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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

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS

[Notice of Motion and Motion to Dismiss filed concurrently]

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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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Though their Complaint focuses on five MusclePharm products (the "Products"), Plaintiffs Matthew Gates and John Martinez (collectively, "Plaintiffs") allege that they each purchased an unspecified protein powder product marketed by Defendant MusclePharm Corporation ("MusclePharm") at an unspecified time from an unspecified retailer. Plaintiffs claim that MusclePharm violated California and New York consumer protection laws by marketing and selling the Products in containers that were allegedly under filled, or had "slack-fill." (Compl., ¶ 7.) Plaintiffs claim that this slack-fill was nonfunctional, and that the Products are thus misleading. (*See, e.g.*, Compl., ¶¶ 21-23.) Based on those general allegations, Plaintiffs allege five causes of action against MusclePharm: (1) violation of California's Consumer Legal Remedies Act, Cal. Civ. Code § 1750 *et. seq.* (the "CLRA"); (2) violation of California's Unfair Competition Law, Cal. Bus. & Prof. Code § 17200 (the "UCL"); (3) violation of California's False Advertising Law, Cal. Bus. & Prof. Code § 17500, *et. seq.* (the "FAL"); (4) violation of NY GBL § 349; and (5) negligent misrepresentation.

Plaintiffs' California statutory claims should be dismissed in their entirety. Plaintiffs have failed to allege the "who, what, when, where, and how" of their alleged purchase or the alleged misrepresentations, and accordingly have not pled with particularity the alleged fraud that underlies their claims. Plaintiffs' California statutory claims should also be dismissed to the extent that they rely on any statements allegedly made on MusclePharm's website because Plaintiffs have not alleged reliance on those statements.

The Court should also dismiss Plaintiffs' claims for injunctive relief because Plaintiffs lack standing to seek injunctive relief. Plaintiffs have not alleged they intend to purchase the product again, and, thus, they are not realistically threatened by a repetition of the violation.

Additionally, the Court should dismiss Plaintiffs' negligent misrepresentation claim because it is barred by the economic loss doctrine.

II. PLAINTIFFS' ALLEGATIONS AND BACKGROUND

Plaintiffs allege that they each purchased an unspecified Product at an unspecified time in the past four years, from an unspecified location. (*See* Compl., ¶ 13 (Mr. Gates of California purchased "a Whey Product for personal consumption during the last four years in San Diego, California"); ¶ 14 (Mr. Martinez purchased "a Whey product for personal consumption during the last four years in West Nyack, New York"). Plaintiffs do not allege which particular Product(s) they purchased, when they purchased the Product(s), or where they purchased the Product(s). Plaintiffs do not even indicate whether they purchased the Product(s) online or in a physical retail store.

Plaintiffs allege that the Products' containers are under-filled, and comprised of approximately 45% non-functional slack-fill. (Compl., ¶¶ 24-31.) Plaintiffs allege, without support, that there is no functional reason for this level of slack-fill, and that no slack-fill safe harbor provisions apply to the Products. (Compl., ¶¶ 21-22, 28.)

Plaintiffs allege that they purchased the Products in reliance on the Products' packaging in containers. (Compl., ¶¶ 13-14.) Plaintiffs also allege that MusclePharm has made various statements regarding MusclePharm's business, and the quality of MusclePharm Products. (Compl., ¶¶ 4-6.) Plaintiffs do not allege, however, that they read those statements prior to purchasing any Products, or that they relied on any of those statements.

III. PLAINTIFFS HAVE FAILED TO PLEAD THEIR CALIFORNIA STATUTORY CLAIMS WITH PARTICULARITY

Federal Rule of Civil Procedure 8 requires that a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. Pro. 8(a)(2). The statement must contain "sufficient factual matter, accepted

as true, to state a claim for relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 664, 129 S. Ct. 1937, 1949 (2009) (internal quotes omitted). These factual allegations must "raise a right to relief above the speculative level" and "some threshold of plausibility must be crossed at the outset" before a case can proceed. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 558, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). While "[t]he plausibility standard is not akin to a probability requirement…it asks for more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 556 U.S. at 678.

For claims sounding in fraud, plaintiffs must meet the pleading requirements of Federal Rule of Civil Procedure 9(b). Rule 9(b) requires that "a party…state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. Pro. 9(b). Rule 9(b) applies to claims based on the UCL, FAL, and CLRA. *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125 (9th Cir. 2009); *Yumul v. Smart Balance, Inc.*, 733 F. Supp. 2d 1117, 1122-23 (C.D. Cal. 2010). The complaint must allege, in detail, "the who, what, when, where, and how" of the alleged fraudulent conduct, *Kearns*, 567 F.3d at 1125, and "set forth what is false or misleading about a statement, and why it is false." *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003). "Defendants should not be forced to guess as to how their conduct was allegedly fraudulent." *Lane v. Vitek Real Estate Industries Group*, 713 F. Supp. 2d 1092, 1103 (E.D. Cal. 2010).

When, as here, Plaintiffs allege a "unified course of fraudulent conduct" as the basis of their claim, "the claim is said to be 'grounded in fraud' or to 'sound in fraud,' and the pleading of that claim as a whole must satisfy the particularity requirement of Rule 9(b)." *Vess*, 317 F.3d at 1103-1104 (citation omitted). Plaintiffs' claims for violations of the CLRA, UCL and FAL are all grounded in fraud. Even if a complaint does not use the "magic" word – fraud – it cannot evade Rule 9(b)'s pleading requirements. *Vess*, 317 F.3d at 1108. If the allegations describe fraudulent conduct, then Rule 9(b) applies to those allegations. *Id.*

A. The Complaint Fails to Identify Which of MusclePharm's Products Were Purchased.

Though the Complaint alleges that five of MusclePharm's products have improper levels of non-functional slack-fill, Plaintiffs fail to allege which product(s) they actually purchased. The Complaint groups all of the products at issue by alleging that

> This lawsuit charges Defendant with intentionally packaging its Protein Products, including its ARNOLD SCHWAZENEGGER SERIES IRON WHEY, MusclePharm Combat Protein Poswer, MusclePharm Combat Powder, MusclePharm Combat Black Weight Gainer, and MusclePharm FitMiss DELIGHT (collectively, "Whey Products" or "Products").

(Compl., ¶ 1.) The Complaint then alleges that each of the Plaintiffs "purchased a Whey Product for personal consumption." (Compl., ¶ 13.) The Complaint fails to identify which of the Products each Plaintiff purchased. The "what" requirement needed to plead a claim under Rule 9(b) has not been satisfied. *Fisher v. Monster Beverage Corp.*, Case No. 12-cv-02188, 2013 WL 4804385, at *7 (C.D. Cal. July 9, 2013) (holding that the complaint's failure to provide specifics as to which of 28 varieties of defendant's beverages were purchased by which plaintiff required dismissal for failure to meet Rule 9(b)'s specificity requirement).

B. The Complaint Fails to Identify Where or How the MusclePharm Products Were Purchased.

The Complaint fails to identify where or how the MusclePharm products were purchased. The Complaint alleges that each Plaintiff purchased a "Whey Product" in a specific city. (Compl., ¶ 13 (alleging Plaintiff Gates purchased "a" Product in "San Diego, California").) The Complaint does not, however, identify where or how each Plaintiff purchased the Product. Specifically, the Complaint fails to identify which store(s) the Plaintiffs visited or whether they visited any physical store at all. It is entirely unclear whether the Plaintiffs purchased the Products in a retail store, or if they purchased them online. Since Plaintiffs' claims relate to the size and fill of the Products' containers, how and where they purchased the Products

may affect the representations they viewed prior to purchasing the Product(s). MusclePharm needs these basic facts in order to properly prepare its defense. Plaintiffs' Complaint fails to provide these foundational facts with sufficient specificity to satisfy Rule 9(b).

C. The Complaint Fails to Sufficiently Allege When the MusclePharm Products Were Purchased.

The Complaint also fails to allege with specificity when the Products were purchased. The Complaint merely alleges that each Plaintiff purchased "a" Product "during the last four years." (Compl., ¶ 13.) Plaintiffs have thus failed to identify, with specificity, when they saw the size of the Product containers upon which they allegedly relied, or when they purchased the Products. MusclePharm needs this information to prepare its defenses. Failure to allege when products were purchased is cause for dismissal. *See, e.g., Allen v. Similasan Corp.*, Case No. 12-cv-0376-BTM-WMC, 2013 WL 2120825, *7 (S.D. Cal. May 14, 2013) (dismissing claims under Rule 9(b) because plaintiffs failed to allege "when they bought Defendant's products"); *Edmunson v. Procter & Gamble Co.*, Case No. 10-CV-2256-IEG NLS, 2011 WL 1897625, *5 (S.D. Cal. May 17, 2011) (dismissing UCL and CLRA claims under Rule 9(b) because plaintiff did not specifically allege what packaging he saw and failed to allege when and how many times he purchased the product or was exposed to alleged misrepresentations); *Yumul v. Smart Balance, Inc.*, 733 F. Supp. 2d 1117, 1124 (C.D. Cal. 2010) (dismissing UCL and FAL claims under Rule 9(b) because plaintiff failed to identify when during the decade period she purchased the product and failed to allege that the packaging remained the same during that period). Additionally, Plaintiffs' failure to allege when they purchased the Products makes it unclear whether their purchases fall within the applicable limitations periods. The CLRA and FAL both have three-year limitations periods. Cal. Civ. Code § 1783; *see also Yumul*, 733 F. Supp. 2d at 1140.

IV. PLAINTIFFS LACK STANDING TO PURSUE CLAIMS BASED ON MUSCLEPHARM'S WEBSITE AND CLAIMS FOR INJUNCTIVE RELIEF

"No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 37 (1976). "The concept of standing is part of this limitation." *Id.*

"To establish standing under Article III, the plaintiff must show: (1) injury in fact; (2) causation; and (3) redressability." *Lieberson v. Johnson & Johnson Consumer Cos.*, 865 F. Supp. 2d 529, 536 (D.N.J. 2011). A plaintiff must "clearly and specifically set forth facts sufficient to satisfy the Article III standing requirements" in the Complaint, insofar as a "federal court is powerless to create its own jurisdiction by embellishing otherwise deficient allegations of standing." *Whitmore v. Ark.*, 495 U.S. 149, 156 (1990). To establish an injury in fact, a plaintiff must demonstrate the "invasion of a legally protected interest which is (a) concrete and particularized; and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (internal quotations and citations omitted). "By particularized," it is meant "that the injury must affect the plaintiff in a personal and individual way." *Id.* at 560 n.1.

In addition, 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) (holding that CLRA claim failed because plaintiff failed to allege facts showing that he "relied on any representation by" defendant); *Kwikset Corp. v. Superior Court*, 51 Cal. 4th 310, 326 (2011) (holding that plaintiff was required to demonstrate actual reliance because his UCL claim was "based on a fraud theory involving false advertising and misrepresentations to consumers").

A. Plaintiffs Lacks Standing To Pursue Injunctive Relief.

Pursuant to Article III, "a plaintiff does not have standing to seek prospective injunctive relief against a manufacturer or 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).

Here, Plaintiffs have not alleged they have any intention of purchasing MusclePharm products in the future. Even if they were not at the time of their alleged purchases, Plaintiffs are now aware of the alleged fill level in the Products. Accordingly, Plaintiffs are not "realistically threatened by a repetition of the violation." *Wang v. OCZ Tech. Grp., Inc.*, 276 F.R.D. 618, 626-627 (N.D. Cal. 2011) (holding that plaintiff lacked standing to pursue injunctive relief to stop the defendant from continuing to disseminate allegedly misleading advertising because, being aware of the allegedly misleading nature of those advertisements, there was "no danger" the plaintiff would again pay "an inflated price for the product based on [the] alleged misrepresentations"); *see also Albert v. Blue Diamond Growers*, Case No. 15-cv-4087, 2015 U.S. Dist. LEXIS 145033, *10-14 (S.D.N.Y. Oct. 21, 2015) (holding plaintiff lacked standing to pursue injunctive relief where plaintiff failed to demonstrate a likelihood of future injury). Therefore, Plaintiff may not pursue injunctive relief against MusclePharm. Moreover, because they are not "entitled to seek injunctive relief," Plaintiffs "may not represent a class seeking that relief." *Hodgers-Durgin v. de la Vina*, 199 F.3d 1037, 1045 (9th Cir. 1999); *Albert*, 2015 U.S. Dist. LEXIS 145033, *13.

B. Plaintiffs Lack Standing to Pursue Claims Based on Products They Did Not Purchase.

The Complaint should be dismissed to the extent that it is based on products that Plaintiffs did not purchase because Plaintiffs lack standing to pursue claims regarding such products. *See Lieberson v. Johnson & Johnson Consumer Cos.*, 865

F. Supp. 2d 529, 537 (D.N.J. 2011) (holding, in a putative consumer class action, that, "[b]ecause Plaintiff has not alleged that she purchased or used two of the four baby bath products at issue here, Plaintiff cannot establish an injury-in-fact with regard to those products"); *In re WellNX Mktg. & Sales Practices Litig.*, 673 F. Supp. 2d 43, 55 (D. Mass. 2009) (holding, in consumer actions against inventors, retailers, and manufacturers of weight-loss products, that "the claims involving [one of the products] must be dismissed" because "none of the named plaintiffs is alleged to have purchased" it); *Granfield v. Nvidia Corp.*, Case No. 11-cv-05403, 2012 WL 2847575, *6 (N.D. Cal. July 11, 2012) (plaintiff lacked standing to assert claims based on products she did not purchase*); Carrea v. Dreyer's Grand Ice Cream, Inc.*, Case No. 10-cv-01044, 2011 WL 159380, *3 (N.D. Cal. Jan. 10, 2011) (same).[1] Plaintiffs' Complaint alleges that each Plaintiff purchased "a" Product, which implies that at least three of the five Products identified in the Complaint were not purchased by either Plaintiff. (Compl., ¶¶ 13-14.) The Complaint should be dismissed to the extent it is based on any Products not actually purchased by either Plaintiff.

C. <u>The Website Statements Challenged in the Complaint Are Not Actionable Under the UCL, FAL, or CLRA.</u>

To recover money under the UCL, FAL, or CLRA, a plaintiff must have been exposed to the allegedly unfair practice that caused the harm. *Pfizer, Inc. v. Super. Ct.*, 182 Cal. App. 4th 622, 631 (2010) ("…one who was not exposed to the alleged misrepresentation and therefore could not possibly have lost money or property as a result of the unfair competition is not entitled to restitution"); *Meyer v. Sprint Spectrum L.P.*, 45 Cal. 4th 634, 641 (2009) (holding that "in order to bring a CLRA action" the consumer must "be exposed to an unlawful practice…").

[1] That the Complaint is styled as a class action "… adds nothing to the question of standing, for even named plaintiffs who represent a class must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent." *Lewis v. Casey*, 518 U.S. 343, 357 (1996).

Where, as here, a complaint alleges that a defendant has engaged in false and fraudulent advertising in violation of the UCL and FAL, the plaintiff must plead and prove causation: that the allegedly false advertising was the "immediate cause" of plaintiff's injury. *In re Tobacco II*, 46 Cal. 4th 298, 326 (2009) (a "plaintiff must show that the misrepresentation was an *immediate cause* of the injury-producing conduct") (emphasis added); *Durell v. Sharp Healthcare*, 183 Cal. App. 4th 1350, 1363 (2010) (applying *Tobacco II* and holding that the plaintiff must show actual reliance upon the alleged unlawful practice that resulted in an injury producing event). The same is true for a CLRA cause of action. *Durell*, 183 Cal. App. 4th at 1367 ("plaintiffs in a CLRA action [must] show not only that a defendant's conduct was deceptive but that the deception caused them harm.").

Here, Plaintiffs identify a number of statements made on MusclePharm's website and imply that they are related to Plaintiffs' claims regarding the Products. (*See* Compl., ¶¶ 4-6.)[2] However, Plaintiffs do not allege that they saw or relied on the MusclePharm website prior to purchasing any Products. To the extent that Plaintiffs purport to base any of their claims on such website statements, they lack standing to do so. *See, e.g.*, *In re Ferrero Litig.*, 794 F. Supp. 2d 1107, 1112 (S.D. Cal. 2011) (plaintiffs lacked standing to challenge statements on website where plaintiff did not allege that they visited the website or actually relied on it); *Victor v. R.C. Bigelow, Inc.*, Case No. 13-02976, 2014 WL 1028881, *7 (N.D. Cal. Mar. 14, 2014) (same); *Branca v. Nordstrom, Inc.*, Case No. 14-cv-2062-MMA (JMA), 2015 WL 1841231, *4 (S.D. Cal. Mar. 19, 2015) (plaintiff lacked standing to bring claims based on website where plaintiff alleged no facts demonstrating he observed or was aware of the website).

[2] It is also worth noting that the statements made on the MusclePharm website cannot form the basis of any of Plaintiffs' claims because they do not make any assertions related to the fill of the Products. (*See* Compl., ¶¶ 4-6.)

V. PLAINTIFFS HAVE FAILED TO STATE A CLAIM FOR NEGLIGENT MISREPRESENTATION

Negligent misrepresentation claims based solely on economic injury fail under the economic loss doctrine, which restricts the remedy of plaintiffs who have suffered economic loss, but not personal or property injury, to an action in contract. *Shahinian v. Kimberly-Clark Corp.*, Case No. 14-cv-8390, 2015 WL 4264638, *8 (C.D. Cal. July 10, 2015) ("Generally, under the 'economic loss' rule, a plaintiff who suffers only pecuniary injury as a result of the conduct of another cannot recover those losses in tort. Instead, the claimant is limited to recovery under the law of contract."); *Weisblum v. Prophase Labs, Inc.*, 88 F. Supp. 3d 283, 297 (S.D.N.Y. 2015) (stating that, under New York law, a plaintiff who has "suffered economic loss, but not personal or property injury," may not recover in tort "[i]f the damages are the type remedial in contract"). The economic loss doctrine applies to claims for negligent misrepresentation under both California and New York law, and courts have repeatedly held that the doctrine bars such claims based on economic injury in consumer class actions. *See, e.g.*, *Minkler v. Apple, Inc.*, 65 F. Supp. 3d 810 (N.D. Cal. 2014) (dismissing negligent misrepresentation claim under economic loss doctrine); *Shahinian*, 2015 WL 4264638 at *8 (same); *Weisblum*, 88 F. Supp. 3d at 297 (dismissing negligent misrepresentation claims under both California and New York law based on economic loss doctrine); *Elkind v. Revlon Consumer Prods. Corp.*, Case No. 14-cv-2484, 2015 WL 2344134 (E.D.N.Y. May 14, 2015) (dismissing negligent misrepresentation claim under New York law).

Plaintiffs do not allege personal injury or property damage. They merely allege that they would not have purchased the Product, or would have paid less for the Product if they knew the Product containers were not full. (*See, e.g.*, Compl., ¶¶ 60, 72, 81, 90.) As Plaintiff has not and cannot establish the required injury to avoid the economic loss doctrine, their negligent misrepresentation claim should be dismissed as a matter of law.

VI. CONCLUSION

For the foregoing reasons, MusclePharm respectfully requests that Plaintiffs' Complaint be dismissed.

Dated: March 16, 2016

SHEPPARD, MULLIN, RICHTER & HAMPTON llp

By *s/ Robin A. Achen*
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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 LOS ANGELES

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 Los Angeles, State of California. My business address is 333 South Hope Street, 43rd Flr., Los Angeles, California.

On March 16, 2016, I served true copies of the following document(s) described as **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS** on the interested parties in this action as follows:

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☒ **BY CM/ECF NOTICE OF ELECTRONIC FILING:** I electronically filed the document(s) with the Clerk of the Court by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system. Participants in the case who are not registered CM/ECF users will be served by mail or by other means permitted by the court rules.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Executed on March 16, 2016, at Los Angeles, California.

49ZM-228034 (USDC – SD)

ANDREA J. HERNANDEZ