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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 12-4247-GHK (RZx)	Date	August 10 2012
Title	*Rodney Bush v. Contour Technology, LLC, et al.*		

Presiding: The Honorable **GEORGE H. KING, U.S. DISTRICT JUDGE**

Beatrice Herrera	N/A	N/A
Deputy Clerk	Court Reporter / Recorder	Tape No.

Attorneys Present for Plaintiff:	Attorneys Present for Defendant:
(none)	(none)

Proceedings: **(In Chambers) Order re**: Motion to Dismiss

This matter is before us on Defendants Contour Technology, LLC ("Contour") and Ken Sherman's ("Sherman" and, collectively, "Defendants") Motion to Dismiss Plaintiff Rodney Bush's ("Plaintiff") Class Action Complaint ("Motion"). We have considered the papers filed in support of and in opposition to this Motion and deem this matter appropriate for resolution without oral argument. L.R. 7-15. As the Parties are familiar with the facts in this case, we will repeat them only as necessary. Accordingly, we rule as follows.

I . Background

For purposes of this Motion, we accept all allegations of material fact as true and construe them in the light most favorable to Plaintiff. *Cousins v. Lockyer*, 568 F.3d 1063, 1067 (9th Cir. 2009). In February 2010, Plaintiff purchased from Defendants a "Contour Core Sculpting System" for $214.75 plus $20.94 tax in reliance on Defendants' advertisements that the product, *inter alia*, would give users "rock hard abs." (Bush Decl. ¶ 2, Dkt. No. 13-1). In January 2011, Plaintiff purchased replacement gel pads for the product for a total of $22.90. (*Id.* ¶ 6). Apparently unsatisfied that the Product did not live up to the advertisements, Plaintiff effectuated written notice to Defendants, pursuant to the California Legal Remedies Act ("CLRA"), informing them that he believed their advertisements to be fraudulent. (Compl. ¶ 17). In February 2012, Defendants credited Plaintiff's credit card on two occasions. On February 14, 2012, they credited $22.90 to his debit card, and on February 16, 2012, they credited $214.75 to his credit card. (Bush Decl. ¶¶ 4, 5, 8). Defendants characterize these credits as "refunds"

for the products that Plaintiff purchased.[1] (Mot. 8). Defendants rejected the various demands made in Plaintiff's CLRA letter, and Plaintiff filed this putative class action in state court on April 11, 2012.

On the basis of these facts, Plaintiff alleges violations of (1) California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code §§ 17200, *et seq.*; (2) California's False Advertising Law ("FAL"), Cal. Bus. & Prof. Code §§ 17500, *et seq.*; and (3) the CLRA, Cal. Civ. Code §§ 1750, *et seq.*, and requests monetary and injunctive relief. Defendants argue that Plaintiff's Complaint must be dismissed because Plaintiff did not suffer an injury prior to the filing of the Complaint and thus lacks standing to bring this action. They also seek to dismiss Plaintiff's request for injunctive relief because there is no threat of repeated injury.

II. Legal Standard and Defendants' Arguments

To survive dismissal for failure to state a claim, a complaint must set forth "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). It must contain factual allegations sufficient to "state a claim to relief that is plausible on its face." *Id.* at 570; *see also Ashcroft v. Iqbal*, 556 U.S. 662 (2009). "In sum, for a complaint to survive a motion to dismiss, the non-conclusory 'factual content,' and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief." *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009).

III. Discussion

A. Lack of Injury and Article III Standing

Defendants argue that since they provided Plaintiff with a refund of the complained-of products, there is no present case or controversy and thus Plaintiff lacks Article III standing to bring this action. Article III standing requires that a party show:

[1] Defendants request that we take judicial notice of transaction receipts that purport to provide evidence that such "refunds" have been granted. Plaintiff objects to this proffer of evidence, and we agree that Defendants have not established that the authenticity of these documents are "not subject to reasonable dispute" or that they come "from sources whose accuracy cannot reasonably be questioned" as required by Federal Rule of Evidence 201(b). We also disagree with Defendants that we may consider these documents pursuant to the "incorporation by reference" doctrine, as Plaintiff's Complaint in no way refers to these receipts or Defendants' purported refund. However, as discussed below, we conclude that even taking as true Defendants' assertion that they credited Plaintiff $214.75 and $22.90, this credit does not fully refund Plaintiff for the purchase price of the product. Accordingly, because we do not rely on these transaction receipts, we need not ultimately determine whether Defendants' transaction receipts are judicially noticeable.

> (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Cetacean Cmty. v. Bush, 386 F.3d 1169, 1174 (9th Cir. 2004).

The Parties primarily dispute whether a defendant can destroy a plaintiff's standing to pursue a consumer class action by "picking off" a proposed class representative by providing that individual with a refund of the purchase price of the product. We need not resolve this issue because it is clear that Defendants have not fully refunded Plaintiff the purchase price of the complained-of products. Thus, at the very least, Plaintiff can pursue his individual claims as well as the class claims because he has a legally cognizable injury in the form of the purchase price of the products at issue. Defendants do not dispute that Plaintiff paid $235.69 for the Contour Core Sculpting System and $22.90 for the replacement pads for the Contour Core Sculpting System. (Bush Decl. ¶¶ 2-3, 6-7). Defendants assert that they refunded Plaintiff $214.75 and $22.90. (Reply 1). Therefore, even taking as true Defendants' assertion about the purported refund, Plaintiff has not been fully refunded for his purchases of the allegedly defective products.[2] Accordingly, Plaintiff has standing to bring this action, and we therefore **DENY** Defendants' Motion insofar is as it premised on this argument.

B. Threat of Repeated Injury and Injunctive Relief

Defendants argue that Plaintiff lacks standing to seek injunctive relief because Plaintiff already has knowledge of the Product's allegedly defective nature and so there is no threat of repeat injury. (*See* Mot. 7 (stating that "it would be illogical and unreasonable" to believe that Plaintiff would buy the Product again in light of his knowledge that the Contour Core Sculpting System is allegedly defective)).

[2] In their Reply, Defendants assert the somewhat convoluted argument that Plaintiff's Complaint only refers to the Contour Core Sculpting System, for which Plaintiff paid $235.69, and Defendants credited his account in the amount of $237.65 ($214.75 plus $22.90), which thus fully compensates him for his purchase of the Contour Core Sculpting System. Defendants' argument is not well taken. First, Plaintiff's Complaint does not refer only to the Contour Core Sculpting System but rather refers to "Contour Products . . ., *including* the Contour Core Sculpting System." (Compl. 1 (emphasis added)). Taking all reasonable inferences in favor of the Plaintiff, it appears that he seeks relief for his purchase of the Contour Core Sculpting System and its replacement pads. Therefore, even if Defendants have refunded Plaintiff $237.65, such refund does not fully compensate him for his purchases of both of the Contour Products. Second, we would be hard-pressed to believe that the $22.90 that Defendants purportedly credited to Plaintiff's debit account, which just so happens to be the exact amount of the replacement pads, was meant "to cover the sales tax that [Defendants] did not refund to Plaintiff" as Defendants assert. (Reply 3). It is difficult to fathom why, if Defendants wanted to refund the sales tax, they did not simply refund that amount.

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Therefore, Defendants seek to dismiss Plaintiff's requests for injunctive relief. Defendants' Motion does not identify a single cause of action that it seeks to dismiss on this basis. Instead, it seeks to strike certain requests for relief *within* each claim. We disfavor motions to dismiss "unless counsel has a good faith belief that such motions will likely result in dismissal, without leave to amend, of all or at least some of the claims under applicable law." (Order re: Case Management, Dkt. No. 6). Accordingly, we decline to consider Defendants' argument, which at best will only result in striking specific forms of relief on a piece-meal basis.

IV. Conclusion

For the reasons stated above, Defendants' Motion is **DENIED**. Defendants **SHALL** Answer Plaintiff's Complaint **within fourteen (14) days hereof**. Fed. R. Civ. P. 12(a)(4)(A).

IT IS SO ORDERED.

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