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MUSCLEPHARM CORPORATION

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

MATTHEW GATES and JOHN MARTINEZ, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

MUSCLEPHARM CORPORATION,

Defendant.

Case No. 15-cv-02870-BAS-DHB

CLASS ACTION

MUSCLEPHARM CORPORATION'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS

Judge: Hon. Cynthia Bashant
Date: May 9, 2016, 2016
Courtroom 4B (Schwartz)

NO ORAL ARGUMENT UNLESS REQUESTED BY THE COURT

[Complaint Filed: December 19, 2015]
Trial Date: None Set

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I. INTRODUCTION

In their Complaint, Plaintiffs allege that they purchased an unspecified MusclePharm product at an unspecified time from an unspecified retailer, and though the net weight of the product was accurately stated on the label, MusclePharm somehow defrauded Plaintiffs because the containers were partially empty. Plaintiffs purport to bring this case on behalf of a class of purchasers of five different MusclePharm products. MusclePharm moved to dismiss Plaintiffs' Complaint on several grounds, including that their fraud-based claims were insufficiently pled.

In their Opposition, Plaintiffs contend that their claims are not grounded in fraud, but rather based on negligent misrepresentation, which they argue must only meet the pleading requirements of Rule 8. While Circuits are split on this question, courts in the Ninth Circuit agree that where the cause of action is grounded in fraud, then Rule 9(b) must be met. Here, Plaintiffs' claims are based on MusclePharm's alleged misrepresentations – *not* whether it used reasonable care in packaging its products – and more specificity is required. Plaintiffs eventually capitulate and provide some information – i.e., that they purchased only one of MusclePharm's products, when the product was purchased, and where the product was purchased. *See* Opposition, p. 8, fns. 4-6. An opposition, however, is not a pleading under Rule 7 that frames the issues for the remainder of the case, and Plaintiffs' acknowledgment of the inadequacies in their Complaint demonstrates that MusclePharm's motion should be granted.

The Court should also dismiss Plaintiffs' claims for injunctive relief with prejudice. Because Plaintiffs have not alleged that they intend to purchase the product again or other facts showing likelihood of repetition of the same harm, they have not alleged facts sufficient to pursue injunctive relief.

The Court should also dismiss Plaintiffs' claims as they relate to products that Plaintiffs now concede they did not purchase. In their Opposition, Plaintiffs

concede they only purchased one product called "Arnold Iron Whey Protein."[1] Plaintiffs do not have standing to bring claims relating to other MusclePharm products that they did not purchase. Their complaint is not about a common ingredient or inaccurate labeling present throughout MusclePharm's product line. Accordingly, Plaintiffs cannot plausibly claim that they were injured by anything other than what they actually purchased.

Finally, Plaintiffs do not oppose MusclePharm's Motion as it relates to Plaintiffs' claims about MusclePharm's website, effectively conceding they have no standing to assert those claims. Oppo., p. 16:12-15. Accordingly, Plaintiffs' claims relating to MusclePharm's website should be dismissed with prejudice.

II. PLAINTIFFS' COMPLAINT IS INSUFFICIENTLY PLED

In its Motion, MusclePharm established that Plaintiffs' Complaint failed to meet the heightened pleading standard for fraud in that Plaintiffs failed to identify which MusclePharm products they purchased, where or how the products were purchased, and when the products were purchased. Such allegations are necessary for MusclePharm to craft its defense.

A. Rule 9 Is The Correct Standard For Plaintiffs' Fraud-Based Claims

In their Opposition, Plaintiffs argue on the one hand that their claims are based on MusclePharm's "false and misleading advertising and unfair business practices" (Oppo. p. 2:6-7), but then contend that that their claims are based on negligent misrepresentation and "must only meet the 'short and plaint [sic] statement' standard of Fed. R. Civ. P. 8(a)(2)." Oppo., p. 5:25-26, 6. Plaintiffs must plead their claims with specificity.

There is currently a split in the Circuits, and even some disagreement amongst courts in the Ninth Circuit, regarding whether claims for negligent misrepresentation must satisfy Rule 9(b). *See Bekins v. Zheleznyak*, 2016 WL 1091057, at *8 (C.D.

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[1] The product is actually called Arnold Schwarzenegger Series Iron Whey.

Cal. Mar. 21, 2016) ("The Ninth Circuit has not yet decided whether Rule 9(b)'s heightened pleading standard applies to a claim for negligent misrepresentation, but most district courts in California hold that it does."); *see also Trooien v. Mansour*, 608 F.3d 1020, 1028 (8th Cir. 2010) (concluding that Rule 9(b) applies to negligent misrepresentation claims); *Aetna Cas. & Sur. Co. v. Aniero Concrete Co*., 404 F.3d 566, 583 (2d Cir. 2005) (same); *cf. Tricontinental Indus., Ltd. v. PricewaterhouseCoopers, LLP*, 475 F.3d 824, 833 (7th Cir. 2007) (holding Rule 9(b) does not apply to claim); *Baltimore Cnty. v. Cigna Healthcare*, 238 Fed. App'x 914, 921-22 (4th Cir. 2007) (same).

However, courts in the Ninth Circuit agree that where a negligent misrepresentation claim is "grounded in fraud," Rule 9(b) applies. *See e.g., Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1127 (9th Cir. 2009) ("Plaintiff's claims under the UCL, FAL, CLRA, and for Negligent Misrepresentation ... sound in fraud, and are subject to the heightened pleading requirements of Rule 9(b)."); *Phillips v. Apple Inc.*, 2016 WL 1579693, at *4, *7 (N.D. Cal. Apr. 19, 2016) (same); *see also Stearns v. Select Comfort Retail Corp.*, 2009 WL 1635931, at *12 (N.D. Cal. June 5, 2009) ("Negligent misrepresentation is a claim based in fraud and thus is subject to the heightened pleading requirements of Fed.R.Civ.P. 9(b)") (citing *Neilson v. Union Bank of Cal*., N.A., 290 F. Supp. 2d 1101, 1141 (C.D. Cal. 2003) ("It is well-established in the Ninth Circuit that both claims for fraud and negligent misrepresentation must meet Rule 9(b)'s particularity requirement")).

As Plaintiffs acknowledge in their Opposition, their claims are based on MusclePharm's alleged misrepresentations relating to the packaging of its "Arnold Iron WheyProtein" product. (Oppo. p. 2:6-7). Accordingly, Plaintiffs' allegations must meet the heightened pleading requirements of Rule 9(b).

B. <u>Plaintiffs Fail To Meet Rule 9's Heightened Pleading Standard</u>

In their Opposition, Plaintiffs contend that, even if Rule 8 does not apply to their claims, they have satisfied the heightened pleading standard under Rule 9.

Plaintiffs acknowledge that a plaintiff "who brings a fraud-based claim must 'articulate the who, what, when, where, and how of the misconduct alleged.'" Oppo., p. 7:6-7, citing *Kearns*, 567 F.3d at 1125-1126. Plaintiffs contend that they have adequately alleged MusclePharm as the who, "Protein Products" as the what, "four years prior" to filing the Complaint as the when, San Diego and West Nyack, New York, as the where, and putting protein powder in large containers as the how. Oppo., p. 7-8. Each of these assertions is specious.

Plaintiffs cannot claim all "Protein Products" are the "what" when they concededly purchased and opened only one product. This case is unlike *Astiana v. Ben & Jerry's Homemade, Inc.*, 2011 U.S. Dist. LEXIS 57348 (N.D. Cal. May 26, 2011), which Plaintiffs rely on in their Opposition, where the "what" were alleged misrepresentations in the labeling of ice cream containers, which would be evident on the face of every product that had alkalized cocoa as an ingredient. *See Astiana v. Dreyer's Grand Ice Cream, Inc.*, 2012 U.S. Dist. LEXIS 101371, 2012 WL 2990766, at *13 (N.D. Cal. July 20, 2012) ("Plaintiffs are challenging the same basic mislabeling practice across different product flavors.").

Here, Plaintiffs do not allege that MusclePharm's labeling is inaccurate (i.e., the weight of the product). Nor can they. Instead, Plaintiffs allege that, once they opened the (one) product and saw the slack-fill, they felt MusclePharm misrepresented the amount of the contents by using a large container. *See* Compl., ¶ 34. Such an allegation cannot be facilely applied to every "Protein Product" without knowing the type of product, the size of the container, etc. In other words, a specific description of the product purchased is required. *See Gitson v. Trader Joe's Co.*, 2013 WL 5513711, at *4 (N.D. Cal. Oct. 4, 2013) ("plaintiffs have pleaded no facts regarding the Unspecified Products, such as what their labels state or even what kinds of products these categories include. As a result, the allegations as to the Unspecified Products do not meet the heightened pleading requirements of Rule 9(b) and are dismissed with leave to amend."); *Trazo v. Nestle USA, Inc.*, 2013 WL

4083218, at *13 (N.D. Cal. Aug. 9, 2013) ("Courts have gone so far as to require plaintiffs to provide the actual labels relied upon … A statement that all people who purchased products containing 'unlawful slack fill' … does nothing to inform potential class members."); *Fisher v. Monster Beverage Corp.*, 2013 WL 4804385, at *7 (C.D. Cal. July 9, 2013).

Plaintiffs' allegations regarding the "where" and the "when" are also deficient. As demonstrated in MusclePharm's motion, it is unclear from Plaintiffs' Complaint whether they purchased the unspecified products in a retail store or if they purchased online, and knowing where the products were purchased may affect the representations made to Plaintiffs about the products. MusclePharm also must know when the products were purchased to know if MusclePharm has a statute of limitations defense for Plaintiffs' CLRA and FAL claims. *See Yumul v. Smart Balance, Inc.*, 733 F. Supp. 2d 1117, 1124 (C.D. Cal. 2010).

Plaintiffs finally clarify in their Opposition which product they purchased, as well as when and where it was purchased. *See* Oppo., p. 8, fns. 4-6. But the fact that Plaintiffs only provide this information in their Opposition demonstrates that they failed to satisfy the requisite pleading standard in their Complaint. Accordingly, Plaintiffs' Complaint should be dismissed.

III. PLAINTIFFS LACK STANDING TO PURSUE INJUNCTIVE RELIEF

A plaintiff does not have standing to seek injunctive relief against a seller "engaging in false or misleading advertising unless there is a likelihood that the plaintiff would suffer future harm from the defendant's conduct." *Mason v. Nature's Innovation, Inc.*, Case No. 12-cv-3019, 2013 WL 1969957, at *4 (S.D. Cal. May 13, 2013).

In their Opposition, Plaintiffs contend that they "adequately alleged the threat of future injury." Oppo., p. 9. Plaintiffs' conclusory allegations regarding a "future injury," with no supporting facts, are not enough. Because Plaintiffs did not allege that they have any intention of purchasing MusclePharm products in the future, they

cannot pursue injunctive relief against MusclePharm. *See Wang v. OCZ Tech. Grp., Inc.*, 276 F.R.D. 618, 626-627 (N.D. Cal. 2011); *Albert v. Blue Diamond Growers*, 2015 U.S. Dist. LEXIS 145033, *10-14 (S.D.N.Y. Oct. 21, 2015).

In their Opposition, Plaintiffs also contend that they have standing to seek injunctive relief even when they are aware of the true content of the products. Oppo., p. 9. The cases on which Plaintiffs rely for this argument, however, all concern allegedly deceptive labeling and are inapplicable here. *See e.g., Koehler v. Litehouse, Inc.*, 2012 U.S. Dist. LEXIS 176971, *2 (N.D. Cal. Dec. 13, 2009); *Henderson v. Gruma Corp.*, 2011 U.S. Dist. LEXIS 41077, *2 (C.D. Cal., Apr. 11, 2011).

Moreover, like the plaintiff in *Wang*, Plaintiffs lack standing to pursue injunctive relief because they are now aware of the alleged slack-fill in the "Arnold Iron WheyProtein" product, and there is no danger that Plaintiffs will purchase the product again. Accordingly, Plaintiffs' claim for injunctive relief should be dismissed with prejudice.

IV. PLAINTIFFS LACK STANDING TO PURSUE CLAIMS BASED ON PRODUCTS THEY DID NOT PURCHASE

In its Motion, MusclePharm established that Plaintiffs have no standing to bring claims based on products that they never purchased. Not only must a plaintiff "clearly and specifically set forth facts sufficient to satisfy the Article III standing requirements" in the Complaint (*Whitmore v. Ark.*, 495 U.S. 149, 156 (1990)), but to have standing under the CLRA, FAL and UCL, a plaintiff must allege that he or she relied on the defendant's misrepresentation. *See Durell v. Sharp Healthcare*, 183 Cal. App. 4th 1350, 1367 (2010); *Kwikset Corp. v. Superior Court*, 51 Cal. 4th 310, 326 (2011). Courts have dismissed similar class action complaints where plaintiffs failed to allege that they purchased the products they were basing their claims on. *See Granfield v. Nvidia Corp.*, 2012 WL 2847575, *6 (N.D. Cal. July 11, 2012); *Carrea v. Dreyer's Grand Ice Cream, Inc.*, 2011 WL 159380, *3 (N.D. Cal. Jan. 10, 2011).

In their Opposition, Plaintiffs concede that they only purchased the "Arnold Iron Whey Protein" product, but contend that they have standing to pursue claims relating to products they did not purchase "so long as the products and alleged misrepresentations are substantially similar." Oppo., p. 12 (citing *Cortina v. Goya Foods, Inc.*, 94 F. Supp. 3d 1174 (S.D. Cal. 2015); *Simpson v. California Pizza Kitchen, Inc.*, 2013 WL5827671 (S.D. Cal. Oct. 1, 2013); *Dorfman v. Nutramax Laboratories, Inc.*, 2013 WL 5353043 (S.D. Cal. Sept. 23, 2013)).

Astiana, *Dorfman, Cortina* and *Simpson*, however, demonstrate just how different this case is to class actions where a consumer brings claims about ingredients (i.e., the use of trans fatty acids in *Simpson*) and/or labeling (i.e., failing to disclose material facts about the levels of 4-MeI in beverages in *Cortina*). *See Astiana*, 2012 2012 WL 2990766, at *13; *Anderson v. Jamba Juice Co*., 2012 U.S. Dist. LEXIS 120723, at *15 (N.D. Cal. Aug. 25, 2012) (the "same alleged misrepresentation was on all of the smoothie kit[s] regardless of flavor").

In *Trazo*, the court held that plaintiffs can only claim "sufficient similarity" when a combination of factors is satisfied: "the challenged products are of the same kind, they are comprised of largely the same ingredients, and they bear the same alleged mislabeling." *Trazo*, 2013 WL 4083218, at *12. Here, Plaintiffs' claims do not relate to a common ingredient throughout MusclePharm's protein powder product line. And Plaintiffs do not allege that MusclePharm's labeling is fraudulent – i.e., that it misrepresents the amount of protein powder in each container. Plaintiffs do not even allege that all of MusclePharm's protein powder products are sold in the same size container (they are not). Plaintiffs simply bought a container of one product, opened it, saw empty space in the container and now claim they were tricked into paying a premium for the larger container. *See* Compl., ¶ 34. Unlike the plaintiffs in *Dorfman*, *Astiana*, *Cortina* and *Simpson*, who could simply look at the labels of the other products they did not purchase and see the common violation in

each, Plaintiffs cannot claim that all of MusclePharm's protein powder products were partially empty just by looking at the containers.

The holding in *Ivie v. Kraft Foods Glob., Inc.*, 961 F. Supp. 2d 1033 (N.D. Cal. 2013) is instructive. In that case, the plaintiff attempted to bring claims relating to products she admittedly did not purchase, alleging "essentially identical" or "similar" packaging for products allegedly purchased by other class members. *Id.* at 1039. Specifically, the plaintiff alleged that Kraft's Jell-O and Stovetop stuffing products contained slack-fill. *Id.* The *Ivie* court held that the plaintiff had no standing to bring such claims: "[w]ith respect to all products that only bear 'similar' packaging or labels [i.e., "Jell–O sugar free products" and "Stovetop stuffing products",] the court finds the allegations of 'similar packaging' insufficient to meet the standing requirement." Similarly here, Plaintiffs were not harmed by anything other than what they bought. Accordingly, the Court should dismiss – with prejudice – Plaintiffs' claims relating to products they did not purchase.

V. PLAINTIFFS' NEGLIGENT MISREPRESENTATION IS BARRED BY THE ECONOMIC LOSS DOCTRINE

Under both California and New York law, the economic loss doctrine bars tort claims – including negligent misrepresentation claims – that are based on alleged economic injury. *See Aas v. Superior Court*, 24 Cal. 4th 627, 643 (2004) ("A person may not ordinarily recover in tort for the breach of duties that merely restate contractual obligations."), superseded by statute on another ground; *see also Weisblum v. Prophase Labs, Inc.*, 88 F. Supp. 3d 283, 297 (S.D.N.Y. 2015); *Minkler v. Apple, Inc.*, 65 F. Supp. 3d 810 (N.D. Cal. 2014) (dismissing negligent misrepresentation claim under economic loss doctrine); *Weisblum*, 88 F. Supp. 3d at 297 (dismissing negligent misrepresentation claims under both California and New York law based on economic loss doctrine).

Plaintiffs do not allege that they were injured or suffered property loss as a result of purchasing MusclePharm's product. Rather, Plaintiffs simply believe that

they paid a premium for a larger container and contend that they can pursue their negligent misrepresentation claim for purely economic loss because a "special relationship" exists between them and MusclePharm. Oppo., p. 15. Plaintiffs are mistaken.

There is no "special relationship" between a consumer and a manufacturer of food products. As the court held in *Vavak v. Abbott Labs., Inc.*, 2011 WL 10550065, at *5 (C.D. Cal. June 17, 2011):

> The absence of a direct contractual relationship on which to base alleged monetary damages does not transform purely economic losses into tort-based injuries. Moreover, Plaintiff cites no authority in support of her contention that manufacturers of products sold for human consumption are in a "special relationship" with consumers who buy their products …[and] to the extent Plaintiff's negligence claims are based solely on money damages incurred from the purchase price, the claims are barred.

See also Mega RV Corp. v. HWH Corp., 225 Cal. App. 4th 1318, 1339 (2014) ("Courts are reluctant to impose duties to prevent economic harm to third parties because as a matter of economic and social policy, third parties should be encouraged to rely on their own prudence, diligence and contracting power, as well as other informational tools.") (internal citations omitted).

Plaintiffs argue that public policy supports finding that MusclePharm owes them a duty of care to prevent economic loss. Oppo., p. 16:5-9. However, doing so here would be extending tort liability to manufacturers for nominal economic losses, and would be devastating to MusclePharm and other companies. As the court held in *532 Madison Ave. Gourmet Foods, Inc. v. Finlandia Ctr., Inc.*, 96 N.Y.2d 280, 289 (2001):

> In drawing lines defining actionable duty, courts must therefore always be mindful of the consequential, and precedential, effects of their decisions … Absent a duty running directly to the injured person there can be no liability in damages, however careless the conduct or foreseeable the harm. This restriction is necessary to avoid exposing defendants to unlimited liability to an indeterminate class of persons conceivably injured by any negligence in a defendant's act.

Moreover, Plaintiffs acknowledge that two of the factors determining whether a "special relationship" exists are the foreseeability of harm to the plaintiff and whether the plaintiff can allege a present injury. Oppo., p. 15:11 (citing *Aas*, 24 Cal. 4th at 646). MusclePharm cannot owe a duty of care to Plaintiffs when it could not foresee that, despite accurately stating the weight of its product, a plaintiff may feel that he paid a premium price for a larger container. Moreover, Plaintiffs cannot pursue their negligent misrepresentation claim as to products they did not purchase as they were never "injured" by purchasing those products.

A negligent misrepresentation claim is not appropriate in this action and must be dismissed with prejudice.

VI. PLAINTIFFS CONCEDE THEIR CLAIMS RELATING TO MUSCLEPHARM'S WEBSITE ARE NOT ACTIONABLE

As Plaintiffs do not oppose MusclePharm's Motion relating to allegations regarding MusclePharm's website (Oppo., p. 16:11-15), the Court should dismiss – with prejudice – all claims relating to representations made by MusclePharm on its website.

Dated: May 2, 2016

SHEPPARD, MULLIN, RICHTER & HAMPTON, LLP

By *s/ Mark G. Rackers*

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United States District Court for the Southern District of California, *Matthew Gates, et al. v. Musclepharm Corporation*, Case No. 15-cv-02870-BAS-DHB

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SAN DIEGO

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of San Diego, State of California. My business address is 501 West Broadway, 19th Floor, San Diego, CA 92101-3598.

On May 2, 2016, I served true copies of the following document(s) described as **MUSCLEPHARM CORPORATION'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS** on the interested parties in this action as follows:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on May 2, 2016, at San Diego, California.

Pamela Parker

Pamela Parker