UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

ROBERT A. MASON, individually and on behalf of all others similarly situated and the general public,

Plaintiff,

v.

NATURE'S INNOVATION, INC., a Georgia Corporation (also known as Naturasil, formerly known as Trask Research Inc.),

Defendant.

Case No. 12cv3019 BTM(DHB)

ORDER GRANTING IN PART AND DENYING IN PART MOTION TO DISMISS

Defendant Nature's Innovation, Inc., has filed a motion to dismiss certain claims in Plaintiff's Complaint. For the reasons discussed below, Defendant's motion is **GRANTED IN PART** and **DENIED IN PART**.

I. BACKGROUND

On December 19, 2012, Plaintiff Robert A. Mason commenced this action. Plaintiff alleges that during the "Class Period" (December 19, 2008 to the present), he purchased Naturasil skin tag remover based on representations on the product label and Defendant's website that the product was an exclusive and 100% natural formula that was FDA registered and was proven to gently and effectively remove skin tags. (Compl. ¶¶ 16, 18-22.)

Plaintiff alleges that Defendant also sold the identical product under its Dermisil brand line and made the same marketing representations in connection with the Dermisil for Skin Tags product. (Compl. ¶ 25.)

Plaintiff alleges that Defendant's representations regarding its skin tag product were false and misleading because (1) the product was not 100% natural (Compl. ¶ 20); (2) the term "FDA Registered" is misleading because the product is listed as an *unapproved* homeopathic drug with the FDA, and the confusion is enhanced by the marketing of the product next to other allopathic, FDA-monograph approved over-the-counter drugs (Compl. ¶¶ 21, 32); (3) the product is not effective at removing skin tags because the active ingredient it allegedly contains, Thuja, is not effective at removing skin tags, and the active ingredient is not even actually present in the product due to the enormous dilution of the product (Compl. ¶¶ 24, 26-28); and (4) the product did not contain "exclusive" ingredients because the exact same ingredients were used in many of Defendant's other products such Naturasil Molluscum, Naturasil Warts, and Naturasil Nail Fungus (Compl. ¶¶ 40-47.)

Plaintiff seeks to bring this action on behalf of himself and a California consumer class defined as: "All purchasers of Defendant's Skin Tags Products from December 19, 2008 to the present (the "Class Period") in California."

Plaintiff's Complaint asserts the following causes of action: (1) violation of the Consumers Legal Remedies Act, Cal. Civ. Code §§ 1750, et seq. ("CLRA") (2) violation of the Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200, et seq. ("UCL"); (3) violation of the False Advertising Law, Cal. Bus. & Prof. Code §§ 17500, et seq. ("FAL"); (4) breach of express warranty; (5) breach of implied warranty of merchantability; and (6) violation of Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301, et. seq. ("MMWA").

II. STANDARD

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) should be granted only where a plaintiff's complaint lacks a "cognizable legal theory" or sufficient facts to support a cognizable legal theory. Balistreri v. Pacifica Police Dept., 901 F.2d 696, 699 (9th

Cir. 1988). When reviewing a motion to dismiss, the allegations of material fact in plaintiff's complaint are taken as true and construed in the light most favorable to the plaintiff. See Parks Sch. of Bus., Inc. v. Symington, 51 F.3d 1480, 1484 (9th Cir. 1995). Although detailed factual allegations are not required, factual allegations "must be enough to raise a right to relief above the speculative level." Bell Atlantic v. Twombly, 550 U.S. 544, 555 (2007). "A plaintiff's obligation to prove the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Id. "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged - but it has not show[n] that the pleader is entitled to relief." Ashcroft v. Iqbal, 565 U.S. 662, 679 (2009) (internal quotation marks omitted). Only a complaint that states a plausible claim for relief will survive a motion to dismiss. Id.

III. DISCUSSION

Defendant moves to dismiss Plaintiff's claims for injunctive relief in connection with his CLRA, UCL, and FAL claims, and also moves to dismiss Plaintiff's claims for violation of the CLRA, breach of the implied warranty of merchantability, and violation of the MMWA. As discussed below, the Court grants Defendant's motion to dismiss as to the claims for injunctive relief as well as the CLRA claim, but denies the motion as to the breach of implied warranty and MMWA claims.

A. Article III Standing to Assert a Claim for Injunctive Relief

Defendant argues that Plaintiff has not satisfied his burden of establishing Article III standing with respective to injunctive relief because Plaintiff has not shown that he will likely be harmed again by Defendant's actions. According to Defendant, there is no likelihood that Plaintiff will purchase Defendant's skin tag removal product in the future because, according to Plaintiff, it does not work. Therefore, there is no risk of future harm and no basis for injunctive relief. The Court agrees.

Plaintiff bears the burden of showing that the Article III standing requirements are met. D'Lil v. Best Western Encina Lodge & Suites, 538 F.3d 1031, 1036 (9th Cir. 2008). In a class action, if none of the named plaintiffs establishes the existence of a case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class. O'Shea v. Littleton, 414 U.S. 488, 494 (1974).

To establish that he has standing, Plaintiff must show that (1) he suffered an injury in fact; (2) the injury is "fairly traceable" to the challenged conduct; and (3) the injury is "likely" to be "redressed by a favorable decision." Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992). To establish standing for prospective injunctive relief, Plaintiff must demonstrate that "he has suffered or is threatened with a 'concrete and particularized' legal harm . . . coupled with 'a sufficient likelihood that he will again be wronged in a similar way.'" Bates v. United Parcel Service, Inc., 511 F.3d 974, 985 (9th Cir. 2007) (quoting City of Los Angeles v. Lyons, 461 U.S. 95, 111 (1983)). Plaintiff must establish a "real and immediate threat of repeated injury." Bates, 511 F.3d at 985. Although past wrongs are evidence relevant to whether there is a real and immediate threat of repeated injury, past wrongs do not in and of themselves amount to a real and immediate threat of injury sufficient to make out a case or controversy. Id.

District courts in this circuit are split over the issue of whether a plaintiff, who is seeking to enjoin a seller or manufacturer from making false or misleading misrepresentations about an item the plaintiff previously purchased, must be able to establish that he would likely purchase the item again to establish standing. In Delarosa v. Boiron, Inc., the Central District held that the named plaintiff lacked Article III standing to seek injunctive relief in connection with her CLRA and UCL claims because she testified that Coldcalm, the product at issue, "doesn't work," and she did not dispute that she did not intend to purchase Coldcalm in the future. (Order Granting in Part Def.'s Mot. for Summ. J. at 8:13-19, 10cv1569 JST (CWx) (C.D. Cal. Dec. 28, 2012), ECF No. 303). The court reasoned that because the plaintiff did not demonstrate a sufficient likelihood that she will again be wronged in a similar way, there was no threat of future injury that could be

redressed by injunctive relief. Id. at 8:18-22.

Similarly, in Wang v. OCZ Tech. Group, Inc., 276 F.R.D. 618 (N.D. Cal. 2011), the court held that Wang had failed to establish standing to seek injunctive relief against the seller, who allegedly engaged in deceptive advertising regarding the capacity and performance of certain models of solid state drives ("SSD"s). The court explained that Wang had failed to demonstrate the likelihood of future harm because Wang had already purchased his SSD, had already paid an inflated price for the product based on the seller's alleged misrepresentations, and did not allege even a likelihood that he would once again purchase an SSD at issue from the seller. Id. at 627. [1]

In contrast, in Henderson v. Gruma Corp., 2011 WL 1362188 (C.D. Cal. Apr. 11, 2011), the court rejected the defendant's argument that the plaintiffs did not have standing to sue for injunctive relief because they were now informed about the ingredients in the defendant's products (guacamole and spicy bean dip) and asserted that they would not purchase the products in the future. The court reasoned:

> If the Court were to construe Article III standing for FAL and UCL claims as narrowly as the Defendant advocates, federal courts would be precluded from enjoining false advertising under California consumer protection laws because a plaintiff who had been injured would always be deemed to avoid the cause of the injury thereafter ("once bitten, twice shy") and would never have Article III standing. . . .
>
> While Plaintiffs may not purchase the same Gruma products as they purchased during the class period, because they are now aware of the true content of the products, to prevent them from bringing suit on behalf of a class in federal court would surely thwart the objective of California's consumer protection laws.

Id. at * 7-8.

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[1] In a footnote, the court indicated that the analysis in Meyer v. Sprint Spectrum L.P., 45 Cal. 4th 634, 646 (2009) (interpreting the CLRA as allowing consumers to enjoin unlawful practices on the public's behalf) might assist Wang's efforts to obtain injunctive relief if Wang successfully amended his CLRA claims. Wang, 276 F.R.D. at 627 n. 54. However, even if the CLRA, UCL, and/or FAL allow a plaintiff to seek injunctive relief on behalf of the public regardless of whether the plaintiff is likely to suffer future harm himself, as a *federal* court, this Court must make sure that the threshold requirements imposed by Article III are satisfied. See Los Angeles v. Lyons, 461 U.S. 95, 101 (1983) ("It goes without saying that those who seek to invoke the jurisdiction of the federal courts must satisfy the threshhold requirement imposed by Article III of the Constitution by alleging an actual case or controversy.")

Similarly, in Koehler v. Litehouse, Inc., 2012 WL 6217635 (N.D. Cal. Dec. 13, 2012), the court concluded that the plaintiff had standing to sue for injunctive relief even though he admitted that he did not intend to make another purchase of the product in question ("Bleu Cheese Yogurt Dressing with Probiotics") because the product did not "boost immunity" as advertised. Following Henderson, the court reasoned that to hold otherwise would "eviscerate the intent of the California legislature in creating consumer protection statutes because it would effectively bar any consumer who avoids the offending product from seeking injunctive relief." Id. at * 6. See also Ries v. Arizona Beverages USA LLC, 287 F.R.D. 523, 533 (N.D. Cal. 2012) ("As plaintiffs further note, were the Court to accept the suggestion that plaintiffs' mere recognition of the alleged deception operates to defeat standing for an injunction, then injunctive relief would never be available in false advertising cases, a wholly unrealistic result."); Larsen v. Trader Joe's Co., 2012 WL 5458396 (N.D. Cal. June 14, 2012) (holding that plaintiffs had standing to seek injunctive relief even though they would not purchase the food items in question again because of their synthetic ingredients).

Guided by the Ninth Circuit's interpretation of Article III's standing requirements, this Court agrees with the courts that hold that a plaintiff does not have standing to seek prospective injunctive relief against a manufacturer or seller engaging in false or misleading advertising unless there is a likelihood that the plaintiff would suffer future harm from the defendant's conduct – i.e., the plaintiff is still interested in purchasing the product in question. Ninth Circuit law makes it clear that the plaintiff himself must demonstrate "a real and immediate threat of repeated injury," Bates, 511 F.3d at 985. The plaintiff must establish "a sufficient likelihood that he will again be wronged in a similar way." Id.

In ADA cases, the Ninth Circuit has held that "Article III . . . requires a sufficient showing of likely injury in the future related to the plaintiff's disability to ensure that injunctive relief will vindicate the rights of the particular plaintiff rather than the rights of third parties." Chapman v. Pier 1 Imports (U.S.) Inc., 631 F.3d 939, 949 (9th Cir. 2011). An ADA plaintiff can show a likelihood of future injury when (1) "he intends to return to a noncompliant accommodation and is therefore likely to reencounter a discriminatory architectural barrier";

or (2) "discriminatory architectural barriers deter him from returning to a noncompliant accommodation." Id. at 950. In both cases, a desire to return to the noncompliant accommodation is necessary. The Ninth Circuit explained:

> An ADA plaintiff must show at each stage of the proceedings either that he is deterred from returning to the facility or that he intends to return to the facility and is therefore likely to suffer repeated injury. He lacks standing if he is indifferent to returning to the store or if his alleged intent to return is not genuine, or if the barriers he seeks to enjoin do not pose a real and immediate threat to him due to his particular disability.

Id. at 953.

If an ADA plaintiff must demonstrate likely injury in the future, consumer plaintiffs such as the one in this case must as well. There is no likelihood of injury in the future if a plaintiff has no interest in purchasing the product at issue again because it does not work or does not perform as advertised.

Although injunctive relief may not be available in federal court in many false advertising cases where the consumer no longer intends to purchase the product in question, it is an exaggeration to claim that injunctive relief would never be available in false advertising cases. There are cases where a consumer would still be interested in purchasing the product if it were labeled properly - for example, if a food item accurately stated its ingredients. Indeed, in Ries, the plaintiffs stated that they intended to purchase the AriZona tea beverage in the future. 287 F.R.D. at 533. In these types of cases that do not involve claims that a product does not work or perform as advertised, injunctive relief may still be available.

At any rate, as important as consumer protection is, it is not within the Court's authority to carve out an exception to Article III's standing requirements to further the purpose of California consumer protection laws. As Judge Tucker stated in her order in Delarosa, "To the extent that Henderson and other cases purport to create a public-policy exception to the standing requirement, that exception does not square with Article III's mandate." (Order at 10:11-12.)

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Moreover, plaintiffs who have no intention of again purchasing a product that is the focus of false advertising claims are not precluded from seeking an injunctive remedy because they can sue in state court. "In assessing standing, California courts are not bound by the 'case or controversy' requirement of article III of the United States Constitution, but instad are guided by 'prudential' considerations." Bilafer v. Bilafer, 161 Cal. App. 4th 363, 370 (2008). Generally, in order to have standing in California courts, the plaintiff must be able to allege an "invasion of the plaintiff's legally protected rights." Angelucci v. Century Supper Club, 41 Cal. 4th 160, 175 (2007). "Standing rules for actions based upon statute may vary according to the intent of the Legislature and the purpose of the enactment." Id.

Under the UCL, a plaintiff has standing to sue for injunctive relief if the plaintiff "has suffered injury in fact and has lost money or property." Cal. Bus. & Prof. Code § 17204. Similarly, the CLRA provides that any consumer who suffers "any damage" as a result of the challenged practices may seek injunctive relief. Cal. Civ. Code § 1780(a). When analyzing standing to seek injunctive relief under the UCL and CLRA, the California Supreme Court has been guided by the statutory language and has not imposed additional requirements, such as the need to show future injury. See Clayworth v. Pfizer, 49 Cal. 4th 758, 788-790 (2010) (holding that pharmacies established standing to sue for injunctive relief under the UCL because they lost money when they paid for an allegedly illegal overcharge); Meyer v. Sprint Spectrum L.P., 45 Cal. 4th 634, 640-646 (2009) (discussing standing requirements under the CLRA and noting that the statute makes clear that remedying an individual consumer grievance "does not prevent consumers from suing to enjoin unlawful practices on the public's behalf.")

In this case, it is apparent that Plaintiff has no intention of buying Defendant's skin tag removal product again in the future. According to Plaintiff, the product has no efficacy with respect to the removal of skin tags, the reason why Plaintiff bought it in the first place. Therefore, Plaintiff has not established the likelihood of future injury from Defendant's alleged misrepresentations regarding the product and lacks Article III standing to seek injunctive relief.

Accordingly, the Court grants Defendant's motion to dismiss as to Plaintiff's claims for injunctive relief under the CLRA, UCL and FAL. Because injunctive relief is the only relief sought in connection with Plaintiff's CLRA claim (Compl. ¶ 71), the Court dismisses the CLRA claim in its entirety. The Court does not reach Defendant's argument that the CLRA claim should be dismissed because Plaintiff failed to file the affidavit of proper venue as required by Cal. Civ. Code § 1780(d).[2]

B. Implied Warranty Claim and MMWA Claim

Defendant moves to dismiss Plaintiff's breach of implied warranty claim and MMWA claim on the ground that Plaintiff failed to provide notice of the alleged breach to Defendant, as required by Cal. Com. Code § 2607(3)(A). In addition, Defendant contends that Plaintiff has not sufficiently alleged any express written warranty as defined by the MMWA, 15 U.S.C. § 2301(6)(A), (B).

The Court declines to dismiss the breach of implied warranty and MMWA claim on the ground of insufficient notice. In Greenman v. Yuba Power Products, Inc., 59 Cal.2d 57 (1963), the California Supreme Court held that it was not appropriate to apply the notice requirement "in actions by injured consumers against manufacturers with whom they have not dealt." Because the plaintiff, who had been injured by a power tool attachment, did not purchase the product from the manufacturer, the court concluded that the plaintiff was not required to give notice of his breach of express warranty claim to the manufacturer. Id. at 62.

In a subsequent case, the California Court of Appeal held that the reasoning of Greenman also applied to a breach of express warranty case that did not involve personal injury. The Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints

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[2] If Plaintiff decides to seek leave to amend his complaint to seek damages under the CLRA, Plaintiff should keep in mind that district courts within this circuit have dismissed CLRA claims when the plaintiff fails to file the venue affidavit concurrently with the filing of the complaint. See Castagnola v. Hewlett-Packard Co., 2012 WL 2159385, at * 10 (N.D. Cal. June 13, 2012); In re Sony Grand Wega KDF-E A10/A20 Series Rear Projection HDTV Television Lit., 758 F. Supp. 2d 1077, 1094 (S.D. Cal. 2010).

v. Cavanaugh, 217 Cal. App. 2d 492, 515 (1963) (holding that notice was not required because the plaintiff did not deal directly with the manufacturer of the plastic pipe that was installed by a contractor). See also Ho v. Toyota Motor Corp., __ F. Supp. 2d __, 2013 WL 1087846, at * 6 (N.D. Cal. March 14, 2013) (holding that Greenman does not impose a physical injury requirement on plaintiffs who bring a breach of express warranty claim against a manufacturer for a defective product purchased from a dealer). Courts have also excused notice of breach of *implied* warranty where the plaintiff did not deal directly with the manufacturer. See Aaronson v. Vital Pharm., Inc., 2010 WL 625337, at * 5 (S.D. Cal. Feb. 17, 2010) (holding that because the plaintiff's breach of implied warranty claim was against Vital Pharm in its capacity as a manufacturer, not as a seller, notice was not required).

Because Plaintiff purchased the Naturasil skin tag remover from CVS, not directly from Defendant, Plaintiff was not required to give notice of his breach of implied warranty claim to Defendant. Therefore, the Court will not dismiss the implied warranty and MMWA claims based on failure to give notice.[3]

Defendant concedes that the MMWA provides a federal cause of action for state law implied warranty claims as well as "written warranty" claims as defined by the MMWA. (Reply at 10:2). Other than arguing that notice was not given, Defendant does not contend that Plaintiff's implied warranty claim fails to state a claim. Therefore, Defendant's motion to dismiss Plaintiff's implied warranty claim is denied, and Plaintiff's MMWA claim survives as well. The Court need not determine at this time which, if any, of Defendant's representations meet the MMWA's definition of a "written warranty." 15 U.S.C. § 2301(6).

IV. CONCLUSION

For the reasons discussed above, Defendant's motion to dismiss is **GRANTED IN PART** and **DENIED IN PART**. Defendant's motion is **GRANTED** as to Plaintiff's claims for injunctive relief and is **DENIED** as to Plaintiff's breach of implied warranty and MMWA

[3] The Court does not decide whether the CLRA notice letter (Ex. 3 to Compl.), which mentions breach of written express warranties, constitutes sufficient notice.

claims. Plaintiff's CLRA claim and claims for injunctive relief under the UCL and FAL are **DISMISSED**. Defendant shall file an answer to the Complaint within 10 days of the entry of this Order.

IT IS SO ORDERED.

DATED: May 13, 2013

BARRY TED MOSKOWITZ, Chief Judge
United States District Court