

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

DEC 14 2022

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

ANTHONY MORENO, individually, and on
behalf of others similarly situated,

No. 21-56370

Plaintiff-Appellant,

D.C. No.

3:20-cv-01446-JM-BGS

v.

MEMORANDUM*

VI-JON, LLC.,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of California
Jeffrey T. Miller, District Judge, Presiding

Argued and Submitted October 18, 2022
Pasadena, California

Before: HIGGINSON,** CHRISTEN, and BUMATAY, Circuit Judges.

Anthony Moreno appeals the dismissal of a class action suit against Vi-Jon, LLC, a manufacturer of common hand sanitizers. Moreno sought certification of a

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Stephen A. Higginson, United States Circuit Judge for the U.S. Court of Appeals for the Fifth Circuit, sitting by designation.

class of California consumers, alleging false or deceptive advertising and related claims. Vi-Jon moved to dismiss for lack of standing and failure to state a claim under Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. The district court granted both motions.

This court has jurisdiction under 28 U.S.C. § 1291, and we review de novo. *Moore v. Trader Joes Co.*, 4 F.4th 874, 880 (9th Cir. 2021); *Rhoades v. Avon Prods., Inc.*, 504 F.3d 1151, 1156 (9th Cir. 2007). During review, “we accept all material allegations in the complaint as true and construe them in the light most favorable to [Moreno].” *N. Star Intern. v. Ariz. Corp. Comm’n*, 720 F.2d 578, 580 (9th Cir. 1983). Dismissal is proper “if the complaint fails to plead enough facts to state a claim to relief that is plausible on its face.” *Koessler v. CVS Health Corp.*, 977 F.3d 803, 807 (9th Cir. 2020) (internal quotation marks and citation omitted).

We reverse the district court’s order granting dismissal pursuant to Rule 12(b)(1), vacate the order granting 12(b)(6) dismissal, and grant Moreno leave to file a third amended complaint.

1. The district court granted Vi-Jon’s motion to dismiss under Rule 12(b)(1) for lack of Article III standing and subject-matter jurisdiction, holding Moreno “only pled a speculative, conjectural and hypothetical injury.” Moreno adequately pleaded economic injury. He alleged that he wouldn’t have purchased or paid as much for Vi-Jon’s products if he had known the truth about their

effectiveness. This is sufficient for an Article III injury. *See Hinojos v. Kohl's Corp.*, 718 F.3d 1098, 1104 n.3 (9th Cir. 2013) (holding that plaintiffs who contend that they “paid more for [a product] than they otherwise would have paid, or bought it when they otherwise would not have done so” have suffered an Article III injury in fact) (simplified); *Maya v. Centex Corp.*, 658 F.3d 1060, 1069 (9th Cir. 2011) (holding that plaintiffs have Article III standing when they “spent money that, absent defendants’ actions, they would not have spent”). We thus reverse the district court’s Rule 12(b)(1) ruling.

2. The district court also granted Vi-Jon’s motion to dismiss for failure to state a claim under Rule 12(b)(6). At oral argument, responses to the panel’s questions indicated that Moreno’s complaint could be amended such that it would potentially survive 12(b)(6) dismissal. For example, the parties disagree about whether the complaint adequately alleges falsity as to the hand sanitizers’ ability to kill only germs commonly found on hands, as opposed to all germs. The district court read the complaint as referring to all germs, but Moreno contends the complaint may be amended to refer to germs commonly found on hands. Both parties agreed at oral argument that the 12(b)(6) analysis would be different under such allegations.

When a complaint can be cured, leave to amend should be freely given. *See AE ex rel. Hernandez v. County of Tulare*, 666 F.3d 631, 636 (9th Cir. 2012). We

thus vacate the district court's 12(b)(6) ruling, remand, and direct the district court to grant Moreno leave to file a third amended complaint. Vi-Jon may then renew its motion to dismiss under 12(b)(6).

REVERSED in part and **VACATED and REMANDED** in part.