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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 13-6429-GHK (PJWx)	Date	June 2, 2014
Title	*Raquel Chavez v. Wal-Mart Stores, Inc.*		

Presiding: The Honorable	**GEORGE H. KING, CHIEF U.S. DISTRICT JUDGE**	
Beatrice Herrera	N/A	N/A
Deputy Clerk	Court Reporter / Recorder	Tape No.

Attorneys Present for Plaintiffs:	Attorneys Present for Defendant:
None	None

Proceedings: **(In Chambers) Order re:** Defendant's Motion to Dismiss and/or Strike Plaintiff's First Amended Complaint [Dkt. No. 34]

This matter is before us on Defendant's Motion to Dismiss and/or Strike Plaintiff's First Amended Complaint ("Motion"). We have considered the papers filed in support of and in opposition to the Motion and deem this matter appropriate for resolution without oral argument. L.R. 7-15. As the Parties are familiar with the facts, we will repeat them only as necessary. Accordingly, we rule as follows:

I. Background

Plaintiff Raquel Chavez filed this putative consumer class action against Defendant Wal-Mart Stores, Inc. ("Wal-Mart") for its sale of Banzai-brand inflatable pools that allegedly uniformly use deceptive images on their product packaging. (FAC ¶ 21). She alleges that the packaging on Wal-Mart's store shelves and the images appearing on its website use photographic manipulation to make Banzai waterslides and pools appear substantially larger than they actually are. (*Id.* ¶¶ 1-6, 13-15). She further alleges that Wal-Mart has sold these products despite its knowledge of Banzai's manipulative marketing practices. (*Id.* ¶ 25). Wal-Mart was put on notice of Banzai's allegedly deceptive practices when it received a copy of a letter from the Federal Trade Commission ("FTC") in which the FTC concluded that Banzai's images misrepresented the products' size and water pressure and would likely cause consumer confusion. (*Id.* ¶¶ 16-17). Wal-Mart was further notified of Banzai's deceptive marketing practices in 2009 when Aviva Sports, Inc. ("Aviva") asserted a competitor injury against Wal-Mart for selling Banzai products that use photograph manipulation techniques on their packaging. (*Id.* ¶¶ 18-20).

On March 3, 2014, we denied Wal-Mart's motion to dismiss Plaintiff's UCL and CLRA claims. However, we granted Wal-Mart's motion with respect to Plaintiff's claims under the other states' consumer protection laws. Because Plaintiff's original complaint merely listed the 49 other states' consumer protection statutes, we concluded that these claims were inadequately pled. Plaintiff filed a First Amended Complaint ("FAC") on April 2, 2014. In addition to her California claims, Plaintiff's FAC asserts claims under 25 additional states' consumer protection laws. Wal-Mart now moves to

dismiss or strike 23 of these claims[1] on the grounds that Plaintiff does not satisfy some of these states' statutory requirements.

II. Discussion

A. Rule 12(g)(2)

As an initial matter, Plaintiff argues that Rule 12(g)(2) bars Wal-Mart from bringing a second motion to dismiss in this case. Plaintiff misapplies Rule 12(g)(2), which provides that a party who brings as a motion under Rule 12 cannot "make another motion . . . raising a defense or objection that was available to the party but omitted from its earlier motion." While 12(g)(2) prohibits a defendant from bringing successive motions to dismiss the same operative complaint, the law is clear that when an amended complaint is filed, it supersedes the original complaint and is therefore susceptible to a renewed motion to dismiss. *See, e.g.*, *In re WellPoint, Inc. Out-of-Network "UCR" Rates Litig.*, 903 F. Supp. 2d 880, 893 (C.D. Cal. 2012); *Migliaccio v. Midland Nat'l Life Ins. Co.*, 2007 WL 316873, at *2-3 (C.D. Cal. Jan. 30, 2007).

B. Time-Barred Claims Are Dismissed

Although Plaintiff filed suit more than two years after she purchased a Banzai product from Wal-Mart, Plaintiff's FAC asserts claims under five state statutes that impose a two-year statute of limitations: Alaska Stat. § 45.50.531(f); Idaho Code § 48-619; Iowa Code § 714H.5(5); O.R.C. § 1345.10(c); and Va. Code § 59.1-204.1. Plaintiff makes no tolling allegations. Indeed, she does not dispute that she would be time-barred from bringing a claim on her own behalf under these state statutes. However, she contends that these claims should not be dismissed because they are being brought by Plaintiff in a representative capacity on behalf of absent class members. She insists that "differences in statutes of limitations are issues for class certification, not for pleadings." (Opp'n 16). Plaintiff is wrong.

It is fundamental that a named plaintiff cannot prosecute a claim on behalf of a class of which she is not a member. *See Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 156 (1982) ("We have repeatedly held that a class representative must be part of the class.") (internal quotation marks omitted); *Berger v. Home Depot USA, Inc.*, 741 F.3d 1061, 1067 (9th Cir. 2014) ("Because [the named plaintiff] only alleges that he took part in one transaction, in April of 2004, he is not a member of subclasses two or three, which are defined as beginning in March 2005 and June 2006, respectively. Because he is not a member of those subclasses, [he] cannot prosecute claims on their behalf."). In other words, Plaintiff must personally satisfy the pleading requirements of each claim that she brings, and she cannot defeat a motion to dismiss by relying on class allegations. *See O'Shea v. Littleton*, 414 U.S. 488, 494 (1974).

Here, Plaintiff's claims under the consumer protection laws of Alaska, Idaho, Iowa, and Virginia

[1] Wal-Mart does not move to dismiss Plaintiff's Hawaii and New Jersey claims.

are time-barred. That absent class members may have claims under these laws is immaterial—only Plaintiff's individual claims are presently before the Court. *See, e.g., Cheng v. BMW of North Am., LLC*, 2013 WL 3940815, at *4 (C.D. Cal. July 26, 2013) ("[I]n ruling on a motion to dismiss a class action complaint prior to class certification, courts generally consider only the claims of the named plaintiff."); *Rutherford v. FIA Card Servs, N.A.*, 2012 WL 5830081, at *4 (C.D. Cal. Nov. 16, 2012) (explaining that prior to certification, the court "looks only to the allegations pled as to Plaintiff himself" because "only Plaintiff's individual claims are at issue"). Plaintiff's argument seems to confuse the Rule 23 inquiry with whether she can state a claim under these statutes in the first instance. *See, e.g., Morales v. Unilever U.S., Inc.*, 2014 WL 1389613, at *5 (E.D. Cal. Apr. 9, 2014). Because Plaintiff has no claim under Alaska, Idaho, Iowa, Ohio, or Virginia law, "she cannot represent others who may have such a claim." *Lierboe v. State Farm Mut. Auto. Ins. Co.*, 350 F.3d 1018, 1022-23 (9th Cir. 2003). Accordingly, these time-barred claims are **DISMISSED**. *See, e.g., Parrish v. Nat'l Football League Players Ass'n*, 534 F. Supp. 2d 1081, 1094-95 (N.D. Cal. 2007) (dismissing named plaintiff's breach of contract claim as time-barred, explaining that absent class members who signed contracts within the statute of limitations did not save plaintiff's claim).

C. Massachusetts and West Virginia Claims Are Dismissed for Failure to Comply with Pre-Litigation Demand Requirements

Plaintiff asserts claims under three consumer protection statutes—those of Maine, Massachusetts, and West Virginia—that have pre-litigation demand requirements. *See* 5 Me. Rev. Stat. Ann. § 213(1-A); Mass. Gen. Law ch. 93A § 9(3); W. Va. Code Ann. § 46A-6-106(b). Plaintiff argues that the Maine, Massachusetts, and West Virginia statutes do not require that a plaintiff's pre-litigation demand letter specifically identify the statutes that have been violated. Instead, she contends that, by their plain language, these three statutes require only that the letter notify the defendant of the general nature of the alleged deceptive practices. *See* 5 Me. Rev. Stat. Ann. § 213(1-A) (requiring that the letter "reasonably describ[e] the unfair and deceptive act or practice relied upon"); Mass. Gen. Laws. Ch. 93A § 9(3) (requiring that the letter "reasonably describ[e] the unfair or deceptive act or practice relied upon"); W. Va. Code Ann. § 46A-6-106(b) (requiring that the letter inform the seller or lessor "of the alleged violation"). As a result, Plaintiff maintains that the demand letter she sent pursuant to the CLRA satisfies these other statutes' pre-litigation demand requirements—even though her letter made no mention of the Maine, Massachusetts, or West Virginia statutes—because her letter described the nature of Wal-Mart's alleged deceptive practices. (*See* FAC ¶ 58).

As the Massachusetts Appeals Court has explained, "the purpose of the statutory written demand is to encourage settlements," and this "objective is not brought closer by keeping the nature of the action concealed." *Cassano v. Gogos*, 20 Mass. App. Ct. 348, 351 (1985). "If consumers assert insufficiently express demands, they will lose an opportunity to stimulate productive settlements." *Id.* Under Massachusetts law, therefore, the pre-litigation demand requirement is not satisfied unless the letter expressly invokes the Massachusetts consumer protection statute. *See id.* Likewise, a letter that does not specifically assert a violation of the West Virginia Consumer Credit Protection Act does not meet that statute's demand requirement. *See Stanley v. Huntington Nat. Bank*, 492 F. App'x 456, 461 (4th

Cir. 2012).

Here, Plaintiff's demand letter concealed the potential scope of Wal-Mart's liability by solely invoking the CLRA. An incomplete letter that fails to disclose such material information does not adequately serve the purposes of the MA and WV statues' pre-litigation demand requirements. *See Cassano*, 20 Mass. App. Ct. at 352 (quoting *Atl. Purchasers, Inc. v. Aircraft Sales, Inc.*, 705 F.2d 712, 717 (4th Cir. 1983)) ("Fundamental fairness requires in such a case . . . that the opposing party be notified of the possibility of the unusual relief early enough in the proceedings to permit the defendant to assess the case realistically for settlement and litigation strategy."). Accordingly, Plaintiff's Massachusetts and West Virginia claims are **DISMISSED**.

However, under Maine law "the notice requirements of section 213(1-A) are not jurisdictional," *Oceanside at Pint Point Condo. Owners Ass'n v. Peachtree Doors, Inc.*, 659 A.2d 267, 273 (Me. 1995), and a plaintiff's "failure to comply with the express terms of [Maine's] notice requirement does not bar [her] Maine consumer protection claim." *In re New Motor Vehicles Canadian Exp. Antitrust Litig.*, 350 F. Supp. 2d 160, 186 (D. Me. 2004). Accordingly, Plaintiff can state a claim under Maine law even if she did not send an adequate pre-litigation demand letter. Because Wal-Mart has identified no other deficiencies with Plaintiff's Maine claim, its Motion is **DENIED** with respect to this claim.

D. Claims Under Statutes with Residency or Nexus Requirements Are Dismissed

Several of the states' consumer protection statutes cannot be applied extraterritorially. These states confer statutory standing only to residents, those who are injured within the state, and/or those who suffer injuries that are otherwise closely connected to the state. Because Plaintiff does not allege that her purchase has any connection to any state other than California, she lacks statutory standing to bring a claim under the consumer protection statutes of Connecticut, Delaware, D.C., Florida, Illinois, Michigan, Minnesota, Missouri, Nebraska, New Hampshire, New York, Rhode Island, and Washington. *See Uniroyal Chem. Co., Inc. v. Drexel Chem. Co., Inc.*, 931 F. Supp. 132, 140 (D. Conn. 1996) (holding that to state a claim under Connecticut's consumer protection statute, the violation must either occur in Connecticut or be "tied to a form of trade or commerce intimately associated with Connecticut"); Del. Code tit. 6, §§ 2512, 2525 (conferring private right of action to those injured by deceptive practices occurring "in part or wholly within" Delaware); *Nelson v. Nationwide Mortg. Corp.*, 659 F. Supp. 611, 616 (D.D.C. 1987) (holding that the D.C. consumer protection statute does not reach extraterritorial transactions); *Karhu v. Vital Pharms., Inc.*, 2013 U.S. Dist. LEXIS 112613, at *25-27 (S.D. Fla. Aug. 9, 2013) (explaining that a claim under Florida's consumer protection statute can only be brought by in-state consumers and non-Florida residents who are injured by conduct that took place predominately in Florida); *Int'l Equip. Trading, Ltd. v. AB Sciex LLC*, 2013 U.S. Dist. LEXIS 123109, at *30 (N.D. Ill. Aug. 29, 2013) ("[Illinois's consumer protection statutes] do not apply to fraudulent practices that take place outside of Illinois."); *In re OnStar Contract Litig.*, 600 F. Supp. 2d 861, 866 (E.D. Mich. 2009) (holding that named plaintiffs who did not reside in Michigan and did make a purchase in Michigan could not pursue a class action claim under Michigan's consumer protection statute because "the statute, by its express terms, limits such a class to persons residing or injured in

Michigan"); *Ly v. Nystrom*, 615 N.W.2d 302, 313 (Minn. 2000) (plaintiff is only a proper claimant for damages under Minnesota's consumer protection laws if the prosecution of her claim would advance Minnesota's interests); Mo. Ann. Stat. §§ 407.020, 407.025 (conferring private right of action to those who purchase deceptively marketed products "in or from the state of Missouri"); Neb. Rev. Stat. §§ 59-1601(2), 59-1609 (conferring private right of action to persons injured by deceptive practices "directly or indirectly affecting the people of the State of Nebraska"); N.H. Rev. Stat. § 358-A:10-a (authorizing class actions only for "persons who are resident of [New Hampshire] or whose cause of action arose within [New Hampshire]"); *Ward v. TheLadders.com, Inc.*, 2014 WL 945011, at *12 (S.D.N.Y. Mar. 12, 2014) (explaining that a "territorial test is embedded in [New York's consumer protection statute]: to state a claim under the statute, the deception of a consumer must occur in New York") (internal quotation marks omitted); R.I. Gen. Laws. §§ 6-13.1-1; 6-13.1-5.2 (conferring private right of action to those injured by deceptive practices "directly or indirectly affecting the people of [Rhode Island]"); Wash. Rev. Code §§ 19.86.010, 19.86.020, 19.86.090 (conferring private right of action to those injured by deceptive practices "directly or indirectly affecting the people of the state of Washington").

Plaintiff does not dispute that she cannot satisfy these statutes' requirements. She argues that it is immaterial that she cannot personally bring a claim under these statutes because she is bringing these claims in her representative capacity on behalf of absent class members who are statutorily authorized to sue. But as explained above with respect to her time-barred claims, Plaintiff cannot let absent class members stand in her stead. These putative class members are not yet parties in this case. Before Plaintiff can represent any class members, she must first state a claim on her own behalf. *Allee v. Medrano*, 416 U.S. 802, 828-29 (1974) ("[A] named plaintiff cannot acquire standing to sue by bringing his action on behalf of others who suffered injury which would have afforded them standing had they been named plaintiffs."). We cannot allow Plaintiff to override these states' statutory standing requirements "through the back door of a class action," *see id.*, because to do so would improperly override these states' prerogatives to limit the application of their consumer protection statutes. *See In re Graphics Processing Units Antitrust Litig.*, 527 F. Supp. 2d 1011, 1026 (N.D. Cal. 2007) ("Standing under each state's antitrust statute is a matter of that state's law. It would be wrong for a district judge, in *ipse dixit* style, to bypass all state legislatures and all state appellate courts and to pronounce a blanket and nationwide revision of all state antitrust laws.").

Relying on *Bruno v. Quten Research Inst., LLC*, 280 F.R.D. 524, 530 (C.D. Cal. 2011), Plaintiff insists that whether she can assert these statutory claims on behalf of absent class members is a question of typicality and adequacy of representation that should be resolved at the class certification stage, not on a motion to dismiss. In *Bruno*, the court held that a named plaintiff could bring a claim on behalf of class members who had purchased the defendant's gelcap product even though she herself had only purchased the defendant's liquid product. Plaintiff contends that, as in *Bruno*, the issue here is whether she can present claims on behalf of absent class members who have similar, but not identical, interests. Plaintiff misunderstands *Bruno* and conflates statutory standing and the Rule 23 requirements for class certification. Whether a plaintiff can bring a claim on her own behalf is entirely distinct from whether she may assert that same claim on behalf of a class. *See, e.g., In re Genentech, Inc. Sec. Litig.*, 1990 WL 120641, at *6 n.4 (N.D. Cal. June 6, 1990) ("The requirements for individual standing represent a

threshold inquiry that must be analyzed separate and apart from Rule 23. If the named plaintiffs for the proposed . . . class . . . do not have standing, the necessary consequence is dismissal of the . . . claim, not denial of class certification."). *Bruno* concerned whether a plaintiff who could bring a claim on her own behalf could also bring the same claim on behalf of others who had suffered similar injuries. It in no way disturbs the fundamental rule that "[i]n a class action suit with multiple claims, at least one named class representative must have standing with respect to each claim." Newberg on Class Actions § 2:5 (5th ed.); *see also, e.g.*, *In re Ditropan XL Antitrust Litig.*, 529 F. Supp. 2d 1098, 1107 (N.D. Cal. 2007). In sum, before we can assess whether Plaintiff is a typical and adequate class representative with respect to a claim, she must first be able to assert that claim on her own behalf.[2]

Based on the foregoing, because Plaintiff cannot personally state a claim under these states' statutes, these claims are **DISMISSED**. *See, e.g.*, *Sahagian v. Genera Corp.*, 2009 WL 9504039, at *8 (C.D. Cal. July 6, 2009) ("The Court finds that . . . Plaintiffs lack standing to assert claims under the state consumer protection laws of [24 states] because no Plaintiffs reside or claim to have purchased autolight products in those states."); *In re Ditropan XL Antitrust Litig.*, 529 F. Supp. 2d at 1106-07 (dismissing claims based on 24 state statutes because no named plaintiff resided in or purchased a product in any of the 24 states); *In re Graphics*, 527 F. Supp. 2d at 1026-27 ("Each claim under each state statute must be analyzed separately. A class cannot assert a claim on behalf of an individual that they cannot represent.").

E. Plaintiff States a Claim Under North Dakota Law

The language in North Dakota's consumer protection statute conferring a private right of action is broad. The statute "does not bar any claim for relief by any person against any person who has acquired any moneys or property by any practice declared to be unlawful." N.D. Cent. Code § 51-15-09.

Wal-Mart contends that Plaintiff cannot state a claim under this statute because Wal-Mart did not create the false-advertising at issue in this case. However, Wal-Mart does not identify any case law interpreting the North Dakota statute as limiting liability to those who created or initiated the deceptive practice. The statute prohibits the "act, use or employment . . . of any deceptive act or practice, fraud,

[2] A minority of courts have interpreted the Supreme Court's decision in *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999) to mean that we may defer resolving statutory standing issues until ruling on class certification. The Northern District of Illinois, for example, has reasoned that class certification issues are "logically antecedent" to these kind of standing concerns because "the standing issue would not exist but for [the plaintiff's] assertion of state law claims on behalf of class members in [other] states." *In re Aftermarket Filters Antitrust Litig.*, 2009 WL 3754041, at *5 (N.D. Ill. Nov. 5, 2009). This approach misapplies *Ortiz*. *Ortiz* merely held that a court may resolve dispositive class certification issues before reaching standing issues where a court is presented with certification issues and standing issues *simultaneously*. Moreover, the concern in *Ortiz* was absent class members' standing, not named plaintiffs' standing. Finally, the Ninth Circuit has recognized that *Ortiz* is limited to "the very specific situation of a mandatory global settlement class." *Easter v. Am. W. Fin.*, 381 F.3d 948, 962 (9th Cir. 2004).

false pretense, false promise, or misrepresentation, with the intent that others rely thereon . . . , whether or not any person has in fact been misled." N.D. Cent. Code. § 51-15-02. The plain language of the statute therefore extends liability to all who "use or employ[]" a misrepresentation, notwithstanding who created the misrepresentation in the first instance. Absent any case law to the contrary, Plaintiff's allegation that Wal-Mart failed to disclaim the manufacturer's misrepresentations after receiving actual notice of the products' deceptive packaging is sufficient to raise an inference that Wal-Mart had adopted the alleged misrepresentations and had used or employed them with the intent that its customers rely on them in purchasing the Banzai products that Wal-Mart sold. This is sufficient to state a claim under North Dakota's consumer protection statute. *See A&R Fugleberg Farms, Inc. v. Triangle Ag, LLC*, 2010 WL 1418870, at *4 (D.N.D. Apr. 7, 2010) (noting that North Dakota's consumer fraud statute is to be "liberally construed in favor of the consumer"). Accordingly, Wal-Mart's Motion is **DENIED** with respect to Plaintiff's North Dakota claim.

F. Plaintiff States a Claim Under Vermont Law

In its Motion, Wal-Mart suggests that Plaintiff's claim under Vermont law fails because Plaintiff has failed to plead facts showing that this Court would have personal jurisdiction over a Vermont class. Wal-Mart's argument makes little sense at the motion to dismiss stage (and Wal-Mart admits as much by abandoning its attack on Plaintiff's Vermont claim in its Reply). In a class action, personal jurisdiction over absent class members is established so long as notice to class members comports with due process requirements. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-812 (1985). Because no class has been certified and no notice has been given, Wal-Mart's personal jurisdiction argument is premature. In any event, whether this Court has personal jurisdiction over absent class members says nothing about whether Plaintiff can state a claim under Vermont law. Accordingly, because Wal-Mart has identified no other deficiencies with Plaintiff's Vermont claim, its Motion is **DENIED** with respect to this claim.

III. Conclusion

Based on the foregoing, Plaintiff's claims under the consumer protection laws of Alaska, Connecticut, Delaware, D.C., Florida, Idaho, Illinois, Iowa, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New Hampshire, New York, Ohio, Rhode Island, Virginia, Washington, and West Virginia law are **DISMISSED without further leave to amend**. However, Wal-Mart's Motion is **DENIED** insofar as it seeks to dismiss Plaintiff's Maine, North Dakota, and Vermont claims. Wal-Mart **SHALL** answer the surviving portions of the FAC with **14 days hereof**.

IT IS SO ORDERED.

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