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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

IN RE HYDROXYCUT MARKETING  
AND SALES PRACTICES LITIGATION

CASE NO. 09MD2087-BTM (AJB)  
(S.D. Cal. No. 09CV2492)

HECTOR MANUEL ABARCA and DIANA  
CURIEL,

Plaintiff,

**ORDER GRANTING DEFENDANTS'  
MOTION TO DISMISS PLAINTIFFS'  
FRAUD CLAIM (COUNT VIII)**

vs.

IOVATE HEALTH SCIENCES U.S.A.,  
INC., IOVATE HEALTH SCIENCES  
GROUP, INC., IOVATE HEALTH  
RESEARCH, INC., IOVATE HC 2005  
FORMULATIONS, LTD., IOVATE  
HEALTH SCIENCES INTERNATIONAL,  
INC., MUSCLETECH RESEARCH AND  
DEVELOPMENT, LTD., HDM  
FORMULATIONS LTD., KERR  
INVESTMENT HOLDING  
CORPORATION and GENERAL  
NUTRITION CENTERS, INC.,

Defendants.

Defendants Iovate Health Sciences U.S.A., Inc., Iovate Health Sciences Research, Inc.,  
Iovate Health Sciences International, Inc., Muscletech Research and Development, Ltd., HDM  
Formulations Ltd., and General Nutrition Centers, Inc. ("Defendants") have filed a motion to

1 dismiss Plaintiffs' fraud claim as pled in Count VIII of Plaintiffs' complaint pursuant to Federal  
2 Rule of Civil Procedure 9(b) ("Motion"). For the reasons set forth below, Defendants' Motion  
3 is **GRANTED** with leave to amend. The Court grants the Motion on the grounds that the  
4 Complaint fails to allege facts sufficient to state a claim of fraud against the Defendants.  
5 Plaintiffs shall have 21 days to file any amended complaint addressing the deficiencies as set  
6 forth herein.

### 7 **I. BACKGROUND**

8 On August 24, 2009, Plaintiffs filed a complaint (the "Complaint") in the District Court for  
9 the Northern District of California (N.D. Cal. Case No. C09-3861). On November 6, 2009, the  
10 case was transferred by the Panel on Multidistrict Litigation ("MDL") to the Southern District of  
11 California. Upon transfer, the case became part of the pending MDL entitled In re Hydroxycut  
12 Marketing and Sales Practices Litigation, 09md2087, and was assigned a separate civil case  
13 number in the Southern District of California, 09cv2492. On January 22, 2010, Defendants filed  
14 a Motion to Dismiss Plaintiffs' fraud claim pursuant to Federal Rule of Civil Procedure 9(b).

### 15 **II. STANDARD**

16 A motion to dismiss under Federal Rule of Civil Procedure 9(b) tests the formal  
17 sufficiency of a plaintiff's statement of a claim for fraud. Rule 9(b) requires that a plaintiff state  
18 a claim for fraud with particularity as follows:

19 In alleging fraud or mistake, a party must state with particularity the  
20 circumstances constituting fraud or mistake. Malice, intent, knowledge,  
and other conditions of a person's mind may be alleged generally.

21 Fed. R. Civ. P. 9(b). A court may dismiss a claim of fraud when its allegations fail to satisfy  
22 Rule 9(b)'s heightened pleading requirements. Vess v. Ciba-Geigy Corp. U.S.A., 317 F.3d  
23 1097, 1107 (9th Cir.2003).

### 24 **III. DISCUSSION**

25 Plaintiff, Hector Manuel Abarca, alleges that he suffered severe abdominal pain, yellow  
26 eyes, general weakness and was ultimately admitted to the hospital with sub-acute liver failure  
27 after ingesting weight loss products manufactured and sold by defendants. Complaint ¶¶ 65-68.  
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1 In the Complaint, Plaintiffs bring eight claims against the defendants, including “Count VIII” for  
2 “Fraud and Misrepresentation.” Complaint ¶¶ 129-131.

3 Defendants have moved to dismiss Count VIII on the ground that it “fails to meet the  
4 stringent pleading requirements” required by Rule 9(b). Specifically, Defendants contend that  
5 Plaintiffs fail to provide sufficient factual details to support their fraud theories.

6 A claim of fraud must have the following elements: “(a) a misrepresentation (false  
7 representation, concealment, or nondisclosure); (b) knowledge of falsity (or ‘scienter’); (c) intent  
8 to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage.” In re  
9 Estate of Young, 160 Cal.App.4th 62, 79 (2008) ( quoting Lazar v. Superior Court, 12 Cal.4th  
10 631, 638 (1996) (internal quotation marks omitted)). Federal Rule of Civil Procedure 9(b)  
11 requires that each of these elements be pled with particularity. The Ninth Circuit has “interpreted  
12 Rule 9(b) to mean that the pleader must state the time, place and specific content of the false  
13 representations as well as the identities of the parties to the misrepresentation. Alan Neuman  
14 Prods., Inc. v. Albright, 862 F.2d 1388, 1393 (9th Cir.1988). As Defendants’ point out,  
15 averments of fraud must be accompanied by the “who, what, when, where, and how” of the  
16 misconduct charged. Cooper v. Pickett, 137 F.3d 616, 627 (9th Cir.1997).

17 The Court’s review of the Complaint reveals that the elements of fraud and the “who” are  
18 specifically alleged. See Complaint ¶¶ 51, 52, 58, and 63-70. However, the Complaint fails to  
19 allege with sufficient particularity the “what,” “where” and “when” that is required. Nowhere does  
20 the Complaint state which Hydroxycut Product(s) Plaintiff ingested. Plaintiffs simply refer to  
21 Hydroxycut Products, which Plaintiffs do not meaningfully define. While there are fourteen  
22 individual Hydroxycut Products identified in the Complaint and a list of dozens of recalled  
23 products, Plaintiff Abarca fails to specify which of those products he consumed. Since Plaintiff’s  
24 claim of fraud is based on allegedly false representations, concealment or nondisclosure in the  
25 promotion, advertising and marketing of Hydroxycut Products including statements and  
26 omissions made on the products’ packaging, his failure to identify, with particularity, which  
27 product(s) he ingested renders the fraud claim deficient.

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1 In addition, Plaintiff's contention that he was "exposed" to these fraudulent statements  
2 and omissions sometime "prior to May 2009" is insufficient to state "when" the fraud occurred  
3 with the requisite particularity. See Complaint ¶ 65. Plaintiff must state when (or the time  
4 period during which) he saw, heard, and/or read and relied upon the allegedly fraudulent  
5 material.

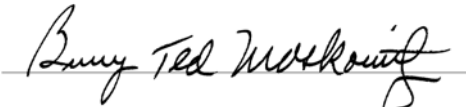
6 The Court, therefore, grants Defendants' Motion to Dismiss Plaintiff's claim of fraud and  
7 misrepresentation as set forth in Count VIII of the Complaint. The Motion is granted without  
8 prejudice and Plaintiffs are granted leave to amend.

9 **III. CONCLUSION**

10 Defendants' Motion to Dismiss is **GRANTED** as stated above. As to Count VIII, the  
11 Court holds Plaintiff has failed to state a claim for fraud and misrepresentation and the Motion  
12 to Dismiss Count VIII is **GRANTED** without prejudice. The Plaintiffs shall have 21 days from  
13 the entry of this order to file any amended complaint correcting the deficiencies in Count VIII.

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15 IT IS SO ORDERED.

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17 DATED: May 5, 2010

18   
19 Honorable Barry Ted Moskowitz  
20 United States District Judge  
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