IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

HI-TECH PHARMACEUTICALS, INC.,

Plaintiff,

v.

ALLMAX NUTRITION INC., HBS INTERNATIONAL CORP., and MICHAEL KICHUK,

Defendants.

CIVIL ACTION FILE

NUMBER 1:16-cv-1783-TCB

O R D E R

This case comes before the Court on Defendant HBS International Corp.'s motion to dismiss [14].

I. Factual Background

Plaintiff Hi-Tech Pharmaceuticals, Inc. manufactures dietary supplement products, including bodybuilding and sports nutrition supplements, and sells, distributes, and markets its products throughout the United States. HBS is also in the nutritional supplement field, and distributes Defendant Allmax Nutrition, Inc.'s

bodybuilding and sports nutrition supplements throughout the United States and Canada. Michael Kichuk is the president of Allmax.

HBS distributes a dietary supplement, called the "Ultra-Premium 6-Protein Blend HexaPro." This product is marketed as a drink mix that helps build muscle mass and aids in workout recovery. While HexaPro is a source of protein, it also contains free-form amino acids and other non-protein ingredients. The product label provides detailed information regarding the protein source—free-form amino acids are included in the ingredient list. Furthermore, the product prominently advertises the inclusion of amino acids and discloses the full amino acid profile.

On June 1, 2016, Hi-Tech filed this action against Defendants alleging false advertising under the Lanham Act, violation of the Georgia Deceptive Trade Practices Act, and violation of the Georgia RICO statute. [1].[1] Hi-Tech contends that HexaPro's labeling is intended to lead consumers to believe that the product contains protein

[1] After HBS filed its motion to dismiss, Hi-Tech stipulated to dismissing with prejudice counts V, VI, and VII—violations of Georgia's RICO statute—of its complaint. [19].

derived exclusively from the "Ultra-Premium 6-Protein Blend" and therefore falsely inflates the protein content of the product. Further, Hi-Tech argues that this labeling is misleading because it draws reasonable consumers' attention away from the significant amount of free-form amino acids and non-protein ingredients in the protein powder.

On October 28, 2016, HBS filed this motion to dismiss [14] Hi-Tech's complaint for failure to state a claim on which relief can be granted. In addition, Defendants Michael Kichuk and Allmax Nutrition, Inc. filed a separate motion to dismiss [13] the claims against them for lack of personal jurisdiction.

II. Legal Standard

Rule (8)(a)(2) of the Federal Rules of Civil Procedure requires a complaint to provide a "short and plain statement of the claim showing that the pleader is entitled to relief." *Chaparro v. Carnival Corp.*, 693 F.3d 1333, 1337 (11th Cir. 2012). This standard does not require "detailed factual allegations," but does demand "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Id.* In

order to survive a motion to dismiss for failure to state a claim under Rule 12(b)(6), a plaintiff must plead "enough facts to state a claim of relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 547 (2007); *see also Chandler v. Sec'y of Fla. Dep't of Transp.*, 695 F.3d 1194, 1199 (11th Cir. 2012). The Supreme Court has explained this standard as follows:

> 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. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully.

Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (internal citation omitted); *Resnick v. AvMed, Inc.*, 693 F.3d 1317, 1325 (11th Cir. 2012). Thus, if the complaint is a mere "formulaic recitation of the elements of a cause of action" it will not survive a motion to dismiss; however, a complaint will survive a motion to dismiss if it contains factual allegations that are "enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 55.

When considering a 12(b)(6) motion to dismiss, the court must accept all well-pleaded facts as true and construe them in the light most

favorable to the plaintiff. *Powell v. Thomas*, 643 F.3d 1300, 1302 (11th Cir. 2011). The court, however, need not accept the plaintiff's legal conclusions as true, even if they are couched as factual allegations. *Iqbal*, 556 U.S. at 678.

III. Analysis

A. Kichuk and Allmax's Motion to Dismiss

Kichuk and Allmax filed a separate motion to dismiss the claims against them for lack of personal jurisdiction. [13]. Hi-Tech has filed no opposition to that motion.

In order to determine whether personal jurisdiction exists over Allmax or Kichuk, the Court must determine whether jurisdiction exists under Georgia's long-arm statute, and whether the exercise of jurisdiction satisfies the requirements of the Due Process clause. *See Burgess v. Religious Tech. Ctr., Inc.*, 600 F. App'x 657, 660 (11th Cir. 2015).

Georgia's long-arm statute provides for personal jurisdiction over a nonresident defendant if:

> [I]n person or through an agent, he or she: (1) Transacts any business within this state; (2) Commits a tortious act or

> omission within this state . . . ; [or] (3) Commits a tortious injury in this state caused by an act or omission outside this state if the tort-feasor regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state.

O.C.G.A. § 9-10-91(1)–(3).

Federal due process requires that a foreign defendant have sufficient "minimum contacts" with the forum state such that "the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Int'l Shoe Co. v. State of Wash., Office of Unemployment Comp. & Placement*, 326 U.S. 310, 316 (1945). To demonstrate that a defendant has sufficient "minimum contacts" with the forum state, a plaintiff may establish the existence of either general or specific jurisdiction. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 594 U.S. 915, 919 (2011); *Specialty Surfaces Int'l, Inc. v. Athletic Surfaces Plus, LLC*, No. 1:12-CV-1901-CAP, 2013 WL 12101062, at *2 (N.D. Ga. June 26, 2013).

The plaintiff bears the burden of establishing personal jurisdiction over a defendant. *Consol. Dev. Corp. v. Sherritt, Inc.*, 216 F.3d 1286, 1291 (11th Cir. 2000). If the defendant challenges personal jurisdiction

by submitting evidence, the plaintiff must provide its own evidence to carry its burden on personal jurisdiction. *United Techs. Corp. v. Mazer*, 556 F.3d 1260, 1274 (11th Cir. 2009).

Although the Court generally takes well-pleaded facts in the complaint as true, it must not accept the plaintiff's allegations where the defendants offer evidence to specifically refute them. *See U.S. Pharm. Corp. v. Breckenridge Pharm., Inc.*, No. 1:09–cv–2050–TWT, 2010 WL 3731112, at *3–5 (N.D. Ga. Sept.16, 2010) (finding no personal jurisdiction over a defendant where the jurisdictional allegations in the complaint were specifically contradicted by the defendant's uncontroverted personal declaration). Instead, the plaintiff bears the burden to offer "substantial evidence" to support jurisdiction. *See AT & T Mobility LLC v. C & C Glob. Enters., LLC*, No. 1:06–cv–2733–TWT, 2007 WL 2001736, at *3 (N.D. Ga. July 3, 2007) (holding corporate officer defendant not subject to personal jurisdiction where plaintiff did not present "substantial evidence" that defendant had connections with forum state).

Hi-Tech does not specify whether it contends Allmax and Kichuk are subject to general or specific jurisdiction. Regardless, it is clear that a finding of jurisdiction under either principle is inappropriate.

1. Allmax Is Not Subject to Personal Jurisdiction

Hi-Tech's complaint alleges that "Allmax is a supplier of bodybuilding and sports nutrition supplements in the United States and Canada" and that "HBS is a wholly-owned subsidiary of Allmax . . . ." [1] at ¶¶4, 7. However, Hi-Tech fails to make any specific allegations to justify this Court's exercise of jurisdiction over Allmax. In addition, Allmax demonstrates through Kichuk's declaration that Hi-Tech's allegations are incorrect. [13-2]. Thus, Hi-Tech has the burden to offer evidence to rebut Allmax's affidavit and to demonstrate personal jurisdiction, but has failed to do so.

Allmax is a Canadian holding company that has no contacts with the United States, let alone Georgia.[2] Allmax does not manufacture,

[2] In 2015, two courts—the Northern District of Illinois and the Eastern District of California—dismissed cases against Allmax for the same reason. *See Smith v. Allmax Nutrition, Inc.*, No. 1:15-CV-00744-SAB, 2015 WL 9434768, at *3 (E.D. Cal. Dec. 24, 2015); *Gubala v. Allmax Nutrition, Inc.*, No. 14 C 9299, 2015 WL 6460086, at *4 (N.D. Ill. Oct. 26, 2015).

distribute, market, or sell any of the products that Hi-Tech says have done the infringing. *Id.* at ¶¶5–7. In fact, Allmax does not manufacture, distribute, market, or sell any products *at all*. *Id.* ¶8. Instead, Allmax's entire business is holding the intellectual property associated with the branding of products made by others. *Id.* ¶11.

Further, Allmax does not own HBS and does not have any parent or subsidiary corporations. *Id.* Allmax lacks *any* contacts approximating physical presence in Georgia, let alone contacts that are so "continuous and systematic" as to meet the high standard required for general jurisdiction. *See Fraser v. Smith*, 594 F.3d 842, 850 (11th Cir. 2010). In addition, Allmax has no contacts at all in Georgia to justify a finding of specific jurisdiction.

Without any evidence to rebut Allmax's affidavit, the Court does not have jurisdiction over Allmax. *See Foppa v. Specialized Bicycle Components, Inc.*, 1:14-cv-1407-CAP, 2015 WL 11256937, at *2 (N.D. Ga. Mar. 11, 2015) ("Because the plaintiff's response to the instant motion is devoid of any evidence supporting jurisdiction . . . the court concludes that [the defendant's] motion to dismiss should be granted.").

2. Kichuk Is Not Subject to Personal Jurisdiction

Hi-Tech does not allege that Kichuk has any personal contacts with Georgia. Further, Kichuk's own unrebutted declaration demonstrates that he has no contacts with Georgia. [13-2] at ¶¶12–13. Instead, Hi-Tech alleges only that the corporate entity of which Kichuk is an officer (Allmax) has contacts with Georgia. That is not sufficient to confer jurisdiction over Kichuk. *See Amerireach.com, LLC v. Walker*, 719 S.E.2d 489 (Ga. 2011) (holding that a corporate officer is not subject to jurisdiction based solely on the corporation's contacts with the forum if they were not "primary participants in the alleged wrongdoing").

Hi-Tech does allege that Kichuk "personally authorized or directed" the statements on the HexaPro label. [1] at ¶58. Similar to the analysis above, Kichuk provides evidence refuting this allegation, and Hi-Tech fails to provide any response demonstrating jurisdiction. Kichuk is not personally responsible for formulating HexaPro, nor is he personally responsible for drafting or designing the HexaPro label. *Id.* ¶¶14–15.

Further, Kichuk is not personally responsible for any contracts negotiated to sell HexaPro into Georgia. *Id.* ¶13. There is, therefore, no basis for this Court to assert personal jurisdiction over him. *See Websters Chalk Paint Powder, LLC v. Annie Sloan Interiors, Ltd.*, No. 1:13-cv-2040-WSD, 2014 WL 4093669, at *5 (N.D. Ga. Aug. 18, 2014) (dismissing claims against an individual corporate officer because the plaintiff "does not allege any facts to support that defendant personally participated in the negotiations or committed an intentional act in Georgia to show that she was a primary participant in the negotiations or the execution of the contracts"); *see also U.S. Pharm. Corp. v. Breckenridge Pharm., Inc.*, No. 1:09-cv-2050-TWT, 2010 WL 3731112, at *4 (N.D. Ga. Sept. 16, 2010) ("Were it enough . . . to allege that [individual defendant] 'directed' [the corporate defendant's] sales activities, personal jurisdiction over corporate officers would be coextensive with that of their corporate employers wherever those officers 'directed' corporate business. This is contrary to [Georgia Supreme Court law].").

For these reasons, Allmax and Kichuk's motion to dismiss [13] will be granted.

B. HBS's Motion to Dismiss

1. Hi-Tech's State Law Claims

Hi-Tech seeks to impose liability against HBS pursuant to O.C.G.A. § 10-1-372(a), the Georgia Deceptive Trade Practices Act. In support of its claim, Hi-Tech alleges that HexaPro has an actual protein content of 17.914 grams per serving, not 25 grams per serving, as stated on its label. Additionally, Hi-Tech alleges that HBS "adds nitrogen-containing, cheap, and less beneficial free form amino acids and non-protein ingredients to [HexaPro]" to increase its protein content. Thus, Hi-Tech avers that HexaPro's true protein content can only be calculated "once the spiking agents are removed from the formula of analysis and the bound amino acid count is determined," [1] at ¶33, which HBS has allegedly failed to do.

In response, HBS contends that Hi-Tech's state law claim is preempted by the Federal Food, Drug, and Cosmetic Act ("FDCA"). More specifically, HBS asserts that Hi-Tech's claim seeks to impose food

labeling requirements that differ from the applicable federal regulation. In addition, HBS asserts that Hi-Tech has failed to follow the required testing method set out in 21 C.F.R. § 101.9(g)(2).

"The [FDCA] governs the labeling of food, drugs, cosmetic products and medical devices." *Lilly v. ConAgra Foods, Inc.*, 743 F.3d 662, 664 (9th Cir. 2014). In passing the FDCA, the Food and Drug Administration ("FDA") was established and charged with ensuring that "foods are safe, wholesome, sanitary, and properly labeled." 21 U.S.C. § 393(b)(2)(A).

In 1990, the FDCA was amended through the passage of the Nutrition Labeling and Education Act ("NLEA"), which established new requirements governing nutrient content labeling. *See Smith v. Allmax Nutrition, Inc.*, No. 1:15-cv-00744-SAB, 2015 WL 9434768, at *4 (E.D. Cal. Dec. 23, 2015) (citing *Chacanaca v. Quaker Oats Co.*, 752 F. Supp. 2d 1111, 1118 (N.D. Cal. 2010)).

The NLEA contains an express preemption provision concerning the regulation of nutrient content statements. *See Salzar v. Honest Tea, Inc.*, 74 F. Supp. 3d 1304, 1310–1311 (E.D. Cal. 2014). The preemption

provision prevents individual states from imposing "any requirement for the labeling of food that is not identical to the federal requirements. . . ." *Lilly*, 743 F.3d at 664–65 (quoting 21 U.S.C. § 343–1(a)(5)).

A state's requirement is not identical if the "state requirement directly or indirectly impose[s] obligations or contains provisions concerning the composition or labeling of food [that] . . . are not imposed by or contained in the applicable [federal regulation] . . . or differ from those specifically imposed by or contained in the applicable [federal regulation]." *Lilly*, 743 F. 3d at 665 (ellipses and alteration in original) (quoting 21 C.F.R. § 100.1(c)(4)).

Thus, to avoid preemption, a state law claim must impose liability only for conduct that violates the FDCA. *Mee v. I A Nutrition, Inc.*, No. C-14-50006 MMC, 2015 WL 2251303, at *2 (N.D. Cal. May 13, 2015) (quoting *Trazo v. Nestle USA, Inc.*, No. 5:12-cv-2272 PSG, 2013 WL 4083218, at *5 (N.D. Cal. Aug. 9, 2013)).

High-Tech's claim under the Georgia Deceptive Trade Practices Act, which seeks to establish that HBS misrepresented the amount of protein in HexaPro, is preempted. Federal regulations require that the

"declaration of nutrition information on the label" include "the number of grams of protein in a serving, expressed to the nearest gram. . . ." 21 C.F.R. § 101.9(c)(7). Further, the "[p]rotein content may be calculated on the basis of the factor of 6.25 times the nitrogen content of the food as determined by the appropriate method of analysis as given in the 'Official Methods of Analysis of the AOAC International.'" *Id.*

Hi-Tech's state law claim is preempted because it attempts to impose liability based on standards different from those required by the FDA. In its complaint, Hi-Tech alleges that "when [HexaPro's] protein content is calculated based on the total bonded amino acids in the product, [HexaPro's] actual protein content is revealed to be 17.914 grams per serving." However, contrary to Hi-Tech's assertion, the FDA regulations stipulate that the protein content may be calculated based on the nitrogen content of the food. 21 C.F.R. § 101.9(c)(7). Thus, Hi-Tech's attempt to measure the protein based solely on the total bonded amino acids is exactly the type of non-identical state requirement that is preempted by the FDCA and NLEA. *See Gubala*, 2015 WL 6460086, at *6 (holding that plaintiff's claim that defendant misrepresented the

protein content in its product was preempted because the only appropriate remedy would require the defendant's label to identify the sources and quality of the proteins included in the protein-content calculation, which is not something the NLEA requires).

Further, Hi-Tech's state law claim is preempted because it is a nutrient-content claim and does not comply with the FDA testing requirements set out in C.F.R. § 101.9(g)(2).[3] Under this regulation, the FDCA and NLEA require a plaintiff alleging a nutrient content claim to use the twelve-step testing method. 21 C.F.R. § 101.9(g)(2); *see also Mee*, 2015 WL 2251303, at *3 (holding that the twelve-step sample method must be used to determine the accuracy of the protein and amino acid content statements found on defendant's label). The twelve-step method is set out in 21 C.F.R. § 101.9(g)(2), which states that the "sample for nutrient analysis shall consist of a composite of 12 subsamples (consumer units), taken 1 from each of 12 different randomly chosen shipping cases, to be representative of a lot."

[3] C.F.R. § 101.13(b)(1) defines a nutrient content claim as "any direct statement about the level (or range) of a nutrient in the food, e.g., low sodium or contains 100 calories." Accordingly, Hi-Tech's claim, which concerns the protein level statement on the HexaPro label, is a nutrient content claim.

Accordingly, a state law claim will be preempted if a plaintiff attempts to establish a violation using a method different from that set out in 21 C.F.R. § 101.9(g)(2). *See Salazar*, 74 F. Supp. 3d at 1313.

Because Hi-Tech's claim is a nutrient-content claim, to prove non-compliance with the FDCA it must demonstrate non-compliance via the required twelve-step method, which is not shown here. *See Mee*, 2015 WL 2251303, at *3 (holding that plaintiff's claim that the front label contains false statements as to the amount of protein in the product requires compliance with the twelve-step testing method). Hi-Tech's complaint does not allege that it tested HexaPro using the method prescribed in C.F.R. § 101.9(g)(2). Thus, the complaint does not show that HBS's statements on its product violate any FDCA labeling requirements. Because Hi-Tech's allegations do not show a violation of the FDCA, its state law claim is preempted.

High-Tech argues that compliance with C.F.R. § 101.9(g)(2) is not required at the pleading stage. However, this Court is inclined to follow the majority of other courts that have considered this issue and found that "a state law claim that seeks to establish a violation of [an] [FDA]

regulation by a different methodology is preempted." *Mee*, 2015 WL 2251303 at *4; *see Salazar*, F. Supp. 3d at 1313 (granting motion to dismiss because plaintiff failed to allege that the testing was done in accordance with § 101.9(g)(2)); *see also Bruaner v. Muscle Pharm. Corp.*, No. cv 14-8869 FMO, 2015 WL 4747941, at *8–9 (C.D. Cal. Aug. 11, 2015); *Burke v. Weight Watchers Int'l, Inc.*, 983 F. Supp. 2d 478, 483 (D.N.J. 2013); *Vital v. One World Co.*, No. 12-314-CJC, 2012 U.S. Dist. LEXIS 186203, at *14 (C.D. Cal. Nov. 30, 2012).

Hi-Tech relies on two cases for the proposition that compliance with C.F.R. § 101.9(g)(2) is not required at the pleading stage: *Smith v. Allmax Nutrition, Inc.*, No. 1:15-cv-00744-SAB, 2015 WL 9434768, at *4 (E.D. Cal. Dec. 23, 2015), and *Clay v. Cytosport Inc.*, No. 15-cv-165 L(DHB), 2015 WL 5007884 (S.D. Cal. Aug. 19, 2015). These cases, however, are not persuasive.

In *Smith*, the Court did not require compliance with the twelve-step method because the plaintiff included supporting lab results, and thus the Court could reasonably infer that subsequent tests that followed the twelve-step method would also support plaintiff's

allegations. *Smith*, 2015 WL 9434768, at *8–9. Similarly, in *Cytosport*, the plaintiff's position was supported by test results from a lab company, which were included with its filed complaint. *Cytosport*, 2015 WL 5007884 at *3.

Here, Hi-Tech has only made the unsupported allegation that the protein content is lower than what HBS has reported on the HexaPro label. Hi-Tech has attached no supporting lab results to its complaint, has not disclosed the method of testing used, and has not offered any information about who performed the testing. With only a bare assertion, the Court cannot reasonably infer that Hi-Tech's allegations are in fact correct. As a result, Hi-Tech's reliance on *Smith* and *Cytosport* is misplaced, and its state law claims are preempted.

2. Hi-Tech's Federal Claims

While not clearly articulated, Hi-Tech's complaint can be read as asserting a claim that is not preempted by the NLEA: that HexaPro's label is misleading because of the proximity of the phrases "Ultra-Premium 6-Probtein Blend" and "25G protein per serving." Contrary to HBS's assertion, Hi-Tech is not arguing that the FDA-approved method

for measuring protein content is misleading or violates the Lanham Act. Instead, Hi-Tech alleges that the above mentioned statements mislead customers into believing that the source of HexaPro's 25 grams of protein is the "Ultra-Premium 6-Protein Blend"-type protein as opposed to amino acids. [17] at 11.

Another court has addressed identical allegations against this exact product on a motion to dismiss and found that HexaPro's label is not misleading and that any claim based on these allegations should be dismissed. *See Gubala v. Allmax Nutrition, Inc.*, No. 14-cv-9299, 2015 WL 6460086, at *6 (N.D. Ill. Oct. 26, 2015). The Court finds such reasoning persuasive and agrees that Hi-Tech has failed to adequately plead that the label is misleading.

As the Court found in *Gubala*, HexaPro's label is not misleading "because it clearly states that in addition to the '6 ultra-high quality proteins,' it contains a '5 Amino Acid Blend with BCAAs' (Branched Chain Amino Acid) . . . prominently located on the front of the label directly beneath the name of the product, 'HexaPro.'" *Id.* Hi-Tech fails to explain how the label can be misleading when it provides a detailed

breakdown of all HexaPro's ingredients, including the mix of amino acids. These statements indicate to consumers that the product is not made solely of the ultra-premium protein blend, but contains other ingredients as well. For these reasons, the Court finds that HexaPro's labeling is not misleading and dismisses Hi-Tech's federal claims.

IV. Conclusion

For the foregoing reasons, HBS's motion to dismiss [14] is granted, and Allmax and Kichuk's motion to dismiss [13] is granted. The Clerk is directed to close this case.

IT IS SO ORDERED this 27th day of July, 2017.

Timothy C. Batten, Sr.
United States District Judge