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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. 09CV2511)
(S.D.N.Y. No. 09CV8630)

RICHARD A. BOUGH,
Plaintiff,

**ORDER DENYING DEFENDANTS'
MOTION FOR A MORE DEFINITE
STATEMENT**

vs.

KERR INVESTMENT HOLDING CORP.,
IOVATE HEALTH SCIENCES, INC.,
IOVATE HEALTH SCIENCES U.S.A.,
INC. and MUSCLETECH RESEARCH
AND DEVELOPMENT, INC.,
Defendants.

On October 9, 2009, Plaintiff Richard A. Bough filed a complaint in the United States District Court for the Southern District of New York against Kerr Investment Holding Corp., Iovate Health Sciences, Inc., Iovate Health Sciences U.S.A., Inc. and MuscleTech Research and Development, Inc. ("Complaint"). On November 30, 2009, after the case was transferred by the Panel on Multidistrict Litigation ("MDL") to the Southern District of California, Defendants

1 filed a Motion for a More Definite Statement pursuant to Fed. R. Civ. P. 12(e) and 9(b)
2 (“Motion”). For the reasons set forth below, Defendants’ Motion is **DENIED**.

3 I. DISCUSSION

4 Defendants contend that they “cannot reasonably frame a responsive pleading or
5 determine what defenses apply to Plaintiff’s Complaint in its current form.” Defendants
6 argue that the Complaint combines 14 individual Hydroxycut-branded products by
7 referencing “Hydroxycut products,” “Products” or “Hydroxycut” throughout thereby failing to
8 give the Defendants proper notice as to which products, representations and omissions are
9 at issue in this action and rendering it impossible to respond to the allegations in the
10 Complaint. Upon review of Plaintiff’s Complaint, the Court holds that Defendants have not
11 come close to showing that the Complaint is so excessively vague as to be unintelligible.

12 Federal Rule of Civil Procedure 12(e) allows for an order requiring Plaintiff to provide
13 a more definite statement when the pleading is so vague or ambiguous that the responding
14 party cannot reasonably be required to frame a responsive pleading. Fed. R. Civ. P. 12(e).
15 Motions for a more definite statement are disfavored. In re European Rail Pass Antitrust
16 Litigation, 166 F. Supp. 2d 836, 844-45 (S.D.N.Y. 2001) (denying motion for a more definite
17 statement where Plaintiff could have been referring to either the identical set of products or
18 to functionally similar competing products). In order to warrant a more definite statement,
19 the complaint must be “so excessively vague and ambiguous as to be unintelligible and as
20 to prejudice the defendant seriously in attempting to answer it.” Kok v. First Unum Life Ins.
21 Co., 154 F. Supp. 2d 777, 781-82 (S.D.N.Y. 2001). The rule is designed to remedy
22 unintelligible pleadings, not to correct for lack of detail. Whether or not to grant a motion for
23 a more definite statement is in the discretion of the trial court. See Vaden v. Lantz, 459 F.
24 Supp. 2d 149, 150 (D. Conn. 2006).

25 In his Complaint, Plaintiff is abundantly clear that his claims are based upon the
26 specific product known as Hydroxycut Regular Rapid Release Caplets. Plaintiff alleges he
27 “ingested a Hydroxycut product, namely Hydroxycut Regular Rapid Release Caplets.”
28

1 Complaint ¶ 14. Furthermore, Plaintiff details his “Experience with Hydroxycut Regular
2 Rapid Release Caplets.” Complaint, page 11. Plaintiff alleges that he:

- 3 • “purchased and used Hydroxycut Regular Rapid Release Caplets from on or about
4 August 1, 2007 through October 10, 2007.” Complaint ¶ 48.
- 5 • “used Hydroxycut Regular Rapid Release Caplets as directed, and for the purpose
6 and in the manner for which it was normally intended.” Complaint ¶ 49.
- 7 • could not have discovered the defective nature and or dangers of Hydroxycut
8 Regular Rapid Release Caplets.
- 9 • “would not have purchased and used Hydroxycut Regular Rapid Release Caplets
10 had Defendant properly disclosed the risks associated with the product.”

11 Plaintiff further alleges that, on or about October 10, 2007, as a direct and proximate result
12 of using Hydroxycut Regular Rapid Release Caplets, he suffered a heart attack and acute
13 kidney failure. Complaint ¶ 51.

14 The Court finds Plaintiff’s reference to the “Hydroxycut products” collectively, as
15 defined in his Complaint, to be sufficiently definite. Complaint ¶ 3. The fact that Plaintiff
16 uses the defined term “Hydroxycut products” to refer to characteristics or representations
17 common to all (including Hydroxycut Regular Rapid Release Caplets) does not render his
18 allegations unintelligible.

19 Even where the more stringent pleading requirements of Federal Rule of Civil
20 Procedure 9(b) apply, the Court holds Plaintiff’s allegations to be sufficiently specific and
21 definite. See e.g., Complaint ¶ 2-8, 29-38, 36, 47, and 96-102.

22 Rather than require Plaintiff to provide a more definite statement, the preferred
23 course is to encourage the use of discovery procedures to apprise the parties of the factual
24 basis of the claims made in the pleadings. Kok, 154 F. Supp. 2d at 782; In re Methyl
25 Tertiary Butyl Ether (MTBE) Prods. Liab. Litig., No. 00 Civ. 1898, MDL 1358, 2005 WL
26 1500893, at *2 (S.D.N.Y. June 24, 2005); Ontario Ltd. v. Lencore Acoustics Corp., 105 F.
27 Supp. 2d 56, 65-66 (E.D.N.Y. 2000) (denying a motion pursuant to Rule 12(e) because
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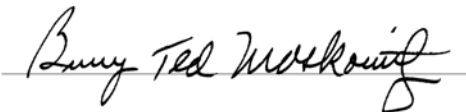
1 discovery is appropriate method for obtaining more information about the specific issues
2 raised in plaintiff's complaint).

3 **II. CONCLUSION**

4 The Defendants' Motion is **DENIED**.

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6 IT IS SO ORDERED.

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8 DATED: February 5, 2010

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10 Honorable Barry Ted Moskowitz
11 United States District Judge
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