UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

AVI WEISS,

Plaintiff,

v.

SEE'S CANDY SHOPS, INC., et al.,

Defendants.

Case No. 16-cv-00661-EMC

PUBLIC/REDACTED VERSION

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

Docket No. 39

Plaintiff Avi Weiss has filed a putative class action against Defendants See's Candy Shops, Inc. and See's Candies Inc. (collectively, "See's"), alleging that See's misrepresented certain products, such as its Classic Red Heart Assorted Chocolates, as being Kosher certified when, in fact, they were not. Although Mr. Weiss has asserted only state law claims, he filed suit in federal court based on diversity jurisdiction. Currently pending before the Court is See's motion to dismiss. According to See's, the Court lacks subject matter jurisdiction over the case. Having considered the parties' briefs and accompanying submissions, as well as the oral argument of counsel, the Court hereby **GRANTS** See's motion.

I. FACTUAL & PROCEDURAL BACKGROUND

In his class action complaint, Mr. Weiss alleges as follows.

See's manufactures, promotes, and distributes chocolates and other candy products. *See* Compl. ¶ 20. See's sells its products in retail stores known as See's Candies Shops throughout the country. *See* Compl. ¶ 21. In each of the stores, See's offers a selection of Kosher certified products. *See* Compl. ¶ 22. Kosher certification indicates that the "processing, preparation, and ingredients of the food meet certain quality and control standards that conform to Jewish dietary laws." Compl. ¶ 16.

To show that a product is Kosher certified, See's puts a "prominent and commonly known symbol for Kosher certification on large signs placed directly above the kosher certified merchandise displayed in [its] stores." Compl. ¶ 22. "Consumers . . . look for the kosher symbol on these signs to make their purchasing decisions." Compl. ¶ 24.

See's has represented to its customers that certain candies, including but not limited to the "Valentine's Day Classic Red Heart Box in various sizes and weights," are Kosher certified.[1] Compl. ¶ 25. In fact, they were not. Compl. ¶ 25. According to Mr. Weiss, he and other putative class members "have been harmed because they overpaid for the products (or would not have purchased the products) had they known that the products were not Kosher certified." Compl. ¶ 26.

"In addition to monetary damages, [Mr. Weiss] seeks injunctive relief to stop [See's] from falsely marketing some of [its] products as Kosher certified and to force [See's] to warn purchasers that certain candies sold as Kosher certified, are not in fact Kosher certified." Compl. ¶ 36.

The class that Mr. Weiss seeks to represent is as follows: "All individuals nationwide who, from four years prior to the filing of this Complaint [on February 9, 2016] through [the] date of certification purchased a product from a See's Candies Shop that was marketed as Kosher certified when the product was not Kosher certified." Compl. ¶ 37.

Based on, *inter alia*, the above allegations, Mr. Weiss has asserted the following claims:

(1) Breach of express warranty in violation of California Commercial Code § 2313;

(2) Unlawful, unfair, and fraudulent business acts and practices in violation of California Business & Professions Code § 17200;

(3) Violation of the California Consumer Legal Remedies Act, *see* Cal. Civ. Code § 1750, *et seq.*;

(4) False advertising in violation of the California Business & Professions Code § 17500; and

[1] Mr. Weiss himself purchased a Valentine's Day Classic Red Heart Box. *See* Compl. ¶ 31.

(5) Fraudulent inducement.

According to Mr. Weiss, "[t]he Court has original jurisdiction over this action pursuant to 28 U.S.C. § 1332(d), because (a) at least one member of the putative class is a citizen of a state different from Defendants, (b) the amount in controversy exceeds $5,000,000, exclusive of interest and costs, and (c) none of the exceptions under that subsection apply to this action." Compl. ¶ 12.

II. DISCUSSION

A. Legal Standard

Federal Rule of Civil Procedure 12(b)(1) provides that a defendant may move for a dismissal based on lack of subject matter jurisdiction. "Rule 12(b)(1) jurisdictional attacks can be either facial or factual." *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000). Where there is a facial attack, a court considers only the complaint. *See id.*; *see also Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004) (stating that, "'[i]n a facial attack, the challenger asserts that the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction'"). With a factual attack, however, a court "need not presume the truthfulness of the plaintiffs' allegations" and "may look beyond the complaint." *See White*, 227 F.3d at 1242; *see also Wolfe*, 392 F.3d at 362 (noting that, in a factual motion to dismiss, the moving party presents affidavits or other evidence).

In the instant case, See's presents both a facial and a factual attack to subject matter jurisdiction.

B. Facial Attack

According to See's, as a facial matter, Mr. Weiss has failed to adequately plead diversity jurisdiction because, in his complaint, (1) he has failed to allege his own citizenship and (2) his allegation that the amount in controversy exceeds $5 million is entirely conclusory in nature and does not specify any facts to support the claim. The Court need not dwell on See's facial attack because, even if there were deficiencies with the complaint, Mr. Weiss would have an opportunity to cure those deficiencies with an amendment. *See* 28 U.S.C. § 1653 (providing that "[d]efective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts"); *May Dep't Store v. Graphic Process Co.*, 637 F.2d 1211, 1216 (9th Cir. 1980) (noting that "an action

should not be dismissed for lack of jurisdiction without giving the plaintiff an opportunity to be heard unless it is clear the deficiency cannot be overcome by amendment"); *Jorio v. Benmansour*, No. 15-cv-00063 NC, 2015 U.S. Dist. LEXIS 188743, at *3 (N.D. Cal. Aug. 25, 2015) ("permit[ting] Jorio to amend his complaint to state that he was domiciled in California at the time he filed suit to cure the subject matter jurisdiction defect"). Moreover, as reflected by the parties' briefs, the crux of the dispute is not the facial challenge to subject matter jurisdiction but rather the factual challenge. The Court thus turns to the factual challenge.

C. Factual Challenge

1. Legal Certainty v. Preponderance of the Evidence/Prima Facie Case

As an initial matter, the Court addresses Mr. Weiss's contention that, for a defendant to prevail on a factual attack, it must be shown to a legal certainty that there is not subject matter jurisdiction. See's responds that the legal certainty standard applies only where there is a facial attack, not a factual one.

Neither party's position is entirely correct. Where there are disputed facts, those facts are resolved by a preponderance of the evidence, but, after that, the predictive legal certainty test does apply. *See, e.g.*, *Meridian Sec. Ins. Co. v. Sadowski*, 441 F.3d 536, 543 (7th Cir. 2006) (stating that "a proponent of federal jurisdiction must, if material allegations are contested, prove those jurisdictional facts by a preponderance of the evidence" and that, "[o]nce the facts have been established, . . . [o]nly if it is 'legally certain' that the recovery (from plaintiff's perspective) or cost of complying with the judgment (from defendant's) will be less than the jurisdictional floor may the case be dismissed"); *Frederico v. Home Depot*, 507 F.3d 188, 194 (3d Cir. 2007) (stating that, "where disputes over factual matters are involved, the . . . preponderance of the evidence standard is appropriate for resolving the dispute"; but "'when relevant facts are not in dispute or findings have been made,' the district court should adhere to the 'legal certainty test'"); *cf. Naffe v. Frey*, 789 F.3d 1030, 1040 (9th Cir. 2015) (stating that where "the plaintiff files suit originally in federal court . . . and the complaint affirmatively alleges that the amount in controversy exceeds the [§ 1332] jurisdictional threshold[,] . . . the legal certainty test applies"; but one situation where the legal certainty standard is met is "when independent facts show that the amount of damages

was claimed merely to obtain federal court jurisdiction"). That legal certainty test which applies to complaint filed in federal (in contrast to cases removed from state to federal court) has been stated variously – for example, "'[i]n cases brought in the federal court . . . it must appear to a legal certainty that the [plaintiff's] claim is really for less than the jurisdictional amount to justify dismissal.'" *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992) (quoting *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 288-90 (1938); adding that "'[a] different situation is presented in the case of a suit instituted in a state court and thence removed [–] [t]here is a strong presumption that the plaintiff has not claimed a large amount in order to confer jurisdiction on a federal court or that the parties have colluded to that end'"). Stated differently, the legal certainty standard is met where the plaintiff has established a colorable claim. *See St. Paul Mercury*, 303 U.S. at 289 (stating that, "if from the face of the pleadings, it is apparent to a legal certainty, that the plaintiff cannot recover the amount claimed or if, from the proofs, the court is satisfied to a like certainty, that the plaintiff never was entitled to recover that amount, and that his claim was therefore colorable for the purpose of conferring jurisdiction, the suit will be dismissed").

In the Ninth Circuit, where there are disputed facts, a plaintiff is permitted to make only a prima facie showing of subject matter jurisdiction (*i.e.*, the plaintiff is not held to the higher preponderance-of-the-evidence standard) if only written materials are submitted for the court's consideration. *See Societe de Conditionnement en Aluminum v. Hunter Eng'g Co.*, 655 F.2d 938, 942 (9th Cir. 1985); *see also Data Disc, Inc. v. Sys. Tech. Assocs., Inc.*, 557 F.2d 1280, 1285 (9th Cir. 1977) (explaining that, "[i]f the court determines that it will receive only affidavits or affidavits plus written materials, these very limitations dictate that a plaintiff must make only a prima facie showing of jurisdictional facts through the submitted materials in order to avoid a defendant's motion to dismiss").

In the case at hand, there are relevant facts in dispute (*i.e.*, the extent of the mislabeling problem), and, as the parties have submitted only written materials to the Court, Mr. Weiss is required to make only a prima facie showing of jurisdiction. For the reasons discussed below, Mr. Weiss has failed to satisfy that low standard – that is, he has failed to make a prima facie case that the amount-in-controversy exceeds $5 million.

2. Economic Damages

In its factual challenge, See's focuses on the amount-in-controversy requirement. As noted above, Mr. Weiss seeks on his own behalf, and on the behalf of a putative class, economic damages, attorney's fees, and injunctive relief. The main relief sought is economic damages.[2]

According to See's, the economic damages of the putative class amount to $0 because See's did not and does not charge more for its Kosher products compared to its non-Kosher products. This argument, however, is not compelling because it glosses over the fact that, for a person who is Kosher adherent, a Kosher-certified product is not simply a dietary preference but rather a dietary restriction. *Ivie v. Kraft Foods Global, Inc.*, No. C-12-02554-RMW, 2015 U.S. Dist. LEXIS 5196 (N.D. Cal. Jan. 14, 2015), and *Khasin v. R.C. Bigelow, Inc.*, No. 12-cv-02204-WHO, 2016 U.S. Dist. LEXIS 42735 (N.D. Cal. Mar. 29, 2016), are both distinguishable because they deal with dietary preferences. In the instant case, the mislabeled product is arguably worthless to the Kosher adherent individual who may be entitled to a refund.

Even if damages were to be measured by the refund of full amounts paid for Kosher-mislabeled products, however, See's contends economic damages would still be well below the $5 million threshold required by § 1332. In support of this claim, See's conducted an internal investigation into the mislabeled price cards and determined that economic damages amounted to [redacted] *See* Reply at 10 ("See's . . . calculated the amount in controversy if every purchaser . . . of a mistakenly labeled product received a full refund, and still the theoretical maximum award would be only [redacted]."); Reply at 11 ("[E]ven if the Court were to include sales of Maple Cashew Brittle in the amount in controversy, See's sold [redacted] of the product while the kosher insignia mistakenly appeared on the website . . . .").

Mr. Weiss contends that the amount in controversy has been met because See's has conceded that its total sales of Kosher products for the relevant period is [redacted] However, the total sales of Kosher products do not establish the amount in controversy because Mr. Weiss is

[2] See's argues that the value of any injunctive relief is minimal at best, and Mr. Weiss does not dispute such. Similarly, the parties agree that attorney's fees would likely be a limited percentage of the economic damages awarded (*e.g.*, 25 percent).

suing only for products marketed as Kosher certified when the products were not in fact Kosher certified. *See* Compl. ¶ 37 (defining the class as "[a]ll individuals nationwide who. . . purchased a product from a See's Candies Shop that was marketed as Kosher certified when the product was not Kosher certified"). Mislabeled products are only a subset of the total sales of Kosher products and the only evidence presented (even after Mr. Weiss was afforded discovery) indicate that subset is an extremely small proportion of those sales.

Contrary to what Mr. Weiss argues, *Lewis v. Verizon Communications, Inc.*, 627 F.3d 400 (9th Cir. 201), does not support his position. In *Lewis*, the plaintiff filed a class action in state court after Verizon billed her for services that she never ordered. "Describing these charges as 'unauthorized,'" the plaintiff sought "to represent a class of landline Verizon customers in California who have been billed for such services that they never expressly agreed to or requested." *Id.* at 397. Verizon removed the case to federal court, arguing that the amount in controversy exceeded $5 million. In support of this claim, Verizon submitted evidence that members of the putative class were billed more than $5 million during the relevant period. In evaluating the propriety of Verizon's removal, the Ninth Circuit took note of the district court's refusal

> to accept the total billings as representing the amount in controversy. Instead, looking to the allegations of the complaint, it held that the total billings could not represent the amount in controversy because the complaint was claiming liability only for charges that were "unauthorized." The district court thus assumed total billings would include both authorized and unauthorized charges and held that the Defendant had failed to meet its burden under our case law to show the amount in controversy, i.e., unauthorized charges, exceeded the jurisdictional amount.

Id. at 400. The Ninth Circuit, however, disagreed with the district court's analysis. It explained that "[t]here is no evidence or allegation to support [the district court's] assumption" that total billings included both authorized and unauthorized charges. *Id.* "[T]he Defendant has put in evidence of the total billings *and the Plaintiff has not attempted to demonstrate, or even argue, that the claimed damages are less than the total billed. . . . Hence, on this record, the entire amount of the billings is 'in controversy.'*" *Id.* (emphasis added).

Here, See's did provide evidence to show that the amount in controversy is less than the

total sales of its Kosher products – *i.e.*, that any mislabeling constituted only a tiny subset of the total sales of Kosher products. Mr. Weiss, despite having discovery, has failed to show that portion exceeds $5 million.

Faced with this problem, Mr. Weiss suggested for the first time at the hearing that, at the very least, it would be reasonable to *assume* that total sales of mislabeled products would likely exceed $5 million given the large total sales of Kosher products. But this argument is based on sheer speculation.

Mr. Weiss argues that See's internal investigation (in which it determined that the amount in controversy was, at best, approximately [redacted] or less) did not account for all mislabeling by See's. Mr. Weiss contends, for example, that See's only investigated price card mislabeling and not other kinds of mislabeling (*e.g.*, package mislabeling). Mr. Weiss also points out that See's internal study did not include mislabeling on products such as See's Christmas Totes and Maple Cashew Brittle and argues that, as a result, there is a systemic problem with mislabeling on the part of See's that is larger than what the internal study suggests.

But even if See's internal investigation did not account for, *e.g.*, package mislabeling or mislabeling on the Christmas Totes and Maple Cashew Brittle,[3] Mr. Weiss has failed to provide any evidence about the dollar value of this mislabeling.[4] He has not demonstrated there is evidence of mislabeling sufficient in magnitude to be material. Nor does the purported mislabeling of the Christmas Totes and Maple Cashew Brittle establish the existence of a wide systemic problem. See's declaration stating that it had to correct "its master data concerning

[3] The Court notes that the alleged mislabeling of the Maple Cashew Brittle took place on See's website. Because Mr. Weiss did not include website mislabeling within the definition of the class, *see* Compl. ¶ 37 (defining the class as "[a]ll individuals nationwide who, from four years prior to the filing of this Complaint [on February 9, 2016] through [the] date of certification purchased a product *from a See's Candies Shop* that was marketed as Kosher certified when the product was not Kosher certified") (emphasis added), the Court could well ignore the alleged mislabeling of the Maple Cashew Brittle on See's website – *i.e.*, it would not count towards the dollar threshold applicable to this case. However, even if the product could count toward the dollar threshold, See's has provided evidence that sales of the product were not that significant. *See* Millington Reply Decl. ¶ 6.

[4] The only evidence in the record is that the sales of Brittle was [redacted] from 2013 through February 2017. *See* Millington Reply Decl. ¶ 6.

Maple Cashew Brittle to ensure the website would not include a kosher certification insignia in the future," Millington Reply Decl. ¶ 4, does not indicate there was a problem with See's master data for other products.

The Court underscores that Mr. Weiss's failure to quantify in some way the dollar value of package mislabeling or mislabeling on the Christmas Totes or find any evidence suggesting a wider systemic labeling problem is especially problematic because it gave Mr. Weiss the opportunity to conduct jurisdictional discovery. Indeed, Mr. Weiss had the opportunity to take jurisdictional discovery *after* See's filed its motion to dismiss for lack of subject matter jurisdiction in which it explained that it had conducted an internal investigation to see what the monetary value of the mislabeling was (assuming a full refund on mislabeled products).

Because Mr. Weiss had the opportunity to take jurisdictional discovery and yet still failed to make a prima facie case that the amount in controversy exceeds $5 million, he has failed to establish subject matter jurisdiction in this Court. And given he was afforded an opportunity to take discovery, dismissal without leave to amend is warranted.

III. CONCLUSION

Accordingly, See's motion to dismiss for lack of subject matter jurisdiction is granted, and with prejudice as to the jurisdictional question. The Clerk of the Court is ordered to enter judgment in accordance with the above and close the file in this case.

This order disposes of Docket No. 39.

IT IS SO ORDERED.

Dated: August 3, 2017

EDWARD M. CHEN
United States District Judge