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7 **UNITED STATES DISTRICT COURT**
8 **NORTHERN DISTRICT OF CALIFORNIA**
9 **SAN FRANCISCO DIVISION**

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11 ALEX ANG and LYNN STREIT,
12 individually and on behalf of all others
13 similarly situated,

14 Plaintiffs

15 v.

16 BIMBO BAKERIES USA, INC.,

17 Defendant.

Case No. 13-cv-01196 WHO (NC)

**ORDER RE: DISCOVERY
DISPUTES**

Re: Dkt. No. 76

18
19 In this putative class action, plaintiffs claim that Bimbo Bakeries sold misbranded and
20 misleading baked products in violation of state and federal law. The current deadline to file
21 a motion for class certification is January 28, 2015, with an anticipated trial date of
22 November 9, 2015. Dkt. No. 75. This case was referred for all discovery purposes to the
23 undersigned Magistrate Judge. Dkt. No. 60.

24 On April 9, 2014, the parties submitted a joint letter brief seeking resolution of
25 several discovery issues related to Bimbo Bakeries' responses to document requests and
26 interrogatories propounded by plaintiffs. Dkt. No. 68. After holding a hearing, the Court
27 issued tentative rulings on some of the matters raised and directed the parties to further meet
28 and confer and submit an updated joint letter brief and proposed orders. Dkt. No. 72.

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1 Having considered the parties’ written submissions and arguments made at the hearing, as
2 well as the record in this case, the Court GRANTS the relief sought by plaintiffs as set forth
3 below.

4 **I. LEGAL STANDARD**

5 In general, “[p]arties may obtain discovery regarding any nonprivileged matter that is
6 relevant to any party’s claim or defense.” Fed. R. Civ. P. 26(b)(1). Furthermore, “[f]or
7 good cause, the court may order discovery of any matter relevant to the subject matter
8 involved in the action.” *Id.* Information is relevant for discovery purposes if it “appears
9 reasonably calculated to lead to the discovery of admissible evidence.” *Id.* However, even
10 when the information sought by the parties in a civil lawsuit is relevant, the Court must
11 limit the scope of discovery if it determines that (1) “the discovery sought is unreasonably
12 cumulative or duplicative, or can be obtained from some other source that is more
13 convenient, less burdensome, or less expensive”; (2) “the party seeking discovery has had
14 ample opportunity to obtain the information by discovery in the action”; or (3) “the burden
15 or expense of the proposed discovery outweighs its likely benefit, considering the needs of
16 the case, the amount in controversy, the parties’ resources, the importance of the issues at
17 stake in the action, and the importance of the discovery in resolving the issues.” Fed. R.
18 Civ. P. 26(b)(2)(C). In other words, the Court seeks to “strike[] the proper balance between
19 permitting relevant discovery and limiting the scope and burdens of the discovery to what is
20 proportional to the case.” *Kaiser v. BMW of N. Am., LLC*, No. 12-cv-01311 DMR, 2013
21 WL 1856578, at *3 (N.D. Cal. May 2, 2013).

22 **II. DISCUSSION**

23 The parties’ updated joint letter brief, Dkt. No. 76, raises three outstanding discovery
24 issues, which the Court addresses in turn.

25 **1. Pre-Class Period Discovery**

26 First, the parties dispute whether Bimbo Bakeries’ responses to plaintiffs’ discovery
27 requests should be limited to the class period alleged in the second amended complaint
28 (four years prior to the filing of the original complaint). Many of the interrogatories and

1 document requests propounded by plaintiffs are not limited in time. *See* Dkt. Nos. 65-3; 65-
2 4.

3 Plaintiffs contend that information pertaining to Bimbo Bakeries’ intent, motive, and
4 knowledge will likely predate the class period and that the relevant discovery period begins
5 shortly before the initial decisions by Bimbo Bakeries to incorporate the alleged unlawful
6 marks and representations on its products. Dkt. Nos. 68 at 2; 76 at 2. Plaintiffs assert that,
7 because the timing of those decisions is presently unknown as that information is in the sole
8 possession of Bimbo Bakeries, the Court should set a discovery period going back eight
9 years, subject to adjustment as further information comes to light. Dkt. No. 76 at 2.

10 Plaintiffs also assert that similar pre-class period discovery has been allowed, citing to
11 *Ogden v. Bumble Bee Foods, LLC*, 292 F.R.D. 620, 627-28 (N.D. Cal. 2013) (permitting
12 discovery regarding defendant’s marketing and labeling decisions dating back to four years
13 before the statute of limitations, but finding that “information such as sales numbers,
14 advertising expenditures, profits, costs, or other information not tied to the marketing
15 decisions is not relevant beyond the limitations period”). The Court agrees with the Court’s
16 holding in *Ogden* that information about defendant’s marketing and labeling decisions
17 concerning the products in this food misbranding case would either be relevant to plaintiffs’
18 claims or could lead to admissible evidence supporting their claims. 292 F.R.D. at 628.¹

19 Bimbo Bakeries asks the Court to limit discovery on the basis that the burden or
20 expense of the pre-class period discovery outweighs its likely benefit. Dkt. No. 76 at 4-5.
21 Bimbo Bakeries argues that “aside from evidence of actual purchases of the products, the
22 product labels during the Class Period are the key pieces of evidence necessary to establish
23 or refute Plaintiffs’ claims” and that discovery outside the class period is “unnecessary” and
24 of “minimal relevance.” *Id.*; Dkt. No. 77 at 2. Bimbo Bakeries further argues that, while
25 evidence of its intent could be relevant to willfulness for punitive damages under the
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27 ¹ Bimbo Bakeries’ argument that intent is not a *required* element of plaintiffs’ claims, Dkt. No. 68
28 at 5-6, does not establish that evidence of intent is not relevant or could lead to admissible
evidence.

1 CLRA, such evidence is premature. Dkt. No. 68 at 6.

2 The Court previously indicated that it was inclined to order Bimbo Bakeries to
3 provide pre-class period discovery, but directed the parties to meet and confer first about the
4 appropriate time limitation as to each discovery request in light of the anticipated burden
5 and benefit. Dkt. No. 72. In response, Bimbo Bakeries makes the blanket assertions that no
6 such discovery is appropriate because it would impose an “extreme” and “immense” burden
7 and require it “to comb records of myriad custodians.” Dkt. No. 76 at 5. Bimbo Bakeries
8 has failed to propose any way to limit the scope of the requested discovery to minimize its
9 burden. The Court finds that Bimbo Bakeries’ unsubstantiated assertions of burden do not
10 demonstrate that the burden or expense of the proposed pre-class period discovery
11 outweighs its likely benefit.

12 Accordingly, by May 28, 2014, Bimbo Bakeries must serve plaintiffs with amended
13 responses to interrogatories Nos. 1-6 and document requests Nos. 3-24, 32-46, 50-55, and
14 58-69.² The amended responses and document production must not be limited in scope to
15 information from the class period and must include any responsive information dating back
16 to eight years prior to the filing of the original complaint.

17 **2. Financial Information**

18 Second, plaintiffs seek to compel Bimbo Bakeries to provide sales, pricing, and
19 revenue information. Plaintiffs contend that such information is needed to calculate
20 damages of the class, and to demonstrate that Bimbo Bakeries was able to charge higher
21 prices or increase total sales when the unlawful representations or marks were added to
22 product labels (thus bearing on Bimbo Bakeries’ motive and intent) and should be
23 produced. Dkt. Nos. 68 at 3; 76 at 3; *see Brazil v. Dole Food Company, Inc.*, No. 12-cv-
24 01831 LHK (HRL) (N.D. Cal. Apr. 1, 2014) (Dkt. No. 123) (compelling production of
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26 ² Plaintiffs’ proposed order on this issue also includes document request No. 57 which seeks
27 “[d]ocuments sufficient to show all SKU numbers of the Purchased Products and the Substantially
28 Similar Products during the Class Period.” Dkt. Nos. 65-3 at 33; 76-1 at 4:12. This document
request does not relate to marketing or labeling decisions and, therefore, there is no basis to expand
its scope outside the class period.

1 financial information, such as sales and revenue data, as relevant to the issue of damages in
2 food misbranding case).

3 Initially, Bimbo Bakeries opposed the production of such information on the basis
4 that it “can be relevant only after liability has been established.” Dkt. No. 68 at 6. At the
5 hearing held on this matter, however, Bimbo Bakeries argued that it has no documents
6 related to retail pricing and that wholesale pricing is not relevant. The Court indicated that
7 it is inclined to order Bimbo Bakeries to provide sales information but directed the parties to
8 further meet and confer about the retail versus wholesale issue and the possibility of
9 prioritizing and producing the information in stages. Dkt. No. 72.

10 In the updated joint letter brief, Bimbo Bakeries argues that because plaintiffs are not
11 entitled to a disgorgement of profits on their claims, any revenues or profits that Bimbo
12 Bakeries realized from the sales of its products at the wholesale level are irrelevant. Dkt.
13 No. 76 at 6. Bimbo Bakeries further asserts that even if it “possessed documents regarding
14 the suggested retail prices of its products, those documents necessarily would not reflect the
15 actual amounts the plaintiffs paid . . . , because the actual cost would vary by retail outlet
16 and location, and could further depend on whether the plaintiffs used coupons or took
17 advantage of discounted or promotional pricing offered by the various retailers.” Dkt. Nos.
18 No. 76 at 6; 77 at 3. Plaintiffs respond that wholesale pricing is relevant because it could be
19 used as an indirect means of calculating total sales to the class and as a “floor” for
20 calculating class damages. Dkt. No. 76 at 3-4.

21 The issue before the Court at this stage is not the proper measure of damages, but
22 whether the requested financial information is discoverable. Bimbo Bakeries’ assertion that
23 the proposed discovery will not show what the individual class members *actually* paid for
24 the products does not establish that the discovery is not relevant, or could not lead to
25 admissible evidence supporting plaintiffs’ claims of damages or motive and intent.
26 Moreover, Bimbo Bakeries has not made any showing that the burden or expense of the
27 proposed discovery outweighs its likely benefit. As with the pre-class period discovery,
28 Bimbo Bakeries has failed to propose any compromise that would limit the scope of the

1 discovery, contending instead that all of the disputed discovery is irrelevant. Accordingly,
2 the Court orders Bimbo Bakeries to serve amended responses to document requests Nos.
3 26-31, 70-71, and 73 and produce any responsive, non-privileged documents by May 28,
4 2014.

5 **3. Products Not Sold in California**

6 Finally, the parties dispute whether Bimbo Bakeries' discovery responses should be
7 limited to information and documents regarding products at issue that were sold in
8 California. Bimbo Bakeries contends that California's Unfair Competition Law, Cal. Bus.
9 & Prof. Code § 17200, *et seq.* ("UCL"), California's False Advertising Law, Cal. Bus. &
10 Prof. Code § 17500, *et seq.* ("FAL"), and California's Consumers Legal Remedies Act, Cal.
11 Civ. Code § 1750, *et seq.* ("CLRA") do not govern non-California residents' purchases of
12 products outside California, and thus any Bimbo Bakeries' products that were never sold in
13 California are irrelevant. Dkt. No. 76 at 5.

14 Plaintiffs argue that such a limitation is not appropriate because (1) the "factual
15 assertion that those products supposedly were not sold in California" is unsupported; (2) the
16 argument that claims relating to certain products may not be asserted because they were not
17 sold in California was not raised in either of Bimbo Bakeries' two motions to dismiss and,
18 as a result, such claims remain in the case; and (3) even if plaintiffs could not assert claims
19 pertaining to these products, information relating to them is still relevant because they
20 contain "the exact same marks and representations as the products defendant agrees were
21 sold in California." Dkt. Nos. 76 at 4; 76-1 at 3. The Court agrees that Bimbo Bakeries'
22 proposed limitation on discovery is not appropriate.

23 While, "[a]s a general rule, California statutes do not have force beyond the
24 boundaries of California . . . [California] statutory remedies may be invoked by out-of-state
25 parties when they are harmed by wrongful conduct occurring in California." *In re Clorox*
26 *Consumer Litig.*, 894 F. Supp. 2d 1224, 1237 (N.D. Cal. 2012) (internal quotation marks
27 and citations omitted); *see also Wilson v. Frito-Lay N. Am., Inc.*, 961 F. Supp. 2d 1134,
28 1147-48 (N.D. Cal. 2013) ("With regard to the UCL, FAL, and CLRA, non-California

1 residents' claims are not supported where none of the alleged misconduct or injuries
2 occurred in California.” (internal quotation marks and citations omitted). “In determining
3 whether California’s consumer protection statutes apply to non-California residents, courts
4 consider where the defendant does business, whether the defendant’s principal offices are
5 located in California, where class members are located, and the location from which
6 advertising and other promotional literature decisions were made.” *In re Clorox*, 894 F.
7 Supp. 2d at 1237-38 (internal quotation marks and citations omitted).

8 The operative complaint in this case asserts claims on behalf of a putative nationwide
9 class. Dkt. No. 40 ¶ 228. The issue of whether the alleged unlawful conduct originated in
10 or had strong connections to California should be addressed on the merits in the District
11 Court and cannot be resolved by the undersigned Magistrate Judge because it exceeds the
12 scope of the discovery referral. Despite previously moving to dismiss the complaint, Bimbo
13 Bakeries did not challenge the class allegations as to products not sold in California.
14 Therefore, such products currently remain in the case. The Court agrees with plaintiffs that
15 Bimbo Bakeries is now seeking a discovery ruling that would effectively dismiss claims
16 relating to these products, which is illustrated by the authorities cited by Bimbo Bakeries.
17 *See, e.g., Wilson*, 961 F. Supp. 2d at 1147-48 (dismissing UCL, FAL, and CLRA claims of
18 nationwide putative class of consumers based on activity occurring in other states “because
19 nothing in Plaintiffs’ complaint alleges that any of the out-of-state purchases were directed
20 from California or had anything to do with California”); *Koehler v. Litehouse, Inc.*, No. 12-
21 cv-04055 SI, 2012 WL 6217635, at *7 (N.D. Cal. Dec. 13, 2012) (dismissing with leave to
22 amend UCL, FAL, and CLRA claims as to purchases outside of California made by non-
23 California residents brought as part of a nationwide class action where the complaint did not
24 allege the requisite contacts with California to support the extraterritorial application of
25 California laws).

26 Accordingly, the Court denies the relief sought by Bimbo Bakeries on this issue. The
27 Court orders Bimbo Bakeries to serve amended responses to plaintiffs’ interrogatories and
28 document requests that do not exclude products Bimbo Bakeries alleges were not sold in

1 California and produce any responsive, non-privileged documents by May 28, 2014.

2 Any party may object to this non-dispositive discovery order within 14 days under
3 Federal Rule of Civil Procedure 72(a).

4 IT IS SO ORDERED.

5 Date: May 14, 2014


Nathanael M. Cousins
United States Magistrate Judge

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