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United States District Court,
C.D. California.

Kim ALLEN
v.
HYLANDS, INC., et al.

No. CV 12–01150 DMG (MANx).
|
May 2, 2012.

Attorneys and Law Firms

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Proceedings: IN CHAMBERS—ORDER RE ENZO FORCELLATI'S MOTION FOR CONSOLIDATION AND DEFENDANTS' MOTION TO DISMISS [Doc.34, 38]

DOLLY M. GEE, District Judge.

***1** Valencia Vallery, Deputy Clerk.

I.

INTRODUCTION

On March 7, 2012, Plaintiffs Kim Allen and Daniele Xenos filed the operative first amended class action complaint against Defendants Hylands, Inc. and Standard Homeopathy Company, raising causes of action for (1) violation of the Consumer Legal Remedies Act ("CLRA"); [1] (2) violation of the Unfair Competition Law ("UCL"); [2] (3) violation of the False Advertising Law ("FAL"); [3] (4) breach of express warranty; (5) breach of implied warranty of merchantability; and (6) money had and received, money paid, and unjust enrichment [Doc. # 17].

On March 26, 2012, Movant Enzo Forcellati filed a motion for consolidation of the instant case with *Forcellati v. Hylands, Inc.*, No. CV 12–01983 GHK (MRWx) (filed Mar. 8, 2012), and appointment of co-lead interim class counsel [Doc. # 34]. On March 30, 2012, Defendants filed a motion to dismiss the first amended complaint [Doc. # 38]. Both motions are currently set for hearing on May 4, 2012. The Court deems these matters suitable for decision without oral argument. *See*Fed.R.Civ.P. 78(b); C.D. Cal. L.R. 7–15. For the reasons set forth below, Defendants' motion to dismiss is GRANTED in part and DENIED in part and Movant's motion for consolidation and appointment of co-lead interim class counsel is DENIED.

II.

LEGAL STANDARDS

A. *Motions To Dismiss*

Federal Rule of Civil Procedure 8(a)(2) requires that a complaint contain " 'a short and plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of what the ... claim is and the grounds upon which it rests.' " *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)). Although a complaint need not contain "detailed factual allegations," it must contain "more than labels and conclusions" or "a formulaic recitation of the elements of a cause of action." *Id.* at 555 (citing *Papasan v. Allain*, 478 U.S. 265, 286, 106 S.Ct. 2932, 92 L.Ed.2d 209 (1986)). The plaintiff must articulate "enough facts to state a claim to relief that is plausible on its face." *Id.* at 570.

Under Rule 12(b)(6), a defendant may seek dismissal of a complaint for failure to state a claim upon which relief can be granted. A court may grant such a dismissal only where the plaintiff fails to present a cognizable legal theory or to allege sufficient facts to support a cognizable legal theory.

Shroyer v. New Cingular Wireless Servs., Inc., 622 F.3d 1035, 1041 (9th Cir.2010) (quoting *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir.2001)). In evaluating the sufficiency of a complaint, courts must accept all factual allegations as true. Legal conclusions, in contrast, are not entitled to the assumption of truth. *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (citing *Twombly*, 550 U.S. at 555).

B. *Motions For Consolidation*

***2** A court may consolidate actions pending before it if they "involve a common question of law or fact."Fed.R.Civ.P. 42(a). District courts have broad discretion whether or not to consolidate actions. *Pierce v. County of Orange*, 526 F.3d 1190, 1203 (9th Cir.2008) (citing *Investor's Research Co. v. U.S. Dist. Court for the Cent. Dist. of Cal.*, 877 F.2d 777, 777 (9th Cir.1989)). In determining whether consolidation is appropriate, courts weigh "the saving of time and effort consolidation would produce against any inconvenience, delay, or expense that it would cause."*Huene v. United States*, 743 F.2d 703, 704 (9th Cir.1984).

III.

DISCUSSION

A. *Motion To Dismiss*

1. Standing

Defendants contend that Plaintiffs lack standing to assert their first three causes of action under California's consumer protection statute because they are not California citizens and their alleged injuries occurred out of state. (Mot. to Dismiss at 6–9.) Defendants rely chiefly on *Mazza v. American Honda Motor Co., Inc.* ., 666 F.3d 581 (9th Cir.2012). In *Mazza*, the district court certified a class of consumers asserting claims under the CLRA, UCL, and FAL. The plaintiff class alleged that the defendant misrepresented and concealed material information in connection with the marketing and sale of certain vehicles. *Id.* at 587.The Ninth Circuit vacated the certification order because, under the facts of that case, "each class member's consumer protection claim should be governed by the consumer protection laws of the jurisdiction in which the transaction took place."*Id.* at 594.

Mazza did *not* hold—as Defendants maintain—that "where an out-of-state plaintiff claims to have been deceived or harmed as a result of misrepresentations or omissions received outside of California, that plaintiff's consumer protection claims must be brought under that plaintiff's own state laws."(Mot. to Dismiss at 8.) To the contrary, *Mazza* explicitly left open the possibility that a court could certify subclasses grouped around "materially different bodies of state law."*Mazza*, 666 F.3d at 594. In other words, *Mazza* merely precludes application of California law to class members from states whose consumer protection laws differ *materially* from California's. It does not categorically rule out application of California law to out-of-state class members.

Plaintiff Allen is a citizen of Florida and Plaintiff Xenos is a citizen of Georgia. (1st Am.Compl.¶¶ 5–6.) Defendants do not argue that Florida or Georgia have materially different consumer protection laws than California. Accordingly, there is no basis at this time for the Court to conclude that it would be inappropriate to apply California law to Plaintiffs' claims.

In any event, choice of law is not the same thing as standing. Whether or not *certification* on a nationwide basis is appropriate in this case is not an issue that is currently before the Court. *Standing*, in contrast, "requires that (1) the plaintiff suffered an injury in fact ... (2) the injury is fairly traceable to the challenged conduct, and (3) the injury is likely to be redressed by a favorable decision."*Id.* (quoting *Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 985 (9th Cir.2007)) (internal quotation mark omitted). In *Mazza*, the Ninth Circuit rejected the defendant's standing argument despite the court's conclusion that the application of multiple jurisdictions' consumer protection laws precluded class treatment. *See id.* at 595.

***3** Here, Defendants do not address the relevant standing considerations. As "[f]ederal courts are required sua sponte to examine jurisdictional issues such as standing,"*Chapman v. Pier 1 Imports (U.S.) Inc.*, 631 F.3d 939, 954 (9th Cir.2011) (*en banc*) (quoting *Bernhardt v. County of Los Angeles*, 279 F.3d 862, 868 (9th Cir.2002)) (internal quotation marks omitted), the Court briefly considers Plaintiffs' standing to ensure that jurisdiction exists.

Plaintiffs allege that Defendants advertise their homeopathic products as possessing certain benefits but in fact know that their products contain no active ingredients in sufficient quantities that could deliver those benefits. (*See, e.g.*, 1st Am. Compl. ¶¶ 10, 16.) Plaintiffs further allege that they purchased Defendants' products in reliance on Defendants' marketing claims. (*See, e.g., id.* ¶¶ 9, 11.)Plaintiffs seek to enjoin

Defendants from making such claims about their products and recover monies that Defendants obtained by selling their products in this manner. (*See id.* ¶¶ 83, 97, 103.)Plaintiffs thus allege an injury that is attributable to Defendants' conduct and that is likely to be redressed by a favorable decision. This is sufficient to confer standing absent any argument from Defendants to the contrary. [4]

2. Warranty Claims

In Plaintiffs' fourth and fifth causes of action, they assert claims for breach of express warranty and breach of the implied warranty of merchantability, respectively.

a. Breach Of Express Warranty

To prevail on a claim for breach of express warranty, a plaintiff must show that "(1) the seller's statements constitute an 'affirmation of fact or promise' or a 'description of the goods'; (2) the statement was 'part of the basis of the bargain'; and (3) the warranty was breached."*Weinstat v. Dentsply Int'l, Inc.*, 180 Cal.App.4th 1213, 1227, 103 Cal.Rptr.3d 614 (2010) (quoting *Keith v. Buchanan*, 173 Cal.App.3d 13, 20, 220 Cal.Rptr. 392 (1985)).

i. False Affirmations Of Fact Or Promises

Defendants maintain that Plaintiffs fail to identify any false affirmations of fact or promises that they made. (Mot. to Dismiss at 10–12.) "The determination as to whether a particular statement is an expression of opinion or an affirmation of fact is often difficult, and frequently is dependent upon the facts and circumstances existing at the time the statement is made."*Keith v. Buchanan*, 173 Cal.App.3d 13, 21, 220 Cal.Rptr. 392 (1985) (quoting *Willson v. Mun. Bond Co.*, 7 Cal.2d 144, 59 P.2d 974 (1936)) (internal quotation marks omitted). Courts liberally construe sellers' affirmations of quality in favor of injured consumers. *Id.* (citing *Hauter v. Zogarts*, 14 Cal.3d 104, 112, 120 Cal.Rptr. 681, 534 P.2d 377 (1975)).

Factors that tend to indicate an opinion statement include (1) a lack of specificity in the statement made; (2) a statement that is made in an equivocal manner; or (3) a statement revealing that the goods are experimental in nature. *Id.* (citation omitted); *see also*Cal. Com.Code § 2313(2) ("[A]n affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty."). Even statements of opinion can become warranties, however, if they become part of the basis of the bargain. *Hauter*, 14 Cal.3d at 115 n. 10, 120 Cal.Rptr. 681, 534 P.2d 377.

***4** According to Defendants, the statements at issue in the first amended complaint fall into two categories. First, there are factual statements about the products themselves as opposed to the products' intended use or effect. [5] The other statements at issue describe the symptoms for which the products purportedly provide relief. [6] Defendants contend that statements in the former category constitute affirmations of fact or promises whereas statements in the latter category do not.

To the contrary, there is no reason why statements such as "Migraine Headache Relief" are any less factual in nature than statements that Defendants concede are factual, such as "Gentle on Skin No Harsh Chemicals."Both require a certain amount of contextualization to evaluate (*e.g.*, How much migraine relief? How gentle on the skin?), yet this does not render them insusceptible to verification.

Defendants mistakenly equate affirmations of fact or promises with statements that their products "will work ***all*** the time for ***everyone"*** or "are guaranteed 'cures' for any ailments or illnesses."(Mot. to Dismiss at 10 (emphasis in original).) That is not what Plaintiffs are claiming. Plaintiffs allege that Defendants' products will not work at *any* time for *anyone* because they either lack ingredients that will produce the advertised relief or contain the ingredients in insufficient quantities to be effective. If this is true—as the Court must assume on a motion to dismiss—then Defendants' statements about relief and effectiveness are not. Thus, Defendants' statements are factual in nature.

ii. Defendants' Purported Compliance With FDA Regulations

Defendants next assert that Food and Drug Administration ("FDA") regulations require labels for over-the-counter ("OTC") drugs to contain statements regarding their intended uses and indications, and that FDA regulations do not require OTC drugs to be 100% effective. (Mot. to Dismiss at 12–15.) As before, Defendants misconstrue Plaintiffs' claims. Moreover, Defendants do not contend that the FDA regulations preempt state warranty law. It is thus unclear how compliance with FDA regulations serves as a defense

to a claim for breach of express warranty. Federal law also prohibits manufacturers from distributing a "misbranded" drug, 21 U.S.C. § 331(a)-(b), such as a drug whose "labeling is false or misleading in any particular."*Id.* § 352(a).

b. Breach Of Implied Warranty Of Merchantability

The implied warranty of merchantability is extracontractual; Defendants' liability "does not depend upon any specific conduct or promise on their part, but instead turns upon whether their product is merchantable under the [California Uniform Commercial Code]."*Hauter*, 14 Cal.3d at 117, 120 Cal.Rptr. 681, 534 P.2d 377. Two elements of merchantability relevant to the instant case are that "the product must '[c]onform to the promises or affirmations of fact made on the container or label' and must be 'fit for the ordinary purposes for which such goods are used.'"*Id.* at 117–18, 120 Cal.Rptr. 681, 534 P.2d 377 (internal citation omitted) (quoting Cal. Com.Code § 2314(2)(c), (2)(f)). Defendants move to dismiss Plaintiffs' implied warranty claim for the same reasons as Plaintiffs' express warranty claim. (*See* Mot. to Dismiss at 15–16.) For the reasons already stated above, their argument is no more availing in this context.

3. Money Had And Received, Money Paid, And Unjust Enrichment

***5** Defendants contend that there is no cause of action for unjust enrichment. (Mot. to Dismiss at 16–17.) While that is not entirely true, a plaintiff may not maintain quasi-contract claims such as unjust enrichment, money had and received, and money paid "if the parties have an enforceable agreement regarding a particular subject matter."*Klein v. Chevron U.S.A., Inc.*, 202 Cal.App.4th 1342, 1388, 137 Cal.Rptr.3d 293 (2012). Thus, in *Klein*, a class of consumers could not maintain a cause of action for unjust enrichment based on their retail purchase of gasoline, which was an enforceable contractual relationship. Here, absent any allegation that Plaintiffs' purchases were not enforceable agreements, Plaintiffs' quasi-contract claims are likewise not viable given Plaintiffs' recourse to warranty-based theories of recovery. Therefore, their sixth cause of action for money had and received, money paid, and unjust enrichment is dismissed with leave to amend.

4. Defendants' Other Homeopathic Products

Although Plaintiffs make specific allegations regarding seven of Defendants' homeopathic products, they assert that "Defendants offer many more homeopathic products" (1st Am.Compl.¶ 56) and Plaintiffs "have purchased some of these additional homeopathic products in reliance on Defendants' representations on the products' effectiveness."(*Id.* ¶ 57, 137 Cal.Rptr.3d 293.) Plaintiffs state that "Defendants' remaining homeopathic products purport to relieve various ailments and symptoms, but in fact are ineffective due to extremely high dilutions, the ineffectiveness of active ingredients in relieving such symptoms, or both."(*Id.*)

Defendants dispute that Plaintiffs have standing to assert claims regarding their remaining homeopathic product line. (Mot. to Dismiss at 17–18.) Plaintiffs claim to have purchased only some of Defendants' other homeopathic products. Thus, they have suffered no monetary injury with respect to homeopathic products that they did not buy. Furthermore, without any allegations that Plaintiffs are likely to purchase other items from Defendants' homeopathic product line, they are not injured from a lack of injunctive relief.

Given the lack of redressable injury, Plaintiffs lack standing to assert claims arising out of any alleged false or misleading statements that Defendants made about their homeopathic products that Plaintiffs have not purchased. As it is impossible to glean from the current pleadings which of the remaining homeopathic products Plaintiffs purchased or are likely to use, their allegations concerning these products are dismissed with leave to amend.

B. *Motion For Consolidation*

General Order 08–05 governs the procedure for consolidating "related" cases, *i.e.*, those that "arise from the same or a closely related transaction, happening or event,""call for determination of the same or substantially related or similar questions of law and fact," or "for other reasons would entail substantial duplication of labor if heard by different judges."C.D. Cal. Gen. Order 08–05 § 5.1.1. The Court previously determined that consolidation of the instant case and the *Forcellati* matter does not meet this standard because "although [*Forcellati*] involves the same defendant, it pertains to different products and is brought by different plaintiffs."(Order re Transfer [*Forcellati* Doc. # 3].) Nothing in Movant's papers convinces the Court that its earlier ruling was incorrect.

***6** The *Forcellati* action involves Defendants' homeopathic cold and flu remedies, which are not among the seven homeopathic products at issue in this action. Although Movant maintains that this action actually encompasses *all*

of Defendants' homeopathic products based on Plaintiffs' allegations discussed above, the Court has dismissed those allegations. Thus, there is currently no overlap between the products at issue in the two suits. Given that these suits involve distinct products, there may be little or no overlap in membership among the putative classes. In addition, the *Forcellati* action raises claims under federal law and New Jersey law that are not at issue here. Lastly, any choice-of-law issues that arise at the class certification stage will be further complicated by the addition of a New Jersey plaintiff.

The Court further notes that both Plaintiffs and Defendants in this action currently oppose consolidation. Consolidation is thus likely to waste just as much time as it saves because counsel for the two sets of plaintiffs will need to reach consensus on litigation decisions. Counsel have already devoted several pages of their briefs in an acrimonious dispute over which set of firms is more qualified to serve as class counsel. (*See* Mot. for Consolidation at 8–19; Pls.' Opp'n to Mot. for Consolidation at 5–18 [Doc. # 51]; Movant's Reply at 1–3, 6–17 [Doc. # 53].)

Given that this action and the *Forcellati* action involve entirely separate factual bases and partially different legal bases, and both parties in this action oppose consolidation, the Court concludes that the minimal saving of time and effort from consolidation would not outweigh the inconvenience, delay, and expense that it would cause. Accordingly, the Court declines to consolidate the two actions. Movant's motion for appointment of interim co-lead class counsel is denied as moot.

IV.

CONCLUSION

In light of the foregoing:

1. Defendants' motion to dismiss is **GRANTED** in part as follows:

a. Plaintiffs' sixth cause of action for money had and received, money paid, and unjust enrichment is **DISMISSED** with leave to amend.

b. Plaintiffs' allegations regarding Defendants' homeopathic products other than Hyland's Calms Forté, Hyland's Teething Relief, Hyland's Migraine Headache Relief, Hyland's ClearAc, Hyland's Poison Ivy/Oak Tablets, Hyland's Colic Tablets and Hyland's Leg Cramps with Quinine PM are **DISMISSED** with leave to amend.

2. Defendants' motion to dismiss is **DENIED** in all other respects.

3. Plaintiffs shall file any amended complaint by no later than **May 17, 2012.**

4. Defendants shall file a responsive pleading within 15 days of service of an amended complaint.

5. Movant's motion to consolidate is **DENIED.**

6. Movant's motion for appointment of interim co-lead class counsel is **DENIED** as moot.

7. The May 4, 2012 hearing is **VACATED.**

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2012 WL 1656750

Footnotes

1 Cal. Civ.Code § 1750 *et seq.*

2 Cal. Bus. & Prof.Code § 17200 *et seq.*

3 Cal. Bus. & Prof.Code § 17500 *et seq.*

4 Plaintiffs' standing is subject to one exception, discussed below, regarding their allegations as to products that Plaintiffs have neither purchased nor expect to purchase.

5 Defendants cite the following examples: “Soft tablets dissolve instantly” (1st Am.Compl.¶ 21); “100% natural” (*id.*);“Quick dissolving tablets” (*id.* ¶ 28); “Aspirin free” (*id.*);“Gentle on Skin No Harsh Chemicals”(*id.* ¶ 34); and “non-habit forming” (*id.* ¶ 51). Defendants claim that these statements do not support Plaintiffs' breach of express warranty claim because

Plaintiffs do not allege them to be false. (Mot. to Dismiss at 10.) In fact, it appears that Plaintiffs *do* challenge the accuracy of these statements. (*See* 1st Am. Compl. ¶ 80; Opp'n to Mot. to Dismiss at 18–19 [Doc. # 49].)

6 Defendants single out the following statements: "relief of simple nervous tension and occasional sleeplessness"; "sleep aid"; "for restless or wakeful sleep from exhaustion"; "for stress, nervousness or nervous headache"; "Relieve Pain and Irritability from Teething"; "Migraine Headache Relief"; "Natural Relief for Itching, Burning and Crusting Skin Due to Exposure to Poison Ivy or Oak"; "Symptomatic Relief for Colic in Children"; and "Temporarily relieves the symptoms of pain and cramps in lower body."(1st Am.Compl.¶ 80.)