

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF
CALIFORNIA

Solis v. Coty, Inc. and Noxell Corporation

Solis · No. 3:22-cv-00400-BAS-NLS · Decided March 7, 2023

SUMMARY

The United States District Court for the Southern District of California grants Defendants’ Rule 12(b)(1) motion and dismisses Plaintiff’s amended consumer-protection class-action complaint without prejudice for lack of subject-matter jurisdiction. The court concludes that the plaintiff failed to adequately allege a concrete economic injury or injury-in-fact arising from her purchase of CoverGirl TruBlend Pressed Powder, including under benefit-of-the-bargain and overpayment theories. The court grants Plaintiff leave to file a second amended complaint.

CASE DETAILS

COURT	United States District Court for the Southern District of California
WRITING FOR THE COURT	Cynthia Bashant
JURISDICTION	United States District Court for the Southern District of California
DECIDED	March 7, 2023
DOCKET	3:22-cv-00400-BAS-NLS
DISPOSITION	dismissed
PROCEDURAL POSTURE	Defendants moved to dismiss the amended consumer-protection class-action complaint under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). The court granted the Rule 12(b)(1) motion for lack of Article III standing and dismissed the amended complaint without prejudice, granting leave to file a second amended complaint.
STANDARD OF REVIEW	For a facial Rule 12(b)(1) challenge to subject-matter jurisdiction, the court evaluates the allegations under a standard comparable to Rule 12(b)(6), accepts factual allegations as true, and draws reasonable inferences in the plaintiff's favor. The plaintiff must clearly allege facts establishing injury in fact, causation, and redressability. The court may not resolve genuinely disputed facts when jurisdiction depends on factual issues intertwined with the merits.
PRECEDENTIAL VALUE	unpublished

TOPICS

consumer protection

class actions

subject matter jurisdiction

pleadings

motions to dismiss

PRACTICE AREAS

consumer protection

civil procedure

constitutional law

class actions

products liability

QUESTIONS PRESENTED

1. Whether Solis adequately alleged a concrete economic injury sufficient to establish Article III standing under a benefit-of-the-bargain theory.
2. Whether Solis adequately alleged a concrete economic injury under an overpayment theory based on misrepresentation, omission, or a hidden defect.
3. Whether Solis adequately alleged a particularized injury by connecting the alleged PFAS contamination to the specific product unit she purchased.
4. Whether the amended complaint should be dismissed under Rule 12(b)(1) for lack of subject-matter jurisdiction and whether leave to amend should be granted.

HOLDINGS

1. A plaintiff cannot establish Article III economic injury under a benefit-of-the-bargain theory for an allegedly unsafe consumer product when the plaintiff identifies no specific misrepresentation concerning the claimed benefit and the product labeling discloses that the alleged benefit was not part of the bargain. Solis therefore failed to establish standing under this theory.
2. An overpayment theory of Article III standing may be based on a false representation or actionable nondisclosure, but Solis failed to plead either because she identified no specific false representation that the product was PFAS-free and the label disclosed PTFE, the alleged PFAS ingredient.
3. The amended complaint did not establish standing under a hidden-defect theory because the product label disclosed PTFE and Solis alleged that the harmful qualities of PFAS were widely known.
4. A plaintiff alleging injury from an adulterated product must plead facts permitting an inference that the specific product purchased was affected; however, a formulaic allegation that the precise unit purchased contained PFAS is not required at the pleading stage if the complaint's product-wide allegations support that reasonable inference.
5. Because Solis failed to allege a concrete economic injury and therefore lacked Article III standing, the court dismissed the amended complaint without prejudice under Rule 12(b)(1), without reaching defendants' Rule 12(b)(6) arguments, and granted leave to file a second amended complaint.

KEY QUOTATIONS

“DISMISSES WITHOUT PREJUDICE the Amended Complaint for lack of subject-matter jurisdiction.” (at 1)

“Together, Birdsong and McGee stand for a simple legal premise: where a plaintiff seeks to allege an injury-in-fact arising from the purchase of a purportedly unsafe consumer item, he or she is precluded from doing so

based upon a “benefit of the bargain” theory where (1) there is no identifiable misrepresentation concerning the purported benefit of which the plaintiff was allegedly deprived and (2) the product’s labeling or packaging discloses the alleged benefit is not part of the bargain.” (at 8)

“That dismissal is WITHOUT PREJUDICE to Solis filing a corrective pleading that resolves the deficiencies delineated herein.” (at 22)

FACTUAL BACKGROUND

Solis purchased CoverGirl TruBlend Pressed Powder in California in December 2021 after reviewing the product label and statements on defendants' websites and investor materials describing their products as safe, sustainable, and suitable for sensitive skin. She alleged that testing of a sample revealed elevated organic fluorine indicative of PFAS and that PFAS are toxic and carcinogenic. The product label expressly listed PTFE, which Solis alleged is a type of PFAS, but she claimed defendants' representations and omissions caused her to believe the product was safe, sustainable, and PFAS-free. She did not allege that the specific unit she purchased had been tested.

PROCEDURAL HISTORY

Solis filed the initial complaint on March 25, 2022. After defendants moved to dismiss, Solis filed an amended complaint instead of opposing the initial motion. The amended complaint asserted fifteen claims arising from the alleged marketing and sale of CoverGirl TruBlend Pressed Powder containing PFAS. Defendants then moved to dismiss under Rules 12(b)(1) and 12(b)(6); the court resolved the jurisdictional motion first, dismissed without prejudice for lack of standing, and permitted a second amended complaint.

DISPOSITION

dismissed

CASES CITED

- Kokkonen v. Guardian Life Insurance Co. of America, 511 U.S. 375, 377 (1994)
- Safe Air for Everyone v. Meyer, 373 F.3d 1036, 1039 (9th Cir. 2004)
- Pride v. Correa, 719 F.3d 1130, 1133 (9th Cir. 2013)
- Knievel v. ESPN, 393 F.3d 1068, 1072 (9th Cir. 2005)
- Thornhill Publishing Co. v. General Telephone & Electric, 594 F.2d 730, 733 (9th Cir. 1979)
- McCarthy v. United States, 850 F.2d 558, 560 (9th Cir. 1988)
- Savage v. Glendale Union High School, 343 F.3d 1036, 1039 n.2 (9th Cir. 2003)
- Roberts v. Corrothers, 812 F.2d 1173, 1177 (9th Cir. 1987)
- Augustine v. United States, 704 F.2d 1074, 1078 (9th Cir. 1983)
- Maya v. Centex Corp., 658 F.3d 1060, 1068–69 (9th Cir. 2011)
- Equity Lifestyle Properties, Inc. v. County of San Luis Obispo, 548 F.3d 1184, 1189 n.10 (9th Cir. 2008)
- Toyota Landscaping Co. v. Southern California District Council of Laborers, 11 F.3d 114, 117 (9th Cir. 1993)

- Prather v. AT&T Inc., 996 F. Supp. 2d 861, 871 n.8 (N.D. Cal. 2013)
- Spokeo, Inc. v. Robins, 578 U.S. 330, 337–40 (2016)
- Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–62 (1992)
- Warth v. Seldin, 422 U.S. 490, 518 (1975)
- Birdsong v. Apple, Inc., 590 F.3d 955, 956, 961–62 (9th Cir. 2009)
- McGee v. S-L Snacks Nat’l, 982 F.3d 700, 705–10 (9th Cir. 2020)
- In re Johnson & Johnson Talcum Powder Products Marketing, Sales Practices & Liability Litigation, 903 F.3d 278, 283 (3d Cir. 2018)
- Estrada v. Johnson & Johnson, No. 2:14-cv-1051-TLN-EFB, 2015 WL 1440466, at *4–5 (E.D. Cal. Mar. 27, 2015)
- Hinojos v. Kohl’s Corp., 718 F.3d 1098, 1104 (9th Cir. 2013)
- Mazzo v. American Honda Motor Co., 666 F.3d 581, 595 (9th Cir. 2012)
- Zeiger v. WellPet LLC, 304 F. Supp. 3d 837, 842, 845–46 (N.D. Cal. 2018)
- Cheslow v. Ghirardelli Chocolate Co., 445 F. Supp. 3d 8, 20 (N.D. Cal. 2020)
- Baur v. Veneman, 352 F.3d 625, 636–37 (2d Cir. 2003)
- Meaunrit v. Pinnacle Foods Group, LLC, No. C 09-04555 CW, 2010 WL 1838715, at *3 (N.D. Cal. May 5, 2010)
- Blackburn v. Champions Petfoods USA, Inc., No. 1:18-cv-0038, 2021 WL 9682169, at *2 (S.D. Iowa Aug. 12, 2021)
- Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 472 (1982)
- Flast v. Cohen, 392 U.S. 83, 99 (1968)
- Baker v. Carr, 369 U.S. 186, 205 (1962)
- Lee v. American National Insurance Co., 260 F.3d 997, 1005 (9th Cir. 2001)
- Wallace v. ConAgra Foods, Inc., 747 F.3d 1025, 1030 (8th Cir. 2014)
- In re Zurn Plumbing Products Liability Litigation, 644 F.3d 604, 616 (8th Cir. 2011)
- Lewis v. Casey, 518 U.S. 343, 357 (1996)
- Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 40 n.20 (1976)
- Doe v. Holly, 557 F.3d 1066, 1073 (9th Cir. 2009) (per curiam)
- Wolfe v. Stankman, 392 F.3d 358, 362 (9th Cir. 2004)
- Schloegel v. Edgewell Personal Care Co., No. 4:21-CV-0631-DGK, 2022 WL 808694, at *1 (W.D. Mo. Mar. 16, 2022)
- Doss v. General Mills, Inc., No. 18-61924-CIV, 2019 WL 7946028, at *2–3 (S.D. Fla. June 14, 2019), aff’d, 816 F. App’x 312 (11th Cir. 2020)
- Pels v. Keurig Dr Pepper, Inc., No. 19-CV-3052-SI, 2019 WL 5813422, at *1 (N.D. Cal. Nov. 7, 2019)
- Rice-Sherman v. Big Heart Pet Brands, Inc., Case No. 19-cv-3613-WHO, 2020 WL 1245130, at *7 (N.D. Cal. Mar. 16, 2020)

- Von Slomski v. Hain Celestial Group, Inc., No. SACV131757AGANX, 2014 WL 12771116, at *5 (C.D. Cal. June 10, 2014)
- Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 103 (1998)

OPINION

Solis v. CoverGirl Cosmetics

PER CURIAM.

1 2 3 4 5 6 7

8 UNITED STATES DISTRICT COURT

9 SOUTHERN DISTRICT OF CALIFORNIA

10 11 YERALDINNE SOLIS, Case No. 22-cv-0400-BAS-NLS 12 Plaintiff, ORDER: 13 v.

(1) GRANTING MOTION TO

14 COTY, INC.; NOXELL

DISMISS PURSUANT TO FED.

CORPORATION,

15 R. CIV. P. 12(b)(1) (ECF No. 19); Defendants. and 16

17 (2) GRANTING PLAINTIFF LEAVE

TO FILE SECOND AMENDED

18

COMPLAINT

19 20 21 Plaintiff Yeraldinne Solis (“Solis”) brings this consumer-protection class action 22 against Defendants Coty, Inc. (“Coty”) and Noxell Corporation (“Noxell,” together with 23 Coty, “Defendants”). She alleges she purchased Defendants’ beauty product marketed as 24 “safe” and “sustainable,” when it contains harmful and carcinogenic chemicals called 25 PFAS. (See generally Am. Compl., ECF No. 13.) Now before the Court is Defendants’ 26 motion to dismiss (“Motion”). (Mot., ECF No. 19.) Solis opposes (Opp’n, ECF No. 20) 27 and Defendants reply (Reply, ECF No. 22.) Having considered the record of this case, the 28 parties’ briefing, and the relevant case law, the Court GRANTS Defendants’ Motion and 1 DISMISSES WITHOUT PREJUDICE the Amended Complaint for lack of subject- 2 matter jurisdiction.¹

3 I. BACKGROUND

4 A. Factual Background² 5 Coty is a foreign corporation with its principal place of business located in New 6 York, New York. (Am. Compl. ¶ 14.) Coty owns CoverGirl Cosmetics brand 7 (“CoverGirl”). (Id.) Noxell is a subsidiary of Coty. (Id. ¶ 15.) Together, Defendants 8 formulate, design, manufacture, advertise, distribute, and sell CoverGirl’s line of beauty 9 products. (Id. ¶ 1.) 10 In December 2021, Solis purchased a unit of CoverGirl’s TruBlend Pressed Powder 11 (the “Product”) from a retail store in Escondido, California. (Am. Compl. ¶ 13.) Prior to 12 purchase, Solis reviewed the Product’s “packaging” and “labeling,” images of which are 13 provided both in the Amended Complaint at Paragraph 28 and at Exhibit K to Defendants’ 14 Request for Judicial

Notice. (See *id.* ¶ 28; Ex. K to RJN, ECF No. 19-13.) In particular, 15 she read the statements on the Product’s label, located on the backside of the Product’s 16 17 18 1 Both parties have filed requests peripheral to the Motion. Defendants submitted alongside their Motion a Request for Judicial Notice (Request for Judicial Notice (“RJN”), Ex. 2 to Mot., ECF No. 19- 19 2) and, shortly after Defendants filed their Reply, Solis moved *ex parte* for leave to file a Notice of Supplemental Authority (Notice, ECF No. 25). The Court GRANTS Defendants’ request for judicial 20 notice as to Exhibit K, color photographs of the packaging and labeling of the cosmetic product at issue. 21 (Photographs, Ex. K to RJN, ECF No. 19-13); see *Kanfer v. Pharmacare US, Inc.*, 142 F. Supp. 3d 1091, 1098–99 (S.D. Cal. 2015) (“Courts addressing motions to dismiss product-labeling claims routinely take 22 judicial notice of images of the product packaging.”); *Chaudry v. Cnty. of San Diego*, No. 21cv1847-GPC (AHG), 2022 WL 17652794, at *3 (S.D. Cal. Dec. 13, 2022) (opining that “[c]onsidering documents 23 subject to judicial notice is not inconsistent with a facial challenge on subject matter jurisdiction” and collecting authorities). The Court DENIES AS MOOT the remainder of Defendants’ request for judicial 24 notice because the Court did not rely on any of the exhibits therein to resolve the pending Motion. 25 The Court GRANTS Solis’ request for leave to file her Notice of Supplemental Authority—a decision by a district court within the Ninth Circuit authored and published after Defendants’ Reply, which 26 Solis claims buttresses her position. (Notice at 1 (citing *Galgetta v. Walmart, Inc.*, No. 3:22-cv-3757- WHO, 2022 WL 17812924, at *1 (N.D. Cal. Dec. 19, 2022)).) 27 2 These facts are all taken from the Amended Complaint. (See ECF No. 13.) The Court accepts as true all non-conclusory factual allegations set forth therein. See *Safe Air for Everyone v. Meyer*, 373 28 1 || packaging, which states the Product is “dermatologically tested” and “suitable for sensitive 2 ||skin.” (Ud. ¥ 7.) oo = - 7 □□ 3 = 4 | be] vi COVERGIRL’ i M5e6e7

4 MINERAL PRESSED POWDER at □

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5 || BOCAS POWDRE MINERALE PRESSEE ae

: BRIGHTENING PIGMENTS AND GUIDE

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CoverGirl’s website explaining it “uses a wide array of testing methods to assess and ensure [their] products remain safe” and will “continue to invest in the latest alternative testing technology and innovation to ensure [it is] delivering safe, high-quality products.” (Cd. 4) 23.) 28 1 • A statement on Coty’s website that it is “changing the way [it] design[s], formulate[s], and manufacture[s], in order to minimize [its] environmental 2 impact and create more innovative, cleaner products.” (Id. ¶ 24.) 3 • A statement on Coty’s website, which provides, “By working hand-in- 4 hand with [its] ingredients suppliers, [Coty] use[s] the latest innovation 5 and technology, applying green science to minimize the pressure of [its] products on natural resources.” (Id.) 6 7 • A statement on Coty’s website that its “products have an important role to play in building a sustainable future” and that “sustainability is at the heart 8 of [its] product creation, from design and development through the 9 procurement of materials.” (Id. ¶ 25.) 10 • A statement on Coty’s website that it “constantly strive[s] to develop 11 products that reflect [its] consumers’ evolving needs. Increasingly this 12 means clean products that meet consumer demand for ingredient transparency and minimalist safe formulas, that don’t compromise on 13 product quality.” (Id. ¶ 26.) 14 • A Coty investor report, which states, “In the U.S., Covergirl continues to 15 show that the brand is on a sustainable path of improvement and growth as 16 it has grown and maintained share in 6 of the last 9 months since the new brand equity was launched.” (Id. ¶ 29.) 17 18 Solis alleges that she believed the Product to be “safe for use and[] otherwise 19 sustainable” based upon the above-mentioned representations and, thus, purchased the 20 Product in reliance upon the truthfulness of those representations. (Am. Compl. ¶¶ 12, 62 21 (“Defendants’ conduct deceived Plaintiff . . . into believing that the Product is safe and 22 sustainable[.]”).) However, Solis claims Defendants’ marketing is misleading, for the 23 Product is neither “safe” nor “sustainable,” but rather it is “unfit for use” and “pose[s] a 24 significant safety risk” because an organization called Toxin Free USA detected in samples 25 of the Product heightened levels of organic fluorine, which are indicative of purportedly 26 27 28 1 harmful per- and polyfluoroalkyl substances (referred to above as “PFAS”). (Id. ¶¶ 1, 6, 2 133.) 3 PFAS are a group of highly persistent, synthetic chemicals. (Am. Compl. ¶¶ 2, 5.) 4 According to the Food & Drug Administration (“FDA”), PFAS “are often intentionally 5 added to certain products such as foundation, lipstick, eyeliner, eyeshadow, and mascara.” 6 (Id. ¶ 33 (citation and quotation marks omitted); see id. ¶ 32 (“PFAS are used in cosmetics 7 due to their properties such as hydrophobicity and film-forming ability, which are thought 8 to increase product wear, durability, and spreadability.”).) Although Solis does not contend 9 there exists a federal or state regulation prohibiting the use of PFAS as an additive in 10 cosmetic products, she avers that “PFAS are not necessary for the intended outcomes” and 11 that several of Defendants’ peers do not use PFAS in their products. (Id. ¶ 34.) 12 Solis alleges it is beyond dispute PFAS are toxic and carcinogenic. (Am. Compl. ¶ 13 40.) Solis claims exposure to PFAS in humans increases the risk of cancer, liver damage, 14 fertility issues, asthma, and thyroid disease, and cites a number of studies linking PFAS to 15 those diseases and health complications. (Id. ¶¶ 3 n.3, 30, 40–42 nn. 35–37.) She avers

16 cosmetics that contain PFAS raise a particularly disconcerting health risk because users 17 apply beauty products directly to the face—in particularly absorptive areas such as near the 18 eyes and mouth—and habitually. (See *id.* ¶¶ 2, 7–8, 38–39.) And “[b]ecause PFAS persist 19 and accumulate over time, they are harmful even at very low levels.” (*Id.* ¶ 2.) 20 Crucially, Solis concedes, as she must, the Product’s label discloses PTFE as one of 21 its ingredients. (See Am. Compl. ¶¶ 46–48; see also *id.* ¶ 28 (providing black-and-white 22 picture of backside of Product’s packaging, which contains a list of ingredients that 23 includes “PTFE”).) 24 25 26 27 3 Solis alleges it is not yet scientifically feasible to test for PFAS directly, and that organic-fluorine 28 See *ea* 4 71692. 071699), EAS □□ RON CODES (CTH. SerkctsrnS TOE MC MOUS AEC 6 aoe . NEW YORK, NY 10118 7 Solis alleges PTFE—known more commonly as Teflon—is “a type of PFAS chemical.” 8 ¶ Ud. | 46.) Nevertheless, Solis alleges that because it is not yet scientifically feasible to 9 isolate particular PFAS in a test sample, “the exact source of organofluorine” in the Product 10 ¶ “cannot be determined to solely come from [PTFE].” (*Ud.* 4 48.) 11 B. Procedural History 12 On March 25, 2022, Solis filed an initial complaint. (ECF No. 1.) On April 27, 13 ¶ 2022, Defendants filed a motion to dismiss. (ECF No. 10.) In lieu of filing an opposition, 14 ¶ Solis filed her Amended Complaint. (ECF No. 13.) The Amended Complaint asserts 15 15 ¶ Separately enumerated claims: (1) unlawful, unfair, and fraudulent business practices in 16 ¶ violation of California’s Unfair Competition Law (“UCL”) (*id.* 49 88-105); (2) violation 17 California’s Consumer Legal Remedies Act (*id.* 106—20); (3) breach of the implied 18 ¶ warranty under the Song-Beverly Act (*id.* 4] 121-34); (4) violation of California’s False 19 ¶ Advertising Law (“FAL”) (*id.* J] 135-47); (5) fraud (*id.* J] 148-56); (6) constructive fraud 20 ¶ Gd. 94] 157-67); (7) fraudulent inducement (*id.* 4] 168-77); (8) money had and received 21 YJ 178-83); (9) fraudulent concealment (*id.* □□ 184-96); (10) fraudulent 22 misrepresentation (*id.* 9] 197-204); (11) negligent misrepresentation (*id.* J] 205-11); 23 unjust enrichment (*id.* 4] 212-20); (13) breach of express warranty (*id.* §{§] 221-30); 24 ¶ (14) violation of the Magnuson-Moss Warranty (“MMW”) Act (*id.* 231-39); and 25 negligent failure to warn (*id.* {J 240-49). She brings these claims on behalf of herself, 26 ¶ a nationwide class, and a California subclass. *Ud.* 9] 79-87.) 27 Defendants now move to dismiss the Amended Complaint pursuant to both Federal 28 ¶ Rule of Civil Procedure (“Rule”) 12(b)(1) for lack of subject-matter jurisdiction and Rule _f. 1 12(b)(6) for failure to state a claim upon which relief can be granted. (See *Mem. in Supp. 2 of Mot., Ex. 1 to Mot.* (“*Mem.*”), ECF No. 19-1.) 3 In particular, Defendants assert the Amended Complaint fails to plead an injury-in- 4 fact as a prerequisite of Article III standing. (See *Mem.* at 9–12.) They further aver Solis 5 fails to state a single claim upon which relief can be granted because, *inter alia*: (1) Solis’ 6 claims under California’s consumer-protection statutes do not plausibly allege violations 7 of the “reasonable consumer standard”; (2) Solis’ claims for which fraud is an elemental 8 lynchpin fail under Rule 9(b)’s heightened standard; (3) Solis’ claims for breach of 9 warranty fail—and, thus, so does her MMW Act claim—because she neither identifies an 10 inaccurate statement in Defendants’ marketing materials nor alleges the Product is unfit for 11 its intended use; (4) Solis’

claims for unjust enrichment and money-had-and-received as 12 currently formulated are precluded by California law; and (5) Solis has not alleged a non- 13 economic injury as a prerequisite for her negligent failure to warn claim. (See *id.* at 12– 14 25.)

15 II. LEGAL STANDARD

16 “Federal courts are courts of limited jurisdiction.” *Kokkonen v. Guardian Life Ins. 17 Co. of Am.*, 511 U.S. 375, 377 (1994). “They possess only that power authorized by 18 Constitution and statute, which is not to be expanded by judicial decree.” *Id.* (internal 19 citations omitted). “It is to be presumed that a cause lies outside this limited jurisdiction, 20 and the burden of establishing the contrary rests upon the party asserting jurisdiction.” *Id.* 21 (internal citations omitted); see also *Abrego v. The Dow Chem. Co.*, 443 F.3d 676, 684 (9th 22 Cir. 2006).

23 Under Rule 12(b)(1), a party may move to dismiss a claim based on lack of subject- 24 matter jurisdiction. *Chandler v. State Farm Mut. Auto. Ins. Co.*, 598 F.3d 1115, 1123 (9th 25 Cir. 2010). A Rule 12(b)(1) challenge to jurisdiction may be facial or factual. *Safe Air for 26 Everyone v. Meyer*, 373 F.3d 1036, 1039 (9th Cir. 2004), cert denied, 544 U.S. 1018 27 (2005). In a facial challenge to subject-matter jurisdiction, the defendant contests the 28 allegations in the complaint itself are insufficient to invoke subject-matter jurisdiction. *Id.* 1 A district court assesses a facial challenge to subject-matter jurisdiction as it would a 2 motion to dismiss under Rule 12(b) (6). *Pride v. Correa*, 719 F.3d 1130, 1133 (9th Cir. 3 2013). That is, “all factual allegations in [the] complaint are taken as true and all reasonable 4 inferences are drawn in [the plaintiff’s favor].” *Id.* (citing, *inter alia*, *Kniesel v. ESPN*, 393 5 F.3d 1068, 1072 (9th Cir. 2005)). 6 Unlike on a facial challenge, where the district court generally is limited to the four 7 corners of the pleading in determining whether it has subject-matter jurisdiction over a 8 case, see *Thornhill Publ’g Co. v. Gen. Tel. Elec.*, 594 F.2d 730, 733 (9th Cir. 1979), on a 9 factual challenge the defendant provides evidence that an alleged fact in the complaint is 10 false, thereby resulting in a lack of subject-matter jurisdiction, *Meyer*, 373 F.3d at 1039. 11 Therefore, on a factual challenge, the allegations in a complaint are not presumed to be true 12 and “the district court is not restricted to the face of the pleadings, but may review any 13 evidence, such as affidavits and testimony, to resolve factual disputes concerning the 14 existence of jurisdiction.” *McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir. 1988), 15 cert denied, 489 U.S. 1052 (1989). “Once the moving party has converted the motion to 16 dismiss into a facial motion by presenting affidavits or other evidence properly brought 17 before the court, the party opposing the motion must furnish affidavits or other evidence 18 necessary to satisfy its burden of establishing subject matter jurisdiction.” *Savage v. 19 Glendale Union High Sch.*, 343 F.3d 1036, 1039 n.2 (9th Cir. 2003), cert denied, 541 U.S. 20 1009 (2004). However, “[a] court may not resolve genuinely disputed facts where ‘the 21 question of jurisdiction is dependent on the resolution of factual issues going to the 22 merits.’” *Roberts v. Corrothers*, 812 F.2d 1173, 1177 (9th Cir. 1987) (quoting *Augustine 23 v. United States*, 704 F.2d 1074, 1078 (9th Cir. 1983)). 24 Where, as here, a Rule 12(b)(1) motion is brought alongside a

Rule 12(b)(6) motion, 25 it is appropriate for the court to first consider and address the disputed jurisdictional issues 26 under the former before analyzing the merits of a claim under the latter. See *Maya v. Centex Corp.*, 658 F.3d 1060, 1068 (9th Cir. 2011) (“[T]he jurisdictional question of 28 standing precedes, and does not require, analysis of the merits.” (quoting *Equity Lifestyle 1 Props., Inc. v. Cnty. of San Luis Obispo*, 548 F.3d 1184, 1189 n.10 (9th Cir. 2008))). If, 2 upon analysis of the Rule 12(b)(1) motion, the court finds it lacks subject-matter 3 jurisdiction over the action, it need not address the merits issues raised in the collateral

4 Rule 12(b)(6) motion. *Toyota Landscaping Co., Inc. v. S. Cal. Dist. Council of Laborers*, 5 11 F.3d 114, 117 (9th Cir. 1993); *Prather v. AT&T Inc.*, 996 F. Supp. 2d 861, 871 n.8 (N.D. 6 Cal. 2013) (“Having concluded that it lacks subject matter jurisdiction over [plaintiff’s]

7 claim, the Court need not—and indeed cannot—address [d]efendants’ alternate grounds 8 for dismissal under Federal Rules of Civil Procedure 12(b)(6) and 9(b).”).

9 III. ANALYSIS

10 Article III, Section 2 of the Constitution limits federal courts to hearing “actual cases 11 or controversies.” *Spokeo, Inc. v. Robins*, 578 U.S. 330, 337 (2016). This limitation means 12 the plaintiff must have standing to sue. *Id.* at 338. To establish standing, a plaintiff must 13 demonstrate the irreducible constitutional minimum of: (1) an injury-in-fact via “an 14 invasion of a legally protected interest which is (a) concrete and particularized, and (b) 15 actual or imminent, not conjectural or hypothetical”; (2) causation—that the injury is 16 “fairly traceable to the challenged action of the defendant”; and (3) redressability—that it 17 is “likely, as opposed to merely speculative, that the injury will be redressed by a favorable 18 decision.” *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992) (internal citations and 19 quotations omitted). “Each element of standing ‘must be supported . . . with the manner 20 and degree of evidence required at the successive stage of litigation.’” *Maya*, 658 F.3d at 21 (quoting *Lujan*, 504 U.S. at 561). 22 To survive a facial attack directed at standing brought pursuant to Rule 12(b)(1), a 23 plaintiff “must ‘clearly . . . allege facts demonstrating’ each element.” *Spokeo*, 578 U.S. at 24 338 (quoting *Warth v. Seldin*, 422 U.S. 490, 518 (1975)); see also At this stage, the Court 25 presumes to be true the factual allegations in the pleadings, and construes in favor of 26 plaintiff all reasonable inferences therefrom. See *Lujan*, 504 U.S. at 555 (instructing 27 district courts to “presum[e] that general allegations embrace those specific facts that are 28 necessary to support a claim” on a Rule 12(b) (1) facial challenge); see also *Bazile v. Fin. 1 Sys. of Green Bay, Inc.*, 983 F.3d 274, 279 (7th Cir. 2020) (“A facial attack tests whether 2 the allegations, taken as true, support an inference that the elements of standing exist.” 3 (citation omitted)); *John v. Whole Foods Mkt. Grp., Inc.*, 858 F.3d 732, 737 (2d Cir. 2017) 4 (“When the defendant asserts a ‘facial’ challenge to standing . . . it remains the case that 5 courts should continue to draw from the pleadings all reasonable inferences in the 6 plaintiff’s favor[.]”). 7 Here, the Rule 12(b)(1) component of Defendants’ Motion is a facial challenge to 8 subject-matter jurisdiction directed at the first element of standing: injury-in-fact. (See

9 Mem. at 9–13.) “To establish an injury in fact, a plaintiff must show that he or she suffered
10 ‘an invasion of a legally protected interest’ that is ‘concrete and particularized’ and ‘actual 11
or imminent, not conjectural or hypothetical.’” *Spokeo*, 578 at 339 (quoting *Lujan*, 504 12 U.S. at
560); see also *In re Facebook, Inc. Internet Tracking Litig.*, 956 F.3d 589, 597 (9th
13 Cir. 2020).

14 Defendants contend Solis has alleged neither economic nor physical harm. Thus, 15 Solis fails
to establish she suffered an injury-in-fact and, therefore, lacks standing to pursue 16 any one of her
15 claims. (Mem. at 12–13.) In response, Solis contends the allegations in 17 her Amended
Complaint give rise to an economic injury sustained as a result of her 18 purchase of a unit of the
Product in December 2021. (Opp’n at 6–14.) Thus, whether Solis 19 has standing to pursue the
instant lawsuit rises and falls with whether the Amended 20 Complaint alleges, or contains facts
that permit a reasonable inference, that Solis suffered 21 a concrete and particularized economic
injury arising from her purchase of the Product. 22 See *Wash. Envtl. Council v. Bellon*, 732 F.3d
1131, 1139 (9th Cir. 2013) (“A plaintiff must 23 demonstrate standing for each claim he or she
seeks to press and for each form of relief 24 sought.” (citing *DaimlerChrysler Corp. v. Cuno*, 547
U.S. 332, 352 (2006))). 25 A. Concrete Injury-in-Fact 26 “A ‘concrete’ injury is one that ‘actually
exist[s],’ meaning that it is ‘real, and not 27 abstract.’” *Arizona v. Yellen*, 34 F.4th 841, 848 (9th
Cir. 2022) (quoting *Spokeo*, 578 U.S. 28 at 340). “A ‘quintessential injury-in-fact’ occurs when
plaintiffs allege that they ‘spent 1 money that, absent defendants’ actions, they would not have
spent.” *Zeiger v. WellPet 2 LLC*, 304 F. Supp. 3d 837, 845 (N.D. Cal. 2018) (quoting *Maya*, 658
F.3d at 1069); *Moreno 3 v. Vi-Jon, LLC*, No. 21-cv-21-56370, 2022 WL 17668457, at *1 (9th Cir.
Dec. 14, 2022) 4 (Mem.) (“[Plaintiff] alleged that he wouldn’t have purchased or paid as much for
5 [defendant’s] products if he had known the truth about their effectiveness. That is 6 sufficient for
an Article III injury.”). 7 Solis argues the economic injury she allegedly suffered as a result of her
December 8 2021 purchase of the Product qualifies as a “concrete” one. Specifically, she avers she
paid 9 a premium for a unit of the Product on the basis it was “safe” and “sustainable,” as 10
Defendants’ purportedly advertised, but that the Product was neither of those things 11 because it
contained heightened levels of organic fluorine indicative of allegedly harmful 12 PFAS. Thus,
Solis claims the Product was worth far less than the amount she paid, and 13 that, had she known
of the health risks attendant to the Product, she either would not have 14 spent her money on the
Product or would have purchased it on different terms. (Opp’n at 15 8 (citing *Am. Compl.* ¶¶ 7–9,
12).) 16 The parties agree that Solis seeks to invoke two theories of standing based upon 17
economic injury: (1) the “benefit-of-the-bargain” theory and (2) the “overpayment” 18 theory.
(See Opp’n at 6–11; Mem. at 9–13.) The Court addresses both theories in turn, 19 below. 20 1.
Benefit of the Bargain Theory 21 A plaintiff adequately alleges a concrete economic injury when
she adequately 22 pleads “she bargained for a product worth a given value but received a product
worth less 23 than the value.” *McGee v. S-L Snacks Nat’l*, 982 F.3d 700, 705–06 (9th Cir. 2020)
(quoting 24 *In re Johnson & Johnson Talcum Powder Prod. Mkt., Sales Prac. & Liab. Litig.* (“In re

25 Johnson & Johnson”), 903 F.3d 278, 283 (3d Cir. 2018)). This is known as the “benefit- 26 of-the-bargain” theory of Article III standing. *Id.* To invoke such a theory, a plaintiff 27 “must do more than allege that she ‘did not receive the benefit she thought she was 28 obtaining’”; she “must show that she did not receive a benefit for which she actually 1 bargained.” *Id.* (emphasis in original) (quoting *In re Johnson & Johnson*, 903 F.3d at 283). 2 Hence, the plaintiff must identify a specific misrepresentation about the elusive benefit, 3 which allegedly was baked into the purchase price of the consumer item at issue. See, e.g., 4 *id.* at 705–06 (“Absent some allegation that [defendant] made false representations about 5 [the product’s] safety, [plaintiff’s] benefit of the bargain theory falls short.”); *Birdsong v. 6 Apple, Inc.*, 590 F.3d 955, 961–62 (9th Cir. 2009) (“The plaintiffs’ benefit of the bargain 7 theory fares no better. They have not alleged that they were deprived of an agreed-upon 8 benefit in purchasing their [product]. The plaintiffs have not alleged that [defendant] made 9 any misrepresentations”); see also *Estrada v. Johnson & Johnson*, No. 2:14-cv-1051- 10 TLN-EFB, 2015 WL 1440466, at *4–5 (E.D. Cal. Mar. 27, 2015) (“Plaintiff received the 11 benefit-of-the-bargain because she received the exact product she intended to purchase, 12 unlike the cases she cites where the consumers received products that were mislabeled or 13 defective.” (footnote omitted)). 14 Solis claims the Amended Complaint contains ample facts to support her benefit-of- 15 the-bargain theory of standing. (See Opp’n at 8.) She alleges that “she reviewed the 16 labeling, packaging, and marketing materials of her Product”—prior to purchase— 17 including representations on the Product’s packaging it is “suitable for sensitive skin” and 18 “dermatologically tested” and representations on Defendants’ websites touting their 19 products as “safe.” (*Id.* (citing Am. Compl. ¶¶ 9–12).) But Solis alleges that Defendants’ 20 representations about the Product’s “safety” benefit are hollow and, more importantly, 21 deceptively misleading, because the Product is, in fact, unsafe due to the presence of 22 purportedly harmful PFAS therein. (*Id.* (citing Am. Compl. ¶ 6).) Thus, Solis avers she 23 was denied the benefit of the bargain when she purchased the Product in December 2021. 24 Defendants contend Solis’ benefit-of-the-bargain theory fails because the Amended 25 Complaint does not actually identify any affirmative representation—either on the 26 Product’s label or packaging or in Defendants’ online marketing materials—that touts the 27 Product as “safe” or PFAS-free. (Mem. at 12–13.) Moreover, Defendants argue the 28 Product label’s express disclosure that PTFE—which Solis concedes is a common type of 1 PFAS—is an ingredient forecloses Solis’ benefit-of-the-bargain theory. (*Id.*) In support, 2 Defendants direct the Court to the Ninth Circuit precedents of *Birdsong* and *McGee*, with 3 which, they assert, the instant case rests on all fours.⁴ (*Id.*) This Court agrees. 4 *Birdsong* involved a class-action in which plaintiffs sued Apple alleging the iPods 5 they purchased were “defective because [they] pose[d] an unreasonable risk of noise- 6 induced hearing loss to users.” 590 F.3d at 956. The *Birdsong* plaintiffs’ theory of standing 7 was premised upon the theory they were deprived of the benefit of safely listening to music, 8 which they alleged was baked into the iPod’s purchase price. *Id.* at 961. The Ninth Circuit 9 held the *Birdsong* plaintiffs lacked standing for failure to allege an

injury-in-fact. *Id.* It 10 found significant that: (1) the Birdsong plaintiffs did not allege Apple made any 11 representation that one of the iPod’s benefits is that it enables users to “safely listen to 12 music at high volumes for extended periods of time”; and (2) “Apple provided a warning 13 against listening to music at loud volumes.” *Id.* Thus, the Ninth Circuit concluded the 14 Birdsong “plaintiffs’ alleged injury in fact [was] premised on the loss of a ‘safety’ benefit 15 that was not part of the benefit of the bargain to begin with[]” and, thus, did not satisfy 16 Article III standing requirements. *Id.* 17 In McGee, the plaintiff alleged that she had purchased defendant’s popcorn believing 18 it contained only safe and healthy ingredients, but later discovered it contained partially 19 hydrogenated oil, a source of carcinogenic trans fat. 982 F.3d at 700. Like the plaintiffs 20 in Birdsong, the McGee plaintiff alleged standing under, *inter alia*, a benefit of the bargain 21 theory. Relying on Birdsong, the Ninth Circuit found the McGee plaintiff also lacked 22 standing. It held: 23 McGee does not contend that [defendant] made any representation about [the popcorn’s] safety. Although she may have assumed that [the popcorn] 24 contained only safe and healthy ingredients, her assumptions were not 25 included in the bargain, particularly given the labeling disclosure that the product contained artificial trans fat. Thus, even if those expectations were 26 not met, she has not alleged that she was denied the benefit of the bargain. 27 4 Although Defendants do not cite directly to Birdsong, they rely heavily upon McGee, which itself 28 1

2 *Id.* at 706.

3 Together, Birdsong and McGee stand for a simple legal premise: where a plaintiff 4 seeks to allege an injury-in-fact arising from the purchase of a purportedly unsafe consumer 5 item, he or she is precluded from doing so based upon a “benefit of the bargain” theory 6 where (1) there is no identifiable misrepresentation concerning the purported benefit of 7 which the plaintiff was allegedly deprived and (2) the product’s labeling or packaging 8 discloses the alleged benefit is not part of the bargain. 9 This Court finds Birdsong and McGee doom Solis’ benefit-of-the-bargain theory. 10 Just as in Birdsong and McGee, Solis alleges the Product she received lacked a “safety” 11 benefit for which she never bargained in the first instance. While Solis claims the Product’s 12 label represents the cosmetic is “dermatologically tested” and “suitable for sensitive skin,” 13 Solis simply fails to draw a cogent nexus between those statements and her belief the 14 Product she purchased was PFAS-free. There is an even weaker link between the 15 statements Solis identified in Defendants’ online marketing materials and the purported 16 safety benefit Solis believed she had bargained for but did not receive. Those statements 17 are far too generalized to reasonably be construed as representations about the Product’s 18 PFAS content. *Cf. Estrada*, 2015 WL 1440466, at *4 (concluding “general safety 19 statements on both of [d]efendants’ websites” lacked “sufficient specificity to substantiate 20 an injury”). And the statement in Coty’s investor report that, “In the U.S., Covergirl 21 continues to show that the brand is on a sustainable path of improvement and growth as it 22 has grown and maintained share in 6 of the last 9 months since the new brand equity was 23 launched” (see *Am. Compl.* ¶ 29), clearly concerns Defendants’

business performance, not 24 the safety and sustainability of Defendants’ products. 25 Moreover, as Birdsong and McGee instruct, Solis is not free to ignore the ingredient 26 list on the Product’s label. See also *Cheslow v. Ghirardelli Chocolate Co.*, 445 F. Supp. 27 3d 8, 20 (N.D. Cal. 2020) (“[W]here the actual ingredients are disclosed, a plaintiff may 28 not ignore the ingredient list.”) (collecting authorities). Indeed, Solis expressly alleges (1) 1 the Product’s label expressly discloses it contains PFAS because it lists PTFE—a type of 2 PFAS—as one of its main ingredients and (2) she reviewed the Product’s label prior to 3 purchase. (Am. Compl. ¶¶ 13 (alleging Solis reviewed the Product’s label), 28 (excerpting 4 images of Product’s label), 46–48 (alleging PTFE is a PFAS)). 5 Simply put, Solis avers she purchased the Product based on her belief it was PFAS- 6 free and, thus, “safe” and “sustainable.” (See, e.g., Am. Compl. ¶ 62 (“Defendants conduct 7 deceived Plaintiff . . . into believing the Product is safe and sustainable, when it is not.”).) 8 But it is clear from the Product’s label that a PFAS-free cosmetic powder was not part of 9 the benefit of the bargain and, thus, Solis’ belief was mistaken. Because Solis cannot 10 identify a misrepresentation in Defendants’ marketing materials or allege the Product was 11 mislabeled, this case is easily distinguishable from those she cites, in which this Court’s 12 sister tribunals found valid benefit-of-the-bargain theories. See *Hinojos v. Kohl’s Corp.*, 13 718 F.3d 1098, 1104 (9th Cir. 2013) (holding plaintiff who purchased from defendant 14 department store items for prices advertised as “discounted” but that were actually the 15 “original” prices suffered a concrete economic injury under the benefit-of-the-bargain 16 theory of standing); *Berke v. Whole Foods Mkt., Inc.* No. CV 19-7471 PSG (KSx), 2020 17 WL 5802370, at *7 (C.D. Cal. Sept. 18, 2020) (distinguishing facts in case at hand from 18 Birdsong on basis that plaintiff adequately alleged defendant had engaged in “false or 19 misleading advertising”). 20 Accordingly, this Court finds Birdsong and McGee preclude Solis from invoking the 21 benefit-of-the-bargain theory to demonstrate a concrete economic injury for Article III 22 standing purposes. 23 2. Overpayment Theory 24 In addition to the benefit-of-the-bargain theory, the parties also appear to agree Solis 25 invokes an overpayment theory of Article III standing. The Ninth Circuit has consistently 26 recognized a concrete economic injury lies where the plaintiff alleges he or she “paid more 27 for a product than [he or she] otherwise would have paid, or bought it when [he or she] 28 otherwise would not have done so.” *Hinojos*, 718 F.3d at 1104; see *McGee*, 982 F.3d at 1 707 (confirming the “overpayment” theory of Article III standing is a viable one in the 2 Ninth Circuit). 3 It is well-established a plaintiff can demonstrate a concrete economic injury by 4 showing he or she was induced into overpaying or purchasing a product he or she otherwise 5 would not have, based upon either a defendant’s (1) false representation and/or (2) 6 actionable non-disclosure. See *Mazzo v. Am. Honda Motor Co.*, 666 F.3d 581, 595 (9th 7 Cir. 2012) (“Plaintiffs contend that class members paid more for the [braking system] than 8 they otherwise would have paid, or bought it when they otherwise would not have done so, 9 because Honda made deceptive claims and failed to disclose the system’s limitations. To 10 the extent that class members were relieved of their money by Honda’s deceptive 11 conduct—as

Plaintiffs alleged—they have suffered an ‘injury in fact.’”); *Maya*, 658 F.3d 12 at 1069 (“Plaintiffs claim that, as a result of defendants’ actions, they paid more for their 13 homes than the homes were worth at the time of sale. Relatedly, they claim that they would 14 not have purchased their homes had defendants made the disclosures allegedly required by 15 law. We agree with plaintiffs that these are actual and concrete economic injuries.”). 16 However, in *McGee*, the Ninth Circuit alluded to a possible third subcategory of the 17 overpayment theory. See 982 F.3d at 707. There, the Ninth Circuit left open the possibility 18 that, by merely showing the item “contain[s] a hidden defect,” a plaintiff may adequately 19 allege economic injury under the overpayment theory in lieu of an identifiable 20 misrepresentation or actionable omission. *Id.* (observing that *Birdsong* did not explicitly 21 reject the premise a plaintiff can demonstrate a concrete economic injury by simply 22 alleging he or she purchased a product with a hidden defect); see also *In re Mattel, Inc.*, 23 588 F. Supp. 2d 1111, 1117 (C.D. Cal. 2008) (“Plaintiffs also properly allege damages for 24 the purchase price of the toys that allegedly were defective and not fit for their represented 25 use. Plaintiff’s claim is straightforward—they alleged that they purchased toys that were 26 unsafe and unusable and should get their money back.”). 27 Reading the Amended Complaint in a light most favorable to Solis, it appears she 28 seeks to invoke all three sub-theories. 1 Misrepresentation: Because Solis’ benefit-of-the-bargain theory is deficient, so is 2 this variant of her overpayment theory. An identifiable, affirmative misrepresentation is 3 the lynchpin of both theories. See *McGee*, 982 F.3d at 707 (rejecting plaintiff’s 4 overpayment theory based upon misrepresentation and alluding to its benefit-of-the- 5 bargain analysis). As this Court already concluded, Solis fails to identify a single false 6 representation about the Product’s safety or grapple with the Product’s PTFE disclosure. 7 Thus, the cases to which Solis cites are inapposite. See *Zeiger*, 304 F. Supp. 3d at 842, 846 8 (finding valid overpayment theory where product label contained statements such as 9 “Unrivaled Quality Standards” and “Optimal Health” but nowhere disclosed the presence 10 of harmful lead, arsenic, and BPA); *Coffelt v. Kroger Co.*, No. EDCV 16-1471 JGB (KKx), 11 2017 WL 10543343, at *5 (C.D. Cal. Jan. 27, 2017) (finding valid overpayment theory 12 where defendant’s produce was labeled “Packed at Peak of Freshness” but were 13 contaminated with a dangerous bacterial called “Listeria”). Accordingly, Solis fails to 14 demonstrate the facts alleged in her Amended Complaint give rise to an overpayment 15 theory of standing predicated upon a misrepresentation of Defendants. 16 Omission: Solis avers “Defendants’ Article III standing argument fails to address 17 [her] claims premised on Defendants’ omission and concealment.” (Opp’n at 10.) But, 18 unlike the cases Solis cites, the Product’s label, here, discloses the very hazard Solis alleges 19 Defendants had a continuing duty to disclose. See *Galgetta v. Walmart, Inc.*, No. 3:22-cv- 20 3757-WHO, 2022 WL 17812924, at *1 (N.D. Cal. Dec. 19, 2022) (alleging Walmart brand 21 spices failed to disclose the possibility they contained “heavy metals” that are dangerous 22 to humans). Indeed, the Court need not look beyond the allegations in the Amended 23 Complaint to conclude Solis fails to identify an actionable nondisclosure. She alleges that 24 all PFAS are harmful, that PTFE is a type of PFAS, and that the Product’s label lists PTFE 25 as one

of the Product’s ingredients. (Am. Compl. ¶¶ 28, 46–48.) 26 In an apparent effort to harmonize her Amended Complaint with her claim 27 Defendants omitted and concealed the Product’s PFAS content, Solis argues Defendants’ 28 PTFE disclosure is both incomplete and insufficient. Alluding to the scientific limitations 1 of PFAS screening, Solis avers “the exact source of organofluorine cannot be determined 2 to solely come from [PTFE].” (Am. Compl. ¶ 48.) From this fact, Solis asks the Court to 3 infer there are other sources and types of PFAS in the Product. While this Court is mindful 4 of Solis’ claim that it is not yet scientifically feasible to screen for discrete PFAS chemicals 5 (see id. ¶¶ 4, 48), this is not a viable method of demonstrating Article III standing. Even 6 the lenient standard that controls this Motion prohibits this Court from making unwarranted 7 inferences based on conclusory allegations unsupported by fact.⁵ See *Baur v. Veneman*, 8 352 F.3d 625, 636–37 (2d Cir. 2003) (explaining that “[w]hile the standard for reviewing 9 standing at the pleading stage is lenient,” a plaintiff may not “rely solely on conclusory 10 allegations of injury or ask the court to draw unwarranted inferences in order to find 11 standing”); cf. *Meaunrit v. Pinnacle Foods Grp., LLC*, No. C 09-04555 CW, 2010 WL 12 1838715, at *3 (N.D. Cal. May 5, 2010) (holding the mere allegation a product “might 13 contain harmful pathogens” was a “speculative, hypothetical injury”); accord *Blackburn 14 v. Champions Petfoods USA, Inc.*, No. 1:18-cv0038, 2021 WL 9682169, at *2 (S.D. Iowa 15 Aug. 12, 2021) (similar).

16 Solis also argues in her Opposition that, by merely listing PTFE as an ingredient, 17 Defendants fail to adequately disclose to consumers the Product contains PFAS. (Opp’n 18 at 19 (“Defendants assume that because the acronym ‘PTFE’ is disclosed on the ingredient 19 list, that consumers like Plaintiff would automatically understand that PTFE is a type of 20 PFAS.”).) But nowhere in the Amended Complaint does Solis make this straightforward 21 allegation. Instead, the Amended Complaint largely grapples with Defendants’ PTFE 22 disclosure by glossing over its existence. (See, e.g., Am. Compl. ¶ 62 (alleging Defendants 23 24 5 Even if this Court were to find the Amended Complaint permits a reasonable inference the 25 Product contains PFAS from another source (it does not), Solis still fails to allege what use a second disclosure would serve beyond the message conspicuously provided in the Product’s ingredient list. Solis 26 alleges she was deceived into believing she had purchased a PFAS-free cosmetic item. But the Product’s ingredient list—as seen in Paragraph 28 in the Amended Complaint—should have dispossessed a 27 reasonable consumer of that belief. Hence, standing alone, the disclosure Solis appears to claim Defendants should have made is a superfluous one. 28 1 “omitted and concealed that the Product contains substances—organic fluorine which is 2 indicative of PFAS—that are widely known to have significant health repercussions”).) 3 Simply put, even construing the Amended Complaint in the light most favorable to 4 Solis, her allegations do not support finding Defendants made an actionable omission about 5 the Product’s safety or PFAS contents. Rather, the Amended Complaint bears the indicia 6 of a pleading that attempts to artfully plead around an express disclosure of the very 7 contaminant the plaintiff alleges defendants had a duty to divulge. 8

Hidden Defect: Finally, reading Solis’ papers charitably, she appears to seek to 9 invoke an overpayment theory on the basis of a hidden defect, as conceptualized by the 10 Ninth Circuit in McGee. There, the Ninth Circuit held that the McGee plaintiff failed to 11 plead a “hidden defect”—that defendant’s popcorn contained trans fats—because the 12 product’s label disclosed trans fats and because the risk of health complications associated 13 with trans fats were well-established at the time of the complaint. 982 F.3d at 709–10. The 14 same is true here: the Product’s label discloses that a PFAS chemical is one of the item’s 15 ingredients (see Am. Compl. ¶¶ 28, 46–48) and, as Solis herself alleges, PFAS’ 16 carcinogenic and toxic qualities are “widely known” (id. ¶ 62). Accordingly, this third 17 strand of Solis’ overpayment theory fails, too. 18 Therefore, Solis’ Amended Complaint must be dismissed under Rule 12(b)(1) for 19 lack of standing. 20 B. Particularized Injury-in-Fact 21 Failure to allege a concrete and particularized injury in fact precludes a plaintiff from 22 demonstrating Article III standing. See *Spokeo*, 578 U.S. at 340 (observing the Supreme 23 Court has “made it clear time and time again that an injury in fact must be both concrete 24 and particularized”) (collecting authorities). Thus, this Court need not delve into 25 Defendants’ argument that Solis fails to allege a particularized economic injury. Yet it 26 does so in the interests of completeness and streamlining the issues, should Solis attempt 27 to cure the deficiencies identified above and should Defendants again seek to dismiss Solis’ 28 prospective second amended pleading under Rule 12(b)(1). 1 “Art[icle] III requires the party who invokes the court’s authority to ‘show that [s]he 2 personally suffered some actual or threatened injury as a result of the putatively illegal 3 conduct of the defendant[.]’” *Valley Forge Christian Coll. v. Ams. United for Separation 4 of Church & State, Inc.*, 454 U.S. 464, 472 (1982). Unless an injury affects the “plaintiff 5 in a personal and individual way,” it is not “particularized” and, thus, cannot form the basis 6 for Article III standing. *Spokeo*, 578 U.S. at 339 (quoting *Lujan*, 504 U.S. at 560 n.1). 7 “The ‘gist of the question of standing’ is whether the party seeking relief has ‘alleged 8 a personal stake in the outcome of the controversy as to assure that concrete adverseness . 9 . . upon which the court so largely depends for illumination of difficult [legal] questions.’” 10 *Flast v. Cohen*, 392 U.S. 83, 99 (1968) (quoting *Baker v. Carr*, 369 U.S. 186, 205 (1962)). 11 Indeed, Article III standing doctrine “derives from the interests in ensuring that parties 12 have the proper incentives to litigate cases.” *Lee v. Am. Nat’l Ins. Co.*, 260 F.3d 997, 1005 13 (9th Cir. 2001). With this doctrinal basis in mind, to demonstrate a particularized economic 14 injury, here, Solis must proffer allegations that enable this Court to infer she purchased a 15 unit of Product contaminated with PFAS. Cf. *Wallace v. ConAgra Foods, Inc.*, 747 F.3d 16 1025, 1030 (8th Cir. 2014) (“In the context of defective products, ‘it is not enough for a 17 plaintiff to allege that a product line contains a defect or that a product is at risk for 18 manifesting this defect; rather, the plaintiffs must allege that their product actually 19 exhibited the alleged defect.’” (quoting *In re Zurn Plumbing Prods. Liab. Litig.*, 644 F.3d 20 604, 616 (8th Cir. 2011)) (emphasis in original)); see also *Lewis v. Casey*, 518 U.S. 343, 21 357 (1996) (“[N]amed plaintiffs who represent a class ‘must allege and show that they 22 personally have been injured, not that injury has been suffered

by other, unidentified 23 members of the class to which they belong and which they purport to represent.” (quoting 24 *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 40 n.20 (1976))). 25 In the Amended Complaint, Solis alleges Toxin Free USA screened a sample of the 26 Product at some unspecified time prior to July 2021, several months before Solis purchased 27 her own unit of Product. (Am. Compl. ¶¶ 6, 31.) Toxin Free USA detected 6,242 parts per 28 million of organic fluorine in the tested sample. (Id. ¶ 6.) However, Solis does not allege 1 she tested—or knows the precise chemical composition of—the unit of Product she 2 purchased in December 2021.6 Defendants contend the absence of such allegations is fatal. 3 (Mem. at 12–13 (“Plaintiff has evidently not undertaken even a basic investigation of the 4 chemical composition of any Product unit she purchased. She has not screened a unit of 5 the Product for fluorine or organic fluorine[.]”).) In support, Defendants cite three cases 6 for the legal premise that, to defeat a Rule 12(b)(1) facial challenge in an economic injury 7 case involving the purchase of a purportedly adulterated product, a plaintiff must expressly 8 allege the specific item he or she purchased is, in fact, adulterated. (Mem. at 12–13 (citing 9 *Schloegel v. Edgewell Personal Care Co.*, No. 4:21-CV-0631-DGK, 2022 WL 808694, at 10 *1 (W.D. Mo. Mar. 16, 20122); *Doss v. Gen. Mills, Inc.*, No. 18-61924-CIV, 2019 WL 11 7946028, at *2–3 (S.D. Fla. June 14, 2019), *aff’d*, 816 F. App’x 312 (11th Cir. 2020); *Pels 12 v. Keurig Dr. Pepper, Inc.*, No. 19-CV-3052-SI, 2019 WL 5813422, at *1 (N.D. Cal. Nov. 13 7, 2019))).) 14 To the extent those precedents might be fairly interpreted to support Defendants’ 15 contention, this Court respectfully disagrees Solis must, as a matter of law, proffer a 16 formulaic recitation that the specific unit of Product she purchased contains PFAS. 17 Defendants do not cite to any Ninth Circuit decision that goes so far. And that premise is 18 incongruent with the standard under which Rule 12(b)(1) facial challenges are adjudicated: 19 district courts must accept the allegations of the complaint as true and draw all reasonable 20 inferences from those allegations in favor of the plaintiff. See *Doe v. Holly*, 557 F.3d 1066, 21 22 6 Alongside her Opposition, Solis proffers a declaration from her counsel, Sean L. Litteral, attaching a copy “of the fluorine and organic fluorine testing results by Galbraith Laboratories, showing 23 7600ppm of Fluorine and 7600ppm of Organic Fluorine.” (Litteral Decl., Ex. 1 to Opp’n, ECF No. 20-1.) The Galbraith’s report indicates that the results pertain to a sample of “CoverGirl TruBlend Pressed 24 Powder” that was screened on May 11, 2022. (Lab Report, Ex. A to Litteral Decl., ECF No. 20-1.) In her 25 Opposition, Solis states that she commissioned Galbraith’s report. (Opp’n at 13–14.) But nowhere in the Litteral Declaration or the Galbraith report does it indicate the test results pertain to the unit of Product 26 Solis purchased in December 2021. See *George v. Grossmont Cuyamaca Cmty. Coll. Dist. Board of Governors*, 22-cv-0424-BAS-DDL, 2022 WL 18330467, at *10 (S.D. Cal. Nov. 29, 2022) (“[S]tatements 27 made in briefs neither constitute well-plead[ed] allegations entitled to the presumption of truth nor admissible evidence[.]”). Indeed, there is no attestation suggesting Solis purchased the unit of Product 28 1 1073 (9th Cir. 2009) (per curiam) (citing *Wolfe v. Stankman*, 392 F.3d 358, 362 (9th Cir. 2 2004)), cert denied, 561 U.S. 1024 (2010). As the Supreme Court opined in *Lujan v. 3 Defenders of Wildlife*, “At the

pleading stage, general factual allegations of injury resulting 4 from the defendant's conduct may suffice, for on a motion to dismiss we 'presum[e] that 5 the general allegations embrace those specific facts that are necessary to support the 6 claim.'" 504 U.S. at 562 (quoting *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 889 (1990)). 7 Thus, to survive Defendants' facial challenge, Solis need not explicitly allege the 8 unit of Product she purchased actually contained PFAS or that all units of the Product 9 contain PFAS, but may simply aver facts from which this Court can make such reasonable 10 inferences. The Amended Complaint permits just that. Unlike in *Schloegel and Doss*, 11 where the plaintiffs hedged their bets by averring "some" of the units of product at issue 12 had been adulterated, Solis repeatedly alleges that the CoverGirl's TruBlend Pressed 13 Powder, as a product line, contains PFAS. (See Am. Compl. ¶¶ 10, 51, 62, 68, 139, 247.) 14 Solis also alleges the Product's marketing and advertising "was uniform and pervasive." 15 (*Id.* ¶ 64; see also *id.* ¶ 138.) This would include the Product's labeling, which, as reflected 16 in the image for which Defendants sought—and this Court granted—judicial notice, 17 expressly discloses the Product contains PTFE. These allegations distinguish the Amended 18 Complaint from the pleadings in *Schloegel, Doss, and Pels*, because they contain facts that 19 lend easily to the inference Solis purchased a unit of the Product with PFAS. Cf. *Rice- 20 Sherman v. Big Heart Pet Brands, Inc.*, Case No. 19-cv-3613-WHO, 2020 WL 1245130, 21 at *7 ("A fair reading of their FAC shows that they allege that all Nature's Food recipe 22 products are falsely advertised. Nowhere in the FAC do plaintiffs allude that some of 23 Nature's Recipe Food is grain-free but that a subset of the product is not.") (emphasis 24 added); *Von Slomski v. Hain Celestial Grp., Inc.*, No. SACV131757AGANX, 2014 WL 25 12771116, at *5 (C.D. Cal. June 10, 2014) (finding allegations sufficient for standing 26 because "Plaintiffs broadly allege[d] that the teas contain pesticides, rather than merely 27 alleging that some of the packages contain pesticides"). 28 1 Accordingly, the Court is unpersuaded by this strand of Defendants' Rule 12(b)(1) 2 argument. 3 *

* * * 4 Based on the foregoing, the Court finds Solis does not sufficiently allege she suffered 5 } a concrete economic injury arising from her December 2021 purchase of the Product. Nor 6 Solis assert she suffered any other injury-in-fact that would supply her with Article 7 ||III standing to pursue her claims. Accordingly, she fails to satisfy her burden of 8 || demonstrating the "triad of injury in fact, causation and redressability," which "constitutes 9 ||the core of Article III's case-or-controversy requirement," and, thus, her Amended 10 } Complaint warrants dismissal under Rule 12(b)(1). See *Steel Co. v. Citizens for Better 11 || Anv't*, 523 U.S. 83, 103 (1998).

12 CONCLUSION

13 For the reasons stated above, the Court GRANTS Defendants' Motion to dismiss 14 Amended Complaint pursuant to Rule 12(b)(1) for lack of subject-matter jurisdiction. 15 || That dismissal is WITHOUT PREJUDICE to Solis filing a corrective pleading that 16 || resolves the deficiencies delineated herein. If Solis wishes to do so, she must file her 17 || Second Amended Complaint on or before March 31, 2023. 18 IT IS SO ORDERED. 19 || DATED: March 7, 2023 (itl A (Liphan 6 20 United States District Judge 21 22 23 24 25 26 27 28 ~922

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