

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

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CIVIL MINUTES - GENERAL

CASE NO.: CV 08-06237 SJO (FMOx) DATE: September 15, 2009

TITLE: POM Wonderful LLC v. The Coca Cola Company

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**PRESENT: THE HONORABLE S. JAMES OTERO, UNITED STATES DISTRICT JUDGE**

Victor Paul Cruz Not Present  
Courtroom Clerk Court Reporter

**COUNSEL PRESENT FOR PLAINTIFF: COUNSEL PRESENT FOR DEFENDANT:**

Not Present Not Present

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**PROCEEDINGS (in chambers): ORDER DENYING DEFENDANT'S MOTION TO DISMISS  
FIRST AMENDED COMPLAINT PURSUANT TO FED. R. CIV. P. 12(b)(6)**

[Docket No. 55]

This matter is before the Court on Defendant The Coca Cola Company's ("Coca Cola") Motion to Dismiss First Amended Complaint Pursuant to Fed. R. Civ. P. 12(b)(6), filed August 10, 2009. This Court held a hearing on September 8, 2009. (See Order of Sept. 9, 2009.) For the following reasons, the Court DENIES Coca Cola's Motion to Dismiss.

I. BACKGROUND

Plaintiff Pom Wonderful ("Pom") produces, markets, and sells POM WONDERFUL® brand bottled pomegranate juice and various pomegranate juice blends, including a pomegranate blueberry juice blend. (Compl. ¶ 11.) Coca Cola, under the brand Minute Maid®, is one of Pom's primary competitors in the bottled pomegranate juice market. (Compl. ¶ 17.) In September 2007, Coca Cola announced a new product in its "Minute Maid® Enhanced Juices" line, called "Minute Maid® Enhanced Pomegranate Blueberry Flavored 100% Juice Blend"<sup>1</sup> (the "Juice"). (Compl. ¶ 18.)

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<sup>1</sup> Coca Cola takes issue with the Complaint's consistent reference to the product at issue as "Pomegranate Blueberry" without using the full name of the product, "Pomegranate Blueberry Flavored Blend of 5 Juices," as printed on the label featured in the Complaint. (See Compl.; see generally Mot. to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(6) ("Def.'s Mot.") 2.) The Court notes that Exhibit B to the Complaint is a depiction of the Minute Maid® website, which shows that Coca Cola does—at least on occasion—refer to the product as "Pomegranate Blueberry" without including the phrase "Flavored Blend of 5 Juices." The Court will therefore refer to the product at issue as "the Juice" to avoid the conflict between the parties over its proper name. (See Compl., Ex. B.)

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Pom alleges that "the main ingredients in [the Juice] are neither pomegranate nor blueberry juice, but rather, apple and grape juice." (Compl. ¶ 19.) Specifically, in ranking the ingredients of the Juice by volume, apple juice ranks first, grape juice ranks second, pomegranate juice ranks third, and blueberry juice ranks fifth. (Compl. ¶ 22.) Nevertheless, Coca Cola labels the Juice as "Pomegranate Blueberry" juice and advertises and markets the Juice, through its packaging, commercials, Minute Maid's website, and other forms of advertising, "based on the representation that [its] primary ingredients . . . are pomegranate and blueberry juice, when, in fact, the primary ingredients are actually apple and grape juice." (Compl. ¶¶ 8, 20.) As such, Pom alleges that purchasers of the Juice "are likely to be misled and deceived by Coca Cola's . . . labeling, marketing and advertising," which damages not only the consuming public, but also Pom as Coca Cola's competitor. (Compl. ¶¶ 22–26.)

Based on these allegations, Pom filed this action against Coca Cola in September 2008 alleging claims for: (1) false advertising under the Lanham Act, § 43(a), 15 U.S.C. § 1125(a); (2) false advertising under California Business and Professions Code § 17500 *et seq.*; and (3) statutory unfair competition under California Business and Professions Code § 17200 *et seq.* (See Compl. ¶¶ 1, 27–48.) Coca Cola then moved to dismiss all claims pursuant to Federal Rule of Civil Procedure 12(b)(6) on November 26, 2008. (See Def.'s Mot. 2.) This Court granted in part and denied in part Coca Cola's motion to dismiss (See Order of Feb. 10, 2009).

On April 15, 2009, Pom served discovery on Coca Cola, but Coca Cola objected to and refused to respond to all discovery with respect to the naming, labeling, and packaging of the Juice. (See Pl.'s Mem. P. & A. Opp'n to Def.'s Mot. to Dismiss First Am. Compl. ("Pl.'s Mem") 1) As such, Pom filed a First Amended Complaint ("FAC") on July 27, 2009 to clarify the scope of this Court's previous order. (See *generally* Pl.'s FAC) The FAC alleges claims for: (1) false advertising under the Lanham Act, 15 U.S.C. § 1125(a); (2) false advertising under California Business and Professions Code § 17500 *et seq.*; and (3) statutory unfair competition under California Business and Professions Code § 17200 *et seq.* (See *generally* FAC.) In response, Coca Cola filed a Motion to Dismiss First Amended Complaint on August 10, 2009. (See Mot. to Dismiss First Am. Compl. Pursuant to Fed. R. Civ. P. 12(b)(6) ("Def.'s Mot. to Dismiss FAC").)

II. DISCUSSION

A. Pom is Not Precluded From Discovery in Furtherance of Its Lanham Act Claim.

The Court's previous order made it clear that "Pom's entire Lanham Act claim is not barred because the Juice, as a multiple-juice beverage, is an FDA-regulated product." (See Order of Feb. 10, 2009.); see *Mutual Pharm. Co.*, 459 F.Supp.2d at 933 (internal citations omitted); see also *Ethex Corp.*, 228 F. Supp. 2d at 1055; *Summit Tech, Inc.*, 933 F. Supp. at 933. Specifically, FDA juice-naming and labeling regulations do not bar Pom from alleging that Coca Cola has advertised or marketed the Juice in a misleading manner on its website and in other advertising avenues, thereby leading consumers to wrongly believe that the Juice's primary ingredients are

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pomegranate and blueberry. (See Order of Feb. 10, 2009.) Coca Cola, however, has interpreted the scope of this Court's prior order as suggesting that Pom is barred from pursuing its Lanham Act claim. (See Def.'s Mot. to Dismiss FAC.) This interpretation is incorrect.

It remains unclear whether Coca Cola's website is formal naming and labeling, or whether, as Pom asserts, Coca Cola's website functions as an advertisement, in which case Pom's Lanham Act claim is clearly not barred. (See Order of Feb. 10, 2009.) In particular, in various avenues, Coca Cola has placed a "prominent image of a split open pomegranate" next to the Juice name, and advertised the Juice on its website as "cranberry and pomegranate juice." (See Pl.'s Mem. of P. & A. in Opp'n to Def.'s Mot. to Dismiss ("Pl.'s Opp'n") 7.) These informal cues suggest advertising and marketing, which may implicate the Lanham Act. Additionally, if Coca Cola's website's names or labels for the Juice are informal, they may not be expressly regulated by the FDA. (See Order of Feb. 10, 2009.) Indeed, informal naming and labeling do not necessarily implicate FDA regulations. (See Order of Feb. 10, 2009.) Accordingly, at this early stage Pom is entitled to conduct discovery to determine to what extent Coca Cola's various cues can be identified as naming and labeling, or as advertising and marketing. (See *generally* Order of Feb. 10, 2009.)

The subject of this Court's previous order was recently addressed by Judge Matz, which was discussed when the parties appeared before the Court on September 8, 2009. See *Pom Wonderful LLC v. Welch Food, Inc.*, No. CV 09-00567 (C.D. Cal. June 23, 2009); see *generally* (Order of Sept. 9, 2009.) Judge Matz suggested that if implicated FDA regulations are not technical, there is little risk to the court of being required to interpret them de novo. "Put another way, Pom could establish that Welch's labeling is misleading even if the FDA regulations set mandatory standards for when a beverage may include an image of a fruit on the label." See *Pom Wonderful LLC v. Welch Food, Inc.*, No. CV 09-00567. This Court noted that the matter before Judge Matz is factually similar to this action. (See Order of Sept. 8, 2009.)

Judge Pregerson also weighed in on this issue in *Pom Wonderful LLC, v. Ocean Spray Cranberries, Inc.*, holding that Defendant's "allegation of marketing representations does not directly or indirectly usurp the FDA's role, because determining the primary ingredients of the beverage and whether Defendant's representations are misleading is not contingent on a decision of fact by the FDA or the enforcement of its regulations." *Pom Wonderful LLC*, 2009 WL 2151355 (C.D. Cal. 2009). Indeed, this action is factually similar to the matter before Judge Pregerson, also.

This Court therefore reasserts its previous position, which is that Pom is not barred from alleging that Coca Cola "has otherwise advertised and marketed its product in a misleading manner that leads consumers to believe that the primary ingredients are pomegranate and blueberry." (See Order of Feb. 10, 2009.) Indeed, at this motion to dismiss stage it is unnecessary to demarcate and identify which (if any) of the allegations in the FAC are within the

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FDA's sole purview, and which allegations are encompassed by the Lanham Act. See generally *Pom Wonderful LLC*, 2009 WL 2151355 (C.D. Cal. 2009). Accordingly, Pom is permitted to conduct discovery with respect to the naming, labeling, and packaging of the Juice.

B. Pom Has Standing to Assert Its State Law Claims

Coca Cola claims that Pom lacks standing to bring its state law claims under California's Unfair Competition Law ("UCL"). Simply put, Coca Cola alleges that Pom has no vested interest in the proceeds of the Juice and so Pom's claim fails because standing is a threshold issue. See *Walker v. Geico Gen. Ins. Co.*, 558 F.3d 1025, 1027 (9th Cir. 2009) (holding that "the UCL in § 17204 now requires a plaintiff to establish that it has 'suffered injury in fact and has lost money or property'. . . [T]he import of the requirement is to limit standing to individuals who suffer losses of money or property that are eligible for restitution."). However, pursuant to *Korea Supply Co. v. Lockhead Martin Corp.*, "restitutionary disgorgement is available under UCL." *Korea Supply Co.*, 29 Cal.4th 1134 (2003).

Pom alleges that its lost market shares constitute the loss of a vested interest for purposes of UCL claims, so that restitutionary relief remains available here. *Overstock.com, Inc. v. Gradient Analytics, Inc.*, 151 Cal. App.4th 688, 716 (2007). Pom is therefore permitted to establish that its interest, Coca Cola's profits, can "be traced to ill-gotten funds," which would therefore be a "vested" interest and entitle Pom to restitution. *Cumis Insurance Society v. Merrick Bank Corp.*, 2008 WL 427787, at 6\* (D. Ariz. Sept. 18, 2008). As such, the Court concludes that Pom has standing to pursue its state law claims.

Accordingly, Coca Cola's Motion is DENIED. Pom may pursue discovery in furtherance of its Lanham Act claim and Pom's state law claims are not barred for lack of standing.

Defendant has until **September 30, 2009** to answer the Complaint.

IT IS SO ORDERED.