UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

RICKY WISDOM, individually and on behalf of similarly situated individuals, Plaintiff, v. EASTON DIAMOND SPORTS, LLC, Defendant.	CV 18-4078 DSF (SSx) Order GRANTING in PART and DENYING in PART Defendant Easton Diamond Sports, LLC's Motion to Dismiss Plaintiff's First Amended Class Action Complaint

Defendant Easton Diamond Sports, LLC (Defendant or EDS), moves to dismiss Plaintiff Ricky Wisdom's First Amended Class Action Complaint (FAC) pursuant to Federal Rules of Civil Procedure 12(b)(1), 12(b)(6), and 12(b)(7). The Court deems this matter appropriate for decision without oral argument.

I. BACKGROUND

EDS, a Delaware limited liability company headquartered in Thousand Oaks, California, is one of the leading manufacturers, sellers, and distributors of baseball and softball equipment and accessories, including the bats at issue in this suit. Defendant's two predecessor entities, Easton Baseball / Softball, Inc. (EBSI) and Easton Baseball / Softball Corp. (EBSC) filed U.S. and Canadian insolvency proceedings, respectively, in October 2016. Defendant acquired the assets of EBSI, EBSC, and other affiliates through a sale approved by the relevant insolvency courts (the EBS Asset Sale). The orders approving the EBS Asset Sale provided that Defendant acquired the assets free and clear of all claims and liabilities arising before or after the commencement of the insolvency proceedings.

Plaintiff purchased a new Easton S750C (-10) 2 5/8" barrel bat for his son, who plays youth baseball. Plaintiff and his son are Alabama residents. Plaintiff purchased the bat from a sporting goods store in Florence, Alabama. Before the purchase, Plaintiff reviewed the bat's label and relied on EDS's representations concerning the weight of the bat.

When Plaintiff purchased the bat, it featured a label stating the bat's weight was 22 ounces. The bat's actual weight is about 25 ounces. Because the bat is too heavy, Plaintiff's son cannot use the bat in training or to play in certain baseball leagues or tournaments. Plaintiff would like to purchase Easton bats for his son in the future if in fact the bats were accurately labeled, but he is currently unable to do so because of Defendant's inaccurate labeling.

II. DISCUSSION

A. Article III Standing

Defendant moves for dismissal pursuant to Rule 12(b)(1), asserting Plaintiff lacks Article III standing, and therefore this Court lacks subject matter jurisdiction. See Maya v. Centex Corp., 658 F.3d 1060, 1067 (9th Cir. 2011).

For Plaintiff to have Article III standing[1], he must demonstrate an (i) injury-in-fact, (ii) that is causally connected to the Defendant, and (iii) likely to be redressed by a favorable decision. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992). Each of these elements "must be supported in the same way as any other matter on which plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation." Id. at 561.

Plaintiff has adequately pleaded that he suffered an injury-in-fact. "To qualify as an injury-in-fact, an alleged harm must be 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" Maya, 658 F.3d at 1069 (quoting Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., 528 U.S. 167, 180 (2000)). A consumer's economic injuries sustained from purchasing a product with inaccurate labeling can be a sufficient injury-in-fact. Davidson v. Kimberly-Clark Corp., 889 F.3d 956, 972 (9th Cir. 2018); see also Chavez v. Blue Sky Natural Beverage Co., 340 F. App'x 359, 360-62 (9th Cir. 2009) (finding plaintiff who

[1] Defendant also claims Plaintiff lacks statutory standing to bring his California statutory claims. Statutory standing is not required for subject matter jurisdiction, but rather is an element of Plaintiff's cause of action. Maya, 658 F.3d at 1067. The Court will address Plaintiff's statutory standing when it considers Defendant's Rule 12(b)(6) motion.

purchased soda allegedly incorrectly labeled as made in New Mexico properly alleged injury-in-fact).

Plaintiff alleges the bat he purchased was incorrectly labeled, and that he purchased the bat in reasonable reliance on the bat's labeled weight. This is a sufficiently concrete economic injury to confer Article III standing.

There is a causal connection between Plaintiff's injury and Defendant's conduct: "During the period relevant to this lawsuit, [Defendant] controlled the manufacture, design, testing, packaging, labeling, assembly, marketing, advertising, promotion, distribution, and selling of Easton bats—including quality control measures regarding the bats' weight and how the bats' weight is displayed on labeling and in advertising—from its headquarters located in Thousand Oaks, California."[2] FAC ¶ 12.

And Plaintiff's alleged injuries are redressable by a decision in his favor. The Court has the authority to grant the requested monetary relief Plaintiff seeks. Plaintiff has established Article III standing to bring claims for monetary damages.

Defendant also argues Plaintiff lacks Article III standing to seek injunctive relief. [3] The Ninth Circuit also considered this issue in Davidson. 889 F.3d at 966. There, plaintiff claimed defendant's "flushable" wipes were not "flushable"; she "regularly visits stores . . . where [d]efendants' 'flushable' wipes are sold"; but she had "no way of determining whether the representation

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[2] Plaintiff moved ex parte to strike evidence submitted with the Reply. The Court will not consider that evidence.

[3] In its motion, Defendant cites Whitaker v. Garcetti, 11 F. App'x 921, 922-23 (9th Cir. 2001), an unpublished Ninth Circuit opinion issued before January 1, 2007, which may not be cited under Ninth Circuit Rule 36-3. Further violations of this Court's or Ninth Circuit rules will result in sanctions.

'flushable' is in fact true." Id. at 970-71. Noting it was a "close question," the Ninth Circuit held Davidson had adequately alleged an "imminent or actual threat of future harm" from defendant's alleged misrepresentations, establishing Article III standing for injunctive relief. Id. at 971-72.

The facts here are similar. Plaintiff alleges he "would like to purchase Easton bats for his son in the future if in fact the bats were accurately labeled," but is unable to do. FAC ¶ 39. But unlike Davidson, Plaintiff does not allege he regularly purchases bats, or is regularly visiting stores where bats are sold. The Supreme Court has held that "'some day' intentions—without any description of concrete plans, or indeed even any specification of *when* the some day will be—do not support a finding of . . . 'actual or imminent' injury." Lujan, 504 U.S. at 564. Absent some plausible allegation of threatened, impending injury—as required by Lujan and as found in Davidson—Plaintiff has failed to adequately allege Article III standing for injunctive relief.

Defendant's Rule 12(b)(1) motion to dismiss is GRANTED as to Plaintiff's claims for injunctive relief, and DENIED as to Plaintiff's remaining claims.

B. Whether EBSI and EBSC Are Indispensable Parties

Defendant next moves to dismiss the FAC pursuant to Rule 12(b)(7) because its predecessor entities—EBSI and EBSC—are indispensable parties. The Defendant argues that because these parties cannot be joined, the Court should dismiss the action, or alternatively should stay the suit until the bankruptcy court determines whether Plaintiff's claims against EBSI and EBSC are barred, enjoined, or discharged.

An action may be dismissed for failure to join a party under Rule 19. Fed. R. Civ. P 12(b)(7). To determine whether Rule 19

requires the joinder of additional parties, the Court may consider evidence outside of the pleadings. McShan v. Sherrill, 283 F.2d 462, 464 (9th Cir. 1960). On a Rule 12(b)(7) motion, "[t]he moving party has the burden of persuasion . . . ." Makah Indian Tribe v. Verity, 910 F.2d 555, 558 (9th Cir. 1990).

The compulsory-party joinder inquiry is a three-step process. EEOC v. Peabody W. Coal Co., 400 F.3d 774, 779 (9th Cir. 2005). First, the Court must determine "whether a nonparty should be joined under Rule 19(a)." Id. Second, the Court must determine "whether it is feasible to order that the absentee be joined." Id. Third, if joinder isn't feasible, the Court must determine whether the party is indispensable. The Court considers "'whether the case can proceed without the absentee,' or whether the action must be dismissed." Id.

A party is necessary if, without joinder, "the court cannot accord complete relief among the parties." Fed. R. Civ. P. 19(a)(1)(A); Confederated Tribes v. Lujan, 928 F.2d 1496, 1501 (9th Cir. 1991). Here Plaintiff seeks monetary relief that this Court can accord without joinder of EBSI or EBSC.

In addition, the absentee must claim "an interest relating to the subject of the action." Fed. R. Civ. P. 19(a)(1)(B). If the outcome of the litigation will have no practical effect on the absentee's interest, the absentee is not a necessary party. Fed. R. Civ. P. 19(a)(1)(B)(i); see also Fourth Inv. LP v. United States, 720 F.3d 1058, 1072 (9th Cir. 2013) (holding appellants failed to establish absent parties were necessary when judgment would not prejudicially affect their interests). In general under this practical effect test, joint tortfeasors are permissive, rather than necessary, parties. Temple v. Synthes Corp., Ltd., 498 U.S. 5, 7 (1990) (per curiam) (collecting cases).

Plaintiff alleges misrepresentations allegedly made by Defendant, not by the predecessor entities. All six causes of action assert conduct occurring after the EBS Asset Sale, and the FAC strictly limits its claims to alleged tortious behavior by Defendant. To the extent that EBSI or EBSC could be found jointly responsible for the alleged torts committed against Plaintiff and members of the putative class, those parties are permissive, rather than necessary. Temple, 498 U.S. at 7. Neither the interests of EBSI and EBSC nor their insolvency estates would be impaired if they are not joined.

Defendant's Rule 12(b)(7) motion is DENIED. Defendant's request to stay the proceedings is DENIED.

C. Adequacy of Plaintiff's Pleadings

Defendant contends that all of Plaintiff's claims should be dismissed because (1) Plaintiff lacks standing under the UCL and FAL, and (2) Plaintiff fails to plead his claims with particularity, as required by Rule 9(b).

1. Legal Standard

Rule 12(b)(6) allows an attack on the pleadings for failure to state a claim on which relief can be granted. "[W]hen ruling on a defendant's motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint." Erickson v. Pardus, 551 U.S. 89, 94 (2007). But the court is "not bound to accept as true a legal conclusion couched as a factual allegation." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). "Nor does a complaint suffice if it tenders naked assertion[s] devoid of further factual enhancement." Id. (alteration in original; citation omitted).

A complaint must "state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). This means that the complaint must plead "factual content that

allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, 556 U.S. at 678. "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." Id. "Determining whether a complaint states a plausible claim for relief" is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." Id. at 679.

"In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally." Fed. R. Civ. P. 9(b).

2. California Statutory Claims - Standing

Defendant argues Plaintiff lacks standing to bring claims under the UCL and the FAL because the California statutes do not have extraterritorial effect.

In general, there is a strong presumption against the extraterritorial application of California law. Sullivan v. Oracle Corp., 51 Cal. 4th 1191, 1207-08 (2011). The "presumption against extraterritoriality applies to the UCL in full force." Id. California's FAL prohibits false or misleading statements made "before the public in this state" and "from this state before the public in any state." Cal. Bus. & Prof. Code § 17500.

But California "statutory remedies may be invoked by out-of-state parties when they are harmed by wrongful conduct occurring in California." Norwest Mortg., Inc. v. Superior Ct., 72 Cal. App. 4th 214, 224-25 (1999); In re Toyota Motor Corp., 785 F. Supp. 2d 883, 916 (C.D. Cal. 2011). Therefore, a non-California resident may have standing under the UCL or the FAL if either (1) the injury occurred in California, or (2) defendants' conduct occurred

in California. See Sullivan, 51 Cal. 4th at 1207-08; see also Tindenberg v. Bidz.com, Inc., No. CV 08-5553 PSG (FMOx), 2009 WL 605249 at *4 (C.D. Cal. Mar. 4, 2009) (looking to "whether the injury occurred in California and whether the conduct of Defendants occurred in California" in determining whether a non-California resident could avail herself of the UCL and the FAL).

In determining whether wrongful conduct occurred in California, courts have considered factors such as where the defendant does business, whether the defendant's principal offices are located in California, where the plaintiffs are located, and where the alleged actionable conduct took place. In re Toyota, 785 F. Supp. at 917. In Tindenberg v. Bidz.com, Inc., the Honorable Philip Gutierrez found plaintiffs did not have standing to pursue a UCL claim where the sole allegation linking defendants to California was that their principle place of business was located in California. Tindenberg, 2009 WL 605249 at *4. But where plaintiffs have plausibly pleaded that a California headquarters oversaw the conduct that led to the violation of a California statute, courts have found that non-California plaintiffs have standing to sue under California consumer protection laws. See, e.g., Precht v. Kia Motors Am., Inc., No. SACV 14-1148 DOC (MANx), 2014 WL 10988343 at *9 (C.D. Cal. Dec. 29, 2014).

Plaintiff alleges Defendant is headquartered in Thousand Oaks, California, and is registered to do business in California. FAC ¶ 10. Plaintiff also alleges that Defendant's conduct—control of the labeling, advertising, promotion, quality control, and sale of the bats—occurred at its headquarters and principal place of business in Thousand Oaks, California.

Plaintiff's motion to dismiss for lack of statutory standing is DENIED.

3. Defendant's Motion to Dismiss for Failure to State a Claim

Defendant argues that each of Plaintiff's six causes of action should be dismissed for failure to state a claim under Rule 12(b)(6). All of the claims are based on the same allegedly fraudulent conduct and are subject to Rule 9 (b)'s heightened pleading standard. See Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1103-04 (9th Cir. 2003) ("[T]he plaintiff may allege a unified course of fraudulent conduct and rely entirely on that course of conduct as the basis of a claim. In that event, the claim is said to be 'grounded in fraud' or to 'sound in fraud,' and the pleading of that claim as a whole must satisfy the particularity requirement of Rule 9(b).").[4]

a. Plaintiff's FAL and UCL Claims.

The UCL prohibits "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising . . . ." Cal. Bus. & Prof. Code § 17200. The FAL makes it unlawful for a business to disseminate any statement "which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading . . . ." Id. § 17500. Defendant argues that Plaintiff has failed to plead these causes of action with sufficient particularity.

[4] The heightened pleading standard applies to Plaintiff's pleadings even if that standard would not be applied by California courts. See Kearns v. Ford Motor Co., 567 F.3d 1120, 1125 (9th Cir. 2009) ("It is well settled that the Federal Rules of Civil Procedure apply in federal court, irrespective of the source of the subject matter jurisdiction, and irrespective of whether the substantive law at issue is state or federal.").

> Plaintiff's claims under the California consumer protection statutes are governed by the reasonable consumer test. Under this standard, Plaintiff must show that members of the public are likely to be deceived. This requires more than a mere possibility that [the alleged mislabeling] might conceivably be misunderstood by some few consumers viewing it in an unreasonable manner. Rather, the reasonable consumer standard requires a probability that a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled.

Ebner v. Fresh, Inc., 838 F.3d 958, 965 (9th Cir. 2016) (citations omitted) (quotation marks omitted).

"[T]o state a claim under either the UCL or the FAL, based on false advertising or promotional practices, it is necessary only to show that members of the public are likely to be deceived." Chapman v. Skype Inc., 220 Cal. App. 4th 217, 226 (2013). And "whether a business practice is deceptive will usually be a question of fact not appropriate for decision on a motion to dismiss." Davis v. HSBC Bank Nevada, N.A., 691 F.3d 1152, 1162 (9th Cir. 2012) (citations omitted) (alterations omitted).

Applying the reasonable consumer standard, the Court finds the alleged mislabeling of the bat's weight is sufficiently deceptive to survive a motion to dismiss.

Defendant also argues Plaintiff has not adequately pleaded Defendant's knowledge of the alleged issues with bat labeling under the FAL. Both sides point to the following paragraph of the FAC: "Defendant, as the manufacturer and distributor of Easton bats, knew or should have known that its representations concerning the weights of nonconforming Easton baseball bats were untrue, misleading, and likely to cause confusion among

customers." FAC ¶ 54. Given Rule 9(b)'s provision that "knowledge . . . may be alleged generally," this statement is sufficiently specific at this stage of the litigation

Defendant's motion to dismiss Plaintiff's First and Second Causes of Action under the UCL and FAL is DENIED.

b. Plaintiff's Third, Fourth, and Fifth Causes of Action – Breach of Express and Implied Warranty, Unjust Enrichment

As a threshold matter, the parties disagree as to whether California or Alabama law applies to Plaintiff's Third, Fourth, and Fifth Causes of Action. Defendant argues that Alabama law should apply under California's choice of law provision. Mot. at 23-24. Plaintiff asserts that California law applies. Opp'n at 19.

The Court has diversity jurisdiction, so it must apply federal procedural law and the substantive law of the forum state, including the choice-of-law rules of that state. See Patton v. Cox, 276 F.3d 493, 495 (9th Cir. 2002) (citing Klaxon Co. v. Stentor Electric Mfg. Co., 313 U.S. 487, 496 (1941)). Where as here, California's "governmental interest analysis" applies, courts must initially analyze whether there is a "material difference" between the laws of the competing states on the basis of the facts presented. Pokorny v. Quixtar, Inc., 601 F.3d 987, 995 (9th Cir. 2010),

Several California district courts have declined to perform a choice-of-law analysis at the motion to dismiss stage of class action litigation, because that analysis is premature. See, e.g., Forcellati v. Hylands, Inc., 876 F. Supp. 2d 1155, 1159 (C.D. Cal. 2012); In re Sony Grand Wega KDF–E A10/A20 Series Rear Projection HDTV Television Litigation, 758 F. Supp. 2d 1077, 1096 (S.D. Cal. 2010) ("In a putative class action, the Court will

not conduct a detailed choice-of-law analysis during the pleading stage.").

Although it would be premature for the Court to speculate about whether any differences in the various consumer protection laws are material here until the parties have had an opportunity engage in discovery, Plaintiff fails to state certain claims adequately whether the Court applies California or Alabama law. Alabama law on breach of express warranty requires that pre-suit notice be given to the seller of goods regarding the allegedly defective item.[5] Plaintiff has not pleaded that he provided such notice, and has therefore not stated a claim under Alabama law.

California law also generally requires that notice be given, Cal. Com. Code. § 2607(3)(A), except when the item is not purchased directly from the manufacturer. See Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 61-62 (1963); see also In re Toyota, 754 F. Supp. 2d at 1180 (discussing multiple federal cases where courts have applied the Greenman exception). Because Plaintiff did not buy his bat directly from Defendant, he need not plead that he provided notice to Defendant.

However, Plaintiff has not sufficiently pleaded that Defendant's label constitutes an "express warranty" under California law. California defines an "express warranty" as: "(1) a written statement arising out of a sale to the consumer of a consumer good pursuant to which the manufacturer, distributor,

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[5] The Supreme Court of Alabama holds that "to establish a breach of an express warranty, . . . the plaintiff must show that the warranty failed of its essential purpose; that either the dealer refused to repair or replace the malfunctioning component, or failed to do so within a reasonable time." Lipham v. General Motors Corp., 665 So. 2d 190, 192 (Ala. 1995) (quoting Ag-Chem Equip. Co. v. Limestone Farmers Co-op., Inc., 567 So. 2d 250 (Ala. 1990)) (quotation marks omitted).

or retailer undertakes to preserve or maintain the utility or performance of the consumer good or provide compensation if there is a failure in utility or performance; or (2) in the event of any sample or model, that the whole of the goods conforms to such sample or model. Cal. Civ. Code. § 1791.2; see also Tipton v. Zimmer, No. CV 15-4171, 2016 WL 3452744, at *6 (C.D. Cal. June 23, 2016) ("A breach of express warranty requires that a plaintiff identify a specific and unequivocal written statement from the manufacturer that demonstrates a guarantee that the manufacture failed to uphold.").

The bat's label, which misrepresented the bat's weight, did not arise "out of a sale." It did not unequivocally state that Easton would preserve or maintain the utility or performance of the bat. Plaintiff has not pleaded any additional facts that suggest the bat's label created an express warranty.

Defendant's motion to dismiss Plaintiff's Third Cause of Action is GRANTED.

Alabama law on breach of implied warranty requires that a plaintiff take reasonable steps to notify the defendant within a reasonable time that the product did not have the expected quality.[6] The FAC does not allege Plaintiff did so. Under California law, the warranty of merchantability provides "a minimum level of quality" and breach occurs only if the product "lacks even the most basic degree of fitness for ordinary use." Birdsong v. Apple, Inc., 590 F.3d 955, 958 (9th Cir. 2009) (citations omitted). Plaintiff's allegations do not create a plausible inference that the bats lacked fitness for ordinary use, or that the

[6] See Jewell v. Seaboard Indus., Inc., 667 So.2d 653, 660 (Ala. 1995) (holding that to properly plead a breach of implied warranty, a plaintiff must allege that he properly notified the seller of any breach within a reasonable time and the seller did not cure the defect).

bats were fundamentally flawed. Allegations that the bat's weight was mislabeled are not sufficient under California law.

Defendant's motion to dismiss Plaintiff's Fourth Cause of Action is GRANTED.

As to unjust enrichment, there is a substantial difference between California and Alabama law. California has no standalone cause of action, and the Ninth Circuit has held that a straightforward statement can be sufficient to plead what is, in effect, a quasi-contract cause of action. Astiana v. Hain Celestial Grp., Inc., 783 F.3d 753, 762 (9th Cir. 2015). Plaintiff meets that standard.

Because Plaintiff has plausibly pleaded a claim under California law, and because the Court declines to perform a choice-of-law analysis at this stage in the litigation, Defendant's motion to dismiss Plaintiff's Fifth Cause of Action is DENIED.

c. Plaintiff's Sixth Cause of Action – Magnuson-Moss Act

Defendant argues Plaintiff fails to state a claim for breach of express warranty under the Magnuson-Moss Act. Plaintiff appears to allege a violation of the Act insofar as Defendant breached its warranties under state law. FAC ¶ 101 ("As discussed above, Defendant breached its express and implied warranties by materially mislabeling and misrepresenting the weights of its Easton bats."). Because Plaintiff has failed to sufficiently plead a claim for relief for its warranty claims under state law, its corresponding Magnuson-Moss claims also fail. Clemens v. DaimlerChrysler Corp., 534 F.3d 1017, 1022 & n.3 (9th Cir. 2008) (holding that where Magnuson-Moss claims hinge on state law implied and express warranty claims, the claims stand or fall with the state law claims).

Plaintiff also failed to plead a sufficient independent claim for relief under the Act. Plaintiff concedes the representation as to the weight of the bat does not qualify as an express warranty under the Act. Opp'n at 21 n.5. Absent a valid pleading of state law warranty claims, Plaintiff has not plausibly stated a claim to relief under the Magnuson-Moss Act.

Defendant's motion to dismiss Plaintiff's Sixth Cause of Action is GRANTED.

D. Plaintiff's Class Claims

Defendant argues that Plaintiff's class claims should be stricken pursuant to Federal Rule of Civil Procedure 12(f), which provides that a court "may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f); see also Whittlestone, Inc. v. Handi–Craft Co., 618 F.3d 970, 973 (9th Cir. 2010) (district court erred in striking damages claim per Rule 12(f) because "none of the five categories [in Rule 12(f)] covers the allegations in the pleading sought to be stricken . . . ."). "[T]he function of a [Rule] 12(f) motion to strike is to avoid the expenditure of time and money that must arise from litigating spurious issues by dispensing with those issues prior to trial." Sidney-Vinstein v. A.H. Robins Co., 697 F.2d 880, 885 (9th Cir. 1983).

Defendant alleges only that the class allegations are legally insufficient. The Motion is DENIED.

III. CONCLUSION

Defendant's motion to dismiss the FAC under Rule 12(b)(1) is GRANTED with leave to amend as to Plaintiff's claims for injunctive relief, and DENIED as to Plaintiff's remaining claims. Defendant's motion to dismiss the FAC under Rule 12(b)(7) is DENIED. Defendant's motion to dismiss the FAC under Rule

12(b)(6) is GRANTED with leave to amend as to Plaintiff's Third, Fourth, and Sixth Causes of Action, and DENIED as to Plaintiff's First, Second, and Fifth Causes of Action. Defendant's motion to strike the class claims under Rule 12(f) is DENIED. An amended complaint may be filed and served no later than November 5, 2018. The Court does not grant leave to add new defendants or new claims. Leave to add defendants or claims must be sought by a separate, properly noticed motion.

IT IS SO ORDERED.

Date: October 9, 2018

Dale S. Fischer
United States District Judge