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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

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|------------------------------------|---|-----------------------------|
| SENSIBLE FOODS, LLC, |) | Case No. 11-2819 SC |
| |) | |
| Plaintiff, |) | ORDER GRANTING IN PART AND |
| |) | DENYING IN PART DEFENDANTS' |
| v. |) | <u>MOTION TO DISMISS</u> |
| |) | |
| WORLD GOURMET, INC.; HAIN GOURMET, |) | |
| INC.; HAIN CELESTIAL GROUP, INC.; |) | |
| WORLD GOURMET MARKETING, LLC; AND |) | |
| SENSIBLE SNACKS, INC., |) | |
| |) | |
| Defendants. |) | |
| |) | |

I. INTRODUCTION

Plaintiff Sensible Foods, LLC ("Plaintiff") brings this action against Defendants World Gourmet, Inc. ("World Gourmet"), Hain Gourmet, Inc. ("Hain Gourmet"), Hain Celestial Group, Inc., ("Hain Celestial"), World Gourmet Marketing, LLC ("WGM"), and Sensible Snacks, Inc. ("Sensible Snacks") (collectively, "Defendants"). ECF No. 1 ("Compl."). Now before the Court is Defendants' Motion to Dismiss Plaintiff's Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. ECF No. 14 ("Mot."). This Motion is fully briefed. ECF Nos. 22 ("Opp'n")¹, 23 ("Reply").

¹ The Court notes that Plaintiff filed its Opposition seven days after the deadline set forth in Civil Local Rule 7-3. The Court will not tolerate future failures to comply with the Local Rules.

1 For the reasons set forth below, the Court GRANTS IN PART and
2 DENIES IN PART Defendants' Motion.

3
4 **II. BACKGROUND**

5 As it must on a 12(b)(6) motion to dismiss, the Court takes
6 all well-pleaded factual allegations in the Complaint as true.
7 Plaintiff is engaged in the development and sale of a full line of
8 organic, health, and natural dried fruit and vegetable snacks and
9 related goods. Compl. ¶ 1. Plaintiff has continuously used its
10 domain name www.sensiblefoods.com since October 1998 and owns
11 various word and design marks for "Sensible Foods" as well as marks
12 for "Snacks Made Sensible," "Snacking Has Never Been More
13 Sensible," and "Snacking Has Never Been So Sensible" (collectively,
14 "Sensible Foods Marks"). Id. ¶¶ 19-27. Since 1997, Plaintiff has
15 spent significant sums and devoted significant resources promoting
16 its Sensible Foods Marks worldwide. Id. ¶ 38.

17 In March 2005, WGM filed with the United States Patent and
18 Trademark Office ("PTO") an application for a mark for protein-
19 based nutrient-dense snack bars and soy-based food bars, among
20 other things. Id. ¶ 41. In January 2007, the Commissioner for
21 Trademarks provided World Gourmet with a registration number for
22 the mark "Sensible Portions" in connection with the application.
23 Id. ¶ 53.

24 In June 2007, WGM filed with the PTO an application for the
25 mark "Sensible Snacks" in connection with goods substantially
26 similar to Plaintiff's. Id. ¶ 54. In a letter to WGM refusing

27
28 Any documents filed after the applicable deadlines without leave of
the Court henceforth will not be considered.

1 registration, the examining trademark attorney found that the
2 "Sensible Snacks" mark so resembled the Plaintiff's registered mark
3 "as to be likely to cause confusion, to cause mistake or to
4 deceive." Id. ¶ 55. Defendants did not challenge the examining
5 attorney's findings. Id. ¶ 64.

6 Plaintiff alleges that Defendants instead "slowly, willfully,
7 incrementally, and maliciously changed Infringing Works . . .
8 mischievously creeping closer and closer through progressive
9 encroachment to Plaintiff's trade dress, packaging, channels of
10 distribution, publication, as well as its [Sensible Foods Marks]."
11 Id. ¶ 65. Plaintiff alleges that consumers, businesses, and other
12 members of the public have confused Plaintiff's and Defendants'
13 products, to the detriment of Plaintiff's business, and provides
14 numerous examples of alleged confusion, including many emails
15 allegedly sent to Plaintiff instead of Defendants and charges
16 allegedly billed to Plaintiff instead of Defendants. Id. ¶¶ 86-
17 114.

18 WGM has registered the domain names www.sensibleportions.com,
19 www.soycrisps.com, and www.wgourmet.com. Id. ¶¶ 80-82. The public
20 is redirected to www.sensibleportions.com when either
21 www.soycrisps.com or www.wgourmet.com is entered into an internet
22 browser. Id. ¶¶ 80-81. Plaintiffs allege that Defendants' domain
23 name is confusingly similar to Plaintiff's. Id. ¶ 82.

24 In August 2010, Plaintiff met with the CEO of Hain Celestial,
25 who stated that he would not give-up use of the "Sensible Portions"
26 mark but would "modify, address or discontinue use the of the term
27 'sensible snacks.'" Id. ¶ 70.

28

1 On August 16, 2010, Plaintiff and Hain Celestial signed a
2 Confidentiality Agreement providing that each party would refrain
3 from disclosing certain confidential information without the
4 other's approval. Id. ¶ 116, Confidentiality Agreement at 1.² The
5 parties entered into the Confidentiality Agreement because they
6 were considering a business arrangement through which Hain
7 Celestial would purchase Plaintiff. Compl. ¶ 126. The
8 contemplated sale never occurred, and Plaintiff now alleges that
9 Defendants improperly disclosed certain confidential information in
10 violation of the agreement. Id. ¶ 122.

11 On June 9, 2011, Plaintiff filed this action, asserting
12 sixteen claims: (1) breach of contract, (2) breach of implied
13 contract against Hain Celestial; (3) breach of implied covenant of
14 good faith and fair dealing against Hain Celestial; (4) state
15 trademark infringement, Cal. Bus. & Prof. Code § 14200 et seq.; (5)
16 contributory infringement; (6) unfair competition, Cal. Bus. &
17 Prof. Code § 17200 et seq.; (7) deceptive trade practices, Cal.
18 Bus. & Prof. Code § 17500 et seq.; (8) false advertising, Cal. Bus.
19 & Prof. Code § 17500 et seq.; (9) federal trademark infringement,
20 15 U.S.C. § 1051 et seq. (Lanham Act); (10) reverse confusion, 15
21 U.S.C. § 1114 et seq. (Lanham Act); (11) cancellation of federal
22 trademark registration (Lanham Act); (12) cyberpiracy, 15 U.S.C. §
23 1025(d) et seq. (Lanham Act); (13) false advertising,
24 misrepresentation, and unfair competition, 15 U.S.C. § 1125(a) et

25 _____
26 ² In the Complaint, Plaintiff referenced the Confidentiality
27 Agreement and identified it as an attachment, but failed to
28 actually file the document with the Court. Plaintiff later re-
filed the Complaint with the missing attachment. ECF No. 12-1
("Confidentiality Agreement").

1 seq. (Lanham Act); (14) state cyberpiracy, Cal. Bus. & Prof. Code §
2 17525, et seq.; (15) trademark infringement (common law); and (16)
3 unjust enrichment. Id. ¶¶ 115-209.

4 Defendants filed the instant Motion to Dismiss Plaintiff's
5 Complaint on August 31, 2011. They make several arguments in favor
6 of dismissal. First, they argue that Plaintiff's third, fourth,
7 and fourteenth claims fail to state a claim upon which relief can
8 be granted. Second, they argue that Plaintiff's equitable and
9 Lanham Act claims (claims 4-5, 9-10, 12-13, 15-16) are barred by
10 laches. They proceed to argue that the court may not retain
11 jurisdiction over Plaintiff's administrative claim for trademark
12 cancellation (claim 11) once the Lanham Act claim is dismissed, and
13 that the Court should decline to exercise supplemental jurisdiction
14 over Plaintiff's state law claims (claims 1-2, 6-8) once all
15 federal claims are dismissed. As a last alternative, Defendants
16 argue that claims 1-2 and 4-16 should be dismissed because
17 Plaintiff has failed to plead sufficient facts to state a plausible
18 claim.

19
20 **III. LEGAL STANDARD**

21 A motion to dismiss under Federal Rule of Civil Procedure
22 12(b)(6) "tests the legal sufficiency of a claim." Navarro v.
23 Block, 250 F.3d 729, 732 (9th Cir. 2001). "Dismissal can be based
24 on the lack of a cognizable legal theory or the absence of
25 sufficient facts alleged under a cognizable legal theory."
26 Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir.
27 1988). "When there are well-pleaded factual allegations, a court
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1 should assume their veracity and then determine whether they
2 plausibly give rise to an entitlement to relief." Ashcroft v.
3 Iqbal, 129 S. Ct. 1937, 1950 (2009). However, "the tenet that a
4 court must accept as true all of the allegations contained in a
5 complaint is inapplicable to legal conclusions. Threadbare
6 recitals of the elements of a cause of action, supported by mere
7 conclusory statements, do not suffice." Id. (citing Bell Atl.
8 Corp. v. Twombly, 550 U.S. 544, 555 (2007)). The allegations made
9 in a complaint must be both "sufficiently detailed to give fair
10 notice to the opposing party of the nature of the claim so that the
11 party may effectively defend against it" and "sufficiently
12 plausible" such that "it is not unfair to require the opposing
13 party to be subjected to the expense of discovery." Starr v. Baca,
14 633 F.3d 1191, 1204 (9th Cir. 2011).

15

16 **V. DISCUSSION**

17 As a preliminary matter, Plaintiff voluntarily withdraws its
18 fourth claim for state trademark infringement, twelfth claim for
19 cyberpiracy under the Lanham Act, fourteenth claim for state
20 cyberpiracy, and sixteenth claim for unjust enrichment. Opp'n at
21 2. Accordingly, these claims are DISMISSED WITH PREJUDICE.

22 **A. Breach of the Implied Covenant of Good Faith (Claim 3)**

23 The implied covenant of good faith and fair dealing prevents a
24 party to a contract from unfairly frustrating the other party's
25 right to receive the benefits of the contract. Guz v. Bechtel
26 Nat'l, Inc., 24 Cal. 4th 317, 349 (2000). To state a claim for
27 breach of the implied covenant of good faith and fair dealing, a
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1 plaintiff must allege more than a mere contractual breach; he or
2 she must allege "a failure or refusal to discharge contractual
3 responsibilities, prompted not by an honest mistake, bad judgment
4 or negligence but rather by a conscious and deliberate act, which
5 unfairly frustrates the agreed common purposes and disappoints the
6 reasonable expectations of the other party thereby depriving that
7 party of the benefits of the agreement." Careau & Co. v. Security
8 Pacific Business Credit, Inc., 222 Cal. App. 3d 1371, 1395 (Cal.
9 Ct. App. 1990). It is well settled that a claim for breach of the
10 implied covenant of good faith and fair dealing cannot contradict
11 the express terms of the contract. Thrifty Payless, Inc. v.
12 Mariners Mile Gateway, LLC, 185 Cal. App. 4th 1050, 1061 (Cal. Ct.
13 App. 2010).

14 Plaintiff alleges that Hain Celestial breached the covenant of
15 good faith and fair dealing by taking actions "which destroyed
16 Plaintiff's rights to receive the fruits of the Confidentiality
17 Agreement between Plaintiff and Hain C[elestial]." Compl. ¶ 130.
18 Plaintiff's only concrete allegation of a "conscious and
19 deliberate" act breaching the covenant is that Hain Celestial
20 purchased products similar to Plaintiff's from other industry
21 suppliers. Id. ¶ 131. Plaintiff thus appears to be alleging that,
22 by declining to purchase Plaintiff and instead purchasing products
23 similar to Plaintiff's products from a third-party supplier, Hain
24 Celestial deprived Plaintiff of the benefits of the Confidentiality
25 Agreement.

26 Defendants argue that Plaintiff fails to state a claim for
27 breach of the implied covenant with regard to the Confidentiality
28

1 Agreement because Plaintiff's allegation contradicts the express
2 terms of the agreement, which provides that neither party "[is]
3 under any legal obligation of any kind whatsoever with respect to
4 any transaction by virtue of this Agreement, except for the matters
5 specifically agreed to herein" and further states that each party
6 reserves the right "to terminate discussions and negotiations with
7 respect to any transaction at any time." Confidentiality Agreement
8 ¶ 9. Moreover, Defendants argue, the purpose of the
9 Confidentiality Agreement is to preserve the confidentiality of
10 exchanged material, not to force one party to purchase products
11 from the other. Mot. at 10. Accordingly, Hain Celestial's
12 purchasing products from a third party supplier cannot frustrate
13 the purpose of the Confidentiality Agreement.

14 In response, Plaintiff argues that Defendants misunderstand
15 the Complaint. Plaintiff contends that its breach of implied
16 covenant claim is based not upon the Confidentiality Agreement, but
17 rather upon an implied contract that is the subject of Plaintiff's
18 second claim. Defendants reply that this argument misrepresents
19 the Complaint and attempts to rewrite Plaintiff's third claim.

20 The Court agrees with Defendants. The third claim in the
21 Complaint clearly states that Defendants "unfairly frustrated the
22 agreed common purpose of the Confidentiality Agreement" and
23 "deprived Plaintiff of the benefits of the Confidentiality
24 Agreement." Compl. ¶ 131. Plaintiff cannot credibly contend that,
25 as written, its third claim is premised upon a contract other than
26 the Confidentiality Agreement. The Court also agrees with
27 Defendants that Plaintiff fails to state a claim with regard to the
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1 Confidentiality Agreement because the clear purpose of the
2 Agreement is to preserve the confidentiality of exchanged material,
3 not to force one party to purchase products from the other.

4 Accordingly, the Court DISMISSES Plaintiff's third claim WITH
5 LEAVE TO AMEND. If Plaintiff means to premise its claim on a
6 contract other than the Confidentiality Agreement, it shall make
7 this clear in its amended Complaint, not leave Defendants to guess
8 at the underlying basis for the claim.

9 **B. Laches (Claims 4-5, 9-10, 12-13, 15-16)**

10 Defendants argue that Plaintiff's equitable and Lanham Act
11 claims (claims 4-5, 9-10, 12-13, 15-16) are barred by laches.
12 Laches bars untimely equitable causes of action. "Laches is an
13 equitable time limitation on a party's right to bring suit, resting
14 on the maxim that one who seeks the help of a court of equity must
15 not sleep on his rights." Jarrow Formulas, Inc. v. Nutrition Now,
16 Inc., 304 F.3d 829, 835 (9th Cir. 2002) (internal citations and
17 quotation marks omitted). It is well established that laches
18 "requires proof of (1) lack of diligence by the party against whom
19 the defense is asserted, and (2) prejudice to the party asserting
20 the defense." Bratton v. Bethlehem Steel Corp., 649 F.2d 658, 666
21 (9th Cir. Cal. 1980) (quoting Costello v. United States, 365 U.S.
22 265, 282 (1961)) (emphasis added).

23 The Court declines to dismiss Plaintiff's claims on the basis
24 of laches because "a laches determination is ill-suited for a
25 motion to dismiss for failure to state a claim." Italia Marittima,
26 S.p.A. v. Seaside Transp. Servs., LLC, C 10-0803 PJH, 2010 U.S.
27 Dist. LEXIS 92771, at *16 (N.D. Cal. Sep. 7, 2010). "Because the
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1 application of laches depends on a close evaluation of all the
2 particular facts in a case, it is seldom susceptible of resolution
3 by summary judgment." Couveau v. American Airlines, Inc., 218 F.3d
4 1078, 1083 (9th Cir. 2000). "At the motion-to-dismiss phase, the
5 obstacle to asserting a successful laches defense is even greater
6 because the defendant must rely exclusively upon the factual
7 allegations set forth in the complaint." Kourtis v. Cameron, 419
8 F.3d 989, 1000 (9th Cir. Cal. 2005), abrogated on other grounds in
9 Taylor v. Sturgell, 553 U.S. 880 (2008).

10 In their Motion, Defendants ask the Court to make factual
11 determinations concerning when Plaintiff knew or should have known
12 about the alleged infringement, Plaintiff's diligence in enforcing
13 its rights, and the prejudice to Defendants caused by Plaintiff's
14 alleged delay. Mot. at 12-13. In Opposition and Reply, the
15 parties raise additional factual disputes concerning the strength
16 of Plaintiff's trademark rights, the harm Plaintiff will suffer if
17 relief is denied, whether Defendants acted in good faith, and
18 whether the parties' products are distinct, among other things.
19 Opp'n at 13-18; Reply at 9-14. Most of the facts relevant to these
20 issues are not set forth the Complaint. Further, even if the Court
21 were to take notice of the facts set forth in the parties' requests
22 for judicial notice,³ it is premature to determine whether such

23 _____
24 ³ Defendants filed a Request for Judicial Notice, ECF No. 15
25 ("Def's.' RJN"), requesting the Court take judicial notice of the
26 facts set forth in the exhibits to the Declaration of Nathan B.
27 Sabri, ECF No. 17 ("Sabri Decl."). In Opposition, Plaintiffs also
28 filed a Request for Judicial Notice, ECF No. 22-1 ("Pl.'s RJN"),
requesting the Court take judicial notice of the facts set forth in
the exhibits to the Declaration of David W. Baxes, ECF Nos. 22-4
("Baxes Decl."). Because resolution of Defendants' laches defense
inappropriate at this stage, it does not rule on the RJNs, except
as to Plaintiff's Exhibits 3(a), 3(b), and 5, as discussed infra.

1 evidence is sufficient to raise a genuine issue of material fact,
2 let alone weigh that evidence.

3 Accordingly, the Court finds that a determination on the
4 adequacy of Defendants' laches defense to claims 4-5, 9-10, 12-13,
5 and 15-16 requires findings of fact and is inappropriate for
6 resolution on a motion to dismiss.

7 **C. Sufficiency of Factual Allegations**

8 Defendants argue that all of Plaintiff's claims, except its
9 third claim for breach of the covenant of good faith and fair
10 dealing, should be dismissed for failure to plead sufficient
11 factual allegations in support of those claims. Plaintiff responds
12 that it has pled sufficient factual allegations to support each of
13 its claims. For the reasons stated below, the Court agrees with
14 Defendants as to Plaintiff's first, second, fifth, eighth, and
15 thirteenth claims. The Court agrees with Plaintiff as to its
16 sixth, seventh, ninth, tenth, eleventh, and fifteenth claims.

17 1. Plaintiff's First Claim for Breach of Contract

18 Plaintiff's claim for breach of the Confidentiality Agreement
19 is a mere recitation of the elements of a breach of contract claim.
20 For example, the Complaint states "Defendants failed to perform all
21 of the conditions, covenants and promises required of them under
22 the confidentiality agreements [sic], including, but not limited to
23 disclosing all or a portion of Plaintiff's Confidential Information
24 without the express or implied consent of Plaintiff." Compl. ¶
25 122. Plaintiff pleads no facts regarding, inter alia, what
26 information was allegedly disclosed or how it was disclosed.⁴ Such

27 _____
28 ⁴ The Court recognizes that the information allegedly disclosed is
purportedly confidential in nature and does not suggest that

1 "[t]hreadbare recitals of the elements of a cause of action" are
2 insufficient to state a claim under Iqbal. See 129 S. Ct. at 1950.

3 Plaintiff argues that its allegation that Defendants breached
4 the contract by "disclosing all or a portion of Plaintiff's
5 Confidential Information" is sufficient to state a claim, and
6 Plaintiff cites to its RJN. Other portions of Plaintiff's
7 Opposition suggest it means to allege that Hain Celestial breached
8 the Confidentiality Agreement by conveying certain information to
9 WGM and disclosing that information at a proceeding before the
10 Trademarks Trial and Appeal Board ("TTAB"). Opp'n at 19. If this
11 is what Plaintiff means to allege, then it must say so in the
12 Complaint. The factual allegations necessary to support a claim
13 must be in the Complaint, not in an opposition brief or a RJN.
14 Because Plaintiff has failed to plead sufficient facts in support
15 of its first claim for breach of contract, the Court DISMISSES the
16 claim WITH LEAVE TO AMEND.

17 The Court further notes that Plaintiff alleges that it entered
18 into the Confidentiality Agreement with Hain Celestial, and the
19 text of the Agreement confirms this fact, but Plaintiff then
20 proceeds to allege that all Defendants breached the Agreement and
21 that there may have in fact been multiple agreements: "[b]y failing
22 to abide by the terms of the Confidentiality Agreement, Defendants
23 breached those agreements." Compl. ¶ 123. If Plaintiff chooses to
24 file an amended complaint, it should clarify how many contracts are
25

26 Plaintiff should disclose its own confidential information in its
27 Complaint. Nevertheless, Plaintiff should at least provide in
28 general terms the information to which it refers and how Defendants
allegedly disclosed that information.

1 at issue, specify who the parties to those contracts are, and limit
2 allegations of breach to those Defendants who were actually parties
3 to the contracts at issue.

4 2. Plaintiff's Second Claim for Breach of Implied
5 Contract

6 Plaintiff's second claim for breach of implied contract
7 likewise fails to clearly allege facts sufficient to put Defendants
8 on notice of the nature of the claim. Simply put, it is unclear
9 from the Complaint, and from Plaintiff's Opposition for that
10 matter, exactly what implied contract Plaintiff contends existed,
11 and which Defendants Plaintiff alleges were parties to said
12 contract.

13 The Complaint appears to allege that one or more Defendants⁵
14 breached an implied contract by misusing Plaintiff's confidential
15 information without compensating Plaintiff. Plaintiff's Complaint
16 states:

17
18 Defendants' [sic] understood that it [sic] was not to
19 use [Plaintiff's confidential information] for any
20 purpose other than the Permitted Purposes of the
21 [Confidentiality Agreement] and that any other use
22 would require Plaintiff's permission and that
23 Plaintiff would expect compensation for any other use,
24 thereby creating an implied contract. Upon
25 information and belief, Defendants' [sic] used
26 Plaintiff's information without compensating Plaintiff
27 for such use - a breach of that implied contract.

28 Compl. ¶ 127. As with its breach of contract claim, Plaintiff has

⁵ The heading beneath "Second Cause of Action" in the Complaint states that the claim is against Hain Celestial. The allegations that follow, however, interchangeably name "Hain C[elestial]" and "Defendants." See Compl. ¶¶ 125-128.

1 not alleged any facts as to how Defendants misused its confidential
2 information.

3 Moreover, in its Opposition Plaintiff appears to change its
4 theory as to what implied contract allegedly existed. Plaintiff
5 argues that Plaintiff and Hain Celestial agreed that, while
6 potential sale negotiations were ongoing, Plaintiff agreed to
7 suspend its opposition proceedings before the TTAB in exchange for
8 Hain Celestial agreeing to discontinue the use of the phrase
9 "sensible snacks" in connection with its products. Opp'n at 5-6.
10 This theory is entirely different from that set forth in the
11 Complaint. If Plaintiff cannot pin down what implied contract
12 Defendants allegedly violated, Defendants certainly lack adequate
13 notice to prepare a defense to Plaintiff's claim.

14 Accordingly, Plaintiff's second claim for breach of implied
15 contract is DISMISSED WITH LEAVE TO AMEND.

16 3. Plaintiff's Fifth Claim for Contributory
17 Infringement

18 A claim for contributory infringement requires a showing that
19 a defendant "intentionally induc[ed] or encourage[d] direct
20 infringement." MDY Indus., LLC v. Blizzard Entm't, Inc., Nos. 09-
21 15932, 09-16044, 2011 U.S. App. LEXIS 3428, at *10 (9th Cir. Feb.
22 17 2011). Defendants argue that Plaintiff's fifth claim for
23 contributory infringement should be dismissed because Plaintiff has
24 failed to plead factual allegations of intentional inducement.
25 Plaintiff responds that without discovery it is unable to
26 differentiate among the parties.

27
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1 The Court agrees with Defendants. Plaintiff's response is
2 beside the point. Regardless of whether Plaintiff can
3 differentiate among the parties, Plaintiff has failed to plead
4 facts supporting the claim that any Defendant induced or encouraged
5 another to infringe. Plaintiff's allegations underlying this claim
6 merely recite legal conclusions such as: "Defendants have
7 contributed, aided and/or encouraged other Defendants and Does 1-20
8 to infringe" Compl. ¶ 140. Iqbal requires Plaintiff to
9 provide factual allegations supporting these conclusions in order
10 to state a plausible claim. 129 S. Ct. at 1950. Plaintiff's fifth
11 claim is DISMISSED WITH LEAVE TO AMEND.

12 4. Plaintiff's False Advertising Claims

13 Plaintiff's eighth and thirteenth claims allege false
14 advertising under California and federal law, respectively. False
15 advertising under section 17500 of the California Business and
16 Professions Code is a claim sounding in fraud. In re Tobacco II
17 Cases, 46 Cal. 4th 298, 312 n.8 (2009). Accordingly, it is subject
18 to the heightened pleading requirements for fraud claims under
19 Federal Rule of Civil Procedure 9(b). In order to state a claim,
20 Plaintiff must allege facts identifying specific allegedly false
21 statements, including facts showing how the statements were
22 misleading. See Chua v. Barratt American, No. 09cv105-L(WVG), 2010
23 U.S. Dist. LEXIS 25298, at *9-10 (S.D. Cal. Mar. 17, 2010).
24 Similarly, to state a federal claim for false advertising under the
25 Lanham Act, Plaintiff must identify "false statements of fact" in
26 advertisements that Defendants made about their own or another's
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1 product. Rice v. Fox Broad. Co., 330 F.3d 1170, 1180 (9th Cir.
2 2003) (internal quotation omitted).

3 Defendants argue that Plaintiff's false advertising claims
4 should be dismissed because Plaintiff has failed to identify any
5 allegedly false statements made by Defendants. Mot. at 19.
6 Plaintiff argues that it has sufficiently pled its claims because
7 it has alleged that Defendants have used trademarks that infringe
8 the Sensible Food Marks in public advertising. Opp'n at 21. The
9 Court agrees with Defendants. Plaintiffs have failed to state a
10 claim for false advertising under California or federal law because
11 they have not identified any allegedly false statements made by
12 Defendants. Accordingly, Plaintiff's eighth and thirteenth claims
13 are DISMISSED WITH LEAVE TO AMEND.

14 5. Plaintiff's Remaining Claims

15 Defendants argue that all of Plaintiff's remaining claims
16 should be dismissed for lack of specificity because Plaintiff often
17 fails to identify which Defendant is alleged to have committed
18 which wrongful act. Mot. at 15. Plaintiff responds that without
19 discovery it cannot be expected to differentiate among the actions
20 of related corporate entities that have used their own names in
21 confusing fashion in the marketplace. Opp'n at 19. Defendants
22 reply that "Plaintiff's blurring of the lines goes well beyond what
23 it needs discovery to clarify." Reply at 15.

24 The Court agrees with Plaintiff. The Court has noted above
25 that Plaintiff should clarify in any amended complaint which
26 parties it allegedly had contractual agreements with and which
27 parties allegedly breached those contracts. Other than those
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1 particular instances, however, the Court finds that Plaintiffs'
2 lack of precision in pleading is not so egregious as to warrant
3 dismissal of the Complaint in its entirety, and in fact, is quite
4 understandable given the interrelationship of Defendants and the
5 often confusing fashion in which Defendants have intermingled their
6 names in the marketplace.

7 Plaintiff alleges, and Defendants do not deny, that Hain
8 Celestial, Hain Gourmet, and WGM are affiliated entities. See
9 Compl. ¶¶ 5, 8-9. As to the remaining two named defendants,
10 Defendants state: "The Complaint names World Gourmet, Inc. and
11 Sensible Snacks, Inc. as defendants. Counsel's current
12 understanding is that neither of these are actual legal entities."
13 Mot. at 1 n.1. However, printed webpages from WGM's website,
14 www.sensibleportions.com,⁶ display the text "World Gourmet, Inc.
15 All Rights Reserved" or "copyright World Gourmet, Inc." Pl.'s RJN
16 Ex. 3(a),(b).⁷ Another printed page from www.sensibleportions.com
17 states that "Sensible Snacks, Inc." is the manufacturer of Sensible
18 Portions. Pl.'s RJN Ex. 5. Defendants even acknowledge the
19 confusing nature of the relationships among the various entities,
20 noting that the issue "may be addressed in a subsequent motion if
21 necessary." Id.

22 If one thing is clear from this morass, it is that Plaintiff
23

24 ⁶ Defendants admit that WGM uses the Internet domain name
www.sensibleportions.com. Reply at 2-3.

25 ⁷ Defendants do not oppose Plaintiff's RJN with regard to exhibits
26 3(a), 3(b), and 5. Because these exhibits are public documents are
27 capable of accurate and ready determination by resort to sources
whose accuracy cannot reasonably be questioned, the Court GRANTS
28 Plaintiff's Request with regard to these exhibits only.

1 cannot be expected to unwind the precise legal relationships
2 between affiliated entities that have operated under various names
3 and specify precisely which entity engaged in every particular
4 act.⁸ See, e.g., Marseglia v. JP Morgan Chase Bank, 750 F. Supp.
5 2d 1171, 1175 (refusing to dismiss complaint for failure to specify
6 which of three defendants -- all affiliates of JP Morgan Chase Bank
7 -- allegedly engaged in which wrongful acts).⁹

8 The allegations made in a complaint must be both "sufficiently
9 detailed to give fair notice to the opposing party of the nature of
10 the claim so that the party may effectively defend against it" and
11 "sufficiently plausible" such that "it is not unfair to require the

12 ⁸ Defendants complain specifically that: (1) Plaintiff alleges that
13 "Defendants" breached a contract and an alleged implied contract to
14 which only Hain Celestial was allegedly a party; (2) Plaintiff
15 refers at various times to a trademark application allegedly filed
16 by WGM as "Defendants' application"; (3) Plaintiff alleges that
17 "Defendants" exhibited at a trade show under the "World Gourmet
18 Marketing" name in 2008, prior to the date that Hain Celestial
19 allegedly acquired WGM; and (4) Plaintiff alleges that "Defendants"
20 registered the domain name www.sensibleportions.com, while it is
21 legally impossible for multiple entities to register a single
22 domain name. Mot. at 17. The Court has addressed the lack of
23 specificity regarding the contract claims supra. The rest of the
24 enumerated instances are either typographical errors, which
25 Defendants shall fix in any amended complaint, or instances where
26 discovery is necessary to allow Plaintiff to pinpoint precisely
27 which Defendants were involved. Defendants cannot credibly contend
28 that such trivialities seriously impair their ability to mount a
defense in this action.

22 ⁹ The cases Defendants rely on involved much more deficient
23 complaints, as well as multiple defendants who were not related
24 entities. For instance, in Page v. Stanley, No. CV 11-02255 CAS
25 (SS), 2011 U.S. Dist. LEXIS 91358, at *5 (C.D. Cal. Aug. 16, 2011),
26 the court dismissed a prisoner's pro se complaint that was
27 "confusing and nonsensical" and failed to specify the incident
28 giving rise to each claim or which of six law enforcement officers
was allegedly involved in each incident. In Fujikawa v. OneWest
Bank, FSB, Civ. No. 11-00151 HG-KSC, 2011 U.S. Dist. LEXIS 79817,
at *2, *7-8 (D. Haw. July 21, 2011), the court dismissed a mortgage
fraud complaint containing a "series of vague factual allegations"
where plaintiff's counsel had filed numerous nearly identical
complaints in other actions.

1 opposing party to be subjected to the expense of discovery." Starr
2 v. Baca, 633 F.3d 1191, 1204 (9th Cir. 2011). Except for the
3 deficiencies specifically discussed supra, Plaintiff's occasional
4 failure to distinguish among Defendants in the instant Complaint
5 does not deprive Defendants of the fair notice necessary to defend
6 against it, and it is not unfair to subject Defendants to discovery
7 to allow Plaintiff to cure the confusion.

8 Defendants' Motion is therefore denied with respect to
9 Plaintiff's sixth, seventh, ninth, tenth, eleventh, and fifteenth
10 claims.

11
12 **V. CONCLUSION**

13 For the foregoing reasons, the Court GRANTS IN PART AND DENIES
14 IN PART the motion by Defendants World Gourmet, Inc., Hain Gourmet,
15 Inc., Hain Celestial Group, Inc., World Gourmet Marketing, LLC, and
16 Sensible Snacks, Inc. to dismiss Plaintiff Sensible Foods, LLC's
17 Complaint, and rules as follows:

- 18 • Plaintiff's fourth claim for state trademark infringement,
19 twelfth claim for cyberpiracy under the Lanham Act, fourteenth
20 claim for state cyberpiracy, and sixteenth claim for unjust
21 enrichment are DISMISSED WITH PREJUDICE.
- 22 • Plaintiff's first claim for breach of contract, second claim
23 for breach of implied contract, third claim for breach of
24 implied covenant of good faith and fair dealing, fifth claim
25 for contributory trademark infringement, eighth claim for
26 false advertising in violation of section 17500 of
27 California's Business and Professions Code, and thirteenth
28

1 claim for false advertising under the Lanham Act are DISMISSED
2 WITH LEAVE TO AMEND.

3 • Plaintiff's sixth claim for unfair competition under section
4 17200 of California's Business and Professions Code, seventh
5 claim for deceptive trade practices under section 17500 of
6 California's Business and Professions Code, ninth claim for
7 federal trademark infringement under the Lanham Act, tenth
8 claim for reverse confusion under the Lanham Act, eleventh
9 claim for cancellation of federal trademark registration under
10 the Lanham Act, and fifteenth claim for common law trademark
11 infringement remain undisturbed.

12
13 Plaintiff is granted thirty (30) days leave to file an amended
14 complaint. If Plaintiff fails to file an amended complaint within
15 this time frame, its first, second, third, fifth, eighth, and
16 thirteenth claims are dismissed WITH PREJUDICE.

17
18 IT IS SO ORDERED.

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20 Dated: November 3, 2011


UNITED STATES DISTRICT JUDGE

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