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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

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UNITED STATES OF AMERICA, EX.  
REL., ZACHARY HALLSTROM,

NO. CIV. 2-10-cv-01459-FCD-EFB

Plaintiff,

v.

MEMORANDUM AND ORDER

AQUA FLORA, INC.; KING BIO,  
INC.; and DOES 1-10,  
INCLUSIVE,

Defendants.

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This matter is before the court on defendants Aqua Flora, Inc. ("Aqua Flora") and King Bio, Inc.'s ("King Bio") (collectively "defendants") motions to dismiss plaintiff Zachary Hallstrom's ("Hallstrom" or "plaintiff") complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). Plaintiff opposes the motions.<sup>1</sup> For the reasons set forth below, defendants' motions to dismiss are DENIED.

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<sup>1</sup> Because oral argument will not be of material assistance, the court orders these matters submitted on the briefs. E.D. Cal. L.R. 230(g).

1 **BACKGROUND**

2 Plaintiff is a California citizen who is bringing this  
3 action on behalf of himself and the United States of America.  
4 (Pl.'s Complaint [Docket # 1] ("Compl."), filed June 14, 2010, ¶  
5 7). Defendants are in the business of manufacturing,  
6 advertising, distributing, and selling homeopathic medicine,  
7 including AquaFlora "Nano-Potentiated" homeopathic products  
8 ("AquaFlora products"). (Id. ¶¶ 1, 8-9). AquaFlora products are  
9 advertised as products that can relieve a number of symptoms,  
10 from physical to mental ailments. (Id. ¶ 16). Plaintiff alleges  
11 that defendants falsely advertise that AquaFlora products are  
12 patented on their respective websites, by representing that  
13 "[t]he *patented* process works by dynamically activating the  
14 substances digestion, assimilation, transportation, cellular  
15 utilization, elimination, storage, recycling, organ and grandular  
16 metabolism activating the complex metabolic regulatory control  
17 networks for optimal homeostasis (balance) and therapeutic  
18 results." (Id. ¶ 19) (emphasis added). Plaintiff claims that  
19 after exhaustively researching public records it has found that  
20 no patent exists for any AquaFlora products or a  
21 "Nano-Potentiated" process. (Id. ¶ 20).

22 Plaintiff asserts that as of June 11, 2010, defendants were  
23 still claims that the AquaFlora products were patented. (See Id.  
24 at Ex. 1-2). Moreover, plaintiff alleges that defendants boast  
25 "17 years, long-standing success" of the AquaFlora Nano-  
26 Potentiated line of products. (Id. ¶ 21; Ex. 2). Plaintiff  
27 further alleges that defendants' false claims concerning  
28 AquaFlora products were intentional and made in an effort to

1 deceive the public, stifle legitimate competition, and gain a  
2 competitive advantage in the market. (Id. ¶¶ 21-22).

3 Plaintiff filed this *qui tam* action on June 14, 2010 under  
4 35 U.S.C. § 292 (the "false marking statute") alleging that  
5 defendants have falsely advertised AquaFlora products as  
6 patented. (Id. ¶ 19). Plaintiff seeks to preliminarily and  
7 permanently enjoin defendants from committing new acts of false  
8 patent marking and cease all existing acts of false patent  
9 marking on AquaFlora products. (Id. ¶ 3).

#### 10 STANDARD

##### 11 A. Lack of Subject Matter Jurisdiction

12 "Federal courts are courts of limited jurisdiction."  
13 Kokkonen v. Guardian Life Ins. Co. of America, 511 U.S. 375, 377  
14 (1994). Lack of subject matter jurisdiction may be asserted by  
15 either party or by a court, *sua sponte*, at any time during the  
16 course of an action. (Fed. R. Civ. P. 12(h)(2)-(3)). Once  
17 challenged, the burden of establishing a federal courts  
18 jurisdiction rests on the party asserting the jurisdiction. See  
19 Farmers Ins. Exch. v. Portage La Prairie Mut. Ins. Co., 907 F.2d  
20 911, 912 (9th Cir. 1990).

21 There are two forms of 12(b)(1) attacks on subject matter  
22 jurisdiction: facial and factual attacks. See Thornhill Publ'g  
23 Co. v. Gen. Tel. & Elecs. Corp., 594 F.2d 730, 733 (9th Cir.  
24 1979). In a facial attack, a court construes jurisdictional  
25 allegations liberally and considers uncontroverted factual  
26 allegations to be true. See Robinson v. Overseas Military Sales  
27 Corp., 21 F.3d 502, 507 (2d Cir. 1994); Oaxaca v. Roscoe, 641  
28 F.2d 386, 391 (5th Cir. 1981). However, where the defendant

1 refers to matters outside the complaint to challenge the  
2 plaintiff's assertion of subject matter jurisdiction, the  
3 12(b)(1) motion is a factual attack. See Safe Air v. Meyer, 373  
4 F.3d 1035, 1039 (9th Cir. 2004). In a factual attack, a district  
5 court may review affidavits or evidence relating to the  
6 jurisdictional issue and need not presume the truthfulness of the  
7 plaintiff's allegations. Id. The burden then falls upon the  
8 party opposing the motion to present affidavits or other evidence  
9 to establish subject matter jurisdiction. Id.

10 **B. Failure to State a Claim Upon Which Relief Can Be Granted**

11 Under Federal Rule of Civil Procedure 8(a), a pleading must  
12 contain "a short and plain statement of the claim showing that  
13 the pleader is entitled to relief." See Ashcroft v. Iqbal, 129  
14 S. Ct. 1937, 1949 (2009). Under notice pleading in federal  
15 court, the complaint must "give the defendant fair notice of what  
16 the claim is and the grounds upon which it rests." Bell Atlantic  
17 v. Twombly, 550 U.S. 544, 555 (2007) (internal quotations  
18 omitted). "This simplified notice pleading standard relies on  
19 liberal discovery rules and summary judgment motions to define  
20 disputed facts and issues and to dispose of unmeritorious  
21 claims." Swierkiewicz v. Sorema N.A., 534 U.S. 506, 512 (2002).

22 On a motion to dismiss, the factual allegations of the  
23 complaint must be accepted as true. Cruz v. Beto, 405 U.S. 319,  
24 322 (1972). The court is bound to give plaintiff the benefit of  
25 every reasonable inference to be drawn from the "well-pleaded"  
26 allegations of the complaint. Retail Clerks Int'l Ass'n v.  
27 Schermerhorn, 373 U.S. 746, 753 n.6 (1963). A plaintiff need not  
28 allege "'specific facts' beyond those necessary to state his

1 claim and the grounds showing entitlement to relief." Twombly,  
2 550 U.S. at 570. "A claim has facial plausibility when the  
3 plaintiff pleads factual content that allows the court to draw  
4 the reasonable inference that the defendant is liable for the  
5 misconduct alleged." Iqbal, 129 S. Ct. at 1949.

6 Nevertheless, the court "need not assume the truth of legal  
7 conclusions cast in the form of factual allegations." United  
8 States ex rel. Chunie v. Ringrose, 788 F.2d 638, 643 n.2 (9th  
9 Cir. 1986). While Rule 8(a) does not require detailed factual  
10 allegations, "it demands more than an unadorned, the  
11 defendant-unlawfully-harmed-me accusation." Iqbal, 129 S. Ct. at  
12 1949. A pleading is insufficient if it offers mere "labels and  
13 conclusions" or "a formulaic recitation of the elements of a  
14 cause of action." Twombly, 550 U.S. at 555; Iqbal, 129 S. Ct. at  
15 1950 ("Threadbare recitals of the elements of a cause of action,  
16 supported by mere conclusory statements, do not suffice.").  
17 Moreover, it is inappropriate to assume that the plaintiff "can  
18 prove facts which it has not alleged or that the defendants have  
19 violated the . . . laws in ways that have not been alleged."  
20 Associated Gen. Contractors of Cal., Inc. v. Cal. State Council  
21 of Carpenters, 459 U.S. 519, 526 (1983).

22 Ultimately, the court may not dismiss a complaint in which  
23 the plaintiff has alleged "enough facts to state a claim to  
24 relief that is plausible on its face." Iqbal, 129 S. Ct. at 1949  
25 (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 554, 570  
26 (2007)). Only where a plaintiff has failed to "nudge [his or  
27 her] claims across the line from conceivable to plausible," is  
28 the complaint properly dismissed. Id. at 1952. While the

1 plausibility requirement is not akin to a probability  
2 requirement, it demands more than "a sheer possibility that a  
3 defendant has acted unlawfully." Id. at 1949. This plausibility  
4 inquiry is "a context-specific task that requires the reviewing  
5 court to draw on its judicial experience and common sense." Id.  
6 at 1950.

7 In ruling upon a motion to dismiss, the court may consider  
8 only the complaint, any exhibits thereto, and matters which may  
9 be judicially noticed pursuant to Federal Rule of Evidence 201.  
10 See Mir v. Little Co. Of Mary Hospital, 844 F.2d 646, 649 (9th  
11 Cir. 1988); Isuzu Motors Ltd. V. Consumers Union of United  
12 States, Inc., 12 F. Supp. 2d 1035, 1042 (C.D. Cal. 1998).

### 13 ANALYSIS

#### 14 A. Standing in a *Qui Tam* Action

15 Defendants move to dismiss plaintiff's complaint for lack of  
16 subject matter jurisdiction. Specifically, defendants argue that  
17 the plaintiff lacks standing in the instant action because he  
18 does not and cannot allege an injury in fact. (Defs.' Mot.  
19 Dismiss [Docket #10] ("Defs.' 12(b)(1)"), filed July 26, 2010, at  
20 3, 5). Defendants assert that in order to have standing,  
21 Hallstrom must allege an injury to himself in addition to an  
22 injury to the United States. (Id.). Plaintiff opposes this  
23 motion and asserts that, as a *qui tam* relator, his standing is  
24 based on the injury in fact suffered by the United States.  
25 (Pl.'s Opp'n [Docket #12] ("Pl.'s 12(b)(1)"), filed Aug. 20,  
26 2010, at 2-3).

27 The issue of standing is a threshold determination of  
28 "whether the litigant is entitled to have the court decide the

1 merits of the dispute or of particular issues." Warth v. Seldin,  
2 422 U.S. 490, 498 (1975); Steel Co. v. Citizens For A Better  
3 Env't, 523 U.S. 83 (1998). "The judicial power of the United  
4 States defined by Art[icle] III is not an unconditioned authority  
5 to determine the constitutionality of legislative or executive  
6 acts." Valley Forge Christian Coll. v. Americans United For  
7 Separation of Church and State, Inc., 454 U.S. 464, 471 (1982).  
8 Rather, Article III limits "the federal judicial power 'to those  
9 disputes which confine federal courts to a role consistent with a  
10 system of separated powers and which are traditionally thought to  
11 be capable of resolution through the judicial process.'" Id. at  
12 472 (quoting Flast v. Cohen, 392 U.S. 83, 97 (1968)); Steele, 523  
13 U.S. at 102. "Those who do not possess Article III standing may  
14 not litigate as suitors in the Courts of the United States." Id.  
15 at 476.

16 In order to satisfy Article III standing a plaintiff must  
17 meet three requirements: injury in fact, causation, and  
18 redressability. Vermont Agency of Natural Res. v. U.S. ex rel.  
19 Stevens, 529 U.S. 765, 771 (2000). To satisfy the first  
20 requirement, injury in fact, the plaintiff must demonstrate that  
21 he has suffered a harm that is "concrete" and "actual or  
22 imminent, not conjectural or hypothetical." Id. Second, to  
23 establish causation the plaintiff must establish a "fairly . . .  
24 traceable" connection between the alleged injury in fact and the  
25 conduct of the defendant. Id. Third, the plaintiff must  
26 demonstrate redressability by showing a "substantial likelihood"  
27 that his requested relief will remedy the alleged injury in fact.  
28 Id. The three factors together constitute the "irreducible

1 constitutional minimum" under Article III's case-or-controversy  
2 requirement. Id. (citing Lujan v. Defenders of Wildlife, 504  
3 U.S. 555, 560 (1992)).<sup>2</sup>

4 It is well established that the false marking statute, 35  
5 U.S.C. § 292, is a *qui tam* statute. See Vermont Agency, 529 U.S.  
6 at 786 n.1 (listing § 292(b) as one of four *qui tam* statutes that  
7 is currently in force); Pequignot v. Solo Cup Co., 608 F. 3d 1356  
8 (Fed. Cir. 2010); Boyd v. Schildkraut Giftware Corp., 936 F.2d  
9 76, 79 (2d Cir. 1991) (stating that § 292 is "enforceable by a  
10 *qui tam* remedy, enabling 'any person' to sue for the statutory  
11 penalty and retain one-half of the recovery"). The Article III  
12 standing requirement applies to plaintiffs who bring suit under a  
13 *qui tam* statute. See Vermont Agency, 529 U.S. at 771-75.

14 The Federal Circuit recently held that in order for a *qui*  
15 *tam* relator to have standing under the false marking statute, he  
16 must assert an injury to the United States, but does not need to  
17 suffer an injury himself. Stauffer v. Brooks Brothers, Inc.,  
18 2010 WL 3397419 (Fed. Cir. Aug. 31, 2010). In Stauffer the *qui*  
19 *tam* relator was a patent attorney who purchased bow ties made by  
20 the defendant, which the relator claimed to have been falsely  
21 marked. The court reasoned that the "*qui tam* provision operates  
22 as a statutory assignment of the United States' rights, and 'the  
23 assignee of a claim has standing to assert the injury in fact  
24 suffered by the assignor.'" Id. (citing Vermont Agency, 529 U.S.  
25 at 773). The court concluded that by creating the statute  
26

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27 <sup>2</sup> Defendants challenge only the sufficiency of  
28 plaintiff's alleged injury in fact, not the second two standing  
requirements.

1 Congress determined that deceptive patent marking is harmful and  
2 should be prohibited; therefore, a violation of § 292 inherently  
3 constitutes an injury to the United States. Id. The court  
4 further reasoned that because the government would have standing  
5 to enforce 35 U.S.C. § 292, the relator, as the government's  
6 assignee, also has standing to enforce § 292. Id. Accordingly,  
7 the court held that the plaintiff, by acting as the government's  
8 assignee, had standing to enforce § 292 against the defendant  
9 without alleging injury to himself.

10 The court finds the Federal Circuit's reasoning persuasive.  
11 As such, the court similarly concludes that a relator in a § 292  
12 can act as the government's assignee without demonstrating his  
13 own injury in fact. In this case, plaintiff alleges a violation  
14 of § 292 by defendants. Following the reasoning of Stauffer,  
15 defendants' violation of the false marking statute gives the  
16 United States, or its assignee, standing under § 292. The fact  
17 that plaintiff has not alleged harm to himself is not necessary  
18 to establish standing in this action. Plaintiff is considered  
19 "any person" under § 292(b) and, as such, may act as an assignee  
20 of the United States to enforce § 292 against defendants.  
21 Therefore, defendants' motion to dismiss plaintiff's complaint  
22 for lack of subject matter jurisdiction is DENIED.

23 **B. Failure to Plead Fraud with Particularity**

24 Defendants also argue that this action must be dismissed  
25 because plaintiff failed to plead false marking with  
26 particularity, as required under Federal Rule of Civil Procedure  
27 9(b) ("Rule 9(b)"). (Defs.' Mot. Dismiss [Docket #9] ("Defs.'  
28 12(b)(6)"), filed July 26, 2010, at 3). Plaintiff claims that

1 the false marking statute is not subject to the heightened  
2 pleading requirements of Rule 9(b); and, alternatively, that if  
3 the court finds that the plaintiff is subject to Rule 9(b), the  
4 complaint also meets the heightened pleading requirements of the  
5 rule. (Pl.'s Opp'n [Docket # 13] ("Pl.'s 12(b)(6)"), at 5-6).

#### 6 **1. Heightened Pleading Standard**

7 In this circuit, the heightened pleading standard of Rule  
8 9(b) applies to claims that are "grounded in fraud" or that  
9 "sound in fraud." See Vess, 317 F. 3d at 1103-04. A claim for  
10 false patent marking requires that the defendant acted for the  
11 "purpose of deceiving the public." (35 U.S.C. § 292(a)). As  
12 such, courts have held that Rule 9(b) applies to false marking  
13 claims because the statute "sounds in fraud" or is "fraud-based."  
14 See e.g. Shizzle Pop, LLC. v. Wham-O, Inc., 2010 WL 3063066, at  
15 \*4 (C.D. Cal. Aug. 2, 2010); Juniper Networks v. Shipley, 2009 WL  
16 1381873, at \*4 (N.D. Cal. May 14, 2009). Specifically, in  
17 Juniper Networks, the court focused on the intent to deceive  
18 element of the false marking statute and concluded that false  
19 marking is a fraud-based claim, which is subject to the  
20 heightened pleading requirement of Rule 9(b). Id. (citing Berson  
21 v. Applied Signal Technology, Inc., 527 F. 3d 982, 987 (9th Cir.  
22 2008) ("[p]laintiffs must 'state with particularity facts giving  
23 rise to a strong inference' that defendants acted with the intent  
24 to deceive"); c.f., Eisai Co., Ltd. V. Teva Pharmaceuticals USA,  
25 Inc., 557 F. Supp. 2d 490, 493 (D.N.J. 2008) (a claim for  
26 inequitable conduct, which requires an intent to deceive the  
27 Patent and Trademark Office, is subject to heightened pleading  
28 standard under Rule 9(b))).

1 Consistent with the holdings of district courts in the  
2 Central District of California and the Northern District of  
3 California, the court concludes that the false marking statute  
4 requires an intent to deceive, and thus, sounds in fraud.  
5 Therefore, plaintiff's complaint must meet the heightened  
6 pleading requirements of Rule 9(b).

## 7 **2. Sufficiency of Plaintiff's Allegations**

8 Federal Rule of Civil Procedure 9(b) requires that when  
9 alleging fraud or mistake, the party must state with  
10 particularity the circumstances constituting fraud or mistake.  
11 Fed. R. Civ. Pro. 9(b). However, under Rule 9(b) malice, intent,  
12 knowledge, and other condition of mind of a person may be plead  
13 generally. Id. Rule 9(b) requires that a plaintiff set forth  
14 the activities underlying the alleged frauds, including the time,  
15 place, specific content of the alleged misrepresentations, and  
16 the identity of the parties involved. Odom v. Microsoft Corp.,  
17 486 F.3d 541, 553 (9th Cir. 2007) (citing Schreiber Distrib. Co.  
18 v. Serv-Well Furniture Co., 806 F. 2d 1393, 1400 (9th Cir. 1986);  
19 see also Moore v. Kayport Package Express, Inc., 885 F.2d 531,  
20 541 (9th Cir. 1989). To satisfy Rule 9(b) the allegations,  
21 essentially, must state the who, what, when, where, and how of  
22 the misconduct charged. Vess v. Ciba-Geigly Corp. USA, 317 F.3d  
23 1097, 1106 (9th Cir. 2003). The purpose of Rule 9(b) is to  
24 identify the circumstances that constitute fraud so that the  
25 defendant can prepare an adequate answer from the allegations.  
26 Odom, 486 F. 3d at 553 (citation omitted).

27 In this case, the complaint alleges that defendants  
28 manufacture, advertise, distribute, and sell AquaFlora products.

1 (Compl. ¶¶ 3, 8-9). The complaint attaches advertisements by  
2 defendants from their respective websites with pictures of the  
3 products at issue in this action. (Compl. at Ex. 1-2). The  
4 complaint also alleges that defendants were advertising AquaFlora  
5 products as patented on June 11, 2010 and that defendants'  
6 products are neither patented, nor do they have a patent pending.  
7 (Id. ¶ 19). Additionally, with respect to intent, plaintiff  
8 alleges that defendants acted intentionally because they have no  
9 reasonable basis to believe that AquaFlora products are patented  
10 and because they attempted to gain a profit by confusing and  
11 misleading customers through claims of "17 years, long-standing  
12 success." (Id. ¶¶ 17, 21-22). The court finds that these  
13 allegations satisfy Rule 9(b) because the allegations address  
14 who, what, when, where, and how defendants have allegedly  
15 violated the false marking statute. See Vess, 317 F.3d at 1106.  
16 The court also finds that plaintiff's allegations regarding  
17 intent meet the general allegation requirement under Rule 9(b).  
18 Therefore, defendants Rule 12(b)(6) motion to dismiss for failure  
19 to plead with particularity is DENIED.

20 **C. Time Barred by the Statute of Limitations**

21 Finally, defendants claim that plaintiff's action is time  
22 barred by the five-year statute of limitations applicable to 35  
23 U.S.C. § 292, and therefore should be dismissed with prejudice.  
24 (Defs.' 12(b)(6), at 4). Specifically, defendants argue that  
25 plaintiff has not alleged when such markings began and thus, it  
26 is unclear whether the complaint was filed within five years from  
27 the date when the claim accrued. (Def.' 12(b)(6) at 5-6).  
28 Plaintiff argues that the defendants misstate the allegations in

1 the complaint. Plaintiff asserts that violations of the false  
2 marking statute have occurred within the statutory period,  
3 specifically referring to June 11, 2010. (Pl.'s 12(b)(6), at 7-  
4 8).

5 False marking claims under 35 U.S.C. § 292 are subject to a  
6 five-year statute of limitations, which is set forth in 28 U.S.C.  
7 § 2462. Arcadia Mach. & Tool Inc. v. Stern, Ruger & Co., 786  
8 F.2d 1124, 1125 (Fed. Cir. 1986). A dismissal under Rule  
9 12(b)(b) based upon the expiration of the statute of limitations  
10 may only be made " if the assertions of the complaint, read with  
11 the required liberality, would not permit the plaintiff to prove  
12 that the statute (had been) tolled." Cervantes v. City of San  
13 Diego, 5 F.3d 1273, 1275 (9th Cir. 1993). The fact that dates  
14 alleged in the complaint are beyond the statutory period is not  
15 enough to support a Rule 12(b)(6) dismissal. Id.

16 Plaintiff's complaint alleges that on June 11, 2010  
17 defendants were in violation of the false marking statute  
18 because, on that date, they described AquaFlora products on their  
19 respective websites as using a "patented process" and as having  
20 "17 years, long-standing success." (Compl. ¶¶ 19, 21). While  
21 plaintiff, in his opposition, broadly asserts that the  
22 misrepresentations have been going on for 17 years, it is unclear  
23 to the court what violations the plaintiff is referring to or  
24 whether the viability of this action is affected. (See Pl.'s  
25 12(b)(6), at 7-8). Rather, taking the complaint in the light  
26 most favorable to the plaintiff and drawing all reasonable  
27 inferences therefrom, the court cannot conclude that the alleged  
28 violations of the false marking statute did not occur within the

1 last 5 years. Indeed, the only specific date alleged in the  
2 complaint is June 11, 2010, which falls within the statute of  
3 limitations. Accordingly, at this stage in the litigation the  
4 court cannot determine as a matter of law that plaintiff's claim  
5 is time-barred.<sup>3</sup> Therefore, defendants's Rule 12(b)(6) motion to  
6 dismiss on the basis that plaintiff's claim is time-barred is  
7 DENIED.

8 **CONCLUSION**

9 For the foregoing reasons, defendants' Rule 12(b)(1) and  
10 Rule 12(b)(6) motions to dismiss are DENIED.

11 IT IS SO ORDERED.

12 DATED: October 15, 2010

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FRANK C. DAMRELL, JR.  
UNITED STATES DISTRICT JUDGE

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<sup>3</sup> The court notes that nothing in this order precludes  
28 defendants from raising this argument in a motion for summary  
judgement.