

1 alleged with sufficient particularity; and 4) that the claims otherwise do not present a
2 plausible claim for relief. For the following reasons, Defendants' Motion is DENIED.²

3 4 **BACKGROUND**³

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6 Plaintiffs Arlene and Michael Wells are the surviving spouse and son of the
7 deceased, Gerald Wells. In 2008, Mr. Wells was diagnosed with moderate aortic
8 stenosis, and his physician recommended he undergo surgery to have a diseased valve
9 replaced. On August 28, 2008, Mr. Wells underwent the valve replacement surgery and
10 had his diseased valve replaced with a valve produced by Defendants ("the Valve").

11 The Valve chosen as a replacement by Mr. Wells' surgeon was a twenty-one
12 millimeter mitroflow aortic pericardial bioprosthesis heart valve manufactured and
13 distributed by Defendants. Mr. Wells' surgeon relied on a chart provided by Defendants
14 ("the Chart") when choosing the particular Valve to use as a replacement for Mr. Wells.
15 The Chart indicated that a twenty-one millimeter valve, such as the one chosen,
16 presented only a small likelihood of creating patient-prosthesis mismatch ("PPM") for
17 someone with Mr. Wells' body surface area ("BSA").

18 In February 2009, Mr. Wells returned to the hospital with symptoms of shortness
19 of breath, lack of energy, and chest pains. After evaluations by several doctors, it was
20 determined that the Valve was functioning correctly. However, a cardiologist ultimately
21 determined that Mr. Wells had severe PPM, and recommended surgery to replace the
22 Valve with a larger size valve. On October 5, 2009, Mr. Wells underwent a second
23 surgery to replace the twenty-one millimeter Valve with a twenty-three millimeter valve.
24 Two days later, Mr. Wells died as a result of severe acidosis, which was a complication
25 of the second replacement surgery.

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27 ² Because oral argument will not be of material assistance, the Court orders this matter submitted
on the briefs. E.D. Cal. Local Rule 230(g).

28 ³ The following recitation of facts is taken, sometimes verbatim, from Plaintiffs' FAC. ECF No. 18.

1 Following Mr. Wells' death, Plaintiffs filed a demand for arbitration against
2 Mr. Wells' healthcare providers for wrongful death. At that time, Plaintiffs claim they had
3 been informed that the Valve had been functioning correctly. During the course of the
4 litigation involving the arbitration, Plaintiffs obtained a copy of the Chart previously used
5 by Mr. Wells' surgeon, which indicated the 21-millimeter valve was the proper size.
6 Plaintiffs claim that prior to November 23, 2011, they discovered no information through
7 their diligent investigation that would have suggested the chart contained false or
8 misleading information. Additionally, Plaintiffs allege that prior to their discovery of the
9 false and misleading material in the Chart, the various doctors they consulted
10 maintained that the Chart was accurate, and were unable to come to a consensus
11 regarding what caused Mr. Wells' condition. Ultimately, on November 23, 2011,
12 Plaintiffs learned through a deposition of an expert that a scholarly article had been
13 published in 2011 which alleged that Defendants had used false and misleading
14 information to construct the Chart.

15 Plaintiffs filed this instant action on November 12, 2013, in Sacramento County
16 Superior Court, alleging nine causes of action based upon Defendants' alleged
17 fraudulent conduct: intentional misrepresentation; intentional concealment; actual fraud;
18 negligent misrepresentation; negligence; intentional infliction of emotion distress;
19 negligent infliction of emotional distress; unfair business practices; and wrongful death.
20 Defendants removed the action to this Court on March 5, 2014. ECF No. 1.

21 On March 12, 2014, Defendants moved to dismiss Plaintiffs' claims pursuant to
22 Rule 12(b)(6) for failure to state a claim upon which relief can be granted. ECF No. 8.
23 Defendants asserted that Plaintiffs' claims were not filed within the time required by their
24 respective statutes of limitations, that Plaintiffs failed to plead with sufficient particularity
25 as required by Rule 9(b), and that the Complaint did not state a plausible claim for relief.
26 Id. The Court issued a Memorandum and Order on May 22, 2014, granting Defendants'
27 motion based on violations of the various statutes of limitations. ECF No. 17. More
28 specifically, the Court found that Plaintiffs' allegations regarding application of the

1 “discovery rule” were too conclusory. Id. However, the Court also held Defendants were
2 not entitled to dismissal under Rule 9(b) or Rule 8, because Plaintiffs sufficiently pleaded
3 their fraud claims. Id.

4 On June 11, 2014, Plaintiffs filed their FAC alleging the same nine causes of
5 action. ECF No. 18. On June 25, 2014, Defendants again moved to dismiss Plaintiffs’
6 claims again pursuant to Rule 12(b)(6) and Rule 9(b). ECF No. 20. That motion is
7 presently before the Court for adjudication. Defendants assert most prominently that
8 Plaintiffs have not pleaded additional facts sufficient to warrant application of the
9 “discovery rule.” Id. at 2.

11 STANDARD

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13 On a motion to dismiss for failure to state a claim under Federal Rule of Civil
14 Procedure 12(b)(6), all allegations of material fact must be accepted as true and
15 construed in the light most favorable to the nonmoving party. Cahill v. Liberty Mut. Ins.
16 Co., 80 F.3d 336,337-38 (9th Cir. 1996). Rule 8(a)(2) requires only “a short and plain
17 statement of the claim showing that the pleader is entitled to relief” in order to “give the
18 defendant fair notice of what the . . . claim is and the grounds upon which it rests.” Bell
19 Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) (quoting Conley v. Gibson, 355 U.S. 41,
20 47 (1957)). A complaint attacked by a Rule 12(b)(6) motion to dismiss does not require
21 detailed factual allegations. However, “a plaintiff’s obligation to provide the grounds of
22 his entitlement to relief requires more than labels and conclusions, and a formulaic
23 recitation of the elements of a cause of action will not do.” Id. (internal citations and
24 quotations omitted). A court is not required to accept as true a “legal conclusion
25 couched as a factual allegation.” Ashcroft v. Iqbal, 129 S. Ct. 1937, 1950 (2009)
26 (quoting Twombly, 550 U.S. at 555). “Factual allegations must be enough to raise a
27 right to relief above the speculative level.” Twombly, 550 U.S. at 555 (citing 5 Charles
28 Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1216 (3d ed. 2004)

1 (stating that the pleading must contain something more than “a statement of facts that
2 merely creates a suspicion [of] a legally cognizable right of action.”)).

3 Furthermore, “Rule 8(a)(2) . . . requires a showing, rather than a blanket
4 assertion, of entitlement to relief.” Twombly, 550 U.S. at 556 n.3 (internal citations and
5 quotations omitted). Thus, “[w]ithout some factual allegation in the complaint, it is hard
6 to see how a claimant could satisfy the requirements of providing not only ‘fair notice’ of
7 the nature of the claim, but also ‘grounds’ on which the claim rests.” Id. (citing 5 Charles
8 Alan Wright & Arthur R. Miller, supra, at § 1202). A pleading must contain “only enough
9 facts to state a claim to relief that is plausible on its face.” Id. at 570. If the “plaintiffs . . .
10 have not nudged their claims across the line from conceivable to plausible, their
11 complaint must be dismissed.” Id. However, “[a] well-pleaded complaint may proceed
12 even if it strikes a savvy judge that actual proof of those facts is improbable, and ‘that a
13 recovery is very remote and unlikely.’” Id. at 556 (quoting Scheuer v. Rhodes, 416 U.S.
14 232, 236 (1974)).

15 A court granting a motion to dismiss a complaint must then decide whether to
16 grant leave to amend. Leave to amend should be “freely given” where there is no
17 “undue delay, bad faith or dilatory motive on the part of the movant, . . . undue prejudice
18 to the opposing party by virtue of allowance of the amendment, [or] futility of the
19 amendment” Foman v. Davis, 371 U.S. 178, 182 (1962); Eminence Capital, LLC v.
20 Aspeon, Inc., 316 F.3d 1048, 1052 (9th Cir. 2003) (listing the Foman factors as those to
21 be considered when deciding whether to grant leave to amend). Not all of these factors
22 merit equal weight. Rather, “the consideration of prejudice to the opposing party . . .
23 carries the greatest weight.” Id. (citing DCD Programs, Ltd. v. Leighton, 833 F.2d 183,
24 185 (9th Cir. 1987)). Dismissal without leave to amend is proper only if it is clear that
25 “the complaint could not be saved by any amendment.” Intri-Plex Techs. v. Crest Group,
26 Inc., 499 F.3d 1048, 1056 (9th Cir. 2007) (citing In re Daou Sys., Inc., 411 F.3d 1006,
27 1013 (9th Cir. 2005); Ascon Props., Inc. v. Mobil Oil Co., 866 F.2d 1149, 1160 (9th Cir.

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1 1989) (“Leave need not be granted where the amendment of the complaint . . .
2 constitutes an exercise in futility . . .”).

4 ANALYSIS

6 A. Rule 9(b)

7 Defendants have moved to dismiss pursuant to Rule 12(b)(6) and Rule 9(b), on
8 grounds that the various statutes of limitations bar Plaintiffs’ claims and additionally that
9 Plaintiffs have failed to plead with the particularity required by Rule 9(b). With respect to
10 the Rule 9(b) grounds, in a footnote within Defendants’ Memorandum of Points and
11 Authorities in Support of Motion to Dismiss, Defendants acknowledge that they are
12 re-alleging the same grounds for dismissal under Rule 9(b) that were rejected by the
13 Court in its previous Order. ECF No. 21 at 3, n.1. Consequently, given the prior Order,
14 and the fact that the FAC alleges no new causes of action, Defendants are not entitled to
15 dismissal under Rule 9(b) for the same reasons set forth in the previous Order. See
16 ECF No. 17 at 5-7.

17 B. Rule 12(b)(6) – Statutes of Limitations

18 The discovery rule is an exception to the general rule in California for defining the
19 accrual of a cause of action. Norgart v. Upjohn Co., 21 Cal. 4th 383, 397 (1999). The
20 discovery rule “postpones accrual of a cause of action until the plaintiff discovers, or has
21 reason to discover the cause of action.” Id. In order to rely on the discovery rule, a
22 plaintiff must “plead that, despite diligent investigation of the circumstances of the injury,
23 he or she could not have reasonably discovered facts supporting the cause of action
24 within the applicable statute of limitations period.” Fox v. Ethicon Endo-Surgery, Inc.,
25 35 Cal. 4th 797, 809 (2005).

26 The Court acknowledged in its previous Order that absent application of the
27 discovery rule, Plaintiffs’ claims would be barred by the various statutes of limitations.
28 See ECF No. 17 at 7. Plaintiffs’ claims for negligence, intentional and negligent infliction

1 of emotional distress, and wrongful death must be brought within the two-year period
2 required by Cal. Code Civ. Proc. § 335.1. The fraud claims are governed by a three-
3 year limitations period under Cal. Code Civ. Proc. § 338(d). Finally, a claim for unfair
4 business practices in violation of Cal. Bus. & Prof. Code § 17200 et seq. is governed by
5 a four-year limitations period. Cal. Code Civ. Proc. § 17208. Plaintiffs filed the instant
6 action on November 12, 2013, over four years after Mr. Wells' death. Thus, in order for
7 Plaintiffs' claims to move forward, the discovery rule must apply.

8 In assessing the viability of Plaintiffs' original Complaint, the Court found that
9 Plaintiffs' allegations regarding delayed discovery were too conclusory to warrant
10 application of the discovery rule. This was because Plaintiffs had failed to allege enough
11 facts attesting to their inability to discover Defendants' alleged misconduct earlier. *Id.* In
12 their FAC, however, Plaintiffs allege additional facts in support of application of the
13 discovery rule. *See* ECF No. 18 at 5-6. Defendants assert those allegations are still
14 insufficient to rectify the deficiencies identified by the Court in its previous Order. *See*
15 ECF No. 21 at 8.

16 In Fox v. Ethicon Endo-Surgery, Inc., the California Supreme Court analyzed
17 whether a plaintiff in a products liability action had alleged enough facts in her complaint
18 to support application of the discovery rule. 35 Cal. 4th at 803. Fox dealt with a plaintiff
19 who initially brought a medical malpractice action against her surgeon, but based on
20 information learned during the surgeon's deposition, later instituted a products liability
21 cause of action against a medical device manufacturer. *Id.* The California Supreme
22 Court ultimately found that the plaintiff's pleading was sufficient to warrant potential
23 application of the discovery rule. *Id.* The Fox court noted that the standard required to
24 support application of the discovery rule when ruling on the pleadings is different than
25 when ruling on a motion for summary judgment. *Id.* at 810. Fox reasoned that it was
26 enough for the plaintiff to allege her inability to discover the product as a potential cause
27 of injury based on the fact that no reasonable person in her position could have
28 discovered that as a cause before the surgeon's deposition. *Id.* at 811.

1 Like the plaintiff in Fox, Plaintiffs have alleged additional facts in their FAC that
2 satisfy the requirements for alleging application of the discovery rule at this early stage.
3 Plaintiffs point out that up until the expert's deposition on November 23, 2011, none of
4 the doctors they consulted mentioned the Chart, nor the fact that it was based on false
5 information. See ECF No. 18 at 5-6. Through their investigation of the cause of
6 Mr. Wells' illness following his initial valve replacement, Plaintiffs consulted multiple
7 doctors who, while presented differing opinions about the cause of his resulting
8 complications, all agreed the Valve product itself was functioning properly. Id. Even the
9 doctor who ultimately determined that a bigger valve size was needed and
10 recommended a second surgery did not mention the chart as an issue. Id. If the various
11 physicians who supervised Plaintiff's care after the initial surgery did not implicate the
12 Chart as containing false and/or misleading sizing information, it would be unreasonable
13 to hold Plaintiffs themselves to a higher standard. Even the scholarly article relied on by
14 the expert in the November 23, 2011 deposition was not published until 2011, two years
15 after Mr. Wells' death. To expect Plaintiffs to be more diligent in their investigation than
16 experts in the field is unwarranted. Thus, Plaintiffs have met their burden for pleading
17 application of the discovery rule at this stage in the case.

18 Because Plaintiffs' claims did not accrue until November 23, 2011, the date of the
19 expert deposition, and since Plaintiffs brought the instant action on November 12, 2013,
20 less than two years later, the claims have been brought within their respective statutory
21 periods. Thus, Plaintiffs' claims are not barred by the various statutes of limitations.

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CONCLUSION

As set forth above, Defendants' Motion to Dismiss Plaintiffs' First Amended Complaint (ECF No. 20) is DENIED.

IT IS SO ORDERED.

Dated: September 29, 2014


MORRISON C. ENGLAND, JR., CHIEF JUDGE
UNITED STATES DISTRICT COURT