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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)

STEVE E. SNOW,

Plaintiff,

v.

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

Defendants.

Case No. 10cv1485 BTM(AJB)

**ORDER GRANTING DEFENDANTS'
MOTION TO DISMISS COUNTS III,
VII, AND VIII OF PLAINTIFF'S FIRST
AMENDED COMPLAINT**

Defendants Iovate Health Sciences U.S.A., Inc., Iovate Health Sciences Group, Inc.,
Iovate Health Sciences Research Inc., Iovate HC 2005 Formulations Ltd., Iovate Health
Sciences International Inc., Muscletech Research and Development Inc., HDM Formulations
Ltd., Bodybuilding.com, LLC, and General Nutrition Centers, Inc. ("Defendants") have filed

1 a motion to dismiss Plaintiff's claims of breach of express warranty (Count III) and breach of
2 implied warranty (Count VII) pursuant to Federal Rule of Civil Procedure 12(b)(6).
3 Defendants have further moved, pursuant to Federal Rule of Civil Procedure 9(b), to dismiss
4 Plaintiff's claim of fraud and misrepresentation (Count VIII). For the reasons discussed
5 below, Defendants' motion to dismiss is **GRANTED**.

6 **I. BACKGROUND**

7 On April 29, 2010, Plaintiff filed his complaint in the Western District of Kentucky
8 (Case No. 1:10cv-78-R). On July 16, 2010, the case was transferred to the Southern District
9 of California as a tag-along action to the In re Hydroxycut Marketing and Sales Practices
10 multi-district litigation (Case No. 09md2087) currently pending before the Court. Upon
11 transfer, the case was assigned a separate civil case number in the Southern District of
12 California (Case No. 10cv1485). On August 2, 2010, Defendants filed a motion to dismiss
13 the complaint. On August 18, 2010, the parties filed a joint motion for leave to file an
14 amended complaint. The Court granted this motion and Plaintiff filed his First Amended
15 Complaint ("FAC") on September 3, 2010. On September 24, 2010, Defendants filed a
16 motion to dismiss Count III (breach of express warranty), Count VII (breach of implied
17 warranty) and Count VIII (fraud and misrepresentation) of the FAC. On November 19, 2010,
18 Plaintiff filed his opposition to Defendants' motion to dismiss. On December 3, 2010,
19 Defendants filed a reply in support of their motion to dismiss.

20 **II. LEGAL STANDARDS**

21 **A. Federal Rule of Civil Procedure 12(b)(6)**

22 A motion to dismiss under Rule 12(b)(6) should be granted only where a plaintiff's
23 complaint lacks a "cognizable legal theory" or sufficient facts to support a cognizable legal
24 theory. Balistreri v. Pacifica Police Dept., 901 F.2d 696, 699 (9th Cir. 1988). When
25 reviewing a motion to dismiss, the allegations of material fact in plaintiff's complaint are taken
26 as true and construed in the light most favorable to the plaintiff. See Parks Sch. Of Bus., Inc.
27 v. Symington, 51 F.3d 1480, 1484 (9th Cir. 1995). Although detailed factual allegations are
28 not required, factual allegations "must be enough to raise a right to relief above the

1 speculative level.” Bell Atlantic v. Twombly, 550 U.S. 544, 555 (2007). “[A] plaintiff’s
2 obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and
3 conclusions, and a formulaic recitation of the elements of a cause of action will not do.” Id.
4 “[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility
5 of misconduct, the complaint has alleged - but it has not show[n] - that the pleader is entitled
6 to relief.” Ashcroft v. Iqbal, 129 S.Ct. 1937, 1950 (2009) (internal quotation marks omitted).
7 Only a complaint that states a plausible claim for relief will survive a motion to dismiss. Id.

8 9 **B. Federal Rule of Civil Procedure 9(b)**

10 A motion to dismiss under Rule 9(b) tests the sufficiency of a plaintiff’s statement of
11 a claim for fraud. Rule 9(b) requires that a plaintiff state a claim for fraud with particularity
12 as follows:

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

15 Fed. R. Civ. P. 9(b). A court may dismiss a claim of fraud when its allegations fail to satisfy
16 Rule 9(b)’s heightened pleading requirements. Vess v. Ciba-Geigy Corp. U.S.A., 317 F.3d
17 1097, 1107 (9th Cir. 2003). The Ninth Circuit has confirmed:

18 Rule 9(b) demands that, when averments of fraud are made, the
19 circumstances constituting the alleged fraud be specific enough to give
20 defendants notice of the particular misconduct ... so that they can defend
21 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, and
22 how’ of the misconduct charged. A plaintiff must set forth more than the
neutral facts necessary to identify the transaction. The plaintiff must set forth
23 what is false or misleading about a statement, and why it is false.

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

24 **III. DISCUSSION**

25 Plaintiff, Steve E. Snow, alleges that he was diagnosed with gall stones, inflammation
26 of the gallbladder, elevated liver enzymes and jaundice after ingesting Hydroxycut Hardcore
27 Liquid Capsules manufactured, marketed and sold by Defendants. FAC ¶ 69. In the FAC,
28 Plaintiff brings eight claims against Defendants, including (1) breach of express warranty, (2)
breach of implied warranty, and (3) fraud and misrepresentation. FAC ¶¶ 18-19, 22-23.

1 **A. Breach of Warranty Claims - Counts III and VII**

2 Privity is a required element to state a claim for breach of express or implied warranty
3 under Kentucky law. See Real Estate Mktg., Inc. v. Franz, 885 S.W.2d 921, 926 (Ky. 1994).
4 At this point, Plaintiff has failed to adequately allege facts that establish privity between him
5 and any of the Product Defendants. Accordingly, Counts III and VII must be dismissed as
6 to the Product Defendants.

7 Defendants also argue that Plaintiff’s breach of express warranty claim fails because
8 Plaintiff has not alleged facts that demonstrate the formation of an express warranty. The
9 Court agrees that Plaintiff has not alleged sufficient facts that provide the basis for an
10 express warranty.

11 Under Kentucky law, express warranties are created as follows:

12 (a) Any affirmation of fact or promise made by the seller to the buyer which
13 relates to the goods and becomes part of the basis of the bargain creates an
express warranty that the goods shall conform to the affirmation or promise.

14 (b) Any description of the goods which is made part of the basis of the bargain
15 creates an express warranty that the goods shall conform to the description.

16 (c) Any sample or model which is made part of the basis of the bargain creates
an express warranty that the whole of the goods shall conform to the sample
or model.

17 Ky. Rev. Stat. Ann. § 355.2-313(1). To sustain an action for breach of an express warranty,
18 the warranty must be “part of the basis of the bargain” by being relied upon as one of the
19 inducements for purchasing the product. Overstreet v. Norden Labs., Inc., 669 F.2d 1286,
20 1291 (6th Cir. 1982); see also Salisbury v. Purdue Pharma, L.P., 166 F. Supp. 2d 546, 552
21 (E.D. Ky. 2001).

22 Though Plaintiff alleges that he purchased Hydroxycut Hardcore Liquid Capsules
23 because of Defendants’ representations through various media, including “magazines such
24 as Men’s Health and TV commercials” that they were “safe for use” (FAC ¶ 68), Plaintiff fails
25 to provide specific language that was used by Defendants to assure the Hydroxycut product’s
26 safety. Plaintiff does allege that he purchased Hydroxycut Products because of his “reliance
27 on the purported trustworthiness and safety of Hydroxycut Products” (FAC ¶ 65), but Plaintiff
28 does not include any specific allegations about which information he read or heard, and

1 relied on, before purchasing the Hydroxycut Hardcore Liquid Capsules.

2 The Court, therefore, grants Defendant's Motion to Dismiss the breach of express
3 warranty claim as pled in Count III of the FAC. The Court also grants Defendant's Motion
4 to Dismiss the breach of implied warranty claim as pled in Count VII of the FAC as to the
5 Product Defendants. Plaintiff shall have leave to amend as to Counts III and VII as set forth
6 herein.

7 **B. Fraud and Misrepresentation - Count VIII**

8 Under Kentucky law, the elements of a cause of action for fraud are: "(a) a material
9 representation, (b) which is false, (c) known to be false or made recklessly, (d) made with
10 inducement to be acted upon, (e) acted in reliance thereon, and (f) causing injury." Wahba
11 v. Don Corlett Motors, Inc., 573 S.W.2d 357, 359 (Ky. App. 1978) (internal citation omitted).
12 Rule 9(b) requires that each of these elements be pled with particularity. The Ninth Circuit
13 has "interpreted Rule 9(b) to mean that the pleader must state the time, place and specific
14 content of the false representations as well as the identities of the parties to the
15 misrepresentation." Alan Neuman Prods., Inc. v. Albright, 862 F.2d 1388, 1392-93 (9th Cir.
16 1988); Bender v. Southland Corp., 749 F.2d 1205, 1216 (6th Cir. 1984). Averments of fraud
17 must be accompanied by the "who, what, when, where, and how" of the misconduct charged.
18 See Cooper v. Pickett, 137 F.3d 616, 627 (9th Cir. 1997).

19 Defendants argue that Plaintiff fails to plead his fraud and misrepresentation claim
20 with the particularity that is required by Rule 9(b). The Court's review of the FAC as a whole
21 reveals that Plaintiff's fraud claim suffers from multiple defects. Plaintiff lumps multiple
22 defendants together, referring to them collectively as "Product Defendants" and "Retail
23 Defendants" and never specifying which defendant did what. Although Plaintiff states that
24 "various media, including, but not limited to, magazines such as Men's Health and TV
25 commercials" misrepresented to Plaintiff that Hydroxycut Hardcore Liquid Capsules were
26 "safe for use" (FAC ¶ 68), Plaintiff does not identify with specificity the purported
27 misrepresentations or specific advertisements or product labeling upon which he actually saw
28 and relied on in making his decision to purchase the Hydroxycut product. In addition,

1 although Plaintiff quotes some Hydroxycut product packaging (FAC ¶¶ 51-53) and attaches
2 pictures of a Hydroxycut Hardcore product label (FAC ¶ 66), he fails to specify whether the
3 product packaging was on the Hydroxycut Hardcore Liquid Capsules or some other
4 Hydroxycut product, when he was exposed to them "prior to May 2009" (FAC ¶ 65), and
5 which material he relied upon in making his decision to purchase the Hydroxycut Hardcore
6 Liquid Capsules.

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

10 **IV. CONCLUSION**

11 For the reasons discussed above, Defendants' motion to dismiss [09md2087 (Doc.
12 No. 357); 10cv1485 (Doc. No. 23)] is **GRANTED**. The breach of express warranty claim
13 (Count III) is dismissed without prejudice as to all Defendants. The breach of implied
14 warranty claim (Count VII) is dismissed without prejudice as to the following Product
15 Defendants: lovate Health Sciences U.S.A., Inc.; lovate Health Sciences Group, Inc.; lovate
16 Health Sciences Research, Inc.; lovate Health Sciences Group, Inc.; lovate Health Sciences
17 International, Inc.; lovate HC 2005 Formulations, Ltd.; MuscleTech Research and
18 Development, Inc.; HDM Formulations, Ltd.; and Kerr Investment Holding Corporation. The
19 fraud and misrepresentation claim (Count VIII) is dismissed without prejudice as to all
20 Defendants.

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1 The Court grants Plaintiff leave to file a second amended complaint. If Plaintiff
2 chooses to do so, Plaintiff must file his second amended complaint within 30 days of the
3 entry of this Order. Defendants shall file an answer within 20 days of the filing of a second
4 amended complaint or the expiration of the time to file the second amended complaint,
5 whichever comes first.

6 **IT IS SO ORDERED.**

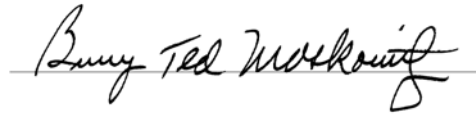
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10 DATED: July 21, 2011

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Honorable Barry Ted Moskowitz
United States District Judge

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