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United States District Court, C.D. California.

JB BROTHERS, INC, Plaintiff,
v.
POKE BAR GA JOHNS CREEK I, LLC, et al., Defendants.

Case No.: 2:21-cv-01405-CBM-MRWx
|
Filed June 06, 2022

Attorneys and Law Firms

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ORDER RE: MOTION TO DISMISS [34]

CONSUELO B. MARSHALL, UNITED STATES DISTRICT JUDGE

***1** The matter before the Court is Plaintiffs and Counter-Defendants JB Brothers, Inc., Jeong H Jun, and Seung N Park's (collectively, "JB Brothers") Motion to Dismiss Defendants and Counter-Claimants Hye Min Shin Choi, Poke Bar GA Johns Creek I, LLC, Poke Bar Athens, LLC, Poke Bar GA Suwanee LLC, and Poke Bar GA Roswell Kroger LLC's (Collectively, "Franchisees") Counterclaim under Federal Rule of Civil Procedure 12(b)(6). (Mot. – Dkt. No. 34; Counterclaim – Dkt. No. 30.) The matter is fully briefed. (*See* Dkt. Nos. 35, 38.)

I. BACKGROUND

This case arises from a dispute over royalties for third-party food delivery sales. Plaintiffs JB Brothers, Inc., and its owners Jeong H Ju and Seung N Park are the franchisors of the Poke Bar Dice & Mix ("Poke Bar") restaurant brand. (Counterclaim. – Dkt. No. 30 at ¶¶ 1–9.) Beginning in January 2017, Franchisees organized as limited liability companies for the purpose of operating as Poke Bar franchisees within the state of Georgia. (Ex. 1 to RJN – Dkt. No. 34-3.)

During the marketing and sale of the franchises at the beginning of 2017, JB Brothers was not yet licensed by the Department of Business Oversight. (Counterclaim – Dkt. No. 30 at ¶ 17.) For this reason, JB Brothers entered into separate, but "materially identical" preliminary "License Agreements" with each of the Franchisees on May 18, 2017. (*Id.* at ¶ 11.) Under the License Agreements, Franchisees each paid a $30,000 initial fee and agreed to pay "royalties and other fees and costs" for the right to the use "Poke Bar" trademark. (*Id.* at ¶ 15.) Franchisees allege that JB Brothers first registered the Poke Bar franchise with the California Department of Business Oversight in July 2017. (*Id.* at ¶ 20.) On September 5, 2017, the Department of Business Oversight sent a notice of violation to JB Brothers, requiring it to disclose to all of its franchisees that purchased a franchise location prior to July 2017 that JB Brothers was in violation of California Corporations Code Section 31303. (*Id.* at ¶ 21.) Franchisees plead that they did not receive any notice of the violation. (*Id.* at ¶ 22.) On September 18, 2018, JB Brothers requested that Franchisee Hye Min Shin Choi execute a new Franchise Agreement. (*Id.* at ¶ 23.)

JB Brothers filed the Complaint on February 16, 2021, asserting six claims: (1) Breach of Contract – Injunction; (2) Breach of Contract – Damages; (3) Trademark Infringement; (4) Trade Dress Infringement; (5) Common Law Infringement; (6) Unfair Competition under 15 U.S.C. § 1125; and (7) Unfair Competition ("UCL"), Cal. Bus. & Prof. Code § 17200 et seq. (Compl. – Dkt. No. 1.) Franchisees initially responded to JB Brothers' suit by filing a lawsuit against JB Brothers in state court on April 4, 2021. (Ex. 1 to Cert. of Interested Parties – Dkt. No. 5; Ex A to Defs.' RJN – Dkt. No. 35-3.) They later dismissed the state court lawsuit and filed the Counterclaim on November 8, 2021 in order to consolidate all of the federal and state claims within the instant action. (Stip. – Dkt. No. 28; Counterclaim – Dkt. No. 30.) Franchisees assert four counterclaims: (1) Violation of the California Franchise Investment Law ("CFIL"), Cal. Corp. Code Section 31000 et seq.; (2) Intentional Misrepresentations (Fraud); (3) Violation of California's Unfair Competition Law (UCL), Bus. & Prof. Code Sec. 17200 et seq.; and (4) Unjust Enrichment. (Counterclaim – Dkt. No. 30.)

II. STATEMENT OF THE LAW

***2** A complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief" to give the defendant "fair notice" of what the claims are and the grounds upon which they rest. Fed. R. Civ. P. 8(a)(2); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). A complaint does not need detailed factual allegations, but "a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a claim for relief above the speculative level." *Twombly*, 550 U.S. at 555 (quotations and citations omitted).

To survive a motion to dismiss, a complaint must contain sufficient factual allegations, which when accepted as true, "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* "Where 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.' " *Id.* (quotations and citations omitted).

"All allegations of material fact are taken as true and construed in the light most favorable to Plaintiffs." *Epstein v. Wash. Energy Co.*, 83 F.3d 1136, 1140 (9th Cir. 1996). If a court dismisses a complaint, it should give leave to amend unless the "pleading could not possibly be cured by the allegation of other facts." *United States v. United Healthcare Ins. Co.*, 848 F.3d 1161, 1182 (9th Cir. 2016) (quotations and citations omitted).

III. DISCUSSION

1. Requests for Judicial Notice

Both parties submit unopposed requests for judicial notice ("RJN"). (RJN – Dkt. Nos. 34-3, 35-3.)

JB Brothers requests that the Court judicially notice the following: (1) Georgia state business search records; (2) JB Brothers' complaint in *JB Brothers, Inc. v. Poke Bar GA Roswell Kroger, LLC*, Case No. 2:21-cv-01434 (consolidated with this case); (3) California Department of Financial Protection & Innovation search records; (4) USPTO business search results showing a trademark registration by JB Brothers filed on September 10, 2015, and (5) USPTO business search results showing the trademark registration for "Poke Bar" filed in 2003 and abandoned in 2004. (RJN – Dkt. No. 34-3; RJN – Dkt. No. 38-1.) Franchisees request that the Court judicially notice the following: (1) Franchisees' state court complaint; (2) the parties' stipulation to consolidate related matters; and (3) California's "Appendix I – Emergency Rules Related to COVID-19, Emergency Rule 9: Tolling statutes of limitations for civil causes of action." (RJN – Dkt. No. 35-3.)

The Court finds that the documents meet the requirements of Federal Rule of Evidence 201 and grants the unopposed requests for judicial notice.

2. CFIL (Counterclaim One)

Franchisees plead that JB Brothers violated Sections 31110 (offer or sale of an unregistered franchise), 31119 (failure to provide an offer circular), and 31201 (false statements to a franchisee) of the CFIL, Cal. Corp. Code Section 31000 et seq., by selling Poke Bar franchises to Franchisees without obtaining licensing from the California Department of Oversight and failing to provide a franchise disclosure document. (Counterclaim – Dkt. No. No. 30 at ¶¶ 26–39.) JB Brothers moves to dismiss Franchisees' CFIL counterclaim on the grounds that the statutes of limitations have lapsed for each violation. (Mot. – Dkt. No. 34-1 at 14–17.)

***3** 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. Cal. Corp. Code § 31303. The statute of limitations for violations of Section 31201 is a maximum of two years. Cal. Corp. Code § 31304. 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. *People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc.*, 95 Cal. App. 4th 709, 723–25 (2002).

Although there is no case directly addressing whether these statutes of limitations require actual or inquiry notice, California courts interpreting identical language in California Corporations Code Section 25506 have held that inquiry notice is sufficient. *Deveny v. Entropin, Inc.*, 139 Cal. App. 4th 408, 419–20 (2006) ("[I]nquiry notice is sufficient to trigger the running of the limitations period ..."). The *Deveny* court's holding regarding inquiry notice relied on two federal cases. *See Id.*; *Kramas v. Sec. Gas & oil, Inc*, 672 F.2d 766, 770–71 (9th Cir. 1982); *Rochabeau v. Brent Exploration, Inc.*, 70 F.R.D. 381, 387 (1978). The Court finds, in light of the identical statutory language, that inquiry notice is sufficient to trigger the limitations period under Sections 31303 and 31304.

Here, JB Brothers contends that Defendants had inquiry notice of the violations of Corporations Code Sections 31110, 31119, and 31201 by the time they signed the License Agreements because (1) they knew (or reasonably should have known) that they had not been provided with an offer circular prior to signing, (2) they knew (or should have known) that JB Brothers was not yet licensed, evidenced by the express statements in the License Agreements that formal Franchise Agreements would be executed at a later date, and (3) JB Brothers' licensing status was a matter of public record available on the Department of Business Oversight's website. (Mot. – Dkt. No. 34-1 at 15.) Thus, JB Brothers identifies May 18, 2017 — the date the License Agreements were signed — as the date that the statute of limitations began for all three Sections.

2.1. Section 31119

Courts have applied the one-year statute of limitations under Section 31303 for failure to provide an offer circular based on the conclusion that "[a] party suing for defective franchise registration almost invariably will be aware of the facts constituting the violation at the time ... he signs the franchise agreement or pays the franchisor." *Powell v. Coffee Beanery*, Ltd., 932 F. Supp. 985, 988 (E.D. Mich. July 31, 1996) (quotations and citation omitted). Moreover, "[a]t the time of closing, 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). Here, Franchisees were aware that they were not provided with an offer circular at the time they executed the License Agreements on May 18, 2017. Thus, they discovered that JB Brothers were in violation of Section 31119 on that date, triggering the one-year statute of limitations.

Accordingly, the Court finds that the statute of limitations ran on May 18, 2018, and dismisses the Counterclaim for violations of Section 31119 with prejudice.

2.2. Section 31201

***4** As to Franchisees' Counterclaim for violations of Section 31201, Franchisees did not oppose JB Brothers' argument that counterclaims are time-barred by the two-year statute of limitations under Section 31304. (Opp'n – Dkt. No. 35-1 at 15–16; Mot. – Dkt. No. 34-1 at 17.)

Accordingly, the Court finds that the statutes of limitations for these violations began on May 18, 2017 and ran on May 18, 2019, and dismisses the Counterclaim for violations of Section 31201 with prejudice.

2.3. Section 31110

As to Franchisees' Counterclaim for violations of Section 31110, the parties dispute which statute of limitations period applies under Section 31303.

Franchisees contend that the four-year statute of limitations applies because they were not aware of the facts constituting the violation of Section 31110 when they signed the License Agreements. (Opp'n – Dkt. No. 35-1 at 16.) JB Brothers contends that the one-year statute of limitations applies because the License Agreements — executed by each Franchisee — expressly required the Franchisees to later execute Franchise Agreements because JB Brothers' registration had not yet been processed by the Department of Business Oversight, which should have caused Franchisees to search the Department of Business Oversight's public website database for information about JB Brothers' registration status and put them on notice of the violation. (Mot. – Dkt. No. 34-1 at 15–16; Reply – Dkt. No. 38 at 11–12.) Neither party, however, requested that the Court judicially notice the License Agreements, nor are any contract provisions pleaded in (or attached to) the Complaint or Counterclaim. Thus, without the benefit of the provisions within the License Agreement, and construing the allegations in the light most favorable to Franchisees, *Epstein*, 83 F.3d at 1140, the Court cannot determine whether Franchisees had notice of JB Brothers' alleged violations of Section 31110 when the License Agreements were executed. [1]

Accordingly, the Court denies the Motion as to the violations of Section 31110.

3. Fraud (Second Counterclaim)

Franchisees plead that JB Brothers committed fraud by representing it was a licensed franchisor when it was not and by representing in the License Agreements that its trademark was for "Poke Bar" instead of "Poke Bar Dice & Mix." (Crossclaim – Dkt. 30, ¶P 41, 42.) JB Brothers moves to dismiss the counterclaim on the grounds that it does not satisfy the heightened pleading standard for specificity under Federal Rule of Civil Procedure 9(b) and is time-barred by the statute of limitations.

3.1. Rule 9(b) Specificity

Rule 9(b) requires that, "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." To satisfy Rule 9(b), a pleading must identify "the who, what, when, where, and how of the misconduct charged," as well as "what is false or misleading about [the purportedly fraudulent] statement, and why it is false." *Cafasso, U.S. ex rel. v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1055 (9th Cir. 2011) (citation omitted).

***5** In the Counterclaim, Franchisees allege that JB Brothers made the fraudulent representations to Defendants in the License Agreements executed on May 18, 2017, that JB Brothers subsequently failed to inform them that the franchise was not registered until July 2017, and that they further concealed their fraudulent activity until they requested that Franchisees execute the Franchise Agreements on September 18, 2018. (Counterclaim – Dkt. No. 30 at 6–7.) The Court finds that these allegations satisfy the heightened pleading requirements of Rule 9(b).

3.2. Statute of Limitations

California's statute of limitations for fraud is three years, and the limitations period does not begin "until the discovery, by the aggrieved party, of the facts constituting the fraud." Cal. Code Civ. Proc. § 338(d). Furthermore, "[i]t has long been established that the defendant's fraud in concealing a cause of action against him tolls the applicable statute of limitations, but only for that period during which the claim is undiscovered by plaintiff or until such time as plaintiff, by the exercise of reasonable diligence, should have discovered it." *Bernson v. Browning-Ferris Indus.*, 7 Cal. 4th 926, 931 (1994); *see also Platt Elec. Supply, Inc. v. EOFF Elec., Inc.*, 522 F.3d 1049, 1055 (9th Cir. 2008).

JB Brothers contends that the fraud counterclaim is time-barred because the statute of limitations period began on May 18, 2017, the date the License Agreements were executed. (Mot. – Dkt. No. 34-1 at 8.) Franchisees contend, however, that JB Brothers concealed their fraudulent activity until September 18, 2018 at the earliest, the date on which JB Brothers sent the franchise disclosure documents and Franchise Agreements. (Opp'n – Dkt. No. 35-1 at 11–12.)

Construing the factual allegations in the Counterclaim in the light most favorable to Franchisees, *Epstein*, 83 F.3d at 1140, the Court denies the Motion as to this counterclaim.

4. UCL (Third Counterclaim)

JB Brothers moves to dismiss Franchisees' counterclaim for violation of the California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code § 17200 et seq.

"An unlawful business practice under [the UCL] is an act or practice, committed pursuant to business activity, that is at the same time forbidden by law." *Durell v. Sharp Healthcare*, 183 Cal. App. 4th 1350, 1361 (2010). "Virtually any law—federal, state or local—can serve as a predicate for an action under Business and Professions Code Section 17200." *Id.* Here, Franchisees predicate their UCL claim on alleged violations of the Federal Trade Commission's ("FTC") Franchise Rules. (Counterclaim – Dkt. No. 30 at ¶¶ 50–54.) The FTC's Franchise Rules mirror the CFIL, and Franchisees allege three violations of the rules (the same violations alleged in the CFIL counterclaim): (1) failure to provide disclosure documents; (2) sale of an unregistered franchise; and (3) failure to provide a period of review when providing a new franchise agreement to Counterclaimant Choi. (Counterclaim – Dkt. 30 at ¶¶ 50–54.)

The UCL restricts private standing for an unfair business practices claim to "a person who has suffered injury in fact and has lost money or property as a result of the unfair competition." Cal. Bus. & Prof. Code § 17204. To establish standing under any prong of the UCL, a claimant must "(1) establish a loss or deprivation of money or property sufficient to qualify as injury in fact, i.e., economic injury, and (2) show that economic injury was the result of, i.e., caused by the unfair business practice or false advertising that was the gravamen of the claim." *Davis v. RiverSource Life Ins. Co.*, 240 F. Supp. 3d 1011, 1017 (N.D. Cal. 2017) (quoting *Kwikset Corp. v. Superior Court*, 51 Cal. 4th 310, 322 (2011)). When the only alleged injury is the violation of a federal statute, without some additional showing of concrete harm, there is no injury in fact and, therefore, no standing. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 340–41 (2016). Even where there has been economic injury, if it is not the direct result of the statutory violation, the claim fails. *Davis*, 240 F. Supp. 3d at 1017–18.

***6** As a threshold matter, JB Brothers contends that the UCL counterclaim is time-barred by the four-year statute of limitations for UCL claims because "the conduct complained of ... occurred in the months leading up to May 18, 2017." Cal. Bus. & Prof. Code § 17208. (Mot. – Dkt. No. 34-1 at 14.) The Counterclaim, however, alleges violations of the Franchise Rules that occurred within the four-year statute of limitations. (See Counterclaim – Dkt. No. 30 at ¶¶ 11–25.) Thus, construing the allegations in the light most favorable to Franchisees, *Epstein*, 83 F.3d at 1140, the Court finds that the UCL counterclaim is not time-barred.

JB Brothers also moves to dismiss on the grounds that Franchisees failed to plead injury-in-fact or actual reliance. (Mot. – Dkt. No. 34-1 at 11–13.) The Counterclaim, however, alleges that Franchisees each paid a $30,000 initial fee and additional royalties

and fees under the License Agreements in reliance on JB Brothers' statements, which they now seek to recover. The Court thus finds that Franchisees sufficiently plead injury-in-fact and actual reliance and denies the Motion as to the UCL counterclaim.

5. Unjust Enrichment (Fourth Counterclaim)

Franchisees plead that JB Brothers was unjustly enriched by the franchise fees and royalty payments it received from Franchisees. (Counterclaim – Dkt. 30, ¶ 56.) JB Brothers moves to dismiss the claim on the grounds that counterclaim is precluded by the existence of the enforceable License Agreements executed by the parties and is otherwise time-barred by the statute of limitations. (Mot. – Dkt. No. 34-1 at 10.)

As a threshold matter, claims for unjust enrichment rely upon separate, validly pleaded causes of action. *LeBrun v. CBS Television Studios, Inc.*, 68 Cal. App. 5th 199, 210 (2021). Here, Franchisees base their unjust enrichment claim on their counterclaims for violations of the CFIL and fraud, which the Court finds are not time-barred. (Counterclaim – Dkt. No. 30 at ¶ 56.) Thus, the Court likewise finds that the counterclaim for unjust enrichment is not time-barred.

As to the substance of the unjust enrichment counterclaim, "California does not have a standalone cause of action for unjust enrichment." *Teddy's Red Tacos Corp. v. Theodoro Vazquez Solis*, 2021 WL 4517723, *5 (C.D. Cal. August 16, 2021) (citing *Atiana v. Hain Celestial Grp., Inc.*, 783 F.3d 753, 762 (9th Cir. 2015). "When a plaintiff alleges unjust enrichment, a court may construe the cause of action as a quasi-contract claim seeking restitution." *Atiana*, 783 F3d at 762 (quoting *Rutherford Holdings, LLC v. Plaza Del Rey*, 223 Cal. App. 4th 221, 166 (2014)). "An unjust enrichment claim must fail, however, where the parties are bound by an enforceable express contract." *Teddy's Red Tacos Corp.*, 2021 WL 4517723 at *5 (*citing Durell v. Sharp Healthcare*, 183 Cal. App. 4th 1350–1370 (2010) ("As a matter of law, an unjust enrichment claim does not lie where the parties have an enforceable express contract.")).

Franchisees contend that the License Agreements do not preclude their unjust enrichment claim because they are seeking recission of them based on JB Brothers' alleged illegal conduct, and because they did not receive the benefits conferred by the agreements because the franchise fees and royalties were paid for the use of the "Poke Bar" trademark, which they allege JB Brothers never owned. (Opp'n – Dkt. No. 3501 at 13–14.)

Construing the allegations in the light most favorable to Franchisees, *Epstein*, 83 F.3d at 1140, the Court finds that Franchisees sufficiently plead that JB Brothers obtained amounts paid to them through fraudulent activity. Moreover, the Court cannot determine the enforceability of the License Agreements at this stage of the case.

***7** Accordingly, the Court denies the Motion as to the unjust enrichment counterclaim.

IV. CONCLUSION

Accordingly, the Court **GRANTS** the Motion to Dismiss with prejudice as to the violations of California Corporations Code Sections 31119 and 31201 because they are time-barred by the statutes of limitations and **DENIES** the Motion as to the remaining counterclaims.

IT IS SO ORDERED.

All Citations

Not Reported in Fed. Supp., 2022 WL 3012822

Footnotes

1 The Court's Order does not preclude JB Brothers from raising a statute of limitations argument for violation of Cal. Corp. Code Section 31110 in a Motion for Summary Judgment when the Court may have the benefit of the License Agreements as evidence.

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