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UNITED STATES DISTRICT COURT

NOTHERN DISTRICT OF CALIFORNIA

ELENA LAUCHUNG-NACARINO, as an individual, on behalf of herself, the general public and those similarly situated,

Plaintiff,

v.

HOSTESS BRANDS, INC; and HOSTESS BRANDS, LLC,

Defendants.

Case No. 3:20-cv-05971-SK

DEFENDANT HOSTESS BRANDS, LLC AND HOSTESS BRANDS, INC.'S NOTICE OF MOTION AND MOTION TO DISMISS PLAINTIFF'S COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES

NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR ATTORNEYS:

PLEASE TAKE NOTICE that on February 22, 2021 at 9:30 a.m. or as soon thereafter as the parties may be heard, in Courtroom C, 15th Floor of the above-entitled court, located at the San Francisco Courthouse at 450 Golden Gate Avenue, San Francisco, California 94102, before the Honorable Sallie Kim, defendant Hostess Brands, LLC and Hostess Brands, Inc. (collectively "Hostess")[1], will and hereby does move for an order granting Hostess's motion to dismiss Plaintiff's complaint. Hostess moves pursuant to Federal Rules of Civil Procedure 8, 9(b), 12(b)(1) and 12(b)(6), based on the following grounds:

1. Plaintiff lacks statutory standing under Cal. Bus. & Prof. Code §§ 17200, *et seq.*; Cal. Bus. & Prof. Code §§ 17500, *et seq.*; and Cal. Civ. Code §§ 1750, *et seq.*; because she fails to plausibly allege she suffered any economic injury in reliance on the labeling.
2. Plaintiff fails to plausibly allege that the labeling is false or misleading to a reasonable consumer.
3. Plaintiff has not adequately pleaded her fraud-based claims.
4. The economic-loss rule bars Plaintiff's common-law fraud claim to the extent it is not based on affirmative misrepresentations.
5. Plaintiff has not alleged any basis for equitable relief.

This motion is based on this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities in Support thereof, the declaration of Naoki Kaneko and exhibits attached thereto, all other pleadings and papers on file in this action, and such argument as may be presented to the Court at the time of the hearing.

[1] This motion to dismiss was re-filed with modifications to adapt it to be filed on behalf of Hostess Brands, Inc. as well. Dkt. No. 22.

Dated: December 1, 2020

SHOOK, HARDY & BACON L.L.P.

By: */s/ Naoki S. Kaneko*
Naoki S. Kaneko

Attorneys for Defendants
Hostess Brands, LLC and
Hostess Brands, INC.

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MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

Elena Lauchung-Nacarino alleges that Hostess[2] led her to believe its "Carrot Cake mini donuts" sold under the donettes® brand ("donettes") contain "a substantial amount of real carrot," not simply artificial carrot flavoring. But she does not allege that the labels made any such claim or even showed an image of a real carrot, and in fact she concedes that the ingredient list *shows* there is no real carrot in the product. Her allegation that she bought the product because she "prefers desserts that contain real fruits or vegetables" is also undermined by her concession that she first bought the donettes in 2019, when the front of the labels read "Naturally and Artificially Flavored Carrot Cake mini donuts." In short, a simple review of the objective information on the front packaging, along with the ingredient list, would have provided Plaintiff with all the information she needed to dispel any belief that the donettes contained "a substantial amount of real carrot" and no artificial flavoring.

Despite this, Plaintiff alleges the labeling of the donettes is misleading and, seeking to represent a California class, accuses Hostess of violating the CLRA, UCL, and FAL, as well as committing common-law fraud. She seeks compensatory and punitive damages as well as equitable relief. The Court should dismiss her complaint.

First, Plaintiff lacks standing because she has not plausibly alleged she suffered any injury in reliance on the alleged misrepresentations or omissions. Her complaint is based on the labels as they appeared for a short time in 2020, when the "Naturally and Artificially Flavored" disclaimer was not present. But it *was* present in 2019, when she concedes she started buying the donuts. Its later absence could therefore not have misled her.

Second, Plaintiff has not adequately alleged her fraud claims, under the plausibility standard of Rule 8 as well as the Rule 9(b) particularity standard.

Third, even if Plaintiff had adequately alleged a fraud claim, the economic-loss rule would bar her claim for common-law fraud to the extent it is not based on affirmative representations.

Fourth, Plaintiff has no standing to pursue injunctive relief.

[2] "Hostess" refers to Hostess Brands, LLC and Hostess Brands, Inc. collectively.

Finally, Plaintiff has not alleged facts showing that she lacks an adequate remedy at law, and so her claims for equitable relief fail. For that reason as well, the Court should dismiss the complaint.

BACKGROUND

Plaintiff claims she is health-conscious and "deliberately seeks out desserts that are healthier than typical desserts." Compl. ¶ 64. She first bought a package of Hostess® Carrot Cake mini donuts in 2019 from a Safeway store in San Francisco. *Id*. ¶ 65. Ms. Lauchung-Nacarino says she saw the "Carrot Cake" description on the front of the package and believed this meant that the donettes contained carrot cake and therefore a substantial amount of carrot. *Id*. However, the front and side panels of the packaging in 2019, as shown below, described the product as "NATURALLY AND ARTIFICIALLY FLAVORED Carrot Cake mini donuts":

Kaneko Decl. ¶ 2, Ex. A (2019 package).[3] Plaintiff also admits that "the ingredients panel of the

[3] The Court can consider the relevant labeling because it was incorporated by reference into the complaint. *Coto Settlement v. Eisenberg*, 593 F.3d 1031, 1038 (9th Cir. 2010) ("We have extended the doctrine of incorporation by reference to consider documents in situations where the complaint necessarily relies upon a document or the contents of the document are alleged in a complaint, and the document's authenticity is not in question and there are no disputed issues as to the document's relevance."). "The defendant may offer such a document, and the district court may treat such a document as part of the complaint, and thus may assume that its contents are true for purposes of a motion to dismiss under Rule 12(b)(6)." *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003). A court must review the actual advertising itself to determine if it is false or misleading. *See, e.g.*, *Macaspac v. Henkel Corp.*, No. 3:17-cv-01755, 2018 WL 2539595, at *6 (S.D. Cal. June 4, 2018) (Because the labels make it impossible for plaintiff to prove that a reasonable consumer was likely to be deceived, the case was dismissed). Separately, "in ruling on a 12(b)(1) jurisdictional challenge, a

product does not list carrots" and *does* say that the "product contains 'natural and artificial flavor." Compl. ¶ 37. This is true for both the 2019 package (as shown below on the left) and the 2020 package (as shown below on the right):


INGREDIENTS: SUGAR, ENRICHED FLOUR (WHEAT FLOUR, MALTED BARLEY FLOUR, NIACIN, FERROUS SULFATE OR REDUCED IRON, THIAMINE MONONITRATE, RIBOFLAVIN, FOLIC ACID), WATER, PALM OIL, COCONUT, TOASTED COCONUT, SOYBEAN OIL, CORN, GLYCERIN, NONFAT DRY MILK, DEFATTED SOY FLOUR, HONEY, WHEY, MODIFIED WHEAT STARCH, SODIUM ACID PYROPHOSPHATE, BAKING SODA, SODIUM ALUMINUM PHOSPHATE, EGG YOLK, SALT, CINNAMON, NATURAL AND ARTIFICIAL FLAVOR, PRESERVATIVE (SORBIC ACID, POTASSIUM SORBATE, SODIUM PROPIONATE, NATAMYCIN), DEXTROSE, MONO AND DIGLYCERIDES, DEXTRIN, SOY LECITHIN, CITRIC ACID, ENZYMES, KARAYA GUM, GUAR GUM, CELLULOSE GUM, COLOR (ANNATTO AND TURMERIC, TITANIUM DIOXIDE), YELLOW 5 LAKE, YELLOW 6 LAKE, RED 40 LAKE, BLUE 1 LAKE, AGAR. 524620
CONTAINS COCONUT, EGG, MILK, SOY, WHEAT.


INGREDIENTS: SUGAR, ENRICHED FLOUR (WHEAT FLOUR, MALTED BARLEY FLOUR, NIACIN, FERROUS SULFATE OR REDUCED IRON, THIAMINE MONONITRATE, RIBOFLAVIN, FOLIC ACID), WATER, PALM OIL, COCONUT, TOASTED COCONUT, SOYBEAN OIL, CONTAINS 2% OR LESS: CORN, GLYCERIN, NONFAT DRY MILK, DEFATTED SOY FLOUR, HONEY, WHEY, MODIFIED WHEAT STARCH, SODIUM ACID PYROPHOSPHATE, BAKING SODA, EGG YOLK, SODIUM ALUMINUM PHOSPHATE, SALT, CINNAMON, NATURAL AND ARTIFICIAL FLAVOR, PRESERVATIVE (SODIUM PROPIONATE, SORBIC ACID, POTASSIUM SORBATE, NATAMYCIN), DEXTROSE, MONO AND DIGLYCERIDES, DEXTRIN, SOY LECITHIN, CITRIC ACID, ENZYMES, KARAYA GUM, GUAR GUM, COLOR (FRUIT JUICE CONCENTRATE, ANNATTO AND TURMERIC, TITANIUM DIOXIDE), YELLOW 5 LAKE, YELLOW 6 LAKE, BLUE 1 LAKE, CELLULOSE GUM, AGAR.
CONTAINS COCONUT, EGG, MILK, SOY, WHEAT. 525434

Kaneko Decl. ¶¶ 2-3, Exs. A, B.

What seems to have prompted Plaintiff's lawsuit is that in 2020, the "naturally and artificially flavored" disclaimer was temporarily removed from the front packaging, so that it appeared as shown below:

Kaneko Decl. ¶ 3, Ex. B (2020 package). But as noted above, it *did* appear there in 2019, when

court may look beyond the complaint and consider extrinsic evidence." *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1141 n.5 (9th Cir. 2003); *see* Section I, V.B.

Plaintiff admits she began buying the product. Plaintiff does not allege she paid any more or less for the donettes in 2019 versus 2020.

Plaintiff also alleges the photograph of the donette on the front label, and her "observation" of the donettes through the transparent plastic packaging, also led her to believe that the product contained a substantial amount of real carrot. She does not explain why or how.

Plaintiff does not allege that the donettes lack a carrot-cake taste or flavor, or that she or anyone else found them unacceptable for that reason. In fact, she continued to buy the seasonal product[4] "dozens of times" after her initial purchase in 2019 through early 2020. Compl. ¶ 67. Plaintiff does not say why she stopped buying the donettes or how or when she learned that they do not contain a substantial amount of real carrot. She simply alleges that if she had known that was the case, she would not have bought the donettes or would have paid less for them. *Id.*

LEGAL STANDARD

Fed. R. Civ. Pro. 12(b)(1) allows a party to move to dismiss based on lack of subject matter jurisdiction. To invoke the jurisdiction of the federal courts, the threshold requirements of Article III of the Constitution must be satisfied by alleging an actual case or controversy. *City of L.A. v. Lyons*, 461 U.S. 95, 101 (1983). Article III requires: "(1) at least one named plaintiff suffered an injury in fact; (2) the injury is fairly traceable to the challenge conduct; and (3) likely to be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). The burden of establishing subject matter jurisdiction over an action is on the Plaintiff. *Ass'n of Med. Colls. v. U.S.*, 217 F.3d 770, 778-79 (9th Cir. 2000). "[I]n ruling on a 12(b)(1) jurisdictional challenge, a court may look beyond the complaint and consider extrinsic evidence." *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1141 n.5 (9th Cir. 2003).

To survive a motion to dismiss, a complaint must allege facts setting forth a plausible claim for relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 678–79 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Labels, conclusions, blanket assertions, and recitations of a claim's legal elements are not "facts" and need not be accepted as true. *Iqbal*, 556 U.S. at 678–79; *Twombly*, 550 U.S. at

[4] The "limited edition" designation means the product is seasonal. It is only available in the spring.

555. The Court "need not accept as true allegations that contradict matters properly subject to judicial notice." *In re Gilead Scis. Sec. Litig.*, 563 F.3d 1049, 1055 (9th Cir. 2008). Nor is it enough to allege facts "merely consistent with" liability. *Iqbal*, 556 U.S. at 678; *Twombly*, 550 U.S. at 557. The facts must show a viable claim without speculation. "A claim is facially plausible when it allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Svenson v. Google, Inc.*, No. 13-cv-04080-BLF, 2015 WL 1503429, *2 (N.D. Cal. Apr. 1, 2015).

Claims "grounded in fraud" are also subject to Federal Rule of Civil Procedure 9(b). *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125, 1127 (9th Cir. 2009). Rule 9(b) requires a plaintiff to "identify the who, what, when, where, and how of the misconduct charged" with particularity. *Salameh v. Tarsadia Hotel*, 726 F.3d 1124, 1133 (9th Cir. 2013) (quotations omitted). The type of allegation that "identifies a general sort of fraudulent conduct but specifies no particular circumstances ... is precisely what Rule 9(b) aims to preclude." *Cafasso ex rel. U.S. v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1057 (9th Cir. 2011). The particularity requirement applies to concealment or omission claims as well. *Kearns*, 567 F.3d at 1126-27; *Tietsworth v. Sears, Roebuck & Co.*, No. 5:09-00288, 2009 WL 3320486, at *6 (N.D. Cal. Oct. 13, 2009). That does not mean a plaintiff has to provide details of affirmative misrepresentations if she does not claim that any were made. But she must allege the other circumstances of the alleged fraud with particularity.

ARGUMENT

I. Plaintiff lacks statutory standing under the UCL, FAL, and CLRA because she fails to plausibly allege she suffered any economic injury in reliance on the labeling.

Plaintiff lacks standing under the UCL, FAL, and CLRA. She has not plausibly alleged she suffered any economic injury caused by Hostess's alleged false advertising because she has not shown "actual reliance on the allegedly deceptive or misleading statements." *Kwikset Corp. v. Super. Ct.*, 51 Cal. 4th 310, 326-27 (2011); *Hinojos v. Kohl's Corp.*, 718 F.3d 1098, 1103 (9th Cir.), *as amended on denial of reh'g and reh'g en banc* (2013).

Plaintiff says she believed the donettes were made of carrot cake and contained a "substantial amount of real carrot" based on the "Carrot Cake" description and her observation of the donettes.

Compl. ¶¶ 65-66. She does not allege that the donettes lacked a carrot-cake taste or flavor, and there is no claim that she (or any class members) did not enjoy the donettes or find them somehow unacceptable for that reason. And Plaintiff herself concedes that carrot is *not* identified in the statement of ingredients, while "natural and artificial flavor" *is* identified. *Id.*, Ex. A, B. Further, when Plaintiff first bought the donettes in 2019, the front and sides of the packaging also disclosed that the donettes were "naturally and artificially flavored":

Kaneko Decl., Ex. A (2019 package). Ms. Lauchung-Nacarino does not allege that anything on the front of the package has, at any time, been inconsistent with the statement of ingredients. "In cases where a product's front label is accurate and consistent with the statement of ingredients, courts routinely hold that no reasonable consumer could be misled by the label because a review of the statement of ingredients makes the composition of the food or drink clear." *Viggiano v. Hansen Nat. Corp.*, 944 F. Supp. 2d 877, 892 n.38 (C.D. Cal. 2013).

That Plaintiff believed the "Carrot Cake" description meant that the donettes contained "less added sugar than typical desserts" and was somehow a healthier alternative is not a reasonable assumption. Compl. ¶ 66. Simply put, if added sugar had been material to her decision, Plaintiff could have reviewed the ingredient list to confirm the exact amount of added sugar in the donettes. Courts have repeatedly rejected exactly this sort of claim. *See Truxel v. Gen. Mills Sales, Inc.*, No. C 16-04957 JSW, 2019 WL 3940956, at *4 (N.D. Cal. Aug. 13, 2019) ("Plaintiffs cannot plausibly claim to be misled about the sugar content of their cereal purchases because … the actual ingredients were fully disclosed and it was up to the Plaintiffs, as reasonable consumers, to come to their own

conclusion about whether or not the sugar content was healthy for them"); *Clark v. Perfect Bar, LLC*, No. 3:18-cv-06006-WHA, 2018 WL 7048788, *1 (N.D. Cal. Dec. 21, 2018) ("No consumer, on notice of the actual ingredients described on the packing including honey and sugar, could reasonably overestimate the health benefits of the bar merely because the packaging elsewhere refers to it as a health bar and describes its recipe as having been handed down from a health-nut parent"); *Workman v. Plum, Inc.*, 141 F. Supp. 3d 1032, 1035 (N.D. Cal. 2015) (there can be no deception if the ingredient list discloses the product's contents, consequently resolving "any potential ambiguity").

In 2020, the "naturally and artificially flavored" disclaimer was removed from the front packaging. But this could not have been material to Ms. Lauchung-Nacarino because, again, she had already began buying the donettes in 2019, when the disclaimer was present. Kaneko Ex. B. Further, plaintiff admits that "[t]he ingredients panel of the product does not list carrots" and "does say that the product contains 'natural and artificial flavor.'" Compl. ¶ 37. Thus, Plaintiff's understanding that "Carrot Cake" meant real carrots were included and whether that was actually material to her purchasing decision are not supported by the product label or her conduct. *Morgan v. Wallaby Yogurt Co., Inc.*, No. 13-cv-00296-WHO, 2013 WL 5514563 (N.D. Cal. Oct. 4, 2013) (dismissing claims where plaintiffs failed to explain how a reasonable consumer would be misled by the term "evaporated cane juice," because "a reasonable consumer … concerned about sugar content" could view the sugar content next to the ingredient list). Indeed, she bought the donettes dozens of times starting in 2019 when the disclaimer was present.

Finally, any argument that the "naturally and artificially flavored" disclaimer impacted the price Plaintiff paid for the donettes is conclusory. Ms. Lauchung-Nacarino does not allege that she paid more or less for the donettes in 2019 versus 2020. She does not, for that matter, even allege how much she paid for the donettes at any point in time. In sum, Plaintiff's conclusory allegations that she suffered injury resulting from Hostess's conduct are insufficient, and her claims should be dismissed.

II. Plaintiff fails to adequately allege fraud with particularity.

Plaintiff's claims (under the CLRA, FAL, UCL, and the common-law claim for fraud) are also not pleaded with particularity as required by Rule 9(b). *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125–26 (9th Cir. 2009) (holding that Rule 9(b) applies to any claim that "sounds in fraud," including fraud claims that may be labeled as unfair- or unlawful-practice claims under the UCL).

A. Plaintiff fails to distinguish between the corporate defendants.

The particularity requirement means, among other things, that a plaintiff must allege who did or said what. To start with, the complaint does not allege the "who."

"Rule 9(b) does not allow a complaint to merely lump multiple defendants together…." *Swartz v. KMPG LLP*, 476 F.3d 756, 764-65 (9th Cir. 2007) (holding general allegations that "defendants" engaged in fraudulent conduct are insufficient as a matter of law). Plaintiff must "at a minimum" identify the "role of [each] defendant" in the fraudulent scheme. *Id.* at 765. But here, Plaintiff defines "Defendants" or "Hostess" to include both defendants collectively. *See, e.g.*, Compl. ¶¶ 1, 11-15. It then consistently uses these collective terms when attempting to allege fraud. *See, e.g.*, Compl. ¶¶ 45-51, 102-108, 110-121. Such generic, collective allegations do not comply with Rule 9(b). The Court should dismiss for this reason alone. *Drake v. Toyota Motor Corp. et al*, No. 2:20-cv-01421-SB-PLA, Dkt. 29 (C.D. Cal. Nov. 23, 2020) (dismissing fraud-based claims because plaintiffs fail to provide "detailed allegations of … the various roles *played in the alleged conspiracy.*") (emphasis in original).

B. Plaintiff has not alleged a claim based on any affirmative misrepresentation.

To the extent it is based on allegations of affirmative misrepresentation, Plaintiff's complaint fails to state a claim for relief because the challenged statement, "Carrot Cake mini donuts," would not deceive a reasonable consumer. The reasonable consumer standard requires a plaintiff to "show that members of the public are likely to be deceived." *Ebner v. Fresh, Inc.*, 838 F.3d 958, 965 (9th Cir. 2016) (citation and internal quotation marks omitted). This requires more than the "mere possibility" that the statements on Hostess's packaging "might conceivably be misunderstood by some few consumers viewing it in an unreasonable manner." *Id.* (*citing Lavie v. Procter & Gamble Co.*, 105 Cal. App. 4th 496, 508 (2003)); *Davis v. HSBC Bank Nevada, N.A.*, 691 F.3d 1152, 1162

(9th Cir. 2012) ("A representation does not become false and deceptive merely because it will be unreasonably misunderstood by an insignificant and unrepresentative segment of the class of persons to whom the representation is addressed.") (citation and internal quotation marks omitted). Rather, it requires a "probability" that "a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled." *Ebner*, 838 F.3d at 965 (citing *Lavie*, 105 Cal. App. 4th at 508). Whether a representation is "likely to deceive" a reasonable consumer is based on the label as a whole, not a "single out-of-context phrase." *Hairston v. S. Beach Beverage Co.*, No. CV 12-1429-JFW, 2012 WL 1893818, at *4 (C.D. Cal. May 18, 2012). Plaintiff's allegations fail that test.

First, Ms. Lauchung-Nacarino does not identify any affirmative statements or representations that the donettes contain real carrot, much less a "substantial amount" of real carrot. The phrase "Carrot Cake mini donuts" does not constitute such a promise. Again, any possible consumer confusion about whether the donettes contained real carrot would be easily dispelled by reviewing the ingredient list that accurately discloses the content of the donettes. *See Cheslow v. Ghiaradelli*, 445 F. Supp. 3d 8, 20 (N.D. Cal. 2020) ("District courts also recognize that where the actual ingredients are disclosed, a plaintiff may not ignore the ingredient list"); *Truxel*, 2019 WL 3940956, at *4; *Workman*, 141 F. Supp. 3d at 1035.

Second, her reliance on carrot cake recipes she found on the internet does not help her state a claim. Compl. ¶ 22. The product at issue is "carrot cake mini donuts," not "carrot cake." In other words, "carrot cake" describes the flavor of the mini donuts. A reasonable consumer would not believe that the mere use of the phrase "Carrot Cake" meant the product contained "a substantial amount of real carrot" and is therefore a healthier alternative to other desserts. *Becerra v. Dr Pepper/Seven Up, Inc.*, 945 F.3d 1225, 1229-30 (9th Cir. 2019) (claims based on unreasonable assumptions are properly dismissed at the pleading stage). And a reasonable consumer who allegedly "seeks out desserts that are healthier than typical desserts," as Plaintiff claims, could and should assess the ingredient list of the dessert she buys in order to make an informed decision. *Clark*, 2018 WL 7048788, *1; *Workman v. Plum, Inc.*, 141 F. Supp. 3d at 1035.

Finally, a reasonable consumer would not rely merely on what the donettes look like, as

Plaintiff claims she did. *See e.g.*, Compl. ¶ 65 ("She also observed the donuts themselves … Based on this observation … she reasonably believed that the donuts were made of carrot cake and contained a substantial amount of real carrot"). Plaintiff does not say anything about what the donettes looked like that led her to believe they contained real carrot. In fact, she does not even describe what they looked like at all. Her supposed reliance on the photograph of the donut's cross-section is similarly conclusory and unreasonable. *Id.* ("She reasonably believed the photograph depicted a carrot cake donut, containing a substantial amount of carrot"). Unlike in some other cases, there are no images of real fruits or vegetables on the Hostess label. Kaneko Decl., Exs. A, B; *see Williams v. Gerber Products Co.*, 552 F.3d 934, 939 (9th Cir. 2008) ("[The] packaging pictures a number of different fruits, potentially suggesting (falsely) that those fruits or their juices are contained in the product"). Ms. Lauchung-Nacarino also alleges nothing about how the photograph of the donut was deceptive. "[I]t would be unreasonable to draw a specific qualitative message about the product from an image on the product." *Cheslow*, 445 F. Supp. 3d at 19 (citing cases).

C. Plaintiff also has not pleaded an omission or concealment claim with particularity.

To plead an omission claim successfully, a plaintiff "must describe the content of the omission and where the omitted information should or could have been revealed." *In re Ford Motor Co. DPS6 Powershift Transmission Products Liab. Litig.*, No. 18-ML-02814 AB, 2020 WL 5267567, *5 (C.D. Cal. Sept. 2, 2020); *Marolda v. Symantec Corp.*, 672 F. Supp. 2d 992, 1002 (N.D. Cal. 2009). Here, as discussed above, Ms. Lauchung-Nacarino does not explain how the 2019 package was misleading particularly given the "naturally and artificially flavored" disclaimer on the front and side panels. Nor does she explain how the 2020 package was misleading or could have possibly led her to assume the donettes were a healthier dessert given the ingredient statement on the back of the package. For example, she says the "Carrot Cake" description led her to believe, somehow, that there would be less added sugar in the donettes. But she does not allege there are other desserts with more or less sugar, or how they compare. Plaintiff also fails to explain how or when she first learned that the donettes do not contain carrot. She also does not allege what price she paid for the donettes or which other products she would have bought instead. *Yumal v. Smart*

Balance, Inc., 733 F. Supp. 2d 1117, 1123 (C.D. Cal. 2010) (dismissing claim where plaintiffs failed to allege precisely what is false or misleading about a statement, and why it is false); *In re Gerber Probiotic Sales Practices Litig.*, No. 12-835 (JLL), 2014 WL 5092920, at *8 (D.N.J. Oct. 10, 2014) (dismissing premium-price allegations where plaintiffs "fail[ed] to allege a price paid for the products, as well as the price for any comparable products"). Rule 9(b) requires those details.

Further, an alleged omission is not actionable unless it was "contrary to a representation actually made by the defendant, or an omission of a fact the defendant was obliged to disclose." *Hodson v. Mars, Inc.*, 891 F.3d 857, 861 (9th Cir. 2018). More specifically, under California law a defendant has a duty to disclose only if it (1) made partial representations that left out material facts; (2) was in a fiduciary relationship with the plaintiff; (3) actively concealed a material fact from the plaintiff; or (4) had exclusive or at least "superior" knowledge of material facts not known to the plaintiff at the time of sale. *Rubenstein v. The Gap, Inc.*, 14 Cal. App. 5th 870, 877 (2017). Here, as discussed above, Ms. Lauchung-Nacarino has not pleaded any material representations, partial or otherwise, with particularity. Nor does she allege a fiduciary relationship. As for "active concealment," that requires "affirmative acts of concealment; *e.g.*, that the defendant sought to suppress information in the public domain or obscure the consumer's ability to discover it." *Taragan v. Nissan N. Am., Inc.*, No. C 09-3660 SBA, 2013 WL 3157918, at *7 (N.D. Cal. June 20, 2013). Ms. Lauchung-Nacarino does not plead any such acts. The remaining issue, therefore, is whether the complaint alleges facts showing that at the time of sale, Hostess had superior knowledge of material facts that Ms. Lauchung-Nacarino did not know. *See, e.g., Wilson v. Hewlett-Packard Co.*, 668 F.3d 1136, 1145 (9th Cir. 2012) (holding among other things that plaintiff must allege facts showing knowledge at time of sale). It does not.

A defendant does not have "superior knowledge" of information that is publicly available. *See Harris v. R.J. Reynolds Vapor Co.*, No. 15-CV-04075-JD, 2017 WL 3617061, at *2 (N.D. Cal. Aug. 23, 2017) (holding complaint's reference to published studies discussing health risks defeated claim of superior knowledge); *Johnson v. Mitsubishi Digital Elecs. Am., Inc.*, 578 F. Supp.2d 1229, 1240 (C.D. Cal. 2008) (holding defendant did not conceal information but rather made it "readily available in the television's owner's manual, which was available to the public on the Internet"),

aff'd 365 F. App'x 830 (9th Cir. 2010); *Clayton v. Landsing Pac. Fund Inc.*, No. C 01-03110 WHA, 2002 WL 1058247, at *6 (N.D. Cal. 2002) (holding fraudulent-concealment claim failed because material information was publicly available and prudent investor would have noticed it), *aff'd* 56 F. App'x 379 (9th Cir. 2003).

Based on Ms. Lauchung-Nacarino's own allegations, any claim that Hostess had exclusive knowledge of or actively concealed that the donettes are artificially flavored and do not contain real carrot fails. Indeed, that the donettes were artificially flavored and did not contain carrot was disclosed on the packaging at all times. *See* Kaneko Decl., Exs. A, B. Plaintiff's own allegations show that the ingredient panel does not identify carrot but identifies natural and artificial flavor. Compl. ¶ 37. Thus, her claim that Hostess actively concealed anything or had superior knowledge regarding the composition of the donettes fails. *Wolph v. Acer Am. Corp.*, No. CV 09-01314 JSW, 2009 WL 2969467, at *4 (N.D. Cal. Sept. 14, 2009) (holding information about minimum memory required to run operating system was not within laptop manufacturer's exclusive knowledge where plaintiff admitted that an article published before purchase disclosed the requirements).

III. The economic-loss rule would also bar the common-law fraud claim.

The economic-loss rule precludes recovery in tort where a plaintiff's damages consist solely of economic loss. *Hammond v. BMW of N. Am., LLC*, No. CV 18-226 DSF (MRWx), 2019 WL 2912232, at *2 (C.D. Cal. June 26, 2019) (citing *Jimenez v. Superior Court*, 29 Cal. 4th 473, 481-84 (2002)). Here, Plaintiff alleges the product was "worth less than what she paid for it, and she did not receive what she reasonably intended to receive." Compl. ¶ 70. That is a claim for economic loss only. *Robinson Helicopter Co. v. Dana Corp.*, 34 Cal. 4th 979, 988 (2004) ("Economic loss consists of 'damages for inadequate value, costs of repair and replacement of the defective product or consequent loss of profits—without any claim of personal injury or damages to other property….") (quoting *Jimenez*, 29 Cal. 4th at 482) (internal quotations and citations omitted). Ms. Lauchung-Nacarino does not allege personal injury or damages to other property. Accordingly, because she seeks solely economic damages and has not otherwise pled any facts to support an exception, her

fraudulent-omission claim should be dismissed. *See Garcia v. Gen. Motors LLC*, No. 18-CV-01313-LJO(BAM), 2018 WL 6560196, at *9.

First, *Robinson Helicopter* recognized a limited exception to the economic-loss rule, but that exception does not apply to the common-law claim here to the extent the claim is based on an alleged omission. Only "a claim for fraud by *affirmative misrepresentation* may avoid the economic loss rule." *In re Ford Motor Co. DPS6 Litig*, 2020 WL 5267567, at *7 (emphasis in original). "*Robinson Helicopter* … does not establish any other exception, such as [] for a claim for fraud by omission." *Id.*; *see also Rattagan v. Uber Technologies, Inc.*, 19-cv-01988-EMC, 2020 WL 4818612, at *8 (N.D. Cal. Aug. 19, 2020) ("to get around the economic loss doctrine, the fraud must be based on an affirmative misrepresentation"); *Mosqueda v. Am. Honda Motor Co., Inc.*, No. SA CV 19-839-MWF-MAAx, 2020 WL 1698710, at *12-13 (C.D. Cal. Mar. 6, 2020) ("Plaintiffs allege no affirmative representations …. Instead, Plaintiffs' common law fraud claim is premised on Honda's alleged 'omissions' …. [C]ourts construing *Robinson* have limited the exception to fraudulent inducement claims based on affirmative misrepresentations, not omissions.").

Second, and even more fundamentally, the exception only applies to acts that "expose a plaintiff to liability for personal damages *independent of* the plaintiff's economic loss." *Robinson Helicopter*, 34 Cal. 4th at 993 (emphasis added). Plaintiff does not allege she or anyone else has suffered such damages here, so there is no allegation of personal damages separate and apart from her alleged economic loss. Compl. ¶ 70.

Finally, to the extent state law is unclear, this Court must err on the side of limiting liability. Under *Erie v. Tompkins*, federal courts sitting in diversity "are bound by the pronouncements of the state's highest court on applicable state law." *Ticknor v. Choice Hotels Int'l, Inc.*, 265 F.3d 931, 939 (9th Cir. 2001); *see Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938); *see Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017, 1024 (9th Cir. 2008) (holding federal courts are "not free to create new exceptions" to state privity requirement); *see also, e.g., Del Webb Communities Inc. v. Partington*, 652 F.3d 1145, 1154 (9th Cir. 2011) (a federal court "should hesitate prematurely to extend the law in the absence of an indication from the state courts or the state legislature that such an extension would be desirable") (citation omitted); *Hemmings v. Tidyman's Inc.*, 285 F.3d 1174,

1203–04 (9th Cir. 2002) (declining to expand liability under state anti-discrimination statute where state courts had not extended law to situation before it); *Davidson v. Apple, Inc.*, No. 16-CV-4942-LHK, 2017 WL 3149305, at *18 (N.D. Cal. July 25, 2017) ("[T]o the extent that Pennsylvania state law remains unclear as to whether the economic loss doctrine bars claims for common law fraud, a federal court sitting in diversity should opt for the interpretation that restricts liability, rather than expands it") (citation omitted).

This defeats Plaintiff's common-law fraud claim. The California Supreme Court, which created the economic-loss rule in the first place, carved out an exception that allows fraud claims between contracting parties to go forward only if truly independent of the contract duties and only if based on intentional affirmative misrepresentations. Because of the federalism concerns set forth in *Erie*, this Court cannot accept any invitation to construe that exception broadly.

IV. Plaintiff has not alleged any basis for equitable relief.

A. Plaintiff's failure to allege an inadequate legal remedy warrants dismissal.

Finally, if any of Plaintiff's claims survive the above arguments, she would still have no basis for equitable relief, which she seeks under her CLRA, FAL, and UCL claims. Compl. ¶¶ 86, 98-100, 119-121. A plaintiff's failure to establish there is no adequate remedy at law available warrants dismissal of equitable claims and relief. The Ninth Circuit recently announced that "the traditional principles governing equitable remedies in federal courts, including the requisite inadequacy of legal remedies, apply when a party requests restitution under the UCL and CLRA in a diversity action … [r]egardless of whether California authorizes its courts to award equitable restitution … when a plain, adequate, and complete remedy exists at law." *Sonner v. Premier Nutrition Corp.*, 971 F.3d 834, 844-45 (9th Cir. 2020). This applies to claims for injunctive relief as well. *In re: MacBook Keyboard Litig.*, 5:18-cv-02813-EJD, 2020 WL 6047253, at *3-4 (N.D. Cal. Oct. 13, 2020)(citing cases applying *Sonner* to injunctive relief claims). Plaintiff's request for injunctive and other equitable relief fails because her complaint does not allege an inadequate legal remedy. *Sonner*, 971 F.3d at 844. To the contrary, she seeks to certify a class asserting a legal remedy. *See e.g.*, Compl. Prayer at D.1; *Philips v. Ford Motor Co.*, No. 14-CV-02989-LHK, 2016

WL 7428810, at *24 (N.D. Cal. Dec. 22, 2016). In affirming the dismissal of the injunctive relief claims in *Philips*, the Ninth Circuit held that "the district court correctly determined that [Plaintiffs] were required to plead the inadequacy of their legal remedies to state a claim for injunctive relief." *Philips v. Ford Motor Co.*, 726 F. App'x 608. 609 (9th Cir. 2018). Accordingly, Ms. Lauchung-Nacarino's equitable claims and relief should be dismissed.

B. Plaintiff lacks standing to pursue injunctive relief.

Plaintiff also lacks standing to seek injunctive relief because she fails to allege she will suffer a repeated injury. To have standing, Plaintiff must show she "has suffered or is threatened with a concrete and particularized legal harm, coupled with a sufficient likelihood that [s]he will again be wronged in a similar way." *Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 985 (9th Cir. 2007) (citations and internal quotations omitted). She "must demonstrate 'a real and immediate threat of repeated injury' in the future." *Champan v. Pier 1 Imports (U.S.) Inc.*, 631 F.3d 939, 946 (9th Cir. 2011) (*quoting O'Shea v. Littleton*, 414 U.S. 488, 496 (1974)). The threat of future injury must be "actual and imminent, not conjectural or hypothetical." *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009).

Unlike in *Davidson*, where the plaintiff could not assess the hygienic wipes' flushability without first buying and testing the wipes, here Ms. Lauchung-Nacrino's knowledge that the donettes are not made with real carrot, and the ability to confirm that by reading the labeling and ingredients panel, precludes any plausible argument that she will suffer confusion in the future. *Davidson v. Kimberly-Clark Corp.*, 889 F.3d 956, 966-72 (9th Cir.), *cert. denied sub nom. Kimberly-Clark Corp. v. Davidson*, 139 S. Ct. 640 (2018). *See Joslin v. Clif Bar & Co.*, No. 4:18-cv-04941-JSW, 2019 WL 5690632, at *4 (N.D. Cal. Aug. 26, 2019) (dismissing claims for injunctive relief because "[i]f Plaintiffs do not want products that do not contain real white chocolate, the Court is hard pressed to see how Plaintiffs would be able to allege the requisite future harm" because they can tell from the ingredient list whether a product contains white chocolate); *Rahman v. Mott's LLP*, No. 13-cv-03482-SI, 2018 WL 4585024 at *3 (N.D. Cal. Sept. 25, 2018) (applying *Davidson* and holding that a consumer lacked standing to sue for injunctive relief where he now understood the product's ingredients).

CONCLUSION

For the foregoing reasons, Hostess respectfully requests that the Court grant its motion to dismiss this action.

Dated: December 1, 2020

SHOOK, HARDY & BACON L.L.P.

By: */s/ Naoki S. Kaneko*
Naoki S. Kaneko

Attorneys for Defendants
Hostess Brands, LLC and
Hostess Brands, Inc.

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that on December 1, 2020, I caused a true and correct copy of the foregoing Motion to Dismiss to be filed electronically. Notice of this filing will be sent to all parties registered on this Court's ECF system by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Naoki s. Kaneko