



## Pearlstone v. Costco Wholesale Corporation

2019 | Cited 0 times | E.D. Missouri | February 21, 2019

COURT OF MISSOURI DIVISION SCOTT PEARLSTONE,

Plaintiff,

COSTCO WHOLESALE CORPORATION,

MEMORANDUM ORDER

("Costco") Plaintiffs Plaintiff Scott Pearlstone's Strike Support

Strike

BACKGROUND 1

iii!

\$60.00 \$120.00. iJ

iJ

U.S. Utilities 690 2012); 801, 806 2008).

UNITED STATES DISTRICT EASTERN DISTRICT

EASTERN individually and on behalf of similarly situated individuals,

v. No. 4:18CV630 RLW

Defendant.

AND This matter is before the Court on Defendant Costco Wholesale Corporation's Motion to Dismiss Class Complaint (ECF No. 9), Motion to Exhibit 1 to Costco's Reply Memorandum in oflts Motion to Dismiss (ECF No. 23), and Costco's Motion to and in the Alternative for Leave to File Response out of Time (ECF No. 25). The motions are fully briefed and ready for disposition.



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Costco operates an international chain of membership warehouses, and customers generally must purchase a 12-month membership in order to fully access and shop at Costco stores. (Compl., ECF No. 1, 13, 14) Customers can purchase one of two levels of memberships that can be renewed annually: a basic, entry-level membership for and an executive membership for (Id. at 17) Customers who purchase executive memberships earn rewards in the form of certificates that provide Costco store credit in the amount of 2% of qualifying purchases made over a certain period. (Id. at 18) These 2%

1 In deciding a motion to dismiss under Rule 12(b)(6), a court assumes all facts in the complaint to be true and construes all reasonable inferences most favorably to the complainant. ex rel. Raynor v. Nat'l Rural Co-op. Fin., Corp., F.3d 951, 955 (8th Cir. Eckert v. Titan Tire Corp., 514 F.3d (8th Cir. "Member Privileges Conditions." if One "Risk-Free 100%

Guarantee," "On

dissatisfied." iii!

2017, Plaintiff St. \$110.00 if Plaintiff

2018. if Upon Plaintiffs

if

Practices ("MMPA"), Stat.§ 407.010 "repeatedly 100%

Plaintiff \$120.00 Plaintiff Procedure

"Class") "Subclass" "Missouri Subclass"),

U.S. rewards are generally issued in executive members' renewal notices and are only redeemable at Costco warehouse locations. (Id.)

All Costco members must complete a membership application and agree to Costco's

& (Id. at 19) of the conditions is a Satisfaction which provides in relevant part: Membership: We will cancel and refund your membership fee in full at any time if you are (Id. at 22, 24; ECF No. 1-1)

In March enrolled in a 12-month executive membership with Costco at a location in Louis and paid for the executive membership. 2

(Id. at 29) asserts he became dissatisfied with his experience and his executive membership, and he



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subsequently cancelled his membership in January (Id. at 32) cancelation, Costco refunded him \$86.13, which was \$23.87 less than what he paid to purchase his executive membership. (Id. at 33)

Plaintiff filed this putative Class Action Complaint in which he asserts the following three claims against Costco: breach of contract (Count I), unjust enrichment (Count II), and violation of the Missouri Merchandising Act Mo. Rev. et seq. (Count III). 3

He argues Costco and systematically breaches its Risk-Free

2

notes Costco raised the executive membership fee to since he became a member. (Compl., ECF No. 1, at 6n.l) 3

seeks class certification pursuant to Federal Rule of Civil 23 on behalf of himself and nationwide class (the with one subclass (the or which the Complaint defines as follows:

The Class: All persons in the who, during the applicable limitations period, purchased an executive membership from Defendant; cancelled the executive membership; and were not refunded the full value of the executive membership fee they originally paid. The Missouri Subclass: All persons who, during the applicable limitations period, purchased an executive membership from Defendant in Missouri; cancelled the executive membership; and were not refunded the full value of the executive membership fee they originally paid.

2 Satisfaction

memberships." if

Procedure Plaintiff

10, Plaintiff Plaintiff

(\$110.00) Plaintiff

10, "Executive Conditions"

"any forfeited"

"Executive Conditions"

Support 20-1) Plaintiff Strike Support



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2018. "Executive Conditions"

Plaintiff Support Strike

at, Subclass.

Guarantee by failing to provide full refunds of membership fees to executive members who cancel their membership, instead refunding less than the amount originally paid for such (Id. at 26)

Costco filed a Motion to Dismiss pursuant to Federal Rules of Civil 12(b)(6) and 9(b). (ECF No. 9) As more fully addressed below, Costco argues has failed to state a claim for which relief can be granted because he did not attach or otherwise address additional terms that govern the contract between the parties. (ECF No. at 2) According to Costco, the amount it refunded (\$86.13) reflects the amount of money paid to purchase his executive membership less the \$23.87 had previously accrued pursuant to the 2% rewards program. (ECF No. at 4) To support its argument, Costco references the

Membership Terms and that are available on the corporation's website. (Id. at 3) Costco contends these terms and conditions state 2% Reward issued or accrued will be if an executive member cancels his or her membership before the expiration of the 12-month membership term. (Id.) Additionally, Costco attached a screenshot of the

Membership Terms and page of its website as Exhibit 1 to its Reply Memorandum in of its Motion to Dismiss. (ECF No.

filed a Motion to Exhibit 1 to Costco's Reply Memorandum in of its Motion to Dismiss (ECF No. 23) on November 12, He argues the screenshot of the

Membership Terms and page from Costco's website is irrelevant to this case as the exhibit indicates the terms were updated five months after the initiation of this lawsuit. Fourteen days later on November 26, filed a Reply Memorandum in of his Motion to (ECF No. 24) and noted Costco had failed to timely file a response within

(Id. 38) Plaintiff brings Counts I and II on behalf of the entire class and Count III on behalf of the Missouri

3 Strike

Plaintiffs

Opposition Plaintiffs Strike Support



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### Plaintiffs Strike

"enough face." 550 U.S. 570 (2007). "Factual "

See 2008)

801, 806 2008)

"[w]here

appropriate." 870 2008) "are

allegation." U.S. seven days as required by this district's local rules. Ten days later on December 6, Costco filed a Motion to and in the Alternative for Leave to File Response out of Time. (ECF No. 25) Costco argues that motion to strike should be stricken for failing to comply with this district's local rules and, in the alternative, that it should be permitted to file its accompanying Memorandum in to Motion to Exhibit 1 to Its Reply Memorandum in oflts Motion to Dismiss (ECF No. 26-1). The Court now grants Costco's motion as to its request to file its response to Motion to Exhibit 1 out of time, and the Court considered the arguments therein. Accordingly, all motions have been fully briefed.

LEGAL STANDARD A complaint must be dismissed under Federal Rule 12(b)(6) for failure to state a claim upon which relief can be granted if the complaint fails to plead facts to state a claim to relief that is plausible on its Bell Atlantic Corp. v. Twombly, 544,

allegations must be enough to raise a right to relief above the speculative level .... Id. at 555. Courts must liberally construe the complaint in the light most favorable to the plaintiff and accept the factual allegations as true. Schaaf v. Residential Funding Corp., 517 F.3d 544, 549 (8th Cir. (stating that in a motion to dismiss, courts accept as true all factual allegations in the complaint); Eckert v. Titan Tire Corp., 514 F.3d (8th Cir. (explaining that courts should liberally construe the complaint in the light most favorable to the plaintiff).

However, the allegations show on the face of the complaint there is some insuperable bar to relief, dismissal under Rule 12(b)(6) is Benton v. Merrill Lynch & Co., 524 F.3d 866, (8th Cir. (citation omitted). Courts not bound to accept as true a legal conclusion couched as a factual Ashcroft v. Iqbal, 556 662, 678

4 (2009) 550 U.S. "begin

truth."

### DISCUSSION



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MMPA

Plaintiff

"Risk-Free 100% Guarantee" "Member Conditions" "[Costco]

dissatisfied." Plaintiff

"Under

dissatisfaction." L.L.C. Supp. 1052, 1063 2010)

S.W.2d (quoting Twombly, at 555). When considering a motion to dismiss, a court can by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of Id. at 679. Legal conclusions must be supported by factual allegations to survive a motion to dismiss. Id.

I. Motion to Dismiss As explained above, Plaintiff's putative Class Action Complaint asserts three counts against Costco: breach of contract (Count I), unjust enrichment (Count 11), and violation of the

(Count III). Costco contends he has failed to state a claim under any of the relevant authority.

(a) Breach of contract claim Costco first argues has failed to state a claim for breach of contract because he has not pleaded facts establishing a condition precedent. The Satisfaction

as provided in the Privileges & says will cancel and refund [a customer's] membership fee in full at any time if [the customer is] (ECF No. 1-1) While the parties agree this contract provision requires plead he was dissatisfied, they disagree on whether he has sufficiently pleaded so in his putative Class Action Complaint.

Missouri law, when performance of a promise is conditioned on the satisfaction of the promisor, the promisor must exercise that judgment in good faith, which means that he cannot act arbitrarily or capriciously and there must be a bona fide reason for his 1861 Grp., v. Wild Oats Markets, Inc., 728 F. 2d (E.D. Mo. (citing Long v. Huffman, 557 911, 916 (Mo. Ct. App. 1977)). Costco contends Plaintiff's

5

"Plaintiff

membership." Plaintiff

Plaintiff



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See, St. S.W.3d 2002)

"satisfaction clause"

Plaintiff

JU

Unjust Plaintiff Under

"(1)

2017).

"Plaintiffs lawsuit." 10, "merely

counsel." Plaintiffs complaint fails to satisfy this standard by simply stating became dissatisfied with his experience and his executive membership, and he subsequently cancelled his (ECF No. 1, 32) Costco argues that, at a minimum, should be required to plead with particularity why he prematurely canceled his executive membership.

The complaint clearly asserts canceled his executive membership after becoming dissatisfied with his experience. Costco does not cite to any authority for its conclusion that a plaintiff claiming breach of contract must plead his objective dissatisfaction with particularity to survive a motion to dismiss pursuant to Rule 12(b)(6). Rather, the case law it cites concern motions for summary judgment. e.g., McCarthy Bldg. Companies v. City of Louis, 81

139, 145 (Mo. Ct. App. (reviewing a trial court's grant of summary judgment and noting that a in a contract is subject to a reasonable person standard). At this stage of the litigation, has stated a plausible claim. Any questions surrounding the veracity of his dissatisfaction can be investigated through discovery and argued at the summary . d 4

gment stage.

(b) enrichment claim Costco next argues has failed to state a claim for unjust enrichment. Missouri law, the elements for a claim of unjust enrichment are: a benefit conferred upon the defendant by the plaintiff; (2) appreciation of the fact of such benefit by the defendant; and (3) acceptance and retention of that benefit under circumstances in which retention without

4 Costco notes Plaintiff is a lawyer and filed another putative class action against Walmart, Inc. shortly before canceling his executive membership with Costco. See Pear/stone v. Wal-Mart Stores,



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Inc., No. 4:17CV2856 HEA (E.D. Mo. Dec. 11, Plaintiff is being represented by the same law firms in both cases. Costco makes repeated references to these facts and claims similar allegations [in the case against Walmart, Inc.], combined with his failure to plead honest dissatisfaction here, suggests that he prematurely canceled his Costco Executive Membership merely to concoct a basis for himself and his fellow lawyers to file this second class action

(ECF No. at 6) Plaintiff objects to the allegation as an unfounded ad hominem attack on Plaintiff and his (ECF No. 18, 9) Again, any potential motive bearing on good faith dissatisfaction is not properly before the Court at the motion to dismiss stage.

6 inequitable." Supp. "Unjust

enrichment." RWS,

1069, 1077 Plaintiffs

"subject matter" Plaintiff

Plaintiff

2006 950204, 10, 2006).

See

Sept. ("[T]he Procedure

");Sargent L.L.C., 2009 30, 2009) ("Pleading

Procedure ).").

4:14-CV-1080

("In payment would be Scottrade, Inc. v. Variant, Inc., 122 F. 3d 869, 875 (E.D. Mo. 2015). enrichment is an equitable remedy based on the concept of a quasi-contract, and a plaintiff may not recover under both an express contract and unjust Cregan v. Mortg. One Corp., No. 4:16 CV 387 2016 WL 3072395, at \*5 (E.D. Mo. June 1, 2016) (internal quotation marks omitted) (quoting Affordable Communities of Mo. v. Fed. Nat 'l Mortg. Ass 'n, 714 F.3d (8th Cir. 2013)). Because unjust enrichment claim is based on the same as his breach of contract claim, see id., Costco avers cannot proceed on both theories.

argues a party may assert alternative claims for breach of an express contract and equitable relief.





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Guarantee Elec. Constr. Co. v. LVC Tech., Inc., No. 4:05CV8949 JCH, WL at \*2 (E.D. Mo. April Further, whether a party may plead in the alternative is procedural in nature, and thus the Court will apply the law of the forum state. Superior Edge, Inc. v. Monsanto Co., Civil No. 12-2672 (JRT/FLN), 2014 WL 4414764, at \*6 (D. Minn. 8, 2014) Federal Rules of Civil explicitly allow parties to include in their pleadings demands for alternative relief ... . v. Justin Time Transp.,

No. 4:09CV596 HEA, WL 4559222, at \*2 (E.D. Mo. Nov. in the alternative is clearly allowed under Federal Rule of Civil 8( e Missouri law does not allow recovery under both an express contract and equitable theories of relief. Level 3 Commc 'ns, LLC v. Ill. Bell Tel. Co., No. (CEJ), 2014 WL 414908, at \*6 (E.D.Mo. Feb. 4, 2014). However, a plaintiff may plead alternative claims for relief in the complaint. Id.; see also Superior Edge, 2014 WL 4414764, at \*6 (citations omitted) reliance upon the Rule 8, federal courts in Missouri have consistently denied motions to dismiss

7 contract.").

Other

See,

2012 1025001, 2012) 2006 Sept. 2006)) ("[T]he

complaint.") Sw. 2011WL1086067, 2011) ("While

claims."); 4:08-CV-1806 2009 1011503, 2009),

2010)

"seeks [contract]"); 2016

"in to"

Plaintiffs "prohibits

nature." quasi-contract claims even where the pleading also alleges the existence of an express

courts in this district have allowed plaintiffs to plead alternative theories for unjust enrichment alongside a claim for breach of an express contract. e.g., Chem Gro of Houghton, Inc. v. Lewis Cty. Rural Elec. Co-op. Ass'n, No. 2:11CV93 JCH, WL at \*3 (E.D. Mo. Mar. 26, (quoting Owen v. General Motors Corp., No. 06-4067-CV-C- NKL, WL 2808632, at \*2 (W.D. Mo. 28, fact that a plaintiff cannot simultaneously recover damages for both breach of an express contract and unjust enrichment does not preclude that plaintiff from pleading both theories in her (alteration in Chem Gro of Houghton,



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Inc.); *Asbury Carbons, Inc. v. Bank, an M & I Bank*, No. 4:10-CV- 878 CEJ, at \*4 (E.D. Mo. Mar. 22, 2011), *unjust enrichment* is often a last resort, plaintiff can submit alternate theories of recovery supported by the same actions which allegedly give rise to its breach of contract, conversion and other cf *Dubinsky v. Mermart LLC*, No. (CEJ), WL at \*5 (E.D. Mo. Apr. 15, 2011), *aff'd*, 595 F.3d 812 (8th Cir. 2019) (dismissing a claim for unjust enrichment and noting the plaintiffs alleged alternative theory recovery for events arising solely out of the

*Cregan*, WL 3072395, at \*5 (not addressing whether the plaintiff attempted to plead alternative theories).

Here, the complaint explicitly states that Plaintiffs unjust enrichment claim is pled the alternative his breach of contract count, and his unjust enrichment count does not incorporate the allegations under the other count. (ECF No. 1, at 11) Consequently, this Court will allow Plaintiffs alternative pleadings for breach of contract and unjust enrichment. 5

5 Costco also argues unjust enrichment claim is barred by the economic loss doctrine, which a party from seeking to recover in tort for economic losses that are contractual in *Graham Const. Servs. v.*

8 MMPA Plaintiff MMPA. MMPA "[t]he

commerce." 407.020.1; 4:08CV00821 2009 20, 2009). Plaintiff

Plaintiff "[i]t

contracts." 60-8.070. MMP

See *United 2005*) U.S.A. 309 702 Plaintiff's "Defendant

2014) *Cht!Vrolet S.W.3d* 2010)).

SNLJ, 2013

Uniform ("UCC"). Plaintiffs UCC.

(c) claim Lastly, Costco argues has failed to state a claim for relief under the The is a broad statute that prohibits act, use or employment by any person of any deception, fraud, false pretense, false promise, misrepresentation, unfair practice or the concealment, suppression, or omission of any material fact in connection with the sale or advertisement of any merchandise in trade or Mo. Rev. Stat. § see *Blake v. Career Educ. Corp.*, No. ERW, WL 140742, at \*2 (E.D. Mo. Jan.

Costco asserts it did not establish a deception or unfair practice by refunding the amount he paid to



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purchase his executive membership less the amount he had accrued in rewards because the terms of their contract provided for it. Further, it suggests a single breach of contract claim cannot establish a statutory consumer protection claim.

cites to a regulation promulgated by the Missouri Attorney General that provides is an unfair practice for any person in connection with the sale of merchandise to unilaterally breach unambiguous provisions of consumer 15 C.S.R. § The

A grants the Missouri Attorney General authority to promulgate rules and the Supreme Court of Missouri has made clear that properly promulgated rules have the force and effect of law. *Pharmaceutical Co. of Mo. v. Mo. Bd. of Pharmacy*, 159 S.W.3d 361, 365 (Mo.

(en banc); *Hawkins v. Nestle Inc.*, F. Supp. 3d 696, (E.D. Mo. 2018).

complaint alleges unilaterally breached the terms of its Member

*Hammer & Steel Inc.*, 755 F.3d 611, 616 (8th Cir. (internal quotation marks omitted) (quoting *Autry Morlan*

*Cadillac, Inc. v. RJF Agencies, Inc.*, 332 184, 192 (Mo. Ct. App. Costco cites a single case from this district for support. In *Flynn v. CTB, Inc.*, No. 1:12-cv-68 WL 28244, at \*6 (E.D. Mo. Jan. 2, 2013), purchasers of farming equipment brought claims against the manufacturer, including a claim for unjust enrichment. Id. at \* 1. The court dismissed the plaintiffs' unjust enrichment claim, holding that the plaintiffs were limited to the remedies available to them under the manufacturer's warranty and the Commercial Code Id. at \*6. This case, however, is distinguishable because claims are not governed by the

Further, the parties dispute whether and to what extent certain terms may govern their contractual relationship.

9 Privileges 100%

if Plaintiff Plaintiffs MMP

MMP "[a]ll

paid." if Plaintiffs

MMP

Under



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2018

Plaintiffs "sales staff" "for reason"

if 30) Plaintiff MMPA MMPA

"the MMPA's

"unlawful practice" fraud."

10 & Conditions and the agreements' Risk-Free Satisfaction Guarantee when it failed to refund the full value of fees paid for cancelled executive memberships. (ECF No. 1, 74) At this stage in the litigation, has sufficiently alleged an unfair consumer practice. Additionally, A claim is not based on a single breach of contract claim or single instance of an unfair consumer practice. He is seeking class certification for his A claim on behalf of persons who, during the applicable limitations period, purchased an executive membership from Defendant in Missouri; cancelled the executive membership; and were not refunded the full value of the executive membership fee they originally (ECF No. 1, 38)

Costco further argues compliant fails to meet the heightened pleading requirements of Rule 9(b).

Allegations of fraud or mistake under the A must meet the heightened pleading requirements of Rule 9(b), Fed.R.Civ.P. this heightened pleading requirement, the complaint must plead such facts as the time, place, and content of the defendant's false representations, as well as the details of the defendant's fraudulent acts, including when the acts occurred, who engaged in them, and what was obtained as a result. Simply put, the complaint must plead the who, what, where, when, and how of the fraud. *Bryan v. Bank of Am., NA.*, No. 4:17CV1616 RLW, WL 485968, at \*5 (E.D. Mo. Jan. 18, 2018) (citations and internal quotation marks omitted). Costco asserts allegation that

told him he could obtain a full refund of cancelled fees any fails to meet this standard. (ECF No. 1,

correctly notes not all claims are based on fraud and, accordingly, not all claims are subject to heightened pleading requirements of Rule 9(b). The Eighth Circuit has held that consumer protections extend far beyond common law fraud. 'It is not necessary in order to establish to prove the elements of common law

*Huffman v. Credit Union of Tex.*, 758 F.3d 963, 968 (8th Cir. 2014) (quoting *Huch v.*

290 S. 2009) ("Unlike

fraud.")). "addresses fraud," "unfair practices." Storage ODS,



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"Proof

407.020.1." C.S.R.

Plaintiff's

"any forfeited"

Plaintiff's MMPA Plaintiff "Missouri

MMPA contract." 20 2018). "the

parties." 902, 908 2013) ("[T]he

complain.") "The

remedy." Plaintiff's Charter Commc 'ns, Inc., W.3d 721, 724 (Mo. (en bane) common law fraud claims, to recover under the MMP A, a consumer-purchaser need not prove that the seller had actual knowledge of an undisclosed material fact, reliance by the plaintiff, or the seller's intent to induce reliance; in addition, the definition of 'material fact' in the applicable MMP A regulations is broader than the materiality requirement of common law The MMPA provides multiple theories of recovery and misconduct beyond including claims based on Muhammad v. Public Co., No. 14-0246-CV-W-

2014 WL 3687328, at \*3 (W.D. Mo. July 24, 2014). Further, another regulation promulgated by the Missouri Attorney General explicitly provides: of deception, fraud, or misrepresentation is not required to prove unfair practices as used in section 15

§ 60-8.020(2). Based on the above, Plaintiff has sufficiently pleaded facts to state a claim under the MMPA to survive a motion to dismiss. 6

II. Motion to Strike Costco's argument that Plaintiff has failed to state a claim for breach of contract is based on additional contract terms as listed on its website that purport to provide 2% Reward issued or accrued will be if an executive member cancels his or her membership before the expiration of the 12-month membership term. Plaintiff disputes the applicability of those

6 As with the unjust enrichment claim, Costco argues claim is barred by the economic loss doctrine. In the case filed by against Walmart, Inc., Judge Autrey explained that courts have not addressed whether the economic loss doctrine prohibits a plaintiff from seeking recovery under the for purely economic losses that are subject to a Pear/stone v. Wal-Mart Stores, Inc., No. 4:17CV2856 HEA, slip op. at (E.D. Mo. Nov. 16, Further, the Eighth Circuit has suggested economic loss doctrine applies only to transactions between commercial Id.; see Dannix Painting, LLC v. Sherwin-Williams Co., 732



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F.3d (8th Cir. 'economic loss' doctrine ... forbids commercial contracting parties (as distinct from consumers, and other individuals not engaged in business) to escalate their contract dispute into a charge of tortious misrepresentation if they could easily have protected themselves from the misrepresentation of which they now (quoting *All-Tech Telecom, Inc. v. Amway Corp.*, 174 F.3d 862, 865-66 (7th Cir. 1999) (Wisc.)). economic loss doctrine is meant to protect sophisticated parties from suing over issues that could have been bargained for. It is not meant to subvert the legislature's efforts to protect customers in their purchase of consumer goods and equip them with a wholly economic Pearlstone, slip op. at 21. Consequently, the economic loss doctrine does not apply to MMA claim.

11 "Executive Conditions"

Support 20-1) Plaintiff Strike

"When

pleadings." 880 990, 2018)

St. "Non-governmental

admissible." 06-00187-CV-W-REL, 2008

20, 2008). 901, L.L.C., 4:10 2011) 570, 2010)

"Updated 2018." 20-1, Plaintiff, 2018. Privileges "Membership terms as they were not included on the physical executive membership application he completed. In addition to citing the web address where the additional terms are located, Costco attached a screenshot of the Membership Terms and page of its website as Exhibit 1 to its Reply Memorandum in of Its Motion to Dismiss. (ECF No. subsequently filed a Motion to Exhibit 1, arguing Costco has failed to establish Exhibit 1 's relevance to this case. (ECF No. 23)

considering a Rule 12(b)(6) motion, the court generally must ignore materials outside the pleadings, but it may consider some materials that are part of the public record or do not contradict the complaint, as well as materials that are necessarily embraced by the

*Ashford v. Douglas Cty.*, F.3d 992 (8th Cir. (quoting *Smithrud v. City of Paul*, 746 F.3d 391, 395 (8th Cir. 2014)). websites are not self authenticating. They must instead be authenticated by the party offering the evidence in order to be *Associated Indem. Corp. v. Small*, No. WL 11338112, at \*12 (W.D. Mo. Feb. Failure to authenticate an exhibit in accordance with Federal Rule of Evidence such as with supporting affidavits, can result in its being stricken. *Deptula v. Amacker*, No. CV 1542 DDN, 2011WL3235714, at \*2 (E.D. Mo. July 27, (citing *Specht v. Google Inc.*, 758 F.Supp.2d 581 (N.D. Ill.



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(striking screenshot printouts of websites for failure to authenticate)).

Exhibit 1 explicitly notes the page was September 5, (ECF No. at 2) however, initiated this case by filing his putative Class Action Complaint on April 19, (ECF No. 1) Costco is correct that the executive membership application and Member

& Conditions states is subject to any and all rules adopted by Costco including our privacy policies and practices, and they are amended from time to time without

12 notice."

2018 "necessarily embraced" 2018. Plaintiff

4.0l(A) "Unless

relies."

See, United States 2006

Plaintiff of "forfeited" "given

crime."

2019). Plaintiff

"reduced" "setoff"

(ECF No. 1-1) Nevertheless, it neglected to authenticate Exhibit 1 or explain how a screenshot of terms that were updated on September 5, are by a complaint filed five months prior on April 19, Additionally, issues related to when and to what extent any terms were amended since initially entered into the contract with Costco and the enforcement of those amended terms are not properly before the Court at the motion to dismiss stage. Accordingly, the Court is justified denying Costco's motion to dismiss without considering the potentially additional terms as provided on Costco's website and Exhibit 1 is stricken. 7

III. Costco's Motion to Strike In addition to requesting leave to file a response to Plaintiffs motion out of time, Costco seeks to strike Plaintiffs motion itself for failure to comply with this district's local rules. Local Rule provides: otherwise directed by the Court, the moving party shall file with each motion a memorandum in support of the motion, including any relevant argument and citations to any authorities on which the party Because Plaintiffs Motion to Strike Exhibit 1 (ECF No. 23) did not contain a separately filed memorandum in support, Costco argues it should be stricken.



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While perhaps not in compliance with the exact requirement of Local Rule 4.0l(A), it is relatively common for litigants to file combined motions and memoranda in support. The cases Costco cites in support concerned motions that were filed without any supporting legal arguments. e.g., v. Johnson, No. 405CR719CEJMLM, WL 156712, at 7 Even if the Court were to consider these additional terms for the purpose of ruling on Costco's motion to dismiss,

has argued they are ambiguous. A dictionary definition is something that is up because of some error, offense, law, or Forfeited, Merriam-Webster, <https://www.merriam-webster.com/dictionary/forfeited> (last visited Feb. 21, argues a reasonable person of average intelligence would understand the terms on Costco's website as providing any unused store credit would not be redeemable after cancellation rather than, as Costco argues, a refund after cancellation would be or

by any accrued store credit. (ECF No. 18, at 7) This contract interpretation argument is beyond the scope of a motion to dismiss under Rule 12(b)(6).

13 20, 2006) "a dismissal" "no cited");

Supp. ("The

[statutes]."). Plaintiffs

Plaintiffs

IS ORDERED Plaintiffs

Plaintiffs IS FURTHER ORDERED Plaintiff Scott Pearlstone's Strike

Support

IS ORDERED Strike

Plaintiffs Strike Plaintiffs Strike

RONNIE UNITED STATES JUDGE \* 1 (E.D. Mo. Jan. (noting a motion failed to comply with local rules because it was merely boiler plate recital of reasons for with case authority Mayo v. Christian Hosp. Ne.-Nw., 962 F. 1203, 1204 n.2 (E.D. Mo. 1997) plaintiffs motion is not accompanied by the requisite memorandum of law in support with citations to relevant caselaw. The motion simply references Here, motion included his legal argument and contained citations to legal authorities. The Court thus denies Costco's motion as to its request to strike motion to strike. Accordingly,





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IT HEREBY that Defendant Costco Wholesale Corporation's Motion to Dismiss Class Complaint (ECF No. 9) is DENIED. Costco is reminded of its obligation to answer Complaint within the time set by the rules.

IT that Motion to Exhibit 1 to Costco's Reply Memorandum in oflts Motion to Dismiss (ECF No. 23) is GRANTED. Costco's Exhibit 1 (ECF No. 20-1) is STRICKEN.

IT FINALLY that Costco's Motion to and, in the Alternative, for Leave to File Response out of Time (ECF No. 25) is GRANTED in part and DENIED in part. The motion is denied as to Costco' s request to strike Motion to Exhibit 1, but it is granted as to Costco' s request to file its response to Motion to Exhibit 1 out of time. Dated of February, 2019.

L. WHITE

DISTRICT

