UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES—GENERAL

Case No.	**EDCV 14-0637 JGB (SPx)**	Date	September 11, 2014
Title	***David Petersen, v. The Scotts Miracle-Gro Company, et al.***		

Present: The Honorable	JESUS G. BERNAL, UNITED STATES DISTRICT JUDGE

MAYNOR GALVEZ	Not Reported
Deputy Clerk	Court Reporter

Attorney(s) Present for Plaintiff(s):	Attorney(s) Present for Defendant(s):
None Present	None Present

Proceedings: **Order (1) GRANTING in part and DENYING in part Defendants' Motion to Dismiss (Doc. No. 20); and (2) VACATING the September 15, 2014 Hearing (IN CHAMBERS)**

Before the Court is Defendants' Motion to Dismiss. ("Motion," Doc. No. 20.) The Court finds this matter appropriate for resolution without a hearing pursuant to Local Rule 7-15. After considering the papers timely filed in support of and in opposition to the Motion, the Court GRANTS in part and DENIES in part the Motion and VACATES the September 15, 2014 hearing.

I. BACKGROUND

Plaintiff Scott Petersen ("Plaintiff") filed his First Amended Complaint ("FAC") against Defendants The Scotts Miracle Gro Company and The Scotts Company LLC (collectively "Defendants") on June 9, 2014. (Doc. No. 15.)

In the FAC, Plaintiff alleges that in November 2012, he purchased a bag of Defendants' GreenMax lawn fertilizer ("Greenmax") at Home Depot for $20.00. (FAC ¶ 7.) Greenmax is a high iron fertilizer. (FAC ¶¶ 16-17.) It contains 5.17 percent iron, while most fertilizer products contain less than 2 percent. (FAC ¶ 17.) High iron fertilizers represent a small portion of the fertilizer market, in part because their high iron content can cause rust stains on hard surfaces. (FAC ¶ 18.)

Before buying the fertilizer, Plaintiff reviewed the "Quick Start Guide" ("Guide") on the package. (Id.) The Guide includes three steps; the first two explain how to apply the fertilizer and the third gives instructions on cleaning up. (FAC ¶ 19.) Specifically, step three states

"sweeping product from hard surfaces onto the lawn keeps product on the grass and **prevents staining**." (Id., emphasis in original.) Plaintiff alleges he followed the Guide's directions but was still left with unsightly rust stains on his property. (FAC ¶ 7.) Plaintiff further alleges that Defendants have received numerous complaints on their website from other consumers who experienced rust stains. (FAC ¶ 23.) Defendants revised the Greenmax label after the action was filed to provide additional warnings, but have not recalled Greenmax bags with the previous label. (FAC ¶ 28.)

Plaintiff seeks to bring a consumer class action against Defendants. (FAC ¶ 2.) Plaintiff alleges that Plaintiff and other California consumers have suffered two forms of harm. (FAC ¶ 32.) First, the product that Plaintiff and other consumers purchased was worth less than they paid. (Id.) Second, Plaintiff and other consumers had to pay to remove the stains by purchasing stain removal products, hiring professionals to remove the stains, or be left with unsightly rust stains on their property. (Id.)

In the FAC, Plaintiff alleges seven causes of actions: (1) violation of the Magnuson-Moss Warranty Act; (2) violation of the California Consumers Legal Remedies Act; (3) violation of California's Unfair Competition Law; (4) violation of California's False Advertising Law; (5) breach of express warranty; (6) breach of implied warranty of merchantability; and (7) unjust enrichment. (FAC ¶¶ 40-92.) Defendants move to dismiss based on a lack of subject matter jurisdiction and failure to state a claim. (Motion at 1-2.)

II. LEGAL STANDARD[1]

Defendants move to dismiss the FAC pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction as well as pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief could be granted.

A. Rule 12(b)(1) Motion to Dismiss for Lack of Subject Matter Jurisdiction

Rule 12(b)(1) allows a party to file a motion to dismiss for lack of subject matter jurisdiction. A Rule 12(b)(1) motion may be either facial or factual. Wolfe v. Strankman, 392 F.3d 358, 362 (9th Cir.2004). A facial 12(b)(1) motion involves an inquiry confined to the allegations in the complaint, whereas a factual 12(b)(1) motion permits the court to look beyond the complaint to extrinsic evidence. Id. When a defendant makes a facial challenge, all material allegations in the complaint are assumed true, and the court must determine whether lack of federal jurisdiction appears from the face of the complaint itself. Thornhill Publ'g Co. v. General Tel. Elec., 594 F.2d 730, 733 (9th Cir.1979). In a factual challenge, the party opposing the motion must produce affidavits or other evidence necessary to satisfy its burden of establishing subject matter jurisdiction. Safe Air For Everyone v. Meyer, 373 F.3d 1035, 1039 (9th Cir. 2004). Under a factual attack, the court need not presume the plaintiff's allegations as true. White v. Lee, 227 F.3d 1214, 1242 (9th Cir. 2000); accord Augustine v. United States, 704 F.2d

[1] Unless otherwise noted, all mentions of "Rule" refer to the Federal Rules of Civil Procedure.

1074, 1077 (9th Cir. 1983). In the absence of a full-fledged evidentiary hearing, however, disputed facts pertinent to subject matter jurisdiction are viewed in the light most favorable to the nonmoving party. Dreier v. United States, 106 F.3d 844, 847 (9th Cir. 1996).

B. Rule 12(b)(6) Motion to Dismiss for Failure to State a Claim

Under Rule 12(b)(6), a party may bring a motion to dismiss for failure to state a claim upon which relief can be granted. As a general matter, the Federal Rules require only that a plaintiff provide "'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." Conley v. Gibson, 355 U.S. 41, 47 (1957) (quoting Fed. R. Civ. P. 8(a)(2)); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). When evaluating a Rule 12(b)(6) motion, a court must accept all material allegations in the complaint — as well as any reasonable inferences to be drawn from them — as true and construe them in the light most favorable to the non-moving party. See Doe v. United States, 419 F.3d 1058, 1062 (9th Cir. 2005); ARC Ecology v. U.S. Dep't of Air Force, 411 F.3d 1092, 1096 (9th Cir. 2005); Moyo v. Gomez, 32 F.3d 1382, 1384 (9th Cir. 1994).

To survive a motion to dismiss, a plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." Twombly, 550 U.S. at 570; Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 1949 (2009). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it stops short of the line between possibility and plausibility of 'entitlement to relief.'" Iqbal, 129 S. Ct. at 1949 (quoting Twombly, 550 U.S. at 556). The Ninth Circuit has clarified that (1) a complaint must "contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively," and (2) "the factual allegations that are taken as true must plausibly suggest an entitlement to relief, such that it is not unfair to require the opposing the party to be subjected to the expense of discovery and continued litigation." Starr v. Baca, 652 F.3d 1202, 1216 (9th Cir. 2011).

III. DISCUSSION

Defendants offer several arguments in support of their Motion to Dismiss. Defendants first challenge Plaintiff's class allegations as insufficient to state a claim, then argue that this Court lacks jurisdiction to hear the class action. In the alternative, Defendants contend that Plaintiff fails to allege facts sufficient to state a claim for his state law causes of action.

A. Defendants' Motion to Dismiss for Failure to State a Claim Based on Adequacy of the Class Allegations

Defendants' first argument centers on the adequacy of Plaintiff's class allegations. Defendants contend that Plaintiff does not adequately plead facts showing (1) a definable class (2) the class is so numerous that the joinder of all members of the class is impracticable (3) common questions of law or fact predominate (4) Plaintiff's claims are typical of the class; and (5) Plaintiff is an adequate representative. (Motion at 9.) Plaintiff responds that these arguments are premature and are more appropriately resolved at the class certification stage.

While Defendants cite several cases for the proposition that class allegations can be stricken at the pleadings stage, it is in fact rare to do so in advance of a motion for class certification. See, e.g., In re Wal–Mart Stores, Inc. Wage and Hour Litig., 505 F.Supp.2d 609, 614–16 (N.D. Cal. 2007) ("the granting of motions to dismiss class allegations before discovery has commenced is rare"); Moreno v. Baca, 2000 WL 33356835 at *2 (C.D. Cal. 2000) (holding that defendants' motion to strike class allegations was premature because no motion for class certification had been filed); See also In re Saturn L–Series Timing Chain Prods. Liab. Litig., 2008 WL 4866604, *24 (D. Neb. Nov. 7, 2008) ("Even where plaintiffs' class definitions are suspicious and may in fact be improper, plaintiffs should at least be given the opportunity to make the case for certification based on appropriate discovery of, for example, the ... lists that they claim will identify the class members"); In re NVIDIA GPU Litig., 2009 WL 4020104, *13 (N.D. Cal. Nov. 19, 2009) ("A determination of the ascertainability and manageability of the putative class in light of the class allegations is best addressed at the class certification stage of the litigation"); In re Jamster Mktg. Litig., 2009 WL 1456632, *7 (S.D. Cal. May 22, 2009) ("Even though the arguments of [the defendant] may ultimately prove persuasive, the court declines to address issues of class certification at the present time. Piece-meal resolution of issues related to the prerequisites for maintaining a class action do not serve the best interests of the court or parties"); Beauperthuy v. 24 Hour Fitness USA, Inc., No. 06–0715 SC, 2006 WL 3422198, *3 (N.D. Cal. Nov. 28, 2006) (finding that a motion to strike class allegations from a complaint "is an improper attempt to argue against class certification before the motion for class certification has been made and while discovery regarding class certification is not yet complete"); Cole v. Asurion Corp., 2008 WL 5423859, *14 (C.D. Cal. Dec. 30, 2008) ("Undoubtedly, addressing these arguments at a later date will require additional time and expense on the part of the defendants. But the Court is reluctant to preemptively deny Plaintiff at least the opportunity to present a motion for class certification").

Along similar lines, one district court in this circuit has found:

> First, Rule 12(b)(6) permits a party to assert a defense that the opposing party has failed "to state a claim upon which relief can be granted." A class action is a procedural device, not a claim for relief. See Deposit Guaranty Nat'l Bank v. Roper, 445 U.S. 326, 331 (1980). Second, other Federal Rules of Civil Procedure exist to address impertinent allegations and class certification. Thus, the use of Rule 12(b)(6) to address the same would create redundancies in the Federal Rules. Finally, the standard of review applied to orders granting motions to dismiss differs from that governing orders granting or denying class certification. The Ninth Circuit reviews de novo orders dismissing claims pursuant to Rule 12(b)(6). Whittlestone, Inc. v. Handi–Craft Co., 618 F.3d 970, 974 (9th Cir. 2010). Grants and denials of class certification, however, are reviewed for abuse of discretion. Marlo v. United Parcel Serv., 639 F.3d 942, 946 (9th Cir. 2011).

Clerkin v. MyLife.Com, 2011 WL 3809912 at *3 (N.D. Cal. Aug. 29, 2011) (directing defendants to present their arguments as an opposition to plaintiffs' motion for class certification).

In the present case, Defendants have yet to file an answer and no class discovery has occurred. Given the relatively early stage of the proceedings, it is premature to determine whether this matter should proceed as a class action, and Defendants' request for dismissal on that basis is inappropriate. Defendants seek to bring a Rule 23 motion under a different guise. Accordingly, the court DENIES Defendants' Motion to Dismiss for failure to state a claim based on class adequacy grounds.

B. Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction

However, Defendants' motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1) is appropriately addressed at this early stage, as the case cannot proceed absent federal jurisdiction. Plaintiff contends that this Court has subject matter jurisdiction over his class action complaint pursuant to the Class Action Fairness Act ("CAFA"), 28 U.S.C. § 1332(d). (FAC ¶ 11.) CAFA is the sole remaining basis for federal jurisdiction[2], as Plaintiff does not allege his individual claims exceed $75,000. Defendants argue that Plaintiff has not alleged sufficient facts to meet CAFA's amount in controversy requirement.

CAFA vests original diversity jurisdiction in district courts to hear civil class actions "in which the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs." 28 U.S.C. § 1332(d)(2); see also Luther v. Countrywide Homes Loans Servicing LP, 533 F.3d 1031, 1033-34 (9th Cir. 2008).

As the party invoking federal jurisdiction, Plaintiff has the burden of establishing the existence of subject matter jurisdiction. See Kokkonen v. Guardian Life Ins. Co., 511 U.S. 375, 377 (1994); In re Ford Motor Co., 264 F.3d 952, 957 (9th Cir. 2001); Thompson v. McCombe, 99 F.3d 352, 353 (9th Cir. 1996). The rule is the same where jurisdiction is predicated on CAFA. Abrego Abrego v. The Dow Chemical Co., 443 F.3d 676, 685 (9th Cir. 2006). A putative class action must demonstrate, by a preponderance of evidence, that the aggregate amount in controversy exceeds the jurisdictional minimum. Rodriguez v. AT & T Mobility Servs. LLC, 728 F.3d 975, 981 (9th Cir. 2013). "When challenged on allegations of jurisdictional facts, the parties must support their allegations by competent proof ." Hertz Corp. v. Friend, 559 U.S. 77, 96–97 (2010) (internal citations omitted).

Plaintiff's efforts to meet the $5 million dollar threshold are minimal. The FAC conclusorily alleges that the amount in controversy exceeds the $5 million dollar threshold. (FAC ¶ 11.) Plaintiff "estimates that the total number of Class members exceeds one hundred thousand." (FAC ¶ 35.) He provides no further allegations to arrive at the $5 million dollar

[2] Plaintiff has withdrawn his Magnuson Moss Warranty Act Claim (Opp'n at 1), and his remaining claims are based on state law. Plaintiff has also withdrawn his implied warranty of merchantability claim. (Id.)

threshold. It is unclear how Plaintiff estimated the class size. It is also unclear what Plaintiff's specific damages were. Absent such facts, Plaintiff has not adequately pled that there is, in the aggregate, at least $5,000,000 in controversy. The Court may not exercise jurisdiction under CAFA on the basis of this type of speculation.

Furthermore, Plaintiff's Opposition fails to provide sufficient support, especially after being challenged on jurisdictional grounds. Plaintiff provides evidence that annual sales for GreenMax were roughly $14-15 million per year nationwide. However, there is no evidence about sales in California specifically. Plaintiff merely speculates "because California includes more than 12% of the U.S. population and because residents in much of the state maintain their lawns throughout the year, sales of [GreenMax] in California during the class period likely exceed $5 million." (Opp'n at 8.) Plaintiff has not defined the class period, so the Court cannot follow this line of reasoning.

Plaintiff also argues that property damage claims could "add another several million dollars" to Defendants' liability. (Opp'n at 8.) Plaintiff appears to base this claim on the assertion that "it is plausible and even likely that an individual claim for property damage could exceed $10,000 . . . [t]here are likely hundreds of such claims in California". (Opp'n at 9.) However, Plaintiff failed to even plead his specific property damage claims, so the Court is left to guess upon the provenance of the above extrapolation.

Plaintiff's remaining efforts to meet the threshold are likewise speculative. First, Plaintiff argues that punitive damages may lie in this case (Opp'n at 9), citing to one conclusory statement in the FAC. (FAC ¶ 62.) The paragraph Plaintiff cites alleges fraud under the UCL. (Id.) However, punitive damages are not recoverable in a UCL action. Yanting Zhang v. Superior Court, 57 Cal. 4th 364, 376 (2013). Second, Plaintiff argues that attorney's fees may be awarded in this case, stating "[a]ttorneys' fees in this action if litigated to trial could easily reach seven figures." (Opp'n at 9.) However, even if correctly included in the aggregate amount, the hypothetical attorneys' fees must be based on some form of computation or calculation, not pulled from thin air. Finally, Plaintiff contends that if his injunctive relief claim is successful, the cost to Defendants of a "full product recall, in store stickering and/or the destruction of (GreenMax) products could add several million dollars to the amount in controversy." (Opp'n at 9.) This unsupported conclusion, once again, is overly speculative. There is no evidence provided to show how Plaintiff arrived at this figure.

Accordingly, the Court GRANTS Defendants' Motion to Dismiss for lack of subject matter jurisdiction. Plaintiff's FAC is DISMISSED with LEAVE TO AMEND. Because the Court grants the Motion to Dismiss, it need not take up Defendants' remaining contentions.

IV. CONCLUSION

For the foregoing reasons, the Court DENIES Defendants' Motion to Dismiss for failure to state a claim based on class adequacy allegations. The Court GRANTS Defendants' Motion to dismiss for lack of subject matter jurisdiction, DISMISSES the Complaint WITH LEAVE TO AMEND, and VACATES the September 15, 2014 hearing. Plaintiff shall file an amended

complaint, if any, by September 29, 2014. Failure to file an amended complaint shall be deemed consent to the dismissal of this action.

IT IS SO ORDERED.