UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

PHORNPHAN CHUBCHAI, ET AL.,

Plaintiffs,

v.

ABBVIE, INC. f/k/a ALLERGAN, INC., f/k/a ALLERGAN PLC, and f/k/a ZELTIQ AESTHETICS, INC.,

Defendant.

Case No. 4:21-cv-4099-YGR

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

Dkt. No. 41

Plaintiffs Phornphan Chubchai, Javier Valencia, and Paula Brooks, individually and on behalf of all others similarly situated bring this purported class action against defendant AbbVie, Inc. ("AbbVie") f/k/a Allergan, Inc., f/k/a Allergan plc, and f/k/a Zeltiq Aesthetics, Inc. ("Zeltiq"). Pending before the Court is defendant AbbVie's motion to dismiss the Second Amended Complaint at Docket Number 37 ("SAC"). AbbVie argues that personal jurisdiction is lacking over it because Zeltiq is the proper entity to sue. AbbVie also contends that plaintiffs have failed to state a claim. Having considered the papers submitted and the pleadings in this action, and for the reasons below, the Court hereby **GRANTS** defendant's motion to dismiss for lack of personal jurisdiction.[1]

I. BACKGROUND

The Court assumes the parties' familiarity with the factual allegations in the SAC as well as the procedural posture of this case. Certain factual allegations are described from the SAC as follows:

This action involves side effects resulting from the use of a medical device called the

[1] Pursuant to Federal Rule of Civil Procedure 78(b) and Civil Local Rule 7-1(b), the Court finds this motion appropriate for decision without oral argument.

CoolSculpting System, which is used to perform body contouring and fat reduction procedures through a process called Crypolipolysis. Certain individuals that used CoolSculpting developed a serious condition called Paradoxical Adipose Hyperplasia ("PAH"), which causes enlargement and hardening of fat tissues in areas that were treated through CoolSculpting. Correcting PAH requires invasive reconstructive surgery. Plaintiffs collectively bring ten claims related to the CoolSculpting System.[2]

The crux of plaintiffs' jurisdictional theory is that AbbVie has been responsible for all aspects of the CoolSculpting business based out of California. Prior to April 2017, Zeltiq was the entity responsible for designing, manufacturing, marketing, and labeling of the CoolSculpting medical device and operated out of Pleasanton, California. (SAC ¶ 14.) However, as alleged, on April 28, 2017, Zeltiq was wholly acquired by Allergan Holdco US, Inc. ("Allergan US") via a statutory merger. Plaintiff alleges that after the merger Allergan (as an undefined entity in the SAC) managed all aspects of the CoolSculpting business. (*Id.* ¶ 15.) On May 8, 2020, AbbVie acquired Allergan plc, Allergan, Inc., and Zeltiq, through a complete merger and is the current owner of the CoolSculpting medical device. (*Id.* ¶ 11, 17.) After the merger, Allergan's executives were terminated and AbbVie became the new party responsible for CoolSculpting. (*Id.* ¶ 17.) As alleged, AbbVie executives took control of Zeltiq, was financially responsible for Zeltiq's debts, paid Zeltiq's legal fees for CoolSculpting litigation, and maintained sole responsibility for all aspects of CoolSculpting operations relevant to this case.

Plaintiffs allege that defendant AbbVie is a corporation formed under the laws of Delaware with its principal place of business in Chicago. (*Id.* ¶ 11.) However, plaintiffs allege that all relevant acts, including the corporate decisions related to selling, promoting, manufacturing, advertising, and labeling the CoolSculpting device were made in California. (*Id.* ¶¶ 12-13.)

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[2] Namely, plaintiffs sue for strict liability (failure to warn), negligence, negligent misrepresentation and concealment, fraudulent misrepresentation and concealment, violation of the California False Advertising Law, violation of the California Consumer Legal Remedies Act, violation of the California Unfair Competition Law, violations of the New York General Business Law, and violation of the Massachusetts Consumer Protection Law.

II. LEGAL STANDARD

A. MOTION TO DISMISS PURSUANT TO RULE 12(b)(2)

Under Federal Rule of Civil Procedure Rule 12(b)(2), a defendant may be dismissed if the court lacks personal jurisdiction over it. The party filing the complaint bears the burden to establish jurisdiction. *Boschetto v. Hansing*, 539 F.3d 1011, 1015 (9th Cir. 2008); *see also Schwarzenegger v. Fred Martin Motor Co*., 374 F.3d 797, 800 (9th Cir. 2004). Federal courts ordinarily follow state law in determining the bounds of their jurisdiction over parties, looking to the state's long arm statute regarding service of summons. *See* Fed. R. Civ. Proc. 4(k)(1)(A) (service of process effective to establish personal jurisdiction over defendant subject to jurisdiction in the state court where the district is located); *Daimler AG v. Bauman*, 571 U.S. 117, 126 (2014) (same). California's long-arm statute, in turn, permits the exercise of personal jurisdiction to the full extent permitted by federal due process. *Daimler*, 571 U.S. at 126; *see also Williams v. Yamaha Motor Co*., 851 F.3d 1015, 1020 (9th Cir. 2017).

Where, as here, the motion to dismiss is based on written submissions, rather than an evidentiary hearing, the plaintiffs need only make a *prima facie* showing of jurisdiction. *Schwarzenegger*, 374 F.3d at 800. Plaintiffs make a "*prima facie*" showing by producing *admissible* evidence which, if believed, would be sufficient to establish the existence of personal jurisdiction. *Ballard v. Savage*, 65 F.3d 1495, 1498 (9th Cir. 1995). In deciding whether such a showing has been made, the Court must accept as true the uncontroverted allegations in the complaint and conflicts between facts contained in the parties' affidavits must be resolved in plaintiffs' favor. *AT&T v. Compagnie Bruxelles Lambert*, 94 F.3d 586, 588 (9th Cir. 1996).

III. DISCUSSION

Only specific jurisdiction is disputed; general jurisdiction does not exist. Specific jurisdiction "exists when a case arises out of or relates to the defendant's contacts with the forum." *Ranza v. Nike, Inc*., 793 F.3d 1059, 1068 (9th Cir. 2015) (quotations and citations omitted). "In order for a court to exercise specific jurisdiction over a claim, there must be an 'affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum State.'" *Bristol-Myers Squibb Co. v. Superior Court of Cal., San*

Francisco Cty., 137 S. Ct. 1773, 1781 (2017) (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011)). As the Supreme Court explained, the inquiry whether a forum state may assert specific jurisdiction over a nonresident defendant centers on the relationship among the defendant, the forum, and the litigation. *Walden v. Fiore*, 571 U.S. 277, 283-84 (2014). "For a State to exercise jurisdiction consistent with due process, the defendant's suit-related conduct must create a substantial connection with the forum State." *Id*. at 284. The plaintiff cannot be the only link between the defendant and the forum; rather, the defendant's conduct must form the necessary connection with the forum in order to establish jurisdiction. *Id*. at 285.

It is undisputed that three requirements must be met for a court to exercise specific jurisdiction over a nonresident defendant in the Ninth Circuit: "(1) [t]he non-resident defendant must purposefully direct [its] activities or consummate some transaction with the forum or resident thereof; or perform some act by which [it] purposefully avails [it]self of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws; (2) the claim must be one which arises out of or relates to the defendant's forum-related activities; and (3) the exercise of jurisdiction must comport with fair play and substantial justice, *i.e*. it must be reasonable." *Yahoo! Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*, 433 F.3d 1199, 1205-06 (9th Cir. 2006); *Schwarzenegger*, 374 F.3d at 802 (citation omitted). Plaintiffs bear the burden of satisfying the first two requirements; the burden then shifts to the defendant to present a "compelling case" that the exercise of jurisdiction would be unreasonable. *Mavrix Photo, Inc. v. Brand Techs., Inc*., 647 F.3d 1218, 1228 (9th Cir. 2011) (citations omitted).

The crux of this jurisdictional dispute concerns whether the substantial California contacts of Zeltiq can properly be imputed to AbbVie. There is no dispute that "[a]s a general principle, corporate separateness insulates a parent corporation from liability created by its subsidiary, notwithstanding the parent's ownership of the subsidiary." *Ranza*, 793 F.3d at 1070. Nor do the parties dispute that it is the connection or relatedness's between the defendant's forum related activities and the plaintiffs' claims that are key to the specific jurisdiction analysis.

Here, plaintiffs primarily argue that the Court has specific jurisdiction over AbbVie because the company fully and completely merged with Zeltiq, Allergan plc, and Allergan, Inc.,

and has taken over all aspects of the CoolSculpting business in California. This theory is incoherent and does not persuade that jurisdiction is proper. On one hand, plaintiffs argue that AbbVie completely and statutorily merged such that the business of Zeltiq is only the business of AbbVie. However, plaintiffs concede that Zeltiq still exists as "an active corporation"[3] and does not dispute that Zeltiq is a registered entity in California.[4] Nor do plaintiffs dispute that AbbVie maintains a separate principal headquarters in North Chicago that is different than the CoolSculpting operations based out of California. Instead, plaintiffs place substantial emphasis on the public merger history to tie AbbVie to California for purposes of specific jurisdiction.

Notably, it is true that under California law, successor liability can be imposed on the basis of a consolidated merger. This theory is commonly referred to as the "de facto merger exception." *See Franklin v. Usx Corp*., 87 Cal. App. 4th 615, 626-27 (2001). Several factors are relevant as to whether an acquisition can be considered a de facto merger: "(1) was the consideration paid for the assets solely stock of the purchaser or its parent; (2) did the purchaser continue the same enterprise after the sale; (3) did the shareholders of the seller become shareholders of the purchaser; (4) did the seller liquidate; and (5) did the buyer assume the liabilities necessary to carry on the business of the seller?" *Marks v. Minnesota Mining and Mfg. Co*., 187 Cal. App. 3d 1429, 1436-37 (1986) (holding that the asset sale at issue was a de facto merger where it achieved "the same practical result as a merger" and "the result of the transaction was exactly that which would have occurred had a statutory merger taken place").

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[3] (Dkt. No. 45 at 12.)

[4] Both parties submitted for consideration Zeltiq's statement of information that is filed with the California Secretary of State. Plaintiffs also submit Allergan's statement of information. The Court takes judicial notice of these public records. *See Lee v. City of L.A*., 250 F.3d 668, 688-89 (9th Cir. 2001) (noting "a court may take judicial notice of matters of public record" and documents whose "authenticity . . . is not contested" and upon which a plaintiff's complaint relies) (internal quotation marks omitted) (alterations in original). For similar reasons, the Court takes judicial notice of Zeltiq's Schedule 14A, Zeltiq's Form 8-K, Allergan plc's Form 8-K, and AbbVie's Form S-4 since all documents were filed with the Securities and Exchange Commission. The Court also considers AbbVie's certificate of good standing from the Illinois Secretary of State.

All documents are afforded their proper evidentiary weight. This means that the Court may only take judicial notice of the documents. The truth of the content, and inferences to be drawn from them, are not a proper subject of judicial notice.

In support of their position, plaintiffs invoke two cases concerning successor liability where a successor corporation cannot escape liability given the mere continuation of the predecessor business. Neither case concerns the appropriate jurisdictional inquiry, however, both are instructive as to the type of merger that may persuade. First, plaintiffs rely on *Petrini v. Mohasco Corp.*, 61 Cal. App. 4th 1091 (1988) in support of the general rule that when there is a statutory merger, the successor corporation is responsible for the predecessor entity's debts and liabilities. In *Petrini*, a parent entity liquidated the assets of its subsidiary such that there were essentially no assets left in the business and then completely "merged" the entity into itself. Based upon these facts, the "*surviving* corporation" was then "responsible for the liabilities of the merged corporations." *Id*. at 1098-99 (emphasis supplied). Second, plaintiffs rely on *McClellan v. Northridge Park Townhome Owners Association*, 89 Cal. App. 4th 746 (2001), where a successor homeowner association appealed an amended judgment where it was added as an additional judgment debtor. There was no dispute in the record that this homeowner association was formed to avoid the liabilities and debts of the preceding homeowner association. *Id*. at 749-50. Ultimately, the successor was unable to avoid the preceding association's debts because the successor "was nothing more than a mere continuation of [the predecessor] under a different name." *Id.* at 756. Here, there are two separate legal entities in existence. This is a fact that plaintiffs concede. AbbVie has submitted uncontroverted evidence that the entities did not completely merge and that Zeltiq continues to carry out the manufacturing of the CoolSculpting system. *See* Declaration of Emily Weith ["Weith Decl."], Dkt. No. 41-8, ¶¶ 3–13. This is not a circumstance where AbbVie has replaced Zeltiq in its entirety to carry on the mere continuation of the CoolSculpting business. Instead, the unrefuted record demonstrates that Zeltiq is a wholly-owned indirect subsidiary of AbbVie as the parent entity.[5]

[5] Plaintiffs submit various exhibits for consideration without proper authentication. Civil Local Rule 7-5 requires that evidentiary matters be appropriately authenticated by an affidavit or declaration. For instance, plaintiffs have submitted an undated, unsigned, and proposed release of liability that was purportedly made by *Allergan* (not AbbVie) to demonstrate that a complete statutory merger occurred. (Dkt. No. 45-7.) They also submitted unauthenticated email correspondence about Allergan's (not AbbVie's) claim process and manufacturing responsibilities over the CoolSculpting device to demonstrate AbbVie's control over Zeltiq. (Dkt. No. 45-6.)

Given the separate existence of the two entities, plaintiffs efforts to establish jurisdiction are more appropriately considered under an alter ego theory. As recognized by the Ninth Circuit, "[t]he alter ego test is designed to determine whether the parent and subsidiary are 'not really separate entities,' such that one entity's contacts with the forum state can be fairly attributed to the other." *Ranza*, 793 F.3d at 1071 (citation omitted). This type of alter ego relationship "is typified by parental control of the subsidiary's internal affairs or daily operations." *Id*. To satisfy the alter ego test and extend personal jurisdiction to a foreign parent or subsidiary on the basis of the in-forum entity's contacts, plaintiffs must make out a *prima facie* case showing "(1) that there is such unity of interest and ownership that the separate personalities of the two entities no longer exists and (2) that failure to disregard their separate identities would result in fraud or injustice." *Williams*, 851 F.3d at 1021.

The first prong of the alter ego test requires "a showing that the parent controls the subsidiary to such a degree as to render the latter the mere instrumentality of the former." *Ranza*, 793 F.3d at 1073 (citation omitted). It requires such "*pervasive control*" that it can only be met where a parent corporation "dictates every facet of the subsidiary's business—from broad policy decisions to routine matters of day-to-day operation." *Id*. (emphasis supplied). Notably, the Ninth Circuit has instructed that "[t]otal ownership and shared management personnel are alone insufficient to establish the requisite level of control." *Id*. (citation omitted). Nor can the first prong be met by only showing "an active parent corporation involved directly in decision-making about its subsidiaries' holdings" where the corporations "observe all of the corporate formalities necessary to maintain corporate separateness." *Doe v. Unocal Corp.*, 248 F.3d 915, 928 (9th Cir. 2001).

In assessing whether the first prong has been satisfied, courts consider nine factors:

To the extent plaintiffs try to rely on public filings with the SEC to prove that AbbVie is in fact a successor to Zeltiq, the tactic is insufficient to support a jurisdictional finding. *See, e.g.*, *Petrash v. Biomet Orthopedics*, No. C 18-5508 SBA, 2019 WL 8013939, at *3-4 (N.D. Cal. June 6, 2019) (finding presentation based upon similar public filings to be uncompelling in carrying plaintiff's burden to establish that personal jurisdiction exists since the Court cannot use the documents for their truth). Given the foundational flaws, plaintiffs' opposition contains little factual support and is heavy on conclusions.

> [1] the commingling of funds and other assets of the entities, [2] the holding out by one entity that it is liable for the debts of the other, [3] identical equitable ownership of the entities, [4] use of the same offices and employees, [5] use of one as a mere shell or conduit for the affairs of the other, [6] inadequate capitalization, [7] disregard of corporate formalities, [8] lack of segregation of corporate records, and [9] identical directors and officers.

Corcoran v. CVS Health Corp., 169 F. Supp. 3d 970, 983 (N.D. Cal. 2016) (citation omitted). Plaintiffs do not affirmatively argue that the alter ego theory is satisfied, nor do they make any effort to tie their factual assertions to the typical test. This is because plaintiffs have improperly placed substantial emphasis on the merger of the two entities. However, plaintiffs do proffer evidence bearing on the second, fourth, and ninth factors. Specifically, plaintiffs submit evidence that at least three officers of Zeltiq overlap with AbbVie and hold themselves out as officers or directors of AbbVie.[6] Furthermore, in two prior litigations[7] in Florida where AbbVie was named as a defendant in CoolSculpting litigation, plaintiffs submit that AbbVie never raised any personal jurisdiction concerns or objections that it is not the proper defendant.[8] Plaintiffs argue that in those proceedings, AbbVie took over as payor of Zeltiq's legal bills. In a third legal proceeding where Zeltiq was the named defendant,[9] plaintiffs also submit that AbbVie's corporate representative was the sole representative to participate in a mediation on behalf of Zeltiq even though AbbVie was not a party to the action.

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[6] The evidence demonstrates that: (1) Zeltiq's Chief Financial Officer is AbbVie's Vice President of Tax; (2) Zeltiq's Chief Executive Officer is the Chief Financial Officer and Executive Vice President of AbbVie; and (3) Zeltiq's Secretary is AbbVie's Vice President, Corporate Legal, Governance, Operations and Assistant Corporate Secretary. All three individuals work out of AbbVie's headquarters in Northern Chicago and this address is included on Zeltiq's registration with the State of California.

[7] Both parties have submitted various court records from litigation concerning the CoolSculpting device. Neither party has opposed consideration. In any event, the Court "may take judicial notice of matters of public record." *Hyatt v. Yee*, 871 F.3d 1067, 1071 n.15 (9th Cir. 2017) (quoting *Lee*, 250 F.3d at 689 (internal quotations and citations omitted)). On this basis, the Court considers documents to the extent they bear on the jurisdictional inquiry.

[8] *See, e.g.*, *Elkins v. AbbVie, Inc.*, No. 6:20-cv-01562-PGB-LRH (M.D. Fla.) and *Dobbins v. AbbVie, Inc.*, No. 21-cv-20978-CMA (S.D. Fla.). AbbVie disagrees with plaintiffs' characterization of the prior litigation history and submits that it objected that it was not the proper defendant. Ultimately, this factual dispute does not change the outcome of this motion.

[9] *See, e.g.*, *Cates v. Zeltiq Aesthetics, Inc.*, No. 6:19-cv-01670-PGB-LRH (Mar. 25, 2020).

Accepting the foregoing facts as true, and taken it in a light most favorable to plaintiffs, the evidence shows only that AbbVie wholly owns Zeltiq as a subsidiary, the two entities have overlapping officers and directors, web-information, and shared office space, and that AbbVie has been involved in litigation as a parent corporation. However, "[i]t is well-settled that common ownership is not dispositive." *Stewart v. Screen Gems-EMI Music, Inc*., 81 F. Supp. 3d 938, 956 (N.D. Cal. 2015); *Apple Inc. v. Allan & Assocs. Ltd*., 445 F. Supp. 3d 42, 53 (N.D. Cal. Mar. 27, 2020) ("In the absence of evidence of actual control, courts generally presume that directors can and do 'change hats' to represent each corporation separately." (citations omitted)). Additionally, courts recognize that separate corporate entities presenting themselves as one online does not rise to the requisite level of unity of interest to show that the companies are alter egos. *See Moody v. Charming Shoppes of Delaware, Inc*., No. C 07-06073 MHP, 2008 WL 2128955, at *3 (N.D. Cal. May 20, 2008) ("[g]eneric language on [company's] website and in its press releases simply do not rise to the day-to-day control required to impute the subsidiary's contacts to the parent"); *see also Gerritsen v. Warner Bros. Entm't Inc*., 116 F. Supp. 3d 1104, 1139 (C.D. Cal. 2015) (explaining that when considering websites in the alter ego context, courts have held this does not reflect an "abuse of the corporate form and existence of an alter ego relationship"). Courts have also rejected finding that separate entities are alter egos based upon a parent's defense and payment of litigation. *See NetApp, Inc. v. Nimble Storage, Inc*., No.: 5:13-CV-05058-LHK (HRL), 2015 WL 400251, at *6 (N.D. Cal. Jan. 29, 2015) (holding that unity of interest prong was not satisfied where no support was provided that paying attorney's fees satisfied the requirement); *MLC Intellectual Prop. v. Micron Tech., Inc*., No. 19-cv-03345-EMC, 2019 WL 4963253, at *12-13 (N.D. Cal. Oct. 8, 2019) (providing legal support, amongst other factors, was insufficient to satisfy the unity of interest prong).

Furthermore, plaintiffs' failure to address the majority of the remaining factors strongly weighs against a finding that Zeltiq's contacts should be imputed to AbbVie. *See, e.g*., *Stewart*, 81 F. Supp. 3d at 955 (unaddressed factors weigh against finding of alter ego status); *Reynolds v. Binance Holdings, Ltd.*, 481 F. Supp. 3d 997, 1007 (N.D. Cal. 2020) ("A plaintiff's failure to discuss a unity of interest factor weighs against the finding of alter ego liability."). This is even more true where AbbVie has submitted an uncontroverted declaration that Zeltiq: (1) is a wholly-owned

indirect subsidiary of AbbVie; (2) is the manufacturer of the CoolSculpting system; (3) is financially independent of AbbVie and treats its assets as separate; (4) is adequately capitalized; (5) operates out of its own facilities independent from those of AbbVie; (6) is not a shell company; (7) respects the legal existence of each entity; (8) and adheres to corporate formalities, including maintaining separate and independent by-laws, minutes, corporate records, financial records, and bank accounts. *See* Weith Decl. ¶¶ 3–13. The Court "may not assume the truth of allegations in a pleading which are contradicted by affidavit." *Mavrix Photo, Inc*., 647 F.3d at 1223.

Thus, the Court concludes that the evidence proffered by the plaintiffs is legally insufficient to satisfy the exacting demands of the unity of interest prong of the alter ego test. Since the plaintiffs failed to establish the first prong, the Court need not address the second prong of the alter ego test, which is not addressed by the plaintiffs in any event. Therefore, plaintiffs have not made a *prima facie* showing that the Court can impute Zeltiq's contacts with California to AbbVie.[10]

IV. CONCLUSION

Based on the foregoing, AbbVie's motion to dismiss for lack of personal jurisdiction is **GRANTED**. Plaintiffs have not sought leave to file a third amended complaint with respect to AbbVie. Considering the record before it, the Court is tentatively of the position that amendment would be futile. Plaintiffs shall file a one-page statement no later than May 6, 2022, indicating how they wish to proceed in light of this Order.

This Order terminates Docket Number 41.

IT IS SO ORDERED.

Dated: April 21, 2022

YVONNE GONZALEZ ROGERS
UNITED STATES DISTRICT JUDGE

[10] Given the lack of jurisdiction over AbbVie, the Court does not reach the merits of the arguments concerning the plaintiffs' failure to state a claim.