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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

NUTRITION DISTRIBUTION, LLC, Plaintiff and Appellant, v. SOUTHERN SARMS, INC., Defendant and Respondent.	B278132 (Los Angeles County Super. Ct. No. BC616482)

APPEAL from a judgment of the Superior Court of Los Angeles County. Michael L. Stern, Judge. Affirmed in part and dismissed in part.

Tauler Smith, Robert Tauler and Lisa Zepeda for Plaintiff and Appellant.

Lewis Brisbois Bisgaard & Smith, Arezoo Jamshidi, Daniel C. DeCarlo and Josephine Brosas for Defendant and Respondent.

Nutrition Distribution, LLC, dba Athletic Xtreme, a manufacturer and marketer of nutritional supplements specifically for bodybuilders, sued Southern SARMs, Inc., a competing nutritional supplement company, for unfair competition (Bus. & Prof. Code, § 17200 et seq.)[1] and false advertising (§ 17500 et seq.), requesting injunctive relief and restitutionary disgorgement. Nutrition Distribution also moved for a preliminary injunction prohibiting Southern SARMs from manufacturing, marketing or selling any products containing the pharmaceutical ingredient Ostarine, a selective androgen receptor modulator. The trial court denied Nutrition Distribution's motion for a preliminary injunction, sustained without leave to amend Southern SARMs's demurrer to the first amended complaint and dismissed the action. We affirm the order of dismissal and dismiss the appeal from denial of the preliminary injunction as moot.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Nutrition Distribution's First Amended Complaint*

On April 8, 2016 Nutrition Distribution filed a complaint, and on July 18, 2016 a first amended complaint,[2] against Southern SARMs for unfair competition and false advertising. Nutrition Distribution alleged Southern SARMs misbranded and unlawfully marketed its product (MK-2866) Ostarine, which contained as its active ingredient a selective androgen receptor

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[1] Statutory references are to the Business and Professions Code unless otherwise stated.

[2] The first amended complaint was filed after the parties met and conferred to discuss Southern SARMs's contemplated motion to strike and demurrer to the original complaint.

modulator (SARM). According to Nutrition Distribution's pleading, "SARMs, like Defendant's Ostarine Product, are synthetic drugs with similar effects to illegal anabolic steroids."

Nutrition Distribution alleged, although Southern SARMs labeled its product as not intended to treat, cure or diagnose any condition or disease and not for human consumption, it simultaneously marketed the product on its website and otherwise as a new miracle dietary supplement to bodybuilders and other competitive athletes to enhance their physiques, promising, for example, lean mass increase and accelerated fat loss in an easy-to-dose oral form. According to Nutrition Distribution, Southern SARMs also misrepresented that its Ostarine product affords similar benefits to testosterone and other anabolic steroids without the negative side effects.

The first amended complaint asserted that medical experts have opined that products containing selective androgen receptor modulators have potential serious side effects including liver damage and increased risk for heart disease and that sale of those products is highly dangerous to public safety. In addition, selective androgen receptor modulators are specifically prohibited for use by participants in sporting events by the World Anti-Doping Agency (WADA) and the United States Anti-Doping Agency (USADA), facts that Southern SARMs did not disclose in its marketing materials.

Nutrition Distribution alleged it is a direct competitor of Southern SARMs in the nutritional supplement industry: In July 2009 Nutrition Distribution introduced "Advanced PCT," a natural product, for sale in the "muscle-gainer sub-market of the nutritional supplement world." However, as a result of Southern SARMs's misleading and deceptive marketing and sale of its

Ostarine product, Southern SARMs caused Nutrition Distribution irreparable injury and wrongfully took Nutrition Distribution's profits and "the benefit of its creativity and investment of time, energy and money."

In its second cause of action for false and misleading advertising, Nutrition Distribution alleged that, by virtue of the conduct described in its pleading, Southern SARMs had disseminated advertising regarding its Ostarine product on its website and otherwise to the public and to consumers that it knew, or in the exercise of reasonable care should have known, was untrue and/or misleading and that was, in fact, likely to mislead or deceive a reasonable consumer. As a result, Nutrition Distribution suffered an ascertainable economic loss of money and reputational injury by the diversion of its business to Southern SARMs. In addition, Nutrition Distribution avers, Southern SARMs's conduct "is a black eye on the industry as a whole, and has the tendency to disparage [Nutrition Distribution's] products and goodwill."

Nutrition Distribution sought preliminary and permanent injunctive relief, prohibiting Southern SARMs from "producing, licensing, marketing, and selling its Ostarine Product, and any other product containing Ostarine and/or other Selective Androgen Receptor Modulators ('SARMs')." Nutrition Distribution also sought disgorgement of all Southern SARMs's profits from its unlawful conduct and full restitution of all of Southern SARMs's "ill-gotten gains."

2. *Nutrition Distribution's Motion for a Preliminary Injunction*

One week after filing its first amended complaint Nutrition Distribution moved for a preliminary injunction to prohibit

Southern SARMs from manufacturing, marketing and selling products containing Ostarine on its website. Southern SARMs opposed the motion, principally on the ground that the requested injunction, which would require a complete cessation of marketing and sales of Ostarine, was overbroad. Southern SARMs also argued that the federal Food and Drug Administration (FDA) had primary jurisdiction to determine whether Ostarine (or products containing selective androgen receptor modulators) was a "drug" or a "dietary supplement" and that such a determination was a condition precedent to any prohibition of the sale of Ostarine.

3. *Southern SARMs's Demurrer*

Prior to responding to Nutrition Distribution's motion for a preliminary injunction, Southern SARMs demurred to the first amended complaint, arguing Nutrition Distribution was not entitled to restitution or restitutionary disgorgement since it had failed to allege Southern SARMs had wrongfully acquired money or property in which Nutrition Distribution had a vested interest; rather, it was seeking standard tort damages, which are not recoverable in an action for unfair competition or false advertising. And, as in its subsequently filed opposition to the motion for a preliminary injunction, Southern SARMs asserted the injunctive relief sought by Nutrition Distribution was overly broad, seeking wholesale prohibition of marketing and sales of Ostarine rather than prohibiting the allegedly false or misleading advertising. In the absence of a right to the relief requested as a

matter of law, Southern SARMs contended, Nutrition Distribution had failed to plead viable causes of action.[3]

4. *The Trial Court's Ruling*

After full briefing on Nutrition Distribution's motion and Southern SARMs's demurrer, the court heard oral argument on both matters on September 12, 2016.[4] The court denied the motion for a preliminary injunction and sustained Southern SARMs's demurrer without leave to amend.[5] A judgment of dismissal was entered on September 15, 2016.

DISCUSSION

1. *Standard of Review*

a. *Review of an order sustaining a demurrer*

A demurrer tests the legal sufficiency of the factual allegations in a complaint. We independently review the superior court's ruling on a demurrer and determine de novo whether the complaint alleges facts sufficient to state a cause of action or discloses a complete defense. (*Loeffler v. Target Corp.* (2014)

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[3] Southern SARMs also filed a separate motion to strike those portions of the first amended complaint seeking restitution, including disgorgement of profits, and injunctive relief. Presenting the same arguments as contained in its demurrer, Southern SARMs argued those allegations constituted "irrelevant, false or improper matter inserted in any pleading" within the meaning of Code of Civil Procedure section 436.

[4] The record on appeal does not contain a reporter's transcript of the joint hearing on the motion for preliminary injunction and demurrer.

[5] In light of its order sustaining Southern SARMs's demurrer, the court deemed the motion to strike moot.

58 Cal.4th 1081, 1100; *Committee for Green Foothills v. Santa Clara County Bd. of Supervisors* (2010) 48 Cal.4th 32, 42.) We assume the truth of the properly pleaded factual allegations, facts that reasonably can be inferred from those expressly pleaded and matters of which judicial notice has been taken. (*Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 20; *Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.) However, we are not required to accept the truth of the legal conclusions pleaded in the complaint. (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126; *Tepper v. Wilkins* (2017) 10 Cal.App.5th 1198, 1203.) We liberally construe the pleading with a view to substantial justice between the parties. (Code Civ. Proc., § 452; *Ivanoff v. Bank of America* (2017) 9 Cal.App.5th 719, 726; see *Schifando*, at p. 1081 [complaint must be read in context and given a reasonable interpretation].)

"'Where the complaint is defective, "[i]n the furtherance of justice great liberality should be exercised in permitting a plaintiff to amend his [or her] complaint."'" (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 970-971.) We determine whether the plaintiff has shown "in what manner he [or she] can amend [the] complaint and how that amendment will change the legal effect of [the] pleading." (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349.) "[L]eave to amend should *not* be granted where . . . amendment would be futile." (*Vaillette v. Fireman's Fund Ins. Co.* (1993) 18 Cal.App.4th 680, 685; see generally *Ivanoff v. Bank of America*, *supra*, 9 Cal.App.5th at p. 726.)

b. *Review of the denial of a preliminary injunction*

In determining whether to issue a preliminary injunction a trial court weighs two interrelated factors: "[T]he likelihood the moving party ultimately will prevail on the merits, and the

relative interim harm to the parties from the issuance or nonissuance of the injunction." (*Hunt v. Superior Court* (1999) 21 Cal.4th 984, 999; accord, *White v. Davis* (2003) 30 Cal.4th 528, 554; *City of Corona v. AMG Outdoor Advertising, Inc.* (2016) 244 Cal.App.4th 291, 298.) Generally, the trial court's ruling on an application for a preliminary injunction rests in its sound discretion and will not be disturbed on appeal absent an abuse of discretion. (*City of Corona,* at p. 298; *SB Liberty, LLC v. Isla Verde Assn., Inc.* (2013) 217 Cal.App.4th 272, 280-281.) An order denying an application for a preliminary injunction may be reversed only if the trial court abused its discretion with respect to both the question of success on the merits and the question of interim harm. (See *Cohen v. Board of Supervisors* (1985) 40 Cal.3d 277, 286-287.)

Notwithstanding this general standard of review, the specific determinations underlying the superior court's decision are subject to appellate scrutiny under the standard of review appropriate to that type of determination. (*People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1136-1137; accord, *Smith v. Adventist Health System/West* (2010) 182 Cal.App.4th 729, 739.) Thus, the superior court's express and implied findings of fact must be accepted by the appellate court if supported by substantial evidence, and its conclusions on issues of pure law are subject to independent review. (*People ex rel. Feuer v. FXS Management, Inc.* (2016) 2 Cal.App.5th 1154, 1158-1159; *420 Caregivers, LLC v. City of Los Angeles* (2012) 219 Cal.App.4th 1316, 1331.)

2. *The Trial Court Properly Sustained the Demurrer to Nutrition Distribution's First Amended Complaint*

a. *Claims under the unfair competition and false advertising laws*

Unfair competition under section 17200, the unfair competition law (UCL), means "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising . . . ." Written in the disjunctive, section 17200 establishes "three varieties of unfair competition—acts or practices which are unlawful, unfair, or fraudulent." (*Cel–Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 180 (*Cel-Tech*); accord, *Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939, 949.)

The "unlawful" prong of the UCL "'borrows' violations from other laws by making them independently actionable as unfair competitive practices." (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1143 (*Korea Supply*); accord, *Kasky v. Nike, supra,* 27 Cal.4th at p. 949.) The "unfair" prong authorizes a cause of action under the UCL if the plaintiff can demonstrate the objectionable act, while not unlawful, is "unfair" within the meaning of the UCL. (*Cel-Tech, supra,* 20 Cal.4th at p. 182.) "When a plaintiff who claims to have suffered injury from a direct competitor's 'unfair' act or practice invokes section 17200, the word 'unfair' in that section means conduct that threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." (*Id.* at p. 187.)

Under the "fraudulent" prong, a business practice violates the UCL if it "is likely to deceive the public. [Citations.] It may be based on representations to the public which are untrue, and "'also those which may be accurate on some level, but will nonetheless tend to mislead or deceive. . . . A perfectly true statement couched in such a manner that it is likely to mislead or deceive the consumer, such as by failure to disclose other relevant information, is actionable under'" the UCL. [Citations.] The determination as to whether a business practice is deceptive is based on the likely effect such practice would have on a reasonable consumer." (*McKell v. Washington Mutual, Inc.* (2006) 142 Cal.App.4th 1457, 1471; accord, *Klein v. Chevron U.S.A., Inc.* (2012) 202 Cal.App.4th 1342, 1380; see *Rubenstein v. The Gap, Inc.* (2017) 14 Cal.App.5th 870, 876-877; see also *Zhang v. Superior Court* (2013) 57 Cal.4th 364, 370 ["[f]alse advertising is included in the 'fraudulent' category of prohibited practices"].)

In cases involving advertising or statements that are not literally false, "'[l]ikely to deceive' implies more than a mere possibility that the advertisement might conceivably be misunderstood by some few consumers viewing it in an unreasonable manner. Rather, the phrase indicates that the ad is such that it is probable that a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled." (*Lavie v. Proctor & Gamble Co.* (2003) 105 Cal.App.4th 496, 508; accord, *Chapman v. Skype Inc.* (2013) 220 Cal.App.4th 217, 226; *People ex rel. Dept. of Motor Vehicles v. Cars 4 Causes* (2006) 139 Cal.App.4th 1006, 1016.)

Like section 17200, section 17500, the false advertising law, generally prohibits advertising that contains "any statement . . . which is untrue or misleading, and which is known, or which

by the exercise of reasonable care should be known, to be untrue or misleading . . . ." To prove a violation under section 17500, however, the plaintiff must also demonstrate the defendant knew, or in the exercise of reasonable care, should have known, that the advertisement was untrue or misleading. (See *Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 224.)

Notwithstanding its broad reach, an action under the UCL "'is not an all-purpose substitute for a tort or contract action.' [Citation.] Instead, the act provides an equitable means through which both public prosecutors and private individuals can bring suit to prevent unfair business practices and restore money or property to victims of these practices. . . . [T]he "overarching legislative concern [was] to provide a streamlined procedure for the prevention of ongoing or threatened acts of unfair competition.' [Citation.] Because of this objective, the remedies provided are limited." (*Korea Supply*, *supra*, 29 Cal.4th at p. 1150.)

"To achieve its goal of deterring unfair business practices in an expeditious manner, the Legislature limited the scope of the remedies available under the UCL. 'A UCL action is equitable in nature; damages cannot be recovered.'" (*In re Tobacco II Cases* (2009) 46 Cal.4th 298, 312; see *Korea Supply*, *supra*, 29 Cal.4th at p. 1150 [damages are not available under the UCL].) "Injunctions are 'the primary form of relief available under the UCL to protect consumers from unfair business practices,' while restitution is a type of 'ancillary relief.'" (*Kwikset Corp. v. Superior Court* (2011) 51 Cal.4th 310, 337.) Restitution is available "to restore to any person in interest any money or property . . . which may have been acquired by means of such

unfair competition." (§ 17203; see *Kraus v. Trinity Management Services, Inc.* (2000) 23 Cal.4th 116, 126 (*Kraus*) ["[t]hrough the UCL a plaintiff may obtain restitution and/or injunctive relief against unfair or unlawful practices"]; see also *In re Tobacco Cases II* (2015) 240 Cal.App.4th 779, 790.)

Similarly, orders of restitution and injunctive relief, but not damages, are authorized for violations of section 17500. (§ 17535; see *Cortez v. Purolator Air Filtration Products Co.* (2000) 23 Cal.4th 163, 177, fn. 10 ["[t]he restitutionary remedies of section 17203 and 17535 . . . are identical and are construed in the same manner"]; *People ex rel Harris v. Sarpas* (2014) 225 Cal.App.4th 1539, 1548.)

b. *Nutrition Distribution failed to allege facts that would entitle it to restitution under the UCL or false advertising law*

Nutrition Distribution's first amended complaint sought recovery of Southern SARMs's profits from the sale of Ostarine through false and misleading advertising and "restitution of all Defendant's ill-gotten gains." Nutrition Distribution is not entitled to either remedy for violations of the UCL or false advertising law under the facts alleged in its pleading.

As discussed, damages are not available under the UCL or false advertising law. (*Cel-Tech*, *supra*, 20 Cal.4th at p. 179; *Korea Supply*, *supra*, 29 Cal.4th at p. 1150.) Recognizing this limitation, Nutrition Distribution argues "restitutionary disgorgement" is a recognized remedy and contends it has adequately pleaded its entitlement to such relief. However, restitution under the UCL must be restorative in nature: "'Restitution under [Business and Professions Code] section 17203 is confined to restoration of any interest in "money

or property, real or personal, which may have been *acquired* by means of such unfair competition." (Italics added.) A restitution order against a defendant thus requires both that money or property have been lost by a plaintiff, on the one hand, and that it have been acquired by a defendant, on the other.' [Citation.] '[C]ompensatory damages are not recoverable as restitution.'" (*Zhang v. Superior Court*, *supra*, 57 Cal.4th at p. 371; accord, *Korea Supply*, at p. 1149 [the "object of restitution is to restore the status quo by returning to the plaintiff funds in which he or she has an ownership interest"]; see *Madrid v. Perot Systems Corp*. (2005) 130 Cal.App.4th 440, 453 ["in the context of the Unfair Competition Law, 'restitution' is limited to the return of property or funds in which plaintiff has an ownership interest (or is claiming through someone with an ownership interest)"]; see also *Cortez v. Purolator Air Filtration Products Co.*, *supra*, 23 Cal.4th at pp. 173, 177-178.)

Although Nutrition Distribution asserts it has a vested interest in any profits and business Southern SARMs wrongfully diverted from it, its characterization of its requested remedy as restitution does not make it so. To the contrary, compensation for lost business opportunities is a traditional measure of tort damages, not restitution, as the Supreme Court explained in rejecting a markedly similar argument in *Korea Supply*. In that case the plaintiff arms broker had sought to recover sums it allegedly would have received as a commission from its principal had the defendant-competitor not unfairly won an arms contract by bribing Korean officials. (*Korea Supply*, *supra*, 29 Cal.4th at p. 1142.) The Supreme Court held the relief sought was not available under the UCL, "This proposed recovery would be exactly the same amount that plaintiff is seeking to recover as

damages for its traditional tort claim of interference with prospective economic advantage. The only difference between what plaintiff seeks to recover as 'disgorgement' and the damages it seeks under its traditional tort claim is that plaintiff would not recover its full commission under a 'disgorgement' remedy if, for some reason, the profits obtained by Lockheed Martin did not equal the amount of plaintiff's expected commission." (*Id.* at p. 1151; see *id.* at p. 1149 ["[i]n an attempt to fit its claim within the statutory authorization for relief, and as an implicit acknowledgement that nonrestitutionary disgorgement is not an available remedy in an individual action under the UCL,[6]

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[6] "Disgorgement as a remedy is broader than restitution or restoration of what the plaintiff lost. [Citations.] There are two types of disgorgement: restitutionary disgorgement, which focuses on the plaintiff's loss, and nonrestitutionary disgorgement, which focuses on the defendant's unjust enrichment. [Citation.] 'Typically, the defendant's benefit and the plaintiff's loss are the same, and restitution requires the defendant to restore the plaintiff to his or her original position.' [Citation.] However, '[m]any instances of "liability based on unjust enrichment . . . do not involve the restoration of anything the claimant previously possessed . . . includ[ing] cases involving the disgorgement of profits . . . wrongfully obtained . . . ."' [Citation.] "[T]he public policy of this state does not permit one to 'take advantage of his own wrong'" regardless of whether the other party suffers actual damage. [Citation.] Where "a benefit has been received by the defendant but the plaintiff has not suffered a corresponding loss or, in some cases, any loss, but nevertheless the enrichment of the defendant would be unjust . . . the defendant may be under a duty to give to the plaintiff the amount by which [the defendant] has been enriched."'" (*American Master Lease LLC v. Idanta Partners, Ltd.* (2014) 225 Cal.App.4th 1451, 1482.)

plaintiff describes its requested remedy as 'restitution.' This term does not accurately describe the relief sought by plaintiff"].)

Nutrition Distribution has not alleged any facts showing it had an "ownership interest" in the profits it seeks to recover from Southern SARMs, nor has it alleged it seeks to recover for some benefit it conferred on Southern SARMs for which it has a legal right of recovery. Nutrition Distribution has thus failed to state a cause of action for restitution under the UCL.

In a final attempt to maintain its action to recover Southern SARMs's profits from its allegedly deceptive marketing of Ostarine, Nutrition Distribution contends, at a minimum, it may seek disgorgement of those profits into a fluid recovery fund, citing as support language from *Alch v. Superior Court* (2004) 122 Cal.App.4th 339. Nutrition Distribution fundamentally misapprehends the import of *Alch*.

In *Alch* our colleagues in Division Eight of this court first explained that the Supreme Court has held that "disgorgement of unfairly obtained profits into a fluid recovery fund" is not an available remedy in either a representative action brought under the UCL" (*Alch v. Superior Court*, *supra*, 122 Cal.App.4th at p. 405, citing *Kraus*, *supra*, 23 Cal.4th at p. 121) or an individual UCL action (*Alch*, at p. 406, citing *Korea Supply*, *supra*, 29 Cal.4th at p. 1147), but then observed, "It may well be that in a proper case a court may order disgorgement of profits into a fluid recovery fund in a UCL class action; at least one case has so held." (*Alch*, at pp. 407- 408, citing *Corbett v. Superior Court* (2002) 101 Cal.App.4th 649, 655 (*Corbett*).) In the next several sentences, however, which Nutrition Distribution omits from its brief discussion of the purported availability of a fluid fund recovery, the *Alch* court held, "Fluid recovery in class actions,

however, is merely a method of paying out damages after they have been awarded. [Citation.] The question is not whether the court could order fluid class recovery of a damages award; it is whether the trial court has the authority to award nonrestitutionary backpay under the UCL in the first instance. It does not." (*Alch*, at p. 408.)

Indeed, the decision in *Corbett*, cited in *Alch* as the one case permitting a fluid recovery fund in a UCL class action, evaluated the availability of that remedy for purposes of restitutionary disgorgement, not nonrestitutionary disgorgement, as Nutrition Distribution seeks in this case. In *Corbett* the defendants were a bank and a car dealership that allegedly made car loans at interest rates lower than the rate disclosed and charged to the customer. The defendants then split the excess interest payments. Thus, the disgorgement was restitutionary—to return money to those who had paid it. (See *Corbett*, *supra*, 101 Cal.App.4th at p. 668.) As the court held in *Madrid v. Perot Systems Corp.*, *supra*, 130 Cal.App.4th 440, neither *Corbett* nor any other authority supports nonrestitutionary disgorgement into a fluid recovery fund in a UCL class action, "[T]he use of the class action vehicle to litigate a UCL claim does not expand the substantive remedies available, and the availability of fluid recovery in a UCL class action (which we presume for purposes of this appeal) says nothing about availability of *non*restitutionary disgorgement of profits." (*Id.* at p. 461.)

c. *Nutrition Distribution failed to allege facts that would justify the broad injunctive relief it seeks prohibiting all production and sales of any product containing selective androgen receptor modulators*

Section 17203 authorizes the court to issue injunctive relief "as may be necessary to prevent the use or employment by any

person of any practice which constitutes unfair competition" as defined by the UCL. Similarly, section 17535 authorizes injunctive relief "as may be necessary to prevent the use or employment by any person . . . of any practices which violate" the false advertising law. Although this power is broad (see *People v. Toomey* (1984) 157 Cal.App.3d 1, 20), it is not unlimited. (See *Colgan v. Leatherman Tool Group, Inc.* (2006) 135 Cal.App.4th 663, 702 ["A trial court has broad authority to enjoin conduct that violates section 17200. [Citation.] That authority is expansive but not unlimited."]; see also *In re Tobacco Cases II*, *supra*, 240 Cal.App.4th at p. 802; *People ex rel. Herrera v. Stender* (2012) 212 Cal.App.4th 614, 631.) In particular, an injunction must be directed to the unlawful or unfair acts or practices prohibited by the UCL or the false advertising law—here, the allegedly false, unfair, misleading and deceptive advertising used by Southern SARMs to sell Ostarine and related products. (*In re Tobacco Cases II*, at p. 802; *Madrid v. Perot Systems Corp.*, *supra*, 130 Cal.App.4th at p. 464.)

The relief requested by Nutrition Distribution fails to satisfy this requirement. In its amended complaint Nutrition Distribution did not seek to enjoin Southern SARMs's allegedly misleading and deceptive advertising of Ostarine as identified in its pleading, but rather prayed for a complete and total prohibition of any production, marketing or sales of Ostarine and any other product containing selective androgen receptor modulators. As Southern SARMs has argued, the requested

injunctive relief is vastly overbroad and in no way tethered to the wrongful conduct alleged.[7]

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[7] Southern SARMs also argues the question whether sales of Ostarine or other products containing selective androgen receptor modulators should be banned raises issues that must be answered in the first instance by the FDA, including "[w]hether Ostarine is a 'drug,' 'new drug,' 'a prescription drug,' or a 'dietary supplement' proscribed or regulated by the FDA." Thus, it contends, Nutrition Distribution's request for injunctive relief is precluded by the primary jurisdiction doctrine. (See, e.g., *Farmers Ins. Exchange v. Superior Court* (1992) 2 Cal.4th 377, 390 [primary jurisdiction "'applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views'"; italics omitted].)

In response, quoting extensively from *Nutrition Distribution, LLC v. Custom Nutraceuticals LLC* (D.Ariz. 2016) 194 F.Supp.3d 952, in which the defendants were alleged to have violated the federal Lanham Act by engaging in false advertising of Ostarine, Nutrition Distribution insists the trial court can decide whether Ostarine is as safe as Southern SARMs claims without expressing an opinion on any technical or policy questions committed to the FDA. (See *Custom Nutraceuticals*, at p. 956 [the court does not "require FDA's expertise to determine whether it is false and misleading to market a product to competitive athletes while neglecting to mention that it has been banned by the World Anti-Doping Agency and the U.S. Anti-Doping Agency. It is not clear that this question even implicates the FDA's regulatory scheme . . ."].)

In its briefs and at oral argument in this court, Nutrition Distribution has continued to argue it is entitled under the UCL and the false advertising law to the broad injunctive relief it has requested. Neither in the trial court nor on appeal has it asked leave to amend to narrow the scope of the injunction sought to parallel the statutory violations it has alleged. Indeed, any such effort might well be futile. Although not properly considered in ruling on Southern SARMs's demurrer, in connection with its opposition to the motion for preliminary injunction, Southern SARMs introduced evidence, uncontradicted by Nutrition Distribution, it had stopped all marketing and sales of Ostarine (and had never manufactured it) and had no intention of resuming marketing or sales of the product. (See *In re Tobacco Cases II*, *supra*, 240 Cal.App.4th at p. 802 ["'in order to grant injunctive relief under section 17204 or section 17535, there must be a threat that the wrongful conduct will continue"]; *Colgan v. Leatherman Tool Group, Inc.*, *supra*, 135 Cal.App.4th at p. 702 ["'[i]njunctive relief will be denied if, at the time of the order of judgment, there is no reasonable probability that the past acts complained of will recur, i.e., where the defendant voluntarily discontinues the wrongful conduct"']; *Madrid v. Perot Systems Corp.*, *supra*, 130 Cal.App.4th at p. 463 ["[i]njunctive relief is appropriate only when there is a threat of continuing misconduct"].)[8]

In light of our holding that the requested injunctive relief is impermissibly overbroad, we need not address the primary jurisdiction issue.

[8] In an appropriate situation a court may enter an injunction requiring corrective advertising to make up for past misleading statements. (See, e.g., *Consumers Union of U.S., Inc. v. Alta-*

In sum, because Nutritional Distribution did not allege facts that would entitle it under the UCL or false advertising law to the remedies it seeks, the demurrer to the first amended complaint was properly sustained.

3. *The Trial Court Did Not Abuse Its Discretion in Denying Leave To Amend*

"'If we see a reasonable possibility that the plaintiff could cure the defect by amendment, then we conclude that the trial court abused its discretion in denying leave to amend. If we determine otherwise, then we conclude it did not.' [Citation.] "'The burden of proving such reasonable possibility is squarely on the plaintiff.'" [Citation.] To satisfy this burden, "'a plaintiff 'must show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading'" by clearly stating not only the legal basis for the amendment, but also the factual allegations to sufficiently state a cause of action." (*Graham v. Bank of America, N.A.* (2014) 226 Cal.App.4th 594, 618.)

In connection with its argument that it should be permitted to seek disgorgement of Southern SARMs's unlawful profits into a fluid recovery fund, Nutrition Distribution contends, if class certification is required for this remedy, it should be granted leave to amend "to consider whether or not to proceed as a class action." Even were this otherwise a proper request for leave to amend, nonrestitutionary disgorgement, whether directly to an

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Dena Certified Dairy (1992) 4 Cal.App.4th 963, 972-974 [upholding court order requiring defendant to place a warning on its product, which it continued to sell, to correct a misperception created by prior false advertising].) No analogous circumstance is present in the case at bar.

individual or into a fluid recovery fund, is not an available remedy under the UCL or the false advertising law. Accordingly, this proposed amendment (such as it is) would be futile. Because Nutrition Distribution has not suggested any other amendment to change the legal effect of its pleading, the trial court properly sustained the demurrer to the first amendment complaint without leave to amend.

4. *The Appeal from the Denial of the Preliminary Injunction Is Moot*

As this court explained *MaJor v. Miraverde Homeowners Assn.* (1992) 7 Cal.App.4th 618, 623, "A preliminary injunction is an interim remedy designed to maintain the status quo pending a decision on the merits. [Citation.] It is not, in itself, a cause of action. Thus, a cause of action must exist before injunctive relief may be granted. . . . [¶] . . . In the present case, the trial court having sustained a demurrer without leave to amend to the only cause of action which might have supported a preliminary injunction in favor of Ms. MaJor, her appeal from the denial of a preliminary injunction is moot." (Accord, *Korean American Legal Advocacy Foundation v. City of Los Angeles* (1994) 23 Cal.App.4th 376, 399 ["in the case at bar, the trial court sustained the City's demurrer without leave to amend to those causes of action alleging the City's procedures were preempted by state constitutional and statutory law. Because these were the only causes of action which would have supported a preliminary injunction in plaintiffs' favor, their appeal from the denial of a preliminary injunction is dismissed as moot"]; see *Agnew v. Los Angeles* (1958) 51 Cal.2d 1, 2 [because the order denying plaintiff's motion for a temporary restraining order and for a preliminary injunction "dealt solely with the right to preventive

relief pending final judgment," the entry of a judgment in favor of defendants after their demurrer to the complaint was sustained without leave to amend "rendered the right to interim relief moot"].)

Having concluded that Nutrition Distribution failed to state a cause of action under the UCL or the false advertising law and that the trial court properly sustained Southern SARMS's demurrer without leave to amend, we need not consider Nutrition Distribution's appeal from the denial of its motion for a preliminary injunction. That portion of Nutrition Distribution's appeal is dismissed as moot. (See *Agnew v. City of Los Angeles*, *supra*, 51 Cal.2d at p. 2.)

DISPOSITION

The judgment of dismissal is affirmed. The appeal from denial of the motion for preliminary injunction is dismissed as moot. Southern SARMs is to recover its costs on appeal.

PERLUSS, P. J.

We concur:

ZELON, J.

SEGAL, J.