

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Michelene Colette et al,
Plaintiff,
v.
CV Sciences, Inc.,
Defendant.

2:19-cv-10227-VAP-JEM(x)

**Order GRANTING IN PART
Defendant’s Motion to Dismiss and
STAYING Remaining Causes of
Action (Dkt. 39).**

United States District Court
Central District of California

Before the Court is Defendant CV Sciences, Inc.’s Motion to Dismiss (the “Motion”). (Dkt. 39). Plaintiffs Michelene Colette and Leticia Shaw filed opposition on April 6, 2020 (Dkt. 43), and Defendant replied on April 20, 2020 (Dkt. 44). The Court deems the Motion suitable for resolution without oral argument pursuant to Local Rule 7-15. After considering all papers filed in support of, and in opposition to, the Motion, the Court GRANTS IN PART the Motion and STAYS the remaining causes of action.

I. BACKGROUND

This lawsuit is one of several in the vanguard of consumer class actions relating to the marketing and sale of cannabidiol (“CBD”) products. Just in the Central and Northern Districts of California, the Court is aware of four similar cases, each filed around the same time and each now facing a pending motion to dismiss. *See DaSilva v. Infinite Product Co.*, No. 2:19-cv-10148, Dkt. 48 (C.D. Cal. Mar. 17, 2020); *Davis v. cbdMD, Inc.*, No. 2:19-cv-10241, Dkt. 40 (C.D. Cal Mar.

1 15, 2020); *McCarthy v. Elixinol, LLC*, 5:19-CV-07948, Dkt. 34 (N.D. Cal. Mar. 13,
2 2020); *McCarthy v. Charlotte’s Web Holdings, Inc.*, 5:19-cv-07836, Dkt. 33 (N.D.
3 Cal. Mar. 16, 2020).

4
5 Defendant here, a California corporation with its principal place of business
6 in San Diego (Dkt. 35 ¶ 15), produces and sells a range of CBD products, including
7 sprays, oil drops, gummies, capsules, and softgels (*id.* ¶ 1). Plaintiff Colette is an
8 Arizona citizen who alleges she purchased Defendant’s CBD spray approximately
9 two years ago for \$60. (*Id.* ¶ 13). Plaintiff Shaw is a California citizen who alleges
10 that she purchased six of Defendant’s products between May and December 2018
11 for a total of \$377.73. (*Id.* ¶ 14). Each Plaintiff claims that, had she known CBD
12 products are “not legally sold in the United States,” she would not have purchased
13 them. (*Id.* ¶¶ 13–14).

14
15 The crux of this lawsuit is Plaintiffs’ allegations that Defendant’s products
16 are illegal under the Federal Food, Drug, and Cosmetic Act of 1938, 21 U.S.C. §
17 301, *et seq* (“FDCA”). Plaintiffs claim the products run afoul of the FDCA in two
18 ways: first, they “are mislabeled as Dietary Supplements or contain the illegal die-
19 tary ingredient CBD,” and second, Defendant’s CBD spray is intended for sublin-
20 gual use and, therefore, “does not meet the definition of a dietary supplement.”
21 (*See generally id.* ¶¶ 18–24). The Food and Drug Administration (“FDA”) is ac-
22 tively considering the regulation of CBD products, including the “manufacturing,
23 product quality, marketing, labeling, and sale of products containing cannabis or
24 cannabis-derived products.” *See* U.S. Food & Drug Admin., *Scientific Data and In-*
25 *formation About Products Containing Cannabis or Cannabis-Derived Compounds*;

26

1 *Extension of Comment Period*, 84 Fed. Reg. 28822, 28823 (June 20, 2019). Cur-
2 rently, the FDA’s position is that it is illegal under federal law to “add CBD to a
3 food or label CBD as a dietary supplement.” *What You Need to Know (And What*
4 *We’re Working to Find Out) About Products Containing Cannabis or Cannabis-de-*
5 *derived Compounds, Including CBD* (May 5, 2020), [https://www.fda.gov/consum-](https://www.fda.gov/consumers/consumer-updates/what-you-need-know-and-what-were-working-find-out-about-products-containing-cannabis-or-cannabis)
6 [ers/consumer-updates/what-you-need-know-and-what-were-working-find-out-](https://www.fda.gov/consumers/consumer-updates/what-you-need-know-and-what-were-working-find-out-about-products-containing-cannabis-or-cannabis)
7 [about-products-containing-cannabis-or-cannabis](https://www.fda.gov/consumers/consumer-updates/what-you-need-know-and-what-were-working-find-out-about-products-containing-cannabis-or-cannabis).

8
9 Citing the FDA’s statements on CBD products, Plaintiffs’ First Amended
10 Complaint (“FAC”) brings claims for (1) violation of California’s Unfair
11 Competition Law (“UCL”), (2) violation of California’s false advertising law, (3)
12 violation of California’s Consumer Legal Remedies Act (“CLRA”), (4) breach of
13 express warranty under California law, (5) breach of implied warranty of
14 merchantability under California law, (6) breach of express warranties under
15 Arizona law, (7) breach of implied warranty of merchantability under Arizona law,
16 (8) violation of the Arizona Consumer Fraud Act (“ACFA”), and (9) declaratory
17 judgment. (Dkt. 35 ¶¶ 43–132). Plaintiffs seek to represent a class of “all persons
18 in the United States who purchased [Defendant’s products] during the class period,”
19 as well as California and Arizona subclasses. (*Id.* ¶ 31–33). Defendant moves to
20 dismiss the FAC for failure to state a claim or, in the alternative, stay the case under
21 the primary jurisdiction doctrine. (*See generally* Dkt. 39-1).

22 23 **II. LEGAL STANDARD**

24 **A. Motion to Dismiss**

25 Federal Rule of Civil Procedure 12(b)(6) allows a party to bring a motion to
26 dismiss for failure to state a claim upon which relief can be granted. Rule 12(b)(6)

1 is read along with Rule 8(a), which requires a short, plain statement upon which a
2 pleading shows entitlement to relief. Fed. R. Civ. P. 8(a)(2); *Bell Atl. Corp. v.*
3 *Twombly*, 550 U.S. 544, 555 (2007). When evaluating a Rule 12(b)(6) motion, a
4 court must accept all material allegations in the complaint—as well as any
5 reasonable inferences to be drawn from them—as true and construe them in the
6 light most favorable to the non-moving party. *See Doe v. United States*, 419 F.3d
7 1058, 1062 (9th Cir. 2005).

8
9 “While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not
10 need detailed factual allegations, a plaintiff’s obligation to provide the ‘grounds’ of
11 his ‘entitlement to relief’ requires more than labels and conclusions, and a formulaic
12 recitation of the elements of a cause of action will not do.” *Twombly*, 550 U.S. at
13 555 (citations omitted). Rather, the allegations in the complaint “must be enough to
14 raise a right to relief above the speculative level.” *Id.*

15
16 To survive a motion to dismiss, a plaintiff must allege “enough facts to state
17 a claim to relief that is plausible on its face.” *Twombly*, 550 U.S. at 570; *Ashcroft v.*
18 *Iqbal*, 556 U.S. 662, 697 (2009). “The plausibility standard is not akin to a
19 ‘probability requirement,’ but it asks for more than a sheer possibility that a
20 defendant has acted unlawfully. Where a complaint pleads facts that are ‘merely
21 consistent with’ a defendant’s liability, it stops short of the line between possibility
22 and plausibility of ‘entitlement to relief.’” *Iqbal*, 556 U.S. at 678 (quoting
23 *Twombly*, 550 U.S. at 556).

24
25 The Ninth Circuit has clarified that (1) a complaint must “contain sufficient
26 allegations of underlying facts to give fair notice and to enable the opposing party to

1 defend itself effectively” and (2) “the factual allegations that are taken as true must
2 plausibly suggest an entitlement to relief, such that it is not unfair to require the
3 opposing party to be subjected to the expense of discovery and continued
4 litigation.” *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011).

6 **B. Motion to Stay**

7 It is well-established that “[a] district court ‘has broad discretion to stay
8 proceedings as an incident to its power to control its own docket’ in an effort to
9 promote judicial economy.” *DeMartini v. Johns*, 693 F. App’x 534, 538 (9th Cir.
10 2017) (quoting *Clinton v. Jones*, 520 U.S. 681, 706–07); *see also Landis v. N. Am.*
11 *Co.*, 299 U.S. 248, 254–55 (1936) (“[T]he power to stay proceedings is incidental to
12 the power inherent in every court to control the disposition of the causes on its
13 docket with economy of time and effort for itself, for counsel, and for litigants.
14 How this can best be done calls for the exercise of judgment, which must weigh
15 competing interests and maintain an even balance.”).

17 **III. DISCUSSION**

18 **A. Declaratory Relief**

19 The Court addresses Plaintiffs’ final cause of action first. In Count Nine,
20 “Plaintiffs seek a declaration that Defendant has misrepresented the nature,
21 ingredients and effectiveness of the Products and that its actions are unlawful.”
22 (Dkt. 35 ¶ 131). This claim for relief arises under the Declaratory Judgment Act, 28
23 U.S.C. § 2201 (“DJA”), which permits a court to “declare the rights and other legal
24 relations of any interested party seeking such declaration.”

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