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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

DOUG CHAMBERS, an individual and
on behalf of the general public,

Plaintiff,

v.

CVS PHARMACY, INC., a Rhode
Island corporation, and DOES 1
through 100, inclusive,

Defendants.

Civil No. 09cv0419 JAH(RBB)

**ORDER GRANTING
DEFENDANT’S MOTION TO
DISMISS [DOC. # 5]**

INTRODUCTION

Now before the Court is the motion of defendant CVS Pharmacy, Inc. (“defendant”) to dismiss the instant complaint. The motion has been fully briefed by the parties. After a thorough review of the pleadings presented, and for the reasons set forth below, this Court **GRANTS** defendant’s motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure.

BACKGROUND

Doug Chambers (“plaintiff”), filed the instant class action complaint on March 3, 2009, and an amended complaint, the operative pleading here, on March 30, 2009. In his amended complaint, plaintiff alleges he purchased an eyeglass repair kit manufactured, marketed and/or sold by defendant labeled “Made in USA”. Doc. # 4 ¶ 10. The amended complaint alleges that the eyeglass repair kits contained

1 component parts made in foreign countries. Id. ¶ 11. Plaintiff claims the purported
2 “Made in USA” label was what induced him to purchase the product. Id. ¶ 16.

3 Plaintiff’s class action complaint, filed on behalf of plaintiff as an individual and on
4 behalf of other persons similarly situated in the State of California who purchased
5 defendant’s eyeglass repair kits, alleges causes of action for (1) violation of the Consumer
6 Legal Remedies Act (“CLRA”), California Civil Code § 1750 *et seq.* (Count I); (2) violation
7 of Business and Prof. Code § 17200 *et seq.* (Count II); and (3) violation of Business and
8 Prof. Code § 17533.7 (Count III). Id. ¶¶ 25 - 63. On April 20, 2009, defendant filed the
9 instant motion to dismiss. Plaintiff’s opposition to the motion was filed on May 22, 2009
10 and defendant’s reply brief was filed June 8, 2009. This Court subsequently took the
11 motion under submission without oral argument. See CivLR 7.1(d.1).¹

12 DISCUSSION

13 Defendant moves to dismiss plaintiff’s amended complaint on the grounds that (1)
14 this Court lacks subject matter jurisdiction over plaintiffs’ claims, and; (2) plaintiff lacks
15 standing to pursue his claims.²

16 1. **Legal Standard**

17 The federal court is one of limited jurisdiction. See Gould v. Mutual Life Ins. Co.
18 of New York, 790 F.2d 769, 774 (9th Cir. 1986). As such, it cannot reach the merits of
19 any dispute until it confirms its own subject matter jurisdiction. Steel Co. v. Citizens for
20 a Better Environment, 523 U.S. 83, 93-94 (1998). “Without jurisdiction the court
21 cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it
22 ceases to exist, the only function remaining to the court is that of announcing the fact and
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24 ¹ After this Court took the motion under submission, plaintiff filed, on June 11, 2009, a notice
25 regarding the status of Kwikset Corp. v. Superior Court, 171 Cal.App.4th 645 (2009), that was cited by
26 defendant in support of its standing argument. See Doc. # 11. Defendant filed a response to that notice
27 and plaintiff filed a motion to strike defendant’s response. See Docs. # 12, 13. Because this Court ultimately
finds it lacks subject matter jurisdiction, this Court does not need to address the issue of standing.
Therefore, plaintiff’s request to strike defendant’s response to plaintiff’s notice [Doc. # 13] is DENIED as
moot.

28 ² Because this Court ultimately grants defendants’ motion to dismiss the complaint pursuant to
Fed.R.Civ.P. 12(b)(1), this Court does not address defendants’ standing arguments.

1 dismissing the cause.” Id. (quoting Ex parte McCardle, 74 U.S. (7 Wall.) 506, 514
2 (1868)); see In re Mooney, 841 F.2d 1003, 1006 (9th Cir. 1988) (“Nothing is to be more
3 jealously guarded by a court than its jurisdiction. Jurisdiction is what its power rests upon.
4 Without jurisdiction it is nothing.”), overruled on other grounds by Partington v. Gedan,
5 923 F.2d 686, 688 (9th Cir. 1991).

6 Under Fed.R.Civ.P. 12(b)(1), the Court may dismiss a complaint for lack of subject
7 matter jurisdiction. The plaintiff bears the burden of establishing subject matter
8 jurisdiction. See Kokkonen v. Guardian Life Ins. Co. of America, 511 U.S. 375, 377
9 (1994) (stating that the burden of establishing jurisdiction rests on the party asserting it).
10 When considering a motion to dismiss under Fed.R.Civ.P. 12(b)(1), the district court “is
11 free to hear evidence regarding jurisdiction and to rule on that issue prior to trial, resolving
12 factual disputes where necessary.” Augustine v. United States, 704 F.2d 1074, 1077
13 (9th Cir. 1983). “In such circumstances, ‘[n]o presumptive truthfulness attaches to
14 plaintiff’s allegations, and the existence of disputed facts will not preclude the trial court
15 from evaluating for itself the merits of jurisdictional claims.” Id. (quoting Thornhill
16 Publishing Co. v. General Telephone & Electronic Corp., 594 F.2d 730, 733 (9th
17 Cir. 1979)).

18 2. Analysis

19 Defendant contends that subject matter jurisdiction is lacking in this case because
20 plaintiff cannot reach the amount in controversy required for diversity jurisdiction.
21 Jurisdiction in this case is based solely on diversity. See Doc. # 4 ¶ 7. For diversity
22 jurisdiction to exist, the named plaintiff must meet the minimum amount in controversy
23 (\$75,000) and complete diversity must exist among all plaintiffs and defendants.
24 See Exxon Mobil Corp. v. Allapattah Servs., 545 U.S. 546 (U.S. 2005). Alternatively, a
25 federal court has subject matter jurisdiction under the Class Action Fairness Act of 2005
26 (“CAFA”), when the class comprises of more than 100 members, minimal diversity of
27 citizenship is present, and where the aggregate amount of all class members’ claims exceeds
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1 \$5,000,000 (exclusive of costs or attorneys' fees).³ 28 U.S.C. § 1332(d). Where a
2 statutory authority provides for attorneys' fees, the fees are included in the amount in
3 controversy to reach CAFA's \$5,000,000 minimum. Lowdermilk v. United States Bank
4 National Ass'n, 479 F.3d 994, 1000 (9th Cir. 2007).

5 In its motion to dismiss, defendant alleges that plaintiff fails to set forth facts
6 establishing that this Court has subject matter jurisdiction because the jurisdictional
7 amount required for diversity jurisdiction cannot be met on the facts plead. Doc. # 5-3
8 at 2. Defendant explains that CVS sold 17,207 kits between January 2007 and December
9 2008, for an average retail price of \$2.45. Doc. # 5-4 at 4-7. Defendant argues that, even
10 if the number of actual kits sold was doubled, at an average price of \$2.45, the gross sales
11 combined with punitive damages would total \$843,140, a figure that falls short of the
12 required jurisdictional minimum. Doc. # 5-3 at 6. In opposition, plaintiff points out that
13 defendant fails to take into consideration the scope of the class. Doc. # 7 at 5. Plaintiff
14 argues that the putative class extends to any CVS customer who purchased any eyeglass
15 repair kit containing a false "Made in USA" designation. Id. Plaintiff contends that there
16 could be six such kits that violate the California "Made in USA" statute and, using this
17 number combined with attorney's fees and costs, the amount in controversy would surpass
18 the jurisdictional minimum. Id.

19 However, this Court finds that plaintiff has identified only one product which
20 offends the "Made in USA" statute. Therefore, this Court cannot assume the existence
21 of other such products and must base its calculations solely on the identified product and
22 the figures provided. Based on the figures provided by defendant, and not disputed by
23 plaintiff, see Doc. # 7 at 5, defendant sold 17,207 kits between January 2007 and
24 December 2008, for an average retail price of \$2.45. Doc. # 5-4 at 4-7. Even adding an
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27 ³In the instant case, it is not alleged that the named plaintiff will meet the minimum amount in
28 controversy, nor is it alleged that complete diversity exists among all plaintiffs and defendants. Plaintiff's
do, however, allege that the class comprises of more than 100 members, minimal diversity exists and an
aggregate amount in cotroversy that exceeds \$5,000,000.

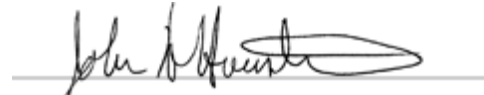
1 award of punitive damages amounting to nine times the restitution amount,⁴ and attorneys
2 fees to the restitution amount above or even double the provided figures, the sum does not
3 exceed \$5,000,000.

4 Therefore, this Court finds that the instant complaint cannot meet the minimum
5 amount in controversy required for diversity jurisdiction because the evidence before the
6 Court suggests that the amount in controversy is far less than \$5,000,000.

7 **CONCLUSION AND ORDER**

8 Based on the foregoing, IT IS HEREBY ORDERED that defendant's motion to
9 dismiss is **GRANTED**, and the action **DISMISSED** without prejudice, for lack of subject
10 matter jurisdiction.

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12 DATED: August 19, 2009

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14 JOHN A. HOUSTON
15 United States District Judge

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⁴Punitive damages awards exceeding nine times the restitution amount are not usually constitutional. A single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process. State Farm Mut. Auto Ins. Co. v. Campbell, 538 U.S. 408, 425 (2003).