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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

MICHAEL GONZALES,)	Case No. 2:10-CV-1360 JAM-DAD
)	
Plaintiff,)	
)	<u>ORDER DENYING DEFENDANT'S</u>
v.)	<u>MOTION TO DISMISS</u>
)	
)	
TRIMEDICA INTERNATIONAL, INC.;)	
and DOES 1-100, Inclusive)	
)	
Defendants.)	

This matter comes before the Court on Defendant Trimedica International, Inc.'s ("Defendant") Motions to Dismiss (Doc. 9 & Doc. 10) the Complaint (Doc. 1) filed by Plaintiff Michael Gonzales ("Plaintiff"). Plaintiff opposes the motion.¹

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff alleges that he is a California citizen who believes in the importance of a fair and competitive market for the manufacture, marketing, sale, and distribution of consumer

¹This motion was determined to be suitable for decision without oral argument. E.D.Cal. L.R. 230(g). The hearing was scheduled for September 15, 2010.

1 products. Complaint ¶ 7. Plaintiff alleges that Defendant is
2 falsely claiming that "AlkaMAX Alkaline Booster" ("AlkaMAX"), a
3 purported pH balancing formula dietary supplement, is patented.
4 Defendant allegedly advertises that AlkaMAX is the "only
5 patented, doctor-recommended pH balancing formula on the
6 market." Complaint ¶ 1. Defendant allegedly marks each box of
7 AlkaMAX as patented and every retailer on the internet allegedly
8 claims that AlkaMAX is patented. Complaint ¶ 17. Plaintiff
9 avers that AlkaMAX is not, and has never been patented. He
10 claims he exhaustively researched public records, including the
11 records of the United States Patent & Trademark office and has
12 confirmed that AlkaMAX is not patented. Id.

13 Plaintiff alleges that Defendant engaged in this false
14 marking scheme to deceive the public, stifle legitimate
15 competition, and gain a competitive advantage in the market.
16 Complaint ¶ 19.

17 Plaintiff brings this suit to act in the public interest
18 under 35 U.S.C. § 292, a false marking statute.

19 20 II. OPINION

21 A. Legal Standard

22 1. Motions to Dismiss

23 a. 12(b)(1)

24 The Article III case or controversy requirement limits
25 federal courts' subject matter jurisdiction by requiring that
26 plaintiffs have standing. Allen v. Wright, 468 U.S. 737, 750
27 (1984). The party asserting federal subject matter jurisdiction
28 bears the burden of proving its existence. Kokkonen v. Guardian

1 Life Insurance Co., 511 U.S. 375, 377 (1994). Standing addresses
2 whether the plaintiff is the proper party to bring the matter to
3 the court for adjudication. Chandler v. State Farm Mutual
4 Automobile Insurance Co., 598 F.3d 1115, 1122 (9th Cir. 2010).
5 Because standing pertains to federal courts' subject matter
6 jurisdiction, it is properly raised in a 12(b)(1) motion to
7 dismiss. White v. Lee, 227 F.3d 1214, 1242 (9th Cir. 2000).

8 b. 12(b)(6)

9 A party may move to dismiss an action for failure to state
10 a claim upon which relief can be granted pursuant to Federal
11 Rule of Civil Procedure 12(b)(6). In considering a motion to
12 dismiss, the court must accept the allegations in the complaint
13 as true and draw all reasonable inferences in favor of the
14 plaintiff. Scheuer v. Rhodes, 416 U.S. 232, 236 (1975),
15 overruled on other grounds by Davis v. Scherer, 468 U.S. 183
16 (1984); Cruz v. Beto, 405 U.S. 319, 322 (1972). Assertions that
17 are mere "legal conclusions," however, are not entitled to the
18 assumption of truth. Ashcroft v. Iqbal, 129 S.Ct. 1937, 1950
19 (2009), citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555
20 (2007). To survive a motion to dismiss, a plaintiff needs to
21 plead "enough facts to state a claim to relief that is plausible
22 on its face." Twombly, 550 U.S. at 570. Dismissal is
23 appropriate where the plaintiff fails to state a claim
24 supportable by a cognizable legal theory. Balistreri v.
25 Pacifica Police Department, 901 F.2d 696, 699 (9th Cir. 1990) .

26 Upon granting a motion to dismiss for failure to state a
27 claim, the court has discretion to allow leave to amend the
28 complaint pursuant to Federal Rule of Civil Procedure 15(a).

1 "Dismissal with prejudice and without leave to amend is not
2 appropriate unless it is clear . . . that the complaint could
3 not be saved by amendment." Eminence Capital, L.L.C. v. Aspeon,
4 Inc., 316 F.3d 1048, 1052 (9th Cir. 2003).

5 B. Claims for Relief

6 1. Standing

7 Defendant argues that the Complaint should be dismissed for
8 lack of standing because Plaintiff has not established the three
9 basic standing requirements: injury in fact, causation, and
10 redressibility. Plaintiff counters that he has standing because
11 this is a *qui tam* action and he is acting as a relator to
12 enforce 35 U.S.C. § 292, which confers upon any person the right
13 to sue for civil monetary penalties, restitution, and injunctive
14 relief for false patent marking.

15 Standing is a threshold issue. Every plaintiff must
16 demonstrate standing, a jurisdictional prerequisite under
17 Article III's case-or-controversy requirement. Vermont Agency
18 of Natural Resources v. United States ex rel. Stevens, 529 U.S.
19 765, 771 (2000). Thus, a plaintiff must show (1) that he has
20 suffered an "injury in fact," an invasion of a legally protected
21 interest that is "(a) concrete and particularized, and (b)
22 actual or imminent, not conjectural or hypothetical," (2) that
23 there is "a causal connection between the injury and the conduct
24 complained of," and (3) that the injury is likely to be
25 redressed by a favorable decision. Lujan v. Defenders of
26 Wildlife, 504 U.S. 555, 560-61 (1992) (citations and quotations
27 marks omitted).

28 Section 292(b) is a *qui tam* provision, i.e., a "statute

1 author[izing] a private person, known alternatively as a
2 'relator' or 'informer,' to bring suit on behalf of the
3 government and to share in the financial recovery." San
4 Francisco Technology, Inc. v. Glad Products Comp., No.
5 10-CV-00966, 2010 WL 2943537 *2 N.3 (N.D.Cal. 2010) (internal
6 citations omitted). The Supreme Court has repeatedly treated
7 Section 292(b) as a *qui tam* statute. See Vermont Agency, 529
8 U.S. at 768 n. 1 (listing section 292(b) as one of four *qui tam*
9 statutes currently in force).

10 A *qui tam* plaintiff, or relator, can establish standing
11 based on the United States' implicit partial assignment of its
12 damages. Vermont Agency, 529 U.S. at 773-74. In other words,
13 even though a relator may suffer no injury himself, a *qui tam*
14 provision operates as a statutory assignment of the United
15 States' rights, and "the assignee of a claim has standing to
16 assert the injury in fact suffered by the assignor." Id.

17 Congress has, by enacting Section 292, defined an injury in
18 fact to the United States. "In passing the statute prohibiting
19 deceptive patent mismarking, Congress determined that such
20 conduct is harmful and should be prohibited." Stauffer v.
21 Brooks Brothers, Inc., Nos. 2009-1429, 2009-1430, 2009-1453,
22 2010 WL 3397419 *4 (Fed. Cir. 2010). Because the government
23 would have standing to enforce its own law, Plaintiff, as the
24 government's assignee, also has standing to enforce Section 292.
25 Defendant's argument that since Plaintiff has not purchased
26 AlkaMAX he lacks standing is unpersuasive since the statute is
27 clear that "any person" has standing and Plaintiff is pursuing
28 this lawsuit to enforce the laws of the United States.

1 Accordingly, Defendant's motion to dismiss based on standing
2 grounds is DENIED.

3 2. Statement of a Claim

4 Defendant's other Motion to Dismiss contends that
5 Plaintiff's Complaint fails to state a claim upon which relief
6 can be granted. Defendant avers that the false marking claim
7 involves fraud so it must be pled with particularity in
8 accordance with Rule 9(b). Furthermore, Defendant argues that
9 Plaintiff does not allege enough facts to plead the "intent to
10 deceive" element of the false marking claim. Plaintiff argues
11 that while he does not need to satisfy a heightened pleading
12 standard, the Complaint nonetheless complies with Rule 9(b)'s
13 requirements and that he properly alleges sufficient facts for
14 his "intent to deceive" claim.

15 (a) Pleading Standard

16 To state a false marking claim, the plaintiff must allege
17 the following: (1) a marking importing that an object is
18 patented; (2) falsely affixed to; (3) an unpatented article;
19 (4) with intent to deceive the public. See Clontech
20 Laboratories v. Invitrogen Corp., 406 F.3d 1347, 1351 (Fed. Cir.
21 2005).

22 Defendant argues that the "intent to deceive the public"
23 element of the false marking claim sounds in fraud and is
24 therefore subject to the particularity requirements of Rule
25 9(b). When fraud is alleged, the complaining party has a higher
26 burden to "state with particularity the circumstances
27 constituting fraud. . . ." Fed.R.Civ.P. 9(b).

28 Courts are split on whether false-marking claims are fraud-

1 based claims that must adhere to Rule 9(b) pleading standards.
2 Compare, e.g., Third Party Verification, Inc. v. Signaturelink,
3 Inc., 492 F.Supp.2d 1314, 1327 (M.D.Fla. 2007) (holding that
4 Rule 9's level of pleading is not required for false-marking
5 claims) with Juniper Networks v. Shipley, No. C 09-0696, 2009 WL
6 1381873, at *4 (N.D.Cal. May 14, 2009) (holding that false-
7 marking claims are fraud-based and therefore subject to Rule 9's
8 pleading requirements).

9 In the Ninth Circuit, when a claim "is said to be grounded
10 in fraud or to sound in fraud[,]” then that claim must satisfy
11 the particularity requirements of Rule 9(b). Kearns v. Ford
12 Motor Co., 567 F.3d 1120, 1125 (9th Cir. 2009). This Court
13 agrees with the Northern District of California that the "intent
14 to deceive" requirement is a "fraud-based claim" and is
15 therefore subject to Rule 9(b). See Juniper Networks, 2009 WL
16 1381873 at *4.

17 The Court also finds that Plaintiff satisfies Rule 9(b)'s
18 heightened pleading requirement. "Averments of fraud must be
19 accompanied by the who, what, when, where, and how of the
20 misconduct charged." Vess v. Ciba-Geigy Corp. USA, 317 F.3d
21 1097, 1106 (9th Cir. 2003) (internal citations omitted). The
22 Complaint alleges that Trimedica manufactures, advertises,
23 distributes, and sells AlkaMAX. Complaint ¶¶ 8, 15. The
24 Complaint alleges that Trimedica marked AlkaMAX as patented.
25 Complaint ¶¶ 1, 16, 17, 26. The Complaint alleges that patent
26 assertions were still being made as of June 03, 2010, the filing
27 date of the Complaint. Complaint ¶¶ 1, 8, 15. The Complaint
28 shows a picture of the allegedly false patent claim on the

1 AlkaMAX label. Complaint ¶ 16. Thus, Plaintiff has satisfied
2 the Rule 9(b) pleading requirements for his false marking claim.

3 (b) Intent to Deceive

4 Defendant also argues that Plaintiff does not allege any
5 specific facts concerning the "intent to deceive" element of the
6 false marking claim. "Intent to deceive, while subjective in
7 nature, is established in law by objective criteria." Clontech
8 Laboratories, Inc., 406 F.3d at 1352 (internal citations omitted).
9 Thus, "objective standards" control and "the *fact* of
10 misrepresentation coupled with proof that the party making it
11 had knowledge of its falsity is enough to warrant drawing the
12 inference that there was a fraudulent intent". Id. Thus, the
13 plaintiff must show "by a preponderance of the evidence that the
14 party accused of false marking did not have a reasonable belief
15 that the articles were properly marked (i.e., covered by a
16 patent)." Id. at 1352-53.

17 Plaintiff alleges AlkaMAX is not patented, has never been
18 patented, and has never had a patent pending. Complaint ¶ 17.
19 Because this is a Motion to Dismiss and the Complaint avers that
20 there existed no patent or any patent pending, at this stage
21 Plaintiff has successfully alleged there was no reasonable
22 belief in the veracity of the patent. Thus, Plaintiff has met
23 his burden and has properly stated a claim for an intent to
24 deceive the public.

25 Accordingly, Defendant's motion to dismiss the Complaint
26 for failure to state a claim is DENIED.

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1 3. Statute of Limitations

2 Defendant argues that Plaintiff's claim is barred by the
3 five year statute of limitations set forth in 28 U.S.C. § 2462.
4 Defendant reasons that the statute of limitations began to run
5 on the date Defendant allegedly violated Section 292, not when
6 Plaintiff discovered the violation. Plaintiff counters that
7 each instance of false marking is a separate violation or
8 injury, restarting the statute of limitations.

9 The marking and false marking statutes exist to give the
10 public notice of patent rights. "Congress intended the public
11 to rely on marking as a 'ready means of discerning the status of
12 intellectual property embodied in an article of manufacture or
13 design.'" Clontech Laboratories, 406 F.3d at 1356 (quoting
14 Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141,
15 162 (1989)). False marking harms the public in a variety of
16 ways: it deters innovation and stifles competition in the
17 marketplace, it dissuades potential competitors from entering
18 the same market, it deters scientific research when an inventor
19 sees a mark and decides to forego continued research to avoid
20 possible infringement, and it also causes unnecessary investment
21 in design around or costs incurred to analyze the validity or
22 enforceability of a patent whose number has been marked upon a
23 product with which a competitor would like to compete. Forest
24 Group, Inc. v. Bon Tool Co., 590 F.3d 1295, 1302-03 (Fed. Cir.
25 2009), (internal quotations omitted), "These injuries occur each
26 time an article is falsely marked." Id.

27 This Court agrees with Federal Circuit that each instance
28 of false marking - in this case, each time AlkaMAX was falsely

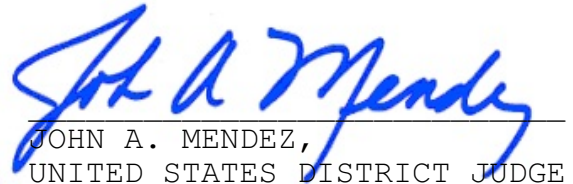
1 marked or the patent assertion was made - is a separate
2 violation or injury. If the Court ruled otherwise, that a
3 single violation tolls the statute of limitations, then the
4 statute would be completely ineffective because a false mark
5 violator would be able to continue to false mark as long as it
6 could get past the proscribed time period of the statute of
7 limitations for its first violation. See Bon Tool, 590 F.3d at
8 1303. Therefore, since the Complaint alleges that the
9 violations were occurring contemporaneously with the filing date
10 of the Complaint, Defendant's motion to dismiss the Complaint
11 because of the statute of limitations is DENIED.

12
13 III. ORDER

14 For the reasons set forth above,
15 Defendant's motions to dismiss under Fed.R.Civ.P. 12(b)(1),
16 12(b)(6) and 9(b) are DENIED.

17 IT IS SO ORDERED.

18 Dated: November 30, 2010

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20 JOHN A. MENDEZ,
21 UNITED STATES DISTRICT JUDGE
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