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United States District Court, C.D. California.

QUICK DISPENSE, INC.
v.
VITALITY FOODSERVICE, INC. et al.

Case No.: 8:23-cv-02322-FWS-ADS
|
Filed June 4, 2024

Attorneys and Law Firms

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PROCEEDINGS: ORDER GRANTING DEFENDANT'S MOTION TO DISMISS SECOND AMENDED COMPLAINT [11]

FRED W. SLAUGHTER, UNITED STATES DISTRICT JUDGE

***1** Before the court is Defendant Vitality Foodservice Inc. and Defendant Darin Perry's (collectively, "Defendants") Motion to Dismiss Second Amended Complaint ("Motion" or "Mot."). (Dkt. 11.) Plaintiff Quick Dispense, Inc. ("Plaintiff") opposes the Motion ("Opposition or Opp."). (Dkt. 13.) Defendants also filed a Reply. (Dkt. 16.) The court found this matter appropriate for resolution without oral argument. *See* Fed. R. Civ. P. 78(b) ("By rule or order, the court may provide for submitting and determining motions on briefs, without oral hearings."); L.R. 7-15 (authorizing courts to "dispense with oral argument on any motion except where an oral hearing is required by statute"). Based on the record, as applied to the applicable law, the Motion is **GRANTED**.

I. Summary of the Second Amended Complaint's Allegations

Plaintiff is a California corporation with its principal place of business in Los Angeles County, California. (Dkt. 7 ("SAC") ¶ 4.) Plaintiff is in the business of distributing wholesale beverage products under a program established by Defendants. (*Id.*) Defendant Vitality Foodservice, Inc. ("Defendant Vitality"), doing business as Nestlé Professional, is a Delaware corporation with its principal place of business in Solon, Ohio. (*Id.* ¶ 5.) Defendant Darin Perry is an individual residing in Utah who was Defendant Vitality's "Senior Vice President - Sales Division" at certain relevant times. (*Id.* ¶ 6.)

Plaintiff alleges that on November 20, 2020, Plaintiff and Defendant Vitality entered into three agreements: (1) the Distributorship Agreement; (2) Sales Agent Agreement; and (3) Independent Contractor Services Agreement, (collectively "Distribution Agreement"). [1] (*Id.* ¶ 11.) Plaintiff alleges that the Distribution Agreement established a franchise relationship between Plaintiff and Defendant Vitality as defined by California Corporation Code § 31005. (*Id.*) Through this Distribution Agreement, Defendants allegedly granted Plaintiff the right to engage in the business of offering, selling, and distributing goods, including but not limited to beverages under the trademark "Nestlé" and "Nescafé." (*Id.* ¶ 13.)

Defendants "own, control, and use" both the Nescafé and Nestlé trademarks and purportedly granted Plaintiff the right to use these trademarks. (*Id.* ¶ 15.) As a result, Plaintiff alleges its business "was substantially associated" with these trademarks based on "the receipt, storage in inventory, sale, and distribution to others of thousands of cases of Defendants' products over extended lengths of time and hundreds of thousands or millions of Defendants' products over extended lengths of time." (*Id.* ¶ 16.)

***2** Defendants also purportedly granted Plaintiff the right "to engage in the business under a marketing plan or system prescribed in substantial part by Defendants." (*Id.* ¶ 14.) Pursuant to this marketing plan, Defendants would distribute Nestlé branded goods to a network of independent distributors with each distributor responsible for a territory, carefully structure exclusive territories, and "advertise, market, and promote themes and methods." (*Id.* ¶ 14(A)-(D).) Plaintiff was allegedly granted "the exclusive right" to distribute Defendant Vitality's coffee, tea, and judice product throughout Arizona, Utah, twelve counties in California, six counties in Idaho, four counties in Nevada, and northeast Colorado. (*Id.* ¶ 14(C)(i-v).)

Plaintiff further alleges it was "required to pay fees and costs and bear substantial costs that were in the nature of an investment and that constituted direct and indirect franchise fees," such as payment "for inventory of equipment and products in excess of quantities needed or that a reasonable businessperson normally would purchase to maintain a going inventory or supply" and payments of "$60,000 per week to Defendants for deductions that Defendants granted to an upstream distributor ... that were passed on to Plaintiff." (*Id.* ¶¶ 17-18.)

Based on these allegations, Plaintiff asserts seven claims against Defendants for: (1) violations of California Franchise Investment Law ("CFIL"), Cal. Corp. Code §§ 31000 *et seq.*; (2) breach of contract; (3) breach of implied contract; (4) wrongful termination or non-renewal in violation of California Franchise Relations Act ("CFRA"), Cal. Bus. & Prof. Code § 20000 *et seq.*; (5) declaratory relief; (6) unfair business practices in violation of California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code § 17200 *et seq.*; and (7) intentional interference with prospective economic advantage. (*Id.* ¶¶ 19-72.)

II. Legal Standard

Rule 12(b)(6) permits a defendant to move to dismiss a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). "[C]ourts must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." *Tellabs, Inc. v. Makor Issues & Rts., Ltd.*, 551 U.S. 308, 322 (2007). To withstand a motion to dismiss brought under Rule 12(b)(6), a complaint must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). While "a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations," a plaintiff must provide "more than labels and conclusions" and "a formulaic recitation of the elements of a cause of action" such that the factual allegations "raise a right to relief above the speculative level." *Id.* at 555 (citations and internal quotation marks omitted); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (reiterating that "recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice"). "A Rule 12(b)(6) dismissal 'can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory.' " *Godecke v. Kinetic Concepts, Inc.*, 937 F.3d 1201, 1208 (9th Cir. 2019) (quoting *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990)).

"Establishing the plausibility of a complaint's allegations is a two-step process that is 'context-specific' and 'requires the reviewing court to draw on its judicial experience and common sense.' " *Eclectic Props. E., LLC v. Marcus & Millichap Co.*, 751 F.3d 990, 995-96 (9th Cir. 2014) (quoting *Iqbal*, 556 U.S. at 679). "First, to be entitled to the presumption of truth, allegations in a complaint ... must contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively." *Id.* at 996 (quoting *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011)). "Second, the factual allegations that are taken as true must plausibly suggest an entitlement to relief, such that it is not unfair to require the opposing party to be subjected to the expense of discovery and continued litigation." *Id.* (quoting *Starr*, 652 F.3d at 1216); *see also Iqbal*, 556 U.S. at 681.

***3** Plausibility "is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 556). On one hand, "[g]enerally, when a plaintiff alleges facts consistent with both the plaintiff's and the defendant's explanation, and both explanations are plausible, the plaintiff survives a motion to dismiss under Rule 12(b)(6)." *In re Dynamic Random Access Memory (DRAM) Indirect Purchaser Antitrust Litig.*, 28 F.4th 42, 47 (9th Cir. 2022) (citing *Starr*, 652 F.3d at 1216). But, on the other, "[w]here a complaint pleads facts that are

merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." *Eclectic Props. E.*, 751 F.3d at 996 (quoting *Iqbal*, 556 at U.S. 678). Ultimately, a claim is facially plausible where "the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *See Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 at 556); *accord Wilson v. Hewlett-Packard Co.*, 668 F.3d 1136, 1140 (9th Cir. 2012).

In *Sprewell v. Golden State Warriors*, the Ninth Circuit described legal standards for motions to dismiss made pursuant to Rule 12(b)(6):

> Review is limited to the contents of the complaint. All allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party. The court need not, however, accept as true allegations that contradict matters properly subject to judicial notice or by exhibit. Nor is the court required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences.

266 F.3d 979, 988 (9th Cir. 2001) (citations omitted).

III. Discussion

In the Motion, Defendants move to dismiss all of Plaintiff's claims, including the CFIL and CFRA claims, the breach of contract claim, the breach of implied contract claim, the declaratory relief claim, the UCL claim for unfair business practices, the intentional interference with prospective economic advantage claim, for failure to state a claim. (Mot. at 2-4.) Defendants also seek to dismiss Plaintiff's request for attorney's fees and punitive damages. (Mot. at 29-30.)

A. The CFIL Claims

Plaintiff alleges three violations of the CFIL attributable to Defendants' alleged failure to provide Plaintiff with a franchise disclosure document in violation of California Corporations Code § 31119, sale of an unregistered franchise in violation of California Corporations Code § 31110, and sale by means of untrue statements or omissions in violation of California Corporations Code § 31201. (SAC ¶¶ 19-31.) Defendants argue all three purported CFIL violations are time barred by the applicable statute of limitations. (Mot. at 13-18.)

Under Rule 12(b)(6), a court may dismiss a claim "on the ground that it is barred by the applicable statute of limitations only when 'the running of the statute is apparent on the face of the complaint.' " *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 969 (9th Cir. 2010) (quoting *Huynh v. Chase Manhattan Bank*, 465 F.3d 992, 997 (9th Cir. 2006)). "A complaint cannot be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts that would establish the timeliness of the claim." *Von Saher*, 592 F.3d at 969 (quoting *Supermail Cargo, Inc. v. United States*, 68 F.3d 1204, 1206 (9th Cir. 1995)).

The statute of limitations for violations of Sections 31110 and 31119 is the earliest of: (i) four years after the violation; (ii) one year after the plaintiff's discovery of the facts constituting the violation; or (iii) ninety days after delivery of written notice of a violation.[2] Cal. Corp. Code § 31303.[3] The four-year ban is "absolute," and "a plaintiff's belated discovery of the fact constituting the violation cannot serve to extend" it. *People ex rel. Dep't of Corp. v. SpeeDee Oil Change Sys.*, 95 Cal. App. 4th 709, 722 (2002). The statute of limitations for violations of Section 31201 is a maximum of two years. *See* Cal. Corp. Code § 31304.[4] "There is no equitable tolling of either statute of limitations, no delayed accrual based on when damage was sustained or because of fraud or conspiracy, and a plaintiff's delayed discovery of the facts constituting the violation does not extend the

limitations period." *JB Brothers, Inc. v. Poke Bar Ga Johns Creek I, LLC*, 2022 WL 3012822, at *3 (C.D. Cal. June 6, 2022) (citing *SpeeDee Oil*, 95 Cal. App. 4th at 723-25).

1. California Corporations Code § 31110

***4** Plaintiff alleges Defendants violated section 31110 by "selling a franchise without first registering the sale." (SAC ¶¶ 11-18); *see also* Cal. Corp. Code § 31110 (prohibiting "offer[ing] or sell[ing] any franchise in this state unless the offer of the franchise has been registered under this part or exempted ....").

The parties dispute whether the four-year period or the one-year discovery period applies to Plaintiff's Section 31110 claim. Defendants argue that Plaintiff had constructive notice that the transaction had the characteristics of a franchise sale and that the purported franchise was unregistered at the time the Distribution Agreement was signed on November 20, 2020, because Plaintiff could have discovered the franchise's unregistered status by checking the public registration filings records. [5] (Mot. at 15-17.) Consequently, Defendants argue Plaintiff's Section 31110 was barred one year after the parties executed the Distribution Agreement on November 20, 2021. (*Id.*)

On the other hand, Plaintiff argues the statute of limitations requires actual knowledge and "Plaintiff's knowledge of the *critical* facts were not conclusively perfected on November [16], 2020," because Plaintiff was not aware of the hidden franchise fees at that time. (Opp. at 17-20.) Essentially, Plaintiff argues it did not know the sale constituted a franchise at the time of the Distribution Agreement was executed because Defendants imposed "hidden franchise fees" on Plaintiff. (*Id.* at 18-20.)

The court finds Plaintiff's argument unavailing for two reasons. First, Plaintiff's "hidden franchise fees" argument is inconsistent with both the Distribution Agreement's provisions and SAC's allegations. As discussed in section III.B, *infra*, Plaintiff alleges it was required to pay franchise fees in the form of "inventory of equipment and products in excess of quantities needed or that a reasonable businessperson normally would purchase to maintain a going inventory or supply" and "payments of $60,000 per week to Defendants for deductions that Defendants granted to an upstream distributor ... that were passed on to Plaintiff." (SAC ¶¶ 17-18(A)-(B).) Plaintiff does not allege these fees were hidden, and Defendant Vitality's entitlement to and procedures for imposing these fees is clearly laid out in the Distribution Agreement. (*See* Dkt. 7-2 ¶¶ 1.12(a)-(b) (stating Plaintiff "is currently indebted to [Defendant] for amounts attributable to certain valid deductions taken directly from [Defendant] by Sysco Corporation" and "shall pay [$60,000.00] via wire transfer to [Defendant] no later than the Friday of each and every week during the term of this Agreement, which amounts will be applied to the outstanding balance of the indebtedness ... "); *id.* ¶¶ 3.1, 3.2 & Exh. E ("[Plaintiff] agrees to use its commercially reasonable efforts to attain the Minimum Performance Requirements ("MPR"), as initially set forth in Exhibit E, and additional requirements as may be established in writing by [Defendant] from time to time..... Notwithstanding an agreed upon MPR for a given time period, [Defendant] may, in an exercise of its business judgment, seek to adjust MPRs for such time period at any point therein, subject to consent of [Plaintiff], which shall not be unreasonably withheld").)

***5** Second, contrary to Plaintiff's argument, "inquiry notice is sufficient to trigger the limitations period under Section 31303." *JB Brothers, Inc.*, 2022 WL 3012822, at *4 (citing *Deveny v. Entropin, Inc.*, 139 Cal. App. 4th 408, 419-20 (2006) (interpreting identical language in California Corporations Code § 25506 and determining inquiry notice is sufficient to trigger the one-year discovery period). A plaintiff "has notice or information of circumstances to put a reasonable person on inquiry" where the plaintiff "suspects a factual basis" for the claim or, "simply put, [they] at least suspect[ ] ... that someone has done something wrong to [them]." *State of California ex rel. Metz v. CCC Info. Servs., Inc.*, 149 Cal. App. 4th 401, 417 (2007) (cleaned up) (quoting *Norgart v. Upjohn Co.*, 21 Cal.4th 383, 397-398 (1999)). The plaintiff "need not know the specific facts necessary to establish the cause of action" but must "seek to learn the facts necessary to bring the cause of action in the first place" within the applicable limitations period. *Id.* (citation omitted).

In this case, the gravamen of Plaintiff's Section 31110 claim "rests on the initial moment of contracting." *Absolute USA, Inc., v. Harman Pro., Inc.*, 2023 WL 2064048, at *5 (C.D. Cal. Feb. 14, 2023). The SAC alleges that the parties executed the Distribution Agreement on November 20, 2020. (SAC ¶ 11.) Plaintiff does not allege that the franchise arose due to any subsequent conduct or changes to the Distribution Agreement; thus, the features of the Distribution Agreement which Plaintiff alleges give rise to a franchise agreement were present at the time the Distribution Agreement was executed. (*See id.* ¶¶ 11-18.) In addition, Plaintiff was aware that the Distribution Agreement explicitly disclaimed any franchise arrangement. (*See* Dkt. 7-2 ¶ 18 ("Nothing herein (including without limitation the defined term "Sales Agent") shall be construed to ascribe unto Sales Agent a status other than that of an independent contractor.").)

In sum, Plaintiff alleges that the Distribution Agreement constituted a franchise agreement in substance and that the Distribution Agreement simultaneously disclaimed this arrangement in form. Thus, the court finds that Plaintiff had sufficient notice of the facts underlying the violation, i.e. Defendants' purported sale of an unregistered franchise, to trigger the statute of limitations at the time of sale, or on November 20, 2020. *See United Studios of Self Def., Inc. v. Rinehart*, 2019 WL 1109682, at *6 (C.D. Cal. Feb. 22, 2019) (stating the one-year "discovery" period "begins to run from the date that a claimant knows of the facts constituting a violation," "even if a claimant is unaware that a violation has occurred") (citing *Powell v. Coffee Beanery, Ltd.*, 932 F. Supp. 985, 988 (E.D. Mich. 1996)). Therefore, the court concludes the statute of limitations ran on November 20, 2021, and **GRANTS** the Motion as to the Section 31110 claim.

2. California Corporations Code § 31119

Plaintiff alleges that Defendants violated Section 31119 by failing to provide Plaintiff with a franchise disclosure document prior to selling Plaintiff the franchise. (SAC ¶ 24); *see also* Cal. Corp. Code § 31119 (prohibiting "sell[ing] any franchise in this state that is subject to registration under this law without first providing to the prospective franchisee, at least 14 days prior to the execution by the prospective franchisee of any binding franchise or other agreement, or at least 14 days prior to the receipt of any consideration, whichever occurs first, a copy of the franchise disclosure document, together with a copy of all proposed agreements relating to the sale of the franchise."). The parties present the same arguments with respect to Section 31119 and Section 31110. (Mot. at 15-17; Opp. at 17-20.)

***6** At the time franchise agreements are executed, "the franchisee has knowledge of the only two relevant facts: (1) the occurrence or non-occurrence of a transaction having the characteristics of a franchise sale; and (2) the presence or absence of the required documentation." *BigFix Asia PTE LTD v. BigFix, Inc.*, 2009 WL 10692076, at *3 (N.D. Cal. Feb. 2, 2009). Therefore, "[a] party suing for defective franchise registration almost invariably 'will be aware of the facts constituting the violation at the time ... [they] sign[ ] the franchise agreement or pay[ ] the franchisor.' " *Id.* (quoting *Powell*, 932 F. Supp. at 988).

Such is the case here. Accepting the SAC's allegations as true, Plaintiff was aware both that it did not receive a franchise disclosure document prior to the time the Distribution Agreement was executed on November 20, 2020, and that the Distribution Agreement allegedly had the characteristics of a franchise sale. (*See, e.g.*, SAC ¶¶ 11-18, 24.) Plaintiff thus "discovered" the facts suggesting that Defendants violated Section 31119 no later than November 20, 2020, and triggered the one-year statute of limitations, which expired on November 20, 2021. Accordingly, the court concludes Plaintiff's Section 31119 claim is barred by the statute of limitations and **GRANTS** the Motion with respect to this claim.

3. California Corporations Code § 31201

Section 31201 prohibits selling a franchise "by means of any written or oral communication not enumerated in Section 31200 which includes an untrue statement of material fact or omits to state a material fact necessary to make the statements made, in light of the circumstances under which they were made, not misleading." Cal. Corp. Code § 31201. Plaintiff alleges Defendants

violated Section 31201 by omitting each category of material facts that would be disclosed in a franchise disclosure document. (SAC ¶ 25.)

Defendants argue that any alleged failure to make a pre-sale disclosure under Section 31201 necessarily occurred before the sale on November 20, 2020, and is thus barred by the two-year statute of limitations. (Mot. at 17-18.) Plaintiff does not oppose the Motion with respect to the purported violation of California Corporations Code § 31201. (*See generally* Opp.)

Plaintiff's failure to oppose Defendants' arguments regarding dismissal is sufficient grounds to grant the Motion. *See Walsh v. Nev. Dep't of Human Res.*, 471 F.3d 1033, 1037 (9th Cir. 2006) (finding a plaintiff "effectively abandoned" a claim when he failed to respond to arguments in motion to dismiss and thus the claim could not be raised on appeal); *Allen v. Dollar Tree Stores, Inc.*, 475 F. App'x. 159, 159 (9th Cir. 2012) (affirming order dismissing claims where plaintiff's "opposition to the motion to dismiss failed to respond to [the defendant's] argument"); *Toranto v. Jaffurs*, 297 F. Supp. 3d 1073, 1104 (S.D. Cal. 2018) (granting motion to dismiss where the plaintiff abandoned the claim by failing to address the issue in the opposing brief).

However, even considering the merits of Plaintiff's Section 31201 claim, the court finds dismissal to be appropriate. Like Plaintiff's Section 31110 and 31119 claims, Plaintiff "discovered" Defendants' purported omission of the material contained in a franchise disclosure document information at the time the Distribution Agreement was executed on November 20, 2020. Thus, Plaintiff's Section 31201 claim was barred by the statute of limitations on November 21, 2021. Further, as Defendants note, "liability under section 31201 involves misleading statements or failing to relate material facts to a franchisee other than those matters contained in documents filed with the Commissioner of Corporations." *SpeeDee Oil*, 95 Cal. App. 4th at 722. Franchise disclosure documents, the source of the purported omission, must be filed with Commissioner and thus cannot give rise to a claim under Section 31201. *See* Cal. Corp. Code § 31114. Accordingly, the court **GRANTS** the Motion as to Plaintiff's Section 31021 claim.

B. Wrongful Termination in Violation of the CFRA

***7** Defendants next argue that Plaintiff failed to allege any of the elements of a franchise relationship as required to state a claim under the CFRA, including a marketing plan, substantial association with trademark, or franchise fee. (Mot. at 18-22.) Plaintiff argues that it has alleged a franchise relationship because Defendant Vitality: (1) required Plaintiff to maintain a marketing plan; (2) authorized Plaintiff to use Defendant Vitality's "Nescafé" trademark on equipment, including a sign advertising a Customer Service Line on the branded equipment; and (3) mandated that Plaintiff pay franchise fees in the form of "required purchases of excess inventory," such that Plaintiff operated as Defendant Vitality's franchisee. (Opp. at 17-20.)

The CFRA defines a "franchise" as an arrangement by which:

> (a) A franchisee is granted the right to engage in the business of offering, selling or distributing goods or services under a marketing plan or system prescribed in substantial part by a franchisor; and
>
> (b) The operation of the franchisee's business pursuant to that plan or system is substantially associated with the franchisor's trademark, service mark, trade name, logotype, advertising, or other commercial symbol designating the franchisor or its affiliate; and
>
> (c) The franchisee is required to pay, directly or indirectly, a franchise fee.

Cal. Bus. & Prof. Code § 20001. "[F]ailure to satisfy any statutory element of the franchise definition is fatal to [a plaintiff's] claims." *Thueson v. U-Haul Int'l Inc.*, 144 Cal. App. 4th 664, 671 (2006).

The Commissioner of Corporations has issued guidelines that are considered prima facie evidence of the definition of franchise under California law.[6] *See* Cal. Bus. & Prof. Code § 20009; *When Does an Agreement Constitute a "*Franchise*?"*, Commissioner's Release 3-F, California Commissioner of Corporations (June 1994) ("Guidelines"). "While the responsibility

for statutory interpretation ultimately rests with the court, the Guidelines, as interpretation of a statute by the officials charged with its administration, are entitled to great weight." *Thueson*, 144 Cal. App. 4th at 671 (citing *People v. Kline*, 110 Cal. App. 3d 587, 593 (1980); *see also City & Cnty. of S.F. v. State of Cal.*, 87 Cal. App. 3d 959, 965 (1978)). Whether an agreement constitutes a franchise agreement is "a mixed question of fact and law." *Macedonia Distrib., Inc. v. S-L Distrib. Co., LLC*, 2018 WL 6190592, at *6, 8 (C.D. Cal. Aug. 7, 2018) (citing Guidelines, ¶ 1(2)(4)(1)). Courts should construe "the CFRA broadly" to effect its purpose of "protect[ing] individuals from the loss of their investments in franchises." *1-800-Got Junk? LLC v. Superior Ct.*, 189 Cal. App. 4th 500, 511, 515-16 (2010).

In this case, the court finds Plaintiff has not sufficiently alleged that it was required to pay a direct or indirect franchise fee. A "franchise fee" is defined as "any fee or charge that a franchisee or subfranchisor is required to pay or agrees to pay for the right to enter into a business under a franchise agreement, including, but not limited to, any payment for goods and services." Cal. Corp. Code § 31011; Cal. Bus. & Prof. Code § 20007. Whether or not a fee or charge is " 'required' and whether it is made 'for the right to enter into a business,' is considered a mixed question of fact and law." *Thueson*, 144 Cal. App. 4th at 671–72 (quoting Guidelines 3-F ¶ 1(2)(4)(1)). Generally, "in determining whether a franchise fee has been paid, courts must draw a distinction between ordinary business expenses and unrecoverable investments made for the right to do business." *Macedonia Distrib.*, 2018 WL 6190592, at *6 (citing *Thueson*, 144 Cal. App. 4th at 672-73).

***8** Certain categories of payment are excluded from the definition of franchise fees. For example, California Corporations Code § 31011 excludes, in pertinent part, "[t]he purchase or agreement to purchase goods at a bona fide wholesale price if no obligation is imposed upon the purchaser to purchase or pay for a quantity of the goods in excess of that which a reasonable businessperson normally would purchase by way of a starting inventory or supply or to maintain a going inventory or supply" and "[t]he payment of a reasonable service charge to the issuer of a credit card by an establishment accepting or honoring that credit card." Cal. Corp. Code § 31011; *see also* Cal. Bus. & Prof. Code § 20007(a).

Here, with respect to the franchise fees, Plaintiff alleges it "was required to pay fees and costs and bear substantial costs that were in the nature of an investment and that constituted direct and indirect franchise fees"; purchased and paid for "inventory of equipment and products in excess of quantities needed or that a reasonable businessperson normally would purchase to maintain a going inventory or supply"; and made "payments of $60,000 per week to Defendants for deductions that Defendants granted to an upstream distributor ... that were passed on to Plaintiff." (SAC ¶¶ 17-18(A)-(B).)

The court finds these allegations too conclusory to establish a franchise fee. The majority of Plaintiff's allegations, including those claiming franchise fees from "fees and costs" "in the nature of an investment" and "excess" product quantities, constitute legal conclusions unsupported by substantiating factual allegations. *See Iqbal*, 556 U.S. at 678 (reiterating that "recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice" to state a plausible claim for relief). For example, Plaintiff provides no factual allegations as to what quantities of product it was required to purchase or how those quantities exceed "that which a reasonable businessperson normally would purchase by way of a starting inventory or supply or to maintain a going inventory or supply." Cal. Bus. & Prof. Code § 20007. Absent such information, Plaintiff has "not establish[ed] that it paid a 'franchise fee,' as distinguished from a mere purchase of product at fair market value." *Gabana Gulf Distrib., Ltd. v. Gap Intern. Sales, Inc.*, 343 F. App'x 258, 259 (2009) (citing Cal. Bus. & Prof. Code § 20007).

Furthermore, Plaintiff's one factual allegation, that Defendant Vitality required Plaintiff to pay $60,000 to an upstream distributor" is too vague to demonstrate a franchise fee because Plaintiff fails to identify the purpose of this fee, when this fee was first assessed, or what portion of the fees were ultimately returned to Plaintiff. *See Absolute USA*, 2023 WL 2064048, at *8 (finding no franchise fee where "[t]here is no indication that the Absolute [p]laintiffs' expenses were non-recoverable or were anything more than incidental business fees" and "the alleged payments only appear to have been made after the Absolute [p]laintiffs had entered business with [defendant]").

In sum, Plaintiff has failed to adequately allege that it paid Defendant Vitality a franchise fee "for the right to do business" and thus has not established the existence of franchise relationship. *Thueson*, 144 Cal. App. 4th at 671 ("[F]ailure to satisfy any

statutory element of the franchise definition is fatal to [a plaintiff's] claims."). Because Plaintiff has not sufficiently demonstrated a franchise relationship, the court **GRANTS** the Motion as to Plaintiff's CFRA claim.

C. Breach of Contract and Breach of Implied Contract Claims

***9** Defendants argue that Plaintiff has failed to allege a breach of contract claim because the Distribution Agreement demonstrates that the parties' contract expired on November 16, 2023, and an expired contract cannot be modified or extended. (Mot. at 22.) Defendants further argue Plaintiff's implied breach of contract claim because the parties' express contract, the Distribution Agreement, contradicts the alleged implied term. (*Id.* at 22-23.)

Plaintiff contends it adequately alleged a breach of contract claim by pleading that the parties' continued performance either caused the parties to enter into a new agreement on the same terms or renewed the existing Distribution Agreement on the same terms. (Opp. at 20-22.) Plaintiff also cites to *Bambu Franchising, LLC v. Nguyen*, 537 F. Supp. 3d 1066, 1077 (N.D. Cal. 2021) for the proposition that "an implied-in-fact contract may exist under [the] same terms of an expired franchise agreement" under California law. (*Id.* at 20.)

Under California law, "the elements of a cause of action for breach of contract are (1) the existence of the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to the plaintiff." *Oasis W. Realty, LLC v. Goldman*, 51 Cal. 4th 811, 821 (2011) (citation omitted). A contract exists where there are: (1) "[p]arties capable of contracting"; (2) "[t]heir consent"; (3) "[a] lawful object"; and (4) "[a] sufficient cause or consideration." Cal. Civ. Code § 1550. "A written contract may be pleaded either by its terms—set out verbatim in the complaint or a copy of the contract attached to the complaint and incorporated therein by reference—or by its legal effect." *McKell v. Wash. Mut., Inc.*, 142 Cal. App. 4th 1457, 1489 (2006) (citation omitted).

The court finds Plaintiff has failed to allege a breach of contract claim against Defendants. "It is the general rule that when a contract specifies its duration, it terminates on the expiration of such period." *Citizens for Amended Proposition L*, 28 Cal. App. 5th at 1189 (quoting *Beatty Safway Scaffold, Inc. v. Skrable*, 180 Cal. App. 2d 650, 654 (1960)). "A contract that is terminated ceases to bind the parties" and "cannot be extended or modified; both extension and modification as those terms are commonly understood presuppose the existence of a valid contract to extend or modify." *Id.*

Here, both the SAC's allegations and the exhibits attached to the SAC, including the Distribution Agreement and the May 1st, 2023, Letter, demonstrate that the Distribution Agreement expired on November 16, 2023. (SAC ¶¶ 34, 40 & Exhs. 1, 2, 4.) The Distribution Agreement explicitly states it would terminate after three years, or on November 16, 2023, if "either party gives at least ninety (90) days written notice of non-renewal prior to the end of the Initial Term of Extension Term, as applicable," (*id.*, Exh. 1 at 2), and Defendant Vitality gave notice ninety days before the expiration of the Initial Term on May 1, 2023, (*id.*, Exh. 4). Because "there was no valid contract to amend, modify, or extend" after the Distribution Agreement expired, the court concludes Plaintiff has failed to allege an existing contractual agreement between the parties as required for a breach of contract claim. *Citizens for Amended Proposition L*, 28 Cal. App. 5th at 1189. Therefore, the court **GRANTS** the Motion as to the breach of contract claim.

However, Plaintiff's failure to allege a breach of contract claim based on the expired Distribution Agreement does not necessarily preclude Plaintiff's claim for breach of an implied contract. A "contract implied in fact 'consists of obligations arising from a mutual agreement and intent to promise where the agreement and promise have not been expressed in words.' " *Retired Emps. Ass'n of Orange Cnty., Inc. v. Cnty. of Orange*, 52 Cal.4th 1171, 1178, (2011) (quoting *Silva v. Providence Hosp. of Oakland*, 14 Cal.2d 762, 773 (1939)). "A cause of action for breach of implied contract has the same elements as does a cause of action for breach of contract, except that the promise is not expressed in words but is implied from the promisor's conduct." *Yari v. Producers Guild of Am., Inc.*, 161 Cal. App. 4th 172, 182 (2008); *see also* Cal. Civ. Code § 1621. "A commonly cited example [of an implied contract] is where parties continue to perform under the terms of their agreement after the written contract

expires." *Telecom Asset Mgmt., LLC v. Fiberlight, LLC*, 203 F. Supp. 3d 1013, 1020 (N.D. Cal. 2016), *aff'd*, 730 F. App'x 443 (9th Cir. 2018) (citing *U.S. ex rel. Oliver v. Parsons Co.*, 195 F.3d 457, 462 (9th Cir. 1999)).

***10** With respect to the implied breach of contract, Plaintiff alleges that "Plaintiff and Defendants continue to function in their relationship consistent with the terms of the Distribution Agreement by [Defendant Vitality] continuing to sell Nestlé products, which are run through Plaintiff's equipment installed by Plaintiff and located at Plaintiff's customers, and [by] Plaintiff continuing to deliver Nestlé products to and service its customers all in the same manner as the parties acted under the Distribution Agreement prior to November 16, 2023." (SAC ¶ 41.) Plaintiff further alleges that Defendants "made partial payments ... reaffirming the obligations" within two years prior to this suit being filed and that Defendants allegedly breached the implied contract by failing "to repay the balance of monies owed." (*Id.* ¶ 42.)

The court finds Plaintiff has failed to allege the existence of an implied agreement because Plaintiff does not allege *mutual* agreement to continue performing under the contract. [7] "Consent is not mutual[ ] unless the parties all agree upon the same thing in the same sense." *Weddington Prods., Inc. v. Flick*, 60 Cal. App. 4th 793, 811 (1998) (citing Cal. Civ. Code §§ 1580, 1636). First, Plaintiff's allegation that Defendant Vitality continues to sell its product through the previously installed machines is insufficient to demonstrate consent through continued performance because the Distribution Agreement authorizes Defendant Vitality to continue using the machines in exactly this scenario following termination of the Distribution Agreement between the parties. (*See* Dkt. 7-3 ¶ 1(F).) [8] Second, Plaintiff's unilateral conduct, including sales of products Plaintiff may have previously purchased from Defendant Vitality, does not adequately demonstrate Defendant Vitality's assent to an implied contract. Because the court finds Plaintiff's limited factual allegations insufficient to demonstrate Defendant Vitality's assent, the court concludes Plaintiff has failed to allege an implied contract. *See Gorlach v. Sports Club Co.*, 209 Cal. App. 4th 1497, 1507 (2012) ("An implied contract ... must be founded upon an ascertained agreement of the parties to perform it ...."). Therefore, the Motion is **GRANTED** as to Plaintiff's claim for breach of implied contract.

D. Declaratory Relief

***11** Defendants argue that Plaintiff's claim for declaratory relief fails both because this claim is duplicative of its claim for violation of the CFRA and CFIL and because Plaintiff has failed to allege a franchise relationship as required for those claims. (Mot. at 24-25.) Plaintiff argues that its claim for declaratory relief is adequately alleged because the parties "are in an ongoing relationship with disputes concerning a franchised distributorship" and "need guidance going forward." (Opp. at 23-25.)

Under the Declaratory Judgment Act, "[i]n a case of actual controversy within its jurisdiction," "any court of the United States ... may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201(a). The phrase "case of actual controversy" refers to "cases" and "controversies" that are justiciable under Article III. *Medimmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007). To demonstrate that a case or controversy exists, the plaintiff must allege "that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment" under all the circumstances. *Id.* (citations omitted). "The controversy must be 'definite and concrete, touching the legal relations of parties having adverse legal interests,' such that the dispute is 'real and substantial' and 'admi[ts] of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.' " *Purely Driven Prod., LLC v. Chillovino, LLC*, 171 F. Supp. 3d 1016, 1018–19 (C.D. Cal. 2016) (quoting *Medimmune, Inc.*, 549 U.S. at 127).

However, "[d]eclaratory relief should be denied when it will neither serve a useful purpose in clarifying and settling the legal relations in issue nor terminate the proceedings and afford relief from the uncertainty and controversy faced by the parties." *United States v. State of Wash.*, 759 F.2d 1353, 1357 (9th Cir. 1985). "A court may dismiss a claim for declaratory relief if it is duplicative of, substantially similar to, or commensurate with relief sought under another cause of action." *In re Albert-Sheridan*, 658 B.R. 516, 543 (B.A.P. 9th Cir. 2024) ((citation omitted). For example, "[w]here a breach of contract claim resolves all questions regarding contract interpretation, declaratory relief may be duplicative and inappropriate." *Fine v. Kansas City Life Ins. Co.*, 627 F. Supp. 3d 1153, 1164 (C.D. Cal. 2022) (citations omitted). Ultimately, "[t]he decision to grant declaratory relief

is a matter of discretion even when the court is presented with a justiciable controversy." *State of Wash.*, 759 F.2d at 1356 (citations omitted).

The court finds Plaintiff's claim for declaratory relief is duplicative of and commensurate with the relief sought as to Plaintiff's CFRA and breach of implied contract claims. Plaintiff seeks three judicial declarations stating that: (1) "the Distribution Agreement and Defendants' relationship with Plaintiff constitute[s] a franchise under California law"; (2) "the parties renewed the Distribution Agreement by continuing to perform and accept the benefits of the Distribution Agreement"; and (3) "Defendants did not and do not now have the right to cease performing or to walk-away from its obligations under the Distribution Agreement without compensating Plaintiff for the fair market value of the franchise and assets of the franchise, which fair market value is in the amount of $25,000,000 or as according to proof at trial." (SAC ¶¶ 12-14.) Each of these determinations necessarily implicates and would be resolved by adjudicating Plaintiff's CFRA and breach of the implied contract claims. Because courts should "avoid duplicative litigation" when deciding declaratory judgment claims, the court **GRANTS** the Motion as to Plaintiff's claim for declaratory relief. *See, e.g.*, *Madrid v. Concho Elementary Sch. Dist. No. 6 of Apache Cnty.*, 439 F. App'x 566, 567 (9th Cir. 2011) (finding no abuse of discretion when district court construed claim for declaratory relief as part of breach of contract claim, noting that Declaratory Judgment Act "authorizes, but does not mandate, relief," and courts should "avoid duplicative litigation").

E. The UCL Claim

***12** Defendants argue that Plaintiff's UCL claim fails for two reasons: (1) a UCL claim cannot be predicted upon a violation of the CFIL or the Federal Trade Commission Act ("FTCA") or the regulations promulgated thereunder; and (2) Plaintiff has failed to allege any other unfair practices. (Mot. at 25-27.) Plaintiff does not address Defendant's arguments regarding the CFIL or FTCA but argues that the SAC has adequately alleged numerous unfair practices, including failing to register the franchise, failing to provide an offering circular, pressuring Plaintiff to increase sales and buy excess quantities of product, taking unauthorized deductions to an upstream distributor, and threatening non-renewal of the franchise. (SAC ¶¶ 61-62.)

Plaintiff appears to assert a UCL claim under the "unfair" prong of the UCL. (*See, e.g.*, SAC ¶¶ 60-65.) Under the UCL's unfairness prong, courts consider whether: (1) "the challenged conduct is tethered to any underlying constitutional, statutory or regulatory provision, or that it threatens an incipient violation of an antitrust law, or violates the policy or spirit of an antitrust law;" (2) "the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers;" or (3) "the practice's impact on the victim outweighs the reasons, justifications and motives of the alleged wrongdoer." *Doe v. CVS Pharmacy, Inc.*, 982 F.3d 1204, 1214-15 (9th Cir. 2020) (citations and internal quotation marks omitted). "The test of whether a business practice is unfair involves an examination of [that practice's] impact on its alleged victim, balanced against the reasons, justifications and motives of the alleged wrongdoer." *S. Bay Chevrolet v. Gen. Motors Acceptance Corp.*, 72 Cal. App. 4th 861, 886 (1999) (citations and internal quotation marks omitted) (alteration in original). "This standard is intentionally broad, thus allowing courts maximum discretion to prohibit new schemes to defraud." *Id.*

The court finds that Plaintiff's UCL claim fails for three reasons. First, to the extent Plaintiff's UCL claim is predicated on violations of the CFIL, this claim is preempted by California Corporations Code Section 31306. Section 31306 provides:

> Except as explicitly provided in this chapter [describing the remedies available under the CFIL], no civil liability in favor of any private party shall arise against any person by implication from or as a result of the violation of any provision of this law or any rule or order hereunder. Nothing in this chapter shall limit any liability which may exist by virtue of any other statute or under common law if [the CFIL] were not in effect.

Cal. Corp. Code § 31306.

"[S]ection 31306 bars claims that may otherwise be brought under the CFIL—*i.e.*, those claims alleging misrepresentations and omissions covered by such provisions as 31200 and 31201" and ensures "that any claims beyond the CFIL's coverage may be brought independently." *Samica Enters. v. Mail Boxes Etc.*, 637 F. Supp. 2d 712, 722 (C.D. Cal. 2008) Thus, courts in this district have dismissed UCL claims premised upon CFIL violations pursuant to Section 31306. *See, e.g., JB Brothers, Inc. v. Poke Bar GA Johns Creek I, LLC*, 2022 WL 17080158, at *5 (C.D. Cal. Sept. 29, 2022); *Full Tilt Boogie, LLC v. Kep Fortune, LLC*, at *5 (C.D. Cal. July 29, 2022); *Flip Flop Shops Franchise Co., LLC v. Flip Flop Shops Franchise Co., LLC*, 2017 WL 2903183, at *8 n.7 (C.D. Cal. March 14, 2017); *Pinkberry Ventures, Inc. v. Penninsular Grp.*, LLC, 2013 WL 12145606, at *2 (C.D. Cal. Dec. 17, 2013). Here, Plaintiff's UCL claim is premised upon Defendants' failure to register the alleged franchise or provide the requisite documents prior to the sale. (*See, e.g.*, SAC ¶¶ 61-62.) As discussed in section III.A, *supra*, the CFIL explicitly proscribes this conduct. Accordingly, the court concludes that Plaintiff's UCL claim is preempted to the extent it is premised upon the aforementioned CFIL violations.

***13** Second, Plaintiff cannot allege a UCL claim based on a violation of the FTCA. "The FTCA 'does not provide individuals with a private right of action' and cannot be used as a predicate for a UCL claim." *BMA LLC v. HDR Global Trading Ltd.*, 2021 WL 4061698, at *16 (N.D. Cal. Sept. 7, 2021) (citing *Nelson v. Am. Home Mortg. Servicing Inc.*, 2010 WL 3034233, at *2 (C.D. Cal. July 29, 2010)); *see also Carlson v. Coca–Cola Co.*, 483 F.2d 279, 280 (9th Cir. 1973) ("The protection against unfair trade practices afforded by the Act vests initial remedial power *solely* in the Federal Trade Commission."); *Schmitt v. SN Servicing Corp.*, 2021 WL 3493754, at *10 (N.D. Cal. Aug. 9, 2021) (finding for purposes of alleging an unlawful business practice, "plaintiffs cannot predicate their UCL claim on the FTC Act"). Therefore, the court concludes that Plaintiff has failed to allege a UCL claim based on a violation of the FTCA. *See, e.g., O'Donnell v. Bank of Am., Nat. Ass'n*, 504 F. App'x 566, 568 (9th Cir. 2013) ("The district court rightly dismissed the unfair competition claim premised on Bank of America's alleged violation of the Federal Trade Commission Act. The federal statute doesn't create a private right of action, ... and plaintiffs can't use California law to engineer one.") (citations omitted).

Third, Plaintiff has failed to allege any other unfair business practice. The court previously found Plaintiff's remaining allegations —that Defendants pressured Plaintiff to increase sales and buy excess quantities of product, took unauthorized deductions to pay an upstream distributor, and threatened non-renewal of the franchise—lacked sufficient factual detail to be cognizable. *See* section III.B, *supra.* Moreover, this purported unfair conduct appears to be improperly premised upon and inconsistent with the terms of the Distribution Agreement. The court notes that "the UCL cannot be used to rewrite [the parties'] contracts or to determine whether the terms of their contracts are fair." *Spiegler v. Home Depot U.S.A., Inc.*, 552 F. Supp. 2d 1036, 1046 (C.D. Cal. 2008), *aff'd sub nom. Spiegler v. Home Depot USA, Inc.*, 349 F. App'x 174 (9th Cir. 2009). Finally, other than the CFIL and FTCA, Plaintiff has not alleged that Defendants' conduct is tethered to any "underlying constitutional, statutory or regulatory provision," "threatens an incipient violation of an antitrust law," or "violates the policy or spirit of an antitrust law." *Doe*, 982 F.3d at 1214-15. For all these reasons, the court **GRANTS** the Motion as to Plaintiff's UCL claim.

F. Intentional Interference with Prospective Economic Advantage

Defendants argue that Plaintiff has failed to allege a claim for intentional interference with prospective economic advantage because Plaintiff has not alleged any wrongful conduct independent of the contract. (Mot. at 27-29.) Plaintiff argues that the SAC sufficiently pleads that Defendants committed a wrongful act independent of the contract by alleging that Defendants: (1) breached the covenant of good faith and fair dealing; (2) acted in an unethical, unfair, and unconscionable matter in violation of the UCL; and (3) misused trade secrets in the form of "statistical, sales and other operational information." (Opp. at 27.)

To state a claim for intentional interference with a prospective economic advantage, the plaintiff must allege:

> (1) an economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) intentional acts

> on the part of the defendant designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by the acts of the defendant.

Port Med. Wellness Inc. v. Conn. Gen. Life Ins. Co., 24 Cal. App. 5th 153, 182-83 (2018).

"A complainant must plead that the defendant engaged in an independently wrongful act' outside of merely interfering with a contract." *Vascular Imaging Pros., Inc. v. Digirad Corp.*, 401 F. Supp. 3d 1005, 1012 (S.D. Cal. 2019) (cleaned up). An act is "independently wrongful" if it is "proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard." *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1139, 131 (2003). This requirement is the "defining and limiting ... aspect of the tort of intentional interference with a prospective economic advantage." *Drink Tank Ventures LLC v. Real Soda in Real Bottles, Ltd.*, 71 Cal. App. 5th 528, 539 (2021).

***14** The court finds Plaintiff has failed to allege an independently wrongful act. First, under California law, breach of the implied covenant of good faith and fair dealing "cannot constitute the 'wrongful' conduct required for the tort of interference with prospective economic advantage." *Deerpoint Grp., Inc. v. Agrigenix, LLC*, 345 F. Supp. 3d 1207, 1235 (E.D. Cal. 2018) (collecting cases). Second, Plaintiff cannot plead an independent act based on a violation of the UCL because Plaintiff has failed to allege a UCL claim. *See* section III.E., *supra.* Third, although trade secret misappropriation can constitute an act independent of the contract, Plaintiff has not alleged any facts demonstrating how Defendants misappropriated trade secrets other than the single conclusory allegation that Defendant Vitality misused "statistical, sales and other operational information." (SAC ¶ 70(C).) Thus, the court concludes Plaintiff has not adequately alleged a claim for intentional interference with a prospective economic advantage and **GRANTS** the Motion as to that claim.

G. Claims against Defendant Perry

Defendants argue that Plaintiff has failed to state any claim or allege any specific factual allegations against Defendant Perry. (Mot. at 30-34.) Plaintiff argues only that Defendant Perry "fully participated in the violation of the California Franchise Investment Law[ ] and misled a California franchisee." (Opp. at 29.)

The court agrees that Plaintiff has failed to allege any claims against Defendant Perry. As a preliminary matter, because Plaintiff alleges all of its claims against both Defendants, Plaintiff's claims against Defendant Perry fail for the reasons explained above. *See* section III.A-F, *supra.* However, in addition to those reasons, Plaintiff has failed to allege facts tying Defendant Perry to any of its claims for relief. The SAC contains only three allegations specific to Defendant Perry: (1) Defendant Perry was "during certain of the relevant times herein the Senior Vice President – Sales Division of Nestlé" and "offered and sold an unregistered franchise to Plaintiff in California"; (2) "Defendant Perry was an executive officer or director or had similar status with Defendants, materially aided in the acts and transactions and is also jointly and severally liable with Defendants"; and (3) "Defendants, acting through Perry and other Defendants, notified Plaintiff in writing that they had 'made the decision not to renew' the franchise 'effective November 16, 2023' and that 'Nestlé will be moving to direct sales and service operations in the relevant markets.' " (SAC ¶¶ 6, 27, 47.) These limited factual allegations are insufficient to state claims against Defendant Perry for breach of contract, breach of implied contract, declaratory relief, intentional interference with prospective economic advantage, or violations of the CFIL, CFRA, or UCL. Accordingly, the Motion is **GRANTED** as to Plaintiff's claims against Defendant Perry.

H. Punitive Damages and Attorney's Fees

Lastly, Defendants argue that Plaintiff has not plausibly alleged an entitlement to attorney's fees or punitive damages. (Mot. at 29-30.) The court first considers punitive damages. California Civil Code § 3294 authorizes punitive damages "[i]n an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice ..." Cal. Civ. Code § 3294. Plaintiff argues that the SAC's allegations that Defendants misappropriated Plaintiff's business, wrongfully solicited Plaintiff's longtime customers, and utilized Plaintiff's equipment for

their own benefit without authorization are sufficient to demonstrate an entitlement to punitive damages. (Opp. at 28.) However, the court has dismissed Plaintiff's claims purportedly giving rise to punitive damages for the reasons discussed above. *See* section III.A-G, *supra.* Because Plaintiff has not alleged any entitlement to punitive damages, the court **GRANTS** the Motion as to the request for punitive damages.

***15** Next, with respect to attorney's fees, "as a general proposition each party must pay his own attorney fees." *Gray v. Don Miller & Assocs., Inc.*, 35 Cal. 3d 498, 504 (1984). Under California Code of Civil Procedure § 1021, attorney's fees are not recoverable as damages in a civil action absent authorization from a statute or contractual provision. Cal. Civ. Proc. Code § 1021 ("Except as attorney's fees are specifically provided for by statute, the measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties; but parties to actions or proceedings are entitled to their costs, as hereinafter provided."). Plaintiff argues that it properly included a request for attorney's fees under California Code of Civil Procedure § 1021.5, (Opp. at 29), which authorizes attorney's fees in instances where the action results in "the enforcement of a public right affecting public interest," Cal. Civ. Proc. Code § 1021.5.

The court finds Plaintiff has not adequately alleged a request for attorney's fees because Plaintiff has not pleaded a claim for relief or factual allegations suggesting that its success in this suit would result in enforcement of a public right. Plaintiff also does not allege any other statutory or contractual right to attorney's fees. "[W]here a complaint does not allege sufficient facts to support a request for attorney['s] fees, courts dismiss the attorney['s] fee request from the complaint." *McCann v. Jupina*, 2017 WL 11893926, at *3 (N.D. Cal. Feb. 14, 2017) (citation omitted). Thus, the court also **GRANTS** the Motion as to Plaintiff's request for attorney's fees.

I. Leave to Amend

Plaintiff requests leave to amend in the event that the court dismisses any of Plaintiff's claims. (Opp. at 29.) "Leave to amend should be granted 'if it appears at all possible that the plaintiff can correct the defect.' " *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000) (quoting *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 701 (9th Cir. 1990)). A district court may deny leave to amend due to " 'countervailing considerations' such as 'undue delay, prejudice, bad faith, or futility.' " *Ctr. for Bio. Diversity v. United States Forest Serv.*, 80 F.4th 943, 956 (9th Cir. 2023) (quoting *Benko v. Quality Loan Serv. Corp.*, 789 F.3d 1111, 1117 (9th Cir. 2015)). "Amendment is futile when 'it is clear ... that the complaint could not be saved by any amendment.' " *Id.* (quoting *Armstrong v. Reynolds*, 22 F.4th 1058, 1071 (9th Cir. 2022)).

The court finds that granting Plaintiff leave to amend its CFIL and breach of contract claims would be futile because these claims are either barred by the statute of limitations or fail as a matter of law. *See, e.g., Anderson v. Anthem Blue Cross*, 776 F. App'x 465, 465 (9th Cir. 2019) (affirming dismissal of claims barred by the statute of limitations without leave to amend). Therefore, the CFIL and breach of contract claims are **DISMISSED WITHOUT LEAVE TO AMEND**. However, the court finds that Plaintiff may be able to cure the deficiencies identified with respect to its remaining claims for breach of implied contract, violation of the CFRA, declaratory relief, violation of the UCL, and intentional interference with prospective economic advantage, as well as its request for punitive damages and attorney's fees. These claims, and corresponding requests for relief, are **DISMISSED WITH LEAVE TO AMEND**.

IV. Disposition

For the reasons stated above, the court **GRANTS** the Motion and **DISMISSES** the SAC, as follows:

1. Plaintiff's first claim for violation of the CFIL and second claim for breach of contract are **DISMISSED WITHOUT LEAVE TO AMEND**.

2. Plaintiff's third claim for breach of implied contract, fourth claim for violation of the CFRA, fifth claim for declaratory relief, sixth claim for violation of the UCL, and seventh claim for intentional interference with prospective economic advantage are **DISMISSED WITH LEAVE TO AMEND**.

***16** 3. Plaintiff is **ORDERED** to file any amended complaint by **July 1, 2024**. Failure to comply with the court's order may result in dismissal. *See* Fed. R. Civ. P. 41(b); L. R. 41-6; *Link v. Wabash R.R.*, 370 U.S. 626, 629 (1962) ("The authority of a federal trial court to dismiss a plaintiff's action with prejudice because of his failure to prosecute cannot seriously be doubted."); *Hells Canyon Pres. Council v. U.S. Forest Serv.*, 403 F.3d 683, 689 (9th Cir. 2005) ("[C]ourts may dismiss under Rule 41(b) sua sponte, at least under certain circumstances.").

IT IS SO ORDERED.

All Citations

Slip Copy, 2024 WL 2925589

Footnotes

1 Plaintiff also attached each of these agreements to the SAC. (*See* SAC, Exhs. 1-3.) The court finds the SAC incorporates these three agreements by reference because "the plaintiff refers extensively to the document[s]" and "the document[s] form the basis of Plaintiff's claims," including its claims for breach of contract, breach of implied contract, violations of the California Franchise Relations Act, and violations of the California Franchise Investment Law. *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 1002 (9th Cir. 2018) (quoting *United States v. Ritchie*, 342 F.3d 903, 907 (9th Cir. 2003)). The court notes that the "Distribution Letter Agreement & Program" is dated November 16, 2023. (SAC, Exh. 1.)

2 The ninety-day statute of limitations is not applicable here because Plaintiff does not allege that it sent Defendants a written notice disclosing a CFIL violation. (*See generally* SAC.)

3 Section 31303 provides, in pertinent part: "No action shall be maintained to enforce any liability created under Section 31300 unless brought before the expiration of four years after the act or transaction constituting the violation, the expiration of one year after the discovery by the plaintiff of the fact constituting the violation, or 90 days after delivery to the franchisee of a written notice disclosing any violation of Section 31110 or 31200 ... whichever shall expire first." Cal. Corp. Code § 31303.

4 Section 31304 provides: "No action shall be maintained to enforce any liability created under Section 31301 unless brought before the expiration of two years after the violation upon which it is based, expiration of one year after the discovery by the plaintiff of the facts constituting such violation, or 90 days after delivery to the franchisee of a written notice disclosing any violation of Section 31201 or 31202 which notice shall be approved as to form by the commissioner, whichever shall first expire." Cal. Corp. Code § 31304.

5 Defendants also request that the court take judicial notice of the fact that "[t]he California Department of Financial Protection and Innovation maintains publicly searchable records of franchise registrations on its website." (Dkt. 11-1.) The court may judicially notice "[f]acts and propositions ... capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy." Fed. R. Evid. 201(b). "Documents published on government-run websites are proper for judicial notice given their reliability." *Eidmann v. Walgreen Co.*, 522 F. Supp. 3d 634, 642 (N.D. Cal. 2021) (citations omitted); *see also Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998 (9th Cir. 2010) (stating it is appropriate to take judicial notice of information made publicly available by government entities and where neither party disputes the authenticity of the website source). The court finds this fact is not subject to reasonable dispute and thus appropriate for judicial notice. Defendants' request for judicial notice is **GRANTED**.

6 The court finds the Guidelines appropriate for judicial notice because courts may take judicial notice of information "made publicly available by government entities ... and neither party disputes the authenticity of the website or the accuracy of the information displayed therein." *Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992-99 (9th Cir. 2010); *see also Absolute USA, Inc., v. Harman Pro., Inc.*, 2023 WL 2064048, at *3 (C.D. Cal. Feb. 14, 2023) (granting request for judicial notice of the Guidelines).

7 For the same reason, Plaintiff's reliance on *Bambu Franchising, LLC v. Nguyen*, 537 F. Supp. 3d 1066 (N.D. Cal. 2021), where defendants did manifest objective assent to continue operating the franchise after the initial agreement expired, is inapposite. *See Bambu Franchising, LLC*, 537 F. Supp. 3d at 1076-77 ("Although the Nguyen Defendants never signed a new franchise agreement, it is undisputed that they continued to operate the Hostetter Shoppe using signs, flyers, posters and other material with the Bambu name and logo. Furthermore, the evidence shows that Jenny understood she was operating the Hostetter Shoppe pursuant to the FA. In September 2020, Jenny informed the Vus that she wanted to sell the store, but that Plaintiff would not give the Vus the same favorable arrangement under the FA that the Hostetter Shoppe had.")

8 This provision of the Independent Contractor and Services Agreement states that: "[I]n the event that [Plaintiff], for whatever reason, is substantially unable or materially fails to provide Services or abandons the Equipment, then in any such event (whether before or after any termination of this Agreement and regardless whether [Defendant] should elect to so terminate, and without prejudice of its rights to do the same), as an emergency measure and acting in good faith at all times to preserve the reputation and goodwill of [Defendant] and its brands in the Territory, upon advance written notice, [Defendant] shall have and is given the right (but shall not be obligated to): (i) to maintain or repair the Equipment while it remains on location with a Customer to such extent as may be necessary to keep such Equipment operative, (ii) to supply NP Products to Customer(s) using Equipment, and (iii) to authorize another entity to perform any of the activities described in (i) or (ii)." (*See* Dkt. 7-3 ¶ 1(F).)

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