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

IN RE HYDROXYCUT MARKETING
AND SALES PRACTICES LITIGATION

Case No. 09MD02087-BTM (AJB)
(S.D. Cal. No. 10CV00587)

CLINTON DAVIS,

Plaintiff,

vs.

**ORDER GRANTING DEFENDANTS'
MOTION TO DISMISS COUNTS VI
AND VII OF PLAINTIFF'S
COMPLAINT**

GNC CORPORATION, IOVATE
HEALTH SCIENCES USA INC., IOVATE
HEALTH SCIENCES, INC., IOVATE
HEALTH SCIENCES RESEARCH, INC.,
IOVATE HEALTH SCIENCES CAPITAL,
INC., IOVATE COPYRIGHT, LTD.,
IOVATE HEALTH SCIENCES GROUP,
INC., IOVATE HEALTH SCIENCES
INTERNATIONAL, INC., IOVATE HC
2005 FORMULATIONS, LTD., and
MUSCLETECH RESEARCH AND
DEVELOPMENT, INC.,

Defendants.

Pursuant to Federal Rule of Civil Procedure 9(b), defendants GNC Corporation, Iovate Health Sciences USA Inc., Iovate Health Sciences, Inc., Iovate Health Sciences Research, Inc., Iovate Health Sciences Capital, Inc., Iovate Copyright, Ltd., Iovate Health Sciences

1 Group, Inc., Iovate Health Sciences International, Inc., Iovate HC 2005 Formulations, Ltd.,
2 and Muscletech Research and Development, Inc. (“Defendants”) have filed a motion to
3 dismiss Plaintiff’s “Fraud and Misrepresentation” claim as pled in Count VI and Plaintiff’s
4 “Violations of Pennsylvania Unfair Trade Practices and Consumer Protection Law” claim as
5 pled in Count VII of Plaintiff’s First Amended Complaint. For the reasons set forth below,
6 Defendants’ motion to dismiss is **GRANTED** with leave to amend. The Court grants the
7 motion on the grounds that the First Amended Complaint fails to plead fraud with the
8 requisite particularity, and fails to allege facts sufficient to state a claim for violation of the
9 Pennsylvania Unfair Trade Practices and Consumer Protection Law against the Defendants.
10 Plaintiff shall have 30 days to file any amended complaint addressing the deficiencies as set
11 forth herein.¹

12 I. BACKGROUND

13 On November 3, 2009, Plaintiff filed a complaint in the District Court for the Eastern
14 District of Pennsylvania (E.D. Pa. Case No. 2:09-cv-05055). On March 15, 2010, Plaintiff
15 filed a First Amended Complaint (“FAC”). On March 22, 2010, the case was transferred by
16 the Panel on Multidistrict Litigation (“MDL”) to the Southern District of California. Upon
17 transfer, the case became part of the pending MDL entitled In re Hydroxycut Marketing and
18 Sales Practices Litigation (09md2087), and was assigned a separate civil case number in
19 the Southern District of California (10cv587). On May 5, 2010, Defendants filed a Motion to
20 Dismiss Counts VI and VII of the FAC pursuant to Federal Rule of Civil Procedure 9(b).
21 Plaintiff filed no opposition to the motion to dismiss.

22 II. LEGAL STANDARD

23 A motion to dismiss under Federal Rule of Civil Procedure 9(b) tests the sufficiency
24 of a plaintiff’s statement of a claim for fraud. Rule 9(b) requires that a plaintiff state a claim
25 for fraud with particularity as follows:

26
27 ¹ On October 21, 2010, Defendants filed a Request for Dismissal of Plaintiff’s claims
28 without prejudice for failure to provide a timely Plaintiff Fact Sheet pursuant to the Case
Management Order dated September 10, 2010. Defendants’ Request for Dismissal is
deemed withdrawn pursuant to Defendants’ Response to Order to Show Cause filed on
January 10, 2011.

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

3 Fed. R. Civ. P. 9(b). A court may dismiss a claim of fraud when its allegations fail to satisfy
4 Rule 9(b)'s heightened pleading requirements. Vess v. Ciba-Geigy Corp. U.S.A., 317 F.3d
5 1097, 1107 (9th Cir. 2003). The Ninth Circuit has confirmed:

6 Rule 9(b) demands that, when averments of fraud are made, the
7 circumstances constituting the alleged fraud be specific enough to give
8 defendants notice of the particular misconduct ... so that they can defend
9 against the charge and not just deny that they have done anything wrong.
Averments of fraud must be accompanied by the 'who, what, when, where,
10 and how' of the misconduct charged. A plaintiff must set forth more than the
11 neutral facts necessary to identify the transaction. The plaintiff must set forth
what is false or misleading about a statement, and why it is false.

Id. at 1106 (internal citations and quotation marks omitted).

12 III. DISCUSSION

13 Plaintiff, Clinton Davis, alleges that he experienced severe health issues, including
14 elevated liver enzymes and severe liver damage, after ingesting Hydroxycut weight loss
15 products manufactured, marketed and sold by Defendants. FAC ¶ 55. In the FAC,
16 Plaintiff brings nine claims against Defendants, including "Count VI" for "Fraud and
17 Misrepresentation" and "Count VII" for "Violations of Pennsylvania Unfair Trade Practices
18 and Consumer Protection Law." FAC ¶¶ 98-112.

19 Defendants have moved to dismiss Counts VI and VII on the ground that Plaintiff
20 has failed to plead these claims with the particularity that is required by Rule 9(b).
21 Specifically, Defendants contend that Plaintiff fails to provide sufficient factual details to
22 support either their common law or statutory fraud theories.

23 A. Fraud and Misrepresentation - Count VI

24 Under Pennsylvania law, the elements of a cause of action for fraud are: (1) a
25 false representation; (2) made with knowledge of its falsity or recklessness as to whether
26 it is true or false; (3) which is intended to make the receiver act; (4) justifiable reliance on
27 the misrepresentation; and (5) damages to the receiver as a proximate result of the
28 reliance. Bucci v. Wachovia Bank, N.A., 591 F. Supp. 2d 773, 782 (E.D. Pa. 2008)

1 (internal citations omitted). Federal Rule of Civil Procedure 9(b) requires that each of
2 these elements be pled with particularity. The Ninth Circuit has “interpreted Rule 9(b) to
3 mean that the pleader must state the time, place and specific content of the false
4 representations as well as the identities of the parties to the misrepresentation.” Alan
5 Neuman Prods., Inc. v. Albright, 862 F.2d 1388, 1392-93 (9th Cir. 1988). Averments of
6 fraud must be accompanied by the “who, what, when, where, and how” of the misconduct
7 charged. See Cooper v. Pickett, 137 F.3d 616, 627 (9th Cir. 1997).²

8 The Court’s review of the FAC reveals that the elements of fraud and the “who”
9 and “when” are specifically alleged. FAC ¶¶ 20-21, 25, 31-37, 50-55. But the FAC fails
10 to allege with sufficient particularity the “what,” “where” and “how” that is required.

11 Nowhere does the FAC state which Hydroxycut product(s) Plaintiff purchased or
12 ingested. While there are fourteen individual Hydroxycut products identified in the FAC,
13 Plaintiff simply refers to “Hydroxycut Products” and fails to specify which of those
14 products he consumed. FAC ¶ 37. Because Plaintiff’s fraud claim is based on allegedly
15 false representations in the promotion, advertising and marketing of Hydroxycut products
16 including statements and omissions made on the products’ packaging, his failure to
17 identify, with particularity, which product(s) he ingested renders the fraud claim deficient.

18 In addition, although Plaintiff quotes the Hydroxycut product packaging, he fails to
19 specify which material he relied upon in making his decision to purchase and consume
20 the Hydroxycut products. FAC ¶¶ 23-29. Plaintiff’s vague allegations of being “targeted
21 and exposed to Defendants’ promotion, advertising and marketing” is insufficient to state
22 “where” and “how” the fraud occurred with the requisite particularity. FAC ¶¶ 50-51.

23 The Court, therefore, grants Defendants’ Motion to Dismiss Plaintiff’s claim of
24 fraud and misrepresentation as set forth in Count VI of the FAC. The motion is granted

25
26 ² The Third Circuit has similarly interpreted Rule 9(b). See Seville Indus. Machinery
27 Corp. v. Southmost Machinery Corp., 742 F.2d 786, 791 (3d Cir. 1984) (“Rule 9(b) requires
28 plaintiffs to plead with particularity the ‘circumstances’ of the alleged fraud in order to place
the defendants on notice of the precise misconduct with which they are charged, and to
safeguard defendants against spurious charges of immoral and fraudulent behavior.”); see
also, Lum v. Bank of America, 361 F.3d 217, 223-24 (3d Cir. 2004).

1 without prejudice and Plaintiff is granted leave to amend.

2 **B. Violations of the Pennsylvania Unfair Trade Practices and Consumer**
3 **Protection Law Claim - Count VII**

4 To bring suit under the Pennsylvania Unfair Trade Practices and Consumer
5 Protection Law, Plaintiff must show that he is a citizen of Pennsylvania or that he was
6 engaged in transactions within Pennsylvania. Lewis v. Ford Motor Co., 263 F.R.D. 252,
7 258-59 n.7 (W.D. Pa. 2009); Mikola v. Penn Lyon Homes, Inc., 2008 WL 2357688, at * 3
8 (M.D. Pa. June 4, 2008). But Plaintiff states that he is a “citizen and resident of Illinois.”
9 FAC ¶ 2. Plaintiff also states that he purchased and consumed Hydroxycut products
10 within “Oswego, Illinois.” FAC ¶ 51. Plaintiff only refers to Pennsylvania in jurisdictional
11 statements regarding Defendants. FAC ¶¶ 3, 15. Accordingly, Defendants’ Motion to
12 Dismiss Count VII of the FAC is granted without prejudice. The Court grants Plaintiff
13 leave to amend if he is able to do so.

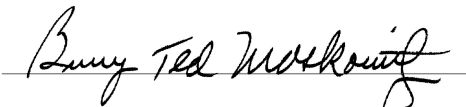
14 **IV. CONCLUSION**

15 Defendants’ motion to dismiss [10cv587 - Doc. No. 21; 09md2087 - Doc. No. 197] is
16 **GRANTED** as stated above. The motion is **GRANTED** without prejudice and with leave to
17 amend. The Plaintiff shall have 30 days from the entry of this order to file any amended
18 complaint correcting the identified deficiencies. If Plaintiff does not file an amended
19 complaint, Defendants shall file an answer to the original complaint on or before **May 9,**
20 **2011.**

21 Defendants’ request for dismissal is deemed withdrawn pursuant to Defendants’
22 Response to Order to Show Cause filed on January 10, 2011.

23 **IT IS SO ORDERED.**

24
25 DATED: March 21, 2011

26 
27 Honorable Barry Ted Moskowitz
28 United States District Judge