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FILED
14 MAY -9 AM 9:41
U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
DEPUTY

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

COREY JONES, Individually and on
Behalf of All Others Similarly
Situating,

Plaintiff,

vs.

AST SPORTS SCIENCE, INC.; and
DOES 1-10, Inclusive,

Defendants.

CASE NO. 13-CV-2434 BEN (RBB)
**ORDER GRANTING
MOTION TO DISMISS**
[Docket No. 7]

Presently before the Court is Defendant AST Sports Science, Inc.’s Motion to Dismiss the Complaint. (Docket No. 7.) For the reasons stated below, the Motion is **GRANTED.**

BACKGROUND

Defendant AST Sports Science, Inc. manufactures, markets, and sells “Anabolic Rush” as a “dietary supplement.” Anabolic Rush is marketed as aiding muscle and body-building. Defendant claims that Anabolic Rush contains citrulline malate, which is designed to promote “Energy,” “Strength,” “Size,” and “Power.”

Plaintiff Corey Jones is a California resident who purchased Anabolic Rush in 2012. Plaintiff alleges that “a laboratory analysis conducted utilizing state-of-the-art liquid chromatography-mass spectroscopy (‘LCMS’) protocol shows that the product contains no citrulline malate, and, thus, cannot provide the results promised, cannot

1 perform as Defendant claims, and does not contain the active ingredients promised.”
2 (Compl. ¶ 1.)

3 On October 9, 2013, Plaintiff filed this proposed class action, alleging three
4 claims: (1) violations of California’s False Advertising Law (California Business &
5 Professions Code §§ 17500, *et seq.*), (2) unlawful, fraudulent and unfair business
6 practices (California Business & Professions Code §§ 17200, *et seq.*), and (3) violation
7 of the Consumers Legal Remedies Act (California Civil Code §§ 1750, *et seq.*).

8 Presently before the Court is Defendant’s Motion to Dismiss for lack of
9 jurisdiction and for failure to state a claim.

10 DISCUSSION

11 Plaintiff alleges that this Court has diversity jurisdiction over this proposed class
12 action pursuant to the Class Action Fairness Act (“CAFA”). CAFA vests district courts
13 with “original jurisdiction of any civil action in which, inter alia, the amount in
14 controversy exceeds the sum or value of \$5,000,000, exclusive of interest and costs,
15 and in which the aggregate number of proposed plaintiffs is 100 or greater, and any
16 member of the plaintiff class is a citizen of a state different from any defendant.”
17 *Lowdermilk v. U.S. Bank Nat’l Ass’n*, 479 F.3d 994, 997 (9th Cir. 2007) (quoting 28
18 U.S.C. § 1332(d)), *overruled on other grounds by Standard Fire Ins. Co. v. Knowles*,
19 133 S. Ct. 1345 (2013). “The burden of persuasion for establishing diversity
20 jurisdiction . . . [rests] on the party asserting it. When challenged on allegations of
21 jurisdictional facts, the parties must support their allegations by competent proof.”
22 *Hertz Corp. v. Friend*, 559 U.S. 77, 96-97 (2010) (internal citations omitted).

23 To establish subject matter jurisdiction, plaintiffs “may rely on calculations to
24 satisfy their burden so long as their calculations are good faith, reliable estimates based
25 on the pleadings and other evidence in the record.” *Ellis v. Pac. Bell Tel. Co.*, No.
26 SACV 10-01141, 2011 WL 499390, at *2 (C.D. Cal. Feb. 10, 2011). However, “a
27 plaintiff must set forth the underlying facts supporting its assertion that the amount in
28 controversy exceeds the statutory minimum.” *Baxter v. Rodale, Inc.*, No. CV 12-

1 00585, 2012 WL 1267880, at *1 (C.D. Cal. Apr. 12, 2012) (internal quotation marks
2 omitted). Conclusory allegations devoid of factual support are insufficient. *See, e.g.,*
3 *Lowdermilk*, 479 F.3d at 1002; *Melvin v. Blue Diamond Growers*, No. SACV 13-1746,
4 2013 WL 7137775, at *1-2 (C.D. Cal. Dec. 23, 2013); *Baxter*, 2012 WL 1267880, at
5 *1-2.

6 Here, Plaintiff alleges that “Defendant has wrongfully taken millions of dollars
7 from consumers nationwide.” (Compl. ¶ 14.) This conclusion is based on the
8 allegations that (1) “tens of thousands of California and United States consumers” have
9 allegedly been led in an “ongoing deception” by Defendant (*id.* ¶ 2), (2) Defendant
10 “sells a one-month supply of the Product for approximately \$40.00” (*id.* ¶ 14), and (3)
11 the proposed class covers “[a]ll persons located within the United States who
12 purchased Anabolic Rush during the four years preceding the filing of this complaint
13 through the date of final judgment in this action” (*id.* ¶ 16).

14 These allegations, however, are conclusory and devoid of factual support. First,
15 Plaintiff does not provide any factual support for the allegation that “tens of thousands
16 of California and United States consumers” have been deceived. Plaintiff does not
17 allege what market share is held by Defendant in Anabolic Rush or in any other dietary
18 supplement product. The complaint contains no allegations of sales figures, industry
19 studies, or estimates supporting these claims. Second, Plaintiff does not provide any
20 factual support for the allegation that Anabolic Rush did not contain citrulline malate
21 during the entire class period. Plaintiff appears to have conducted only a single test on
22 one sample of the Anabolic Rush. (*Id.* ¶¶ 1, 12.)

23 In contrast, Defendant submits evidence showing that the amount in controversy
24 is far below \$5 million for the proposed four-year class period from October 2009 to
25 October 2013. In a declaration, Denise Pedersen, Vice President of AST, testifies that
26 the total nationwide unit sales for Anabolic Rush during the proposed class period were
27 approximately 5,399 units, with revenues of approximately \$161,792.66. (Pedersen
28 Decl. ¶ 5.) Approximately 520 units of Anabolic Rush were sold in California during

1 the proposed class period, with revenues of approximately \$15,513.58. (*Id.* ¶ 6.)

2 Plaintiff argues that the minimum amount in controversy requirement is
3 presumptively satisfied by Plaintiff's allegation that there is over \$5 million in
4 controversy, unless it appears to a legal certainty that his claim is actually for less than
5 the jurisdictional minimum. In *Knowles*, however, the Supreme Court overruled this
6 legal certainty test. 133 S. Ct. at 1348-49; *see also Rodriguez v. AT & T Mobility*
7 *Servs. LLC*, 728 F.3d 975, 981 (9th Cir. 2013).

8 Accordingly, Plaintiff has failed to show that the amount in controversy exceeds
9 \$5 million, as required for this Court to have jurisdiction pursuant to CAFA. As this
10 issue is dispositive, the parties' remaining arguments will not be addressed. This action
11 is **DISMISSED** for lack of subject matter jurisdiction.

12 **CONCLUSION**

13 For the reasons stated above, Defendant's Motion to Dismiss is **GRANTED**.
14 This action is **DISMISSED**.

15 **IT IS SO ORDERED.**

16
17 DATED: 5/8/14


18 HON. ROGER T. BENITEZ
United States District Judge