NOT FOR PUBLICATION

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JASON DECARLO, individually and on behalf of all others similarly situated, Plaintiff-Appellant, v. COSTCO WHOLESALE CORPORATION, a Washington Corporation and MBNR, INC., a New Mexico corporation, Defendants-Appellees.	No. 16-56602 D.C. No. 3:14-cv-00202-JAH-BLM MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
John A. Houston, District Judge, Presiding

Argued and Submitted July 9, 2018
Pasadena, California

Before: PAEZ, FISHER,** and CHRISTEN, Circuit Judges.

Plaintiff-Appellant Jason DeCarlo ("DeCarlo") appeals the dismissal with prejudice of his suit against Defendants-Appellees Costco Wholesale Corporation

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

** The Honorable D. Michael Fisher, United States Circuit Judge for the U.S. Court of Appeals for the Third Circuit, sitting by designation.

("Costco") and MBNR, Inc ("MBNR"). We reverse in part, vacate in part, and remand for further proceedings.

1. We first consider whether DeCarlo has sufficiently alleged Article III standing, that is, whether he "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). We review de novo the district court's determination of this issue. *Maya v. Centex Corp.*, 658 F.3d 1060, 1067 (9th Cir. 2011).

The district court correctly concluded that DeCarlo lacks Article III standing with respect to his claims under the "unlawful" prong of California's Unfair Competition Law ("UCL"), because the harm that DeCarlo alleges is not fairly traceable to the mere fact that Costco and MBNR allegedly violated certain provisions of California law regulating their business relationships. But with "no jurisdiction to reach the merits," the district court "had no power to dismiss [these claims] with prejudice." *Hampton v. Pac. Inv. Mgmt. Co. LLC*, 869 F.3d 844, 847 (9th Cir. 2017). We therefore vacate the judgment as to these claims and remand with instructions to dismiss them without prejudice pursuant to Federal Rule of Civil Procedure 12(b)(1).

As to DeCarlo's claims based on the allegation that it was misleading to market Costco-based optometrists as independent—specifically, his claims under

California's False Advertising Law ("FAL"), Consumer Legal Remedies Act ("CLRA"), as well as the "unfair" and "fraudulent" prongs of the UCL—the district court erred in concluding that DeCarlo lacks Article III standing. Someone who alleges that he or she "paid more" for something than he or she "otherwise would have paid" or "bought [something] when they otherwise would not have done so" has "suffered an Article III injury in fact." *Hinojos v. Kohl's Corp.*, 718 F.3d 1098, 1104 n.3 (9th Cir. 2013) (quoting *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 595 (9th Cir. 2012)); *accord Maya*, 658 F.3d at 1069. DeCarlo has alleged that he was injured in this way. That alleged injury, moreover, is not speculative and is traceable to Costco and MBNR because DeCarlo adequately alleged that his optometrist was not independent even though Costco and MBNR advertised that he was. DeCarlo's alleged injury is also redressable, as he could be compensated for the difference between how much he paid for the eye exam and how much he valued one from an optometrist who was not independent.

2. We next consider whether DeCarlo has sufficiently alleged statutory standing under California law with respect to his misrepresentation claims. We conclude that he has.

Under the UCL and the FAL, "the quantum of lost money or property necessary to show standing" is the same as that required to show Article III standing. *Van Patten v. Vertical Fitness Grp., LLC*, 847 F.3d 1037, 1048–49 (9th

Cir. 2017) (quoting *Kwikset Corp. v. Superior Court*, 246 P.3d 877, 886 (Cal. 2011)). And much like the plaintiffs in *Kwikset Corp. v. Superior Court*, 246 P.3d 877 (Cal. 2011), who "bargained for locksets that were made in the United States" but "got ones that were not" made in the United States, *id.* at 892, DeCarlo bargained for an eye exam performed by an independent optometrist but got one performed by an optometrist who allegedly was not independent. Furthermore, because the California legislature chose to regulate the independence of optometrists, and because Costco allegedly marketed Costco-based optometrists as independent, at this stage we can conclude only that the independence of the optometrist was a material part of DeCarlo's bargain.[1] *See id.* at 892 (applying similar reasoning and observing that materiality should rarely be decided at the pleadings stage).

DeCarlo has also satisfied the UCL's and the FAL's causation requirements. That is because "[p]leading that one would not have otherwise purchased the product but for the [defendants' alleged misconduct] . . . satisfies the consumer's

[1] *Birdsong v. Apple, Inc.*, 590 F.3d 955 (9th Cir. 2009), does not counsel otherwise. There, the plaintiffs admitted that the defendant "provided a warning against listening to music at loud volumes," rather than representing that doing so was safe. *Id.* at 961. That is why safety from hearing loss "was not part of the bargain to begin with." *Id.* This case is precisely the opposite. Again, Costco allegedly marketed Costco-based optometrists as independent, making independence part of the bargain.

obligation to plead a causal link between the advertising and the alleged economic injury." *Hinojos*, 718 F.3d at 1104 n.5.

Based on the foregoing, it follows *a fortiori* that DeCarlo has statutory standing under the CLRA as well. *See id.* at 1108.

3. We remand for the district court to consider in the first instance whether DeCarlo has plausibly stated a claim for relief under Federal Rule of Civil Procedure 12(b)(6), and for further proceedings not inconsistent with this disposition.[2]

REVERSED in part, VACATED in part, and REMANDED.

[2] We express no view on the argument that DeCarlo's CLRA claims fail as a matter of law due to the CLRA's reference to "any person in a transaction," Cal. Civ. Code § 1770(a), and—with respect to the claim against MBNR—DeCarlo's alleged failure to send a notice-and-demand letter.

United States Court of Appeals for the Ninth Circuit

Office of the Clerk
95 Seventh Street
San Francisco, CA 94103

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)
Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
  - ► A material point of fact or law was overlooked in the decision;
  - ► A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
  - ► An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ► Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ► The proceeding involves a question of exceptional importance; or
- ► The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms.*
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms.*

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
  - ► Thomson Reuters; 610 Opperman Drive; PO Box 64526; Eagan, MN 55123 (Attn: Jean Green, Senior Publications Coordinator);
  - ► and electronically file a copy of the letter via the appellate ECF system by using "File Correspondence to Court," or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

Form 10. Bill of Costs .....***(Rev. 12-1-09)***

United States Court of Appeals for the Ninth Circuit

BILL OF COSTS

This form is available as a fillable version at:
http://cdn.ca9.uscourts.gov/datastore/uploads/forms/Form%2010%20-%20Bill%20of%20Costs.pdf.

Note: If you wish to file a bill of costs, it MUST be submitted on this form and filed, with the clerk, with proof of service, within 14 days of the date of entry of judgment, and in accordance with 9th Circuit Rule 39-1. A late bill of costs must be accompanied by a motion showing good cause. Please refer to FRAP 39, 28 U.S.C. § 1920, and 9th Circuit Rule 39-1 when preparing your bill of costs.

_____ v. _____ 9th Cir. No. _____

The Clerk is requested to tax the following costs against: _____

Cost Taxable under FRAP 39, 28 U.S.C. § 1920, 9th Cir. R. 39-1	**REQUESTED** *(Each Column Must Be Completed)*				**ALLOWED** *(To Be Completed by the Clerk)*			
	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST
Excerpt of Record			$	$			$	$
Opening Brief			$	$			$	$
Answering Brief			$	$			$	$
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* *Costs per page*: May not exceed .10 or actual cost, whichever is less. 9th Circuit Rule 39-1.

** *Other*: Any other requests must be accompanied by a statement explaining why the item(s) should be taxed pursuant to 9th Circuit Rule 39-1. Additional items without such supporting statements will not be considered.

Attorneys' fees **cannot** be requested on this form.

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Form 10. Bill of Costs - *Continued*

I, _____ , swear under penalty of perjury that the services for which costs are taxed were actually and necessarily performed, and that the requested costs were actually expended as listed.

Signature _____

("s/" plus attorney's name if submitted electronically)

Date _____

Name of Counsel: _____

Attorney for: _____

(To Be Completed by the Clerk)

Date _____ Costs are taxed in the amount of $ _____

Clerk of Court

By: _____ , Deputy Clerk