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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

STEPHANIE MATTERO,

Plaintiff,

v.

COSTCO WHOLESALE CORPORATION,

Defendant.

Case No. [18-cv-02871-WHO](#)

**ORDER DENYING MOTION TO
DISMISS OR STAY**

Re: Dkt. No. 19

Plaintiff, on behalf of herself and a proposed class of nationwide consumers and a subclass of California consumers, challenges defendant Costco Wholesale Corporation's (Costco) advertising and marketing on its Kirkland Signature Premium Liquid Dish Soap (Dish Soap) and Kirkland Signature Premium Laundry Detergent (Laundry Detergent, collectively Products) as "environmentally responsible." Plaintiff alleges that Costco's use of various "environmentally friendly" phrases and images on its labeling and marketing for the Products is false, misleading, and in violation of state and federal laws because the Products contain "unnatural, harmful, and toxic chemical ingredients" and that reasonable consumers do not expect such ingredients to be in products labeled "environmentally responsible."

Costco moves to dismiss. I am denying that motion because plaintiff has adequately alleged her deceptive and fraud-based claims and Costco's challenges to the same cannot be resolved on a motion to dismiss. Costco also moves to stay this case until a pending motion to dismiss is resolved by the Eastern District of New York in a case based on similar misrepresentations. I deny that motion as well because the claims here are largely based on California law (and to a lesser extent Washington law) while the claims in the other case are based largely on New York law. Moreover, staying this case is not equitable because in the Eastern District of New York Costco sought, and the plaintiffs eventually agreed, to dismiss California

United States District Court
Northern District of California

1 law claims from that litigation. Those claims should proceed here.

2 **BACKGROUND**

3 Plaintiff challenges Costco’s advertising and marketing its Kirkland Signature Premium
4 Dish Soap and Laundry Detergent as “environmentally responsible,” along with specific
5 representations that the Products are made from “naturally derived ingredients,” are “recognized
6 for safer chemistry,” are “safer for the planet,” and are made with a “biodegradable formula.”
7 Compl. ¶¶ 4-6 (Statements). The Products’ labels are also filled with imagery – icons resembling
8 recycling symbols, water drops, leaves, and a central image of a leaf floating in pristine water—
9 that are according to plaintiff “highly suggestive of [a] ‘green,’ environmentally responsible
10 product.” *Id.* ¶¶ 7, 35-42. These Statements, plus the imagery, create “an impression that the
11 Products are natural, safer, and environmentally sound alternatives to traditional dish soaps and
12 detergents.” *Id.* ¶¶ 8, 32-33.

13 Plaintiff contends that representation or impression is false because the Products “contain
14 unnatural, harmful, and toxic chemical ingredients, including sodium hydroxide, sodium lauryl
15 sulfate (‘SLS’), lauramine oxide, and methylisothiazolinone (‘MI’)” as well as
16 methylchlorisothiazolinone (“MCI”) and benzisothiazolinone (“BIT”). *Id.* ¶ 10 & n.2; *see also*
17 *id.* ¶¶ 44-73.¹ According to plaintiff, “[r]easonable consumers do not expect such ingredients to be
18 in products labeled ‘environmentally responsible.’” *Id.* ¶¶ 10, 68-73.

19 Plaintiff alleges that because of its deceptive conduct, Costco is able to sell more or charge
20 more for the Products than it would if the Products were accurately labeled. *Id.* ¶¶ 15, 83.

21 Plaintiff purchased the Dish Soap in December 2015, and she reviewed and relied on the
22 “environmentally responsible” labelling and images. *Id.* ¶¶ 18-19. If defendant remedied its
23 misleading conduct, plaintiff avers that she would consider buying the Products again. *Id.* ¶ 21.

24 Plaintiff brings this case on behalf, first, of a nationwide class (Class), and separately, on
25 behalf of a California sub-class (Sub-Class). *Id.* ¶ 85. She alleges that defendant’s
26 misrepresentations and false advertising violate the Federal Trade Commission’s (FTC) “Green
27

28 ¹ In her Complaint, plaintiff includes specific allegations regarding Sodium Hydroxide, Sodium
Lauryl Sulfate, Lauramine Oxide, and Methylisothiazolinone. *Id.* ¶¶ 50-67.

1 Guides,” and as such are *per se* unlawful under California’s Environmental Marketing Claims Act
2 (EMCA). *Id.* ¶¶ 75-82. She asserts causes of action for: (i) violation of the California Consumer
3 Legal Remedies Act, Cal. Civ. Code § 1750, on behalf of the Sub-Class; (ii) violation of
4 California’s False Advertising Law, Cal. Bus. & Prof. Code § 17500, on behalf of the Sub-Class;
5 (iii) violation of the California EMCA, Cal. Bus. & Prof. Code §§ 17580-17581, on behalf of the
6 Sub-Class; (iv) violation of California’s Unfair Competition Law, Cal. Bus. & Prof. Code §
7 17200, on behalf of the Sub-Class; (v) breach of express warranty, on behalf of the Class; and (vi)
8 violation of the Washington Consumer Protections Act, RCW § 19.86.010, on behalf of the Class.

9 Costco moves to dismiss, arguing that plaintiff does not have standing to pursue claims
10 against the Laundry Detergent because she did not buy it, fails to identify an actionable
11 misrepresentation to support her breach of express warranty claim, fails to plead her fraud-based
12 claims with particularity, and fails to allege that “environmentally responsible” is deceptive under
13 California or Washington law.

14 In the alternative, Costco moves to stay this case pending the determination of a pending
15 motion to dismiss in a “first-filed” case, *Gonzalez v. Costco Wholesale Corp.*, No. 16-cv-2590
16 (NG) (E.D.N.Y.), which is based on the same misrepresentations.

17 **LEGAL STANDARD**

18 Under Federal Rule of Civil Procedure 12(b)(6), a district court must dismiss a complaint
19 if it fails to state a claim upon which relief can be granted. To survive a Rule 12(b)(6) motion to
20 dismiss, the plaintiff must allege “enough facts to state a claim to relief that is plausible on its
21 face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007). A claim is facially plausible when
22 the plaintiff pleads facts that “allow the court to draw the reasonable inference that the defendant
23 is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation
24 omitted). There must be “more than a sheer possibility that a defendant has acted unlawfully.” *Id.*
25 While courts do not require “heightened fact pleading of specifics,” a plaintiff must allege facts
26 sufficient to “raise a right to relief above the speculative level.” *Twombly*, 550 U.S. at 555, 570.

27 In deciding whether the plaintiff has stated a claim upon which relief can be granted, the
28 Court accepts the plaintiff’s allegations as true and draws all reasonable inferences in favor of the

1 plaintiff. *Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987). However, the court is
2 not required to accept as true “allegations that are merely conclusory, unwarranted deductions of
3 fact, or unreasonable inferences.” *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir.
4 2008).

5 DISCUSSION

6 I. MOTION TO DISMISS

7 A. Standing

8 As an initial matter, Costco argues that plaintiff cannot sue for claims based on the
9 Laundry Detergent because she does not allege she bought it, the Laundry Detergent has an
10 “entirely different” formula from the Dish Soap she purchased, and the Laundry Detergent has an
11 entirely different use than the Dish Soap.

12 As my prior opinions in food labeling context have explained, plaintiffs have standing to
13 sue over “unpurchased products” when the label statements challenged are very similar to the
14 statements on the labels of the unpurchased products and there are no material differences between
15 the products that would significantly alter the reasonable consumer analysis. *See, e.g., Ang v.*
16 *Bimbo Bakeries USA, Inc.*, No. 13-CV-01196-WHO, 2014 WL 1024182, at *8 (N.D. Cal. Mar. 13,
17 2014) (“the best approach is one which focuses on whether the type of claim and consumer injury
18 is substantially similar as between the purchased and unpurchased products. That determination
19 necessarily focuses on whether the resolution of the asserted claims will be identical between the
20 purchased and unpurchased products.”).

21 Facts that plaintiff did not purchase the Laundry Detergent and the Laundry Detergent has
22 different ingredients and that the Laundry Detergent only shares one harmful ingredient with the
23 Dish Soap are not in and of themselves hurdles to plaintiff’s standing. *See, e.g., Gallagher v.*
24 *Bayer AG*, No. 14-CV-04601-WHO, 2015 WL 1056480, at *10 (N.D. Cal. Mar. 10, 2015)
25 (“Defendants have not shown that because some of the Supplements have additional
26 vitamins/minerals or have different amounts of vitamins/minerals, the consumers’ claims are
27 different or that consumers will suffer different injuries as a result of the materially identical
28 Statements.”); *Krommenhock v. Post Foods, LLC*, 255 F. Supp. 3d 938, 969 (N.D. Cal. 2017)

1 (non-legally-significant differences in product ingredients does not defeat standing to sue for
2 unpurchased products). Here, Costco has not alleged, much less shown, that the Statements and
3 imagery that plaintiff complains of differ in a legally significantly way between the purchased-
4 Dish Soap and the unpurchased Laundry Detergent. Nor has Costco explained how the facts that
5 the Laundry Detergent and Dish Soap have different ingredients, different uses, and share only one
6 of the “toxic” ingredients plaintiff complains of are legally significant to whether reasonable
7 consumers will be misled or what reasonable consumers expect from those Products given the
8 Products’ labeling and imagery.

9 Arguments about the differences between the Products, including their uses and their
10 ingredients, may be significant on class certification or summary judgment. But Costco’s bare
11 assertion that there are differences is not enough to show a lack of standing. Costco’s motion is
12 DENIED on this ground.

13 **B. Actionable Misrepresentations for Breach**

14 Costco argues that plaintiff has not stated and cannot state a breach of warranty claim
15 because: (i) “environmentally responsible” is too vague a representation to be an express warranty;
16 (ii) the warranty that plaintiff is actually trying to enforce is that the Products would contain only
17 “non-toxic, natural substances” but that claim appears nowhere on the Products; and (iii) plaintiff
18 has pleaded no facts supporting breach because she ignores label statements that adequately
19 “substantiate” the “environmentally responsible” representation.

20 In general, a plaintiff asserting a breach of warranty claim must allege facts sufficient to
21 show that: (1) the seller’s statements constitute an affirmation of fact or promise or a description
22 of the goods; (2) the statement was part of the basis of the bargain; and (3) the warranty was
23 breached. *See Weinstad v. Dentsply Int’l, Inc.*, 180 Cal.App. 4th 1213, 1227 (2010). Statements on
24 a food label can create an express warranty. *See, e.g., Brown v. Hain Celestial Grp., Inc.*, 11-cv-
25 03082-LB, 2012 WL 6697670, at *16 (N.D. Cal. Dec. 22, 2012) (“All Natural & Organic”
26 cosmetic products); *Vicuna v. Alexia Foods, Inc.*, 11-cv-6119-PJH, 2012 WL 1497507, at *2
27 (N.D. Cal. Apr. 27, 2012) (“All Natural” label on potatoes was an express warranty that they did
28 not have artificial ingredients); *see also Jones v. Nutiva, Inc.*, 16-CV-00711-HSG, 2016 WL

1 5210935, at *9 (N.D. Cal. Sept. 22, 2016) (denying motion to dismiss breach of warranty claim as
2 to statements including “Superfood,” “Coconut is one of the world’s most nourishing foods,” “is
3 ‘better than butter,’” and “A nutritious substitute in baking” because, taking inferences in the light
4 most favorable to plaintiff, “the challenged statements constitute an affirmative fact or promise”).

5 When determining whether an express warranty has been made, courts look to the context
6 of the statement, including other content on the label. *See, e.g., Jones v. Nutiva, Inc.*, 2016 WL
7 5210935 at *7 (“considered in the context of Defendant’s entire Virgin Coconut Oil label, this
8 statement could ‘certainly contribute [] ... to the deceptive context of the package as a whole.’”).
9 At this juncture, as with the “all natural” cases, the “environmentally responsible” claim can,
10 taking all reasonable inferences in the plaintiff’s favor, constitute an affirmative fact or promise
11 sufficient to create a warranty.

12 Costco’s argument that the warranty plaintiff wants to assert (that the Products only
13 contain non-toxic, natural substances) but cannot because that representation is not made on its
14 labelling, fares no better. Plaintiff contends that the promise that the Products are
15 “environmentally responsible” is false because the products contain chemicals that have been
16 identified by authorities as hazardous, toxic, or bad for the environment. Costco cannot attempt to
17 shift plaintiff’s theory in order to dismiss it. Costco’s argument that plaintiff has failed to allege
18 sufficient facts to show how the warranty is breached also fails. Plaintiff’s Complaint is very
19 specific regarding why Costco’s has breached the warranty of “environmentally responsible,”
20 namely by including in the product toxic and hazardous ingredients.

21 Finally, Costco’s position that plaintiff’s warranty claims fail because other, unrelayed on
22 statements on the back of the Products’ labels are true and show that the products are (in some
23 ways) “environmentally responsible” may provide a good defense at summary judgment, but
24 cannot be used to win on a motion to dismiss. Those unchallenged statements are “Designed for
25 the Environment U.S. EPA Recognized for Safer Chemistry”, “Biodegradable formula per OECD
26 [standards]”, and “USDA Certified Biobased Product” representations. Mot. at 9. Even if I could
27 rely on these unchallenged statements to evaluate the merits of plaintiff’s breach claim, the *import*
28 of those statements with respect to the Statements plaintiff does rely on is not obvious at this

1 juncture. For example, simply because a product has a “biodegradable formula” per for OECD,
2 does that mean as a matter of law that a reasonable consumer would find the product
3 environmentally responsible notwithstanding the presence of an (allegedly) highly toxic
4 ingredient? These sorts of determinations must be made with an evidentiary record later in the
5 case.

6 Costco’s motion is DENIED on this ground.

7 **C. Specificity of Fraud-Based Claims**

8 Costco contends that each of plaintiff’s consumer-protection claims are fraud-based and,
9 therefore, she must plead her claims with specificity in accordance with Rule 9(b). I agree that
10 Rule 9(b) applies to plaintiff’s California consumer misrepresentation claims as well as the claim
11 arising under Washington law. However, Rule 9(b) only requires plaintiff to identify “the who,
12 what, when, where, and how of the misconduct charged,” as well as “what is false or misleading
13 about [the purportedly fraudulent] statement, and why it is false. *See Ebeid ex rel. United States v.*
14 *Lungwitz*, 616 F.3d 993, 998 (9th Cir. 2010) (internal quotation marks and citations omitted).

15 Costco argues that plaintiff has failed to meet the 9(b) standard because she does not allege
16 facts showing how she became aware that the Statements on the Products were false, when and
17 how she learned the Products contained the hazardous and toxic chemicals, and when or how she
18 came to the belief that the presence of those ingredients in the Products contradicted the
19 Statements. Mot. at 10. What Costco seeks, however, is information that it may uncover during
20 discovery. All that is required, even under Rule 9(b), is for plaintiff to “set forth what is false or
21 misleading about a statement, and why it is false.” *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097,
22 1106 (9th Cir. 2003). The allegations of fraud “must be specific enough to give defendants notice
23 of the particular misconduct which is alleged to constitute the fraud charged so that they can
24 defend against the charge and not just deny that they have done anything wrong.” *Swartz v.*
25 *KPMG LLP*, 476 F.3d 756, 764 (9th Cir. 2007). The detailed allegations in plaintiff’s Complaint
26 do just that. Costco is entitled to no more at the juncture.

27 **D. Deception under State Consumer Protection Statutes**

28 Finally, Costco argues that the term “environmentally responsible” is not deceptive under

1 the CLRA, UCL, and Washington consumer protection statutes *when* that statement is considered
 2 in connection with other, unchallenged statements on the labels. Generally, “whether a business
 3 practice is deceptive will usually be a question of fact not appropriate for decision on demurrer”
 4 under California law. *Williams v. Gerber Products Co.*, 552 F.3d 934, 938 (9th Cir. 2008). That
 5 is particularly true when defendants claim that alleged misrepresentations made on packaging
 6 might be dispelled when viewing other, less prominent representations. *See, e.g., id.* at 939
 7 (rejecting argument “that reasonable consumers should be expected to look beyond misleading
 8 representations on the front of the box to discover the truth from the ingredient list in small print
 9 on the side of the box.”).

10 Costco’s challenge here depends, as above, on the meaning to a reasonable consumer of
 11 the additional, unchallenged statements on its Products that the Products were: “Designed for the
 12 Environment U.S. EPA Recognized for Safer Chemistry,” “Biodegradable formula per OECD
 13 [standards],” and “USDA Certified Biobased Product.” Costco argues that the challenged
 14 representations are, at most, a promise that Costco complies with the additional unchallenged
 15 statements. In other words, that the Products were designed in accordance with “safer chemistry”
 16 guided by the EPA, in conformance with the OECD biodegradable standards and in accordance
 17 with the USDA “biobased” standards. However, the relationship between these unchallenged
 18 statements (and what they convey to consumers) and whether those statements as understood by
 19 reasonable consumers undermine plaintiff’s claims based her assertion that consumers do not
 20 expect “environmentally responsible” products to contains the identified toxic and hazardous
 21 ingredients are not appropriately resolved on a motion to dismiss.

22 This is not a case where plaintiff’s challenge to a statement on a label is easily dispelled
 23 because of other, similarly prominent or proximate statements. *See, e.g., Kane v. Chobani, Inc.*,
 24 12-CV-02425-LHK, 2013 WL 5289253, at *10 (N.D. Cal. Sept. 19, 2013) (“it is not plausible that
 25 Plaintiffs believed, based on Defendant’s [o]nly natural ingredients’ or ‘all natural’
 26 representations, that the Yogurts did not contain added fruit juice.”); *see also Jonathan Chuang v.*
 27 *Dr. Pepper Snapple Group, Inc.*, CV1701875MWFMRWX, 2017 WL 4286577, at *4 (C.D. Cal.
 28 Sept. 20, 2017) (“Plaintiff does not adequately allege how the images and statements are false, in

1 particular because an independent review of the product labels reveals that the statements are not
2 false, as the products do contain the fruits and vegetables depicted, are made with fruit and
3 vegetable juice, and contain 100% of the daily value of Vitamin C.”). Here, the meaning of the
4 challenged and unchallenged statements by a reasonable consumer in light of the allegedly toxic
5 and hazardous ingredients in the Products is not easily determined (or easily dispelled) and cannot
6 be resolved on this motion.

7 Defendant’s motion to dismiss is DENIED.

8 **II. MOTION TO STAY**

9 In the alternative, Costco argues that this case should be stayed until the pending motion to
10 dismiss the Second Amended Complaint is resolved in the *Gonzalez* matter, which is being
11 litigated in the Eastern District of New York by the same plaintiff’s counsel as in this case.
12 Costco contends the cases are materially similar, except that the sub-class in *Gonzalez* is New
13 York consumers and tied to New York consumer protection statutes. Costco’s motion to dismiss
14 the Second Amended Complaint in *Gonzalez* has been pending since November 2017. Costco
15 notes that in *Gonzalez*, there was a California plaintiff asserting the same California consumer
16 protection claims asserted here, but that plaintiff voluntarily dismissed her claims in *Gonzalez* one
17 month after this case was filed. Mot. at 14. Plaintiff, here, responds that the California claims
18 were voluntarily dismissed in the *Gonzalez* case in the face of Costco’s motion to dismiss for lack
19 of personal jurisdiction over the California claims. Oppo. at 15.

20 Generally, “when two identical actions are filed in courts of concurrent jurisdiction, the
21 court which first acquired jurisdiction should try the lawsuit and no purpose would be served by
22 proceeding with a second action.” *Pacesetter Sys., Inc. v. Medtronic, Inc.*, 678 F.2d 93, 95 (9th
23 Cir. 1982). The parties and issues do not need to be identical, but only “substantially similar.”
24 *See Kohn Law Grp. v. Auto Parts Mfg. Miss., Inc.*, 787 F.3d 1237, 1239 (9th Cir. 2015) (“a district
25 court [may] stay proceedings if a similar case with substantially similar issues and parties was
26 previously filed in another district court.”); *see also Barnes & Noble, Inc. v. LSI Corp.*, 823 F.
27 Supp. 2d 980, 986 (N.D. Cal. 2011) (“When two actions involving nearly identical parties and
28 closely related [] questions are filed in separate districts . . . the general rule is that the case first

1 filed takes priority, and the subsequently filed suit should be dismissed or transferred or stayed.”).

2 The first-to-file rule is intended promote judicial efficiency and when “applying the first-
3 to-file rule, courts should be driven to maximize ‘economy, consistency, and comity.’” *Kohn*, 787
4 F.3d at 1239–40 (quoting *Cadle Co. v. Whataburger of Alice, Inc.*, 174 F.3d 599, 604 (5th
5 Cir.1999)). “Thus, a court analyzes three factors: chronology of the lawsuits, similarity of the
6 parties, and similarity of the issues.” *Kohn*, 787 F.3d at 1240. However, “[t]he most basic aspect
7 of the first-to-file rule is that it is discretionary” *Alltrade, Inc. v. Uniweld Prods., Inc.*, 946
8 F.2d 622, 628 (9th Cir. 1991). It “is not a rigid or inflexible rule to be mechanically applied, but
9 rather is to be applied with a view to the dictates of sound judicial administration.” *Pacesetter*
10 *Sys.*, 678 F.2d at 95.

11 The *Gonzalez* case was filed two years before this case. However, there are significant
12 distinctions between the cases. The plaintiff in *Gonzalez* seeks to represent a nationwide class for
13 her common law unjust enrichment and breach of express warranty claims, and she also seeks to
14 represent a New York sub-class under New York’s consumer protection laws. Plaintiff’s
15 nationwide Class claims here are not just for breach of warranty, there is a claim arising under the
16 Washington Consumer Protection statute, and Sub-Class claims based on California’s consumer
17 protection statutes. Plaintiff argues that in these circumstances there is not enough similarity and
18 this case should not be stayed. See, e.g., *Lac Anh Le v. Pricewaterhousecoopers LLP*, C-07-5476
19 MMC, 2008 WL 618938, at *1 (N.D. Cal. Mar. 4, 2008) (denying stay where the case differed
20 from first-filed state-law wage and hour case because plaintiff included a FLSA claim and plaintiff
21 sought to represent a large, more expansive class).

22 There is some similarity in the parties given Costco is the defendant in both. However,
23 now that the California-based plaintiff’s claims have been dismissed in *Gonzalez*, with prodding
24 from Costco, the differences between the cases in terms of what laws are in play with respect to
25 the nationwide class and state law sub-classes are not that similar, although the underlying
26 questions (e.g., what is deceptive and as such illegal) may be. In addition, that Costco moved to
27 dismiss the California law claims in *Gonzalez* and was successful in convincing plaintiff to drop
28 them in that case is significant. Concerns of equity and comity likewise counsel against a stay on

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these facts.

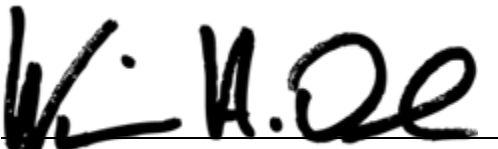
Costco's motion to stay is DENIED.

CONCLUSION

For the reasons discussed above, Costco's motion to dismiss or in the alternative to stay is DENIED.

IT IS SO ORDERED.

Dated: September 17, 2018



William H. Orrick
United States District Judge