

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV 09-566 DSF (CTx) Date 10/21/09

Title Pom Wonderful, LLC v. Tropicana Products, Inc., et al.

Present: The Honorable DALE S. FISCHER, United States District Judge

Debra Plato

Not Present

Deputy Clerk

Court Reporter

Attorneys Present for Plaintiffs:

Attorneys Present for Defendants:

Not Present

Not Present

Proceedings: (In Chambers) Order GRANTING IN PART and DENYING IN PART Defendant's Motion to Dismiss (Docket No. 43)

This is a dispute between two juice manufacturers. Plaintiff POM Wonderful, LLC, is a leading producer of pomegranate juice. Defendant Tropicana Products, Inc. produces a product officially called "Tropicana Pure 100% Juice Pomegranate Blueberry Flavored Blend of 5 Juices from Concentrate with Other Natural Flavors." Plaintiff claims that Defendant's labeling and marketing of this product is deceptive because the product contains little pomegranate or blueberry – instead it is mostly pear juice.

On July 6, 2009, the Court granted in part Defendant's motion to dismiss and for a more definite statement. On July 17, 2009, Plaintiff filed a first amended complaint. Defendant now moves to dismiss the first amended complaint claiming that Plaintiff's Lanham Act claim is not pleaded with the required specificity and that Plaintiff does not have standing to bring its state law claims for false advertising and unfair competition. The Court deems this matter appropriate for decision without oral argument. See Fed. R. Civ. P. 78; Local Rule 7-15. The hearing set for October 26, 2009, is removed from the Court's calendar.

Specificity of Lanham Act Claims

It is not clear whether a Lanham Act claim that sounds in fraud must be pleaded with particularity under Federal Rule of Civil Procedure 9(b). However, the Court finds that even if Plaintiff's Lanham Act claim must be pleaded with particularity, the first

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amended complaint satisfies that standard. The first amended complaint provides detail about the allegedly false statements, describes how and when they were made, alleges that consumers rely on the statements, and provides details on why consumers rely on them. At the complaint stage, Plaintiff is not required to counter all of the arguments made in the motion to dismiss – e.g., the possibility that consumers would read the ingredient list and not be misled.

Standing for State False Advertising and Unfair Competition Claims

Plaintiff does not have standing to raise a California statutory false advertising or statutory unfair competition claim. To have standing to raise these claims, a plaintiff must have “suffered an injury-in-fact” and have “lost money or property as a result of . . . unfair competition.” Cal. Bus. & Prof. Code § 17204. California courts have interpreted the “lost money or property” component of UCL standing to mean that a prospective UCL plaintiff must be entitled to restitution under the statute. See Kwikset Corp. v. Super. Ct., 171 Cal. App. 4th 645, 653-55 (2009), rev. granted 97 Cal. Rptr. 3d 271 (2009); Citizens of Humanity, LLC v. Costco Wholesale Corp., 171 Cal. App. 4th 1, 22 (2009); Buckland v. Threshold Enterprises, Ltd., 155 Cal. App. 4th 798, 817-19 (2007); see also Walker v. Geico Gen. Ins. Co., 558 F.3d 1025, 1027 (9th Cir. 2009) (quoting Buckland with approval).

Plaintiff claims that it is entitled to restitution for “its profits which are attributable to [Defendant’s] wrongful taking of Plaintiff’s vested interest in its rightful share of the pomegranate juice market.” (FAC ¶ 51.) Lost profits are not restitution – they are damages. See Kelton v. Stravinski, 138 Cal. App. 4th 941, 949 (2006). And although a plaintiff can recover restitution for lost property in which it had a “vested interest,” but did not have actual possession, see Korea Supply Co. v. Lockheed Martin Corp., 29 Cal. 4th 1134, 1149-50 (2003), there is no reasonable definition of vested interest that would include market share. A vested interest is an interest that is “not contingent; unconditional; absolute.” Black’s Law Dictionary 1699 (9th ed. 2009). The California Supreme Court has likened a vested interest in property to property that can be the subject of a constructive trust. See Korea Supply, 29 Cal. 4th at 1150. Whatever interest that a corporation has in a product’s market share clearly does not meet either of these definitions.¹

¹ The Court respectfully disagrees with Judge Otero’s contrary conclusion in POM Wonderful, LLC v. The Coca-Cola Co., No. CV 08-6237 (C.D. Cal. 2009).

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Plaintiff claims that even if its loss of market share is not restitution it has standing to bring its state law claims. Plaintiff barely mentions Kwikset, Citizens of Humanity, and Buckland, which are directly on point. Plaintiff does attempt to distinguish Walker by arguing that the California Supreme Court has disapproved of its reasoning in In re Tobacco II Cases, 46 Cal. 4th 298 (2009). This argument is unpersuasive. Tobacco II does not discuss the definition of “lost money or property” and does not disapprove of Walker or any of the cited California Court of Appeal cases. The California Supreme Court has granted review of Kwikset, see 97 Cal. Rptr.3d 271, and it is possible that it will diverge from the lower courts’ interpretation of the standing requirements of § 17204. However, in the absence of a such a ruling, the weight of authority – both in the California state courts and from the Ninth Circuit – favors an interpretation of “lost money or property” to require that the Plaintiff be eligible to recover restitution.

Conclusion

The motion to dismiss is GRANTED with respect to the state law claims and DENIED with respect to the Lanham Act claims.

IT IS SO ORDERED.