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Superior Court of California
County of Los Angeles

JUL 10 2025

David W. Slayton, Executive Officer/Clerk of Court
By: V. Salas, Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES - EAST DISTRICT

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

vs.

FLUMGIO TECHNOLOGY, INC., et al.,

Defendants.

CASE NO. 25PSCV00155

ORDER ON DEMURRER

Hon. Allison L. Westfahl Kong
Department H

Defendants' Demurrer to Plaintiff's Complaint is OVERRULED as to both causes of action.

I. Background

Plaintiff the People of the State of California ("Plaintiff") allege that since at least April 2021, Flumgio Technology Inc. "Flumgio"), Berkeley Int'l Business Crew Inc. ("Berkeley"), and Zaoyu Zhu ("Zhu") (together, "Defendants") have violated Business and Professions Code sections 17200 and 17500 by, among other things, unfairly marketing e-cigarettes to California's youth and engaging in unfair business practices by continuing to import, distribute, and sell e-flavored cigarettes into California, even though California banned the retail sale of flavored tobacco products in December 2022. Plaintiff alleges that Defendants have misled the public into believing that their "clear" flavored e-cigarettes are unflavored when they have a distinguishable taste.

On January 15, 2025, Plaintiff filed a complaint, asserting two causes of action against Defendants and Does 1-100 for violations of the Business and Professions Code: (1) Business and Professions Code, § 17500 et seq. (False Advertising Law) and (2) Business and Professions Code, § 17200 et seq. (Unfair Competition Law).

Pending before the Court is Berkeley and Zhu's demurrer to the complaint. The Court held a hearing on the demurrer on July 10, 2025. After considering the parties' briefs and the arguments made by counsel at the hearing, the Court now issues its final ruling overruling the demurrer.

II. Legal Standard

A demurrer may be made on the grounds that the pleading, inter alia, does not state facts sufficient to constitute a cause of action. (Code Civ. Proc., § 430.10, subd. (e).)

"A demurrer tests the pleadings alone and not the evidence or other extrinsic matters. Therefore, it lies only where the defects appear on the face of the pleading or are judicially noticed." (*SKF Farms v. Superior Court* (1984) 153 Cal.App.3d 902, 905 [citations omitted].) At the pleading stage, a plaintiff need only allege ultimate facts sufficient to apprise the defendant of the factual basis for the claim against him. (*Semole v. Sansoucie* (1972) 28 Cal.App.3d 714, 721.) "[A] demurrer does not, however, admit contentions, deductions or conclusions of fact or law alleged in the pleading, or the construction placed on an instrument pleaded therein, or facts impossible in law, or allegations contrary to facts of which a court may take judicial knowledge." (*S. Shore Land Co. v. Petersen* (1964) 226 Cal.App.2d 725, 732 [citations omitted].)

III. Requests for Judicial Notice

Both parties ask this Court to take judicial notice of certain screenshots relating to Defendants' applications and regulatory compliance under Evidence Code section 452(h), which permits the court to take judicial notice of "facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy."

The Court denies the requests for judicial notice. In addition to the fact that the proffered exhibits are immaterial to the Court's ultimate ruling, the Court concludes that the proffered exhibits are not appropriate subjects for judicial notice. (*See, e.g., Searles Valley Mins. Operations, Inc. v. State Bd. of Equalization* (2008) 160 Cal.App.4th 514, 519 [holding that trial court properly denied request for judicial notice "of materials contained on the website pages of the American Coal Foundation and the U.S. Department of Energy," noting that while "it might be appropriate to take judicial notice of the existence of the websites, the same is not true of their factual content."].)

IV. Discussion

First Cause of Action: Violation of Business and Professions Code section 17500

Berkeley and Zhu (the "Distributor Defendants") demur to the first cause of action in the complaint on the ground that it fails to state facts sufficient to state a cause of action as against the Distributor Defendants, as they are not alleged to have been involved in the specific advertising and marketing practices set forth in the complaint.

The Court disagrees. In addition to alleging liability based on an agency theory (Compl. ¶ 7; *Kiseskey v. Carpenters' Trust for So. California* (1983) 144 Cal.App.3d 222, 230 ["general allegation of agency is one of ultimate fact, sufficient against a demurrer"]),[1] the complaint adequately alleges liability under an aiding-and-abetting theory. Specifically, the complaint alleges that Zhu founded Flumgio and Berkeley "for the purpose of importing and distributing Flumgio products into California" and that the two companies "work[ed] in tandem to promote and sell FLUM brand products." (Compl. ¶¶ 34-35.) The complaint further alleges Defendants "promot[ed] and advertis[ed] certain FLUM e-cigarettes as 'Clear'" in order to "mislead consumers, law enforcement, and public health officials into believing that these products have no flavor and therefore legal for sale despite the retail flavor ban." (Compl. ¶ 41.) The complaint also connects Zhu to this aforementioned "scheme," alleging that Zhu "described this scheme" [referring to the scheme to promote and advertise FLUM e-cigarettes as "Clear" to mislead others into believing the products were legal] to agents from the California Department of Tax and Fee Administration ("CDTFA"). (*Id.*)

The demurrer is overruled as to the first cause of action.

Second Cause of Action: Violation of Business and Professions Code section 17200

The Distributor Defendants demur to the second cause of action in the complaint on the basis that it fails to state facts sufficient to constitute a cause of action, as it does not allege that the Distributor Defendants engaged in any unlawful business practice.

The second cause of action alleges that Defendants engaged in "unlawful, unfair, or

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[1] The Distributing Defendants argue that the general agency allegation is contradicted by the more specific allegation that Flumgio is "responsible for marketing FLUM products through the Flumgio brand website, social media, and in person at trade shows." (Compl. ¶ 32.) However, this allegation does not necessarily contradict the allegation that Flumgio acted as an agent for the Distributing Defendants.

fraudulent acts or practices that constitute unfair competition" by engaging in, or aiding and abetting, the following acts or practices: "(a) Introducing flavored tobacco products into the California market that cannot be legally sold at retail pursuant to Health and Safety Code section 104559.5; (b) Encouraging and enabling California retailers in selling flavored FLUM e-cigarettes in violation of Health and Safety Code section 104559.5; (c) Importing and distributing 'clear' flavored e-cigarettes into California for the purposes of assisting retailers to evade Health and Safety Code section 104559.5; (d) Unfairly targeting underage consumers by marketing FLUM e-cigarettes in colors, designs, and flavors that appeal to youth; and (e) Violating Business and Professions Code section 17500 et seq." (Compl. ¶¶ 56-57.)

The scope of the Unfair Competition Law under Business and Professions Code section 17200 is "broad" (*Capito v. San Jose Healthcare Sys., LP* (2024) 17 Cal. 5th 273, 283.) Section 17200 deems as unfair competition "any unlawful, unfair or fraudulent business act or practice." (*Podolsky v. First Healthcare Corp.* (1996) 50 Cal. App. 4th 632, 647.) "Because section 17200 is written in the disjunctive, it establishes three varieties of unfair competition—acts or practices which are unlawful, or unfair, or fraudulent"—meaning that "a practice is prohibited as 'unfair' or 'deceptive' even if not 'unlawful' and vice versa." (*Id.*)

In their moving papers, the Distributing Defendants only address whether the complaint sufficiently pleads "unlawful" business acts or practices. As such, the Court overrules the demurrer as to this cause of action on the basis that the Distributing Defendants have not addressed why the allegations fail under the "unfair" prong. The Distributing Defendants cannot rectify this omission by addressing this issue for the first time in their reply brief. (*Jay v. Mahaffey* (2013) 218 Cal.App.4th 1522, 1538 ["Points raised for the first time in a reply brief will ordinarily not be considered, because such consideration would deprive the respondent of an opportunity to counter the argument"].)

The demurrer is overruled as to the second cause of action.

V. Conclusion

For the reasons stated herein, the Distributing Defendants' demurrer is overruled.

DATED: July 10, 2025

Allison L. Westfahl Kong

Hon. Allison L. Westfahl Kong
Judge of the Superior Court