EXHIBIT A

LINK: 13

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 13-02823 GAF (VBKx)	Date	September 6, 2013
Title	Payam Ahdoot v. Babolat VS North America		

Present: The Honorable	**GARY ALLEN FEESS**	
Stephen Montes	None	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

I.
INTRODUCTION & BACKGROUND

Plaintiff Payam Ahdoot brings this putative class action against Defendant Babolat VS North America, alleging that Defendant has engaged in false and misleading advertising with respect to its AeroPro Drive tennis racquets ("AeroPro"), endorsed by Rafael Nadal, its Pure Drive tennis racquets ("Pure Drive"), endorsed by Andy Roddick, and a number of other racquets associated with professional tennis players. (Docket No. 10 [First Amended Complaint ("FAC")] ¶¶ 4-11.) Plaintiff insists that Defendant misrepresented to consumers that the racquets available for purchase by the public are identical to those used on the professional tennis tour by professional players when, in reality, "[t]he racquets which many of the Babolat-sponsored pros actually use are much different than [those racquets] and [are] not available to the public." (Id. ¶ 4) Specifically, Plaintiff alleges that Babolat's use of the phrase "Nadal's racquet of choice" is misleading and that "[p]rior to major professional tennis tournaments, Babolat paints and otherwise modifies these pros' customized racquets so that they appear to be identical to the ones sold in stores and on the internet." (Id. ¶ 4) Plaintiff's FAC also describes what he characterizes as a "long-term and pervasive advertising campaign [by Babolat] . . . designed to deceive consumers about the racquets it sells." (Id. ¶ 5)

On or about January 15, 2011, Plaintiff purchased an AeroPro Drive racquet for a total of $222.92 from Westwood Sporting Goods in Los Angeles, California. (Id. ¶ 25) Plaintiff alleges that he has therefore "suffered injury in fact and lost money purchasing a racquet he otherwise

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would not have purchased" but for Defendant's allegedly deceptive advertising. (Id. ¶ 31) On this basis, Plaintiff asserts claims against Babolat for: (1) violation of California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code § 17200; (2) violation of the Consumer Legal Remedies Act ("CLRA"), Cal. Civ. Code § 17500; (3) breach of express warranty; (4) violation of False Advertising Law ("FAL"), Cal Bus. & Prof. Code §§17500 et seq.; (5) fraud; (6) negligent misrepresentation; and (7) restitution/unjust enrichment. (FAC.)

Now before the Court is Defendant's Motion to Dismiss. (Docket No. 14 [Memorandum in Support of Motion to Dismiss ("Mem.")].) Because the Court concludes that Plaintiff lacks standing to pursue claims relating to racquets other than the AeroPro Drive racquet he personally purchased, Defendant's motion is **GRANTED in part** with respect to its standing argument. Defendant's motion is also **GRANTED** as to Plaintiff's claim for "restitution/unjust enrichment." However, Defendant's motion is **DENIED** with respect to Plaintiff's remaining claims. The Court sets forth its reasoning in detail below.

II.
DISCUSSION

A. LEGAL STANDARDS UNDER RULES 12(B)(6) AND 9(B)

A complaint may be dismissed if it fails to state a claim upon which relief can be granted. See Fed. R. Civ. P. 12(b)(6). On a motion to dismiss under Federal Rule of Civil Procedure ("F.R.C.P.") 12(b)(6), a court must accept as true all factual allegations pleaded in the complaint, and construe them "in the light most favorable to the nonmoving party." Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336, 337-38 (9th Cir. 1996); see also Stoner v. Santa Clara County Office of Educ., 502 F.3d 1116, 1120-21 (9th Cir. 2007). Dismissal under Rule 12(b)(6) may be based on either (1) a lack of a cognizable legal theory, or (2) insufficient facts under a cognizable legal theory. SmileCare Dental Grp. v. Delta Dental Plan of Cal., Inc., 88 F.3d 780, 783 (9th Cir. 1996) (citing Robertson v. Dean Witter Reynolds, Inc., 749 F.2d 530, 534 (9th Cir. 1984)).

Under Rule 8(a)(2), a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). The Supreme Court has interpreted this rule to allow a complaint to survive a motion to dismiss only if it "contain[s] sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct

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alleged." Id. (citing Twombly, 550 U.S. at 556). "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct," the complaint has not sufficiently established that the pleader is entitled to relief. Id. at 679.

A complaint generally need not contain detailed factual allegations, but "a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Twombly, 550 U.S. at 555 (citation, alteration, and internal quotations omitted). Similarly, a court need not "accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." Sprewell v. Golden State Warriors, 266 F.3d 979, 988 (9th Cir. 2001). That is, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. . . . While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." Iqbal, 556 U.S. at 678-79; see also Warren v. Fox Family Worldwide, Inc., 328 F.3d 1136, 1139 (9th Cir. 2003).

Moreover, Rule 9(b) imposes heightened pleading requirements for claims of fraud, or claims that sound in fraud. See Fed. R. Civ. P. 9(b). A plaintiff "must state with particularity the circumstances constituting fraud," but can allege generally "[m]alice, intent, knowledge, and other conditions of a person's mind." Id. The particularity requirement "has been interpreted to mean the pleader must state the time, place and specific content of the false representations as well as the identities of the parties to the misrepresentation." Miscellaneous Serv. Workers, Drivers & Helpers, Teamsters Local No. 427 v. Philco-Ford Corp., 661 F.2d 776, 782 (9th Cir. 1981). In addition, the plaintiff must "set forth what is false or misleading about a statement, and why it is false." Rubke v. Capitol Bancorp Ltd., 551 F.3d 1156, 1161 (9th Cir. 2009) (internal quotations omitted). These requirements "ensure[] that allegations of fraud are specific enough to give defendants notice of the particular misconduct which is alleged to constitute the fraud charged so that they can defend against the charge and not just deny that they have done anything wrong." Semegen v. Weidner, 780 F.2d 727, 731 (9th Cir. 1985).

B. APPLICATION

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1. PLAINTIFF LACKS STANDING TO PURSUE CLAIMS RELATING TO PRODUCTS HE DID NOT PURCHASE AND ADVERTISEMENTS ON WHICH HE DID NOT RELY

There is a standing question at the center of this case. Plaintiff purchased the AeroPro Drive tennis racquet, but has never purchased a Pure Drive racquet, even though he claims to act on behalf of everyone who did purchase a Pure Drive. Standing principles bar him from doing so.

"Standing is a threshold matter central to our subject matter jurisdiction." Bates v. United Parcel Service, Inc., 511 F.3d 974, 985 (9th Cir. 2007). The Court must therefore "assure [itself] that the constitutional standing requirements are satisfied before proceeding to the merits." Id. (citing United States v. Hays, 515 U.S. 737, 742 (1995); Casey v. Lewis, 4 F.3d 1516, 1524 (9th Cir. 1993)). "In a class action, standing is satisfied if at least one named plaintiff meets the [following Article III] requirements": (1) that "the plaintiff suffered an injury in fact"; (2) that "the injury is 'fairly traceable' to the challenged conduct"; and (3) that "the injury is 'likely to be 'redressed by a favorable decision.'" Id. (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992)). "Standing must be shown with respect to each form of relief sought, whether it be injunctive relief, damages or civil penalties." Friends of the Earth, Inc. v. Laidlaw Envt'l Servs. (TOC), Inc., 528 U.S. 167, 185 (2000). Although the Ninth Circuit has not yet weighed in on the issue before the Court, lower courts that have grappled with it conclude that one who has not purchased a product has no injury and therefore cannot pursue remedies on behalf of those who did.

Relying principally on Route v. Mead Johnson Nutrition Co., No. 12-7350, 2013 WL 658251, at *3 (C.D. Cal. 2013), Defendant argues that "Plaintiff lacks standing to pursue claims based on any products other than the single racquet he purchased, upon advertisements on which he did not rely, and upon damages theories that do not apply to him." (Mem. at 7.) The Court agrees.

Route involved a false advertising claim against a manufacturer of prebiotic baby food products. Route, 2013 WL 658251, at *3. The court rejected the named plaintiff's attempt to bring a putative class action involving four products where the plaintiff had purchased only one of the products at issue, explaining that "a proposed class representative may not seek to represent a class claim arising out of products she herself never purchased, as that plaintiff has only suffered an injury (if at all) with regard to those products she did purchase . . . ." Id.

Here, Plaintiff alleges only that he bought a single "Babolat AeroPro Drive" racquet in January 2011, (FAC ¶ 25), and makes no allegations that "he ever purchased a Pure Drive

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Roddick GT, Pure storm +GT, or any other Babolat tennis racquet purportedly used by a Babolat-sponsored tennis professional." (Mem. at 8.) In addition, Defendant points out that "the FAC cites as examples of Babolat's 'false and misleading advertising' statements that appeared on various websites after Plaintiff allegedly purchased his AeroPro Drive." (Mem. at 8 (citing FAC ¶¶ 15, 20–22, advertising the 2013 AeroPro Drive and GT Plus models); see In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, & Products Liab. Litig., 754 F. Supp. 2d 1145, 1183 (C.D. Cal. 2010) (requiring that to pursue express warranty claim plaintiff must allege that he was "actually exposed to the advertising"). Thus, Defendant urges, Plaintiff lacks standing to pursue any claims relating to products other than the Babolat AeroPro Drive as he has alleged "injury in fact" with respect to only that particular racquet model. Lujan, 504 U.S. at 555.

In opposition, Plaintiff insists that Defendant has ignored a critical aspect of the Route decision. Plaintiff observes that "Route v. Mead was a consumer labeling case in which plaintiff alleged that the amount of a particular ingredient and its efficacy were in question." (Docket No. 16 [Opposition ("Opp.")] at 23.) He urges that "[t]he Route Court astutely noted that while the Route plaintiff had standing to pursue claims arising out of representations concerning only the product she purchased, a plaintiff could have standing to represent a class claim arising out of products the plaintiff did not purchase." (Id.) Specifically, Route recognized that the plaintiff might have standing with respect to all four products "[i]f all four products (1) contained the same controverted ingredient in the same amount, (2) were subject to the same advertisement campaign and same representations, and (3) the only differences between the products were not germane to Plaintiff's claims . . . ." (Id. (citing Route, 2013 WL 658251, at *3 n.4)) Plaintiff urges that the products at issue here—tennis racquets—meet each of these three criteria. (Opp. at 23.)

Dicta from a court whose decision is not precedential to begin is not a persuasive basis for an argument. Route plainly held that a party who has not purchased a product cannot claim to have been injured by it and therefore lacks standing. The rest is judicial conversation. But even if the Court were to treat the Route dicta as controlling, it would not advance Plaintiff's case. As Defendant points out, "the FAC centers on the premise that the publicly available racquets differ from the ones used by the professional tennis player associated with that racquet." (Docket No. 17 [Reply] at 9.) It is therefore significant that "[t]he racquets manufactured by Babolat vary by size, weight, and composition, and are targeted at different players, categorized by experience, gender and age." (Id.) As Defendant argues persuasively, "[t]hey are specialized products and not just a generic racquet with different 'flavors.'" (Id.)

The Court therefore concludes that Plaintiff lacks standing to pursue claims for products

other than the specific racquet he purchased and advertisements upon which he personally relied. Defendant's motion is therefore **GRANTED** with respect to its standing argument. And in light of this determination, the Court will address the remainder of Defendant's motion only as it relates to the AeroPro Drive racquet purchased by Plaintiff.

2. PLAINTIFF HAS ADEQUATELY PLEADED HIS CLAIM FOR BREACH OF EXPRESS WARRANTY

To plead a claim for breach of express warranty under California law, the buyer must allege that the seller: "(1) made an affirmation of fact or a promise, or otherwise described the goods; (2) the statement formed part of the basis of the bargain; (3) the express warranty was breached; (4) the plaintiff was harmed; and (5) the breach of warranty was a substantial factor causing the plaintiff's harm." Stearns v. Select Comfort Retail Corp., 763 F. Supp. 2d 1128, 1142 (N.D. Cal. 2010).

Defendant urges that the breach of warranty claim should be dismissed because "Plaintiff has failed to identify the exact terms of the warranty he alleges that Babolat offered him or any specific factual representation or promise made to him that might serve as the basis for an express warranty claim." (Mem. at 10.) The thrust of Defendant's argument is that the slogan "Nadal's racquet of choice" is not actionable as an express warranty because "it merely reflects 'the seller's opinion or commendation of the goods.'" (Mem. at 11 (citing Cal. Com. Code § 2313(2).) Defendant insists that this statement "is not an explicit promise that Plaintiff would be able to purchase at Westwood Sporting Goods the identical AeroPro Drive racquet that Mr. Nadal was at that moment using in professional play." (Mem. at 11.)

But Defendant's argument is unpersuasive, particularly at the pleading stage. Whatever the Court may think of the imagined harm the resulted from the alleged breach of express warranty, the Court's task in evaluating a motion to dismiss pursuant to Rule 12(b)(6) is to assess the adequacy of the allegations in the Complaint. Here, Plaintiff has adequately alleged his claim for breach of express warranty. The Complaint unambiguously alleges that "Babolat at all relevant times falsely advertised, on its website, that Nadal used the then-current version of the AeroPro Drive which was available for sale to the public." (FAC ¶ 15.) It then goes on to describe the contents of this advertisement which, contrary to Defendant's characterization, consists of more than the mere statement that the AeroPro Drive is "Nadal's racquet of choice." Instead, Plaintiff alleges in the FAC that "[o]n the babolat.com player profile page for Nadal" there is "a picture of a black and yellow striped AeroPro Drive racquet which looks like the racquet used by Nadal on tour." (Id.) Plaintiff further alleges that "he was led to believe that the AeroPro Drive Babolat racquet he was purchasing was the one used by Nadal based on" a broad

marketing campaign, including "Babolat sponsored marketing materials shown on authorized online retailer http://www.tennis-warehouse.com"; "Tennis Channel television commercials showing Nadal holding and playing with what looked to be the AeroPro Drive"; and "[a]dvertisements for the AeroPro Drive in Tennis Magazine, in which Nadal was shown holding what appeared to be [an] AeroPro Drive Racquet." (Id. ¶ 17)

The Court therefore concludes that, even though it may be difficult to conceive of any harm flowing from the breach of such warranty, for present purposes Plaintiff has adequately pleaded a claim for breach of express warranty and Defendant's motion is **DENIED** with respect to this claim.

3. PLAINTIFF'S UCL, CLRA, FAL, FRAUD AND NEGLIGENT MISREPRESENTATION CLAIMS SURVIVE DEFENDANT'S 12(B)(6) CHALLENGE

Defendant urges that Plaintiff's UCL, CLRA, FAL, and negligent misrepresentation claims must be dismissed because (1) "[t]he alleged misrepresentation ('Nadal's Racquet of Choice') is not likely to deceive a reasonable consumer" and (2) Plaintiff has not alleged these claims with the specificity required under Federal Rule of Civil Procedure 9(b). (Mem. at 15–16.) Defendant argues that "'Nadal's racquet of choice' is not a specific and measurable claim, capable of being proved false or of being reasonably interpreted as a statement of objective fact" because "it has no objective meaning." (Mem. at 14.) Instead, "'racquet of choice' is nothing more than a common slogan used to reinforce the connection between an athlete and a brand, a practice that is widely accepted by commercial custom." (Id. (citing Abdul-Jabbar v. Gen. Motors Corp., 85 F.3d 407, 413 (9th Cir. 1996))

However, the allegations in the FAC are clearly adequate—and sufficiently specific within the meaning of Rule 9(b)—to state claims grounded in fraud. As previously discussed in the context of Plaintiff's breach of express warranty claim, Defendant is simply incorrect that Plaintiff's theory of misrepresentation hinges entirely on the phrase "Nadal's racquet of choice." Instead, the FAC describes in detail Babolat's alleged scheme to convince the public that the Babolat racquets available for purchase are identical to those used by professional tennis players:

> In its advertisements, Babolat claims its sponsored players use these racquets on the professional tennis tour. In many cases, this is not true. The racquets which many of the Babolat-sponsored pros actually use are much different than and not available to the public. Prior to the major professional tennis

> tournaments, Babolat paints and otherwise modifies these pros' customized racquets so that they appear to be identical to the ones sold in stores and on the internet. Members of the public are led to believe they are buying the same racquets used by their favorite tennis pros, when in fact there are significant differences between the racquets used by the pros and those sold to the public.

(FAC ¶ 4.) In light of the foregoing, the Court concludes that Plaintiff has alleged, with the requisite specificity, fraud on the part of Babolat. And it is worth reiterating that, on a motion to dismiss, it is not the Court's task to evaluate the merits of Plaintiff's case. The Court is to assess only the adequacy of the pleadings and here, Plaintiff has adequately alleged its fraud-based claims. Accordingly, Defendant's motion is **DENIED** with respect to Plaintiff's UCL, CLRA, FAL, and negligent misrepresentation claims.

4. CALIFORNIA LAW DOES NOT RECOGNIZE UNJUST ENRICHMENT AND RESTITUTION AS INDEPENDENT CAUSES OF ACTION

Defendants urge that Plaintiff's claim for unjust enrichment must be dismissed because "[u]njust enrichment is not a viable claim under California law." (Mem. at 19.) Defendants are correct that "there is no cause of action in California for unjust enrichment." Melchior v. New Line Prods., Inc., 106 Cal. App. 4th 779, 793 (2003). Instead, "[u]njust enrichment is a 'general principle, underlying various legal doctrines and remedies,' rather than a remedy itself. It is synonymous with restitution." Id. at 784 (citations omitted). Plaintiff insists that dismissal is inappropriate because "Ahdoot's claim is entitled 'Restitution/Unjust Enrichment' and no authority is provided by Babolat which would require dismissal of a Restitution claim." (Opp. at 20.) But Plaintiff's claim for restitution also fails because "[t[here is no cause of action for restitution . . . . [Instead,] there are various causes of action that give rise to restitution as a remedy." Robinson v. HSBC Bank USA, 732 F. Supp. 2d 976, 987 (N.D. Cal. 2010).

Accordingly, Defendant's motion is **GRANTED** with respect to Plaintiff's claim for "Restitution/Unjust Enrichment" and the claim is **DISMISSED with prejudice**.

III.
CONCLUSION

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For the foregoing reasons, the Court **GRANTS in part** Defendants' motion to dismiss with respect to its standing argument. In addition, Plaintiff's claims for unjust enrichment and restitution are **DISMISSED with prejudice**. However, Defendant's motion is **DENIED in part** as to Plaintiff's UCL, CLRA, FAL, fraud, negligent misrepresentation, and breach of express warranty claims. The hearing on this matter presently scheduled for Monday, September 9, 2013, is **VACATED.**

IT IS SO ORDERED.