IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

INKIES SPORTS, INC., on behalf of itself and all others similarly situated,

Plaintiff,

v.

FACEBOOK, INC., ADSAGE CORPORATION, DHGATE.COM, and DOE DEFENDANTS 1-100,

Defendants.

No. 12-cv-01095 WJ-RHS

MEMORANDUM IN SUPPORT OF DEFENDANT ADSAGE CORPORATION'S MOTION TO DISMISS PURSUANT TO FED. R. CIV. P. 12(b)(6)

Defendant adSage Corporation ("adSage") submits the following memorandum in support of its motion pursuant to Fed. R. Civ. P. 12(b)(6) to dismiss all claims asserted against it by Plaintiff Inkies Sports, Inc. ("Plaintiff") in the First Amended Class Action Complaint (Dkt. No. 3) ("Complaint").

I. INTRODUCTION

This case concerns alleged false advertising on Facebook by counterfeiters of licensed NFL merchandise. The First Amended Complaint ("Complaint") names a large number of defendants, alleging they are each somehow involved in the alleged counterfeiting scheme. One of those defendants is adSage Corporation ("adSage"), a Washington State corporation.

Plaintiff does not claim adSage sells counterfeit merchandise (which it does not), or that it makes or ships counterfeit goods (it does not). The Complaint identifies a number of specific advertisements for counterfeit goods, and several websites run by alleged counterfeiters. But it does not allege adSage placed any of those advertisements (it did not), or that it put them next to

Plaintiff's Facebook page (it did not), or identify any connection between adSage and the alleged counterfeit websites in the Complaint (there is none).

Rather, adSage simply created a software product that companies and individuals can download and use – without adSage's participation or assistance – to place their own advertisements on Google, Facebook, or other websites. In creating and distributing a product that is used by other companies to post their own advertisements, adSage does not create or use the advertisements any more than the suppliers of other products and services used by the advertiser, such as the supplier of the advertiser's operating system, the supplier of the hardware used to create the ad, or the supplier of the advertiser's internet service.

Even from the sparsely-pled facts in the Complaint, it is apparent that Plaintiff did not, and cannot, state a claim against adSage as a matter of law. Plaintiff does not plead adSage is its competitor, but under controlling Tenth Circuit law, only a competitor has standing to bring a Lanham Act false advertising claim (Plaintiff's First Cause of Action). Similarly, Plaintiff is a seller of goods, not a consumer of adSage's products or services, and therefore lacks standing to bring a New Mexico Unfair Practices Act claim against adSage (Plaintiff's Second Cause of Action). Moreover, the Complaint spans 54 pages and 83 paragraphs of allegations, but only a handful of those paragraphs even mention adSage. And, only a tiny fraction of those paragraphs allege any wrongdoing by adSage – and then do so only in the most conclusory of terms that are plainly insufficient under the *Twombly/Iqbal* standards applied by the Tenth Circuit and under Fed. R. Civ. P. 9(b).

Plaintiff did not state a claim against adSage and cannot do so. All claims against adSage should be dismissed.

II. STATEMENT OF FACTS

This case concerns advertisements of alleged counterfeit NFL merchandise on Facebook. Plaintiff is an Albuquerque retailer that sells officially licensed NFL merchandise and "maintains a Facebook page in order to update its customers about new merchandise, promotions and community/store events." Compl. at ¶ 3. Plaintiff claims advertisements for counterfeit

merchandise "are regularly displayed on [its] Facebook page." *Id.* The "counterfeit merchandise" is merchandise that is not "officially licensed" and may suffer from defects like "incorrect stitching, the absence of an authentic hologram . . . and other tell-tale signs of counterfeiting." *Id.* at ¶¶ 2, 6. Plaintiff alleges that it and other legitimate retailers are harmed by the advertisements for counterfeit merchandise because "they must lower their prices" to compete with the counterfeit goods that are often sold at reduced prices. *Id.* at ¶ 57. Plaintiff also alleges it is harmed because consumers may conclude that Plaintiff offers "the same fake merchandise" as the counterfeiters who advertise in close proximity to Inkies's online postings. *Id.*at ¶ 58.

The Complaint names three specific defendants (Facebook, adSage, and DHgate.com), along with 100 unidentified "Doe" Defendants – apparently, the alleged counterfeiters – who were "in some way responsible for, participated in, or contributed to the matter and things of which Plaintiff complains herein, and in some form and under some theory [are] subject to liability therefore." *Id.*at ¶¶ 11-15. Yet instead of focusing on the alleged counterfeiters, the allegations in the Complaint focus primarily on Facebook. *Id.* at ¶¶ 26-58. Plaintiff does not claim Facebook took any active role in creating the alleged counterfeit ads, but rather that Facebook is liable because it published the ads on its website and "has failed to take any measures to curb or stop the placement of fraudulent or illegal ads on its website." *Id.* at ¶ 38. The Complaint includes screen shots of particular alleged counterfeit ads on Facebook and identifies specific websites that allegedly "placed Sponsored advertisements on Facebook and have been selling counterfeit NFL merchandise to Facebook customers." *See id.* at Fig. 1, Fig. 2, ¶ 35. Additionally, Plaintiff cites news articles discussing Facebook and counterfeit ads. *Id.* at ¶¶ 37, 40. None of the screen shots from Facebook are alleged to be connected to adSage. None of the specific websites listed in the Complaint are alleged to belong to adSage, or be connected to it in any way. For every specific example of alleged counterfeiting alleged in the Complaint, not a single one is claimed to come from adSage.

The Complaint also alleges that Defendant DHgate.com is a "retailer of counterfeit NFL merchandise" and includes screen shots showing advertisements for "cheap, unlicensed NFL jerseys" on DHgate.com's website and on its Facebook page. *See* Compl. at ¶¶ 64, 65, Fig. 14, Fig. 15. As with Facebook, none of the DHgate.com screen shots show advertisements claimed to be connected to adSage, and none of the alleged counterfeiting by DHgate.com detailed in the Complaint is alleged to come from, or be connected to, adSage.

The Complaint alleges Plaintiff's counsel made a "controlled purchase" of counterfeit NFL goods following links in advertisements placed next to Plaintiff's Facebook page. *Id.* at ¶ 48. Yet the Complaint does not claim that "controlled purchase" was made from a website operated by or connected to adSage; that adSage made, supplied or shipped the counterfeit merchandise; that adSage received the proceeds of the sale; that adSage placed the ad clicked by Plaintiff's counsel; or that adSage had anything at all to do with that advertisement or transaction. *Id.* at ¶¶ 48-51.

Plaintiff's allegations against adSage are different than those against the other defendants. Unlike DHgate.com, who is a retailer alleged to be actually selling counterfeit merchandise, or the Doe defendants, who are the alleged counterfeiters, or Facebook, who is alleged to be posting advertisements, adSage is alleged to "develop[ ] tools and applications for paid advertising through websites such as Facebook and Google." *Id.* at ¶ 12.[1] Plaintiff's claims against adSage apparently are based on the belief that certain technological tools or applications (computer programs) developed by adSage are being purchased and used by counterfeit advertisers. But instead of being based on specific instances, or concrete facts, those claims rest on the vague "information and belief" that adSage, "in association with various Doe Defendants, is

[1] Although not germane to this Motion, Plaintiff's claims against adSage have a fundamental flaw: the defendant Plaintiff sued is a Washington State corporation entirely separate from the Chinese entity discussed in the Complaint. Defendant adSage merely re-sells some of that entity's products and focuses on customers outside of China, primarily in the United States and Europe. Put simply, Plaintiff sued the wrong company.

responsible for the creation, hosting, posting and funding of the counterfeit ads running on Facebook." *See, e.g., id.*at ¶ 60.

Nothing in the Complaint identifies a single instance of counterfeiting that adSage allegedly participated in or alleges any plausible connection between adSage and claimed counterfeiters, much less describes any specific advertisements adSage allegedly created or posted, the dates and locations of such advertisements, or other information that would state a claim or give adSage adequate notice of its alleged wrongful conduct. Rather, Plaintiff attempts to infer a connection between adSage and alleged counterfeiters from general facts and coincidences, e.g., that adSage uses the same web hosting company as some counterfeit websites or that a part of its business relates to Facebook advertising.

Despite that lack of any specifically identifiable connection, Plaintiff nevertheless asserts two claims against adSage on behalf of itself and a class comprised of retail sellers of NFL licensed merchandise who have maintained a presence on Facebook since at least January 1, 2011: (1) a claim of unfair competition under the Lanham Act, 15 U.S.C. § 1125(a), and (2) a claim for unfair and deceptive trade practices under the New Mexico Unfair Practices Act ("UPA"), N.M. Stat. Ann. § 57-12-1 et seq.

III. ARGUMENT

Plaintiff asserts claims under the UPA and the Lanham Act. The UPA requires Plaintiff to be a consumer. The Complaint does not allege Plaintiff is a consumer. Similarly, the Lanham Act requires Plaintiff to be a competitor. None of the allegations state that Plaintiff competes with adSage. And, Plaintiff's skeletal pleading of facts and conclusory legal allegations against adSage fall far short of meeting controlling pleading requirements. Plaintiff did not state a claim as a matter of law, and cannot do so. Its claims against adSage should be dismissed.

A. Fed. R. Civil P. 12(b)(6) Standard of Review

A plaintiff's complaint should be dismissed if it fails to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). The Supreme Court recently clarified that to withstand a motion to dismiss under Fed. R. Civil P. 12(b)(6), a complaint must "contain sufficient factual

matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 1949 (2009) (*quoting Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)); *see also Ridge at Red Hawk, LLC v. Schneider*, 493 F.3d 1174, 1177 (10th Cir. 2007); *Gee v. Pacheco*, 627 F.3d 1178, 1184 (10th Cir. 2010). Broadly stated, a plaintiff must plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. 662, 129 S. Ct. at 1949. "

Two working principles underlie the *Iqbal*/*Twombly* standard. *Kansas Penn Gaming, LLC v. Collins*, 656 F.3d 1210, 1214 (10th Cir. 2011). "First, 'the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions.'" *Id.* (*quoting Iqbal*, 556 U.S. 662, 129 S.Ct. at 1949). "[M]ere 'labels and conclusions,' and 'a formulaic recitation of the elements of a cause of action' will not suffice; a plaintiff must offer specific factual allegations to support each claim." *Id.* (*quoting Twombly*, 550 U.S. at 555, 127 S. Ct. 1955). Thus, while factual allegations are generally taken as true and construed in the light most favorable to the non-moving party, the Court need not accept conclusory allegations, legal conclusions, unwarranted deductions of fact or unreasonable inferences. *See Bixler v. Foster*, 596 F.3d 751, 756 (10th Cir. 2010) (*quoting Iqbal*, 556 U.S. 662, 129 S. Ct. at 1949) ("[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice."); *Cory v. Allstate Ins.*, 583 F.3d 1240, 1244 (10th Cir. 2009) ("[C]onclusory allegations without supporting factual averments are insufficient to state a claim on which relief can be based." (quotation omitted)); *Carpenter v. New Mexico*, No. CV 10-112 JB/WDS, 2010 WL 2292890, *5 (D.N.M. May 26, 2010) ("The court is not required to accept the conclusions of law or asserted application of law to the alleged facts. Nor is the Court required to accept as true legal conclusions that are presented as factual allegations.") (citations omitted).

The second principle is that "'only a complaint that states a plausible claim for relief survives a motion to dismiss.'" *Kansas Penn*, 656 F.3d at 1214 (quoting *Iqbal*, 556 U.S. 662,

129 S. Ct. at 1950). The Supreme Court explained that "[d]etermining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 556 U.S. 662, 129 S. Ct. at 1950. Under the plausibility standard, a plaintiff must offer sufficient factual content to "raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555, 127 S. Ct. 1955. It is not enough for a plaintiff to plead facts that are "'merely consistent with'" liability or merely create the "sheer possibility that a defendant has acted unlawfully." *Iqbal*, 556 U.S. 662, 129 S. Ct. at 1949 (quotations omitted). Allegations that are so general they encompass a wide swath of conduct, much of it innocent, do not satisfy the plausibility requirement. *Kansas Penn*, 656 F.3d at 1215; *see also Ridge at Red Hawk*, 493 F.3d at 1177 ("The [Supreme] Court explained that a plaintiff must 'nudge his claims across the line from conceivable to plausible' in order to survive a motion to dismiss. Thus, the mere metaphysical possibility that *some* plaintiff could prove *some* set of facts in support of the pleaded claims is insufficient; the complaint must give the court reason to believe that *this* plaintiff has a reasonable likelihood of mustering factual support for *these* claims.") (quoting *Twombly*, 127 S. Ct. at 1974) (emphasis in original).

B. Plaintiff Cannot State a Claim Under the Unfair Practices Act.

Plaintiff has no standing to assert a New Mexico Unfair Practices Act (UPA) claim against adSage because Plaintiff is a seller of NFL merchandise, not a consumer. A UPA claim has three required elements: (1) the defendant made an oral or written statement, a visual description or a representation of any kind that was either false or misleading; (2) the false or misleading representation was knowingly made in connection with the sale, lease, rental, or loan of goods or services in the regular course of the defendant's business; and (3) the representation was of the type that may, tends to, or does deceive or mislead any person. *Lohman v. Daimler-Chrysler Corp.*, 142 N.M. 437, 166 P.3d 1091, 1093 (N.M. App. 2007), *cert. denied*, 142 N.M. 434, 166 P.3d 1088 (2007).

It is well-established only consumers have standing to assert UPA claims, because only consumers can establish the second element. As the New Mexico Court of Appeals recently explained:

> While we agree that *Lohman* does not require a transaction between a claimant and a defendant, *Lohman* does stand for the proposition that the plaintiff must have sought or acquired goods or services and the defendant must have provided goods or services. We understand this to mean that the plaintiff does not necessarily have to purchase the product from the defendant, but that somewhere along the purchasing chain, the claimant did purchase an item that was at some point sold by the defendant. Although Hicks contacted Eller to acquire his services as an art appraiser, those services were never purchased, and the transaction that is the subject of the suit relates to Hicks' sale of the Duntons and Eller's purchase of the paintings. Consistent with its purpose as consumer protection legislation, the UPA gives standing only to buyers of goods and services. *See Santa Fe Custom Shutters & Doors, Inc. v. Home Depot U.S.A., Inc*., 2005-NMCA-051, ¶ 17, 137 N.M. 524, 113 P.3d 347 ("However, the [L]egislature has not chosen to treat sellers and buyers identically under the UPA."). Because Hicks never purchased anything from Eller or an intermediary of Eller, she has no UPA claim against him.

Hicks v. Eller, 280 P.3d 304, 309 (N.M. App. 2012), *cert. denied*, --- P.3d ----, 2012-NMCERT-5 (N.M. May 8, 2012). *See also Guidance Endodontics, LLC v. Dentsply Int'l, Inc.*, 708 F. Supp. 2d 1209, 1256-57 (D.N.M. 2010) (seller of endodontic equipment lacked standing to assert UPA counterclaim; "The Court . . . finds that a UPA claim may only be based on unfair practices in connection with the sale of goods or services—thus that it must be brought by a purchaser, not a seller."); *Santa Fe Custom Shutters & Doors, Inc. v. Home Depot U.S.A., Inc.*, 137 N.M. 524, 529-30, 113 P.3d 347, 352-53 (N.M. App. 2005) (plaintiff shutter manufacturer lacked standing to assert UPA claim; the UPA "contemplates a plaintiff who seeks or acquires goods or services and a defendant who provides goods or services" and thereby "gives standing only to buyers of goods or services."), *cert. denied*, 137 N.M. 522, 113 P.3d 345 (2005); *and see Mac Towing, Inc. v. Dunlar Collision Inc.*, No. 12-CV-487 WJ/LFG, Mem. Opinion & Order Granting Defendants' Motion to Dismiss Plaintiff's Claim for Violations of the New Mexico Unfair Practices Act Due

to Lack of Subject Matter Jurisdiction, at *3-4 (D.N.M Oct. 26, 2012) (Dkt. #47) (plaintiff towing company lacked standing to assert UPA claim; "Like the plaintiffs in *Guidance Endodontics* and *Hicks*, Plaintiff lacks standing to sue Defendants under the UPA because Plaintiff is not in the category of entities to be protected by consumer legislation, and therefore does not have any claim for relief through the UPA.").

Courts have consistently applied that rule to dismiss for lack of standing UPA claims brought by sellers of goods or services. *Cf. Guidance Endodontics*, 708 F. Supp. 2d at 1257 (holding that seller of endodontic equipment lacked UPA standing to sue "the entity to which it was supplying its product"); *Hicks*, 280 P.3d at 309 (holding that seller of paintings lacked UPA standing because the "transaction that is the subject of the suit relates to [plaintiff's] sale of the [paintings] and [defendant's] purchase of the paintings"); *Santa Fe Custom Shutters*, 137 N.M. at 529-30, 113 P.3d at 352-53 (holding that shutter manufacturer lacked UPA standing because it was a supplier or seller of shutters to the defendant and the defendant's activities in marketing plaintiff's shutters and installation services to defendant's own customers was not a sale of marketing services to plaintiff for purposes of Section 57–12–2(D)); *Mac Towing*, No. 12-CV-487 WJ/LFG, Mem. Opinion & Order Granting Defendants' Motion to Dismiss Plaintiff's Claim for Violations of the New Mexico Unfair Practices Act Due to Lack of Subject Matter Jurisdiction at *1, 3-4 (D.N.M Oct. 26, 2012) (Dkt. #47) (holding that towing company lacked UPA standing where it alleged that defendants had registered domain names so that they could redirect plaintiff's customers to the websites of the defendants).

Plaintiff is a seller, not a consumer of goods or services. The Complaint does not allege Plaintiff ever purchased any goods or services sold by adSage, or that there is any consumer relationship between the two companies. Rather, the Complaint claims Plaintiff was harmed as a seller because adSage allegedly helped other sellers at Plaintiff's expense. Compl. at ¶¶ 81-83; *see also id.* at ¶¶ 53, 57 (alleging competitive injury and injury to Plaintiff's business). Plaintiff therefore lacks standing to bring a UPA claim against adSage, just like the plaintiffs in *Guidance Endodontics*, *Hicks*, *Santa Fe Custom Shutters*, and *Mac Towing*. *See also Guidance*

Endodontics, 708 F. Supp. 2d at 1256 ("[T]he very nature of the legislation at issue, to protect consumers, implies that only a consumer should be able to take advantage of [the UPA's] protections.").

C. Plaintiff Cannot State a Lanham Act False Advertising Claim.

The Complaint alleges all defendants are liable under the Lanham Act, 15 U.S.C. § 1125(a), because defendants "made false and misleading statements in advertisements, promoting counterfeit merchandise purporting to be officially licensed by the NFL and other trademark holders," in commerce, which "have actually deceived or have the capacity to deceive consumers in the United States who use Facebook's website." Compl. at ¶¶ 70, 72.

Plaintiff and adSage are not competitors. Under controlling Tenth Circuit law, a plaintiff "must be a competitor of the defendant and allege a competitive injury" to have standing for a false advertising claim under the Lanham Act. *Stanfield v. Osborne Indus., Inc.*, 52 F.3d 867, 873 (10th Cir. 1995), *cert. denied*, 516 U.S. 920, 116 S. Ct. 314 (1995). As the Circuit explained in *Stanfield*, "[a] false advertising claim implicates the Lanham Act's purpose of preventing unfair competition. *See* 15 U.S.C. § 1127. Thus, to have standing for a false advertising claim, the plaintiff must be a competitor of the defendant and allege a competitive injury." *Id.*, citing *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1109 (9th Cir. 1992).

Accordingly, courts have consistently dismissed Lanham Act false advertising claims where defendants did not compete with the plaintiff. *See Stanfield*, 52 F.3d at 873 (dismissing false advertising claim because, although defendant developed the heating pad that was alleged to have been falsely advertised, he did not sell it, and therefore was not a competitor of plaintiff); *Two Moms and a Toy, LLC v. Int'l Playthings, LLC*, No. 10–cv–02271–PAB–BNB, --- F. Supp. 2d ----, 2012 WL 4510686, at *4 (D. Colo. Sept. 30, 2012) (dismissing Lanham Act false advertising claim by patent owners against retailer who allegedly sold infringing products because plaintiffs conceded that they did not engage in the sale of toys); *US West, Inc. v. Business Discount Plan, Inc.*, 196 F.R.D. 576, 590 (D. Colo. 2000) (finding that a telephone

company lacked standing to a bring false advertising claim under the Lanham Act against a telemarketer and a verification services company as they were not competitors of the telephone company); *see also L.S. Heath & Son, Inc. v. AT & T Information Sys., Inc.*, 9 F.3d 561, 575 (7th Cir. 1993) (applying same rule in Seventh Circuit and dismissing false advertising claim because plaintiff was a manufacturer of chocolate products and "thus is not a competitor of AT & T"); *Peviani v. Hostess Brands, Inc.*, 750 F. Supp. 2d 1111, 1120 (C.D. Cal. 2010) (applying same rule in Ninth Circuit and dismissing Lanham Act false advertising claim because plaintiff was a consumer, not a competitor); *Bernard v. Donat*, No. 11–cv–03414–RMW, 2012 WL 525533, at *2 (N.D. Cal. Feb. 16, 2012) (dismissing Lanham Act claim because plaintiff failed to allege "that plaintiff and defendant are commercial competitors").

The Complaint does not allege Plaintiff and adSage are competitors, nor could they reasonably be construed to be. *See, e.g., Peviani*, 750 F. Supp. 2d at 1120 (parties are competitors within the meaning of the Lanham Act if they "vie for the same dollars from the same consumer group.") (quotation omitted); *Brosnan v. Tradeline Solutions, Inc.*, 681 F. Supp. 2d 1094, 1101 (N.D. Cal. 2010) (defining "competitors" as "[p]ersons endeavoring to do the same thing and each offering to perform the act, furnish the merchandise, or render the service better or cheaper than his rival"; parties were not competitors when plaintiff's "Apex Credit Repair" business offered services such as correcting information on credit reports or finding mortgage lenders while defendants' business only provided credit piggybacking, which improves a person's credit); *Fuller Bros., Inc. v. Int'l Marketing, Inc.*, 870 F. Supp. 299, 303 (D. Or. 1994) (parties were not competitors where plaintiff manufactured a liquid formula to extend the life of tires while defendant manufactured a dry tire formula that did not perform the same function).

The Complaint describes Plaintiff as "a retail seller of officially licensed NFL merchandise." *Id.* at ¶ 10. By contrast, the Complaint describes adSage as "an online advertising business . . . [that] develops tools and applications for paid advertising" and implements "many data mining projects and software packages for over 3,000 Chinese customers." *Id.* at ¶ 12. Plaintiff and adSage do not "vie for the same dollars from the same

consumer group" because they operate in vastly different industries. *Brosnan*, 681 F. Supp. 2d at 1100.[2] Accordingly, the parties are not competitors and Plaintiff's false advertising Lanham Act claim fails as a matter of law.

D. Plaintiff's Allegations Are Also Patently Insufficient to State a Claim Under the Governing Pleading Standards.

The sparse allegations against adSage in the Complaint fall far short of meeting the pleading requirements set forth by the Supreme Court in *Twombly/Iqbal*, as applied in this Circuit. Nor do they meet the heightened pleading requirements of Rule 9(b), as required for Plaintiff's Lanham Act claim.

1. Plaintiff's Allegations Against adSage Do Not Satisfy the *Iqbal/Twombly* Pleading Requirements.

Plaintiff's Lanham Act claim groups together all defendants (including the Doe defendants who are apparently the alleged counterfeiters), alleging without any differentiation that defendants "play a critical role in misleading consumers with . . . false advertisements by facilitating, promoting, and/or causing the placement of the false advertisements on the Facebook pages of businesses selling authentic, NFL-licensed merchandise as well as placing the false advertisements adjacent to photos and text depicting or referencing authentic NFL merchandise." Compl., at ¶ 71. Plaintiff similarly lumps all defendants together, and invokes similar conclusory language, in describing its UPA claim, alleging (again without differentiation) that all defendants' "actions of marketing, advertising and selling counterfeit goods as officially licensed NFL merchandise fit within the definitions and scope of the NMUPA, and thereby violate the statute." *Id.* at ¶ 81.

---

[2] Even if adSage had provided advertising support to Plaintiff's competitors – and there are no specific facts pled in the Complaint that would render such a conclusion plausible or likely – that would still not render adSage a "competitor" within the meaning of the Lanham Act, because adSage does not "directly sell, produce, or otherwise compete" in the plaintiff's market. *Jurin v. Google Inc.*, 695 F. Supp. 2d 1117, 1122 (E.D. Cal. 2010) (rejecting argument that, because it provided advertising support to companies in defendant's industry, Google was a competitor of a supplier of building materials).

The Complaint never specifies adSage's role in such alleged wrongs, or pleads specific facts (as required under *Twombly* and *Iqbal*) to establish it was even involved in such conduct. Rather, the Complaint rests on the "information and belief" that adSage, "in association with various Doe Defendants, is responsible for the creation, hosting, posting and funding of the counterfeit ads running on Facebook." *See, e.g.*, Compl. at ¶ 60. The "information" is not identified in the Complaint, and no specific facts are pled to establish a reasonable basis for such a belief.

Instead, the Complaint relies on purely circumstantial "evidence" that establishes, at most, when viewed in a light most favorable to Plaintiff, that adSage had the *opportunity* to participate in the alleged wrongdoing – but does not reasonably or plausibly lead to such a conclusion. For example, the Complaint alleges adSage "develops tools and applications for paid advertising through websites such as Facebook and Google" (Compl. at ¶ 12), but so do many other companies and independent developers. The broad-stroke claim that adSage makes advertising-related software does not in any way lead to a reasonable inference of participation in the wrongs alleged in the complaint. Similarly, the Complaint alleges that adSage's Chinese website "resides on the servers" of a company that "serves as the registrar and administrator for a number of counterfeiters' websites," (Compl. at ¶ 63) but does not pleads facts that make it plausible adSage's use of the same internet service as certain potential counterfeiters is anything more than coincidence or innocent activity.[3] Nor do allegations adSage has Chinese customers and the counterfeiters are located in China – a country of over one billion people and millions of businesses – create a reasonable inference of wrongdoing.

The Complaint also alleges adSage is "link[ed]" to DHgate.com by a reference to adSage in a newspaper article that refers to DHgate.com as another entity that does business connected

[3] By way of analogy, the United States' company goDaddy.com provides internet services similar to HiChina to millions of entities that have no relationship to one another. *See* About Go Daddy, godaddy.com, http://www.godaddy.com/newscenter/about-godaddy.aspx?ci=9079 (last visited Dec. 13, 2012) (stating that it hosts secure websites for more than 10.7 million customers).

to Facebook, stating: "Joining adSage in recognizing the benefits of doing business on Facebook is DHGate…" *Id.* at ¶ 64. But neither the quoted article nor the Complaint alleges any actual connection between the two companies, other than the statement in the article that both companies "recogniz[e] the benefits of doing business on Facebook." Similarly, the Complaint purports to quote a newspaper article (translated from Chinese by Plaintiff in what appears to be a mistranslation) that refers to adSage as "Facebook's only 'official partner' in China" and states it has helped Chinese advertisers "open[] accounts" on "Facebook's advertising network," and another newspaper article saying adSage helps firms in mainland China "open Facebook accounts" and offers them "guidance on managing advertising campaigns on the networking site," Compl. at ¶¶ 61, 62.[4] Aside from the fact Plaintiff's claim of "official partnership" is incorrect, the issue is not whether adSage does business in China or with Facebook, but rather whether, even if true, such an allegation reasonably leads to the inference adSage committed the wrongs in the Complaint. At most, a link between Facebook and adSage could establish opportunity for adSage to participate in placing advertisements on Facebook – but does not make it likely, or even plausible, adSage placed the ads alleged in the Complaint.

Conclusory allegations or sweeping factual assertions – like those against adSage in the Complaint – are not enough to state a claim under controlling pleading standards. Rather, Plaintiff's claims must be supported by specific factual allegations stating a claim "that is plausible on its face." *Iqbal,* 129 S. Ct. at 1949. The Complaint does not make specific factual allegations showing adSage was involved in or responsible for the wrongful conduct pled in the Complaint. Nowhere does it plead adSage created any of the specific ads featured in the Complaint, or plead specific facts giving reason to believe adSage is actually connected to the alleged counterfeiters. Moreover, the facts pled in the Complaint do not allow for a reasonable

[4] Plaintiff cites a February 3, 2012 article from an Asian newspaper, originally written in Chinese and translated into English, as the source of that statement. Aside from the fact adSage does not hold itself out as "Facebook's only 'official partner' in China" (and is not), the quotation Plaintiff relies on is a mistranslation.

inference adSage made specific false and misleading statements in advertisements, or placed the advertisements in interstate commerce, as required to state claims under the Lanham Act and UPA. That is insufficient, for reasons the Tenth Circuit explained in applying *Twombly*:

> The [Supreme] Court explained that a plaintiff must 'nudge his claims across the line from conceivable to plausible' in order to survive a motion to dismiss. Thus, the mere metaphysical possibility that *some* plaintiff could prove *some* set of facts in support of the pleaded claims is insufficient; the complaint must give the court reason to believe that *this* plaintiff has a reasonable likelihood of mustering factual support for *these* claims.

Ridge at Red Hawk, L.L.C. v. Schneider, 493 F.3d 1174, 1177 (10th Cir. 2007) (quoting *Twombly*, 127 S. Ct. at 1974) (emphasis in original). *See also Kansas Penn*, 656 F.3d at 1214-15 (explaining that the Supreme Court found the allegations in *Iqbal* and *Twombly* inadequate because they were consistent with innocent, lawful conduct). While the "plausibility standard is not akin to a 'probability requirement,'" a plaintiff must show "more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 556 U.S. 662, 129 S. Ct. at 1949. Plaintiff has not met this threshold. To allow Plaintiff to go forward with its claims on so little would be to allow it to "gin[] up the costly machinery associated with our civil discovery regime on the basis of a largely groundless claim." *Kansas Penn*, 656 F.3d at 1215 (quotation omitted). Plaintiff's claims should be dismissed for failure to meet applicable pleading requirements.

2. Plaintiff's Lanham Act Allegations Fail to Satisfy Fed. R. Civil P. 9(b)

The allegations in the Complaint also fall far short of meeting the pleading standard under Fed. R. Civil P. 9(b), which provides, "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.'" Under this rule, the Tenth Circuit "requires a complaint alleging fraud to set forth the time, place and contents of the false representation, the identity of the party making the false statements and the consequences thereof." *Koch v. Koch Indus.*, 203 F.3d 1202, 1236 (10th Cir. 2000) (quotation omitted), *cert. denied*, 531 U.S. 926, 121 S. Ct. 302 (2000); *see also United States ex rel. Sikkenga v. Regence Bluecross Blueshield*, 472 F.3d 702, 726-27 (10th Cir. 2006) ("At a minimum, Rule 9(b) requires that a plaintiff set forth the who, what, when, where and how of the

alleged fraud." (quotation omitted)); *Midgley v. Rayrock Mines, Inc.*, 374 F. Supp. 2d 1039, 1047 (D.N.M. 2005) ("To survive a motion to dismiss, an allegation of fraud must 'set forth the time, place, and contents of the false representation, the identity of the party making the false statements and the consequences thereof.'") (*quoting Schwartz v. Celestial Seasonings, Inc.*, 124 F.3d at 1252). "[E]ven in circumstances where allegations of fraud may be based on information and belief, because the facts are peculiarly within the opposing party's knowledge, Rule 9(b) continues to require the complaint to set forth the factual basis for the plaintiff's belief." *U.S. ex rel. Sikkenga v. Regence Bluecross Blueshield of Utah*, 472 F.3d 702, 728 (10th Cir. 2006) (quotation omitted).

The heightened Rule 9(b) pleading standard applies to Plaintiff's Lanham Act claim. *See, e.g., Transfresh Corp. v. Ganzerla & Assoc., Inc.*, 862 F. Supp. 2d 1009, 1017-18 (N.D. Cal. 2012) (applying Rule 9(b) standard to Lanham Act claims); *Conditioned Ocular Enhancement, Inc. v. Bonaventura*, 458 F. Supp. 2d 704, 709 (N.D. Ill. 2006) ("Claims that allege ... false advertising under the Lanham Act are subject to the heightened pleading requirements of Fed. R. Civ. P. 9(b)."); *Thermolife Int'l, LLC v. Gaspari Nutrition, Inc.*, No. CV 11–01056–PHX–NVW, 2011 WL 6296833, at *4 (D. Ariz. Dec. 16, 2011) ("[M]any courts have applied Rule 9(b)'s heightened pleading standard to claims for false advertising brought under the Lanham Act."); *cf. Gates Corp. v. Dorman Products, Inc.*, No. 09–CV–02058 CMA–KLM, 2009 WL 5126556, at *3 n.5 (D. Colo. Dec. 18, 2009) (observing that the Tenth Circuit has not expressly addressed this issue).

For the same reasons the Complaint does not satisfy the *Iqbal/Twombly* pleading requirements, it does not even come close to satisfying the heightened standard under Rule 9(b) applicable to Plaintiff's Lanham Act claim. Put simply, Plaintiff entirely fails to plead specific facts showing the "who, what, when, where and how" of adSage's involvement in the purported misconduct alleged in the Complaint.

IV. CONCLUSION

Despite its verbosity and length, the Complaint is full of sweeping generalizations and bereft of specific facts that could establish adSage's liability under the Lanham Act or UPA. Even if Plaintiff had pled such facts – which it did not – its claims against adSage would fail as a matter of law because Plaintiff does not have standing under the Lanham Act or the UPA to bring claims against adSage. Plaintiff's claims against adSage should be dismissed with prejudice.

Submitted this 27th day of December, 2012 by:

/s/ *Gavin W. Skok*
Gavin W. Skok, Esquire
Shata L. Stucky, Esquire
RIDDELL WILLIAMS. P.S.
1001 4th Ave., Suite 4500
Seattle, WA 98154-1192
(206) 624-3600

Jeffrey R. Brannen, Esquire
JEFFREY R. BRANNEN, P.A.
644 Don Gaspar Avenue
Santa Fe, New Mexico 87505
(505) 983-4429

Attorneys for Defendant adSage Corporation

CERTIFICATE OF SERVICE

We hereby certify that on the 27th day of December, 2012, we filed the foregoing electronically through the CM/ECF system providing notice to all counsel of record.

/s/ *Gavin W. Skok*