UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 13-05942 ABC (Ex)	Date	December 16, 2013
Title	Frank Ortega et al. v. Natural Balance Inc et al.		

Present: The Honorable	Audrey B. Collins	
Angela Bridges	None Present	N/A
Deputy Clerk	Court Reporter / Recorder	Tape No.

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
None Present	None Present

Proceedings: ORDER RE: MOTIONS TO DISMISS
(In Chambers)

Pending before the Court is a Motion to Dismiss for Lack of Personal Jurisdiction ("12(b)(2) Motion," docket no. 34) filed by Defendants Nutraceutical International Corporation ("NIC") and Natural Balance, Inc. ("NBI"), and a Motion to Dismiss for Failure to State a Claim ("12(b)(6) Motion," docket no. 35) filed by Defendant Nutraceutial Corporation ("Nutraceutical"), and joined by the other two defendants (docket no. 37). Plaintiffs Frank Ortega and Troy Lambert ("Plaintiffs") filed Oppositions and Defendants filed Replies. The Court took the Motions under submission. The Court rules as follows.

I. BACKGROUND

This consumer class action concerns a product called Cobra Sexual Energy ("Cobra"), a dietary supplement containing various herbs, extracts, and other plant-based materials. Plaintiffs contend that Defendant "falsely market [Cobra] as having beneficial health and aphrodisiac properties and being scientifically formulated to improve virility, despite that none of the ingredients in Cobra, individually or in combination, provide such benefits." FAC ¶ 1. Based on the foregoing Plaintiffs assert the following claims against all Defendants:

- Violation of the Unfair Competition Law, Unlawful Prong (Cal. Bus. & Prof. Code § 17200 et seq), First Cause of Action
- Violation of the Unfair Competition Law, Unfair and Fraudulent Prong (Cal. Bus. & Prof. Code § 17200 et seq), Second Cause of Action
- Violation of the False Advertising Law (Cal. Bus. & Prof. Code § 17500 et seq), Third Cause of Action
- Violation of the Consumer Legal Remedies Act (Cal. Civ. C. § 1750 et seq.), Fourth Cause of Action

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Nutraceutical International Corporation ("NIC") and Natural Balance, Inc. ("NBI") move to dismiss all claims for lack of personal jurisdiction, and Nutraceutical Corporation ("Nutraceutical") moves to dismiss for failure to state a claim, a Motion in which NIC and NBI join.

II. NIC'S AND NBI'S 12(b)(2) MOTION

A. Legal Standard

Evaluating personal jurisdiction entails a two-step process. First, the court determines whether the exercise of jurisdiction over the defendant satisfies the requirements of the applicable state's long-arm statute. Dow Chem. Co. v. Calderon, 422 F.3d 827, 830 (9th Cir. 2005).[1] If so, the court then determines whether the exercise of jurisdiction comports with federal due process protections. Id. Due process requires that the imposition of personal jurisdiction cannot "offend traditional notions of fair play and substantial justice." Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945). The "constitutional touchstone" of that inquiry is "whether the defendant purposefully established 'minimum contacts' with the forum state." Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474 (1985).

The "minimum contacts" standard can be met in two ways. First, a defendant is subject to general jurisdiction when its contacts with the forum are so "continuous and systematic" that the defendant may reasonably be haled into court even when the cause of action does not arise out of or relate to the defendant's activities in the forum. See Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 415-16 (1984). A finding of general jurisdiction requires that the defendant's contacts be of the sort that approximates physical presence. Glencore Grain Rottterdam B.V. v. Shivnath Rai Harnarain Co., 284 F.3d 1114, 1124 (9th Cir. 2002). "This is an exacting standard, as it should be, because a finding of general jurisdiction permits a defendant to be haled into court in the forum state to answer for any of its activities anywhere in the world." Schwarzenegger v. Fred Martin Motor Co., 374 F.3d 797, 801 (9th Cir. 2004).

Second, a court may exercise "specific jurisdiction" if "the defendant has purposefully directed his activities at residents of the forum . . . and the litigation results from alleged injuries that arise out of or relate to those activities." Burger King, 471 U.S. at 472-73 (internal quotations and citations omitted). The Ninth Circuit employs a three-part test for the exercise of specific jurisdiction: (1) some action must be taken whereby the defendant purposefully avails itself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of the forum's laws; (2) the claim must arise out of or result from the defendant's forum-related activities; and (3) the exercise of personal jurisdiction must be reasonable. Sher v. Johnson, 911 F.2d 1357, 1361 (9th Cir. 1990).

[1] For purposes of this motion, the Court assumes that New York's long-arm statute is satisfied.

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B. Discussion

NIC and NBI contend that this Court has neither specific nor personal jurisdiction over them. Plaintiffs contend that NIC is subject to both general and specific jurisdiction, and that NBI is subject to specific jurisdiction.

NIC and NBI provide declarations from their respective principals, Jeffrey Hinrichs (of NIC) and Christopher Neuberger (of NBI), purporting to establish their respective company's lack of contacts with California. See docket nos. 34-1, 34-2. Indeed, Hinrichs and Neuberger state that, in essence, neither company has any contacts with California. In response, Plaintiffs submitted several of NIC's SEC 10-K annual reports, some discovery materials, and pages from the website nutraceutical.com that they claim contradict these declarations.

The Court has carefully considered all the evidence submitted in connection with the Motion. The evidence is not conclusive on the question of jurisdiction. The evidence Plaintiffs submitted was slim, and some if it (such as webpages associated with Nutraceutical) was not relevant to either NIC or NBI. For their part, all three Defendants are clearly related, and someone among them must maintain the California contacts noted in the 10-K forms and be responsible for Cobra, yet Defendants do little to clarify their relationships. For example, while Defendants contend that NIC's 10-K form is ambiguous and thus does not show NIC has contacts with California, they do not take the opportunity in their Reply to explain which of NIC's subsidiaries does have the contacts in California reflected in the 10-K forms.

For the foregoing reasons, it is appropriate to deny the motion without prejudice to allow for discovery as to jurisdiction. The Court expects Defendants to be forthcoming as to their and their subsidiaries' contacts with California and their relationships to Cobra. Following jurisdictional discovery, the Court expects Plaintiffs' counsel to continue to name NIC and NBI as defendants **only if** they can do so consistent with Fed. R. Civ. P. 11. If, on the other hand, further discovery demonstrates that NIC and/or NBI are not subject to this Court's jurisdiction (either for lack of contacts with California, lack of connection to Cobra, or both), the Court expects Plaintiffs to voluntarily dismiss NIC and/or NBI and thus avoid further burdening the Court with this issue.

The 12(b)(2) Motion is therefore **DENIED** without prejudice.

III. NUTRACEUTICAL'S 12(b)(6) MOTION

A. Legal Standard

Fed. R. Civ. Proc. 8(a)(2) requires a pleading to present a "short and plain statement of the claim showing that the pleader is entitled to relief." Under Fed. R. Civ. Proc. 12(b)(6), a defendant may move to dismiss a pleading for "failure to state a claim upon which relief can be granted." Thus, a pleading that does not satisfy Rule 8 is subject to dismissal under Rule 12(b)(6). Dismissal is proper under Rule 12(b)(6) where there is either a "lack of a cognizable legal theory" or "the absence of sufficient facts

alleged under a cognizable legal theory." Balistreri v. Pacifica Police Dept., 901 F.2d 969, 699 (9th Cir. 1988).

"[A] plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007) (internal quotations and alterations omitted). Although this does not require "detailed factual allegations," it "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." Ashcroft v. Iqbal, 555 U.S. 662, 678 (2009). A sufficiently-pled claim must be "plausible on its face." Id. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. For purposes of a motion to dismiss, allegations of fact are taken as true and are construed in the light most favorable to the nonmoving party. See Newdow v. Lefevre, 598 F.3d 638, 642 (9th Cir. 2010).

The first step in determining whether a claim is sufficiently pled is to identify the elements of that claim. See Iqbal, 555 U.S. at 675. The court should then distinguish between the pleading's allegations of fact and its legal conclusions: a court "must take all of the factual allegations in the complaint as true," but should not give legal conclusions this assumption of veracity. Iqbal, 556 U.S. at 678. The court must then decide whether the pleading's factual allegations, when assumed true, "plausibly give rise to an entitlement to relief." Id. at 679. The court may not consider material beyond the pleadings other than judicially noticeable documents, documents attached to the complaint or to which the complaint refers extensively, or documents that form the basis of the claims. See United States v. Ritchie, 342 F.3d 903, 908 (9th Cir. 2003).

B. Discussion

The Court rules as follows on the numerous arguments Nutraceutical raises in its 12(b)(6) motion. In light of NIC's and NBI's joinder in the Motion, the same rulings apply to them.

The Court **DENIES** the Motion insofar as it is based on Plaintiffs' failure to comply with Cal. Civ. C. § 1780(d). Assuming without deciding that § 1780(d) applies, Plaintiffs cured their non-compliance by filing the appropriate venue affidavits, thereby mooting this basis for the motion.

The Court **DENIES** the Motion insofar as it argues Plaintiffs failed to plead fraud with particularity. The Court has reviewed the FAC's allegations, that they are sufficient. See FAC ¶¶ 43-93. Although Plaintiffs do not specify which of the three related Defendants made each statement, which Defendant is responsible for Cobra and its packaging is necessarily within the Defendants' knowledge.

The Court **DENIES** the Motion insofar as it argues that the misleading claims on Cobra's packaging are merely non-actionable puffery. While some of the claims presented in the FAC may be puffery, some are not. The Court declines to rule on a piecemeal basis at this time.

The Court **DENIES** the Motion insofar as it argues that Plaintiffs' claims are based on an improper "lack of substantiation" theory. Some of Plaintiffs' assertions are that Defendants' claims are unsubstantiated, but the gravamen of the FAC as a whole is that the challenged representations are false. Again, the Court declines to rule on a piecemeal basis at this time.

The Court **DENIES** the Motion insofar as it seeks the dismissal of Plaintiffs' federal Food, Drug, and Cosmetic Act ("FDCA")-based UCL claims on the ground that Plaintiffs failed to allege that their harm was *caused by* the FDCA violations. The gravamen of Plaintiffs UCL claims are that Defendants made false claims on Cobra's packaging, thus inducing them to purchase the product, and giving rise to UCL claims for false advertising and unfair competition. The sections of the FAC alleging these claims expressly identify sections of the FDCA and implementing regulations that the product and its packaging violate. See FAC ¶ 121. Earlier paragraphs allege reliance. See, e.g., FAC ¶¶ 97, 99, 102, 103. This is sufficient to overcome a motion to dismiss.

The Court **DENIES** the Motion to dismiss the UCL claims on the ground that Cobra is a dietary supplement and not a drug, and therefore is not subject to the FDCA's regulations pertaining to drugs. Although this is a forceful argument, the Court finds that, in light of the allegations in the FAC, it is not able to resolve this somewhat complex question on a motion to dismiss. Summary judgment is the procedure better suited to resolving this issue.

The Court **DENIES** the Motion insofar as it seeks the partial dismissal of the class claims as time-barred. The UCL has a four year statute of limitations, and the FAL and CLRA claims have a three year statute of limitations. Plaintiffs filed suit on August 14, 2013. Accordingly, the UCL claims are limited to the period since August 14, 2009, and the FAL and CLRA claims are limited to the period since August 14, 2010, unless the delayed discovery rule applies.

There is no dispute that the delayed discovery rule may apply to Plaintiffs' FAL and CLRA claims. Contrary to Defendants' argument, the delayed discovery rule may also apply to UCL claims. See Aryeh v. Canon Bus. Solutions, Inc., 55 Cal. 4th 1185, 1196 (2013) (discussing split in California and federal courts on this issue, and holding that "the well-settled body of law that has built up around [claim] accrual," including equitable exceptions like delayed discovery, can apply to UCL claims). To invoke the delayed discovery rule, "the plaintiff must plead and prove [] facts showing: (a) Lack of knowledge. (b) Lack of means of obtaining knowledge (in the exercise of reasonable diligence the facts could not have been discovered at an earlier date). (c) How and when he did actually discover the fraud or mistake." Gen. Bedding Corp. v. Echevarria, 947 F.2d 1395, 1397 (9th Cir. 1991).

Here, Plaintiffs sufficiently pled delayed discovery as to their own claims. See FAC ¶¶ 104-105. As to the class, Plaintiffs pled generalized allegations consistent with the elements of the delayed discovery rule. See FAC ¶ 106. Defendants fault these allegations as conclusory. However, it is hard to imagine how delayed discovery allegations for the claims of unknown class members could be particularly specific. As such, the Court finds that the FAC sufficiently alleges delayed discovery on behalf of the putative class. Whether delayed discovery can be applied as a practical matter can be

addressed at the class certification stage.

The Court **GRANTS** the Motion to dismiss the claims of class members who are not California residents. The UCL, FAL, and CLRA arise under California law. In light of the presumption that state laws to not apply extraterritorially, remedies under the UCL, FAL, and CLRA "may be available to non-California residents [only] if those persons are harmed by wrongful conduct occurring in California." In re Toyota Motor Corp., 785 F. Supp. 2d 883, 916 (C.D. Cal. 2011). Although Plaintiffs seek to represent a nationwide class, they have not alleged or explained how any of the wrongful conduct alleged herein that occurred in California could have harmed non-residents of California such that those non-residents could invoke these statutes. Indeed, the Defendants are all Delaware corporations with their principal places of business in Utah. Nothing in the FAC suggests that, to the extent Defendants' conduct occurred in California, it injured anyone but California residents. Plaintiffs' choice-of-law arguments are not on point. The claims of non-California residents are therefore **DISMISSED**. As this defect cannot be cured, these claims are dismissed with prejudice.

The Court **GRANTS** the Motion to dismiss Plaintiffs' claim for punitive damages. "For corporate punitive damages liability, [§ 3294(b)] requires that the wrongful act giving rise to the exemplary damages be committed by an 'officer, director, or managing agent.'" White v. Ultramar, Inc., 21 Cal. 4th 563, 572 (1999). Plaintiffs do not point to any allegation that pleads this substantive element. Rather, Plaintiffs argue that their claim is not subject to California's heightened pleading requirement for punitive damages because it conflicts with Fed. R. Civ. P. 9(b), which allows malice and fraudulent intent to be pled generally. Plaintiffs argument is not on-point: § 3294's requirement that a corporation may be liable for punitive damages only if the wrongful conduct was committed by an officer, director, or managing agent is a substantive element of the claim, not a procedural requirement like heightened pleading. Because Plaintiffs have failed to plead this substantive element, their punitive damages claim is **DISMISSED**, but with leave to amend.

The Court **DENIES** the Motion to dismiss Plaintiffs' claims for injunctive relief for lack of standing for the reasons well-articulated in Henderson v. Gruma Corp., CV 10-04173 AHM (AJWx,) 2011 WL 1362188 at *7 and (C.D. Cal. Apr. 11, 2011) and Ries v. Arizona Beverages USA LLC, 287 F.R.D. 523, 533-543 (N.D. Cal. 2012).

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IV. CONCLUSION

For the foregoing reasons, the Court

- **DISMISSES with prejudice** the claims of non-California residents of the putative class, and

- **DISMISSES with leave the amend** the claim for punitive damages.

If they can do so consistent with Fed. R. Civ. P. 11, Plaintiffs may attempt cure the defect in their claim for punitive damages by filing an amended complaint within fourteen (14) days of the issuance of this Order; otherwise, the punitive damages claim shall be deemed dismissed with prejudice.

The Motions to Dismiss are **DENIED** in all other respects.

IT IS SO ORDERED.

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