UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

VP RACING FUELS, INC,
a Texas corporation

Plaintiff,

v.

GENERAL PETROLEUM CORPORATION,
a California corporation, and
DOES 1 through 100, inclusive

Defendants.

No. 2:09-cv-02067-MCE-GGH

MEMORANDUM AND ORDER

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Plaintiff VP Racing Fuels, Inc. ("Plaintiff") seeks injunctive and monetary relief from Defendant General Petroleum Corporation ("Defendant") for Unfair Competition in violation of Business and Professions Code § 17200 et seq. and for false advertising and related violations of the Unfair Practices Act, Business and Professions Code §§ 17500, et seq. Plaintiff's claims against Defendant stem from alleged misrepresentations of the octane rating of racing fuel distributed throughout California by Defendant.

Presently before the Court is Defendant's Motion to Dismiss Plaintiff's Amended Complaint for failure to state a claim upon which relief can be granted, pursuant to Federal Rule of Civil Procedure 12(b)(6). Defendant concurrently brings the Motion to Dismiss for failure to comply with Federal Rule of Civil Procedure 9(b). For the reasons set forth below, Defendant's Motion to Dismiss will be denied.[1]

BACKGROUND[2]

Plaintiff, a Texas corporation authorized to do business in California, sells racing fuels in California, including street legal 100 Octane fuel. Defendant, a California corporation with its principal place of business in California, distributes racing fuel in California under the Sunoco brand, including Sunoco's 100 Octane product, known as 260 GT™. Plaintiff contends that Defendant "sold or caused to be sold 97 Octane fuel that has been represented and marketed to consumers to be 100 Octane." (Am. Compl. ¶ 16.)

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[1] Because oral argument was not of material assistance, this matter was deemed suitable for decision without oral argument. Local Rule 230(g).

[2] The factual assertions in this section are based on the allegations in Plaintiff's Amended Complaint unless otherwise specified.

Plaintiff alleges that in June 2009, it collected samples of allegedly 100 Octane fuel from ten fueling stations in California ("Subject Locations"). Plaintiff alleges that Defendant is the distributor responsible for the 100 Octane fuel offered for sale at the Subject Locations. Plaintiff avers that laboratory testing and analysis showed that "[n]one of the evidentiary samples tested from the Subject Locations were validated as 100 Octane. The evidentiary samples taken at the Subject Locations, despite being portrayed and sold as '100 Octane' tested at 97 Octane or below." (Am. Compl. ¶ 15.)

Plaintiff alleges that Defendant, willfully and intentionally, misrepresented the nature, characteristics and qualities of Defendant's product in its labeling, marketing, and product displays. Plaintiff also alleges that as a direct competitor of Defendant, Plaintiff "has been harmed by consumer reliance upon such misrepresentations, which has enabled Defendants to price their 100 Octane product below the true market value of bona fide, 100 Octane fuel ... [and] has resulted in competitive harm and has unfairly diverted sales to Defendants." (Am. Compl. ¶ 31.)

Plaintiff filed the present action on July 27, 2009. Plaintiff filed an Amended Complaint on December 17, 2009. Defendant now moves to dismiss all of Plaintiff's claims for failure to state a claim upon which relief can be granted, pursuant to Federal Rule of Civil Procedure 12(b)(6).

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STANDARD

On a motion to dismiss for failure to state a claim under Rule 12(b)(6), all allegations of material fact must be accepted as true and construed in the light most favorable to the nonmoving party. Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336, 337-38 (9th Cir. 1996). Federal Rule of Civil Procedure 8(a)(2) requires only "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." Conley v. Gibson, 355 U.S. 41, 47 (1957). While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, 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 Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) (internal citations and quotations omitted). Factual allegations must be enough to raise a right to relief above the speculative level. Id. (citing 5 C. Wright & A. Miller, Federal Practice and Procedure § 1216, pp. 235-236 (3d ed. 2004) ("The pleading must contain something more...than...a statement of facts that merely creates a suspicion [of] a legally cognizable right of action"). Assertions that are mere "legal conclusions," are not entitled to the assumption of truth. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1950 (2009) (citing Twombly, 550 U.S. at 555).

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When a claim for fraud is raised, Federal Rule of Civil Procedure 9(b) provides that "a party must state with particularity the circumstances constituting fraud." "A pleading is sufficient under Rule 9(b) if it identifies the circumstances constituting fraud so that the defendant can prepare an adequate answer from the allegations." Neubronner v. Milken, 6 F.3d 666, 671-672 (9th Cir. 1993) (internal quotations and citations omitted). "The complaint must specify such facts as the times, dates, places, benefits received, and other details of the alleged fraudulent activity." Id. at 672.

ANALYSIS

A. Standing

Defendant argues that Plaintiff does not have standing to assert either an Unfair Competition Law ("UCL") or a False Advertising Law ("FAL") cause of action because it has not suffered an injury in fact and has not lost money as a result of unfair competition. Defendant contends that Plaintiff never had prior possession or a vested legal interest in the money from lost sales. Defendant consequently contends that Plaintiff lacks standing.

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To satisfy Article III standing, a plaintiff must show that: (1) it has suffered an "injury in fact" that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 180-181 (2000).

The injury in fact prong is generally considered the "principal limitation imposed by Article III." Grand Lodge of Fraternal Order of Police v. Ashcroft, 185 F. Supp. 2d 9, 14 (D.C. Cir. 2001) (citations omitted). To satisfy the injury in fact requirement under the UCL, a plaintiff must show that he has: (1) "suffered injury in fact" and; (2) "lost money or property as a result of unfair competition." Cal. Bus. & Prof. Code § 17204; see also Walker v. Geico General Ins. Co., 558 F.3d 1025, 1027 (9th Cir. 2009).

Plaintiff suffered an economic injury in fact when it purchased Defendant's racing fuel and spent resources to test Defendant's fuel. Additionally, taking the facts in the light most favorable to the non-moving party, Plaintiff has been injured by consumer reliance upon Defendant's misrepresentations which have resulted in competitive harm and diverted sales.

Although the purchase of an item for the sole purpose of facilitating litigation does not constitute an "injury in fact," "funds spent independently of litigation to investigate or combat the defendant's misconduct may establish an injury in fact."

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Buckland v. Threshold Enterprises, Ltd., 155 Cal. App. 4th 798, 815 (2007) (citing Walker v. City of Lakewood, 272 F.3d 1114, 1124, n. 3 (9th Cir. 2001)); see also Southern California Housing Rights Cernter v. Los Feliz Towers Homeowners Ass'n, 426 F. Supp. 2d 1061, 1069 (C.D. Cal. 2005) (finding that Plaintiff had standing because it presented evidence of an actual injury based on loss of financial resources in investigating a claim and diversion of staff time to conducting the investigation).

Here, Plaintiff suffered injury and spent significant resources purchasing Defendant's racing fuel and identifying the octane levels in Defendant's fuel. As Plaintiff explains, the fuel was not purchased for the litigation and was tested before Plaintiff became aware of a potential lawsuit. Pl.'s Opp. to Mot. to Dismiss 6:5-10.

In addition, Plaintiff is not a consumer initiating action on behalf of the public, but rather claims injury for its own harm incurred as a competitor of Defendant. The purpose of the UCL is to "protect both consumers and competitors by promoting fair competition in commercial markets for goods and services." Shersher v. Superior Court, 154 Cal. App. 4th 1491, 1496 (2007).[3]

[3] The Court recognizes that California voters, through their passage of Proposition 64, did seek to limit standing under the UCL in order to "prevent abusive UCL actions by attorneys whose clients had not been injured in fact or used the defendant's product or service, and to ensure that only the California Attorney General and local public officials [are] authorized to file and prosecute actions on behalf of the general public." Buckland, 155 Cal. App. 4th at 812-813 (internal quotations omitted) (citing Prop. 64 § 1, subds. (b), (e), (f).) In this case, however, Plaintiff is a corporation bringing the UCL cause of action as a competitor, and consequently, is not the type of plaintiff whose standing was targeted by California voters through Proposition 64.

With respect to the FAL cause of action, California law mandates a Plaintiff meet the same standing requirements as those required in a UCL cause of action. Buckland, 155 Cal. App. 4th at 819. Accordingly, under the FAL, a plaintiff can only assert this cause of action if it "has suffered injury in fact and has lost money or property as a result of such unfair competition." Id.; see also Cal. Bus. & Prof. Code § 17535. Plaintiff's Amended Complaint meets that standard for the reasons already set forth above.

Defendant cites ZL Technologoies as authority for its argument that standing is absent because Plaintiff has failed to allege that it was in possession of any "lost profits." ZL Technologies, Inc. v. Gartner, Inc., 2009 WL 3706821, at *10-11 (N.D. Cal. Nov. 4, 2009). In fact, however, Plaintiff alleges not only lost profits from diverted sales but also expenses incurred for both the purchase of Defendant's racing fuel and the testing on that fuel. Thus, even if Plaintiff was not in possession of lost profits from diverted sales, Plaintiff certainly was in possession of and had an ownership interest in funds spent on Defendant's fuel and funds spent on testing that fuel.

Defendant further argues that Plaintiff has failed to show that the money spent on the purchase of fuel directly benefitted Defendant. Def.'s Mot. to Dismiss First Am. Compl. 9:10, n.3 and Def.'s Reply on Mot. to Dismiss 6:1-8. To maintain a cause of action under UCL, a plaintiff must "once have had an ownership interest in the money or property acquired by the *defendant* through unlawful means."

Fulford v. Logitech, Inc., 2008 WL 4914416, at *3 (N.D.Cal. Nov. 14, 2008) (emphasis added) (citing Shersher, 154 Cal. App. 4th at 1500). Although "California still requires that the defendant have benefitted from the actions that resulted in an economic loss to plaintiff,...direct payment from plaintiff to defendant is not necessary to state a claim of false advertising or unlawful practices under the UCL." ZL Technologies, 2009 WL 3706821, at *10 (citing Shersher, 154 Cal. App. 4th at 1499-1500). In Shersher, the court found that defendant Microsoft benefitted from plaintiff's purchase of Microsoft products from third party dealers. Shersher, 154 Cal. App. 4th at 1499-1500. Here, Plaintiff sufficiently alleges that the fuel Plaintiff purchased benefitted Defendant, even though monies were not paid directly from Plaintiff to Defendant. A reasonable inference can be drawn that Defendant benefitted from Plaintiff's purchase of fuel that it distributed. This is enough to overcome any objection to standing for pleading purposes.

B. Unfair Competition Claim

California's Business and Professions Code § 17200, more commonly known as California's Unfair Competition Law ("UCL"), defines unfair competition as "any unlawful, unfair or fraudulent business act or practice and any act prohibited by [Cal. Bus. & Prof. §§ 17500 et seq.]." Therefore, in order to state a cause of action for unfair competition under the UCL, a plaintiff must allege either: (1) an unlawful act; (2) an unfair act; (3) a fraudulent act; or (4) false advertising.

Defendant contends that Plaintiff's Amended Complaint still fails to allege a proper cause of action under the UCL because it has failed to sufficiently allege either "unlawful conduct," "fraud," or "unfair conduct," as it must in order to state a viable claim. Moreover, Defendant argues that its actions fall within the Petroleum Marketing Practices Act ("PMPA") Safe Harbor and there is an absence of anti-trust violations.

Like its predecessor, Plaintiff's Amended Complaint alleges that Defendant's practices constitute unfair competition because "(1) they are unlawful, unfair, or fraudulent, or (2) they involve unfair, deceptive, untrue or misleading advertising ...." (Am. Compl. ¶ 20.) Thus, it appears Plaintiff is attempting to state a cause of action under each prong of the UCL's definition for unfair competition.

Plaintiff has alleged both "unfair" and "fraudulent" behavior with reasonable particularity. This Court already came to that conclusion in its previous Order. Mem & Order 35-36, November 25, 2009. Plaintiff's Amended Complaint maintains the same language with respect to those two requirements. The only remaining question, therefore, is whether Plaintiff satisfies the "unlawful" prong of the UCL.

"Unlawful" practices are practices "forbidden by law, be [they] civil or criminal, federal, state, or municipal, statutory, regulation, or court-made." Saunders v. Superior Court, 27 Cal. App. 4th 832, 838-39 (1994) (citing People v. McKale, 25 Cal. 3d 626, 632 (1979)).

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To state a cause of action based on an "unlawful" business act or practice under the UCL, a plaintiff must allege facts sufficient to show a violation of some underlying law. McKale, 25 Cal. 3d at 635.

With respect to the "unlawful" prong, Plaintiff's Amended Complaint alleges that Defendant violated California Business and Professional Code § 13413(a), § 13413(b), and § 12024.6. The Amended Complaint explains that:

> "Defendant's conduct and the Advertising Statements are unlawful because Defendants have, on information and belief, misrepresented 'the brand, grade, quality, or price of a petroleum product'[Cal. Bus. & Prof. Code § 13413(a)] or used 'false or deceptive representations or designations in connection with the sale of petroleum products.'" [Cal. Bus. & Prof. Code § 13413(b)]." (Am. Compl. ¶ 21.)

Plaintiff further explains that Defendant's conduct was "proscribed by Business and Professional Code § 12024.6." (Am. Compl. ¶ 21.) These allegations are sufficiently detailed to satisfy the "unlawful" prong of the UCL.

With regard to Defendant's argument that the PMPA provides a safe harbor for Defendant's conduct, this Court has already ruled that the PMPA does not preempt state law claims for Unfair Competition, pursuant to Cal. Bus. & Prof. Code § 17200 or for False Advertising, pursuant to Cal. Bus. & Prof. Code § 17500. Mem & Order 15 & 17, November 25, 2009. Additionally, as determined in this Court's previous Order, Plaintiff satisfies the Cal-Tech requirement with respect to an "unfair" act. Id. at 25; Cal-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co., 20 Cal. 4th 163, 187 (1999).

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In sum, because Plaintiff has sufficiently plead "unlawful," "unfair" and "fraudulent" behavior by Defendant, Defendant's Motion to Dismiss Plaintiff's UCL claim is denied.

C. False Advertising Claim

Defendant argues that the Amended Complaint fails to allege that Defendant had anything to do with the advertising of the racing fuel. Def.'s Mot. to Dismiss, 10:1. Defendant further contends that Plaintiff's allegations relating to false advertising are "sparse and conclusory." Id. at 10:2. According to Defendant, Plaintiff must explain with more detail how Defendant had "substantial control" over the fuel's advertising and who at General Petroleum exercised such control. Id. at 10:3-4.

California's False Advertising Law ("FAL") prohibits the dissemination in *any advertising media* of any "statement" concerning real or personal property offered for sale, "which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading." Cal. Bus. & Prof. Code § 17500.

"[T]o state a claim under either UCL or the false advertising law, based on false advertising or promotional practices, 'it is necessary only to show that "members of the public are likely to be deceived."'"

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In re Tobacco II Cases, 46 Cal. 4th 298, 312 (2009) (quoting Kasky v. Nike, Inc., 27 Cal. 4th 939, 951 (2002)).[4] Accordingly, a plaintiff must allege: (1) that statements made in advertising are untrue or misleading, and (2) that defendant knew, or by the exercise of reasonable care should have known, that such statements were untrue or misleading. People v. Lynam, 253 Cal. App. 2d 959, 965 (1967).

Plaintiff's Amended Complaint cured the deficiencies this Court originally found. With respect to the FAL, this Court previously found that the Complaint asserted conclusory allegations that defendant made false statements in its advertising and that Plaintiff had not alleged any facts as to the substance or even existence of these labeling, marketing, and product displays. Mem & Order 29, November 25, 2009. In its Amended Complaint, Plaintiff states that Defendant "sold or caused to be sold 97 Octane fuel that has been represented and marketed to consumers to be 100 Octane." (Am. Compl. ¶ 16.) Additionally, Plaintiff alleges that "Defendant exercises or is charged with substantial control over the method and manner of how the fuel at issue is labeled, signaled, displayed, advertised and marketed at the retail locations where Plaintiff purchased the fuel." (Am. Compl. ¶ 5.) The first prerequisite for unfair advertising is therefore satisfied.

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[4] A violation of the UCL's fraud prong is also a violation of false advertising law (Cal. Bus. & Prof. Code § 17500 et seq.). Committee on Children's Television, Inc. v. General Foods Corp., 35 Cal. 3d 197, 210 (1983).

Plaintiff also satisfies the second prong of this test, alleging that Defendant "has permitted Sunoco to make marketing/advertising statements on Sunoco's web site that advertise 100 octane fuel and the Subject Locations when, in point of fact, [Defendant] knows or should know that 100 octane fuel is not being sold at those locations." (Am. Compl. ¶ 26.) These specific allegations in the Amended Complaint satisfy the pleading requirements for an FAL claim. Accordingly, Defendant's Motion to Dismiss the FAL cause of action is denied.

CONCLUSION

For all these reasons, Defendant's Motion to Dismiss (Docket No. 22) is DENIED.

IT IS SO ORDERED.

Dated: April 20, 2010

MORRISON C. ENGLAND, JR.
UNITED STATES DISTRICT JUDGE