UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES—GENERAL

Case No. **CV 13-08174 DMG (JCGx)** Date June 13, 2014

Title ***Thomas Flowers, et al. v. Doctor's Best, Inc.*** Page 1 of 9

Present: The Honorable DOLLY M. GEE, UNITED STATES DISTRICT JUDGE

KANE TIEN	NOT REPORTED
Deputy Clerk	Court Reporter
Attorneys Present for Plaintiff(s) None Present	Attorneys Present for Defendant(s) None Present

Proceedings: IN CHAMBERS—ORDER RE DEFENDANT'S MOTION TO DISMISS [DOC. # 23]

On February 20, 2014, Plaintiffs Flowers and Nelson filed the operative First Amended Complaint ("FAC") against Defendant Doctor's Best, Inc. ("Doctor's Best") alleging violations of (1) California's False Advertising Law ("FAL"), Cal. Bus. & Prof. Code § 17500 *et seq*., (2) California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code § 17200 *et seq*., and (3) California's Consumer Legal Remedies Act ("CLRA"), Cal. Civ. Code § 1750 *et seq*. [Doc. # 11.]

On April 23, 2014, Doctor's Best filed a motion to dismiss. [Doc. # 23.] Plaintiffs filed an opposition on May 23, 2014. [Doc. # 26.] Doctor's Best filed a reply on May 30, 2014. [Doc. # 28.] The motion was scheduled for hearing on June 13, 2014. On June 12, 2014, the Court took the motion under submission because it deemed the matter appropriate for decision without oral argument. *See* Fed. R. Civ. P. 78(b); C.D. Cal. L.R. 7-15.

I.
JUDICIAL NOTICE AND INCORPORATION BY REFERENCE

Doctor's Best requests that the Court take judicial notice of publicly filed documents in two federal cases. [Doc. # 24.] Doctor's Best has also provided the Court with several documents that it contends are incorporated by reference into the FAC. (Mot. at 2 n.1; *see* Steinford Decl., Exhs. A-F [Doc. # 25].)

A court's review of a Rule 12(b)(6) motion to dismiss is generally limited to the contents of the complaint. *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). If considering evidence outside the pleadings on a Rule 12(b)(6) motion, a court "must normally

convert the 12(b)(6) motion into a Rule 56 motion for summary judgment, and it must give the nonmoving party an opportunity to respond." *U.S. v. Ritchie*, 342 F.3d 903, 907-08 (9th Cir. 2003).

The Ninth Circuit has identified two exceptions to this general rule: (1) "a court may consider material which is properly submitted as part of the complaint," and "[i]f the documents are not physically attached to the complaint, they may be considered if the documents' authenticity . . . is not contested and the plaintiffs' complaint necessarily relies on them"; and (2) "under Fed. R. Evid. 201, a court may take judicial notice of matters of public record," but "a court may not take judicial notice of a fact that is subject to reasonable dispute." *Lee v. City of Los Angeles*, 250 F.3d 668, 688-89 (9th Cir. 2001) (internal quotations and citations omitted).

With respect to Doctor's Best's request for judicial notice, Plaintiffs do not contend that these matters of public record are subject to reasonable dispute. Indeed, they have not opposed the request. Accordingly, the Court takes judicial notice of the court filings.

Doctor's Best's contends that three of its product labels and three sections of its website are incorporated by reference in the FAC. (Mot. at 2 n.1; *see* Steinford Decl. ¶¶ 2-7.) Plaintiffs have not contested the authenticity of the documents. Where a document is not attached to the complaint, it may be incorporated by reference "if the plaintiff refers extensively to the document or the document forms the basis of the plaintiff's claim." *Ritchie*, 342 F.3d at 908. Here, all but one of the documents at issue[1] form the basis of Plaintiffs' claims, given that the gravamen of the FAC is that Doctor's Best made false and misleading statements in the documents Doctor's Best seeks to introduce. Accordingly, the documents that form the basis of Plaintiffs' claims are incorporated by reference into the FAC.

II.
FACTUAL ALLEGATIONS

Doctor's Best is a manufacturer of nutritional supplements that sells its products nationally through various online and brick-and-mortar retailers. (FAC ¶¶ 1-3.) This action concerns the following products marketed and sold by Doctor's Best: (1) Glucosamine Chondroitin MSM 120C; (2) Glucosamine Chondroitin MSM 240C; and (3) Glucosamine

[1] One document—the "Benefits" section of the Glucosamine Chondroitin MSM Plus HA 150C product on Doctor's Best's website—does not appear to contain any of the statements that Plaintiffs specifically identified as false or misleading. (*See* Steinford Decl., Exh. F.) Accordingly, the Court finds that it is not incorporated by reference in the FAC.

Chondroitin MSM + Hyaluronic Acid (collectively "the Supplements").[2] (*Id.* ¶ 18.) This action concerns whether Doctor's Best's representations about these products are false or misleading. (*See, e.g.*, ¶¶ 4-9.)

From approximately August 2009 to the present, Doctor's Best's Glucosamine Chondroitin MSM 120C and Glucosamine Chondroitin MSM 240C products contained the following statements on product packaging: (1) "Science-Based Nutrition"; and (2) "MAINTAINS HEALTHY JOINTS & CONNECTIVE TISSUE." (Steinford Decl. ¶¶ 2-3; *see id.*, Exhs. A-B.) From approximately December 2011 to the present, Doctor's Best's Glucosamine Chondroitin MSM + Hyaluronic Acid product contained the following statements on product packaging: (1) "Science-Based Nutrition"; and (2) "MAINTAINS AND LUBRICATES HEALTHY JOINTS & CONNECTIVE TISSUE." (*Id.* ¶ 4; *see id.*, Exh. C.)

Since at least January 22, 2013, Doctor's Best's website has contained the following statement about Glucosamine in a description of the "Benefits" of the Glucosamine Chondroitin MSM 120C and Glucosamine Chondroitin MSM 240C products:

> Glucosamine is a fundamental building block for proteoglycans and glycosaminoglycans. Glucosamine sulfate (GS) helps to maintain joint health through its ability to both act as a component of and stimulate formation of cartilage glycosaminoglycans and the hyaluronic acid backbone essential for the formation of cartilage proteoglycans.

(*Id.* ¶¶ 5-6; *see id.*, Exhs. D-E (internal citations omitted).)

The "Benefits" section of the website for the Glucosamine Chondroitin MSM 120C and Glucosamine Chondroitin MSM 240C products also contains the following statement:

> Extensive joint health research over the past few decades has investigated the effects of glucosamine sulfate, chondroitin sulfate, or a combination of the two. A 2009 meta-analysis summarized results from 6 well-designed studies involving a total of 1,502 research participants. The authors of this meta-analysis were able to make some conclusions about the apparent effectiveness of long-term oral supplementation with CS or GS. Glucosamine sulfate at 1,500 mg daily over a period of at least 3 years and chondroitin sulfate at 800 mg daily over a period of at least 2 years both helped subjects maintain healthy knee cartilage structure. In

[2] While Plaintiffs contend that the action is "not limited to" these products (FAC ¶ 18), they have identified no other products in their FAC.

> a 2008 review of GS & CS used for joint support, the London physician who wrote it concludes that, "Glucosamine, chondroitin, and the combination of these two agents have stood the test of time."

(*Id.* ¶¶ 5-6; *see id.*, Exhs. D-E (internal citations omitted).)

Plaintiff Thomas Flowers suffers from "joint issues" that "exist on a daily basis and have progressively worsened over time." (FAC ¶ 15.) On several unspecified occasions, Flowers "repeatedly purchased" the Supplements from "stores located in California" so as to "remediate [his] pain and discomfort and to improve his joint health and rebuild cartilage" and "to combat and prevent further cartilage damage and joint pain." (*Id.*) Flowers relied "on Doctor's Best's claims that the products would rebuild cartilage and provide joint health benefits." (*Id.*) Flowers "did not receive any of the promised benefits" from the Supplements. (*Id.*)

Plaintiff Christopher L. Nelson suffers from "joint issues" that "exist on a daily basis and have progressively worsened over time." (*Id.* ¶ 16.) On several unspecified occasions, Nelson "repeatedly purchased" the Supplements from stores "located in Pennsylvania" so as to "remediate [his] pain and discomfort and to improve his joint health and rebuild cartilage" and "to combat and prevent further cartilage damage and joint pain." (*Id.*) Nelson relied "on Doctor's Best's claims that the products would rebuild cartilage and provide joint health benefits." (*Id.*) Nelson "did not receive any of the promised benefits" from the Supplements. (*Id.*)

Plaintiffs allege that "Doctor's Best's representations about the efficacy of the ingredients in the Supplements products are totally contradicted by all credible scientific evidence," and they cite various clinical studies and articles that allegedly demonstrate that the Supplements are not effective with respect to their stated purposes. (*Id.* ¶¶ 7, 26-39.) Plaintiffs allege that Doctor's Best "knew, but failed to disclose, that the Supplements do not provide the joint health benefits represented and that well-conducted, clinical studies have found the ingredients in the Supplements to be ineffective in providing the joint health benefits represented by Doctor's Best." (*Id.* ¶ 42.) As a result, Plaintiffs and putative Class members "have been and will continue to be deceived or misled by Defendant's deceptive joint health benefit representations." (*Id.* ¶ 43; *see also id.* ¶ 45.) Doctor's Best, in contrast, has "reaped enormous profit from its false marketing and sale of the Supplements." (*Id.* ¶ 46.)

III.
LEGAL STANDARD

Federal Rule of Civil Procedure 8(a)(2) requires a pleading that states a claim for relief contain "'a short and plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 1964, 167 L. Ed. 2d 929 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)). While a pleading need not contain "detailed factual allegations," it must contain "more than labels and conclusions" or "a formulaic recitation of the elements of a cause of action." *Id*. (citing *Papasan v. Allain*, 478 U.S. 265, 286, 106 S. Ct. 2932, 92 L. Ed. 2d 209 (1986)). The pleading must articulate "enough facts to state a claim to relief that is plausible on its face." *Id*. at 570.

Under Rule 12(b)(6), a party may seek dismissal of a claim for failure to state a claim upon which relief can be granted. A court may grant such a dismissal only where the pleading party fails to present a cognizable legal theory or to allege sufficient facts to support a cognizable legal theory. *Shroyer v. New Cingular Wireless Servs., Inc.*, 622 F.3d 1035, 1041 (9th Cir. 2010). In evaluating the sufficiency of a pleading, as discussed *supra*, courts generally must accept all factual allegations as true. Legal conclusions, in contrast, are not entitled to the assumption of truth. *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009) (citing *Twombly*, 550 U.S. at 555).

Federal Rule 9(b) imposes a heightened pleading standard on a party alleging fraud. *See* Fed. R. Civ. P. 9(b) (requiring party to "state with particularity the circumstances constituting fraud or mistake"). Rule 9(b) requires that averments of fraud be specific enough to give the opposing party notice of the particular misconduct in order to allow the opposing party to defend against the charge and not just deny that it has done anything wrong. *See Vess v. CIBA-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003) ("Averments of fraud must be accompanied by 'the who, what, when, where, and how' of the misconduct charged.") (citations omitted). "[A] plaintiff must set forth *more* than the neutral facts necessary to identify the transaction. The plaintiff must set forth what is false or misleading about a statement, and why it is false." *Id.* (emphasis in original) (alterations in original). "Where fraud is not an essential element of a claim, only those allegations of a complaint which aver fraud are subject to Rule 9(b)'s heightened pleading standard." *Kearn v. Ford Motor Co.*, 567 F.3d 1120, 1124 (9th Cir. 2009). "Any averments which do not meet [the Rule 9(b)] standard should be disregarded or stripped from the claim for failure to satisfy Rule 9(b)." *Id.* (internal quotations omitted). The Ninth Circuit has identified three purposes Rule 9(b) serves:

> (1) to provide defendants with adequate notice to allow them to defend the charge and deter plaintiffs from the filing of complaints as a pretext for the discovery of unknown wrongs; (2) to protect those whose reputation would be harmed as a result of being subject to fraud charges; and (3) to prohibit plaintiffs from unilaterally imposing upon the court, the parties and society enormous social and economic costs absent some factual basis.

Id. at 1125 (internal quotations and brackets omitted).

Should a court dismiss certain claims, it must also decide whether to grant leave to amend. "Courts are free to grant a party leave to amend whenever 'justice so requires,' and requests for leave should be granted with 'extreme liberality.'" *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 972 (9th Cir. 2009) (citation omitted) (quoting Fed. R. Civ. P. 15(a)(2)); *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 712 (9th Cir. 2001)). "Leave to amend should be granted unless the district court 'determines that the pleading could not possibly be cured by the allegation of other facts.'" *Knappenberger v. City of Phoenix*, 566 F.3d 936, 942 (9th Cir. 2009) (quoting *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (*en banc*)); *see also Vess*, 317 F.3d at 1108 ("As with Rule 12(b)(6) dismissals, dismissals for failure to comply with Rule 9(b) should ordinarily be without prejudice.").

IV.
DISCUSSION

A. The FAC Does Not Satisfy the Rule 9(b) Standard

Rule 9(b)'s heightened pleading standard applies to Plaintiffs' claims. The Ninth Circuit held in *Kearns* that claims under California's consumer protection statutes are subject to Rule 9 if they are "grounded in fraud," that is, if the pleading alleges a "unified course of fraudulent conduct and rel[ies] entirely on that course of conduct as the basis of that claim." 567 F.3d at 1125. The *Kearns* court held that the plaintiff's allegations were grounded in fraud where the plaintiff alleged that the defendant's national marketing, sales materials, and sales personnel misrepresented the rigorousness of the defendant's inspections of its products as part of a conspiracy to increase revenues. *Id.* at 1125-26. Although *Kearns* only addressed claims under California's Consumers Legal Remedies Act, Cal. Civ. Code § 1750 *et seq.*, and California's Unfair Competition Law, Cal. Bus. & Prof. Code § 17200 *et seq.*, its reasoning extends equally to claims under the FAL. *Lima v. Gateway, Inc.*, 710 F. Supp. 2d 1000, 1006-07 (C.D. Cal. 2010).

Here, the gravamen of the FAC is that Doctor's Best has "affirmatively misrepresent[ed] the joint health benefits of [its] Supplements," and its representations are "totally contradicted by all credible scientific evidence." (FAC ¶¶ 8, 26.) The FAC specifically alleges that Doctor's Best "knew, but failed to disclose, that the Supplements do not provide the joint health benefits represented and that well-conducted, clinical studies have found the ingredient in the Supplements to be ineffective in providing the joint health benefits represented by Doctor's Best." (*Id.* ¶ 42.) Finally, Plaintiffs allege that Doctor's Best deceived them and "reaped enormous profit" by so doing. (*Id.* ¶¶ 43, 45-46.) This conduct forms the basis of Plaintiffs' FAL, CLRA, and UCL claims. Plaintiffs thus allege a "unified course of fraudulent conduct" and rely entirely on that conduct as the basis of their claims, and their claims are grounded in fraud.

Plaintiffs do not dispute that the Rule 9(b) standard applies to their claims, but they urge the Court to relax the Rule 9(b) standard, apparently on the ground that they could not be expected to have personal knowledge of and to allege matters peculiarly within the knowledge of Doctor's Best. (*See* Opp'n at 16 (quoting *Neubronner v. Miliken*, 6 F.3d 666, 672 (9th Cir. 1993).) The problem with Plaintiffs' argument is that they fail to satisfy the Rule 9(b) standard with respect to matters uniquely in *Plaintiffs'* knowledge, thereby depriving Doctor's Best of the opportunity to defend against the charges rather than simply denying that it has done anything wrong. *See Vess*, 317 F.3d at 1106.

As discussed, *supra*, Rule 9(b) requires averments of fraud to be accompanied by "the who, what, when, where, and how of the misconduct charged" in order to give the opposing party notice of the particular misconduct at issue. *Id*. In *Kearns*, the Ninth Circuit considered whether the district court had properly dismissed a complaint pursuant to Rule 9(b). 567 F.3d at 1125. The Ninth Circuit determined that the plaintiff had "failed to articulate the who, what, when, where, and how of the misconduct alleged" where it failed to allege: (1) what the allegedly misleading material "specifically stated"; (2) "when he was exposed [to the statements] or which ones he found material"; (3) "which sales material he relied upon in making his decision to buy [the product]"; and (4) who made allegedly false statements and when the statements were made. *Id.* at 1126. Thus, the Ninth Circuit affirmed the district court's dismissal of the complaint under Rule 9(b). *Id.*

In this case, as in *Kearns*, Plaintiffs have failed to identify the who, what, when, where, and how of the misconduct alleged, and thus fail to satisfy Rule 9(b). While Plaintiffs specifically identify a few statements made by Doctor's Best, the FAC mostly refers in general terms to "Doctor's Best's claims," "Doctor's Best's promises," "numerous references" by Doctor's Best, Doctor's Best's "affirmative[ ] misrepresent[ations]," Doctor's Best's

"misleading representations and omissions," and Doctor's Best's "deceptive joint health benefit representations." (FAC ¶¶ 4-6, 8-10.) These general allegations appear to overstate the specific representations made by Doctor's Best. (*Compare id.* ¶ 4 ("[T]he Supplements are 'science-based nutrition' that 'maintains healthy joints and connective tissue[.]'") *with id.* ¶¶ 15-16 ("Doctor's Best[ ] claim[ed] that the products would rebuild cartilage . . . ."). Moreover, Plaintiffs fail to specifically identify all of the products purportedly at issue in this case. (*See id.* ¶ 18 ("This lawsuit concerns the products marketed and sold by Doctor's Best including, but not limited to . . . .").) Thus, it is unclear if they contend that other product packaging and advertisements are at issue.

Just as in *Kearns*, Plaintiffs also fail to allege when they were exposed to Doctor's Best's statements and which of these statements they found material at the time they purchased the products. *See Kearns*, 567 F.3d at 1126. While the FAC alleges that Flowers and Nelson "repeatedly purchased" the Supplements (FAC ¶¶ 15-16), it provides no additional allegations with respect to dates or time frames. *See Yumul v. Smart Balance, Inc.*, 733 F. Supp. 2d 1117, 1124 (C.D. Cal. 2010). Nor does the FAC allege that the statements on Doctor's Best packaging remained consistent throughout the relevant time period. *Id.*

Moreover, as in *Kearns*, Plaintiffs fail to allege which of the alleged false statements or misrepresentations they relied upon in making their decision to buy Doctor's Best's Supplements. *See Kearns*, 567 F.3d at 1126. Indeed, the FAC does not identify which of the Supplements Flowers and Standard purchased, and thus it is not clear whether Plaintiffs purchased one of the three products specifically identified in the FAC or some other of "Doctor's Best brand Supplements." (*See* FAC ¶ 15.) Given that the statements on the packaging of Doctor's Best's products differ to some extent, and that Plaintiffs apparently relied on statements on product packaging, it is significant that Plaintiffs have not identified which products they purchased.

Finally, Plaintiffs fail to allege with specificity where they encountered the statements at issue. The FAC alleges that Doctor's Best's statements "are conveyed to the consuming public uniformly and through a *variety of media including* its website and online promotional materials, and also at the *point of purchase*." (FAC ¶ 9 (emphasis added).) As an initial matter, Plaintiffs have not identified any statements in "online promotional materials" other than the two statements on Doctor's Best's website in the "Benefits" section relating to two particular products. With respect to statements made at "the point of purchase," the FAC alleges that Flowers bought the Supplements "at stores located in California" and Nelson bought the Supplements "as stores located in Pennsylvania." (*Id.* ¶¶ 15-16.) As one court in this district noted in a well-reasoned opinion applying the Rule 9(b) standard discussed in *Kearns*,

"California is the third largest state in terms of area in the United States; it spans 163,696 square miles. Alleging only that the fraud occurred in California does not meet the Ninth Circuit's requirement that plaintiff identify 'where' the fraud occurred." *Yumul*, 733 F. Supp. 2d at 1124 n.9. The Court finds this reasoning persuasive, particularly given that Plaintiffs allege that they relied on statements at the point of purchase.

Plaintiffs' arguments that they satisfy Rule 9(b) are unpersuasive. The unpublished, out-of-circuit district court opinion upon which they principally rely (Opp'n at 16 (citing *Pearson v. Target Corp.*, No. 11-7972, 2012 WL 7761986, at *2 (N.D. Ill. Nov. 9, 2012)), does not consider whether the complaint at issue alleged "the who, what, when, where, and how of the misconduct charged"—the standard in the *Ninth* Circuit. Moreover, neither of the district court cases Plaintiffs cite—apparently on the ground that Rule 9(b) does not require a complaint to allege "the who, what, when, where, and how of the misconduct charged" (*see* Opp'n at 16)—displace *Ninth Circuit* precedent on this point.

In light of the foregoing, the FAC fails to comply with Rule 9(b)'s pleading requirements. Doctor's Best's motion is **GRANTED** and the FAC is dismissed in its entirety on this ground.

V.
CONCLUSION

In light of the foregoing, the Court orders as follows:

1. Doctor's Best's motion to dismiss the FAC is **GRANTED** on the ground that the FAC fails to satisfy the requirements of Rule 9(b);

2. Doctor's Best's motion to dismiss is otherwise **DENIED** as moot;

3. Plaintiffs may file their amended complaint within 21 days from the date of this Order; and

4. Doctor's Best may file its response within 21 days from the service of any amended complaint.

IT IS SO ORDERED.