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UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

DESIGNER SKIN, LLC, an Arizona limited liability company; SPLASH TANNING PRODUCTS, LLC, an Arizona limited liability company; BOUTIQUE TANNING PRODUCTS, LLC, an Arizona limited liability company,	)	CASE NO. CV05-3699-PHX-JAT
	)	MOTION TO DISMISS
Plaintiffs,	)	(Hon. Judge James A Teilborg)
- vs. –	)	
S & L VITAMINS, INC. d/b/a BODY SOURCE d/b/a THESUPPLENET.COM, a New York corporation; and LARRY SAGARIN, an unmarried individual,	)	
Defendants.	)	

Defendants hereby move the Court to dismiss the complaint and hereby submits the following Memorandum of Law in Support of Motion.

MEMORANDUM OF LAW OF DEFENDANTS IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS THE COMPLAINT

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PRELIMINARY STATEMENT

S&L Vitamins Inc., the corporate defendant[1], makes this Federal Rule of Civil Procedure 12(b)(6) motion to dismiss the claims in this action because plaintiffs cannot maintain their trademark, unfair competition, dilution, or tortious interference claims, and, to the contrary, have utilized litigation – or the threat of it – as a form of unfair competition against a smaller competitor with far fewer resources.

This is not a case of an Internet merchant falsely placing a trademark holder's marks on its website to attract Internet traffic to sell unrelated or competing goods. Rather, this is a case in which plaintiffs are attempting to use the courts to extend their market control beyond their own contracts and relationships, and to prevent even a party that has lawfully purchased merchandise through legitimate retail outlets from reselling it to willing buyers over the Internet. There is no legal basis for such audacious overreaching, nor do plaintiffs have any cognizable unfair competition or trademark claim here.

S & L Vitamins is a small independent retailer that lawfully buys merchandise at retail stores and sells that merchandise on the Internet, much as millions of people do every day either on their own websites or in markets such as eBay and the like. Plaintiffs are leading manufacturers of tanning lotion and related products that seek complete control over the sale and distribution of their products. In fact, plaintiffs twice threatened S & L with litigation as a result of S & L's lawful business practices. Hoping to establish its legal rights to sell and to advertise its own property, S & L Vitamins filed a declaratory judgment action against plaintiffs in the Eastern District of New York. Subsequent to S & L's New York filing, plaintiffs filed this identical Arizona action. S & L, in turn, filed a motion to dismiss, stay, enjoin, or, alternatively, transfer the instant later filed action, and such motion is currently pending in the Eastern District of New York. As the pleadings herein demonstrate, plaintiffs are prepared to achieve and maintain control over the sale and distribution of their products by manipulating the federal intellectual property schema and using litigation, or the threat of it, as a form of competition.

As will be demonstrated below, S & L's activities are permissible under the first sale doctrine, which permits an individual to sell a trademark-protected product, regardless of whether the trademark owner wishes him to or not, once he has purchased that product. Plaintiffs' claims attempt to circumvent this doctrine by asserting that while trademark law does not prevent S&L from selling the

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[1] Defendant, Larry Sagarin, is the corporate secretary of S&L Vitamins, and plaintiffs assert the same claims against both. For convenience, both are referred to collectively here as "S&L Vitamins," "S&L" or "defendants."

products in question, it prevents S&L from advertising – however truthfully; however accurately; however beneficially to the consumer – that it sells the products in question.

This logic is ludicrous. Trademark law is designed to protect consumers by preventing customer confusion; it is not designed to protect a manufacturer's inflated price structure by preventing truthful, accurate advertising. Clearly plaintiffs, aware that trademark law does not permit them to stifle legal sales – on-line or otherwise – of their products, are trying to accomplish through the back door what they cannot accomplish through the front. This Court should not permit them to succeed.

STATEMENT OF FACTS

All the facts set forth herein are based on the pleadings in this matter. S&L Vitamins operates an Internet website which sells various products to consumers at discount prices. Among the products offered for sale are tanning products, including those manufactured by plaintiffs, which S&L Vitamins obtains from various retailers. S&L Vitamins informs the public that it is offering this merchandise for sale, and transacts sales, through its website.

On or about February 26, 2004, plaintiffs' counsel sent correspondence to S&L threatening legal action for trademark infringement and tortious interference with contractual relationships. Three days later, S & L responded substantively to plaintiffs' letter, defending S & L's business practices and rebutting the trademark infringement claim. There was no further correspondence.

Some twenty months later, however, on or about October 25, 2005, plaintiffs resumed their threatening correspondence to S&L. Based upon that letter, which promised legal action, S&L filed a complaint for declaratory judgment in the Eastern District of New York, hoping to establish its legal rights to sell and advertise its own property once and for all.

In response to S&L's filing, plaintiffs filed an identical action in this Court, asserting claims for trademark infringement, trademark dilution, unfair competition, and tortious interference with contractual relations. Plaintiffs essentially complain that a retailer's truthful and accurate advertisement that it sells, among its many offerings, a particular trademark holder's products is "misleading," apparently because some customer, somewhere, contrary to all the information presented to him on S&L's website, may become confused into believing that the retailer is affiliated with the trademark holder.

Plaintiffs further claim that S&L Vitamins' legal sale of these products amounts to interference with plaintiffs' distribution agreements. Plaintiffs' claim describes a scheme by plaintiffs to control the marketplace in their products through an arrangement under which plaintiffs sell only to distributors who in turn agree to sell only to tanning salons which agree to keep prices artificially high.

The sine qua non of this arrangement is that plaintiffs will threaten or file litigation against any person who sells its products at a competitive price, regardless of how it was obtained, and assert intellectual property and contractual claims meant to cow smaller competitors into capitulation. The result is the maintenance of monopoly-like profits for plaintiffs and their distributors alike.

Plaintiffs' problem, however, is that – exactly as economic theory predicts – the retailers have a strong incentive to depart from a scheme that benefits them only marginally (since they could sell more tanning lotion if it were fairly priced) and sell to so-called "unauthorized" retailers who in turn make the product available to consumers at market prices. To plaintiffs' dismay, there is no legal reason these tanning salons may not do this, for unlike the "authorized" distributors, they are under no contractual obligation to limit their sales.

Thus, plaintiffs must claim, regardless of the facts, that the merchandise sold by S & L was purchased from their distributors, giving rise to a supposed interference with contract. Yet the claim not only fails to identify even one distributor with which S&L Vitamins supposedly did business; it does not even suggest plaintiffs' factual grounds for alleging that such a distributor exists, nor any basis for claiming that S&L Vitamins knew of plaintiffs' alleged contracts with any particular distributors, which – even after being privy to plaintiffs' allegations – it still does not.

The purchase of products from retailers could not possibly constitute interference with contract because plaintiffs have not claimed the existence of any contracts between these retailers and plaintiffs. And, consistent with legal authority, the use of trademarks to identify accurately the various products that it sells is, under well-established precedent, not infringement.

LEGAL ARGUMENT

I. THE CLAIMS CANNOT WITHSTAND THE STANDARD FOR DISMISSAL FOR FAILURE TO STATE A CLAIM UNDER FED. R. CIV. P. 12(b)(6).

When considering a motion brought under Rule 12(b)(6), the court presumes that all of the allegations of the complaint are true, it reads the complaint in the light most favorable to plaintiff, and it resolves all doubts or inferences in plaintiff's favor. R2 Investments LDC v. Phillips, 401 F.3d 638, 642 (5th Cir. 2005); Bright v. Westmoreland County, 380 F.3d 729, 745 (3d Cir. 2004). The court will include in its analysis not only the assertions made in the complaint, but also those contained in documents attached to, or incorporated by reference into, the pleadings (of which, in this instance, there are none). Gregory v. Daly, 243 F.3d 687, 691 (2d Cir. 2001). The court will not, however, consider material from outside the pleadings without converting the motion into a motion for summary judgment. The moving party has the burden of establishing that no relief can be granted under any set of facts that could be proved consistently with plaintiff's allegations. Oxford Associates v. Waste System Authority of Eastern Montgomery County, 271 F.3d 140, 144-45 (3d Cir. 2001); Abels v. Farmers Commodities Corp., 259 F.3d 910, 916 (8th Cir. 2001). Plaintiff may not, however, rely on "mulled allegations," "legal conclusions masquerading as factual conclusions," or unwarranted deductions" to defeat a motion to dismiss. Bright, 380 F.3d at 735 (citing Morse v. Lower Merion School Dist., 132 F.3d 902, 905, 907 n.8 (3d Cir. 1997).

A. Plaintiffs' trademark and unfair competition claims should be dismissed under the first sale doctrine.

It is hornbook law that S&L Vitamins' sale of plaintiffs' products was wholly lawful according to the first sale exhaustion principle. "[T]he right of a producer to control distribution of its trademarked product does not extend beyond the first sale of the product. Resale by the first purchaser of the original article under the producer's trademark is neither trademark infringement nor unfair competition." Sebastian Int'l, Inc. v. Longs Drug Stores Corp., 53 F.3d 1073, 1074 (9th Cir.), cert. denied, 516 U.S. 914 (1995). In addition, "The exhaustion or first-sale rule is not an affirmative defense. Rather, it defines an area of commerce beyond the reach of trademark law." Taylor Made Golf Company, Inc. v. MJT

Consulting Group LLC, 265 F.Supp.2d 732 (N.D. Tex. 2003), citing Polymer Tech. Corp. v. Mimran, 975 F.2d 58, 61 (2d Cir. 1992) (emphasis supplied).

Plaintiffs' claims of trademark infringement and unfair competition, therefore, are not grounded in any recognized legal theory of trademark law. Once a trademark owner, such as plaintiffs, sells goods protected by trademark, a buyer such as S&L is free to resell those goods to others without having to remove the trademarks.

Furthermore, the first sale exhaustion rule is not limited to "authorized" resales; to so limit the rule would be to eviscerate it. It applies even when no subsequent resales are anticipated or even contemplated by the trademark owner. In fact, even when trademark-protected goods are diverted by wholesalers to "unauthorized" retail outlets, such as discounters, it is not trademark infringement for those discounters to sell those goods, and to market them with the use of the trademarks, despite the displeasure or objections of the trademark owner. Sales of merchandise at retail are, after all, not licenses.

For example, in Adobe Systems Inc. v. One Stop Micro Inc., 84 F. Supp.2d 1086 (N.D. Cal. 2000), Adobe sold an educational version of its software at a substantial discount. One Stop lawfully purchased numerous units of the educational version and sold some of them, unchanged, to non-students on the open market, without Adobe's authorization. Adobe, like plaintiffs here, frustrated by its inability to control the "downstream" flow of its merchandise by commercial means, sued, claiming that One Stop's sales of its Adobe-branded merchandise constituted trademark infringement. The court rejected this claim on the basic principle that the whole purpose of trademarks is to communicate to consumers that what they are buying is indeed what they think it is, and not more or less: "Adobe fails to present evidence of how One Stop's activities affected the quality of its software," wrote the court. "The mere distribution by One Stop of admittedly unadulterated software is insufficient to establish trademark infringement . . ." Id. at 1094.

Even closer to the instant case in terms of facts is McDonald's Corp. v. Shop at Home, Inc., 82 F.Supp.2d 801 (M.D. Tenn. 2000). The McDonald's restaurant chain had a toy firm manufacture a special "collectable" toy premium, which was marketed aggressively to increase patronage at McDonald's restaurants. Defendant obtained quantities of the toys directly from McDonald's franchisees — the source McDonald's had in fact "authorized" to sell the toys — and then in turn offered them for sale on television even before the toys were available as premiums at McDonald's. The Court rejected McDonald's argument, similar to the claim made by plaintiffs here, that the "first sale" did not occur until the merchandise was purchased and consumed by an "end user":

> In this case, McDonald's products were on the open market albeit on their way to the ultimate consumer—long before they

> reached the hands of Shop At Home or the other defendants. The sale to the franchisees was a first sale to which McDonald's consented. The earlier sales that took place along the supply chain might also qualify as first, second and other sales.

Id. at 814. The court found that the authorized first sale occurred either when the premiums were sold by the original manufacturer of the toys or when they were sold to the McDonald's franchisee. That a McDonald's franchisee made an "unauthorized" bulk sale of the toys to defendant did not make the defendant a trademark infringer. "That McDonald's did not approve of the alleged sale between the franchisees and the defendants makes little difference if McDonald's approved of the prior sales of the toys up to and including the sale to the franchisees." Id. at 812.

Here, too, where the retailers have made the rational economic decision to sell plaintiffs' lotion to S & L, there is nothing in the Lanham Act that prevents S&L from truthfully identifying its wares – regardless of whether plaintiffs approve of the medium.

B. Plaintiffs' claims for trademark infringement and unfair competition under the Lanham Act are uncognizable under the nominative fair use doctrine.

The nominative fair use doctrine gives additional reason to dismiss plaintiffs' claims. It is axiomatic that given the prevalence and high visibility of trademarks in our society, it is often essential to use someone else's trademark to refer legitimately to that person's goods. For example, website proprietors frequently use third parties' trademarks on the Internet to identify the various brands they offer for sale. This practice, which is all that S&L Vitamins did with respect to plaintiffs' trademarks, is called nominative use of trademarks — nominative because the mark is being used to name another party.

The prevailing approach to nominative use is the one formulated in the Ninth Circuit by Judge Kozinski in New Kids on the Block v. News America Pub., Inc., 971 F.2d 302 (9th Cir. 1992). In that case, the court adopted the following test for nominative use:

> First, the product or service in question must be one not readily identifiable without use of the trademark; second, only so much of the mark or marks may be used as is reasonably necessary to identify the product or service; and third, the user must do nothing that would, in conjunction with the mark, suggest sponsorship or endorsement by the trademark holder.

Id. at 308 (footnote omitted). The New Kids court noted in its opinion that a commercial use may be a nominative use. Id. at 309.

Similarly, and highly instructive in the matter at bar, is Playboy Enterprises, Inc. v. Welles, 279 F.3d 796 (9th Cir. 2002). There the defendant, a former Playmate of the Year, made use in meta-tags and online content of the term PLAYMATE OF THE YEAR, which is a trademark of Playboy. The Ninth Circuit concluded that the defendant had satisfied all three prongs of the New Kids test in using the trademarks in both the banner advertisements and in the meta-tags and that the complaint, therefore, should be dismissed. Regarding the meta-tags, the court observed, in language that is instructive here:

> There is simply no descriptive substitute for the trademarks used in Welles' metatags. Precluding their use would have the unwanted effect of hindering the free flow of information on the internet, something which is certainly not a goal of trademark law.

Welles, 279 F.3d at 804.

Moreover, plaintiffs' unfair competition claims are premised on S&L Vitamins' supposed improper use of plaintiffs' products which, according to plaintiffs, suggest a false designation of source. The first sale and nominative fair use doctrines, however, fully permit S&L Vitamins to sell plaintiffs' products and to advertise that it is doing so without calling into question issues of source. Plaintiffs' claim for unfair competition, therefore, is not based on any cognizable legal theory.

For all of the foregoing reasons, S&L Vitamins' sale of plaintiffs' products not only is supported, protected, and legitimized by the law, but the sale represents an area of commerce that is not even within the contemplation of trademark law. Plaintiffs wholly lack any cognizable legal theory on which to base their trademark and unfair competition claims, and, thus, such claims are appropriate for Rule 12(b)(6) dismissal.

C. Plaintiffs' claims for trademark dilution are uncognizable under the nominative fair use doctrine.

Plaintiffs argue that S & L's use of their trademarks constitutes "dilution." Trademark dilution occurs when a famous mark is used by a third party in such a way as to dilute the distinctive quality of the mark. Such a claim is simply inapplicable to the allegations pleaded by plaintiffs.

The Ninth Circuit in Welles also addressed Playboy's assertion that Welles's uses of its marks constituted trademark dilution, which is also claimed by plaintiffs here. In finding that Welles had engaged in nominative fair use, the court explained, there could be no dilution, because nominative fair use "by definition, do[es] not dilute trademarks." Id. at 805 (emphasis added). The court went on to write:

> Uses that do not create an improper association between a mark and a new product but merely identify the trademark holder's products should be excepted from the reach of the anti-dilution statute. Such uses cause no harm . . . [W]e conclude that nominative uses are also excepted [from anti-dilution law]. A nominative use, by definition, refers to the trademark holder's product. It does not create an improper association in consumers' minds between a new product and the trademark holder's mark . . . So long as a use is nominative . . . trademark law is unavailing.

Id. at 806 (emphasis supplied).

In this case, logically, the only way for S&L Vitamins to describe the products manufactured by plaintiffs that it is selling is by referring to them –

truthfully, accurately – as plaintiffs' products. Such a reference, by definition, is nominative fair use, for which "trademark law is unavailing," Id., and which, far from diluting them, actually strengthens plaintiffs' marks by accurately associating them with the authentic goods with which they are associated. Therefore, under the nominative fair use doctrine and pertinent case law, according to the terms of their own allegations, plaintiffs have no cognizable claim for trademark infringement or dilution. Indeed, Congress never intended the powerful antidilution provisions of the Lanham Act to be used to deprive an independent dealer of legitimate use of the mark of products in which he deals. In Ty, Inc. v. Perryman, 306 F.3d 509 (7th Cir. 2002), cert. denied, 538 U.S. 971 (2003), Judge Posner, writing for the Seventh Circuit Court of Appeals, explained that the owner of the mark BEANIE BABIES for beanbag stuffed animal toys could not prevent defendant Perryman, a dealer, from using the trademark in her business of selling second-hand toys to collectors:

> You can't sell a branded product without using its brand name, that is, its trademark . . . Perryman's principal merchandise is Beanie Babies, so that to forbid it to use "Beanies" in its business name and advertising (Web or otherwise) is like forbidding a used car dealer who specializes in selling Chevrolets to mention the name in his advertising . . . We do not think that by virtue of trademark law producers own their aftermarkets and can impede sellers in the aftermarket from marketing the trademarked product.

Id. at 512, 513 (emphasis supplied).

In sum, under the first sale doctrine and relevant case law, plaintiffs do not have, nor did they ever have, a legitimate, cognizable cause of action for trademark infringement or dilution. The law permitting S&L Vitamins to sell plaintiffs' products, and to advertise that it is doing so, is clear, unequivocal, settled, and well-known and is "beyond the reach of trademark law." Taylor Made Golf Company, 265 F. Supp.2d 732.

D. Plaintiffs' claims for common law and state statutory trademark infringement should be dismissed.

As noted above, plaintiffs fail to make out a case for trademark infringement under the Lanham Act. For the same reasons, plaintiffs' claims for trademark infringement under state law should also be dismissed. As one treatise notes, "In most states, the state statutes are given the same meaning and interpretation as the mainstream principles of common law and federal trademark law." McCarthy on Trademarks, §22.1. Because plaintiffs cannot make out a claim under the Lanham Act, they also cannot do so under state law.

E. Plaintiffs' claims for tortious interference with contractual relations contain insufficient allegations to make out a cognizable legal claim, and this claim should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6).

In addition to the trademark-related claims dealt with above, plaintiffs' claims for relief under tortious interference with contractual relations contain insufficient facts to state a cognizable legal basis for relief and, thus, must be dismissed.

To establish a prima facie claim for tortious interference with contract, a plaintiff must show (1) the existence of a valid contractual relationship or business expectancy; (2) the interferer's knowledge of the relationship or expectancy; (3) intentional interference inducing or causing a breach or termination of the relationship or expectancy; and (4) resultant damage to the party whose relationship or expectancy has been disrupted. Miller v. Hehlen, 209 Ariz. 462, 104 P.3d 193, 202 (2005), citing Wallace v. Casa Grande Union High Sch. Dist. No. 82 Bd. of Governors, 184 Ariz. 419, 427, 909 P.2d 486, 494 (App. 1995). Plaintiffs' allegations, even if taken as true, simply cannot satisfy these elements.

It is not enough to allege a defendant's merely general knowledge of the alleged existence of a distribution agreement between a plaintiff and a third party to meet the second prong above and impose legal liability on a defendant. A case involving remarkably similar facts and the same legal standard is John Paul Mitchell Systems v. Quality King Distributors, Inc. et al., 106 F.Supp.2d 462, 475 (S.D.N.Y. 2000). There, as here, a manufacturer claimed that an "unauthorized" distributor of its salon products was interfering with its distribution contracts. Considering the same sort of generalized allegations set forth here that unspecified distribution contracts were breached due to the defendant's inducement, the court rejected the claim, writing as follows:

> [Plaintiff] will have a more difficult time proving that [defendant] knew that the only possible source of [the manufacturer's] product would be a distributor or salon violating its contract. Although [plaintiff] publicly states that it sells its products only through salons, this creates no legal obligation on its part to do so. From [defendant]'s perspective, [plaintiff] may say that it only sells its product to distributors contractually bound to sell only to salons, but may in fact sell to distributors who have not made this contractual commitment. Indeed, [one distributor's] 1999 purchases from [the manufacturer] were made on an order-by-order basis, apparently without a contract. Although this Court is satisfied by [plaintiff]'s representations that [plaintiff] did require such contracts from all distributors during the life of the [distributor] contract . . . [defendant] did not have such sworn representations.

In other words, absent specific knowledge of specific distribution contracts that might be implicated by its actual purchases of merchandise, there is no legal basis to place a duty on a business such as S&L Vitamins to curtail its legitimate commercial activities merely to avoid the risk that it might, theoretically, impinge on some contractual relationship between parties unknown to it.

Similarly, in Matrix Essentials, Inc. v. Cosmetic Gallery, Inc., 870 F.Supp. 1237 (D.N.J. 1994), cited in John Paul Mitchell Systems, another "salon-only" manufacturer sought to enforce its distribution policy against third parties by asserting tortious interference with contract. There, too, the defendants had purchased the products in question in "authorized" salons and then resold them. The court in Matrix Essentials, too, required particular knowledge of the anti-diversion provisions of the distribution contracts in order to show actionable knowledge on the part of the defendants, writing, "We do not equate general knowledge of the Matrix distribution scheme to knowledge of the existence or contents of the salon agreements." Id. at 1247.

Both Matrix Essentials and John Paul Mitchell Systems involved claims based on the defendant's purchases made from distributors in supposed violation of contractual provisions, and both claims failed. Yet here plaintiffs' claims suffer not only from the same deficiencies as the ones in those cases, they suffer from even more serious problems: Plaintiffs here claim that S&L Vitamins interfered with the relationships between plaintiffs and their unnamed distributors – by purchasing merchandise from third parties (the tanning salons) which are not even parties to those unspecified relationships!

In fact, nothing in plaintiffs' complaint demonstrates that plaintiffs have either a basis for claiming that S&L Vitamins had done business with any distributors — as evidenced by plaintiffs' failure to identify even a single distributor that S&L Vitamins allegedly did business with or any grounds for a good faith belief that it did so — or a basis for claiming that S&L Vitamins knew of plaintiffs' specific contracts, much less their anti-diversion provisions, with any specific distributors. Under these facts, S&L Vitamins cannot realistically be said to have known, for purposes of imposing tort liability or otherwise, of any contract between plaintiffs and their distributors, much less its specific terms and limitations, as the law requires before finding interference with that contract.

Plaintiffs' pleading fails also to allege facts that amount to satisfaction of the third prong to establish such liability: that a defendant's intentional acts are designed to induce a breach or disruption of the contractual relationship. Here, the complaint does not even allege that there was any inducement by S&L Vitamins to a party to that contract. By plaintiffs' logic, not only S&L Vitamins, but S&L Vitamins' customers, and any other person on Earth to whom they might sell plaintiffs' products would also be liable for "inducing" a breach of an unknown contract between these two utter strangers.

Finally, even if plaintiffs could overcome these burdens, their claims would still be appropriate for dismissal under Rule 12(b)(6) because they have failed to make any legally cognizable, or even coherent, allegation of damages, another necessary element in a tortious interference claim (and, indeed, a trademark or unfair competition claim). They merely insinuate, without even stating so explicitly, that S&L Vitamins sold their products on the Internet, which is somehow presumed to be harmful.

In fact, ordinarily selling a company's product is considered a benefit, not an injury, to the company. As the Court wrote in John Paul Mitchell Systems, rejecting the tortious interference claim based on so-called "diversion," courts across the country "have been suspicious of the claim that disruption of these exclusive distribution arrangements causes any pecuniary injury . . ." 106 F.Supp.2d at 475, citing H.L. Hayden Co. v. Siemens Medical Sys., Inc., 879 F.2d 1005, 1024 (2d Cir. 1989), Graham Webb Int'l Ltd. Partnership v. Emporium Drug Mart, Inc., 916 F.Supp. 909, 918 (E.D. Ark. 1995) ("no basis for concluding that [any] lost sales would be greater than the increased revenue resulting from the availability of the product in ordinary retail outlets"), Matrix Essentials, Id. at 1250. Here, too, plaintiffs have made no allegation that they suffered any specific, financial harm from S&L Vitamins' alleged interference with contract – nor, logically, could they. As these cases demonstrate, a generalized claim of harm merely by virtue of not being able to employ the distribution scheme of choice cannot form the basis of a tortious interference claim. According to their own allegations and common sense, the result of S & L's lawful activities is that plaintiffs' distributors are selling more of plaintiffs' merchandise than if S & L were not buying it from tanning salons (who are not parties to this action). Obviously, plaintiffs are also selling more of their merchandise – at full price – to its distributors (who are not parties to this action), and to consumers. Consumers are buying more of plaintiffs' products and enjoying their many fine qualities – but they are not paying as much for it as plaintiffs would like. If all these products being bought and sold by S & L constitutes a harm to plaintiffs, it is not one of which the law should take cognizance.

Ultimately, it would be a strange shifting of legal burdens to suggest that merely by asserting the existence of a contract between oneself and a third party, one could demand that a person stop advertising and selling products and essentially close its business. Considering all the foregoing, plaintiffs have pled insufficient facts under a cognizable legal theory, and, therefore, under Rule 12(b)(6), the court should dismiss plaintiffs' claim for intentional interference with contractual relations.

F. Plaintiffs' claims for injunctive relief should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6).

Plaintiffs' claim for injunctive relief is not an independent cause of action, but is derivative of the other counts of the complaint. As such, it fails to state a cognizable legal basis for relief and, thus, must be dismissed.

CONCLUSION

For all the reasons set forth above, this Court should dismiss plaintiffs' complaint for failure to state a claim upon which relief can be granted.

RESPECTFULLY SUBMITTED this 24th day of February, 2006

_s/ Gregory J. Kuykendall
Gregory J. Kuykendall
Attorney for Defendants

ORIGINAL filed with the Clerk of the Court
this 24th day of February, 2006 in:

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COURTESY COPY of the foregoing mailed/delivered
this 24th day of February, 2006 to:

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