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

NADEEM KACHI,

Plaintiff,

vs.

NATROL, INC.; NATROL
ACQUISITION CORP.; NATROL
PRODUCTS, INC.; and NATROL
DIRECT, INC.,

Defendants.

CASE NO. 13cv0412 JM(MDD)

ORDER DENYING MOTION FOR
CLASS CERTIFICATION;
DISMISSING ACTION FOR LACK
OF SUBJECT MATTER
JURISDICTION

Plaintiff Nadeem Kachi, individually and on behalf of all others similarly situated (“Plaintiff” or “Kachi”), moves to (1) certify the claims for class-wide treatment; (2) appoint himself as class representative, and (3) appoint his counsel, the firms of Oliver Law Group, P.C. and Seeger Weiss LLP, as class counsel. Defendants Natrol, Inc., Natrol Acquisition Corp., Natrol Products, Inc., and Natrol Direct, Inc. (d/b/a Medical Research Institute) (collectively “Natrol”) oppose the motion. Pursuant to Local Rule 7.1(d)(1), the court finds the present matter appropriate for decision without oral argument. For the reasons set forth below, the court denies the motion for class certification, dismisses the action for lack of subject matter jurisdiction, and permits Plaintiff to file an appropriate motion within 30 days of entry of this order.

BACKGROUND

On April 2, 2013 Plaintiff filed the First Amended Complaint (“FAC”) alleging five causes of action against Natrol for (1) violation of Cal. Bus and Prof Code §17200 et seq., (2) violation of Cal. Civil Code §1750 et seq., (3) violation of Cal. Bus and Prof Code §17500 et seq., California’s False Advertising Law (“FAL”), (4) breach of express warranty, and (5) unjust enrichment. Plaintiff asserts federal subject matter jurisdiction pursuant to 28 U.S.C. §1332(d), the Class Action Fairness Act (“CAFA”).

Natrol packages and sells three products to the fitness supplement market. The three products contain L-arginine or Arginine-Alpha Ketoglutarate (“AAKG”) as the active ingredients. The products are sold directly to the public, distributed on the Internet, and sold through retail outlets with uniform labeling. (Shub Decl. Exhs. B-D). Natrol sets forth the following table identifying the product, ingredients, recommended dosage, and certain product claims:

Product	Ingredients	Recommended Dosage	Claims
L-Arginine 1000	L-Arginine 1000mg	1 tablet/day	- Nitric Oxide Precursor for Vascular Support - Promotes Immune Function - Supports Muscle Metabolism
L-Arginine 3000 (Advanced Erectile Function Formula)	- L-Arginine 1000mg - Vitamin B-6 - Folic Acid - Vitamin B-12	3 tablets/day	- Supports Sexual Desire and Arousal - Erectile Function Formula - Promotes Stamina and Performance
NO2 Platinum	AAKG 1000 mg	4-10 tablets/day (depending on gender and weight of consumer)	- Perpetual Pump - Muscularity - Post-Workout Recovery - Endurance

(Shub Decl, Exhs. B-D).

In broad brush, Plaintiff alleges that Natrol’s products “are generally categorized

1 as a Nitric Oxide product[] which falsely claim to provide increased formation of Nitric
2 Oxide in the blood, improve male sexual performance, strengthen immunity, improve
3 cardiovascular function, increase circulation of oxygen and nutrients, support increased
4 lean muscle tissue, and provide muscle pumps” (FAC ¶7). In light of these allegedly
5 false claims, Plaintiff asserts that such conduct is unfair, deceptive, fraudulent, and
6 misleading and has “unfairly deceived [Class Members] into purchasing the Products.”
7 (FAC ¶13).

8 One central allegedly false statement made by Natrol is that “L-Arginine 3000
9 helps support vasodilation to enhance blood flow to tissues . . . promotes healthy blood
10 vessels and supports vascular health.” (Plaintiff’s Exh. B). Plaintiff argues that the
11 products do not metabolize into Nitric Oxide and therefore all product claims are false.
12 Plaintiff explains that the body produces endogenous arginine (generated internally by
13 all humans) which does dilate blood vessels and is known to metabolize into Nitric
14 Oxide. (Motion at p.2:17-19). In reliance upon the expert report prepared by Dr.
15 William Campbell, Plaintiff concludes that there is a near universal consensus that
16 arginine through oral ingestion is not metabolized into Nitric Oxide in the bloodstream,
17 and that none of the product representations is supportable. (FAC ¶28-92).

18 Plaintiff seeks to certify a national class or, alternatively, a California class
19 defined as:

20 California Class: All Persons in the State of California who have spent
21 money purchasing the Products from Defendants from four years from the
22 first-filed complaint in this action until the final disposition of this and
any and all related cases.

23 National Class: All Persons in the United States who have spent money
24 purchasing the Products from Defendants from four years from the
first-filed complaint in this action until the final disposition of this and
any and all related cases.

25 (FAC ¶94).

26 DISCUSSION

27 Class Certification Under Rule 23

28 The purpose of the class-action device is to “save[] the resources of both the

1 courts and the parties by permitting an issue potentially affecting every class member
2 to be litigated in an economical fashion.” General Tel. Co. of Southwest v. Falcon, 457
3 U.S. 147, 155 (1982) (quotation omitted). Thus, “[w]hether a case should be allowed
4 to proceed as a class action involves intensely practical considerations. . . . Each case
5 must be decided on its own facts, on the basis of practicalities and prudential
6 considerations.” Reed v. Bowen, 849 F.2d 1307, 1309 (10th Cir. 1988).

7 Plaintiffs bear the burden of demonstrating that class certification is appropriate.
8 Plaintiffs must establish that all four requirements of Fed. R. Civ. P. 23(a) are satisfied,
9 and that the proposed class fits within one of the categories under Rule 23(b).
10 Doninger v. Pacific Northwest Bell, Inc., 564 F.2d 1304, 1308-09 (9th Cir. 1977).
11 However, plaintiffs need not make a prima facie showing that they will prevail on the
12 merits for class certification to be granted. Eisen v. Carlisle & Jacquelin, 417 U.S. 156,
13 177 (1974).

14 In considering a motion to certify a class, the court is bound to take the
15 substantive allegations of the complaint as true. Blackie v. Barrack, 524 F.2d 891, 901
16 n.17 (9th Cir. 1975), cert. denied, 429 U.S. 816 (1976); In re Coordinated Pretrial
17 Proceedings in Petroleum Products Antitrust Litigation, 691 F.2d 1335, 1342 (9th Cir.
18 1982), cert. denied, 464 U.S. 1068 (1984). The court, however, is also bound "to
19 consider the nature and range of proof necessary to establish those allegations." Id.

20 An Ascertainable Class

21 A class must be objectively ascertainable. See DeBremaecker v. Short, 433 F.2d
22 733, 734 (5th Cir. 1980). Here, Plaintiff seeks to represent a California class or a
23 nationwide class. The court rejects the definition for a nationwide class because the
24 complaint states causes of action for violations of California law only. Plaintiff makes
25 no showing that the other 49 states recognize the same causes of action, provide
26 remedies for Natrol’s alleged wrongful conduct, or that California law is a law of
27 nationwide application. With respect to ascertainability, Plaintiff provides the
28 following definition of the proposed California class:

1 California Class: All Persons in the State of California who have spent
2 money purchasing the Products from Defendants from four years from the
3 first-filed complaint in this action until the final disposition of this and
any and all related cases.

4 In sum, applying this definition, the court concludes that it is possible to
5 objectively identify a California class consisting of individuals who purchased Natrol's
6 products.

7 Rule 23(a)

8 Rule 23(a) sets forth the four prerequisites to a class action:

9 (1) the class is so numerous that joinder of all members is impracticable, (2)
10 there are questions of law or fact common to the class, (3) the claims or defenses
11 of the representative parties are typical of the claims or defenses of the class, and
(4) the representative parties will fairly and adequately protect the interests of
the class.

12 Numerosity

13 Before a proposed class may be certified, Rule 23(a)(1) requires the class to be
14 so numerous that joinder of all class members is impracticable. Impracticability does
15 not mean impossibility, but only difficulty or inconvenience of joining all class
16 members. Harris v. Palm Springs Alpine Estates, 329 F.2d 909, 913-14 (9th Cir. 1964)
17 (citation omitted). The exact number or identity of class members need not be shown.
18 General Tel. Co. of Northwest, Inc. v. E.E.O.C., 446 U.S. 318, 330 (1980).

19 Plaintiff alleges that Natrol sold more than 200,000 bottles of product in less
20 than two years between 2010 and 2012. Even though this appears to be a nationwide
21 sales figure, presumably a sufficiently large number of those products were sold in
22 California, thus satisfying the numerosity requirement.

23 In sum, the numerosity requirement is satisfied.

24 Commonality and Typicality

25 Rule 23(a)(2) requires that there be questions of law or fact common to the class.
26 In Rosario v. Livaditis, 963 F.2d 1013, 1017-18 (7th Cir. 1992), cert denied 506 U.S.
27 1051 (1993), the Seventh Circuit set forth the considerations relevant to the
28 commonality inquiry. "The fact that there is some factual variation among the class

1 grievances will not defeat a class action. . . . A common nucleus of operative fact is
2 usually enough to satisfy the commonality requirement of Rule 23(a)(2)." Id. (citations
3 omitted); see also Harris, 329 F.2d at 914.

4 "Commonality requires the plaintiff to demonstrate that the class members 'have
5 suffered the same injury.'" Wal-Mart Stores, Inc. v. Dukes, 131 S.Ct. 2541, 2551
6 (2011) (quoting General Telephone Co. of Southwest v. Falcon, 457 U.S. 147, 157
7 (1982)). Class claims must depend on a common contention that is "capable of
8 classwide resolution—which means that determination of its truth or falsity will resolve
9 an issue that is central to the validity of each one of the claims in one stroke." Id.
10 "What matters to class certification . . . is not the raising of common 'questions'—even
11 in droves—but, rather the capacity of a classwide proceeding to generate common
12 answers apt to drive the resolution of the litigation. Dissimilarities within the proposed
13 class are what have the potential to impede the generation of common answers." Id.

14 Closely related to the commonality requirement is the typicality requirement.
15 Dukes, 131 S.Ct. at 2551. Rule 23(a)(3) requires the claims or defenses of the
16 representative plaintiff to be typical of the claims or defenses of the class. The
17 typicality inquiry "refers to the nature of the claim or defense of the class
18 representative, and not to the specific facts from which it arose or the relief sought."
19 Jones v. Shalala, 64 F.3d 510, 514 (9th Cir. 1995). The purpose of Rule 23(a)(3)'s
20 typicality requirement is to assure that the interest of the named representative aligns
21 with the interests of the class. Hanon v. Dataproducts Corp., 976 F.2d 497, 508 (9th
22 Cir. 1992); Jones, 64 F.3d at 514 ("Typicality is an inquiry we undertake . . . to
23 determine whether a named plaintiff may represent a class"). The test is "whether
24 other members have the same or similar injury, whether the action is based on conduct
25 which is not unique to the named plaintiffs, and whether other class members have
26 been injured by the same course of conduct." Hanon, 976 F.2d at 508 (citation
27 omitted). The court should "look to the defendant's conduct and the plaintiff's legal
28 theory to satisfy Rule 23(a)(3)." Rosario, 963 F.2d at 1018. Class certification,

1 however, is inappropriate "where a putative class representative is subject to unique
2 defenses which threaten to become the focus of the litigation." Hanon, 976 F.2d at 508
3 (citation omitted). Moreover, "a class is not fairly and adequately represented if class
4 members have antagonistic or conflicting claims." Rosario, 963 F.2d at 1018 (citation
5 omitted).

6 Here, at the heart of Plaintiff's claim is the allegation that Natrol's products are
7 ineffective and do not perform as represented because L-arginine does not cause
8 vasodilation, and therefore Natrol's "product labeling and its advertising claims are
9 false." (Motion at p.6:7-8). Plaintiff phrases the salient common question as: "does
10 an oral arginine supplement metabolize into nitric oxide ("N.O.") in the body as does
11 endogeneous and naturally produced arginine?" (Motion at p.13:11-13). At first blush,
12 the evidence submitted by Plaintiff demonstrates that the class claims share the same
13 fundamental premise: Natrol misrepresents the effectiveness of its products because
14 oral arginine does not increase N.O. levels in the body. If this were the entirety of the
15 evidentiary record, Plaintiff would satisfy both the typicality and commonality
16 requirements of Rule 23(a) with this evidence.

17 The evidentiary record submitted by Natrol, however, casts significant doubt on
18 Plaintiff's premise. Plaintiff submits an expert report prepared by Dr. Bill Campbell
19 to support his claim that oral arginine supplementation does not increase levels of N.O.
20 "in healthy populations." (Plaintiff Exh. G, Campbell Report at p.2). Dr. Campbell
21 supported his conclusions by referring to numerous studies concerning the
22 effectiveness of arginine in healthy populations. Id.

23 While the focus of Plaintiff's expert is on a "healthy" population, Natrol's expert
24 declares that oral arginine supplementation does, in fact, "increase N.O. synthesis for
25 certain populations, including older individuals, subjects with low arginine intake,
26 smokers, overweight individuals, individuals with risk factors for cardiovascular
27 disease, and individuals with diabetes." (Wu Decl. ¶5). Dr. Wu explains that these
28 populations suffer from reduced N.O. syntheses for various reasons. With respect to

1 both healthy and unhealthy populations, Dr. Wu opines that, in addition to increasing
2 N.O. synthesis, L-arginine increases the release of insulin, increases the synthesis of
3 creatine, and decreases white fat accretion and viscosity of blood. (Id. ¶9). There is
4 no indication in the evidentiary record as to the number of healthy consumers (those
5 that would not benefit from oral arginine supplementation) and unhealthy consumers
6 (those that would benefit from oral arginine supplementation).

7 Plaintiff argues, without citation to the evidentiary record, that Natrol's products
8 are marketed to "only the fit," (Reply at p.9), and therefore class members who
9 benefited from the supplement do not exist because they are not fit. The difficulty with
10 this argument is that it is not supported by the evidentiary record. The labeling
11 reviewed by this court does not, expressly nor implicitly, limit product sales to only
12 healthy populations. (Shub Decl. Exhs. B - D).¹

13 The court concludes that resolution of Plaintiff's central claim (i.e. oral
14 supplements of arginine in healthy individuals do not increase N.O. synthesis or
15 provide the represented health benefits) fails to take into account the class of
16 purchasers, consisting of unhealthy individuals, who arguably actually received
17 benefits from Natrol's products. While the representations contained on the packaging
18 are uniform, the injuries suffered by the two groups (healthy vs. unhealthy) are distinct
19 and not capable of resolution by uniform proof on the present record. As the class is
20 defined to include both healthy and unhealthy purchasers of Natrol's products, the
21 court concludes that the commonality and typicality requirements of Rule 23(a) are not
22 satisfied.²

23 In sum, Plaintiff fails to establish the commonality and typicality requirements
24 of Rule 23(a). In light of this failure, the court does not reach the adequacy of

25
26 ¹ The court rejects Natrol's arguments that some consumers may be satisfied with
27 the products, or obtained unadvertised benefits from the products, as a basis to deny
28 class certification.

² As a corollary, the class definition is woefully overbroad and cannot be
maintained as proposed because it incorporates class members who suffered injury and
those that did not.

1 representation requirement nor the Rule 23(b) requirements.

2 **Subject Matter Jurisdiction**

3 The court has serious concerns regarding subject matter jurisdiction under CAFA
4 because (1) the amount in controversy appears less than the \$5,000,000 statutory
5 minimum and (2) the parties appear non-diverse. Federal courts are courts of limited
6 jurisdiction. “Without jurisdiction the court cannot proceed at all in any cause.
7 Jurisdiction is power to declare the law, and when it ceases to exist, the only function
8 remaining to the court is that of announcing the fact and dismissing the cause.” Steel
9 Co. v. Citizens for a Better Environment, 523 U.S. 83, 94 (1998) (quoting Ex parte
10 McCardle, 74 U.S. (7 Wall.) 506, 514, 19 L.Ed. 264 (1868)). Accordingly, federal
11 courts are under a continuing duty to confirm their jurisdictional power and are
12 “obliged to inquire sua sponte whenever a doubt arises as to [its] existence...”
13 Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 278 (1977) (citations
14 omitted).

15 Under CAFA, the court possesses original jurisdiction where the amount in
16 controversy exceeds \$5,000,000, there are more than 100 class members, and “any
17 member of a class of plaintiffs is a citizen of a State different from any defendant.” 28
18 U.S.C. §1332(d)(2)(A). For diversity purposes, a corporation is a citizen of its state of
19 incorporation and its principal place of business. 28 U.S.C. §1332(c)(1).

20 The entirety of Plaintiff’s jurisdictional allegation provides:

21 there are at least 100 Class Members in the proposed Class, the combined
22 claims of proposed Class Members exceed \$5,000,000 exclusive of
23 interest and costs, and at least one Class Member is a citizen of a state
24 other than Defendants’ state of citizenship.

24 (FAC ¶17). Plaintiff cannot satisfy Rule 8(a)(1)’s requirement for a short and plain
25 statement of jurisdiction by simply reciting the statutory elements. Courts should
26 dismiss a complaint for failure to state a claim when the factual allegations are
27 insufficient “to raise a right to relief above the speculative level.” Bell Atlantic Corp.
28 v. Twombly, 550 U.S. 544, 555 (2007) (the complaint’s allegations must “plausibly

1 suggest[]” that the pleader is entitled to relief); Ashcroft v. Iqbal, 556 U.S. 662 (2009)
2 (under Rule 8(a), well-pleaded facts must do more than permit the court to infer the
3 mere possibility of misconduct). “The plausibility standard is not akin to a ‘probability
4 requirement,’ but it asks for more than a sheer possibility that a defendant has acted
5 unlawfully.” Id. at 678. Thus, “threadbare recitals of the elements of a cause of action,
6 supported by mere conclusory statements, do not suffice.” Id. Here, the threadbare
7 recitals of the elements for subject matter jurisdiction under CAFA are insufficient, as
8 a matter of law, to viably establish the court’s subject matter jurisdiction.

9 Looking beyond the pleadings, Plaintiff alleges that Natrol sold 200,000 bottles
10 of products nationwide during a two year period of time. While Plaintiff does not
11 identify the amount of product sold in California, even assuming all bottles were sold
12 in California, the amount of loss would be around \$2,000,000 (200,000 bottles at the
13 purchase price of \$10 per bottle). While statutory damages may increase the amount
14 in controversy, neither party speculates that the total amount in controversy exceeds
15 \$5 million.

16 Even if Plaintiff could demonstrate a reasonably plausible basis for a \$5 million
17 amount in controversy, the parties are non-diverse. See 28 U.S.C. §1332(d)(2). Each
18 Natrol entity maintains its principal place of business in the state of California and is
19 therefore, like the Plaintiff and the class of individuals he seeks to represent, a
20 California citizen. At the time of filing the complaint, Plaintiff sought to represent both
21 a nationwide and California class. However, Plaintiff has not made any showing as to
22 the viability of a nationwide class action based upon violations California state law.³
23 Accordingly, at this juncture, all Plaintiffs and Defendants appear to be citizens of the
24 same state, California.

25 As the FAC fails to identify the basis for the exercise of the court’s subject


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27 ³ As noted by Natrol, ten states do not recognize the right of private individuals
28 to bring class actions, the states have different statutes of limitations, and the elements
of each cause of action, to the extent the state recognizes the cause of action, may be
significantly different. Under these circumstances, Plaintiff fails to establish that a
nationwide class action would be appropriate.

1 matter jurisdiction, the court dismisses the FAC without prejudice for lack of subject
2 matter jurisdiction. In the event Plaintiff decides to pursue this action, he is instructed
3 to file an appropriate motion within 30 days of entry of this order.

4 In sum, the court denies Plaintiff's motion for class certification because he fails
5 to establish the prerequisites for class certification: commonality and typicality. The
6 court also dismisses the action for lack of subject matter jurisdiction and permits
7 Plaintiff to file an appropriate motion within 30 days of entry of this order.

8 **IT IS SO ORDERED.**

9 DATED: June 19, 2014



Hon. Jeffrey T. Miller
United States District Judge

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11 cc: All parties

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