UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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S&L VITAMINS, INC.,

Plaintiff,

-against-

AUSTRALIAN GOLD, INC.,

Defendant.

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MEMORANDUM AND ORDER
05-CV-1217(JS)(MLO)

APPEARANCES:

For Plaintiff and Third-Party Defendants Larry Sagarin and John Does 1-10	Ronald D. Coleman, Esq. Coleman Law Firm 1350 Broadway, Suite 1212 New York, NY 10018
For Defendant:	Francis Earley, Esq. Mintz Levin Cohn Ferris Glovsky & Popeo PC 666 Third Avenue New York, NY 10017

SEYBERT, District Judge:

On March 4, 2005, Plaintiff S & L Vitamins, Inc. ("S&L Vitamins") commenced the instant action seeking a declaratory judgment that its sale of Defendant Australian Gold's ("AG") products did not, inter alia, constitute trademark infringement. AG answered the Complaint, alleging counter-claims against S&L Vitamins for copyright infringement, trademark infringement, unfair competition, trademark dilution, tortious interference with contract, tortious interference with prospective economic advantage, deceptive business practices, and false advertising. AG also filed a Third-party Complaint, alleging similar claims against

Larry Sagarin ("Sagarin"), the owner of S&L Vitamins.[1]

Pending before the Court is S&L's Motion for Judgment on the Pleadings, dismissing certain of AG's counterclaims and third-party claims, and granting S&L a declaratory judgment. For the reasons explained below, S&L's motion is GRANTED in part and DENIED in part.

BACKGROUND

The following facts have been gleaned from AG's Second Amended Answer with Counterclaims and Third-Party Complaint. The facts are presumed to be true for the purpose of deciding S&L's motion.

AG is an Indiana corporation with its principal place of business in Indianapolis, Indiana. (2d Am. Ans. with Counterclaims & Third Party Compl. ("2d Am. Compl.") (filed Sept. 14, 2005) ¶ 1.) AG manufactures tanning lotions and other related tanning products that are sold to a majority of the tanning salons throughout the United States. (Id. ¶¶ 2-3.) AG is the manufacturer and exclusive distributor of "Australian Gold," "Caribbean Gold," and "Swedish Beauty" tanning lotions ("Products"). (Id. ¶ 2.) AG owns or is the licensee of registered and common law trademarks ("Marks") for these Products. (Id. ¶ 3.)

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[1] Hereinafter, all references to "S&L" shall include both the company and Sagarin.

S&L is a New York corporation with its principal place of business located in New York. (Id. ¶ 13.) S&L does business on the internet at two web addresses: www.thesupplenet.com, and www.bodysourceonline.com (collectively, the "Websites"). S&L also owns two retail stores located in Lindenhurst, New York and Miller Place, New York. The retail stores operate under the name "Body Source." (Id. ¶¶ 7, 29-30.)

S&L sells the Products on its Website and/or its retail locations. (Id. ¶ 8.) AG claims that S&L's use of its Marks and distribution of its Products via the Website violates AG's copyrights and trademarks, and tortiously interferes with its distribution contracts.

AG's Distribution Of The Products

AG distributes its Products through independent distributors ("Distributors"). The Distributors ability to resell the Products is limited by the terms of a "Distributorship Agreement." The Distributorship Agreement contains, inter alia, a counter-party limitation and a geographic limitation. (Id. ¶¶ 23-24.)

The counter-party limitation provides that the Products only be sold to "legitimate tanning salons and hair care salons that offer indoor tanning as an on-premises service and instruction on the use of the Products." (Id. ¶ 23.) Sales to internet sellers, such as S&L, and other retailers, that will re-sell the

Products to the general public are prohibited. (Id. ¶¶ 14, 24.)

AG maintains that sale to tanning salons providing on-premises instruction is indispensable to retaining consumer goodwill. According to AG, "Proper instruction on the use of the Products is paramount to consumer safety and satisfaction. If a person with the wrong skin type or novice tanner uses the wrong Product . . . it could create an adverse physical reaction affecting both the consumer and [AG's] reputation in the market place." (Id. ¶ 15.) In a typical year, AG trains over 30,000 employees, salon owners and managers on the proper use of the Products in order to implement its "distribution strategy."

AG explains that the purpose of the "distribution strategy" is to

> (1) ensure that the end users of the Products receive[] proper instruction . . . ; (2) ensure the end user receive[s] face-to-face consultation . . . so that the consumer purchase[s] the correct Product . . . ; (3) ensure that the Products . . . are used in a safe and proper manner since the Products are designed to achieve different results and not all Products are suited for all consumers; (4) protect the reputation of the Products as premium products available only in tanning salons; and (5) allow for the opportunity to cross-sell other Products to the consumers."

(Id. ¶ 17.) AG's implementation of the distribution strategy has yielded beneficial results, increasing AG's sales and reputation in the marketplace over the past several years. (Id. ¶ 19.)

The Distributorship Agreement also contains a geographic limitation. Distributors are only permitted to sell the Products to counter-parties located in the United States. (Id. ¶ 24.) AG imposes this restriction because it has separate, exclusive distributorship agreements with third parties in foreign countries ("Foreign Distributors") for the distribution of the Products. In addition, AG asserts a need to retain exclusive quality control over the Products because the distribution of the domestic version in certain nations might subject AG to substantial liability for failing to comply with labeling requirements. (Id.)

AG's Protection Of Its Marks And The Alleged Infringement

AG has expended substantial time and effort to preserve the integrity of its Marks and distribution strategy. It sends cease and desist letters to companies that sell the Products over the internet, and terminates Distributors that sell to internet businesses. (Id. ¶ 26-27.) Here, AG alleges that S&L acquired the Products from an unknown Distributor, then impermissibly used AG's Marks in effort to re-sell the products through the Websites. AG argues that S&L's sale of the Products without the necessary quality controls impairs goodwill associated with the Marks.

One of AG's primary objections with S&L's use of its Marks concerns S&L's relationship with Yahoo! S&L's Website is "hosted" by Yahoo! Store, an internet service provided by the internet company Yahoo!. Yahoo! Store provides internet based businesses with services such as webpage hosting and sales order processing. (Id. ¶ 31.) In addition to the Yahoo! Store services, Yahoo! also provides a "pay for placement" service, whereby a business can pay Yahoo! to "sponsor" certain search terms. An entity that sponsors a given search term (or terms) will have its name and web address appear at the top of the list of "hits" for the term. (Id. ¶¶ 32-33.) Yahoo! boasts that its "pay for placement" program can reach a substantial number of internet users. (Id. ¶ 33.)

AG claims that S&L has paid Yahoo! to sponsor terms associated with its Products. For example, S&L's Website is listed near the top of the search results for the terms Australian Gold, and Swedish Beauty. S&L's Website appears under a separate heading, entitled "Sponsor Results." (Id. ¶¶ 34-36.) AG alleges that S&L's sponsorship of the terms associated with the Product names gives consumers a false impression that AG authorizes S&L's sale of the Products.

AG also objects to S&L's use of the Marks in the HTML source code and metatags[2] for its Website, and claims that S&L has appropriated Product images and Product descriptions from AG's website.[3] For example, AG claims that S&L's Website "falsely draws an association and affiliation between the Products, [AG] and

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[2] Metatags are "hidden code used by some search engines to determine the content of websites in order to direct searchers to relevant sites." Playboy Enterprises v. Welles, 279 F.3d 796, 800 n.2 (9th Cir. 2002)

[3] AG operates its own website, but does not use the website as a point of sale to general consumers.

[S&L]" by superimposing the name of the "BodySourceOnLine.com" over the photographs of the Products." (Id. ¶ 42.)

S&L's Acquisition And Continued Sale Of The Products

AG does not claim that the Products that S&L sells are not authentic. AG alleges that S&L obtains the Products through an unknown retail tanning salon Distributor. (Id. ¶¶ 11, 44-45.) AG alleges (upon information and belief) that the unknown Distributor is affiliated with S&L. "The sole purpose of the tanning salon is a pass through . . . to facilitate [S&L's] activities, avoid suspicion and . . . induce authorized distributors to sell Products to [S&L]" (Id. ¶ 45.)

On January 15, 2004, AG sent a cease and desist letter to one of S&L's retail stores. (Id. ¶ 46.) The cease and desist letter informed S&L of AG's distribution strategy and the Distributorship Agreements. To date, S&L continues to distribute the Products and refuses to reveal to AG the name of the tanning salon from which it purchases the Products. (Id. ¶ 47.) Aside from the foregoing objections concerning S&L's sale of the Products via the internet, AG claims that S&L's current distribution reaches Europe, subjecting AG to liability because the U.S. products do not comport with European labeling laws. (Id. ¶ 48.)

PROCEDURAL POSTURE

On September 14, 2005, AG filed its Second Amended Answer with Counterclaims, alleging that S&L (1) copied AG's copyrighted works; (2) used AG's Marks without authorization or permission, and/or manipulated AG's Marks in order to give a false impression of affiliation in violation of federal law and New York State law; (3) engaged in unfair competition in violation of the Lanham Act, and New York state law; (4) diluted the distinctive quality of the Marks; (5) tortiously interfered with AG's Distributorship Agreements; (6) tortiously interfered with AG's business relationships in the United States and abroad; (7) conducted deceptive business practices in violation of New York General Business Law §§ 133, and 349; and (8) falsely advertised AG's products in violation of the Lanham Act and New York General Business Law § 350. S&L has moved to dismiss certain of AG's counter-claims and third-party claims.

The procedural posture of S&L's motion is somewhat unusual. While S&L's Motion for Judgment on the Pleadings was pending, AG filed a Motion for Leave to Amend its Amended Answer, Counter Claims and Third Party Complaint. S&L had already responded to AG's First Amended Answer and Third-Party Complaint, requiring AG to seek leave prior to filing the amended pleading. Six days after AG filed its Motion for Leave to Amend, S&L filed a letter expressing its consent to AG's request. The letter indicated both Parties' agreement that the filing of the Second Amended Answer with Counterclaims and Third-Party Complaint would not change the issues raised by S&L's Motion for Judgment on the

Pleadings. After receiving S&L's letter, the Court granted AG's motion. On September 14, 2005, AG filed its Second Amended Answer with Amended Counterclaims and Third Party Complaint.

Based upon the representations of the Parties, the Court construes S&L's Motion for Judgment on the Pleadings as pertaining to AG's Second Amended Answer with Amended Counterclaims and Third Party Complaint. However, because no Answer has been filed with respect to the Amended Counter Claims and Cross Claims, the Court construes S&L's motion as filed pursuant to Rule 12(b)(6).

STANDARD OF REVIEW

A district court should grant a motion to dismiss only if "'it is clear that no relief could be granted under any set of facts that could be proved consistent with allegations.'" H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 249-50, 109 S. Ct. 2893, 106 L. Ed. 2d 195 (1989) (quoting Hishon v. King & Spaulding, 467 U.S. 69, 73, 104 S. Ct. 2229, 81 L. Ed. 2d 59 (1984)). The district court's duty "'is merely to assess the legal feasibility of the complaint, not to assay the weight of the evidence which might be offered in support thereof.'" Sims v. Artuz, 230 F.3d 14, 20 (2d Cir. 2000) (quoting Ryder Energy Distribution Co. v. Merrill Lynch Commodities, Inc., 748 F.2d 774, 779 (2d Cir. 1984)); see also Goldman v. Belden, 754 F.2d 1059, 1067 (2d Cir. 1985). The appropriate inquiry, therefore, is not whether a plaintiff's claims are ultimately meritorious, but whether the plaintiff is entitled to offer evidence to support them. See Ricciuti v. New York City Transit Auth., 941 F.2d 119, 123-24 (2d Cir. 1991).

Accordingly, a plaintiff is not required to set out in detail the facts upon which he or she bases a claim. Conley v. Gibson, 355 U.S. 41, 47, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957). A plaintiff need only give a statement of his or her claim that will give the defendant "fair notice of what the . . . claim is and the grounds upon which it rests." Id. Where a complaint is filed that charges each element necessary to recover, the dismissal of the case for failure to set out evidential facts can seldom be warranted. See U.S. v. Employment Plasterers' Ass'n, 347 U.S. 186, 189, 74 S. Ct. 452, 98 L. Ed. 618 (1954).

DISCUSSION

According to S&L, this case concerns the breadth of control that a manufacturer may exercise over its trademarked products. S&L argues that AG uses litigation (or the threat thereof) in order to stifle competition from smaller entities and extend its control over the Products' secondary markets beyond a lawful reach. S&L distinguishes itself from an "internet merchant falsely placing . . . on its website to attract internet traffic to sell unrelated or competing goods;" S&L displays the Products for sale on its website - not unlike "millions of people do every day." (S&L Mem. of Law at 1.)

S&L raises the following arguments in support of its motion to dismiss: (1) the "first sale doctrine" and/or the "nominative fair use doctrine" preclude AG's trademark infringement, unfair competition, and trademark dilution claims; (2) AG's consumer protection claims pursuant to New York General Business Law §§ 349 and 350 must be dismissed because AG has failed to allege how S&L's sale of the Products harms consumers in general; and (3) AG's tortious interference with contract claim is insufficient because AG fails to allege (i) S&L's knowledge of specific distribution contracts, (ii) the name of the distributor that S&L purchased the Products from, (iii) any acts indicating that S&L intentionally induced a breach of contract; and (iv) damages resulting from the alleged tortious interference. The Court will address S&L's arguments in turn.

I. AG's Lanham Act Claims For Trademark Infringment And Unfair Competition

In order to state a claim for trademark infringement, AG must allege that it owns a valid trademark, and S&L's use of its Marks is likely to "cause confusion, or to cause mistake, or to deceive." 15 U.S.C. § 1114(1)(a); see also Playtex Prod., Inc. v. Georgia-Pacific Corp., 390 F.3d 158, 161 (2d Cir. 2004); Time, Inc. v. Petersen Publ'g Co., L.L.C., 173 F.3d 113, 117 (2d Cir. 1999); Pfizer, Inc. v. Y2k Shipping & Trading, Inc., 00-CV-5304, 2004 WL 896952 at *2 (E.D.N.Y. Mar. 26, 2004). There are several theories of infringement. For example, "an owner of a trademark may assert that [an infringer] . . . has created a likelihood of confusion by leading consumers to believe that they are authorized distributors of a trademarked product when they are not, by passing off an inferior quality product as a trademarked product or by otherwise trying to capture business by using another company's trademark in a misleading fashion." McDonald's Corp. v. Shop At Home, Inc., 82 F. Supp. 2d 801, 807-08 (M.D. Tenn. 2000).

Most pertinent to AG's claims, this Circuit has recognized that "[d]istribution of a product that does not meet the trademark holder's quality control standards may result in the devaluation of the mark by tarnishing its image. If so, the non-conforming product is deemed for Lanham Act purposes not to be the genuine product of the holder and its distribution constitutes infringement." Warner-Lambert Co. v. Northside Dev. Co., 86 F.3d 3, 6 (2d Cir. 1996); see also El Greco Leather Prods. Co. v. Shoe World, Inc., 806 F.2d 392, 395 (1986); Perkins School for the Blind v. Maxi Aids Inc., 274 F. Supp. 2d 319, 323 (E.D.N.Y. 2003). To state a claim for such unauthorized distribution, "the trademark holder must allege that: (i) it has established legitimate, substantial, and nonpretextual quality control procedures, (ii) it abides by these procedures, and (iii) the non-conforming sales will diminish the value of the mark." Perkins, 274 F. Supp. 2d at 324.

AG has sufficiently alleged the three elements. AG claims that it has adopted significant quality control procedures with respect to the distribution of the Products. AG alleges that S&L's method of distributing the Products indicates a false affiliation between S&L and AG. Finally, AG claims that S&L's distribution of the Products to the public, without, any guidance concerning usage, damages the goodwill associated with the Products and their Marks.

A. The First Sale Doctrine

There is, however, a well-settled restraint on infringement claims. "As a general rule, trademark law does not reach the sale of genuine goods bearing a true mark even though the sale is not [specifically] authorized by the mark owner." Luxottica Grp. S.p.A. v. Bausch & Lomb Inc., 160 F. Supp. 2d 545, 552 (S.D.N.Y. 2001) (quoting Polymer Tech. Corp. v. Mimran, 975 F.2d 58, 61-62 (2d Cir. 1992)). Where a "purchaser resells a trademarked article under the producer's trademark, and nothing more, there is no actionable misrepresentation" under the Lanham Act. Sebastian Int'l, Inc. v. Longs Drug Stores Corp., 53 F.3d 1073 (9th Cir. 1995). This is because the consumer is not being deceived; they are receiving exactly what they have bargained for. See id. at 1075.

This limitation on trademark protection is known as the "first sale," or exhaustion doctrine. The doctrine is divined from the premise that, once a trademark holder sells its product, it has already been rewarded for the goodwill and notoriety associated with its mark. After the first sale, a trademark holder exhausts his "exclusive statutory right to control [the product's] distribution." Quality King Distributors, Inc. v. L'anza Research Int'l Inc., 523 U.S. 135, 152 118 S. Ct. 1125, 140 L. Ed. 2d 254 (1998) (discussing the first sale doctrine under copyright law); see also Sebastian, 53 F.3d at 1074-75. The doctrine "preserves an area for competition by limiting the producer's power to control the resale of its product." Sebastian, 53 F.3d at 1075; see also Taylor Made Golf Co., Inc. v. MJT Consulting Grp., LLC, 265 F. Supp. 2d 732 (N.D. Tex. 2003) (stating that the first sale doctrine "defines an area of commerce beyond the reach of trademark law").

Here, S&L contends that, even assuming the facts alleged by AG to be true, its activities are protected by the "first sale" doctrine. The Court disagrees. AG alleges that S&L has done more than simply "stock and display" the Products for sale. See Sebastian, 53 F.3d at 1076 ("conduct by the reseller other than merely stocking and reselling genuine trademarked products may be sufficient to support a cause of action for infringment"). Specifically, AG claims that (1) S&L has paid to sponsor specific internet search terms corresponding to the Products' names, (2) S&L pays to have its Website appear under a separate heading entitled "sponsor results," (3) S&L has superimposed its Website name on top of pictures of the Products, and (4) S&L has copied graphics and product descriptions found on AG's website and used them on its own Website. Such activities, if found to suggest an affiliation between S&L and AG, would render the first sale doctrine inapplicable. See D 56, Inc. v. Berry's Inc., 955 F. Supp. 908, 920 (N.D. Ill. 1997);

B. The Nominative Fair Use Doctrine

S&L suggests that its activities are also protected by the "nominative fair use doctrine." The nominative fair use doctrine evolved in the Ninth Circuit's holding in The New Kids on the Block v. News America Publishing Incorporated, 971 F.2d 302 (9th Cir. 1992). In New Kids, the Ninth Circuit held that "a commercial user" who is not using someone else's mark to refer to his own product "is entitled to a nominative fair use defense provided he meets the following three requirements: First, the product . . . must be one not readily identifiable without use of the trademark; second, only so much of the mark . . . may be used as is reasonably necessary to identify the product . . .; and third, the user must do nothing that would, in conjunction with the mark, suggest sponsorship or endorsement by the trademark holder." 971 F.2d at 308; see also Chambers v. Time Warner, Inc., 282 F.3d 147, 156 (2d Cir. 2002) (impliedly recognizing this Circuit's adoption of the New Kids nominative fair use defense).

As explained above, AG has alleged sufficient facts that, if proven true, might preclude S&L's "nominative fair use" defense.

Specifically, AG has alleged that S&L has engaged in practices that arguably suggest AG's endorsement or sponsorship of the Websites.

Because neither the "first sale doctrine" or the "nominal fair use doctrine" protects S&L's actions, the Court DENIES S&L's motion to dismiss AG's Lanham Act claims for trademark infringement and/or unfair competition.

II. State Law Claims And Dilution Claims

Because S&L concedes that its motion to dismiss AG's state law claims for trademark infringement and unfair competition[4] hinges on the success of its federal challenge, the Court DENIES S&L's motion to dismiss AG's state law infringement and unfair competition claims. In addition, because the Court has rejected S&L's reliance on the nominative fair use doctrine (the only basis proffered for dismissing AG's dilution claims), S&L's motion to dismiss AG's dilution[5] claims is DENIED.

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[4] AG relies upon S&L's purported violation of New York General Business Law § 133. Section 133 prohibits, inter alia, any "person, firm or corporation" from using another corporation's trade name or symbol "with intent to deceive or mislead the public." N.Y. Gen. Bus. L. § 133.

[5] Claims for dilution of a famous mark arise under federal or state law. Under the Lanham Act,"[t]he owner of a famous mark [is] . . . entitled . . . to an injunction against another person's commercial use in commerce of a mark or trade name, if such use begins after the mark has become famous and causes dilution of the distinctive quality of the mark." 15 U.S.C. § 1125(c)(1). "Dilution is defined for this purpose as the lessening of the capacity of a famous mark to identify and distinguish goods or services, regardless of the presence or absence of-(1) competition between the owner of the famous mark and other parties, or (2) likelihood of confusion, mistake, or

III. New York Consumer Protection Claims

S&L has also moved to dismiss AG's claims pursuant to New York General Business Law §§ 349, and 350. Sections 349 and 350 are consumer protection statutes. Section 349 provides in pertinent part:

> Deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful.
>
> In addition to the right of action granted to the attorney general pursuant to this section, any person who has been injured by reason of any violation of this section may bring an action in his own name to enjoin such unlawful act or practice, an action to recover his actual damages or fifty dollars, whichever is greater, or both such actions. The court may, in its discretion, increase the award of damages to an amount not to exceed three times the actual damages up to one thousand dollars, if the court finds the defendant willfully or knowingly violated this section. The court may award reasonable attorney's fees to a prevailing plaintiff.

N.Y. Gen. Bus. L. § 349. Section 350 provides that "False advertising in the conduct of any business, trade or commerce or in the furnishing of any service in this state is hereby declared unlawful." N.Y. Gen. Bus. L. § 350.

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deception. To obtain injunctive relief under the [Lanham Act], the owner of the mark must make a showing of actual dilution, rather than a likelihood of dilution. A cause of action under New York's antidilution statute can be made out, however, by demonstrating a likelihood of dilution." Starbucks Corp. v. Wolfe's Borough Coffee, Inc., No. 01-CV-5981, 2005 WL 3527126, at *7 (S.D.N.Y. Dec. 23, 2005) (internal quotations, citation omitted).

It is well settled that "[m]ost trademark and trade dress infringement claims . . . fall outside the ambit of sections 349 and 350." Perkins, 274 F. Supp. 2d at 327. "Courts in this [Circuit] routinely reject claims brought under § 349 where a commercial claimant does not adequately allege harm to the public interest. Commercial claimants under § 349 must allege conduct that has 'significant ramifications for the public at large' in order to properly state a claim." Gucci America, Inc. v. Duty Free Apparel, Ltd., 277 F. Supp. 2d 269, 273 (S.D.N.Y. 2003) (quoting Shred-It USA, Inc. v. Mobile Data Shred, Inc., 228 F. Supp. 2d 455, 465 (S.D.N.Y. 2002)). Similar reasoning has been applied in dismissing claims pursuant to § 350. See Perkins, 274 F. Supp. 2d at 327.

Here, AG fails to allege any significant harm to consumers in general. While S&L's alleged failure to furnish purchasers with instruction or otherwise adhere to AG's quality controls may tarnish the goodwill associated with the Products and the Marks, it does not constitute the type of significant ramifications for the public at large to justify AG's consumer protection claims. Where, as here, "the gravamen of the complaint is harm to a business as opposed to the public at large, the business does not have a cognizable cause of action under § 349." Gucci, 277 F. Supp. 2d at 274. For similar reasons, the Court rejects AG's § 350 false advertising claims. See Strishak &

Assocs. v. Hewlett Packard Co., 300 A.D.2d 608, 609, 752 N.Y.S.2d 400 (2d Dep't 2002) (recognizing that a plaintiff must allege injury to consumers at large).

Accordingly, AG's consumer protection claims are DISMISSED.

IV. Tortious Interference With Contract[6]

Finally S&L argues that AG has failed to allege the necessary elements of a tortious interference with contract claim. The Court disagrees.

Under New York law, a party claiming a tortious interference with contractual relations must allege: "(1) a valid contract [exists] between plaintiff and a third party, (2) defendant's knowledge of the contract, (3) defendant's intentional inducement of the third-party to breach the contract, and (4) damages." Perkins 274 F. Supp. 2d at 328.

S&L concedes that AG has adequately alleged the existence of a contract between AG and its Distributors. But S&L maintains that AG has failed to adequately allege the last three elements. The Court finds S&L's arguments premature; AG is not required to prove its case at the pleading stage.

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[6] AG separately alleges a claim for tortious interference with an economic benefit. The Court views the claim as subsumed into AG's tortious interference with contract claim. See Perkins, 274 F. Supp. 2d at 328 ("Where, as here, a contractual relationship with a third party is involved, a claim for an unlawful interference with an economic benefit is, in substance, a claim for tortious interference with a contract.").

First, AG alleges sufficient facts indicating S&L's knowledge of AG's Distributorship Agreements (See 2d Amend. Compl. ¶¶ 45-47, 80.) To the extent S&L challenges the extent of its knowledge of the Distribution Agreements, see e.g., John Paul Mitchell Sys. v. Quality King Distrib., Inc., 106 F. Supp. 2d 462 (S.D.N.Y. 2000), S&L may raise that issue on summary judgment.

With respect to inducement, AG alleges that S&L obtains the Products through an unknown tanning salon Distributor. (2d Am. Compl. ¶¶ 11, 44-45, 81.) Upon information and belief, AG alleges that the unknown Distributor is "own[ed] operat[ed] control[ed] . . . or . . . affiliated with S&L and "[t]he sole purpose of the tanning salon is a pass through . . . to facilitate [S&L's] activities, avoid suspicion and . . . induce authorized distributors to sell Products to [S&L]" (Id. ¶¶ 45, 81.) A fair reading of the allegation is that S&L, through an affiliate, is inducing other Distributors to sell the Products to S&L in violation of their Distributorship Agreements. Such allegations are sufficient to satisfy the inducement element.

Finally, AG plainly alleges that it "has been damaged by the conduct of [S&L]" as a result of S&L's tortious interference. At the pleading stage, this is sufficient to satisfy AG's burden.

CONCLUSION

For the reasons explained above, the Court GRANTS in part S&L's motion to dismiss. AG's claims pursuant to New York General Business Law §§ 349, 350 are DISMISSED. S&L's motion is DENIED in all other respects.

SO ORDERED.

Dated: Central Islip, New York
March 30, 2006

/s/ JOANNA SEYBERT
Joanna Seybert, U.S.D.J.