitted to serve the Products (e.g., nonprofits that
5 occasionally serve or sell food, see § 113789(c)(3)), and those where Perez is unlikely to eat
6 (e.g., school cafeterias, commissaries, private dining facilities).

7 The chain of reasoning can be summarized as follows. A lot of businesses buy things
8 from Costco's business center. Some of those businesses are restaurants. There are
9 restaurants in Perez's area. Some of those restaurants are probably Costco customers. Of
10 those, it is possible some are buying and serving the Products at issue here. Admittedly,
11 there is some likelihood of this happening, but Perez has not shown it is a substantial or
12 reasonable probability.

13 Turning to the Products themselves, the Court's second order to show cause pointed
14 out that the risk is slim that Perez might unwittingly eat cream puffs, chocolate chunk
15 cookies, or clam chowder of any kind. (See Docket no. 13 at 3 n.1.) The complaint never
16 alleged Perez ate these foods, though if he did, it would be expected he would allege he did.
17 At argument, the Court pointed out this same problem. Because Perez has twice been
18 prompted to address this and has not done so, the Court infers he cannot truthfully allege he
19 ate any of these foods, or that there is a danger he would unknowingly eat them at any
20 restaurant. Another problem Perez never addressed is why injunctive relief is available to
21 help him avoid these three foods, and why the solution of simply not ordering them in
22 restaurants would not suffice.

23 This leaves just the margarine and shortening. Because these are commonly used as
24 ingredients in other foods, it is possible that if a restaurant were using them, it might not be
25 apparent. Assuming some of the restaurants where Perez eats bought the margarine or
26 shortening from Costco, he might be in danger of unknowingly eating it.

27 Perez theorizes that many restaurant operators who shop at Costco's business
28 centers do not know about the prohibition on use of trans fats, and might buy and use the

1 Products without knowing they cannot legally do so. Perez also argues they might not be
2 able to tell him whether the food they serve contains trans fats, even if he asks. While it is
3 possible this might happen, the regulatory framework makes it unlikely. Since January 1,
4 2010, food facilities in California have been forbidden to store or use margarine or shortening
5 containing trans fats. § 114377(b)(1). And since January 1, 2011, no food of any kind
6 containing trans fats can be stored or used in food facilities. § 114377(b)(2). In other words,
7 accepting the allegation that the margarine and shortening contain trans fats, no restaurant
8 in California can legally use them, or even store them on premises (unless they are kept,
9 unopened, in the original manufacturer's packaging, as provided by § 114377(c)).
10 Furthermore, all food facilities must keep on their premises the labels for any fat, oil, or
11 shortening (or foods containing these) that they store, distribute, or use. § 114377(a). At
12 argument, it was established that restaurant inspectors can inquire about and examine the
13 labels, and those who operate restaurants know they will be inspected periodically. See Cal.
14 Health & Safety Code § 114390 (providing for inspection of food facilities). Furthermore,
15 Perez himself could ask to see the labels.

16 Assuming a restaurant where Perez eats, or is likely to eat, shops at Costco, a second
17 chain of contingencies must fall into place before he suffers an injury. First, the restaurant
18 must have need of one or more of the Products. Then, that restaurant's owner or operator
19 would have to not know about or be willing to ignore the statutory ban on trans fats, or fail
20 to look at the Product's label (which by law the restaurant must maintain). After that, the
21 restaurant's violation would have to escape detection by an inspector. While it's possible the
22 stars might align and these things might all take place, it does not raise the threat above a
23 conjectural or hypothetical level. See *Lujan*, 504 U.S. at 560; *Sierra Club*, 774 F.3d at 391.

24 This is not a case like those Perez cites, where plaintiffs were known to be (or about
25 to be) exposed to something that increased the risk of harm. See *Central Delta*, 306 F.3d at
26 948 (finding standing where planned release of water from reservoirs increased risk of
27 damage to crops). Nor is it a case where the plaintiffs risked exposure to something that, if
28 it took place, would certainly cause harm. See *Ocean Advocates*, 402 F.3d at 859–60

1 (finding standing where pier expansion increased risk of oil spills, which, if they occurred,
2 would harm plaintiffs). Instead, Perez's claim is that Costco's actions increase the risk that
3 he might be exposed to something that in turn increases the risk of harm — in other words,
4 an increased risk of increased risk of harm. This is too conjectural, too hypothetical, and not
5 imminent enough to amount to an injury in fact.

6 Perez's opposition implicitly acknowledges that he cannot allege that he ate at any
7 restaurant that bought one or more Products from Costco. (Opp'n to Mot. to Dismiss,
8 1:13–16.) He attempts to turn the tables by arguing that Costco has this information in its
9 records and knows it sold Products to restaurants, and which restaurants those are. But this
10 turns the pleading standard on its head. It is the plaintiff who is obligated to plead his case,
11 not the defendant. A knowing allegation amounting to "you know what you did" is not enough.
12 *See N. Am. Catholic Educ. Programming Found., Inc. v. Womble, Carlyle, Sandridge & Rice,*
13 *PPLC*, 887 F. Supp. 2d 78, 88 n.7 (D.D.C. 2012) ("Pleadings should not boil down to: 'You
14 did something wrong. You know what you did wrong. Now look through your files and refresh
15 your memory.'"); *In re Nelson*, 2014 WL 1347031, slip op. at *5 (Bkrcty. D. Utah, Apr. 4,
16 2014) ("In essence, . . . the adversary complaint amount[s] to little more than this accusation
17 that the Plaintiffs level against Nelson: 'You know what you did.' This does not suffice.")

18 Perez's briefing and argument suggests he believes he finds himself in a Catch-22,
19 unable to plead his case without discovery, and unable to get discovery until he has pled a
20 case. No doubt many a plaintiff has felt the same way. But here, it is not impossible. Perez
21 could, for example, have learned of a restaurant where he ate food containing trans fats and
22 traced the food product back to the supplier. Had he done so, he might be able to plead a
23 claim against that supplier. What he may not do is speculate that a supplier might be selling
24 shortening or margarine containing trans fats to restaurants where he ate, make a claim, and
25 then obtain discovery to see if it is so. *See, e.g., In re Medtronic, Inc. Sprint Fidelis Leads*
26 *Products Liability Litigation*, 2009 WL 294353, at *2 (D.Minn., Feb. 5, 2009) (citing authority
27 for the principle that a plaintiff must adequately plead a claim before obtaining discovery).

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1 **Fear or Uncertainty as Injury**

2 *Staubert* recognized that an injury in fact, sufficient to establish standing, could be the
3 inability to consume dairy products secure in the knowledge that they were free from
4 dangerous substances. The controversy was whether the Food and Drug Administration had
5 properly required the drug manufacturer to demonstrate the safety of the drug for use on
6 dairy cattle, as required under the Food, Drug, and Cosmetic Act. The opinion rejected the
7 defense argument against standing, that milk from cows treated with the drug was not
8 dangerous. But this case addressed deprivation of a statutorily-created procedural right,
9 namely a right to have drugs properly tested to confirm they will not have dangerous effects.
10 The fear or uncertainty that results from untested or improperly-tested drugs is an evil the Act
11 seeks to eliminate. Failure to properly test drugs that a plaintiff is likely to be affected by, in
12 other words, amounts to "an invasion of a legally protected interest which is . . . concrete and
13 particularized, and . . . actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S.
14 at 560 (citations, numbering, and quotation marks omitted).

15 Perez also cites a concurrence in *Covington v. Jefferson County*, 358 F.3d 626,
16 652–54 (9th Cir. 2004), for the principle that fear of various diseases as a result of ozone
17 depletion was an injury in fact. But the concurrence actually refers to the fear of "objective
18 and certain" risks that "will follow" from the complained-of actions. *Id.* at 653–54. The
19 concurrence also noted that Congress recognized and protected the right to be free from
20 such risks.

21 Here, Perez seeks to vindicate a right that California has decided not to give legal
22 protection to, namely the right to be free from risks that might occur from food containing
23 trans fats being sold in its original packaging. The parties did not address the legislative
24 history, and it may not be possible to know why the state made this decision. But it is clear
25 the state decided to provide protection under a different statutory scheme. Rather than trying
26 to regulate those sales, the state put the onus on the owners and operators of restaurants
27 and other food facilities. Not only are they forbidden to use or serve foods containing trans
28 fats, they must maintain product labels for oils, shortenings, and the like that they use. It is

1 this requirement that creates a right to be free from uncertainty or fear about trans fats in
2 restaurant food. Costco, of course, is exempt from this requirement insofar as it sells
3 products sealed in their original packaging.

4 **Amount in Controversy**

5 Though questions have arisen concerning the amount in controversy, Costco did not
6 brief it in depth. (See Mot. to Dismiss at 17 n.7.) Costco did, however, argue that some of
7 Perez's Private Attorney General Act and Unfair Competition Law claims are not allowed by
8 law, and that he cannot therefore proceed on behalf of the general public, nor obtain
9 attorney's fees under the Private Attorney General Act. See § 17203 (providing that a person
10 may pursue representative claims on behalf of others only if he meets the standing
11 requirements in § 17204); § 17204 (limiting standing to an injured person who has lost either
12 money or property as a result of the alleged unfair competition). See *Jenkins v. JP Morgan*
13 *Chase Bank, N.A.*, 216 Cal. App. 4th 497, 521 (Cal. App. 4 Dist. 2013) (explaining the
14 standing requirement of § 17204). Because Perez does not allege he lost either money or
15 property, Costco argues, he will not be eligible for attorney's fees and the amount in
16 controversy is in doubt.

17 Perez conceded earlier that he did not purchase any of the Products from Costco, and
18 was not seeking to recover for money he spent on them. He responds to Costco's argument
19 by contending that he lost money as the result of buying food containing trans fats in
20 restaurants. But in fact, he does not know whether he lost this money, or if he did, when he
21 lost it and how much he lost. His briefing has focused on probabilities, not known facts, and
22 he cannot amend in good faith to allege this kind of loss. He appears to regard his argument
23 as sufficient, however, because he offers no explanation of how the amount in controversy
24 can be met if he is ineligible for attorney's fees.

25 Perez has therefore not met his burden of showing that the Court can exercise
26 diversity jurisdiction.

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1 **Whether Perez Can Amend**

2 It is clear the complaint must be dismissed for lack of jurisdiction. Ordinarily, a plaintiff
3 will be given leave to amend. But Perez's arguments in briefing and at the hearing have
4 made clear he cannot amend to eliminate some of the problems with standing. That being
5 said, some discussion of the merits may be helpful, to show why amendment would be futile.

6 California's Unfair Competition Law provides for private rights of action to remedy
7 unlawful, unfair, or fraudulent business activities. See *Cel-Tech Communications, Inc. v. Los*
8 *Angles Cellular Telephone Co.*, 20 Cal.4th 163, 180 (1999). Perez has argued that Costco
9 is liable under the "unlawful" prong, for aiding and abetting restaurants' violation of § 114377,
10 and under the "unfair" prong, for creating serious health risks.

11 Aiding and abetting a violation can give rise to a claim, see *Velazquez v. GMAC*
12 *Mortg. Corp.*, 605 F. Supp. 2d 1049, 1068 (C.D.Cal., 2008), but this requires a showing that
13 the alleged aider and abettor knew the principal's conduct amounted to a breach of a duty,
14 and gave "substantial assistance or encouragement to the other so to act." *Id.* (citing *In re*
15 *First Alliance Mortgage Co.*, 471 F.3d 977, 993 (9th Cir. 2006)). It also implies participation
16 in the unlawful practices, see *People v. Toomey*, 157 Cal. App. 3d 1, 15 (Cal. App. 1 Dist.
17 1984), rather than mere failure to opt out. See *Emery v. Visa Int'l Serv. Ass'n*, 95 Cal. App.
18 4th 952, 962–64 (Cal. App. 3 Dist. 2002) (credit card company was not liable criminally or
19 under Unfair Competition Law for allowing merchants engaged in illegal sales to use its
20 payment system or for failing to stop their misuse of its logo). Even if there were any factual
21 allegations to support Costco's knowing what its customers would do with the products it
22 sold, a store's arm's-length sale of a product in the ordinary course of business generally
23 does not amount to substantial assistance or encouragement. See *id.* (citing cases).

24 Suits under the "unfair" prong are not allowed, if the legislature has provided a safe
25 harbor. *Cel-Tech*, 20 Cal.4th at 182. Failure to regulate is not, however, a safe harbor. The
26 parties dispute whether the statutory scheme provides a safe harbor, or whether it merely
27 fails to regulate. California courts have clarified that, to qualify for *Cel-Tech's* safe harbor
28 rule, the defendant must show that a statute explicitly prohibits liability for the defendant's

1 acts or omissions, or if state law precludes an action based on the conduct. *Klein v. Chevron*
2 *U.S.A., Inc.*, 202 Cal. App. 4th 1342, 1379 (Cal. App. 2 Dist. 2012) (citing *Krumme v. Mercury*
3 *Ins. Co.*, 123 Cal. App. 4th 924, 940 n. 5 (Cal. App.1 Dist. 2004)). Here, there is an explicit
4 limitation on liability for the sale of products containing trans fats: if they are sold or served
5 in a manufacturer's original, sealed package (as Costco does), the prohibition does not apply
6 to them and selling them is not a violation of the law. § 114377(c). Perez argues that this
7 should be treated as a failure to regulate, but the inclusion of this exemption in the same
8 section that defines the violation makes it clear no liability attaches if this condition is met.
9 It should also be noted that certain establishments are exempted from laws applicable to
10 "food facilities," see § 113789, and can legally buy and use foods containing trans fats as
11 well. Treating the legal sale of foods containing trans fats as generally actionable would
12 effectively gut both provisions.

13 Perez disclaims any reliance on an aiding and abetting theory under the "unfair"
14 prong, and even if he had not, it would fall to the same analysis as under the "unlawful"
15 prong. But without vicarious liability for the restaurants' actions, Perez can have no claim
16 under this prong. Selling foods containing trans fats to restaurants might be unfair to the
17 restaurants, but it is not unfair to him. If a restaurant bought the Products and later sued for
18 a refund, or if another supplier's sales were being hurt by Costco's allegedly unfair sales,
19 they might have a strong case. But without some theory of vicarious liability in play, a
20 stranger to the transaction has no claim.

21 **Conclusion and Order**

22 The Court finds Perez lacks Article III standing, and his concessions show he cannot
23 successfully amend his complaint to allege a cognizable injury in fact. He also failed to show,
24 when challenged, that the amount in controversy was met. And even if he could plead facts
25 to establish jurisdiction, amendment would be futile because his claims would fail on the
26 merits.

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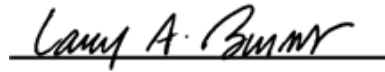
1 The motion to dismiss is therefore **GRANTED** and this action is **DISMISSED** without
2 prejudice for lack of jurisdiction, but without leave to amend.

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4 **IT IS SO ORDERED.**

5 DATED: March 9, 2015

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Handwritten signature of Larry A. Burns in black ink, written over a horizontal line.

7

HONORABLE LARRY ALAN BURNS
United States District Judge

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