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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

ThermoLife International, LLC, an Arizona limited liability company, Plaintiff, vs. Gaspari Nutrition, Inc., a New Jersey corporation; Richard Gaspari, a New Jersey resident; Daniel Pierce, a New Jersey resident; and Bruce Kneller, a New Jersey resident, Defendants.	No. CV 11-01056-PHX-NVW **ORDER**

Before the Court is Defendants' Motion to Dismiss Pursuant to Fed. R. Civ. P. Rule 9(b) and 12(b)(6) (Doc. 10), Plaintiff's Request for Entry of Default Against Gaspari Nutrition, Inc. On Counts I, II, IV, and V (Doc. 14), and the parties' Joint Memorandum Regarding Discovery Dispute (Doc. 32).

I. Background

Plaintiff ThermoLife International, LLC ("ThermoLife") and Defendant Gaspari Nutrition, Inc. ("Gaspari") are both suppliers of dietary supplements. Individual Defendants Richard Gaspari, Daniel Pierce, and Bruce Kneller have all been employed by Gaspari. Plaintiff claims that Gaspari falsely and misleadingly marketed and sold products that were not compliant with the federal Dietary Supplement Health and Education Act of 1994 ("DSHEA"). Specifically, Plaintiff claims that Gaspari sold and marketed a product called

Novedex XT as being DSHEA compliant when it was not actually DSHEA compliant. On September 9, 2010, the FDA issued a formal action stating that Novedex XT was not DSHEA compliant because it contained aromatase inhibitors that could cause potential adverse effects in users. On October 7, 2010, Gaspari issued a recall of Novedex XT.

Additionally, Plaintiff claims that Gaspari falsely advertised its Halodrol Liquigels and Halodrol MT products as being DSHEA compliant. On October 6, 2010, the FDA issued a formal enforcement report stating that Gaspari's Halodrol products were not DSHEA compliant and would accordingly be recalled. Plaintiff further claims that Gaspari falsely advertised that its Halodrol products contained 95% 3,4-divanillytetrahydrofuran. However, Plaintiff tested material that was marketed and sold as 95% 3,4-divanillytetrahydrofuran and concluded that the material it had tested was not in fact 95% 3,4-divanillytetrahydrofuran. From this, Plaintiff extrapolates that the commercial production of 95% 3,4-divanillytetrahydrofuran was cost prohibitive, and that Gaspari's Halodrol products could not actually contain 95% 3,4-divanillytetrahydrofuran.

Plaintiff also raises issues related to Gaspari's advertisement of its SuperPump 250 product. Plaintiff claims that Gaspari advertised that the SuperPump 250 contained an ingredient called Turkesterone, although there is not actually any Turkesterone in the SuperPump 250. Alternatively, Plaintiff claims that if there is some amount of Turkesterone in the SuperPump 250, it exists in such trace amounts as to be ineffective; accordingly, Defendant falsely advertised that the SuperPump 250 contained effective levels of Turkesterone. Plaintiff claims that it has been harmed by Gaspari's false and misleading advertisements of all of these products through a direct diversion of ThermoLife's sales and a lessening of the goodwill associated with its products.

Finally, Plaintiff alleges that Gaspari improperly prevented ThermoLife from maintaining exhibiting at the Mr. Olympia bodybuilding competition and trade show, which was held on September 25-26, 2009, by contacting organizers of the Mr. Olympia competition and threatened to pull its advertising if ThermoLife was allowed to exhibit at the event. Plaintiff claims Gaspari's actions caused Plaintiff to lose business opportunities and

unrecoupable costs it had expended in anticipation of attending the competition.

ThermoLife's complaint raises five causes of action related to these allegations: (1) False Advertising Under 15 U.S.C. § 1125(a)(1)(B) - Against Gaspari; (2) Common Law Unfair Competition - Against Gaspari; (3) Violation of A.R.S. §§ 13-2301 *et seq.* – Against Richard Gaspari, Daniel Pierce, and Bruce Kneller; (4) Tortious Interference with Business and Business Expectancy; and (5) Unjust Enrichment.

II. Legal Standard

A. Rule 12(b)(6), Federal Rules of Civil Procedure

On a motion to dismiss under Fed. R. Civ. P. 12(b)(6), all allegations of material fact are assumed to be true and construed in the light most favorable to the nonmoving party. *Cousins v. Lockyer*, 568 F.3d 1063, 1067 (9th Cir. 2009). Dismissal under Rule 12(b)(6) can be based on "the lack of a cognizable legal theory" or "the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). To avoid dismissal, a complaint must contain "only enough facts to state a claim for relief that is plausible on its face." *Twombly*, 550 U.S. at 570. The principle that a court accepts as true all of the allegations in a complaint does not apply to legal conclusions or conclusory factual allegations. *Ashcroft v. Iqbal*, 556 U.S. 662, 239 S. Ct. 1937, 1951 (2009). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* at 1949. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* To show that the plaintiff is entitled to relief, the complaint must permit the court to infer more than the mere possibility of misconduct. *Id.*

B. Rule 9(b), Federal Rules of Civil Procedure

"In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). Rule 9(b) requires allegations of fraud to be "specific enough to give defendants notice of the particular misconduct which is alleged to constitute the fraud charged so that they can defend against the charge and not just deny that they have done anything wrong." *Bly-Magee v. California*, 236 F.3d 1014, 1019 (9th Cir. 2001). "While statements of the time, place and nature of the alleged fraudulent activities are sufficient, mere conclusory allegations of fraud are insufficient." *Moore v. Kayport Package Express, Inc.*, 885 F.2d 531, 540 (9th Cir. 1989). Further,

> Rule 9(b) does not allow a complaint to merely lump multiple defendants together but requires plaintiffs to differentiate their allegations when suing more than one defendant and inform each defendant separately of the allegations surrounding his alleged participation in the fraud. In the context of a fraud suit involving multiple defendants, a plaintiff must, at a minimum, identify the role of each defendant in the alleged fraudulent scheme.

Swartz v. KPMG LLP, 476 F.3d 756, 764-65 (9th Cir. 2007) (internal quotation marks, alteration marks, and citations omitted).

III. Motion to Dismiss

Defendant has moved to dismiss Plaintiff's RICO claim for failing to plead fraud with particularity under Fed. R. Civ. P. 9(b) and for failing to state a plausible claim for relief under Fed. R. Civ. P. 12(b)(6). Defendant also seeks dismissal of Plaintiff's complaint in its entirety for failing to plead fraud with particularity under Fed. R. Civ. P. 9(b), on the theory that because Plaintiff's RICO count and the underlying facts of the complaint sound in fraud, the whole complaint must satisfy the Fed. R. Civ. P. 9(b) pleading standards.

A. RICO Count

In order to state a claim under Arizona's RICO statute, A.R.S. §§ 13-2301 *et seq.*, Plaintiff must allege Defendants engaged in a "pattern of racketeering activity . . . defined as '[a]t least two acts of racketeering' that are 'related' and 'continuous'[.]"' *Lifeflite Med. Air Transport, Inc. V. Native Amer. Air Servs., Inc.*, 198 Ariz. 149, 151-52, 7 P.3d 158, 160-61 (Ct. App. 2000) (citing *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229,

241-42 (1989)); *see also* A.R.S. § 13-2301(D)(4) (defining unlawful activities that constitute "racketeering acts" when committed for financial gain). To establish the necessary continuity element, Plaintiff may allege either open-ended continuity—meaning "past conduct that by its nature projects in the future with a threat of repetition"—or close-ended continuity, meaning "a closed period of repeated conduct." *See Turner v. Cook*, 362 F.3d 1219, 1229 (9th Cir. 2004); A.R.S. § 13-2314.01(T)(3)(iii).

"'Where the predicate racketeering acts of a RICO claim sound in fraud, . . . the pleading of those predicate acts must satisfy the particularity requirement of [Federal Rule of Civil Procedure] 9(b)' . . . which provides that in 'all averments of fraud or mistake, the circumstances constituting the fraud or mistake shall be stated with particularity.'" *Laron, Inc. V. Constr. Resource Servs., LLC,* 2007 WL 1958732, *5 (citing *Wasserman v. Maimonides Med. Ctr.*, 970 F. Supp. 183, 187 (E.D.N.Y. 1997)). A plaintiff must "state the time, place, and specific content of the false representations as well as the identifies of the parties to the misrepresentation" in order to sufficiently plead fraud with particularity. *Odom v. Microsoft Corp.*, 2007 WL 1297249, at *12 (9th Cir. 2007). Further, where a plaintiff names multiple defendants, it must "identify the role of each defendant in the alleged fraudulent scheme." *Swartz*, 476 F.3d at 765. "Allegations made on 'information and belief' are not sufficient 'unless the complaint sets forth the facts on which the belief is founded.'" *Laron*, 2007 WL 1958732 at *5 (citing *In re Worlds of Wonder Secs. Litigation*, 694 F. Supp. 1427, 1432-33 (N.D. Cal. 1988)).

Plaintiff here asserts that the individual Defendants' unlawful predicate acts include "asserting false claims" and conducting "a scheme or artifice to defraud." (Doc. 1 at ¶141 (citing A.R.S. § 13-2301(D)(4)(b)(xv),(xx)). Plaintiff alleges the individual Defendants "knowingly, intentionally, and falsely" made statements that "Gaspari's products are DSHEA complaint . . . contain raw materials . . . that are not found in Gaspari's products... and that anyone who alleges otherwise is not truthful." (*Id.* at ¶ 143.) Although these claims clearly sound in fraud, Plaintiff's RICO count does not contain specific enough allegations to make out a claim under RICO with the particularity required by Rule 9(b). While there are

allegations related to specific allegedly false statements scattered throughout the complaint, Plaintiff has not sufficiently linked those allegations specifically to the RICO count in order to make clear which statements support Plaintiff's RICO claim and which statements support Plaintiff's other state law and Lanham Act claims. Further, Plaintiff has not sufficiently alleged when and in what forum these alleged false statements were made.

Plaintiff has also failed to state a plausible claim for relief under Arizona's RICO statute. While the complaint alleges facts that plausibly support Plaintiff's claims for alleged state law and Lanham Act violations, it does not allege facts which comfortably fit within the parameters of a RICO claim. For example, Plaintiff's complaint has not identified when the alleged predicate activities occurred, beyond stating that at least two of the false statements were made within the last five years (Doc. 1 at ¶ 142), making it difficult to ascertain whether Defendants' allegedly unlawful conduct was sufficiently continuous. *See, e.g.*, *Lifelite*, 161, 152 (citing *H.J. Inc.*, 492 U.S. at 242) (noting "[p]redicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy'" the continuing activity requirement). Nor has Plaintiff alleged how Defendants' "predicate misconduct . . . by its nature projects into the future with a threat of repetition," *Turner*, 362 F.3d at 1229, especially considering Plaintiff concedes that Defendants' non-DSHEA compliant products were recalled upon notification by the FDA of their non-compliance and no allegations were made that Defendants continued to advertise their products as being DSHEA-compliant after the FDA determined the products were non-compliant. Conclusory allegations that Defendants' "false statements are continuous, ongoing and pose a threat of continued unlawful activity" (Doc. 1 at ¶ 147) are insufficient to state a claim for relief.

For these reasons, Defendant's motion to dismiss Plaintiff's RICO count (Doc. 10) will be granted. Plaintiff will be permitted leave to amend by January 13, 2012.

B. Application of Fed. R. Civ. P. 9(b) to Non-RICO Counts

Defendants also claim that Plaintiff's complaint should be dismissed in its entirety because the underlying factual allegations supporting the complaint sound in fraud. Plaintiff argues that only its RICO requires a showing of fraud and, accordingly, only the RICO count

must be pled with particularity. Plaintiff further asserts that, to the extent its state law claims and claim for false advertising under the Lanham Act must be pled to the Rule 9(b) standard, the complaint is sufficient under Rule 9(b).

While Plaintiff's state law and Lanham Act claims do not require proof of fraud to state a claim for relief, such claims may nonetheless be subject to the heightened pleading standard under Rule 9(b) if the complaint as a whole "sounds in fraud." *See Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1103-04 (9th Cir. 2003) ("[T]he plaintiff may allege a unified course of fraudulent conduct and rely entirely on that course of conduct as the basis of a claim. In that event, 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 9(b)."). Further, Ninth Circuit case law also suggests that "misrepresentation claims are a species of fraud, which must meet Rule 9(b)'s particularity requirement." *Meridian Project Sys., Inc. v. Hardin Constr. Co., LLC*, 404 F. Supp. 2d 1214, 1219 (E.D. Cal. 2005); *see also Neilson v. Union Bank of Cal., N.A.*, 290 F. Supp. 2d 1101, 1141 (C.D. Cal. 2003) (same). Indeed, many courts have applied Rule 9(b)'s heightened pleading standard to claims for false advertising brought under the Lanham Act. *See e.g., Collegenet, Inc. v. XAP Corp.*, 2004 WL 2303506, *4 (D. Or. Oct 12, 2004) (applying Rule 9(b) to a Lanham Act claim where plaintiff alleged "knowing" and "intentional conduct"); *Max Daet-wyler Corp. v. Input Graphics, Inc.*, 608 F.Supp. 1549, 1556 (E.D.Pa.1985) (although Lanham Act claims are not categorically subject to the heightened pleading requirements of 9(b), "the policies which underlie Rule 9(b)'s requirement that the nature of an alleged misrepresentation be pleaded with specificity are equally applicable to the type of misrepresentation claims presented in plaintiff's Lanham Act claim."); *Pestube Systems, Inc. v. HomeTeam Pest Def., LLC*, 2006 WL 1441014 (D. Ariz. May 24, 2006) (applying Rule 9(b) to Lanham Act claim where claim was "grounded" or "sounding" in fraud because of allegations of knowing misrepresentations.)

Here, Plaintiff's complaint details numerous allegations against Defendants, some of which allege fraud and others of which do not. *Compare* (Doc. 1 at ¶ 6 (alleging Gaspari

"falsely advertis[ed] its products . . . Gaspari kn[ew] or should have known [were] not DSHEA complaint")) *with* (*Id.* at ¶ 143 (alleging that individual Defendants "knowingly [and] intentionally" made false statements about Gaspari's products)). However, the false statements that make out Plaintiff's state law and Lanham Act claims also appear to be the basis for Plaintiff's RICO claim, wherein Plaintiff alleges the false statements were made knowingly, intentionally, and fraudulently. It is a fair conclusion, as Plaintiff's claims are currently pled, that Plaintiff alleges Defendants acted in unified conduct of fraud, making the complaint as a whole sound in fraud. Thus, Plaintiff "must state the time, place and specific content of the false representations as well as the identities of the parties to the misrepresentation" for all of its claims. *See Schreiber*, 806 at 1401. Plaintiff will be given leave to amend its complaint to either allege all counts with the particularity required by Rule 9(b), or more clearly delineate their claims to make clear which counts relate to and rely upon Defendants' allegedly fraudulent activity and which do not, if a unified conduct of fraud is not, in fact, the basis for Plaintiff's allegations.

IV. Plaintiff's Motion for Default

In its response to Defendants' motion to dismiss, Plaintiff also requests entry of default against Defendant Gaspari Nutrition, Inc. on Counts I, II, IV, and V (Doc. 14). Plaintiff claims that "[a]lthough Defendants' Motion to Dismiss purports to be filed on behalf of all Defendants, the Motion to Dismiss does not argue that any claim against Gaspari should be dismissed." (*Id.* at 7.) Plaintiff further contends that to the extent Gaspari had responded to some of the claims in the complaint, default would still be appropriate for the claims to which Gaspari had not responded (*Id.* at 7, n.3).

Contrary to Plaintiff's assertion, Defendants' motion to dismiss was filed on behalf of all Defendants and represents the response of all Defendants (Doc. 10). Further, Defendants have effectively responded to all of Plaintiff's claims in their motion, which seeks dismissal of Plaintiff's entire complaint on the basis that the complaint sounds in fraud and Plaintiff has failed to plead fraud with the particularity required by Fed. R. Civ. P. 9(b). (*Id.* at 2, n.3.) ("As the gravamen of Plaintiffs' [*sic*] Complaint is a unified course of

fraudulent conduct, Plaintiff's entire Complaint—not just the Little RICO claim—is subject to dismissal.").

Even if Defendants had failed to responded to one or more claims listed in Plaintiff's complaint, such failure would not be sufficient cause for entry of default as requested. Plaintiff cites *Gerlach v. Michigan Bell Telephone Co.*, 448 F.Supp. 1168, 1174 (E.D.1978) for the proposition that because each claim in a complaint constitutes an independent basis for the suit, a motion to dismiss certain claims should not toll the time to respond to the other allegedly unchallenged claims. However, the holding in *Gerlach* "is clearly the minority position and the recent authority is clearly opposed to any such holding." *Pestube Systems, Inc. V. HomeTeam Pest Defense, LLC*, No. CV05-2832-PHX-MHM, 2006 WL 1441014, at *7 (D. Ariz. May 24, 2006). Rather, the majority of courts have expressly held that even though a pending motion to dismiss may only address some of the claims alleged, the motion to dismiss tolls the time to respond to all claims. *See id.* (collecting cases). The majority rule recognizes that requiring a defendant to answer some claims raised in the complaint concurrently with a pending motion to dismiss creates the potential for duplicative proceedings if the motion to dismiss were denied, and is therefore more persuasive than the *Gerlach* rule. *Id.* For these reasons, Plaintiff's motion for entry of default (Doc. 14) will be denied.

V. Discovery Dispute

The parties have also filed a joint memorandum regarding a discovery dispute related to Defendant's Response and Objections to Plaintiff's First Set of Requests for Production of Documents (Doc. 32). Because the Court will dismiss Plaintiff's complaint with leave to amendment, a ruling on the scope of discovery at this stage is premature. The parties may renew their relevant objections if they arise later in this litigation.

IT IS THEREFORE ORDERED that Plaintiff's Request for Entry of Default Against Gaspari Nutrition, Inc. On Counts I, II, IV, and V (Doc. 14) is denied.

IT IS FURTHER ORDERED that Defendants' Motion to Dismiss Pursuant to Fed. R. Civ. P. Rule 9(b) and 12(b)(6) (Doc. 10) is granted.

IT IS FURTHER ORDERED that Plaintiff may file an amended complaint by January 13, 2012. The Clerk is directed to terminate this case without further order if Plaintiff does not file an amended complaint by January 13, 2012.

DATED this 16th day of December, 2011.

Neil V. Wake
United States District Judge