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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

KEVIN D. BRYANT,
Plaintiff,
vs.
APOTEX, INC., et al.,
Defendants.

CASE NO. 1:12-CV-01377 LJO JLT
ORDER ON DEFENDANTS’ MOTION FOR
JUDGMENT ON THE PLEADINGS
(Doc. 39)

_____/

Defendants Apotex, Inc., AmeriSource Health Services Corporation, The Harvard Drug Group LLC d/b/a Major Pharmaceuticals, Teva Pharmaceuticals USA, Inc., Mylan Pharmaceuticals Inc., and Mylan Institutional Inc. (herein collectively “Defendants”¹) have filed a motion for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c). Plaintiff Kevin D. Bryant (“Mr. Bryant” or “Plaintiff”), who is proceeding *pro se*, has filed an opposition to the motion, and Defendants have filed a reply. Having considered the parties’ submissions, the Court GRANTS IN PART and DENIES IN PART Defendants’ motion for judgment on the pleadings.

I. BACKGROUND

A. Plaintiff’s Allegations

Plaintiff is a California state prisoner currently housed in Kern Valley State Prison (“KVSP”). Defendants manufacture and distribute prescription drugs, including Gabapentin and Tramadol, which are at issue in this case.

¹ In addition to Defendants, Plaintiff includes 250 “Doe” defendants in this action. Plaintiff also refers to several named individuals as “defendant” in the body of his complaint; however, it appears that Plaintiff references these named individuals as defendants only because they are (or were) defendants in a separate suit filed by Plaintiff in state court. See Bryant v. CDCR, Case No. S-1500-CV-272692 (Kern County Superior Court).

1 In November or December 2009, Plaintiff was instructed by medical staff at KVSP to take his
2 pain medications, which included Gabapentin and Tramadol, in crushed form. The medications were
3 crushed and floated in small cups of water as part of a prison policy to prevent inmates from hoarding,
4 selling, and overdosing on medication. Within one month of the policy's implementation, however,
5 Plaintiff experienced severe pain in his stomach, vomited black blood frequently, and observed blood
6 in his stool. These symptoms persisted over the next six months.

7 On July 7, 2010, Plaintiff was admitted to Mercy Hospital for leg surgery. The next morning,
8 Plaintiff vomited black blood. In response, Plaintiff underwent an emergency procedure wherein 1.6
9 liters of blood, food, and other gastric content were removed from his stomach. Plaintiff's physician
10 diagnosed Plaintiff's condition as severe erosive esophagitis with slow hemorrhages in the esophagus.
11 Plaintiff's physician also indicated that this condition was probably caused by taking Gabapentin and
12 Tramadol in crushed form.

13 Ms. Markman, a nurse at KVSP, informed Plaintiff that the "crush and float" policy at KVSP
14 was implemented after several meetings between prison officials and KVSP medical staff. According
15 to Ms. Markman, prison officials and KVSP medical staff were aware that administering Gabapentin
16 and Tramadol in crushed form was contrary to the manufacturers' instructions, acknowledged the risks
17 posed to prisoners, and yet decided to implement the "crush and float" policy regardless. In fact, some
18 prison officials even claimed that they had obtained express permission and approval from Defendants
19 to administer Gabapentin and Tramadol to prisoners in crushed form.

20 **B. Procedural History**

21 Plaintiff filed suit in the Kern County Superior Court. Plaintiff asserted claims for negligence,
22 strict products liability, breach of express warranty, breach of implied warranty, and fraud. The action
23 was then removed to this Court on August 21, 2012, based on the Court's diversity jurisdiction under
24 28 U.S.C. § 1332(a).

25 On November 28, 2012, Defendants filed the pending motion for judgment on the pleadings.
26 The Court deemed the matter to be suitable for decision without oral argument pursuant to Local Rule
27 230(g), vacated the hearing, and set a briefing schedule for this matter. Plaintiff filed an opposition on
28 January 17, 2013, and Defendants filed a reply on January 25, 2013.

1 **II. LEGAL STANDARD**

2 A party may move for judgment on the pleadings after the pleadings are closed so long as there
3 is no delay to trial. Fed. R. Civ. P. 12(c). Where, as here, a motion for judgment on the pleadings is
4 used to raise the defense of failure to state a claim, the motion “faces the same test as a motion under
5 [Federal Rule of Civil Procedure] 12(b)(6)[.]” McGlinchy v. Shell Chemical Co., 845 F.2d 802, 810
6 (9th Cir. 1988).

7 To survive a motion to dismiss under Rule 12(b)(6), a complaint must contain sufficient factual
8 matter, accepted as true, to “state a claim to relief that is plausible on its face.” Ashcroft v. Iqbal, 556
9 U.S. 662, 678 (2009). In making this determination, courts follow a “two-pronged approach.” Id. at
10 679. First, the court identifies those allegations that are not presumed to be true. See id. at 680. This
11 includes allegations that are mere conclusions or allegations that are contradicted by matters properly
12 subject to judicial notice or exhibit. Sprewell v. Golden State Warriors, 266 F.3d 979, 988 (9th Cir.
13 2001). Second, the court determines whether the factual allegations that are presumed to be true give
14 rise to a claim that is plausible on its face when construed in the light most favorable to the opposing
15 party. See Iqbal, 556 U.S. at 681; Sprewell, 266 F.3d at 988. Although the plausibility standard is not
16 akin to a probability requirement, it asks for more than a sheer possibility that the defendant has acted
17 unlawfully. Iqbal, 556 U.S. at 678.

18 If the court concludes that the complaint fails to state a claim that is plausible on its face, the
19 court should dismiss the complaint with leave to amend unless the deficiencies in the complaint could
20 not be cured by amendment. See Cook, Perkiss & Liehe, Inc. v. Northern California Collection Serv.
21 Inc., 911 F.2d 242, 246-47 (9th Cir. 1990); In re Dynamic Random Access Memory Antitrust Litig., 516
22 F. Supp. 2d 1072, 1084 (N.D. Cal. 2007) (courts have discretion to grant Rule 12(c) motions with leave
23 to amend and should generally do so unless amendment would be futile or would result in prejudice to
24 the moving party).

25 **III. DISCUSSION**

26 **A. Construction of Plaintiff’s Claims**

27 As a preliminary matter, the Court finds it necessary to construe Plaintiff’s claims because it is
28 apparent that the parties disagree on this issue. Defendants argue that Plaintiff’s claims are essentially

1 “failure to warn” claims under state tort law, which seek to impose liability on Defendants for failing
2 to provide *additional warnings* (i.e., warnings beyond those already contained in the drug’s approved
3 warning label) to prison officials and to Plaintiff regarding the dangers of ingesting Gabapentin and/or
4 Tramadol in crushed form. Plaintiff, on the other hand, asserts that the essence of this case is not any
5 failure to warn, but rather his allegation that Defendants gave prison officials express permission and
6 approval to administer Gabapentin and Tramadol to him and other prisoners in crushed form, *despite*
7 *being aware that this directly contradicted Defendants’ own instructions regarding the administration*
8 *of the two drugs*. In other words, Plaintiff claims that Defendants told prison officials that they could
9 disregard Defendants’ own drug warning labels, which specifically caution against ingesting the drugs
10 in crushed form.

11 Although Plaintiff’s complaint is not a model of clarity, it does contain allegations that support
12 Plaintiff’s position. For example, Plaintiff alleges:

13 [P]rison officials now claim that [Defendants] gave them permission and approval to
14 administer them to human beings crushed and floated and *contrary to the administering*
15 *directions of the drugs*, and that they knew all along that they were giving it to human
16 beings here at KVSP and throughout CDCR this same way.

17 (Doc. 1, Ex. A (“Compl.”) at ¶ 32) (emphasis added). Similarly:

18 [Defendants] gave CDCR express permission and approval to administer these two drugs
19 in question to Me [sic] and all CDCR inmates crushed and floated contraindicative of the
20 dosing and administration directions and are liable and responsible for My [sic] damages
21 and injuries[.]

22 (Id. at ¶ 48.)

23 Because Plaintiff is the master of his complaint, and the complaint’s allegations are susceptible
24 to the interpretation advanced by Plaintiff, the Court will construe Plaintiff’s allegations accordingly.
25 See Eldridge v. Block, 832 F.2d 1132, 1137 (9th Cir. 1987) (however inartful, the pleadings of *pro se*
26 litigants must be construed liberally). The gravamen of this case is the allegation that Defendants told
27 prison officials that they could administer Gabapentin and Tramadol to Plaintiff and other prisoners in
28 crushed form, despite being aware that this was contrary to the drugs’ warning label and administration
instructions. With this in mind, the Court turns to the merits of Defendants’ substantive arguments for
judgment on the pleadings.

1 The Supremacy Clause establishes that federal law “shall be the supreme Law of the Land; . . .
2 any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.” U.S. Const., art.
3 VI, cl. 2. As such, where state and federal law conflict, state law is preempted and is “without effect.”
4 Maryland v. Louisiana, 451 U.S. 725, 746 (1981). State and federal law conflict when it is impossible
5 for a party to meet its obligations under both state and federal law. See Freightliner Corp v. Myrick, 514
6 U.S. 280, 287 (1995). Here, Defendants have failed to show any tension or impossibility between its
7 state and federal law obligations. Accordingly, the Court concludes that Plaintiff’s state law claims are
8 not preempted by federal law.

9 **C. Sufficiency of Plaintiff’s Allegations**

10 **1. Claims Related to Fraud**

11 Defendants maintain that Plaintiff’s state law claims relating to fraud are not sufficiently pled
12 under Rule 9(b). Here the Court agrees.

13 State law claims grounded in fraud are subject to the heightened pleading standard under Rule
14 9(b). Vess v. Ciba-Geity Corp. USA, 317 F.3d 1097, 1103-04 (9th Cir. 2003). See Neilson v. Union
15 Bank of Cal., N.A., 290 F. Supp. 2d 1101, 1141 (C.D. Cal. 2003) (“It is well-established in the Ninth
16 Circuit that both claims for fraud and negligent misrepresentation must meet Rule 9(b)’s particularity
17 requirements.”). Under Rule 9(b), the circumstances constituting the alleged fraud must be pled with
18 “particularity.” Fed. R. Civ. P. 9(b). In other words, the party claiming fraud must set forth specific
19 facts establishing the “who, what, when, where, and how” of the alleged fraudulent activity. Vess, 317
20 F.3d at 1006. Even where the party claiming fraud cannot be expected to have personal knowledge of
21 all the facts, the party must provide a sufficient factual basis for its allegations and beliefs. Neubronner
22 v. Milken, 6 F.3d 666, 672 (9th Cir. 1993).

23 Here, Plaintiff only makes two substantive allegations with respect to his claims for fraud: (1)
24 Defendants gave prison officials permission and approval to administer Gabapentin and Tramadol in
25 crushed form despite being aware of the dangers of ingesting the drugs in that way; and (2) Defendants
26 instructed prison officials to tell any prisoner who asked that it was safe to ingest the drugs in crushed
27 form. (Compl. at 12.) This falls well short of establishing the “who, what, when, where, and how” of
28 Defendants’ alleged fraudulent activity. Vess, 317 F.3d at 1106. For example, there is no indication

1 when or where Defendants had these conversations with prison officials; nor is there any indication as
2 to who specifically was involved.

3 Moreover, Plaintiff fails to establish a sufficient factual basis for his allegation/belief that these
4 conversations took place. Plaintiff states that prison medical officials told him that such conversations
5 occurred.² (See Compl. ¶ 25.) But, there is no indication who these officials are or on what basis they
6 made their statements. Such vague, naked accusations cannot serve as the sole foundation on which a
7 claim for fraud rests. Accord Kearns v. Ford Motor Co., 567 F.3d 1120, 1125 (9th Cir. 2009) (one of
8 the purposes of Rule 9(b) is to prohibit plaintiffs from unilaterally imposing upon the court, the parties,
9 and society enormous social and economic costs associated with a claim for fraud absent a firm factual
10 basis). Accordingly, the Court concludes that Plaintiff’s claims sounding in fraud are not sufficiently
11 pled under Rule 9(b) and must be dismissed.

12 2. Other Claims

13 Defendants also appear to argue that Plaintiff’s other claims (i.e., strict products liability, breach
14 of express warranty, and breach of implied warranty) are insufficiently pled under Rule 8. (See Doc. 39
15 (“Def.’ Mot. for J. on the Pleadings”) at 13-14.) Yet, beyond reciting the legal standard for a motion
16 to dismiss, Defendants offer no specific argument. Accordingly, the Court concludes that dismissal of
17 Plaintiff’s other claims is not warranted at this time. See Kehr Packages, Inc. v. Fidelcor, Inc., 926 F.2d
18 F.2d 1406, 1409 (3d Cir. 1991) (“[U]nder Rule 12(b)(6) the defendant has the burden of showing no
19 claim has been stated.”); see also Gallardo v. DiCarlo, 203 F. Supp. 2d 1160, 1165 (C.D. Cal. 2002) (“It
20 is the burden of the party bringing a motion to dismiss for failure to state a claim to demonstrate that the
21 requirements of Rule 8(a)(2) have not been met.”).

22 3. Leave to Amend

23 Plaintiff will be given an opportunity to amend his allegations relating to fraud. If, however,
24 Plaintiff elects to file an amended complaint he is cautioned that he may not change the nature of this
25 suit by adding new and unrelated claims. See George v. Smith, 507 F.3d 605, 607 (7th Cir. 2007) (no
26 “buckshot” complaints). In addition, Plaintiff is advised that once he files an amended complaint his

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28 ² It should be noted that Plaintiff does not allege that every prison medical officials agrees that such conversations took place. According to Plaintiff, some prison officials have explicitly indicated that they did not have permission from Defendants to administer Gabapentin and Tramadol in crushed form. (Compl. at ¶ 25.)

1 original complaint is superceded and no longer serves any function in this case. See Loux v. Rhay, 375
2 F.2d 55, 57 (9th Cir. 1967). Thus, Plaintiff’s amended complaint must be “complete in itself without
3 reference to the . . . superceded pleading.” Local Rule 220. A cause of action alleged in the original
4 complaint but not re-alleged in the amended complaint will be deemed to have been waived. King v.
5 Atiyeh, 814 F.2d 565, 567 (9th Cir. 1987).

6 **D. Defendants’ Reply Arguments**

7 Finally, the Court notes that Defendants maintain in their reply that there is no private right of
8 action under the FDCA. At first blush, the Court does not see the relevance of this argument. In any
9 event, the Court need not reach this argument because it was not raised in Defendants’ initial motion.
10 See Zamani v. Carnes, 491 F.3d 990, 997 (9th Cir. 2007) (district court need not consider arguments
11 raised for the first time in a reply brief).

12 Defendants also seek judicial notice of the warning labels for Neurontin and Ultram. Although
13 the Court GRANTS Defendants’ requests, see, e.g., In re Epogen & Aransep Off-Label Mktg. & Sales
14 Practices Litig., 590 F. Supp. 2d 1282, 1286 (2008) (taking judicial notice of FDA approved warning
15 labels), the Court struggles to see how this is helpful to Defendants’ position. Presumably, Defendants
16 argue that, contrary to Plaintiff’s assertions, Gabapentin and Tramadol do not actually have warnings
17 against ingesting the drugs in crushed form. Yet, this appears to be untrue. The FDA approved label
18 for Gabapentin provides:

19 **How should I take NEURONTIN [Gabapentin]?**

- 20 • Take NEURONTIN [Gabapentin] exactly as prescribed. Your healthcare
21 provider will tell you how much NEURONTIN [Gabapentin] to take.
- 22 ○ Do not change your dose of NEURONTIN [Gabapentin] without talking
23 to your healthcare provider. If you break a tablet in half the unused half
24 of the tablet should be taken at your next scheduled dose. Half tablets not
used within several days of breaking should be thrown away. If taking
capsules, *always swallow them whole* with plenty of water.

25 (Doc. 51 (“Reply”) at 43) (italics and brackets added).³ With respect to Tramadol, the matter appears
26 to be less clear. The FDA approved label for Ultram does not contain a warning against ingesting the

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³ For the entire label see FDA Drug Database, http://www.accessdata.fda.gov/drugsatfda_docs/label/2011/020235s050,020882s035,021129s033lbl.pdf.

