DATE FILED: February 11, 2016 9:02 AM

DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO 1437 Bannock Street, Room 256 Denver, Colorado 80202	
BRANDON FLORES, and BRANDIE LARRABEE, Plaintiffs, v. LIVWELL, INC., et al., Defendants.	▲ COURT USE ONLY ▲
	Case No.: 2015CV33528 Courtroom: 215

ORDER ON DEFENDANT LIVWELL'S MOTION TO DISMISS

THIS MATTER comes before the Court on Defendant Livwell, Inc.'s Motion to Dismiss Plaintiffs' Complaint. Having reviewed the parties' briefs, case law, and relevant portions of the case file, the Court rules as follows.

I. INTRODUCTION

Plaintiffs bring an action on behalf of themselves and a similarly situated class of individuals against Defendant Livwell, Inc., a major marijuana grower and dispenser, and various unspecified John Doe parties (hereinafter, collectively, "Defendant"). Plaintiffs allege that Defendant sold them marijuana contaminated with a fungicide, and that they suffered injuries as a result.

Defendant moves to dismiss the case under C.R.C.P. 12(b)(1) and (5). Defendant argues that Plaintiffs have not suffered any cognizable injury and thus lack standing under Rule 12(b)(1). Defendants also argue that Plaintiffs' Complaint fails to state a claim upon which relief can be granted.

II. STANDARD OF REVIEW

Under C.R.C.P. 12(b)(1), "the court is 'free to weigh the evidence and satisfy itself as to the existence of its power to hear the case.' . . . In contrast, because a [Rule 12(b)(5)] motion 'results in a determination on the merits at an early stage of plaintiff's case, the plaintiff is afforded the safeguard of having all its allegations taken as true and all inferences favorable to plaintiff will be drawn." *Trinity Broadcasting of Denver, Inc. v. City of Westminster*, 848 P.2d

916, 925 (Colo. 1993) (quoting *Boyle v. Governor's Veterans Outreach & Assistance Center*, 925 F.2d 71, 74 (3d Cir. 1991).

Under C.R.C.P. 12(b)(5), if a plaintiff is entitled to relief under any legal theory, then the complaint is sufficient. *Denver & R. G. W. R. R. v. Wood*, 476 P.2d 299 (Colo. App. 1970). In assessing such a motion a court must accept all matters of material fact as true and view the allegations in the light most favorable to the plaintiff. *Asphalt Specialties, Co. v. City of Commerce City*, 218 P.3d 741 (Colo. App. 2009). All inferences are to be drawn in favor of the plaintiff. *Medina v. State*, 35 P.3d 443 (Colo. 2001). The complaint cannot be dismissed unless it appears that the non-moving party is entitled to no relief under any statement of facts which may be proved in support of the claims. *People v. Sumner*, 525 P.2d 512 (Colo. App. 1974).

III. FACTUAL BACKGROUND

Viewing the Complaint's allegations in their most favorable light, Defendant is a large and successful marijuana grower and retail seller. (Compl., ¶¶ 25, 45, 51.) Defendant used Eagle 20, a fungicide, to treat its marijuana plants during the first quarter of 2015. (Id., ¶ 36.) The active ingredient of Eagle 20 is myclobutanil, an anti-fungal agent. (Id., ¶ 29.) Myclobutanil is dangerous. (Id., ¶¶ 31-35.) Myclobutanil was listed as an ingredient in Defendants' cannabis products. (Id. ¶ 70.) Plaintiffs purchased and consumed marijuana that Defendant had treated with myclobutanil. (Id., ¶¶ 44-49, 50-55.) Had Plaintiffs known about the myclobutanil, they would have either not paid as much for the marijuana, or would not have inhaled it. (Id., ¶¶ 47-49, 53-55.) The marijuana Plaintiffs purchased had a diminished value because it was treated with myclobutanil. (Id., ¶¶ 49, 55.) Plaintiffs have been damaged because they overpaid for the marijuana in light of the fact that it was treated with myclobutanil. (Id.)

Plaintiffs allege the following causes of action: breach of contract; breach of the covenant of good faith and fair dealing; breach of express and implied warranties; intentional misrepresentation; concealment of material facts; unjust enrichment; conspiracy; and declaratory and injunctive relief.

IV. ANALYSIS

Defendant argues that Plaintiffs lack standing because they have not suffered an injury in fact. Colorado employs a two-prong test for determining whether a plaintiff has standing to sue. *Wimberly v. Ettenberg*, 570 P.2d 535, 539 (Colo. 1977). "This test has become the routine test for assessing standing in Colorado." *Hickenlooper v. Freedom From Religion Foundation, Inc.*, 338 P.3d 1002, 1006 (Colo. 2014). "To satisfy the *Wimberly* test, a plaintiff must establish that (1) he suffered an *injury in fact*, and (2) his injury was to a *legally protected interest.* *See Wimberly,* 194 Colo. at 168, 570 P.2d at 539." *Hickenlooper v. Freedom From Religion Foundation, Inc.*, 338 P.3d at 1006 (emphasis in original).

Here, Plaintiffs sole stated injury is that they overpaid for Defendant's product. There are no allegations that the product did not perform as it was supposed to, and indeed the Complaint

alleges that Plaintiffs consumed the product. (*See e.g.* Compl., ¶ 48 ("Had Mr. Flores known the cannabis he purchased had been treated with Eagle 20, he would not have inhaled it.").) Nor are there any allegations that Plaintiffs suffered physical or emotional injury.

Defendants cite numerous on-point cases standing for the proposition that Plaintiffs' claims of diminished value do not state an injury in fact. One such example is *Rule v. Fort Dodge Animal Health, Inc.*, 604 F. Supp. 2d 288 (D. Mass. 2009). In that case, plaintiff had her dog, Luke, injected with a heartworm drug that was later recalled. Neither plaintiff nor her dog suffered any physical injury, but plaintiff sought damages in the amount of the difference between the as-advertised drug and the defective drug. *Id*. at 292. The court dismissed the claim.

> Unlike the typical breach of warranty case, Rule does not allege that the product she purchased ever failed to perform as warranted. Rule does not contend, for example, that Luke developed heartworm despite being injected with ProHeart® 6, or that Luke suffered any adverse health effects as a consequence of the injections. By contrast, in most breach of warranty cases where the plaintiff alleges a purely economic injury, the defect of the product in question has clearly manifested itself to the plaintiff's detriment, whether in terms of lost profits, repair costs, or the diminished opportunity to use the purchased product

Id. at 294.

Rivera v. Wyeth-Ayerst Laboratories, 283 F.3d 315 (5th Cir. 2002), is also four-square with Plaintiffs' allegations. In that case, plaintiff purchased a drug, Duract, which was later recalled. Plaintiff consumed the drug and suffered no physical or emotional injury. *Id*. at 317. Rather, plaintiff sought economic damages under a number of theories, including breach of warranty and unjust enrichment. *Id*. The court held that plaintiffs had not shown an injury in fact.

> To establish an injury in fact, plaintiffs must demonstrate an invasion of a legally protected interest which is concrete and particularized. Rivera's claim to injury runs something like this: Wyeth sold Duract; Rivera purchased and used Duract; Wyeth did not list enough warnings on Duract, and/or Duract was defective; other patients were injured by Duract; Rivera would like her money back. The plaintiffs do *not* claim Duract caused them physical or emotional injury, was ineffective as a pain killer, or has any future health consequences to users. Instead, they assert that their loss of cash is an "economic injury."
>
> The plaintiffs never define this "economic injury," but, instead, spend most of their brief listing helpful suggestions on how a court could calculate damages. These arguments are relevant (if at all) to redressability, not injury. Merely asking for money does not establish an injury in fact.

Id. at 319 (internal quotations and citations omitted).

Defendants cite other similar cases in their Motion which stand for same propositions articulated in *Rivera* and *Rule*. *See* Motion at pp. 7-8. Plaintiffs' attempts to distinguish these cases are unavailing for the simple reason that the only measure of damages asserted in their Complaint is the price difference between treated and untreated cannabis. Plaintiffs' brief only serves to emphasize the point: "rather, [Plaintiffs'] claims are for overpayments because no reasonable consumer would expect any marijuana seller to provide them with cannabis that has been laced with Eagle 20." (Response, p. 9.) It is exactly this type of damage that *Rivera*, *Rule* and the other cases cited by Defendant hold are not sufficient to establish injury in fact.

Plaintiffs cite no cases supporting their position. In *Colorado Med. Soc'y v. Hickenlooper*, 353 P.3d 396, 401 (Colo. App. 2012), the Court of Appeals held that allegations of injury which included economic harm (due to a reduced ability to practice medicine); deprivation of a statutory right to practice medicine; and diminution of professional reputation stated injury in fact. *Id*. Plaintiffs allege none of those things. Plaintiffs only allege that they overpaid for a product that they then used and which performed as intended.

Fuentes v. Kroenke Sports & Entm't, LLC, No. 13-CV-02841-PAB-CBS, 2014 WL 4477946 (D. Colo. Sept. 11, 2014) does not address the merits of plaintiff's damages claim, it only finds that it passes muster under Fed. R. Civ. P. 11, a low bar. *Fuentes* concerned an allegedly illegal restriction printed on event tickets, a non-consumable good, which was alleged to prevent their resale. Plaintiffs do not allege that they intended to resell their cannabis, they only claim that they overpaid for it in the first instance.

For similar reasons, the cases cited by Plaintiffs involving diminution in value of automobiles and real estate (Response, at pp. 9-10) miss the mark. Real estate and automobiles (and other consumer durables) can be resold. If a defect reduces the original or resale value of the good, the consumer of the good has suffered an injury in fact. That is not the case here. As in the cases cited by Defendant, Plaintiffs bought the cannabis and consumed it. There is nothing to resell, and there are no allegations that Plaintiffs intended to resell the marijuana that they purchased. Plaintiffs have failed to state an injury in fact.

Because the Court concludes that Plaintiffs have not alleged an injury in fact, the Court will not address Defendants arguments under C.R.C.P. 12(b)(5).

V. CONCLUSION

Plaintiffs lack standing to bring this action because they have failed to plead a cognizable injury in fact. Accordingly, Defendant's Motion is GRANTED. Plaintiffs' case is DISMISSED.

ENTERED this 11th day of February, 2016.

BY THE COURT:

J. Eric Elliff
District Court Judge