

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

KIM ALLEN, et al., on behalf of
themselves, all others similarly
situated, and the general public,

Plaintiffs,

v.

SIMILASAN CORPORATION,

Defendant.

Case No. 12cv0376-BTM-WMC
**ORDER GRANTING
DEFENDANT’S MOTION TO
DISMISS**

On June 18, 2013, Defendant Similasan Corporation (“Defendant” or “Similasan”) filed a motion to dismiss in part Plaintiffs’ Second Amended Complaint (“SAC”) (ECF No. 43). For the reasons below, Defendant’s motion is hereby **GRANTED**. The Court **DISMISSES** the SAC with leave to amend within twenty-one (21) days.

//
//
//
//
//
//
//

1 **I. BACKGROUND**

2 Plaintiffs Kim Allen and Lainie Rideout and new plaintiff Kathleen Hairston
3 (“Plaintiffs”) filed the SAC against Similasan Corporation on June 4, 2013, alleging
4 violations of California’s Consumers Legal Remedies Act (“CLRA”), California Unfair
5 Competition Law (“UCL”), California False Advertising Law (“FAL”), breach of
6 express and implied warranties, and unjust enrichment. In the SAC, they have also
7 added new claims for violations of the Magnuson-Moss Warranty Act (“MMWA”) and
8 the Florida Deceptive and Unfair Trade Practices Act (“FDUTPA”).

9 Plaintiff Kim Allen is a resident of Florida. Plaintiffs Lainie Rideout and
10 Kathleen Hairston are both residents of California. Defendant Similasan Corporation
11 markets and sells homeopathic products throughout the United States. Plaintiffs allege
12 that they purchased various products¹ on the basis of unsubstantiated advertising claims
13 made by Defendant on the products’ packaging and on Defendant’s website, and that
14 Defendant was unjustly enriched thereby.

15
16 **II. LEGAL STANDARD**

17 A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) should be
18 granted only where a plaintiff’s complaint lacks a “cognizable legal theory” or
19 sufficient facts to support a cognizable legal theory. Balistreri v. Pacifica Police Dept.,
20 901 F.2d 696, 699 (9th Cir. 1988). When reviewing a motion to dismiss, the
21 allegations of material fact in plaintiff’s complaint are taken as true and construed in
22 the light most favorable to the plaintiff. See Parks Sch. of Bus., Inc. v. Symington, 51
23 F.3d 1480, 1484 (9th Cir. 1995).

24 Although detailed factual allegations are not required, factual allegations “must

25 _____
26 ¹ In the SAC, it is alleged that Plaintiff Allen purchased the following Similasan
27 products: Stress & Tension Relief, Anxiety Relief, Sleeplessness Relief, and Ear Wax
28 Relief. See SAC ¶¶ 28, 34, 39, & 45. It is alleged that Plaintiff Rideout purchased
Nasal Allergy Relief and Sinus Relief. Id. at ¶¶ 57 & 64. Finally, Plaintiff Hairston
is alleged to have purchased Allergy Eye Relief, Earache Relief (now sold as “Ear
Relief”), Dry Eye Relief, and Pink Eye Relief (now sold as “Irritated Eye Relief”) Id.
at ¶¶ 73, 81, 92, & 99.

1 be enough to raise a right to relief above the speculative level.” Bell Atlantic v.
2 Twombly, 550 U.S. 544, 555 (2007). “A plaintiff’s obligation to prove the ‘grounds’
3 of his ‘entitle[ment] to relief’ requires more than labels and conclusions, and a
4 formulaic recitation of the elements of a cause of action will not do.” Id. “[W]here the
5 well-pleaded facts do not permit the court to infer more than the mere possibility of
6 misconduct, the complaint has alleged—but it has not show[n]—that the pleader is
7 entitled to relief.” Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009) (internal quotation
8 marks omitted).

10 **III. DISCUSSION**

11 Plaintiffs assert seven causes of action: (1) violation of the CLRA, (2)
12 violation of the UCL, (3) violation of the FAL, (4) breach of express warranty, (5)
13 breach of implied warranty of merchantability, (6) violation of the MMWA, and (7)
14 violation of the FDUTPA.

15 In its motion to dismiss, Similasan argues that: (a) Plaintiffs’ claims seeking
16 injunctive relief should be dismissed because the Court already held that Plaintiffs
17 had no standing to do so; (b) Plaintiffs failed to meet their CLRA notice obligations
18 with regard to several of their allegations and the CLRA claim should therefore be
19 dismissed as to those allegations; (c) Plaintiffs failed to state a claim under the
20 MMWA; and (d) Plaintiffs have asserted untimely claims for the class they seek to
21 represent.

23 **A. Injunctive Relief**

24 In the SAC, Plaintiff Hairston seeks injunctive relief under the CLRA, UCL,
25 and FAL. (See SAC ¶¶ 142, 155, & 162.) Plaintiff Allen also seeks injunctive
26 relief under the FDUTPA. (See id. at ¶ 188.)

27 In the Court’s May 14, 2013 Order, the Court dismissed Plaintiff Rideout’s
28 claims for injunctive relief under the CLRA, UCL, and FAL because Plaintiff

1 Rideout could not show a “real and immediate threat of repeated injury in the
2 future,” Chapman v. Pier 1 Imports (U.S.) Inc., 631 F.3d 939, 946 (9th Cir. 2011)
3 (internal quotations omitted), as it was highly unlikely that she would repurchase a
4 product that she had determined did not work. See also Mason v. Nature’s
5 Innovation, Inc., No. 12-cv-3019-BTM-DHB (S.D. Cal. filed May 13, 2013).
6 Similasan argues that this holding forecloses Plaintiffs’ new claims for injunctive
7 relief, as the same reasoning applies.

8 The Court agrees. While Plaintiffs argue that they are harmed by their
9 repeated exposure to Defendant’s allegedly false advertising, they are unlikely to be
10 overcome by a cacophony of falsehood and deceit as they walk the aisles of their
11 local drug store. The Court noted in its August 7, 2013 order that “Plaintiff is not
12 injured in fact by exposure to false advertising if she is aware that it is false.” (ECF
13 No. 53 at 5.) Nonetheless, in the same order, the Court granted Plaintiffs leave to
14 file an amended complaint for the limited purpose of alleging standing for its
15 injunctive relief claims, which Plaintiffs may do within 21 days of the filing of this
16 order. Therefore, the Court **GRANTS** Defendant’s motion on this ground, with
17 leave to renew this argument once Plaintiff’s Third Amended Complaint is filed.

18 19 **B. CLRA Notice Requirements**

20 Defendant Similasan also argues that Plaintiffs failed to comply with the
21 CLRA notice requirements. Specifically, Similasan alleges that Plaintiff Rideout
22 failed to comply with the CLRA notice requirements as to her “100% Natural” and
23 “Preservative free” allegations against the Nasal Allergy Relief product, and her
24 “100% Natural” allegation against the Sinus Relief Product, and that Plaintiffs
25 Rideout and Hairston failed to comply with the CLRA notice requirements as to all
26 of their “Good Manufacturing Practices,” “Original Swiss Formula,” and premarket
27 regulatory approval allegations.

28 Under the CLRA, plaintiffs must provide at least 30 days’ notice to the

1 alleged wrongdoer prior to filing an action for damages. Cal. Civ. Code § 1782.
2 The notice must specify the “particular alleged violations” of the CLRA and
3 demand that the person “correct, repair, replace or otherwise rectify” the alleged
4 violations. Id. However, a plaintiff who brings an action for injunctive relief may
5 give notice *after* filing suit, and at least thirty days after giving notice may amend
6 the complaint to add a request for damages. Id. § 1782(d). The notice requirement
7 is strictly applied to vindicate the purpose of the CLRA: “to provide and facilitate
8 pre-complaint settlements of consumer actions wherever possible and to establish a
9 limited period during which such settlement may be accomplished.” Outboard
10 Marine Corp. v. Superior Court, 52 Cal. App. 3d 30, 41 (Cal. Ct. App. 1975).

11 Here, Plaintiffs have requested both injunctive relief and money damages.
12 See SAC ¶ 142. To the extent Plaintiffs are seeking damages under the CLRA and
13 failed to provide 30 days’ notice, their claims must fail. Plaintiff Rideout’s CLRA
14 notice letter failed to raise her “100% Natural” and “Preservative Free” allegations
15 against the Nasal Allergy Relief product, and her “100% Natural” allegations
16 against the Sinus Relief product. Similarly, Plaintiffs Hairston’s and Rideout’s
17 CLRA notice letters failed to raise their “Good Manufacturing Practices,” “Original
18 Swiss Formula,” and premarket regulatory approval allegations. We note that
19 “[p]ermitting Plaintiff to seek damages first and then later, in the midst of a lawsuit,
20 give notice and amend would destroy the notice requirement's utility, and
21 undermine the possibility of early settlement.” Cattie v. Wal-Mart Stores, Inc., 504
22 F. Supp. 2d 939, 950 (S.D. Cal. 2007).

23 Moreover, Plaintiffs cannot invoke § 1782(d) to sustain their damage claims.
24 To take advantage of § 1782(d), a plaintiff must seek injunctive relief and, “[n]ot
25 less than 30 days after the commencement of an action for injunctive relief, and
26 after compliance with subdivision (a), the consumer may amend his or her
27 complaint without leave of court to include a request for damages.” Cal. Civ. Code
28 § 1782(d). Plaintiffs first sought injunctive relief in their original complaint on

1 February 10, 2012, but have yet to establish that they complied with the notice
2 requirements of § 1782(d) with regard to the previously discussed claims. Thus,
3 Plaintiffs' claims regarding these allegations must be **DISMISSED**. The Court
4 **GRANTS** Defendant's motion to dismiss on this ground, limited to Plaintiff
5 Rideout's "100% Natural" and "Preservative free" allegations against the Nasal
6 Allergy Relief product, and her "100% Natural" allegation against the Sinus Relief
7 Product, and Plaintiffs Rideout's and Hairston's "Good Manufacturing Practices,"
8 "Original Swiss Formula," and premarket regulatory allegations. Plaintiffs may
9 reassert these claims in their Third Amended Complaint if they can show that they
10 strictly complied with the notice requirements of § 1782(d).

11
12 C. MMWA

13 Similasan next argues that Plaintiffs have failed to state a claim under the
14 MMWA. The MMWA creates a federal cause of action for consumers to enforce
15 the terms of implied or express warranties. 15 U.S.C. §§ 2301, *et seq.* See 15
16 U.S.C. § 2310(d). The warranties at issue are "[a]ll representations made in the
17 Products' labels cited in quotations" in the SAC. See SAC ¶¶ 165, 169. Similasan
18 argues that labeling products "100% Natural" has consistently been held not to
19 create a warranty under the MMWA, as labeling a product "natural" describes the
20 product but is not a guarantee of performance and does not warrant that the product
21 is defect-free. See, e.g., Allen v. Hyland's Inc., CV 12-01150 DMG MANX, 2013
22 WL 1748408 at *5-6 (C.D. Cal. Apr. 11, 2013). Similasan further argues that this
23 reasoning also applies to Plaintiffs' allegations regarding Defendant's labels of
24 "Preservative free," "Original Swiss formula," "Good Manufacturing Practices,"
25 and premarket regulatory approval.

26 However, that body of case law applies to written warranties, not implied
27 warranties. The MMWA provides relief for any "consumer who is damaged by the
28 failure of a supplier, warrantor, or service contractor to comply with any obligation

1 . . . under a written warranty, implied warranty, *or* service contract.” 15 U.S.C.A. §
2 2310(d)(1) (emphasis added). Moreover, “written warranty” and “implied
3 warranty” have separate definitions under the MMWA. See 15 U.S.C. § 2301(6)-
4 (7).

5 Plaintiffs allege that Defendant has violated implied warranties, not written
6 warranties. An “implied warranty” is defined as “an implied warranty arising under
7 State law . . . in connection with the sale by a supplier of a consumer product.” Id. §
8 2301(7). The Court determined in its May 14, 2013 order that Plaintiffs had stated a
9 cause of action for breach of the implied warranty of merchantability under state
10 law. (See ECF No. 34 at 10.) Therefore, under the plain language of the MMWA,
11 the Court holds that Plaintiffs have stated a cause of action under the MMWA as
12 well. Defendant’s motion to dismiss as to the MMWA claim is **DENIED**.

13 14 D. Untimely Claims

15 Finally, Similasan argues that several of Plaintiffs’ claims are untimely, and
16 that the Class Period falls in part outside of the statutes of limitations. The Court
17 established in the May 14, 2013 order that the statute of limitations is three years for
18 CLRA and FAL claims, four years for UCL claims, and four years for claims of
19 breach of express warranty and breach of the implied warranty of merchantability.
20 (See ECF No. 34 at 11.) As to Plaintiffs’ new claims, the statute of limitations for
21 both FDUTPA and MMWA claims is four years. See Sundance Apartments I, Inc.
22 v. Gen. Elec. Capital Corp., 581 F. Supp. 2d 1215, 1223 (S.D. Fla. 2008);
23 Mendelson v. Country Coach, Inc., EDCV0600572SGLOPX, 2007 WL 4811927 at
24 *1 (C.D. Cal. Nov. 19, 2007).

25 Plaintiffs argue that the following doctrines apply to toll the statutes of
26 limitations: 1) delayed discovery, 2) equitable tolling, 3) fraudulent concealment, 4)
27 continuing violation, and 5) continuous accrual. Each will be discussed in turn.

28 First, as discussed in the May 14, 2013 order, a plaintiff invoking the delayed

1 discovery exception must plead facts alleging (1) the time and manner of discovery
2 that they had a claim and (2) the inability to have made earlier discovery despite
3 reasonable diligence. (See ECF No. 34 at 12.) In addition, this exception does not
4 apply to UCL claims. (See id.)

5 In the May 14, 2013 order, the Court held that Plaintiffs had met the second
6 prong, but not the first because they failed to adequately allege the time and manner
7 of their discovery, or otherwise allege that their claims fall within the limitations
8 period. (Id. at 12-13.) The same still holds true for the SAC. Plaintiffs allege
9 where and when they bought Defendant's products, but not how they discovered
10 they might have a claim against Defendant. Only Plaintiffs Rideout and Hairston
11 allege the time period in which they discovered they might have a claim. Moreover,
12 while they argue that they could not have made the discovery earlier due to their
13 lack of knowledge as laypeople and Defendant's alleged deception through false
14 advertising, they still fail to allege the manner in which they discovered that they
15 might have a claim.

16 Second, equitable tolling may be applied "when a plaintiff has reasonably and
17 in good faith chosen to pursue one among several remedies and the statute of
18 limitations' notice function has been served." Aryeh v. Canon Bus. Solutions, Inc.,
19 55 Cal. 4th 1185, 1192 (2013) (citing McDonald v. Antelope Valley Community
20 College Dist., 45 Cal. 4th 88, 99-100 (2008)). In McDonald, for instance, the
21 plaintiff was an employee who pursued an internal administrative remedy prior to
22 filing suit. However, Plaintiffs in this case have not alleged they pursued any
23 comparable alternative remedy, instead pointing only to the filing of the complaint
24 in this case.

25 Third, "[t]he doctrine of fraudulent concealment tolls the statute of limitations
26 where a defendant, through deceptive conduct, has caused a claim to grow stale."
27 Aryeh, 55 Cal. 4th at 1192. To successfully invoke the doctrine, a plaintiff "must
28 plead with particularity the facts giving rise to the fraudulent concealment claim and

1 must establish that they used due diligence in trying to uncover the facts.” Volk v.
2 D.A. Davidson & Co., 816 F.2d 1406, 1415-16 (9th Cir. 1987). Here, Plaintiffs
3 have sufficiently alleged the facts giving rise to the fraudulent concealment claim,
4 namely that Defendant fraudulently concealed the inefficacy of its products through
5 false advertising. However, Plaintiffs have failed to establish that they used due
6 diligence in trying to uncover the facts. For instance, Plaintiff Rideout alleges that
7 she purchased Nasal Allergy Relief from 2000 until 2010, see Compl. ¶ 57, but
8 provides no factual allegations to explain why it took her ten years to realize that the
9 products were ineffective. See Lauter v. Anoufrieva, 642 F. Supp. 2d 1060,
10 1100-01 (C.D. Cal. 2009) (“At least to the extent predicated on fraudulent behavior,
11 a plaintiff seeking to toll the statute of limitations must plead the factual predicate
12 for such a theory.”)

13 Fourth, “[t]he continuing violation doctrine aggregates a series of wrongs or
14 injuries for purposes of the statute of limitations, treating the limitations period as
15 accruing for all of them upon commission or sufferance of the last of them.” Aryeh,
16 55 Cal. 4th at 1192. Most cases invoking the continuing violations doctrine in
17 California involve alleged employment discrimination, see, e.g., Morgan v. Regents
18 of Univ. of Cal., 88 Cal. App. 4th 52 (2000), but the underlying reasoning is still
19 applicable here. As the court stated in Morgan:

20 [T]he continuing violation doctrine is premised on the equitable
21 notion that the statute of limitations should not begin to run until
22 a reasonable person would be aware that his or her rights have
23 been violated. Thus, a continuing violation claim will likely fail
if the plaintiff knew, or through the exercise of reasonable
diligence would have known, he was being discriminated against
at the time the earlier events occurred.

24 Id. at 65 (internal quotations, alteration, and citation omitted). The issue is whether
25 Plaintiffs knew or should have known through the exercise of reasonable diligence
26 that they might have had claims against Defendant. Plaintiffs have not alleged a
27 sufficient factual basis to support a continuing violation theory here. Using the
28 same example as above, Plaintiff Rideout alleges that she used Defendant’s Nasal

1 Allergy Relief for ten years, but fails to allege how she was unable to find out
2 through reasonable diligence over the course of a decade that the product was
3 ineffective.

4 Finally, under the continuous accrual doctrine, “a series of wrongs or injuries
5 may be viewed as each triggering its own limitations period, such that a suit for
6 relief may be partially time-barred as to older events but timely as to those within
7 the applicable limitations period.” Aryeh, 55 Cal. 4th at 1192. In other words, it
8 does not actually toll the statutes of limitations but only allows Plaintiffs to recover
9 for those purchases made within the limitations period. The Court finds no reason
10 this doctrine should not apply, as the Plaintiffs made discrete purchases of different
11 products over many years.

12 However, Defendant is correct that “an amended pleading that adds a new
13 plaintiff will not relate back to the filing of the original complaint if the new party
14 seeks to enforce an independent right or to impose greater liability against the
15 defendants.” Estate of Garcia-Vasquez v. Cnty. of San Diego,
16 06CV1322LAB(LSP), 2008 WL 4183913 at *9 (S.D. Cal. Sept. 9, 2008) (quoting
17 San Diego Gas & Electric Co. v. Superior Court, 146 Cal.App.4th 1545, 1550
18 (2007)). Plaintiff Allen was the only original plaintiff; Plaintiffs Rideout and
19 Hairston were both added at different times through subsequent amendments of the
20 complaint. Thus, the calculation of the statutes of limitations will be different for
21 each of the novel claims added in each subsequent amendment.

22 The Court will grant Plaintiffs leave to amend for the limited purpose of
23 alleging facts sufficient to support their tolling claims, as calculation of the various
24 class periods now would be fruitless if Plaintiffs can allege sufficient facts to show
25 that some or all of the statutes of limitations should be tolled. Defendant’s motion
26 to dismiss on the basis of untimely claims is accordingly **GRANTED**.

27

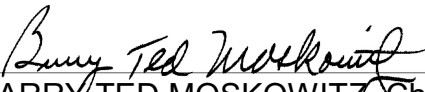
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

IV. CONCLUSION

For the reasons above, the Court **GRANTS** Defendant’s motion to dismiss (ECF No. 43). Plaintiffs have twenty-one (21) days from the date of this order to file a Third Amended Complaint. Plaintiffs may only amend the complaint in order to allege facts sufficient to show standing to seek injunctive relief, to show strict compliance with the notice requirements of Cal. Civ. Code § 1782(d), and to support tolling of the statutes of limitation. Plaintiffs may not add additional plaintiffs or claims without first seeking leave of the Court and showing good cause. Defendant shall not file any further motions to dismiss, but may proceed by moving for summary judgment.

DATED: September 27, 2013


BARRY TED MOSKOWITZ, Chief Judge
United States District Court