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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 12-06887 GAF (JCGx)	Date	April 16, 2013
Title	The American Institute of Intradermal Cosmetics, Inc. v. Society of Permanent Cosmetic Professionals, et al.		

Present: The Honorable	**GARY ALLEN FEESS**	
Renee Fisher	None	N/A
Deputy Clerk	Court Reporter / Recorder	Tape No.

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
None	None

Proceedings: **(In Chambers)**

ORDER RE: MOTION TO DISMISS

I.
INTRODUCTION

The Society of Permanent Cosmetic Professionals ("SPCP") is a trade association that counts among its members a number of permanent cosmetic manufacturers, distributors, and technicians who offer services related to a specialized form of tattooing that uses colored pigments. Plaintiff, American Institute of Intradermal Cosmetics, Inc. ("Plaintiff" or "AIIC") is a competitor of SPCP's members. In this case, AIIC brings Sherman Act Section 1 and 2 claims against SPCP and its members who have allegedly conspired with each other to drive business from AIIC and to monopolize relevant markets connected with the tattoo industry. SPCP and a number of other named defendants in this case now move to dismiss the complaint. The Court concludes that the Section 1 claim has been adequately pled but that the Section 2 claim should be dismissed with leave to amend.

II.
THE PARTIES AND PENDING MOTIONS

In the pending complaint AIIC names as defendants SPCP, and a number of permanent cosmetic manufacturers, distributors, and technicians who are SPCP members: Program Coordinators, LLC; Kathleen Ciampi; Lasting Impressions, Inc.; Derma International, LLC; Elizabeth Finch-Howell; Mei-Cha International, Inc.; Face and Body Professionals, Inc.; Wakeup with Makeup, LLC; Liza Sims; Lemor Permanent Cosmetics, LLC; Yolanda Moore;

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Marjorie Grimm; and Rose Ann Cloud. (Docket No. 27 [First Amended Complaint ("FAC")].) Defendants SPCP; Derma International, LLC; Face and Body Professionals, Inc.; Wake Up With Makeup LLC; Kathleen Ciampi; Rose Ann Cloud; Elizabeth Finch-Howell; Marjorie Grimm; and Liza Sims bring this motion. (Docket No. 36 [Motion to Dismiss ("Mem.")] at 2.) Defendants Lasting Impressions I, Inc.; Mei-Cha Beauty International, Inc.; LeMor Micropigmentation Institute; and Yolanda Moore are represented by separate counsel and are responding separately to the FAC. (Id.)[1] Individual Defendants Ciampi, Finch-Howell, and Sims ("Individual Defendants") also move to dismiss the FAC for lack of personal jurisdiction. (Id.)

As discussed in detail below, the Court concludes that Plaintiff has adequately alleged its claims under section 1 of the Sherman Act and Defendants' motion is therefore **DENIED with respect to section 1 claim**. However, Defendants' motion is **GRANTED with respect to Plaintiff's deficient section 2 claims** and these claims are therefore **DISMISSED with leave to amend**. Plaintiff's requests for injuctive relief pursuant to section 2 are accordingly also **DISMISSED with leave to amend**. Finally, Defendants' motion to dismiss Individual Defendants Ciampi, Finch-Howell, and Sims for lack of personal jursidiction is **GRANTED**. Plaintiff's claims against these three defendants are therefore **DISMISSED with leave to amend**.

III.
BACKGROUND

Plaintiff is "one of the leading competitors in the permanent cosmetic industry," a specialized form of cosmetic tattooing with colored pigments. (FAC ¶¶ 7–8.) It manufactures and sells pigment dispersions and supplies, provides training and certification for permanent cosmetic technicians, performs permanent cosmetic procedures, and hosts events related to permanent cosmetics. (Id. ¶ 8.) Defendant Society of Permanent Cosmetic Professionals ("SPCP") is a non-profit professional association of cosmetic professionals that has grown to over 1400 members. (Id. ¶ 9.) Individual Defendant Kathleen Ciampi ("Ciampi") is the CEO and Executive Director of SPCP, and her company, Program Coordinators, LLC, manages SPCP's daily business operations. (Id. ¶ 58.) Individual Defendant Elizabeth Finch-Howell ("Finch-Howell") has served on the SPCP Board since 2005 and currently serves on its Past

[1] Although Defendant Derma International, LLC appears to have already been included as a moving party in the initial motion to dismiss, it filed a notice of joinder to this motion. (Docket No. 40.)

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Presidents' Council. (Id. ¶ 60.) Finch-Howell was also SPCP's Ethics Chair in 2005, Treasurer in 2006, and President from 2007 until 2009. (Id. ¶ 60.) And, finally, Individual Defendant "Sims was on SPCP's Board of Directors from 2008 until 2011. She also was SPCP's Membership Chair in 2007 and its Communications Chair from 2008 until 2010." (Id. ¶ 61.) The remaining defendants are some of Plaintiff's largest SPCP-approved competitors. (Id. ¶¶ 10–12.)

Plaintiff alleges that Defendants have conspired with each other to drive business away from Plaintiff and other competitors in violation of section 1 of the Sherman Act, and have attempted to monopolize certain markets within the permanent cosmetic industry in violation of section 2 of the Sherman Act. (Id. ¶ 14.) The gravamen of Plaintiff's FAC—which spans more than forty pages—is that SPCP created a set of "industry standards" or "guidelines" as well as a "Code of Ethics," which, "as a pretext, ostensibly help maintain high quality and safety standards for the industry." (Id. ¶ 75.) Plaintiff contends that "[t]his pretext, however, is false and deceptive," and that "Defendant SPCP's real purpose in enforcing these guidelines, standards, and ethics code is to stifle competition and protect itself and its approved suppliers and trainers from other competitors." (Id. ¶¶ 75–76.) In support of its theory, Plaintiff alleges that, despite SPCP's representations to the contrary, these "guidelines" are completely divorced from FDA standards. (Id. ¶¶ 80–83.) Furthermore, the SPCP-promulgated guidelines—for example, the "Zero Tolerance" policy for technicians who advertise with stock photos of permanent makeup procedures rather than photos of their own work—are selectively enforced. (Id. ¶ 111.)

Plaintiff alleges that Defendants, including Individual Defendants Ciampi, Finch-Howell, and Sims, enacted and amended the guidelines and code of ethics at a series of SPCP-sponsored trainings and summit meetings. (See FAC ¶¶ 79, 80, 83, 86, 98–102.) Of particular relevance to the personal jurisdiction inquiry is the fact that only once does Plaintiff allege that Ciampi, Finch-Howell, and Sims traveled to California as part of their work with SPCP—this was for the 2005 SPCP annual convention held in San Diego where "SPCP voted into effect its 'Guidelines for Pigment Manufacturers' . . . ." (Id. ¶ 80.)

III.
DISCUSSION

A. LEGAL STANDARD

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1. MOTION TO DISMISS PURSUANT TO RULE 12(B)(6)

A complaint may be dismissed if it fails to state a claim upon which relief can be granted. See Fed. R. Civ. P. 12(b)(6). On a motion to dismiss under Federal Rule of Civil Procedure ("F.R.C.P.") 12(b)(6), a court must accept as true all factual allegations pleaded in the complaint, and construe them "in the light most favorable to the nonmoving party." Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336, 337–38 (9th Cir. 1996); see also Stoner v. Santa Clara County Office of Educ., 502 F.3d 1116, 1120–21 (9th Cir. 2007). Dismissal under Rule 12(b)(6) may be based on either (1) a lack of a cognizable legal theory, or (2) insufficient facts under a cognizable legal theory. SmileCare Dental Grp. v. Delta Dental Plan of Cal., Inc., 88 F.3d 780, 783 (9th Cir. 1996) (citing Robertson v. Dean Witter Reynolds, Inc., 749 F.2d 530, 534 (9th Cir. 1984)).

Under Rule 8(a)(2), a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). The Supreme Court has interpreted this rule to allow a complaint to survive a motion to dismiss only if it "contain[s] sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 566 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. (citing Twombly, 550 U.S. at 556). "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct," the complaint has not sufficiently established that the pleader is entitled to relief. Id. at 679.

A complaint generally need not contain detailed factual allegations, but "a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Twombly, 550 U.S. at 555 (citation, alteration, and internal quotations omitted). Similarly, a court need not "accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." Sprewell v. Golden State Warriors, 266 F.3d 979, 988 (9th Cir. 2001). That is, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. . . . While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." Iqbal, 556 U.S. at 678-79; see also Warren v. Fox Family Worldwide, Inc., 328 F.3d 1136, 1139 (9th Cir. 2003).

2. MOTION TO DISMISS PURSUANT TO RULE 12(B)(2)

A court cannot proceed against a defendant over which it lacks personal jurisdiction

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unless that defendant has waived the requirement. See Fed. R. Civ. P. 12(b)(2); Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702-03 (1982). Because no applicable federal statute governs jurisdiction in this case, California personal jurisdiction law applies. See Panavision Int'l, L.P. v. Toeppen, 141 F.3d 1316, 1320 (9th Cir. 1998) ("Panavision"). California's long arm statute permits the exercise of personal jurisdiction to the fullest extent permitted by due process. See Cal. Civ. Proc. Code § 410.10; Panavision, 141 F.3d at 1320. "Because California's long-arm jurisdictional statute is coextensive with federal due process requirements, the jurisdictional analyses under state law and federal due process are the same." Schwarzenegger v. Fred Martin Motor Co., 374 F.3d 797, 800–01 (9th Cir. 2004).

Personal jurisdiction satisfies due process where there are "minimum contacts" with the forum state "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (citation omitted). "Sufficient minimum contacts will give rise to either specific or general jurisdiction," depending on the nature of the defendant's contacts. Revell v. Lidov, 317 F.3d 467, 470 (5th Cir. 2002). "Personal jurisdiction over each defendant must be analyzed separately." Harris Rutsky & Co. Ins. Servs., Inc. v. Bell & Clements Ltd., 328 F.3d 1122, 1130 (9th Cir. 2003) (citations omitted) ("Harris Rutsky").

When a defendant's contacts with the forum state are "substantial" or "continuous and systematic" within the forum state, general jurisdiction may be exercised over that defendant for any cause of action even if it is unrelated to the defendant's activities within the forum state. Data Disc, Inc. v. Sys. Tech. Assocs., 557 F.2d 1280, 1287 (9th Cir. 1977) ("Data Disc"); Schwarzenegger, 374 F.3d at 801. In cases where a defendant's contacts are insufficient to support an exercise of general jurisdiction, the more limited specific jurisdiction may be found where the defendant has "purposefully availed" itself by conducting activities in the forum state that are related to the subject of the lawsuit. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472-73 (1985) ("Burger King"); Ballard v. Savage, 65 F.3d 1495, 1498 (9th Cir. 1995). "Specific jurisdiction may be exercised with a lesser showing of minimum contacts than is required for the exercise of general jurisdiction." ACORN v. Household Int'l, Inc., 211 F. Supp. 2d 1160, 1164 (C.D. Cal. 2002).

The party invoking the Court's jurisdiction bears the burden of proving that personal jurisdiction over the defendant exists. Data Disc, 557 F.2d at 1285. To survive a motion to dismiss where, as here, no evidentiary hearing is held, Plaintiffs must make a prima facie showing of personal jurisdiction. Ballard, 65 F.3d at 1498. In determining whether a plaintiff has made the requisite showing, the Court must accept uncontroverted allegations in the

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complaint as true. AT&T Co. v. Compagnie Bruxelles Lambert, 94 F.3d 586, 588-89 (9th Cir. 1996). At the same time, the parties may go beyond the pleadings and support their positions with discovery materials, affidavits, or declarations. Id. As the Ninth Circuit has noted, "[w]e do not think that the mere allegations of the complaint, when contradicted by affidavits, are enough to confer personal jurisdiction of a nonresident defendant. In such a case, ***facts, not mere allegations, must be the touchstone.***" Taylor v. Portland Paramount Corp., 383 F.2d 634, 639 (9th Cir. 1967) (emphasis added); see also Chem Lab Prods., Inc. v. Stepanek, 554 F.2d 371 (9th Cir. 1977); Cummings v. W. Trial Lawyers Ass'n, 133 F. Supp. 2d 1144, 1154 (D. Ariz. 2001).

Although a plaintiff's version of the facts is not taken as true if it is directly contravened, see Harris Rutsky, 328 F.3d at 1129, "in establishing its prima facie case, the documents submitted by the plaintiff 'are construed in the light most favorable to the plaintiff and all doubts are resolved in its favor.'" Metro. Life Ins. Co. v. Neaves, 912 F.2d 1062, 1064 n.1 (9th Cir. 1990) (citation omitted) (pleadings and affidavits). In addition, "conflicts between the facts contained in the parties' affidavits must be resolved in [claimant's] favor for purposes of deciding whether a prima facie case for personal jurisdiction exists." Doe v. Unocal Corp., 248 F.3d 915, 922 (9th Cir. 2001) (quoting AT&T Co., 94 F.3d at 588) (quotation marks omitted). At the same time, however, the plaintiff must submit admissible evidence in support of its prima facie case. See, e.g., Rippey v. Smith, No. C-99-1488, 1999 U.S. Dist. LEXIS 17361, at *4 (N.D. Cal. Oct. 28, 1999); Hancock v. Hitt, No. C-98-960, 1998 U.S. Dist. LEXIS 10058, at *5 (N.D. Cal. June 19, 1998).

B. APPLICATION

1. PLAINTIFF HAS ADEQUATELY ALLEGED A PER SE VIOLATION OF SECTION 1 OF THE SHERMAN ACT

"Section 1 of the Sherman Act prohibits '[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States.'" Texaco Inc. v. Dagher, 547 U.S. 1, 5 (2006) (quoting 15 U.S.C. § 1). Thus, "[t]o prevail on a claim under § 1 of the Sherman Act, [a] plaintiff must prove: (1) that there was a contract, combination, or conspiracy; (2) that unreasonably restrained competition; and (3) that affected interstate or foreign commerce." Int'l. Norcent Tech. v. Koninklijke Philips Elecs., No. CV 07-00043, 2007 U.S. Dist. LEXIS 89946, at *18 (C.D. Cal. Oct. 29, 2007) (citing Tanaka v. University of Southern California, 252 F.3d 1059, 1062 (9th Cir. 2001)).

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The Supreme Court, however, "has not taken a literal approach to this language," and instead "has long recognized that Congress intended to outlaw only unreasonable restraints." Texaco, 547 U.S. at 5 (quoting State Oil Co. v. Khan, 522 U.S. 3, 10 (1997)). In assessing the reasonableness of a restraint, the Court applies either a "per se" or "rule of reason" analysis. The "Court presumptively applies rule of reason analysis, under which antitrust plaintiffs must demonstrate that a particular contract or combination is in fact unreasonable and anticompetitive before it will be found unlawful." Id. (citations omitted). "The rule of reason is to be applied 'where the economic impact of the challenged practice is not obvious.'" Int'l. Norcent, 2007 U.S. Dist. LEXIS 89946, at *20 (citing Jack Russell Terrier Network of Cal., 407 F.3d 1027, 1033 n.13 (9th Cir. 2005)). In contrast, "[p]er se liability is reserved for only those agreements that are 'so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality.'" Id. (quoting National Soc. Of Professional Engineers v. United States, 435 U.S. 679, 692 (1978)). Here, the Court concludes that, under relevant Supreme Court precedent, Plaintiff has adequately alleged a per se violation of section 1 of the Sherman Act.

Defendants argue that "there is no justification for applying the per se rule" to their conduct because the per se rule "is applied only to practices that almost invariably have no procompetitive effects and have significant anticompetitive effects—or, that have a 'pernicious effect on competition and lack . . . any redeeming virtue.'" (Mem. at 10 (quoting N. Pac. Ry. Co. v. U.S., 356 U.S. 1, 5 (1958)). They take issue with Plaintiff's reliance on Radiant Burners Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656 (1961), for its argument that Defendants committed a per se violation of section 1 by agreeing "'to eliminate or significantly reduce sales of goods and services to SPCP members from suppliers and trainers that are not approved by Defendant SPCP.'" (Mem. at 10 (quoting FAC ¶ 14).)

In Radiant Burners, the American Gas Association, Inc. ("AGA"), "a membership corporation," adopted a "'seal of approval' which [wa]s affixe[d] on such gas burners as it determine[d] ha[d] passed its tests." 364 U.S. at 658 (1961). The complaint in that case alleged that the "tests [we]re not based on 'objective standards,' but [we]re influenced by respondents, some of whom [we]re in competition with petitioner, and thus its determinations c[ould] be made 'arbitrarily and capriciously.'" Id. The district court dismissed the case for failure to state a claim and the Seventh Circuit affirmed, stating that "'[n]o boycott, conspiracy to boycott or other form of per se violation [wa]s established by the facts alleged . . . .'" Id. at 659 (citations omitted).

The Supreme Court reversed, explaining that "[t]he allegation in the complaint that 'AGA and its utility members . . . effectuate the plan and purpose of unlawful conspiracy . . . by . . .

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refusing to provide gas for use in the plaintiff's Radiant Burner[s]' because they 'are not approved by AGA' clearly shows 'one type of trade restraint and public harm the Sherman Act forbids . . . .'" Id. (citations omitted). The Court further noted that "[i]t [wa]s obvious that petitioner c[ould] not sell its gas burners, whatever may be their virtues, if, because of the alleged conspiracy, the purchasers c[ould not] buy gas for use in those burners." Id. at 659. As a result, "[t]he conspiratorial refusal 'to provide gas for use in the plaintiff's Radiant Burner[s because they] are not approved by AGA' therefore falls within one of the 'classes of restraints which from their 'nature or character' [are] unduly restrictive, and hence forbidden by both the common law and the statute.'" Id. at 659–60.

Defendants urge that the facts here are distinguishable[2] because, in Radiant Burners, the AGA standard was "set using non-objective, clearly anticompetitive measures." (Mem. at 10-11 (citing Radiant Burners, 364 U.S. 656).) In this case, Defendants insist, "Plaintiff does not allege that SPCP set forth a single non-objective standard." (Id.) Instead, Plaintiff "argues that SPCP members came together to create a standard and successfully promoted it; every standard identified in the FAC is clear and based on objective measures." (Id. (citing FAC ¶¶ 89, 101, 103, 106))

[2] Another distinction between the facts in Radiant Burners and the case here is that the Radiant Burners plaintiff applied for the AGA seal of approval, but the AGA denied its request. Radiant Burners, 364 U.S. at 658. Although Defendants do not mention this distinction in the "per se violation" section of their briefing, they do note in their introduction and their arguments regarding section 2 of the Sherman Act that Plaintiff "never even applied for membership to SPCP, claiming that such efforts would be 'pointless' and 'futile.'" (Mem. at 1 (citing FAC ¶¶ 121–23.), 22.) However, for purposes of the "per se violation" inquiry, the Court concludes that Plaintiff's decision not to apply for SPCP membership is irrelevant as it is clear that, without fundamentally altering their products and training programs, AIIG could not meet SPCP membership standards. Thus, it appears beyond dispute that, like the Radiant Burners plaintiff's application to the AGA, any application AIIG made to the SPCP would have been rejected. Defendants' insistence (in a footnote in the section of its brief devoted to the Sherman Act § 2 claims) that "[i]n a private antitrust action under § 1, a demand and refusal is prerequisite to a claim of concerted refusal to deal" does not alter the Court's conclusion. (Mem. at 22 n.15 (citing Dahl, Inc. v. Roy Cooper Co., 448 F.2d 17 (9th Cir. 1971); Cleary v. Nat'l Distillers & Chem. Corp., 505 F.2d 695 (9th Cir. 1974).) The cases Defendants cite are simply not analogous to the facts here. Dahl involved a small theater in Palo Alto that could not effectively compete with larger theaters in the area for the first run of films—the case did not involve a trade association or any allegations of improperly manipulated industry standards. Nor did the Cleary case involve a trade association or subjective industry standards. It instead involved allegations that corporations conspired to refuse to sell a hydrocarbon detection device to a particular dairy owner. The facts in those cases are essentially the inverse of the allegations here—that subjective industry standards are being abused to prevent AIIC from selling its own products. AIIC is not attempting to obtain a product unless membership in SPCP can be construed as a "product." These cases are simply not relevant to this determination and Defendants' decision to relegate them to a footnote in the last few pages of the brief further substantiates this conclusion.

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But Defendants' reading of Radiant Burners conflates two meanings of the term "objective." Although Defendants' standards may be "objective" in the sense that they are "clear," Plaintiff alleges that SPCP's standards are not "objective" because they are created by parties with an economic interest in the standards and because they are divorced from any meaningful, scientifically-justified safety standard. (See, e.g., FAC ¶¶ 75, 76, 80—83, 100, 111.) This latter definition of "objective" appears to be the one adopted by the Radiant Burners Court, which contrasted the term "objective standards" with standards "influenced by respondents, some of whom [we]re in competition with petitioner." Radiant Burners, 364 U.S. at 658. This understanding of the term "objective" is further confirmed by the Radiant Burners plaintiff's allegation that its product was "safer and more efficient than, and just as durable as, gas burners which AGA ha[d] approved.'" Id.

Here, just as in Radiant Burners, Plaintiff alleges that the "'guidelines,' standards, and [] code of ethics" promulgated by SPCP," which "ostensibly help maintain high quality and safety standards for the industry," have the "real purpose" of "stifl[ing] competition and protect[ing] itself and its approved suppliers and trainers from other competitors." (FAC ¶¶ 75, 76.) And just as the AGA's standards effectively precluded the sale of gas to the Radiant Burners plaintiff, the SPCP's "guidelines and rules have been enforced arbitrarily, capriciously, and in such a way that forecloses Plaintiff and other pigment manufacturers, distributors, and trainers from selling their products and services to SPCP's technician members." (Id. ¶ 78.)

In support of these contentions, Plaintiff points out that, despite the fact that no intradermal pigments used for permanent make-up tattoos are approved by the FDA, SPCP's "Guidelines for Pigment Manufacturers" include the statement: "It is recommended by the SPCP that inorganic or organic colorants should come from the FDA['s] FD&C and D&C listings 21-CFR-73 ad 74." (Id. ¶ 80.) Plaintiff alleges that SPCP's "Code of Ethics" contains similar references to FDA approval that are not, in fact, based on any FDA guidelines. The "Code of Ethics" promulgated in 2005, for example, included the following requirement: "Members will . . . not use any product deemed unsafe or improper by the FDA." (Id. ¶ 83.) However, Plaintiff maintains this requirement is "nonsensical and deceptive" because "[t]he FDA does not approve any pigments for proper or safe use in permanent cosmetic dispersions" and "therefore has not deemed any to be 'safe' or 'proper.'" (Id.)

Furthermore, Plaintiff alleges that the SPCP selectively enforces its guidelines. For example, although Defendants campaigned heavily against shorter technician training programs, such as those offered by Plaintiff, in reality many SPCP-approved trainers do not abide by the SPCP guidelines. "Although the Code of Ethics purportedly required at least 100 hours of

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beginner-level training, many SPCP-approved trainers actually taught only 4- to 6-day courses (i.e., 32 to 48 hours of training assuming 8-hour per day classes) for the entry-level programs." (Id. ¶ 100.)

Similarly, SPCP ostensibly maintains a "Zero Tolerance" policy for the use of stock photos of permanent makeup (as opposed to photos of an individual artist's work). Because the website template Plaintiff produces and sells to permanent cosmetic technicians contains these "stock" "before and after" photos, Defendants "have warned Plaintiff's customers that they cannot use Plaintiff's website template." (Id. ¶ 110.) But, Plaintiff alleges, SPCP "chooses to turn a blind eye when it comes to enforcing its Zero Tolerance policy against favored suppliers." (Id. ¶ 111.) For example, "Lasting Impressions and one of its distributors, Beauty Inks, published 'before and after' photos of procedures [that were actually] performed by Plaintiff," and no disclaimer accompanies the photos indicating they are not the work of Lasting Impressions or Beauty Inks. (Id.) Thus, Defendants "have enforced the Code in an arbitrary and capricious manner . . . for anticompetitive purposes." (Id. ¶ 104.)

The above represents only a sampling of the allegations in the Complaint in this case, which spans more than forty pages. This sampling alone demonstrates that, just as in Radiant Burners, Defendants allegedly have abused an industry-wide standard-setting process for the purpose of stifling competition. Accordingly, Plaintiff has adequately alleged a per se violation of section 1 of the Sherman Act.

Defendants' insistence that International Norcent, a case involving the promulgation of DVD industry standards, precludes application of the per se liability doctrine to this case is unavailing. Defendants argue that International Norcent demonstrates that "courts hold that private action of t[he] type [in this case] does not give rise to a Sherman Act claim absent proof of coercion." (Mem. at 11.) But International Norcent does not even engage in an analysis of the applicability of the "per se violation" rule because both parties agreed that, on the facts of that case, the rule of reason analysis applied. Int'l. Norcent, 2007 U.S. Dist. LEXIS 89946, at *21. Furthermore, there were no allegations in International Norcent that the DVD industry standards were completely divorced from quality-related concerns or that the standards were manipulated or abused in order to exclude competitors. In fact, the International Norcent Court distinguished Radiant Burners, along with two other Supreme Court cases, on precisely this basis:

> In each of these cases, the Court found an antitrust violation because an established industry-wide standard-setting process was abused or

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> manipulated. In each, there was an allegation that an industry standard-setting organization had been coopted by one or more members of the industry in an anti-competitive way. Norcent does not allege that the Group of 10 abused an industry-wide standard-setting process. Rather, it argues that members of the group of 10 came together to create a standard and successfully promoted it.

Id. at 27–28 n.51. Here, abuse of an industry-wide standard-setting process is precisely what Plaintiff alleges. As a result, the Court concludes that Plaintiff has adequately alleged a per se violation under section 1 and analysis of the sufficiency of its "rule of reason" allegations is therefore unnecessary.

2. PLAINTIFF HAS ADEQUATELY ALLEGED ANTITRUST INJURY

"Even in cases involving per se violations [of the Sherman Act,] the right of action under § 4 of the Clayton Act is available only to those private plaintiffs who have suffered antitrust injury." Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 344 (1990). And the Ninth Circuit has enunciated a four-part definition of antitrust injury: "(1) unlawful conduct; (2) causing an injury to the plaintiff; (3) that flows from that which makes the conduct unlawful; and (4) that is of the type the antitrust laws were intended to prevent." American Ad. Mgmt., Inc. v. General Tel. Co., 190 F.3d 1051, 1055 (9th Cir. 1999). Thus, as a practical matter, "plaintiff must show how defendant's anticompetitive conduct harms both competition *and* plaintiff." Digital Sun v. Toro Co., 2011 WL 1044502, at *4 (N.D. Cal. Mar. 22, 2011).

Defendants insist that "[p]laintiff's damages allegations are problematic because, at best, they describe hypothetical harm to Plaintiff, but not, as the Supreme Court requires, to the competitive process or consumer welfare." (Mem. at 7.)[3] Defendants maintain that, in fact, "Plaintiff concedes that its supposed injuries arise from increased, rather than reduced, competition – *i.e.*, diversion of business away from Plaintiff's products and services, and lost business and income that Plaintiff otherwise would have earned if Defendants were not in business." (Mem. at 8 (quoting FAC ¶ 69)). But a review of paragraph 69 of the FAC demonstrates that Plaintiff makes no such concession. The entirety of paragraph 69 reads

[3] Defendants argue that "[t]he second problem is that Plaintiff's own allegations make clear that, even if suffered, these purported 'injuries' would not be due to any unlawful conduct on the part of Defendants." (Mem. at 8.) As set forth in detail above, the Court has already concluded that Plaintiff has adequately alleged a per se violation of section 1 and this argument is therefore unavailing.

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> Collectively, the two Pigment Defendants control a dominant share of the market for the manufacture and sale of permanent cosmetic dispersions, and their market shares have increased significantly during the past 4 years, while the market shares of other competitors, including Plaintiff, have declined.

(FAC ¶ 69.) Thus, this paragraph of the Complaint is not a concession that competition has increased, but appears intended to demonstrate the injury suffered by Plaintiff and its competitors as a result of allegedly subjective guidelines promulgated and enforced by Defendants to aid them in stifling competition. And in addition to alleging injury to itself, Plaintiff alleges injury to other competitors and consumers of its products (many of whom are technicians) throughout the FAC. For example, Plaintiff alleges in paragraph 78 of the FAC that

> These guidelines and rules have been enforced arbitrarily, capriciously, and in such a way that forecloses Plaintiff and other pigment manufacturers, distributors, and trainers from selling their products and services to SPCP's technician members. Each of the Pigment Defendants, Distributor Defendants, and Trainer Defendants has knowingly received financial benefits, in the form of higher prices and less competition, as a result of these anticompetitive rules and guidelines; while SPCP's technician members have been harmed through fewer options and higher prices for products and services.

(FAC ¶ 78.) Thus, while the Court agrees with Defendants that "[a]n adverse effect upon *competition*, however small, is the distinguishing characteristic of restraint of trade," the FAC clearly alleges this adverse effect upon competition. (Mem. at 9.) Accordingly, because Plaintiff has adequately alleged both a per se violation of Sherman Act § 1 and antitrust injury, Defendants' motion to dismiss is **DENIED with respect to the section 1 claims**.

3. PLAINTIFF HAS FAILED TO ADEQUATELY ALLEGE ITS CLAIMS UNDER SECTION 2 OF THE SHERMAN ACT

"To establish a Sherman Act § 2 violation for attempted monopolization, a private plaintiff seeking damages must demonstrate four elements: (1) specific intent to control prices or destroy competition; (2) predatory or anticompetitive conduct directed at accomplishing that purpose; (3) a dangerous probability of 'achieving monopoly power;' and (4) causal antitrust injury." Rebel Oil Co., Inc. v. Atlantic Richfield Co., 51 F.3d 1421, 1432 (9th Cir. 1995) (citing McGlinchy v. Shell Chem Co., 845 F.2d 802, 811 (9th Cir. 1988).

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Here, Plaintiff's section 2 claim fails for the simple reason that "[t]o pose a threat of monopolization, *one firm alone* must have the power to control market output and exclude competition." Rebel Oil Co., 51 F.3d at 1443 (9th Cir. 1995) (emphasis added); see also Midwest Gas Servs. Inc. v. Indiana Gas Co., 317 F.3d 703, 713 (7th Cir. 2003) (dismissing monopolization claim because "a § 2 claim can only accuse one firm of being a monopolist, but the plaintiff's monopoly maintenance claim involves both [Indiana Gas Co.]'s monopoly over the sale of gas and its distribution within its territory via ProLiance," a separate entity). In its Opposition, Plaintiff cites a number of cases demonstrating it need not have precise data as to market share or other monopolization factors to make out its case, see, e.g., Broadcom Corp. v. Qualcomm, Inc., 501 F.3d 297, 317 (3rd Cir. 2007), but offers no authority contrary to Rebel Oil that permits a section 2 monopolization claim against many firms simultaneously in this fashion. (Opp. at 16.)

The Court therefore finds persuasive Defendant's argument that Plaintiff's section 2 claim fails because it "has not alleged that a given Defendant (not all of them collectively) has a dangerous probability of achieving monopoly power." (Reply at 8.) "Instead, Plaintiff equally asserts monopolization claims against all Defendants, each with varying businesses and industry clout." (Id.) Accordingly, Plaintiff has failed to adequately allege its section 2 claim and Defendants' motion is therefore **GRANTED with respect to this claim**. Plaintiff's section 2 claim is therefore **DISMISSED with leave to amend**.[4]

4. PLAINTIFF HAS NOT DEMONSTRATED THIS COURT'S JURISDICTION OVER INDIVIDUAL DEFENDANTS CIAMPI, FINCH-HOWELL, AND SIMS

Finally, Defendants urge dismissal of the claims against individual defendants Ciampi, Finch-Howell, and Sims because they are "out-of-state individuals who reside and operate businesses in Illinois, Pennsylvania, and Alaska, respectively." (Mem. at 23.) They insist that although the Clayton Act "confers personal jurisdiction over *corporate* defendants to antitrust claims, [] an analysis of whether an *individual* defendant is subject to the jurisdiction of a particular federal court is determined by the laws of the forum state." Id. (citing Action Embroidery Corp. v. Atl. Embroidery, Inc., 368 F.3d 1174, 1179–80 (9th Cir. 2004))

[4] Defendants also request, in only two sentences at the end of their brief, that Plaintiff's claims for injunctive relief under the Sherman Act be dismissed because "[a]s stated above, Plaintiff has failed to allege facts to establish a valid conspiracy in restraint of trade to support its § 1 claim, or a single element of § 2 monopolization claim." (Mem. at 23.) Because the Court concludes that the monopolization claim should be dismissed, Plaintiff's claims for injunctive relief pursuant to section 2 is also **DISMISSED with leave to amend.** However, Plaintiff may pursue its injunctive relief claims under section 1 of the Sherman Act.

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Plaintiff does not assert that Ciampi, Finch-Howell, and Sims are subject to general jurisdiction. (Opp. at 19.) The Court's analysis is therefore limited to the exercise of specific jurisdiction. As set forth above, under Schwarzenegger, the plaintiff bears the burden of satisfying the "purposeful availment" and "relatedness" prongs. And here, the Court concludes that with respect to Schwarzenegger's "purposeful availment" prong, Plaintiff has not met its burden. The overarching question in assessing "purposeful availment" is whether "the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." World-Wide Volkswagon Corp. v. Woodson, 444 U.S. 286, 297 (1980). The defendant must engage in some form of affirmative conduct allowing or promoting the transaction of business within the forum state. (Wolf Designs, Inc. v. DHR Co., 322 F. Supp. 2d 1065, 1070 (C.D. Cal. 2004)).

Plaintiff argues that Ciampi, Finch-Howell, and Sims purposefully availed themselves of this forum because they are "officers or directors" of SPCP, a California corporation, and attended a 2005 SPCP convention in California. (Opp. at 20–21 (citing ZW Global, Inc. v. Snow, 2011 U.S. Dist. LEXIS 46917, *6 (D. Nev. Apr. 27, 2011).) Furthermore, should the Court conclude that the jurisdictional allegations are deficient with respect to these three individual defendants, Plaintiff requests that it be permitted to conduct jurisdictional discovery—specifically, it requests depositions of Ciampi, Finch-Howell, and Sims. (Id.)

The Defendant's status as officers or directors of SPCP will not support the exercise of jurisdiction. ZW Global, Inc., 2011 U.S. Dist. LEXIS 46917 at *6 citing Davis v. Metro Prods., Inc., 885 F.2d 515, 522 (9th Cir. 1989).) More specifically, "[u]nder the fiduciary shield doctrine, a person's mere association with a corporation that causes injury in the forum state is not sufficient in itself to permit that forum to assert jurisdiction over the person." Davis, 885 F.2d at 520 (citing Weller v. Cromwell Oil Co., 504 F.2d 927 (6th Cir. 1974)). However, the fiduciary shield doctrine does not apply if (1) the corporation is the alter ego of the individual, or (2) the individual is the "'guiding spirit' behind the wrongful conduct . . . or the 'central figure' in the challenged corporate activity." Davis, 885 F.2d at 524 n.10 (internal quotations and citation omitted). To be the "guiding spirit" or "central figure" in a challenged corporate activity, the defendant must have "personal[ly] direct[ed] . . . the allegedly unlawful activities." Fasugbe v. Willms, No. 10-2320, 2011 WL 3667440, at *4 (C.D. Cal. Aug. 22, 2011) (rejecting personal jurisdiction over the CEO of an allegedly fraudulent website, where the complaint alleged, in conclusory fashion, that he made all final decisions with regard to the site's operation).

Nowhere does Plaintiff allege that Ciampi, Finch-Howell, or Sims are alter-egos of SPCP. Nor does Plaintiff allege that these individuals were the "central figures" or "guiding spirits"

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behind the allegedly wrongful conduct. On the basis of the facts presented by Plaintiff, therefore, the fiduciary shield doctrine bars imputation of SPCP's contacts with California to the Individual Defendants. And the Individual Defendants' contacts independent of their status as directors or board members of SPCP are insufficient to support the exercise of personal jurisdiction over them. Plaintiff alleges only one instance of the Individual Defendants' travel to California—the 2005 San Diego convention. Furthermore, only one small link in the alleged chain of the conspiracy to restrain trade occurred at this meeting—"SPCP voted into effect its 'Guidelines for Pigment Manufacturers'" (FAC ¶ 80)—and Plaintiff does not allege whether the individual defendants voted for the guidelines. The allegations merely state that "[e]ach of the Defendants attended and participated in this annual convention in San Diego." (Id.) Without more, these allegations are insufficient to permit the exercise of personal jurisdiction over Ciampi, Finch-Howell, or Sims. Defendants' motion to dismiss Ciampi, Finch-Howell, and Sims pursuant to Rule 12(b)(2) is therefore **GRANTED**.

The Court further concludes that Plaintiff's request for jurisdictional discovery should be **DENIED.** Plaintiff has already presented the Court with the Individual Defendants' forum-related contacts that arise out of its involvement with SPCP and they have been found insufficient for personal jurisdiction purposes. Further discovery would likely only reveal contacts unrelated to this dispute and thus, if insufficient to permit general jurisdiction, would fail under Schwarzenegger's "relatedness" prong. Plaintiff's claims against Ciampi, Finch-Howell, and Sims are therefore **DISMISSED**, but Plaintiff is granted **leave to amend** should it wish to further address the "guiding spirit" or "central figure" standard.

IV.
CONCLUSION

Defendants' motion to dismiss pursuant to Rule 12(b)(6) is **DENIED** with respect to Plaintiff's claims under the Sherman Act § 1. However, the motion is **GRANTED** with respect to Plaintiff's Sherman Act § 2 claims and those claims are therefore **DISMISSED with leave to amend**. Accordingly, Plaintiff's injunctive relief request arising out of the § 2 claim is also **DISMISSED with leave to amend**. Finally, Defendants' motion to dismiss Individual Defendants Ciampi, Finch-Howell, and Sims pursuant to Rule 12(b)(2) is **GRANTED**. The claims against Ciampi, Finch-Howell, and Sims are therefore **DISMISSED with leave to amend**.