

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA
Miami Division

Case Number: 14-23309-CIV-MORENO

MARIA HOSTRUP,

Plaintiff,

vs.

HI-TECH PHARMACEUTICALS, INC.,

Defendant.

**ORDER GRANTING MOTION TO DISMISS AND GRANTING PLAINTIFF
LEAVE TO AMEND THE COMPLAINT**

This Class Action Fairness Act case seeks redress for Defendant's alleged fraud in selling Garcinia Cambogia, an herbal supplement that is advertised as a revolutionary fat buster. Defendant has moved to dismiss arguing the Court lacks jurisdiction because the amount-in-controversy is not met. The Court agrees and dismisses the case without prejudice. Plaintiff may re-plead the complaint to provide the Court with additional support that the jurisdictional amount is met.

THIS CAUSE came before the Court upon the Defendant's Motion to Dismiss (**D.E. No. 9**), filed on **October 24, 2014**.

THE COURT has considered the motion, the response, and the pertinent portions of the record, and being otherwise fully advised in the premises, it is

ADJUDGED that the motion is GRANTED. Plaintiff may file an amended complaint

consistent with this order by no later than **April 15, 2015**. Failure to do so may result in the Court closing the case.

I. Factual Background

Plaintiff, Maria Hostrup, filed a class action complaint seeking to recover damages for her purchase of Garcinia Cambogia. She alleges on behalf of a class that Defendant Hi-Tech Pharmaceuticals, Inc. made false claims regarding the supplement's weight-loss efficacy. The Class Action Complaint contains five counts alleging breach of express warranty (Count I), fraud by uniform written misrepresentation and omission (Count II), violation of the Florida Deceptive and Unfair Trade Practices Act (FDUPTA) (Count III); unjust enrichment (Count IV), and entitlement to final injunctive relief (Count V). Defendant has moved to dismiss the Class Action Complaint arguing the Plaintiff has not pled sufficient facts to establish subject matter jurisdiction under the Class Action Fairness Act, and she failed to plead fraud with particularity as required by Federal Rule of Civil Procedure 9(b). Defendant also moves to dismiss for failure to state a claim.

Plaintiff alleges Defendant made false claims regarding the efficacy of Garcinia Cambogia with respect to fat burning, metabolism boosting, weight loss, and appetite suppression. Plaintiff claims Defendant had access to substantial scientific research refuting the claims of fat burning, weight loss, and appetite suppression. The product's label indicates the product provides "natural appetite control," "boosts metabolism and burn[s] fat" and "promotes weight loss."

Plaintiff bought one bottle of Garcinia Cambogia in March 2013 at

puregarciniacambogia.com, one at a CVS pharmacy in October 2013, and one on Amazon in January 2014. She also states that in the months leading up to her purchases she watched the Dr. Mehmet Oz show, and he touted the efficacy of Garcinia Cambogia as a revolutionary fat buster, with the words “No Exercise, No Diet, No Effort” on the screen behind him.

Plaintiff explains in her complaint that a number of studies on Garcinia Cambogia revealed the supplement failed to produce weight loss. Given these studies, the Plaintiff’s complaint alleges that Defendant knew Garcinia Cambogia did not control appetite, boost metabolism, burn fat, and promote weight loss. Plaintiff believed Garcinia Cambogia would provide her with the stated benefits.

II. Analysis

A. Jurisdiction under the Class Action Fairness Act

At issue in the motion to dismiss is the Court’s jurisdiction under the Class Action Fairness Act. Plaintiff has the burden of demonstrating that the amount in controversy exceeds \$5 million. 28 U.S.C. § 1332(d)(2). The Eleventh Circuit has held that when the “allegations of jurisdictional facts are challenged by [an] adversary in any appropriate manner, [a plaintiff] must support them by competent proof.” *Pretka v. Kolter City Plaza, II, Inc.*, 608 F.3d 744, 764 (11th Cir. 2010). The Eleventh Circuit has also set forth a standard where jurisdiction is based on a claim for indeterminate damages. It held:

Where jurisdiction is based on a claim for indeterminate damages, the ‘legal certainty’ test gives way, and the party seeking to invoke federal jurisdiction bears the burden of proving by a preponderance of the evidence that the claim on which it is basing jurisdiction meets the jurisdictional minimum.

Bradley v. Kelly Servs., Inc., 224 Fed. App'x. 893, 895 (11th Cir. 2007). Put eloquently, “[j]urisdiction is not conferred by the stroke of a lawyer’s pen. When challenged, it must be adequately founded in fact.” *Morrison v. Allstate Indem. Co.*, 228 F.3d 1255, 1272 (11th Cir. 2000) (quoting *Diefenthal v. Civil Aeronautics Bd.*, 681 F.2d 1039 (5th Cir. 1982)).

In the Class Action Complaint, Plaintiff alleges the \$5 million dollar amount-in-controversy is met. To support this, Plaintiff alleges there are hundreds or thousands of Florida residents and many thousands of United States residents that are members of a class. Plaintiff does not provide any factual support to support her allegation as to the number of class members, nor does she provide a statement of her own damages. She does not explain how the \$5,000,000 is met in the Class Action Complaint.

Rather than provide some evidence of the claim on which she is basing jurisdiction, the Plaintiff urges the Court to follow the standard set forth in *Int’l Christian Broad, Inc. v. Koper*, 928 F. Supp. 2d 559, 562 (E.D.N.Y. 2013). The *Koper* case states that the reasonable probability that the claim is in excess of the jurisdictional amount is “easily met, since there exists a rebuttable presumption that the face of a plaintiff’s complaint is a ‘good faith representation of the actual amount in controversy.’” *Id.* *Koper* adds that “[t]o overcome this presumption, the party opposing jurisdiction must show ‘to a legal certainty’ that the amount sought is below the jurisdictional minimum.” *Id.* *Koper* is not binding precedent in this district. This Court follows the guidance of the Eleventh Circuit in *Pretka*, *Bradley*, and *Morrison*.

While this Court gives due credit to the good faith claims of the Plaintiff, it would be

“remiss in its obligations if it accepted every claim of damages at face value.” *Morrison*, 228 F.3d at 1272.

This court has an obligation to “scrupulously enforce its jurisdictional limitations.” *Id.* Plaintiff’s conclusory allegation that the requirement is met, without more, is insufficient. Accordingly, the Court grants the motion to dismiss and dismisses the case without prejudice. Having found the Plaintiff has failed to sufficiently show the Court has jurisdiction under the Class Action Fairness Act, the Court need not reach the other issues briefed in the motion to dismiss.

DONE AND ORDERED in Chambers at Miami, Florida, this 17 day of March, 2015.



FEDERICO A. MORENO
UNITED STATES DISTRICT JUDGE

Copies provided to:

Counsel of Record