

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

DEC 13 2023

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

BRUCE HORTI; et al.,

Plaintiffs-Appellants,

v.

NESTLE HEALTHCARE NUTRITION,
INC.,

Defendant-Appellee.

No. 22-16832

D.C. No. 4:21-cv-09812-PJH

MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Phyllis J. Hamilton, District Judge, Presiding

Argued and Submitted December 6, 2023
San Francisco, California

Before: S.R. THOMAS, BRESS, and JOHNSTONE, Circuit Judges.

Plaintiffs appeal the district court's dismissal of their putative class action against Nestle Healthcare Nutrition, Inc., which alleges violations of state consumer protection laws based on Nestle's allegedly deceptive labeling and marketing of BOOST Glucose Control products. We have jurisdiction under 28 U.S.C. § 1291. We review de novo the district court's dismissal under Federal Rule of Civil

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Procedure 12(b)(6). *Nguyen v. Endologix, Inc.*, 962 F.3d 405, 413 (9th Cir. 2020).

We reverse and remand for further proceedings.

1. Plaintiffs have pleaded an injury sufficient to support Article III standing. To show Article III standing, a plaintiff must demonstrate “(i) that he suffered an injury in fact that is concrete, particularized, and actual or imminent; (ii) that the injury was likely caused by the defendant; and (iii) that the injury would likely be redressed by judicial relief.” *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021). At the pleading stage, plaintiffs’ complaint must sufficiently allege facts demonstrating each required element of Article III standing. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016).

Plaintiffs allege that they purchased a product they otherwise would not have bought but for defendant’s alleged misrepresentations. The purchase price itself is therefore a “tangible economic injury” and is sufficient at the pleading stage to show the plaintiffs “suffered actual, discrete, and direct injury in fact in the form of financial losses” *Nat’l Audubon Soc’y, Inc. v. Davis*, 307 F.3d 835, 855–56 (9th Cir. 2002). Because the plaintiffs claim that they “spent money that, absent defendant[’s] actions, they would not have spent,” they have pleaded “a quintessential injury-in-fact” to support Article III standing. *Maya v. Centex Corp.*, 658 F.3d 1060, 1069 (9th Cir. 2011). In addition, plaintiffs sufficiently alleged an injury in fact at the pleading stage through their price premium allegations. Plaintiffs

fairly alleged that BOOST Glucose Control has a higher price than other comparable products and that plaintiffs chose to pay the premium based on Nestle's alleged misrepresentations.

2. Plaintiffs have sufficiently alleged that the representations on the BOOST Glucose Control label are likely to mislead a reasonable consumer. We evaluate the plaintiffs' theory of product deception under the reasonable consumer test, which requires plaintiffs to "demonstrate that a 'reasonable consumer' is likely to be misled by the representation." *Moore v. Trader Joe's Co.*, 4 F.4th 874, 881 (9th Cir. 2021). This standard "requires a probability 'that a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled.'" *Ebner v. Fresh, Inc.*, 838 F.3d 958, 965 (9th Cir. 2016) (quoting *Lavie v. Procter & Gamble Co.*, 129 Cal. Rptr. 2d 486, 495 (Ct. App. 2003)).

Nestle's product labels contain three relevant representations: the name "Glucose Control," the statement that the product is "designed for people with diabetes," and the claim that the product "helps manage blood sugar." We conclude that, at the pleading stage, these representations are sufficient to show that a reasonable consumer could expect the product to exert some benefit on the control and regulation of blood sugar. The labels specifically reference the disease of diabetes and claim to help consumers "control" glucose and "manage" blood sugar. A reasonable consumer could understand these representations to indicate that the

product will have a positive effect on diabetes and blood sugar levels. Nestle offers contrary interpretations of the product labels, but that disagreement is not appropriate for resolution on a motion to dismiss.

Further supporting the plausibility of plaintiffs' allegations and their claimed understanding of the product label is the fact that the product was placed in stores and on websites alongside legitimate diabetes treatments and other health and nutritional supplement products. Although Nestle argues that it did not control product placement in stores, that issue cannot be resolved on a motion to dismiss. Nestle's control over product placement is also irrelevant to the reasonableness of consumer perceptions, as alleged in the operative complaint. The products' placement in stores alongside legitimate diabetes treatments may create a "contextual inference[]" that the product may have a positive effect on the regulation of blood sugar. *Moore*, 4 F.4th at 882. Nor, at the pleading stage, can we draw conclusions as to whether the consumers who purchased BOOST Glucose Control were more knowledgeable about its potential health benefits or lack thereof.

REVERSED AND REMANDED.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate electronic filing system or, if you are a pro se litigant or an attorney with an exemption from the electronic filing requirement, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1) Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) Purpose

A. Panel Rehearing:

- A party should seek panel rehearing only if one or more of the following grounds exist:
 - A material point of fact or law was overlooked in the decision;
 - A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
 - An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Rehearing En Banc

- A party should seek en banc rehearing only if one or more of the following grounds exist:
 - Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
 - The proceeding involves a question of exceptional importance; or

- The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing must be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- See Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms*.
- Attorneys must file the petition electronically via the appellate electronic filing system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms*.

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-8000.

Petition for a Writ of Certiorari

- The petition must be filed with the Supreme Court, not this Court. Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov.

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
 - Thomson Reuters; 610 Opperman Drive; PO Box 64526; Eagan, MN 55123 (Attn: Maria Evangelista, maria.b.evangelista@tr.com);
 - **and** electronically file a copy of the letter via the appellate electronic filing system by using the Correspondence filing category, or if you are an attorney exempted from electronic filing, mail the Court one copy of the letter.

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

Form 10. Bill of Costs

Instructions for this form: <http://www.ca9.uscourts.gov/forms/form10instructions.pdf>

9th Cir. Case Number(s)

Case Name

The Clerk is requested to award costs to *(party name(s))*:

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