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

STEPHANIE HIRMEZ, Individually
and on Behalf of All Others Similarly
Situated,

Plaintiff,

vs.

GNC HOLDINGS, INC., et al.,

Defendants.

CASE NO. 13-cv-1828 BEN (JMA)

ORDER GRANTING MOTION TO
DISMISS WITH LEAVE TO AMEND

Now before the Court is Defendants’ Motion to Dismiss the Complaint. For the reasons stated below, the motion is granted.

BACKGROUND

According to the Complaint, Plaintiff is a California resident who purchased a health food product at a Defendant retail store in California some time in May 2013. The product was GNC Pro Performance Rapid Drive Arginine 5000. Plaintiff alleges that Defendants made “false, fraudulent, misleading, unfair and deceptive claims” about the effects on human health of the L-Arginine in the product.

The Complaint asserts against all Defendants a putative class action on behalf of all individuals who purchased the product from the Defendants. The Complaint

1 sets out four claims for relief under California state law: (1) violation of the
2 California’s Unfair Competition Law (“UCL”), Cal. Bus. & Prof. Code § 17200 *et*
3 *seq.*; (2) violation of the California’s Consumer Legal Remedies Act (“CLRA”), Cal.
4 Civil Code § 1750 *et seq.*; (3) violation of California’s False Advertising Law
5 (“FAL”), Cal. Bus. & Prof. Code § 17500 *et seq.*; and (4) breach of express
6 warranty. The Defendants argue that the Complaint should be dismissed because
7 Plaintiff lacks standing and fails to state claims upon which relief can be granted.

8 DISCUSSION

9 The Complaint fails to allege a case over which this court has jurisdiction.
10 Plaintiff alleges that this Court has diversity jurisdiction over this proposed class
11 action pursuant to the Class Action Fairness Act (“CAFA”). *See* 28 U.S.C.
12 § 1332(d). CAFA vests district courts with original jurisdiction of any civil action in
13 which the amount in controversy exceeds the sum or value of \$5,000,000 and in
14 which the aggregate number of proposed plaintiffs is 100 or greater, and any
15 member of the plaintiff class is a citizen of a state different from any defendant.
16 *Lowdermilk v. U.S. Bank Nat’l Ass’n*, 479 F.3d 994, 997 (9th Cir. 2007) (quoting 28
17 U.S.C. § 1332(d)), *overruled on other grounds by Standard Fire Ins. Co. v.*
18 *Knowles*, 133 S. Ct. 1345 (2013). “The burden of persuasion for establishing
19 diversity jurisdiction . . . [rests] on the party asserting it. When challenged on
20 allegations of jurisdictional facts, the parties must support their allegations by
21 competent proof.” *Hertz Corp. v. Friend*, 559 U.S. 77, 96-97 (2010) (internal
22 citations omitted). A putative class action must demonstrate, by a preponderance of
23 evidence, that the aggregate amount in controversy exceeds the jurisdictional
24 minimum. *Rodriguez v. AT&T Mobility Servs. LLC*, 728 F.3d 975, 981 (9th Cir.
25 2013).

26 To establish subject matter jurisdiction, plaintiffs “may rely on calculations to
27 satisfy their burden so long as their calculations are good faith, reliable estimates
28 based on the pleadings and other evidence in the record.” *Ellis v. Pac. Bell Tel. Co.*,

1 No. SACV 10-01141, 2011 U.S. Dist. LEXIS 16045, 2011 WL 499390, at *2 (C.D.
2 Cal. Feb. 10, 2011). However, “a plaintiff must set forth the underlying facts
3 supporting its assertion that the amount in controversy exceeds the statutory
4 minimum.” *Baxter v. Rodale, Inc.*, No. CV 12-00585, 2012 U.S. Dist. LEXIS
5 59571, 2012 WL 1267880, at *1 (C.D. Cal. Apr. 12, 2012) (internal quotation marks
6 omitted). Conclusory allegations devoid of factual support are insufficient. *See,*
7 *e.g., Lowdermilk*, 479 F.3d at 1002; *Melvin v. Blue Diamond Growers*, No. SACV
8 13-1746, 2013 U.S. Dist. LEXIS 184980, 2013 WL 7137775, at *1-2 (C.D. Cal.
9 Dec. 23, 2013); *Baxter*, 2012 U.S. Dist. LEXIS 59571, 2012 WL 1267880, at *1-2.

10 First, Plaintiff fails to allege minimal diversity. The Complaint alleges
11 Plaintiff’s residency, but not her citizenship. Compl. ¶18 (“Hirmez is a resident of
12 the County of San Diego, State of California.”). This is a fatal flaw by itself, if not
13 corrected. Second, while Plaintiff alleges she purchased GNC Pro Performance
14 Rapid Drive Arginine 5000, she does not specify the day of her purchase, the price
15 of the product, nor how much she paid.¹ She provides no sales receipt from the
16 purchase.

17 In order to establish that the aggregate amount in controversy exceeds the
18 jurisdictional minimum of \$5,000,000, more is required. The only suggestion of the
19 amount in controversy comes from a web page screen shot dated August 6, 2013 and
20 attached to the Complaint as Exhibit “A”. Plaintiff’s Complaint does not explain the
21 significance of the exhibit. Even if one assumed its significance to be evidence of
22 the price of GNC Pro Performance Rapid Drive Arginine 5000, the screen shot

23
24 ¹This allegation, lacking in specifics as it does, may be insufficient to set forth
25 Plaintiff’s Article III standing which requires a specific injury-in-fact. In the Ninth
26 Circuit, it has been said that “no class may be certified that contains members lacking
27 Article III standing.” *Mazza v. American Honda Motor Co., Inc.*, 666 F.3d 581, 594
28 (9th Cir. 2012) (citation omitted). Whether Plaintiff has Article III standing is left for
another day in view of Plaintiff’s failure to establish federal diversity jurisdiction under
CAFA. *See also Waller, Jr. v. Hewlett-Packard Co.*, 295 F.R.D. 472 (S.D. Cal. 2013)
(Burns, J.) (discussing whether putative class members must demonstrate Article III
injury-in-fact for a class action California Unfair Competition Law claim under the
reasoning of *Mazza*).

1 reflects two prices: \$39.99 and \$23.97. Assuming the truth of the Complaint’s
2 allegations that the product is actually worthless (Compl. ¶59), Plaintiff’s own
3 damages do not meet the jurisdictional threshold.

4 Courts are instructed to look beyond the complaint to determine whether the
5 putative class action meets the jurisdictional requirements. *AT&T Mobility Servs.*
6 *LLC*, 728 F.3d at 981 (citing *Standard Fire Ins.*, 133 S. Ct. at 1350). Even assuming
7 the truth of the Complaint’s allegations as to the size of the class, the damages here
8 may not meet the jurisdictional threshold. *See* Compl. ¶64 (“The Classes are
9 composed of *thousands* of persons geographically dispersed.”) (emphasis added).
10 The Complaint does not allege how many *thousands* of putative class members
11 exist.² If each person paid \$39.99 for the allegedly worthless product, and there
12 were more than one thousand – say, two thousand – class members, the aggregate
13 amount in controversy would be only \$79,980. If each person paid \$39.99 for a
14 worthless product, and there were nine thousand class members, the aggregate
15 amount in controversy would be only \$359,910 – still well below the jurisdictional
16 minimum of \$5,000,000. Of course, the actual aggregate amount could be more or
17 less. The problem is that it is up to the plaintiff (as the party seeking the federal
18 forum) to set forth the underlying facts supporting its assertion that the amount in
19 controversy exceeds the statutory minimum. *AT&T Mobility Servs. LLC*, 728 F.3d
20 at 978. Plaintiff has not met her burden in this case.

21 These allegations are conclusory and devoid of factual support. It cannot be
22 determined with any confidence that based on the allegations, Plaintiff case exceeds
23 the \$5,000,000 amount in controversy jurisdictional threshold. Accordingly,
24 Plaintiff has failed to show that the amount in controversy exceeds \$5,000,000, as
25 required for this Court to have jurisdiction pursuant to CAFA. As this issue is
26 dispositive, the parties’ remaining arguments will not be addressed.

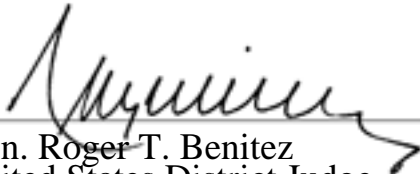
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28 ²It conspicuously alleges neither “tens of thousands” nor “hundreds of
thousands.” Whether the word “thousands” as used in the Complaint actually means
much more is left for speculation.

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CONCLUSION

For the reasons stated above, Defendants' Motion to Dismiss is granted. Plaintiff is granted leave to file an amended complaint and shall do so, if it all, no later than June 20, 2014.

DATED: May 27, 2014



Hon. Roger T. Benitez
United States District Judge