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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

HOMELAND HOUSEWARES, LLC, a California LLC; NUTRIBULLET, LLC, L a California LLC,)	Case No. CV 14-03954 DDP (MANx)
)	
Plaintiffs,)	ORDER GRANTING IN PART
)	DEFENDANT'S MOTION TO DISMISS
v.)	PLAINTIFFS' FIRST AMENDED
)	COMPLAINT WITH LEAVE TO AMEND
)	
EURO-PRO OPERATING LLC, a Massachusetts LLC,)	[Dkt. No. 24]
)	
Defendant.)	
_____)	

Presently before the court is Defendant Euro-Pro Operating, LLC's Motion to Dismiss Plaintiffs' First Amended Complaint. Having considered the submissions of the parties, the court grants the motion in part and adopts the following order.

I. Background

Plaintiffs Homeland Housewares, LLC and Nutribullet, LLC (hereinafter collectively referred to as "Homeland") and Defendant Euro-Pro Operating, LLC ("Euro-Pro") are both in the home blender market. (First Amended Complaint ("FAC") ¶¶ 4&6, Dkt. No. 12.)

Plaintiffs sell several single-serving blenders under its BULLET line of products, including the NUTRIBULLET, the NUTRIBULLET

1 SPORT, and the NUTRIBULLET PRO. (FAC ¶ 4, Exs. 2&4, Dkt. No. 12.)
2 Plaintiffs allege that they have spent several hundred million
3 dollars in advertisements for these products, including investing
4 in infomercials. (Id.)

5 Defendant sells a competing single-serving blender called the
6 NUTRI NINJA that competes with Plaintiffs' NUTRIBULLET line of
7 products. (Id. at ¶ 6, Ex. 2.) Plaintiffs take issue with the
8 product packaging for the NUTRI NINJA. (Id.) Specifically,
9 Plaintiffs allege that Defendant duplicated "the color scheme,
10 fonts, phraseology, and overall look and feel of Plaintiff's
11 NUTRIBULLET packaging trade dress." (Id.) Moreover, NUTRI NINJA's
12 packaging compares the NUTRI NINJA to the NUTRIBULLET line
13 regarding several features in the form of a chart ("Chart"). (Id.)

14 Plaintiffs also allege that Defendant planted "false reviews
15 on the Internet, making false claims of defects in NUTRIBULLET
16 blenders and touting the NUTRI NINJA as a superior alternative."
17 (Id. at ¶ 9.)

18 On May 22, 2014, Plaintiffs filed the Original Complaint
19 seeking damages and injunctive relief for false advertising under
20 both federal and state statutes, trade dress infringement, trade
21 libel, and unfair competition. (Dkt. No. 1.) These claims are
22 based primarily on NUTRI NINJA's packaging. (Id.) On July 3,
23 2014, Plaintiffs filed a First Amended Complaint. (Dkt. No. 12.)

24 In this motion to dismiss, Defendant seeks to dismiss all of
25 Plaintiffs' claims with prejudice under Fed. R. Civ. P. 12(b)(6),
26 arguing that Plaintiffs fail to state plausible claims.

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1 **II. Legal Standard**

2 A complaint will survive a motion to dismiss when it contains
3 "sufficient factual matter, accepted as true, to state a claim to
4 relief that is plausible on its face." Ashcroft v. Iqbal, 556 U.S.
5 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544,
6 570 (2007)). When considering a Rule 12(b)(6) motion, a court must
7 "accept as true all allegations of material fact and must construe
8 those facts in the light most favorable to the plaintiff." Resnick
9 v. Hayes, 213 F.3d 443, 447 (9th Cir. 2000). Although a complaint
10 need not include "detailed factual allegations," it must offer
11 "more than an unadorned, the-defendant-unlawfully-harmed-me
12 accusation." Iqbal, 556 U.S. at 678. Conclusory allegations or
13 allegations that are no more than a statement of a legal conclusion
14 "are not entitled to the assumption of truth." Id. at 679. Even
15 under the liberal pleading standard of Federal Rule of Civil
16 Procedure 8(a)(2), under which a party is only required to make a
17 "short and plain statement of the claim showing that the pleader is
18 entitled to relief," a "pleading that offers 'labels and
19 conclusions' or a 'formulaic recitation of the elements of a cause
20 of action will not do.'" Id. 678 (quoting Twombly, 550 U.S. at
21 555).

22 **III. Discussion**

23 **A. False Advertising Claim**

24 Because Defendant has withdrawn its motion to dismiss
25 Plaintiffs' false advertising claims as to NUTRI NINJA's packaging,
26 (Reply at 2:1-5), the Court considers the motion to dismiss solely
27 as to Plaintiffs' false advertising claims based on allegedly false
28 reviews.

1 The elements of a Lanham Act § 43(a)¹ false advertising claim
2 are: "(1) a false statement of fact by the defendant in a
3 commercial advertisement about its own or another's product; (2)
4 the statement actually deceived or has the tendency to deceive a
5 substantial segment of its audience; (3) the deception is material,
6 in that it is likely to influence the purchasing decision; (4) the
7 defendant caused its false statement to enter interstate commerce;
8 and (5) the plaintiff has been or is likely to be injured as a
9 result of the false statement" Southland Sod Farms v.
10 Stover Seed Co., 108 F.3d 1134, 1139 (9th Cir. 1997).

11 Plaintiffs have not sufficiently alleged facts to support its
12 false advertising claim based on allegedly false reviews, primarily
13 because it has not alleged clearly that Defendant made a false
14 statement of fact.² Plaintiffs have not specified what sort of
15 "false claims of defects" Defendant is supposed to have made.
16 Without something more, the allegation is ambiguous. Do the

17
18 ¹ The Lanham Act § 43(a), codified at 15 U.S.C. § 1125(a),
provides in pertinent part:
19 1) Any person who, on or in connection with any goods or
20 services, or any container for goods, uses in commerce any ...
false or misleading representation of fact, which-
21 (A) ...
22 (B) in commercial advertising or promotion, misrepresents the
23 nature, characteristics, qualities, or geographic origin of
his or her or another person's goods, services, or commercial
24 activities, shall be liable in a civil action by any person
who believes that he or she is or is likely to be damaged by
such act.
15 U.S.C. § 1125(a) (1988).

25 ² Defendant argues that Rule 9(b)'s fraud pleading standard
26 applies to false advertising claims even though the Ninth Circuit
has not clearly addressed this issue. See EcoDisc Tech. AG v. DVD
27 Format/Logo Licensing Corp., 711 F. Supp. 2d 1074, 1085 (C.D. Cal.
2010). However, the Court does not need to address whether Rule
28 9(b)'s heightened pleading standard applies to false advertising
claims because Plaintiffs have not sufficiently pled facts to meet
the requirements of Rule 8(a).

1 reviews, for example, label Plaintiff's products "poorly made" or
2 "too small" or "ugly," which would be statements of opinion? Or do
3 they make falsifiable factual claims about Plaintiffs' blenders?
4 Secondly, even if Defendant made statement of fact, were they
5 material? These questions matter, because merely alleging that
6 Defendant said negative things about one's product is not stating a
7 claim for false advertising. Plaintiffs must clarify its
8 allegations to state a cognizable false advertising claim based on
9 false reviews. See, e.g., Newcal Indus., Inc. v. Ikon Office
10 Solution, 513 F.3d 1038, 1052-53 (9th Cir. 2008) (plaintiff had
11 "alleged all elements of a Lanham Act violation" when it listed
12 particular statements constituting false or misleading statements
13 of fact).

14 Secondarily, simply stating that "false reviews" can be found
15 somewhere on the internet does not provide sufficient notice to the
16 Defendant as to what exactly Plaintiff alleges, as the internet is
17 vast and contains multitudes. And because the allegation is so
18 vague, it also does not tend to show that the audience is likely to
19 be deceived, that the message was placed into interstate commerce,
20 or that Plaintiff has been or is likely to be injured. Some
21 indication of the nature and scope of the communication is required
22 to successfully allege false advertising.

23 Accordingly, the Court grants Defendant's motion to dismiss
24 Plaintiffs' false advertising claim based on false reviews, with
25 leave to amend.

26 **B. Trade Dress Infringement Claim**

27 "Section 43(a) of the Lanham Act provides a remedy for a broad
28 range of deceptive marking, packaging and marketing of goods or

1 services in commerce." Fuddruckers, Inc. v. Doc's B.R. Others,
2 Inc., 826 F.2d 837, 841 (9th Cir. 1987). Trade dress involves "the
3 total image of a product and may include features such as size,
4 shape, color or color combination, texture, graphics, or even
5 particular sales techniques." Two Pesos, Inc. v. Taco Cabana,
6 Inc., 505 U.S. 763, 765 n. 1 (1992); see also One Indus., LLC v.
7 Jim O'Neal Distrib., Inc., 578 F.3d 1154, 1165 (9th Cir. 2009).

8 To sustain a claim for trade dress infringement, Plaintiffs
9 must specifically prove: "(1) that its claimed dress is
10 nonfunctional; (2) that its claimed dress is inherently distinctive
11 or has acquired secondary meaning; and (3) that the defendant's
12 product or service creates a likelihood of consumer confusion."
13 Clicks Billiards, Inc. v. Sixshooters, Inc., 251 F.3d 1252, 1259
14 (9th Cir. 2001).

15 As an initial matter, "[a] plaintiff seeking to recover for
16 trade dress infringement under section 43(a) must show that its
17 trade dress is protectable. . . ." Fuddruckers, Inc. v. Doc's B.R.
18 Others, Inc., 826 F.2d 837, 841 (9th Cir. 1987). In particular, "a
19 plaintiff must specifically define the list of elements that
20 comprise the trade dress." Treat, Inc. v. Dessert Beauty, No.
21 05-923 PK, 2006 WL 2812770 at *14 (D. Or. May 5, 2006). "Only then
22 can the court and the parties coherently define exactly what the
23 trade dress consists of and determine whether the trade dress is
24 valid and if what the accused is doing is an infringement." Id.
25 (internal quotation marks and citation omitted). See also
26 Globefill Inc. v. Elements Spirits, Inc., 473 F. App'x 685, 686
27 (9th Cir. 2012) (recognizing that Plaintiff's Second Amended
28 Complaint alleged with specificity the elements of the trade dress

1 it sought to protect with the following factual description: "a
2 bottle in the shape of a human skull, including the skull itself,
3 eye sockets, cheek bones, a jaw bone, a nose socket, and teeth, and
4 including a pour spout on the top thereof.").

5 Plaintiffs have not clearly articulated what comprises their
6 claimed trade dress. Plaintiffs argue that they have sufficiently
7 described their trade dress because they have provided a photograph
8 of their trade dress in Exhibit 2 of the First Amended Complaint
9 and have provided a written description to accompany it in the
10 First Amended Complaint. (Pls. Opp'n. at p. 13, Dkt. 28.)

11 However, the written description solely describes the claimed
12 trade dress as "the color scheme, fonts, phraseology, and overall
13 look and feel" of Plaintiffs' product packaging. (FAC ¶ 18, Dkt.
14 No. 12.) This description and the photograph alone do not
15 sufficiently identify the particular elements of the packaging that
16 they seek to protect. See Landscape Forms, Inc. v. Columbia
17 Cascade Co., 113 F.3d 373, 381 (2d Cir. 1997) (holding that "focus
18 on the overall look of a product does not permit a plaintiff to
19 dispense with an articulation of the specific elements which
20 comprise its distinct dress," because the court must be able to
21 evaluate the claim and narrowly tailor relief). Plaintiffs have
22 not sufficiently described their claimed trade dress.

23 Because the Court finds that Plaintiffs have not sufficiently
24 described their trade dress, it need not reach whether Plaintiffs
25 have sufficiently pled the elements of distinctiveness or
26 likelihood of confusion.³ See Keep a Breast Found. v. Seven Grp.,

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28 ³ Both parties have briefed this issue. Without reaching the
(continued...)

1 No. 11-CV-00570 BEN WMC, 2011 WL 3240756, at *3 (S.D. Cal. July 28,
2 2011). Thus, the Court dismisses Plaintiffs' trade dress
3 infringement claim with leave to amend.

4 **C. Trade Libel Claim**

5 Under California law, "trade libel is an intentional
6 disparagement of the quality of property, which results in
7 pecuniary damage." Films of Distinction, Inc. v. Allegro Film
8 Prod., Inc., 12 F. Supp. 2d 1068, 1081 (C.D. Cal. 1998). "To prove
9 trade libel, Plaintiff must show (1) a statement that (2) was
10 false, (3) disparaging, (4) published to others in writing, (5)
11 induced others not to deal with it, and (6) caused special
12 damages." New.Net, Inc. v. Lavasoft, 356 F. Supp. 2d 1090, 1113
13 (C.D. Cal. 2004).

14 "A cause of action for trade libel requires pleading and
15 showing special damages." Piping Rock Partners, Inc. v. David
16 Lerner Associates, Inc., 946 F. Supp. 2d 957, 981 (N.D. Cal. 2013).
17 "Under federal pleading requirements, '[w]hen items of special
18 damages are claimed, they shall be specifically stated.'" Isuzu
19 Motors Ltd. v. Consumers Union of U.S., Inc., 12 F. Supp. 2d 1035,
20 1047 (C.D. Cal. 1998) (quoting Fed. R. Civ. P. 9(g)). "Thus, while
21 the requirement that plaintiff plead special damages arises from
22 state law governing a claim for product disparagement, the
23 requirement that special damages be specifically pleaded stems from
24 Fed. R. Civ. P. 9(g)." Id.

25
26 ³(...continued)
27 merits of this issue, the Court notes that Plaintiffs need to
28 allege facts to establish all three elements of their trade dress
infringement claim. A mere recitation of the required elements
and/or conclusory allegations will not survive a motion to dismiss.

1 Plaintiffs cannot satisfy the special damages requirement for
2 trade libel under California law. Plaintiffs argue that they have
3 sufficiently established special damages in support of their trade
4 libel claim by pleading that they have suffered "lost sales,
5 disruption of business relationships, loss of market share and of
6 customer goodwill" and by requesting \$3 million dollars in damages
7 in their prayer for relief. (Pls. Opp'n. at p. 17-18, Dkt. 28)

8 However, Plaintiffs' general statements of economic loss and
9 bare statement for relief of \$3 million dollars in damages do not
10 sufficiently identify special damages. See Isuzu Motors, 12 F.
11 Supp. 2d 1035, 1047 (C.D. Cal. 1998) (finding a claim for special
12 damages from "the loss of revenue from wholesale and retail sales
13 of [plaintiff]" to be a bare allegation of the amount of pecuniary
14 loss and therefore to be inadequate). Plaintiffs generally seek
15 damages in the amount of \$3 million for the false advertising,
16 unfair competition, and trade libel claims. But Plaintiffs do not
17 allege specifically what amount of that total is attributable to
18 the libelous statements as a whole. See First Advantage Background
19 Servs. Corp. v. Private Eyes, Inc., 569 F. Supp. 2d 929, 938 (N.D.
20 Cal. 2008) (party did not adequately plead special damages where it
21 alleged a total loss of \$4-\$5 million but did not provide specific
22 damages for the trade libel claim).

23 Moreover, to recover damages based on general business loss,
24 Plaintiffs "should have alleged facts showing an established
25 business, the amount of sales for a substantial period preceding
26 the publication, the amount of sales subsequent to the publication,
27 [and] facts showing that such loss in sales were the natural and
28 probable result of such publication[.]" Isuzu Motors, 12 F. Supp.

1 2d 1035, 1047 (C.D. Cal. 1998) (citations omitted). Plaintiffs did
2 not set forth any factual allegations other than that Plaintiffs
3 lost sales, market share, and customer goodwill. This conclusory
4 statement is not sufficient to properly plead special damages for
5 trade libel under California law.

6 Thus, the Court finds that Plaintiffs have failed to satisfy
7 the special damages requirement for a trade libel claim.
8 Accordingly, the Court grants Defendant's motion to dismiss
9 Plaintiffs' claim for trade libel, with leave to amend.

10 **D. California False Advertising and Unfair Competition Claims**

11 "The Ninth Circuit has consistently held that state common law
12 claims of unfair competition and actions pursuant to California
13 Business and Professions Code § 17200 are 'substantially congruent'
14 to claims made under the Lanham Act." Cleary v. News Corp., 30
15 F.3d 1255, 1262-63 (9th Cir. 1994); see also Japan Telecom, Inc. v.
16 Japan Telecom Am. Inc., 287 F.3d 866, 875 (9th Cir. 2002)
17 (plaintiff's "California unfair competition claim fails because its
18 related Lanham Act claims fail"); Denbicare U.S.A., Inc. v. Toys
19 "R" Us, Inc., 84 F.3d 1143, 1152-53 (9th Cir. 1996), *abrogated on*
20 *other grounds* (dismissal of plaintiff's § 17200 and § 17500 claims
21 were proper since plaintiff's Lanham Act claim was properly
22 dismissed); Cosmos Jewelry, Ltd. v. Po Sun Hon Co., No. 06-56338,
23 2009 WL 766517, at *2 (9th Cir. Mar. 24, 2009) ("Because we affirm
24 the finding of trademark infringement, we also affirm the finding
25 of unfair competition").

26 Because their related Lanham Act claims fail for the reasons
27 stated above, the Court dismisses Plaintiffs' Cal. Bus. & Prof.
28 Code § 17200 and 17500 claims as to 1) Plaintiffs' false

1 advertising claim based on allegedly false reviews, and 2)
2 Plaintiffs' trade dress infringement claim.

3 **E. Cal. Bus. & Prof. Code Section 17508 Claim**

4 "It shall be unlawful for any person doing business in
5 California and advertising to consumers in California to make any
6 false or misleading advertising claim, including claims that (1)
7 purport to be based on factual, objective, or clinical evidence,
8 (2) compare the product's effectiveness or safety to that of other
9 brands or products, or (3) purport to be based on any fact." Cal.
10 Bus. & Prof. Code § 17508(a).

11 Defendant argues that Plaintiffs, as private persons, cannot
12 sustain a claim for false advertising under § 17508. (Mot. Dismiss
13 at p. 24-25.) Defendant claims that "the statute can only be
14 invoked by certain California public officials, namely 'the
15 Director of Consumer Affairs, the Attorney General, any city
16 attorney, or any district attorney.'" (Id.) Plaintiffs counter
17 that a private plaintiff *can* assert a claim under § 17508, although
18 he cannot take advantage of the substantiation and burden-shifting
19 provisions in subdivisions (b)-(c) of the statute. (Opp'n at 19:1-
20 14.)

21 The application of Cal. Bus. & Prof. Code. § 17508 is somewhat
22 unclear. Although it is clear that a private plaintiff cannot take
23 advantage of the "substantiation" provisions of the statute, Cal.
24 Bus. & Prof. Code. § 17508(b)-(c), it is less certain whether the
25 statute permits private persons to bring suit at all. There is a
26 dearth of reported cases dealing with § 17508: the Court has found
27 only 23 cases in Westlaw's database that even mention the statute,
28 and in many of those the statute is not actually at issue in the

1 case. The closest any California court has come to answering the
2 question is in Nat'l Council Against Health Fraud, Inc. v. King Bio
3 Pharm., Inc., where the appeals court held that the substantiation
4 procedure "is limited to prosecuting authorities and may not be
5 utilized by private persons." 107 Cal. App. 4th 1336, 1343 (2003).
6 The court also stated immediately thereafter that "[B]oth private
7 persons and prosecuting authorities may sue to enjoin false
8 advertising and obtain restitution" Id. at 1344. Because
9 the plaintiff in that case had brought its complaint under § 17500
10 (the general false advertising law), however, and because the
11 discussion of § 17508 revolved primarily around establishing burden
12 of proof under the state's false advertising law generally, the
13 court's statements are not helpful in determining whether § 17508
14 can be the basis of an independent cause of action.

15 However, Plaintiff brings its Fifth Cause of Action under §
16 17500 *and* § 17508. § 17500 prohibits and makes actionable false
17 advertising generally. Logically it is surely the case that
18 *specific* flavors of false advertising are actionable under the
19 *general* false advertising provisions of § 17500, at least absent a
20 statutory exemption. Section 17508 seems to serve as the opposite
21 of a statutory exemption: it is more like a statutory inclusion,
22 clarifying specifically that advertising that makes false
23 statements of verifiable fact, including false comparisons, is
24 unlawful. Several of the sections that follow § 17500 seem to fill
25 this function, specifying particular kinds of unlawful false
26 advertising, all of which are presumably actionable under § 17500.
27 See Cal. Bus. & Prof. Code § 17505 (prohibiting the
28 misrepresentation of ownership or control); Cal. Bus. & Prof. Code

1 § 17505.2 (prohibiting misrepresentation of one's status as a
2 recreation therapist); Cal. Bus. & Prof. Code § 17507 (prohibiting
3 failure to adequately identify pricing when advertising multiple
4 items of the same type). Although it also creates the
5 substantiation mechanism, § 17508 first identifies a particular
6 kind of unlawful false advertising: false comparative advertising.
7 See § 17508(a). As false advertising is actionable under § 17500,
8 it becomes somewhat academic to ask whether the claim is "under" §
9 17508 as well, or whether § 17508 merely clarifies that false
10 comparative advertising is, indeed, actionable false advertising
11 under § 17500.⁴

12 The Court therefore holds that a sufficiently well-pled claim
13 that Defendants made false comparative statements in advertising is
14 permissible under California false advertising law. Because this
15 claim shares the same factual predicate as Plaintiffs' federal
16 false advertising claim, and because Defendant has withdrawn its
17 motion to dismiss Plaintiffs' federal false advertising claims as
18 to NUTRI NINJA's packaging, (Reply at 2:1-5), the Court denies the
19 motion to dismiss as to the Fifth Cause of Action for false
20 advertising under state law.

21 **IV. Conclusion**

22 For the foregoing reasons Defendant's motion to dismiss
23 Plaintiffs' First Amended Complaint is GRANTED IN PART. It is
24

25 ⁴California courts apparently allow plaintiffs to bring claims
26 under multiple sections of the "False Advertising" portion of the
27 Code at once, which lends support to the Court's interpretation of
28 the statute. E.g., Blatty v. New York Times Co., 42 Cal. 3d 1033,
1038 (1986) ("In his amended complaint Blatty . . . asserted . . .
false and misleading advertising in violation of Business and
Professions Code sections 17500 to 17508").

1 GRANTED as to Plaintiff's Lanham Act claims with regard to "false
2 reviews" and trade dress infringement, as well as related state
3 unfair competition claims. It is further GRANTED as to Plaintiff's
4 trade libel claim. However, the motion is DENIED as to Plaintiff's
5 federal claim regarding the comparison chart on Defendant's
6 packaging, and it is also denied as to Plaintiff's related claims
7 under Cal. Bus. & Prof. Code §§ 17200, 17500, and 17508. Plaintiff
8 is GRANTED LEAVE TO AMEND; such amendment must be filed with the
9 Court no later than ten days from the effective date of this order.

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IT IS SO ORDERED.

Dated: November 5, 2014



DEAN D. PREGERSON

United States District Judge