

EXHIBIT 23

Exhibit 32 - Mark Reilly
10/29/2024 - MJS

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Attorneys for Defendant
MARTIAN SALES, INC.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

C.M. and M.C, on behalf of themselves and
all others similarly situated,

Plaintiffs,

v.

MARTIAN SALES, INC.,

Defendant.

Case No. 3:23-cv-06202

**MARTIAN SALES, INC.'S NOTICE OF
MOTION AND MOTION TO DISMISS
COMPLAINT PURSUANT TO FED.
RULE OF CIVIL PROCEDURE 12(B)(2)
AND 12(B)(6); MEMORANDUM OF
POINTS AND AUTHORITIES AND
DECLARATION OF MARK REILLY IN
SUPPORT OF THEREOF**

Judge: Judge Araceli Martínez-Olguín

Ctrm: 10, 19th Floor

Hearing Date: May 2, 2024

Hearing Time: 2:00 p.m.

1 *v. DaimlerChrysler Corp.*, 534 F.3d 1017, 1023 (9th Cir. 2008) (citation omitted); *Green v.*
 2 *Canidae Corp.*, No. CV 09-0486 GAF PLAX, 2009 WL 9421226, at *5 (C.D. Cal. June 9, 2009);
 3 *see also Xavier v. Philip Morris USA Inc.*, 787 F. Supp. 2d 1075, 1082 (N.D. Cal. 2011) (“A buyer
 4 and seller stand in privity only if they are in adjoining links of the distribution chain; an end
 5 consumer who buys products from a retailer is not in privity with the manufacturer of the
 6 products.”); *Watkins v. MGA Ent., Inc.*, 550 F. Supp. 3d 815, 830 (N.D. Cal. 2021) (same). As set
 7 forth above, (*see* Section B, *supra*) Martian Sales does no direct-to-consumer sales⁴, and Plaintiffs
 8 do not allege any direct purchase from the Defendant. Compl. ¶¶ 89-94. Because Defendant did not
 9 sell any products directly to Plaintiffs, Count IV cannot survive.

10 Nonetheless, even if privity did exist, which it does not, Plaintiffs will be unable to maintain
 11 their claims. California recognizes two theories for a breach of the implied warranty of
 12 merchantability: (i) whether the goods are not fit for the ordinary purposes for which they are used,
 13 and (ii) whether the goods fail to conform with the promises or affirmations contained on the
 14 container or label. *See Kanfer v. Pharmicare US, Inc.*, 142 F. Supp. 3d 1091, 1104 (S.D. Cal. 2015)
 15 (explaining that there are “two separate definitions of merchantability”) (citing to *Martinez v.*
 16 *Metabolife Int’l, Inc.*, 113 Cal. App. 4th 181, 189, 6 Cal. Rptr. 3d 494 (2003)). Here, Plaintiffs are
 17 proceeding under the second theory—*i.e.*, failure to conform with promises and affirmations.

18 Plaintiffs describe O.P.M.S. kratom as failing to conform with the “implied affirmations of
 19 fact . . . that the Products are not addictive and do not cause withdrawals.” Compl., ¶ 141. But the
 20 entire theory behind the Complaint is that Martian Sales did not tell end-users in its packaging that
 21 Kratom was potentially addictive and/or could cause withdrawal symptoms. Plaintiffs cannot
 22 premise their implied warranty claim on the notion that kratom failed to conform with promises or
 23 affirmations that were never actually made.

24
 25
 26 ⁴ Further, there is a split of authority in California district courts as to whether the CLRA claim
 27 could also be dismissed for lacking privity between the end-consumer (Plaintiffs) and the
 28 manufacturer (Martian Sales). *See MGA Ent., Inc.*, 550 F. Supp. 3d at 836 (discussing split of
 authority and holding no CLRA claim without privity of sale); *Here, neither Martian Sales nor*
O.P.M.S. do direct to consumer sales. See <https://opmkratom.com/faqs/>.

1 that they also fail to explain what disclosure, if any, Martian Sales should be forced to make in the
2 future. Their claim for injunctive relief fails for that reason as well.

3
4 **CONCLUSION**

5 For the foregoing reasons, this Court should dismiss each of Plaintiffs' claims with
6 prejudice.

7 Dated: February 9, 2024

Respectfully Submitted,

8 Squire Patton Boggs (US) LLP

9 By: /S/ Adam R. Fox

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11 Attorneys for Defendant
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