UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

JONATHAN KANFER, on behalf of himself and all others similarly situated, Plaintiff, v. PHARMACARE US, INC., Defendant.	Case No.: 3:15-cv-00120-H-JLB **ORDER GRANTING DEFENDANTS MOTION FOR SUMMARY JUDGMENT** [Doc. No. 79]

On September 15, 2016, Defendant filed a motion for summary judgment. (Doc. No. 74.) On October 3, 2016, Plaintiff filed an opposition to Defendant's motion. (Doc. No. 79.) On October 7, 2016, Defendant filed a reply to Plaintiff's opposition. (Doc. No. 80.) For the reasons set forth below, the Court grants Defendant's motion for summary judgment as to all claims other than the Magnuson-Moss Warranty Act claim, which the Court dismisses for lack of jurisdiction.

BACKGROUND

Plaintiff Jonathan Kanfer filed this case on January 20, 2015. (Doc. No. 1.) He filed the operative first amended complaint (hereinafter "FAC") on June 19, 2015. (Doc. No. 31.) Plaintiff alleges that the labeling on Defendant's product IntenseX violates federal and California state law because IntenseX is an unapproved aphrodisiac drug and

the label claims are false or misleading. (Id.) He alleges that he bought IntenseX because he believed it "had powerful aphrodisiac qualities and would improve his sexual power and performance" but did not experience those benefits and IntenseX is incapable of providing those benefits. (Id. ¶¶ 65-66.)

Plaintiff alleges violations of California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code § 17200 et seq.; False Advertising Law ("FAL"), Cal. Bus. & Prof. Code § 17500 et seq.; Consumer Legal Remedies Act ("CLRA"), Cal. Civ. Code § 1770 et seq.; breach of express warranty; breach of the implied warranty of merchantability; and violation of the federal Magnuson-Moss Warranty Act ("MMWA"), 15 U.S.C. §§ 2301, et seq. (FAC ¶¶ 85-135.) Plaintiff alleges jurisdiction under the Class Action Fairness Act, 28 U.S.C. § 1332(d)(2). (Id. ¶ 6.)

On November 4, 2015, the Court denied Defendant's motion dismiss and strike portions of Plaintiff's first amended complaint. (Doc. No. 43.) The Court concluded that the Food, Drug, and Cosmetic Act preempted Plaintiff's theory that the IntenseX label made impermissible disease claims but did not preempt Plaintiff's other theories. (Id. at 7-10.) The Court determined that many of the remaining claims were better suited for resolution at summary judgment. (Id. at 21.)

Defendant answered on November 18, 2015. (Doc. No. 44.) Following a case management conference, on January 5, 2016, the Court entered a scheduling order regulating discovery and pretrial proceedings. (Doc. No. 52.) The scheduling order specified that all discovery, including expert discovery, must be completed by September 6, 2016. (Id. ¶2.) The order directed the parties to disclose their experts by July 6, 2016, and their rebuttal experts by August 5, 2016, and to comply with the corresponding disclosure requirements of Rule 26(a)(2) of the Federal Rules of Civil Procedure by those dates. (Id. ¶¶ 3-5.) The scheduling order further specified that any party that failed to make the required disclosures would not, absent substantial justification, be permitted to use the undisclosed evidence or testimony at any hearing or at trial, and could be subject to sanctions under Rule 37. (Id. ¶¶ 4, 6.) The order also specified that any motion for

class certification had to be filed so as to be heard by June 6, 2016, and all other pretrial motions had to be filed so as to be heard by October 17, 2016. (Id. ¶¶ 7-8.)

On May 9, 2016, Plaintiff filed a motion for certification of a nationwide class under California law challenging claims on the product label and the product website, for a period spanning more than a decade. (Doc. No. 59 at 4-5.) Plaintiff's motion also asked the Court to consolidate the case with a related case, Sandoval v. Pharmacare US, Inc., No. 3:15-cv-00738-H-JLB, because of the substantial overlap between the cases. (Id. at 25.) On May 23, 2016, Defendants filed a response to Plaintiff's motion for certification. (Doc. No. 65.) On May 27, 2016, Plaintiff filed his reply in support of his motion for class certification. (Doc. No. 71.)

On June 6, 2016, the Court held a hearing on the motion for class certification. (Doc. No. 72.) On June 10, 2016, the Court denied certification. (Doc. No. 73.) Among other difficulties, a classwide inference of reliance was not appropriate under In re Tobacco II Cases, 46 Cal. 4th 298 (2009), because consumers were not exposed to a widespread, long-term common marketing campaign. (Id. at 8.) Additionally, Plaintiff did not submit sufficient evidence that the challenged representations were material to consumers, that any significant portion of consumers shared Plaintiff's understanding of the effects IntenseX would have, or that others similarly found the product lacking. (Id.) As for Plaintiff's theory that IntenseX is a mislabeled aphrodisiac, he has not shown that the regulation he relied on, which facially applies only to over-the-counter drugs, applied to a supplement like IntenseX. (Id. at 9.) Additionally, the Court noted choice-of-law problems with the proposed nationwide class, as well as difficulties with standing, the statutes of limitations, calculating the correct monetary remedy, and identifying class members. (Id. at 5-6, 9 n.3, 10-14.)

On September 15, 2016, Defendant filed a motion for summary judgment. (Doc. No. 74.) On September 16, 2016, Plaintiff filed an ex parte motion to stay the proceedings pending appeal of the related case, Sandoval v. Pharmacare US, Inc. (Doc. No. 75.) On September 23, 2016, the Court denied Plaintiff's motion to stay. (Doc. No.

78.) On October 3, 2016, Plaintiff filed his opposition to Defendant's motion for summary judgment. (Doc. No. 79.) On October 7, 2016, Defendant filed a reply. (Doc. No. 80.)

DISCUSSION

I. LEGAL STANDARD

Summary judgment is proper when a moving party shows there is no genuine dispute of material fact and they are entitled to judgment as a matter of law. See Fed. R. Civ. P. 56; Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). To be "genuine" a dispute must be more than "some metaphysical doubt." Matsushita Elec. Indus. Co., Ltd. V. Zenith Radio Corp., 475 U.S. 574, 587 (1986) (internal quotations omitted). There is no genuine dispute if "the record taken as a whole could not lead a rational trier of fact to find for the non-moving party." Id. A fact is material if it could affect the outcome of the case, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986), and "[d]isputes over irrelevant or unnecessary facts will not preclude a grant of summary judgment," T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987).

The moving party bears the initial burden of producing evidence showing they are entitled to summary judgment. Celotex Corp., 477 U.S. at 330. How the moving party satisfies this burden depends on whether they bear the burden of persuasion at trial. Id. at 331. If the moving party bears the burden of persuasion at trial, they must produce credible evidence entitling them to a directed verdict if uncontroverted. Id. If the non-moving party bears the burden of persuasion at trial the moving party may satisfy their burden either by (1) producing evidence that negates an essential element of the non-moving party's claim or (2) demonstrating that the nonmoving party's evidence is insufficient to establish an essential element of the nonmoving party's claim. Id.

If the moving party satisfies their initial burden, then the burden shifts to the nonmoving party to introduce evidence showing there is a genuine dispute of material fact. Id. at 331; see also T.W. Elec. Serv., Inc., 809 F.2d at 630. To satisfy its burden, the non-moving party "may not rest upon mere allegations or denials of his pleadings."

Anderson, 477 U.S. at 256. Rather, the nonmoving party "must present affirmative evidence . . . from which a jury might return a verdict in his favor." Id.

A. UCL, FAL, and CLRA Claims

Plaintiff asserts claims under the UCL, FAL, and CLRA. (FAC ¶¶ 85-113.) Defendant contends that it is entitled to summary judgment on these claims because Plaintiff cannot challenge the statements on the IntenseX website, the statements on the IntenseX label are not actionable, and Plaintiff is not entitled to the remedies he prays for in his first amended complaint. (Doc. No. 74-1 at 3-11.) Plaintiff opposes. (Doc. No. 79 at 3-6.)

Regarding the statements on the IntenseX website, Defendant points out that "actual reliance" is a necessary element of a fraud claim under the UCL, FAL, and CLRA. See Kwikset Corp. v. Superior Court, 51 Cal. 4th 310, 326 (2011); In re Tobacco II Cases, 46 Cal. 4th 298, 326 (2009); Sevidal v. Target Corp., 189 Cal. App. 4th 905, 928 (2010). Plaintiff claims there is a material dispute of fact as to whether he relied on the IntenseX website, (Doc. No. 79 at 3-6), but the record shows otherwise. At his deposition, Plaintiff repeatedly testified that he only relied on statements appearing on the IntenseX package when purchasing the product. (E.g., Doc. No. 74-5 at 49:9-12) ("Q: Have you given me all of the reasons why you purchased IntenseX ¶ A. The reason was simple, the advertising on the box drew my attention to it.") (see also Doc. No. 74-5 at 38:5-18; 52:11-18) Moreover, Plaintiff's complaint does not allege Plaintiff ever looked at Defendant's website prior to purchasing IntenseX. (See FAC ¶ 64.)

Plaintiff argues that he does not need to show reliance for his "unlawful" claims because "illegalness is considered material." (Doc. No. 79 at 9.) But his authority does not stand for such a broad rule. See In re Steroid Hormone Prod. Cases, 181 Cal. App. 4th 145, 157 (2010) (holding that a reasonable person would find it material that the product was "unlawful to sell or possess"). Moreover, Plaintiff's "unlawful" claims are premised on fraud, hence subject to the "actual reliance" requirement like any other fraud claim. See Kwikset Corp., 51 Cal. 4th at 326 n.9. Accordingly, the Court grants

judgment for Defendant on Plaintiff's theories related to the claims on the IntenseX website.

As for Plaintiff's claims that the IntenseX label is false and misleading, Defendant argues that the statements on the label are too generalized and vague to be actionable. (Doc. No. 74-1 at 6-8.) Claims of false or misleading advertising are governed by the "reasonable consumer" test. Williams v. Gerber Prods. Co., 552 F.3d 934, 938 (9th Cir. 2008). To satisfy the test, a plaintiff must show that "members of the public are likely to be deceived." Freeman v. Time, Inc., 68 F.3d 285, 289 (9th Cir. 1995) (internal quotation marks omitted). "Likely to be deceived" means that "it is probable that a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled." Lavie v. Procter & Gamble Co., 105 Cal. App. 4th 496, 508 (2003). "[I]f the alleged misrepresentation, in context, is such that no reasonable consumer could be misled, then the allegation may . . . be dismissed as a matter of law." Haskell v. Time, Inc., 857 F. Supp. 1392, 1399 (E.D. Cal. 1994).

Moreover, Plaintiff has a claim for false advertising only to the extent the product claims are false or misleading, as opposed to merely unsubstantiated. See In re Clorox Consumer Litig., 894 F. Supp. 2d 1224, 1232 (N.D. Cal. 2012) ("Consumer claims for a lack of substantiation are not cognizable under California law."); Nat'l Council Against Health Fraud, Inc. v. King Bio Pharm., Inc., 107 Cal. App. 4th 1336, 1245 (2003) ("Private plaintiffs are not authorized to demand substantiation for advertising claims."). A plaintiff can carry his burden of showing that claims are false with studies showing that a statement is false. See Bronson v. Johnson & Johnson, Inc., 2013 WL 1629191, at *8 (N.D. Cal. Apr. 16, 2013). However, "reliance on a lack of scientific evidence or inconclusive, rather than contradictory, evidence is not sufficient." Id.

The IntenseX label bears the IntenseX logo and statements including "Sexual Power and Performance," "Fast Acting!" and "designed to intensify your endurance, stamina, and sexual performance." (Doc. No. 74-5 at 157-58; see also Doc. No. 31.) As Plaintiff's own expert points out, however, "the vague language used with respect to

IntenseX effects on sexuality ('sexual power and performance') has no support as such terms remain scientifically undefined and therefore untestable." (Doc. No. 74-10 at 11 ¶ 26.) Thus, it is not plausible that a "significant portion of the general public" would be misled. See, e.g., Ebner v. Fresh, Inc., 2016 WL 5389307, at *6 (9th Cir. Sept. 27, 2016) (affirming the district court's dismissal of a label-based claim for failing to state a claim).

Next, Defendant argues that it is entitled to summary judgment on Plaintiff's claim that IntenseX is unlawful because its label makes impermissible "disease" claims. (Doc. No. 74-1 at 5-6.) In the November 4, 2015 order on Defendant's motion to dismiss and strike Plaintiff's first amended complaint, the Court concluded that the Food, Drug, and Cosmetic Act preempts Plaintiff's theory that the IntenseX label makes impermissible "disease" claims. (Doc. No. 43 at 8.) Accordingly, the Court grants judgment for Defendant on this claim.

Similarly, in the order on Plaintiff's motion for class certification, the Court noted that the regulation Plaintiff relies on to contend that IntenseX is a mislabeled aphrodisiac drug, 21 C.F.R. § 310.528, facially applies only to over-the-counter drugs, and that over-the-counter drugs and supplements are subject to different regulatory schemes. (Doc. No. 73 at 9.) Plaintiff contends that an FDA enforcement letter for another product shows that the FDA applies the regulation to supplements. (Doc. No. 79 at 8.) But Plaintiff has not shown that the regulation applies to IntenseX. Accordingly, the Court grants summary judgment for Defendant on Plaintiff's claims under UCL, FAL, and CLRA.

B. State-Law Warranty Claims

Plaintiff asserts claims under state law for breach of express warranty and breach of the implied warranty of merchantability. (Doc. No. 31 ¶¶ 114-24.) Defendant points out, correctly, that Plaintiff cannot rest his express warranty claim on the statements on the IntenseX website. (Doc. No. 47-1 at 18-19.) Plaintiff testified at his deposition that he did not buy IntenseX from Defendant, (Doc. No. 74-5 at 43:12-44:11.), and did not rely on the statements on the IntenseX website when making his purchases, (Doc. No. 74-5 at 39:5-18, 50:9-12; 53:11-18). "[I]n the absence of privity, California law requires a

showing that a plaintiff relied on an alleged omission or misrepresentation." Keegan v. Am. Honda Motor Co., 284 F.R.D. 504, 546 (C.D. Cal. 2012).

As for warranties created by the IntenseX label, Defendant argues that Plaintiff cannot establish that the label created a warranty and that Plaintiff did not reasonably rely on the statements that purportedly created a warranty. (Doc. No. 74-1 at 17-19).

Any affirmation of fact or promise relating to a product or any description of the product that becomes part of the basis of the bargain creates and express warranty that the product will conform to the affirmation, promise, or description." See Hauter v. Zogarts, 14 Cal. 3d 104, 115 n.9 (1975). An express warranty claim requires the plaintiff to prove a warranty has been breached. See Scott v. Metabolife Int'l, Inc., 115 Cal. App. 4th 404, 415-16 (2004). Similarly, a plaintiff who claims a breach of the implied warranty of merchantability must show that the product did not "conform to the promises or affirmations of fact made on the container or label," or was not "fit for the ordinary use for which such goods are used." Hauter, 14 Cal. 3d at 117-18.

These claims, like Plaintiff's UCL, FAL, and CLRA claims, rely on the theory that the label made promises that were not true. They fall short for the same reasons. Accordingly, the Court grants judgment for Defendant on Plaintiff's warranty claims.

C. Magnuson-Moss Warranty Act Claim

Last, Plaintiff asserts a claim under the federal Magnuson-Moss Warranty Act. (Doc. No. 31 ¶¶ 125-35.) As Defendant points out, however, the Magnuson-Moss Warranty Act has a jurisdictional minimum that Plaintiff's claim does not satisfy:

> No claim shall be cognizable in a suit brought under paragraph (1)(B) of this subsection—
>
> (A) if the amount in controversy of any individual claim is less than the sum or value of $25;
>
> (B) if the amount in controversy is less than the sum or value of $50,000 (exclusive of interests and costs) computed on the basis of all claims to be determined in this uit; or

(C) if the action is brought as a class action, and the number of named plaintiffs is less than one hundred.

15 U.S.C. § 2310(d)(3).

This case is no longer a putative class action, and Plaintiff only purchased IntenseX on four occasions. (Doc. No. 74-5 at 41:13-18.) Each time Plaintiff purchased IntenseX he paid between $9-10. As a result, this Court lacks jurisdiction over Plaintiff's Magnuson-Moss warranty claim and dismisses it on that basis.

CONCLUSION

For the foregoing reasons, the Court grants Defendant's motion for summary judgment as to all claims other than the Magnuson-Moss Warranty Act claim, which the Court dismisses for lack of jurisdiction. (Doc. No. 74.)

IT IS SO ORDERED.

DATED: October 13, 2016

Hon. Marilyn L. Huff
United States District Judge