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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

GEMINI BIOPRODUCTS, INC., a
California Corporation,

Plaintiff,

v.

SERUM SOURCE INTERNATIONAL, INC.,
a North Carolina corporation; and
DOES 1-50, Inclusive,

Defendants.

No. 2:17-cv-01551-JAM-KJN

**ORDER GRANTING SERUM SOURCE
INTERNATIONAL, INC.'S
MOTION TO DISMISS**

In this action, Plaintiff, Gemini Bioproducts, Inc. ("Gemini" or "Plaintiff") claims it bought a bad shipment of Fetal Bovine Serum ("FBS") for \$209,912.95 from Defendant Serum Source, International ("SSI" or "Defendant"). First Amended Compl. ("FAC"), ECF No. 13, ¶¶ 13-15. SSI rejected Gemini's request for a refund. FAC, ¶¶ 16-20. As a result, Gemini filed its Complaint against Defendant. See generally FAC. In November 2017, this Court granted Defendant's previous motion to dismiss, without prejudice, for lack of personal jurisdiction. Order, ECF No. 12. Plaintiff filed its FAC in December and Defendant again

1 moves to dismiss for lack of personal jurisdiction. Mot, ECF No.
2 16; Mem., ECF No. 16-1. Plaintiff opposes. Opp., ECF No. 17.
3 For the reasons explained below, the Court grants Defendant's
4 motion—this time with prejudice.¹

5
6 I. FACTUAL AND PROCEDURAL BACKGROUND

7 Gemini is a California corporation headquartered in West
8 Sacramento. Decl. of Bertram J. Polan In Support of Opp. ("Polan
9 Decl."), ECF No. 9-2, ¶ 3. It manufactures and sells cell
10 culture sera like FBS. Id., ¶ 4. SSI is a North Carolina
11 corporation with its headquarters in Charlotte. Decl. of
12 Jonathan Jacobs In Support of Mot., ECF No. 6-3, ¶ 2. SSI has
13 done business with Gemini and at least four other businesses in
14 California that are not parties to this litigation. Polan Decl.,
15 ¶¶ 7-8.

16 Since 2006, Gemini has purchased 46 lots of FBS from SSI.
17 FAC, ¶ 10. In February 2016, Gemini bought 967 bottles of FBS
18 from SSI for \$209,912.95. See id., ¶ 13. The invoice
19 consummating this transaction includes an attorneys' fees
20 provision and a return policy and warranty by SSI. Id., ¶¶ 16,
21 22.

22 Gemini received the bottles of FBS a couple of weeks later.
23 See id. But when Gemini marketed the bottles to its customers,
24 they complained about cells dying or growing very slowly in the
25 FBS. See id., ¶¶ 14-15. In over 30 years of being in business,

26
27 ¹ This motion was determined to be suitable for decision without
28 oral argument. E.D. Cal. L.R. 230(g). The hearing was scheduled
for Feb. 13, 2018. In deciding this motion, the Court takes as
true all well-pleaded facts in the FAC.

1 this was the first time Gemini did not have a 100% rate of
2 acceptance of FBS. Id., ¶ 14.

3 In September 2016, Gemini complained to SSI that the FBS it
4 bought in February was not of the quality that SSI represented or
5 that was standard for the industry. FAC, ¶ 17. SSI told Gemini
6 it was trying to resolve the problem with the manufacturer but
7 also reminded Gemini that it knew the quality of the FBS it was
8 buying. See id., ¶ 19. Now Gemini wants a full refund and has
9 sued SSI on the following claims: (1) breach of contract;
10 (2) breach of the implied covenant of good faith and fair
11 dealing; (3) open book account; and (4) unfair competition. See
12 generally FAC.

13 Gemini filed suit in the Superior Court of California,
14 County of Yolo, on June 19, 2017, and served SSI a week later.
15 Notice of Removal, ECF No. 1. The case was removed to federal
16 court a month after SSI received the complaint, on the basis of
17 diversity jurisdiction and the amount in controversy being more
18 than \$75,000. See Notice of Removal at 2-3.

20 II. OPINION

21 A. Personal Jurisdiction

22 When a defendant moves to dismiss for lack of personal
23 jurisdiction, the plaintiff must make a prima facie showing that
24 the court has jurisdiction over the defendant. Pebble Beach Co.
25 v. Caddy, 453 F.3d 1151, 1154 (9th Cir. 2006). Still, a
26 plaintiff cannot simply rest on the bare allegations of the
27 complaint. Ranza v. Nike, Inc., 793 F.3d 1059, 1068 (9th Cir.
28 2015). In making its prima facie showing, the plaintiff can

1 offer affidavits that the Court can choose to consider. Data
2 Disc, Inc. v. Sys. Tech. Assocs., 557 F.2d 1280, 1285 (9th Cir.
3 1977).

4 There are two types of personal jurisdiction: general and
5 specific. Goodyear Dunlop Tires Operations, S.A. v. Brown, 564
6 U.S. 915, 919-20 (2011) (internal citation omitted). General
7 jurisdiction lies where a foreign corporation's affiliations
8 with the forum state are sufficiently continuous and systematic
9 to render them at home in the forum state. Goodyear, 564 U.S.
10 at 919-20. A court may have general jurisdiction over a
11 defendant even when the claims at issue are distinct from the
12 defendant's activities in that forum. Id. Specific
13 jurisdiction lies where the defendant has established minimum
14 contacts with the forum state and the dispute arises from those
15 contacting activities with the forum state. Yahoo! Inc. v. La
16 Ligue Contre Le Racisme Et L'Antisemitisme, 433 F.3d 1199, 1204-
17 05 (9th Cir. 2006).

18 B. Discussion

19 1. General Jurisdiction

20 Gemini argues that its allegations in the FAC are
21 sufficient for this Court to find that it has general
22 jurisdiction over SSI because of (1) SSI's systematic and
23 continuous promotion, marketing, and sale of products to
24 Plaintiff and other similarly situated businesses in the
25 California cell culture industry and (2) a continual and
26 longstanding course of conduct and business between Gemini and
27 SSI. See Opp. at 5-6. The Court disagrees.

28 General jurisdiction requires Gemini to show that SSI's own

1 affiliations with California are sufficiently "continuous and
2 systematic" and that California essentially operates as SSI's
3 home. Goodyear Dunlop Tires Operations, S.A., 564 U.S. at 919
4 (internal citation and quotation marks omitted). "This is an
5 exacting standard, as it should be, because a finding of general
6 jurisdiction permits a defendant to be hauled into court in the
7 forum state to answer for any of its activities anywhere in the
8 world." Schwarzenegger v. Fred Martin Motor Co., 374 F.3d 797,
9 801 (9th Cir. 2004) (internal citation omitted). Gemini must
10 prove that SSI's contacts with California are of the type that
11 "approximate physical presence." Bancroft & Masters, Inc. v.
12 Augusta Nat'l Inc., 223 F.3d 1082, 1086 (9th Cir. 2000)
13 (internal citation omitted), holding modified by Yahoo! Inc.,
14 433 F.3d 1199. Only a limited set of affiliations that
15 effectively render a corporate defendant at home in the forum
16 state will result in general jurisdiction lying over that
17 defendant. Daimler AG v. Bauman, 134 S. Ct. 746, 760 (2014).

18 Here, Gemini concedes SSI is a North Carolina corporation
19 organized and existing under the laws of that state. Opp. at 5.
20 But Gemini contends that SSI's continuous business activity and
21 marketing in California combined with Gemini's purchase of 46
22 lots of FBS from SSI since 2006 constitute the continuous and
23 systematic contacts required for general jurisdiction. See id.
24 Gemini's allegations that SSI conducts continuous business
25 activity in California do not suggest, however, that SSI is
26 effectively at home in California. Defendant selling FBS to
27 customers in California is not the kind of unique relationship
28 with California, like incorporation or establishment of a

1 headquarters, that would justify maintaining general
2 jurisdiction over Defendant. Daimler AG, 134 S. Ct. at 760-61.
3 As Defendant points out, concluding otherwise would effectively
4 subject it to general jurisdiction in any state where it has
5 customers. Reply, ECF No. 19, at 1-2 (citing Daimler AG, 134 S.
6 Ct. at 760). Accordingly, this Court again finds that it does
7 not have general jurisdiction over SSI in this case.

8 2. Specific Jurisdiction

9 Gemini next argues in response to SSI's motion that it has
10 sufficiently alleged that specific jurisdiction lies over SSI
11 because: (1) SSI purposefully availed itself of California's laws
12 by entering into a contract with Gemini through electronic
13 communication and marketing its products in California;
14 (2) Gemini's claim arises out of SSI's conduct within California;
15 and (3) the exercise of personal jurisdiction over SSI is
16 reasonable. See Opp. at 8-12. The Court finds otherwise.

17 To decide whether specific jurisdiction lies, the Court
18 applies a three-part test. First, the non-resident defendant
19 must either: (1) purposefully direct their activities or
20 consummate some transaction with the forum or resident thereof or
21 (2) perform an act by which they purposefully avail themselves of
22 the privilege of conducting activities in the forum, thereby
23 invoking the benefits and protections of its laws.

24 Schwarzenegger, 374 F.3d at 802 (internal citations and quotation
25 marks omitted). Second, the claim must arise from or relate to
26 the defendant's forum-related activities. Id. Finally, the
27 exercise of jurisdiction must comport with fair play and
28 substantial justice, i.e. be reasonable. Id.

1 Plaintiff has the burden on the first two prongs. Boschetto
2 v. Hansing, 539 F.3d 1011, 1016 (9th Cir. 2008). If it fails to
3 meet that burden, the jurisdictional inquiry ends and the case
4 must be dismissed. Id. But if Plaintiff succeeds in meeting the
5 burden, Defendant must then present a compelling case that
6 exercising jurisdiction would be unreasonable. Id.

7 For the first prong in the test for specific jurisdiction,
8 the Court conducts a purposeful availment inquiry, rather than a
9 purposeful direction inquiry (used in tort cases), to determine
10 if the contract claims justify exercising specific jurisdiction.
11 See Schwarzenegger, 374 F.3d at 802; Picot v. Weston, 780 F.3d
12 1206, 1212 (9th Cir. 2015). Evidence of availment is shown by
13 action taking place in the forum that invokes the benefits and
14 protections of the laws in that forum. Pebble Beach, 453 F.3d at
15 1155. Evidence of direction, on the other hand, consists of
16 action taking place outside the forum that is directed at the
17 forum. Id.

18 Since this is a contract case, to satisfy the first prong,
19 Gemini must allege that SSI affirmatively acted to promote the
20 transaction of business within California. See Sher v. Johnson,
21 911 F.3d 1357, 1362 (9th Cir. 1990); Picot, 780 F.3d at 1212
22 (defendant must take actions that create a substantial connection
23 with the forum state) (internal citation omitted). Formation of
24 a contract with a nonresident defendant by itself is not enough
25 to create jurisdiction. Boschetto, 539 F.3d at 1017. To decide
26 whether a contract establishes minimum contacts, the Court
27 considers the following facts: (1) previous negotiations;
28 (2) contemplated future consequences; and (3) the terms of the

1 contract and the parties' actual course of dealing. Gray & Co.
2 Firstenberg Mach. Co., 913 F.2d 758, 760 (9th Cir. 1990)
3 (internal citations and quotation marks omitted).

4 Gemini also seeks to apply the Zippo Mfg. Co. v. Zippo Dot
5 Com, Inc., 952 F. Supp. 1119 (W.D. Pa. 1997) sliding scale
6 internet effects test, as it was applied by the Ninth Circuit in
7 Mavrix Photo, Inc. v. Brand Techs., Inc., 647 F.3d 1218, 1227
8 (9th Cir. 2011), to this case. Opp. at 7-8. But the Ninth
9 Circuit applied the Zippo test to "copyright infringement, a
10 tort-like cause of action" and not to contract claims, like those
11 at issue here. Mavrix, 647 F.3d at 1228. Similarly, the Stomp,
12 Inc. v. NeatO, LLC, 61 F. Supp. 2d 1074, 1078-79 (C.D. Cal. 1999)
13 case that Gemini cites in support of its argument does not apply
14 here. In that case, the Central District of California used the
15 Zippo test in a case involving patent infringement claims and not
16 contract claims. Id. Gemini's reliance on these cases is
17 unavailing.

18 Here, Gemini argues that SSI had a continuing commitment to
19 Gemini because of SSI's return policy and warranty and the
20 parties' inclusion of an attorney's fees provision in their
21 invoice. See Opp. at 9. Gemini also contends it meets the
22 standard for purposeful availment because SSI and Gemini had a
23 prior course of dealing over the 46 lots that Gemini bought and
24 led it to transact with SSI for the most recent sale. See id.

25 As Defendant points out, premising personal jurisdiction on
26 SSI's warranty of the quality of FBS would convert the purposeful
27 availment analysis into something like the purposeful direction
28 test used in tort cases, where the defendant is responsible for

1 the effects of its conduct in the forum state. Reply at 3
2 (citing Panavision Int'l, L.P. v. Toeppen, 141 F.3d 1316, 1321
3 (9th Cir. 1998)).

4 Instead, the purposeful availment test involves the
5 affirmative conduct of the defendant and not the ultimate effects
6 of the defendant's conduct. Gray, 913 F.2d at 760. Gemini's
7 exercise of its warranty right and use of Defendant's return
8 policy is not an affirmative action by Defendant. In addition,
9 "foreseeability of causing injury in another state is not a
10 sufficient basis on which to exercise jurisdiction." Id.

11 Further, the attorney's fees provision does not satisfy the
12 purposeful availment test because it creates a contingent right
13 and addresses Defendant's potential failure to perform; the
14 attorney's fees provision does not represent Defendant
15 affirmatively doing something to avail itself of the benefits and
16 protections of California's laws. See Gray, 913 F.2d at 760.
17 While Gemini notes that California Civil Code § 1717 transforms
18 attorney's fee provisions into mutual obligations, this does not
19 mean a non-California company's use of an attorney's fees
20 provision in a contract with a California party constitutes
21 purposeful availment. See FAC, ¶ 22. Finding otherwise would
22 allow state legislatures to circumscribe the constitutional
23 limits on the exercise of personal jurisdiction that are provided
24 by the Fourteenth Amendment. See Walden v. Fiore, 134 S. Ct.
25 1115, 1121 (2014) ("to determine whether the Federal District
26 Court in this case was authorized to exercise jurisdiction over
27 petitioner, we ask whether the exercise of jurisdiction comports
28 with the limits imposed by federal due process on the [forum

1 state]”) (internal quotation marks and citation omitted).

2 Finally, Gemini’s allegations of the parties’ 46 prior
3 transactions and concomitant course of dealing also do not
4 satisfy its burden of showing that Defendant purposefully availed
5 itself of the benefits and protections of California’s laws for
6 the transaction giving rise to this lawsuit. Gemini only alleges
7 that those prior sales motivated Gemini to purchase FBS from
8 Defendant in the most recent transaction. Opp. at 9. Gemini
9 does not allege that those prior sales actually created a mutual
10 contemplation of future consequences between the transacting
11 parties, as required by Gray. See id.; Gray, 913 F.2d at 760.
12 Gemini has also failed to provide any authority to support a
13 finding that Defendant purposefully availed itself of the
14 benefits and protections of California’s laws based on the
15 parties’ prior transactions, the warranty and return policy, and
16 the attorney’s fees provision.

17 Gemini contends that Gray and Boschetto should not apply to
18 this case. Opp. at 9-10. Gemini notes that in Gray, the invoice
19 stated the sale was “as is, where is,” indicating the defendant’s
20 desire to not be responsible for the product after delivery. Id.
21 at 9 (citing Gray, 913 F.3d at 761). This is a distinction
22 without a difference. The invoice’s note on finality from Gray
23 is absent from this case. But, similar to the sale in Gray, the
24 sale here did not “contemplate[] a continuing relationship”
25 between Gemini and Defendant. Gray, 913 F.3d at 761. After
26 Defendant delivered the FBS to Gemini, the parties were free to
27 go their separate ways unless something went wrong, which is
28 insufficient to find purposeful availment. See id.

1 Gemini's attempt to distinguish Boschetto also fails.
2 Gemini emphasizes that in Boschetto, the eBay seller did not know
3 who the winning bidder was until the auction ended, unlike here
4 where Defendant marketed and solicited customers in California.
5 Opp. at 9-10 (citing 539 F.3d at 1019). But the court in
6 Boschetto also noted that "the consummation of the sale via eBay
7 here is a distraction from the core issue: [t]his was a one-time
8 contract for the sale of a good" and that "[plaintiff] did not
9 create any ongoing obligations with Boschetto in California; once
10 the car was sold the parties were to go their separate ways[.]"
11 539 F.3d at 1017, 1019. While Gemini and Defendant consummated
12 46 prior sales, these were separate stand-alone transactions and
13 not an ongoing transaction.

14 Since Gemini still cannot meet its burden on the first prong
15 of the three-part specific jurisdiction test, the Court's inquiry
16 ends and the case must be dismissed. The Court also does not and
17 need not reach Defendant's Federal Rule of Civil Procedure
18 12(b)(6) arguments.

19 C. Leave to Amend

20 Gemini requests further leave to amend if the Court grants
21 Defendant's motion to dismiss. See Opp. at 15. But the Court
22 need not grant leave to amend where amendment would be futile.
23 Deveraturda v. Globe Aviation Sec. Servs., 454 F.3d 1043, 1049
24 (9th Cir. 2006). As explained above, Gemini has again failed to
25 satisfy its burden of showing that maintaining general
26 jurisdiction over Defendant is appropriate. Maintaining
27 specific jurisdiction is also not appropriate because Gemini has
28 failed to satisfy its burden of showing that Defendant

1 purposefully availed itself of the benefits and protections of
2 California's laws. Gemini has pointed to no facts suggesting
3 amendment could rectify its failures. The Court denies
4 Plaintiff's request.

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III. ORDER

For the reasons above, the Court GRANTS Defendant's motion to dismiss with prejudice.

IT IS SO ORDERED.

Dated: March 30, 2018



JOHN A. MENDEZ,
UNITED STATES DISTRICT JUDGE