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

STONE Y BILLEDEAUX,

Plaintiff,

v.

SURGIMESH, dba ASPIDE MEDICAL,
and BG MEDICAL LLC,

Defendants.

Case No.: 3:19-cv-00871-H-MDD

**ORDER DENYING DEFENDANT BG
MEDICAL'S MOTION TO DISMISS**

[Doc. No. 19]

On July 11, 2019, Defendant BG Medical LLC (“Defendant BG Medical”) filed a motion to dismiss Plaintiff Stoney Billedeaux’s (“Plaintiff”) first amended complaint. (Doc. No. 19.) On July 29, 2019, Plaintiff filed an opposition. (Doc. No. 20.) On August 2, 2019, Defendant filed a reply. (Doc. No. 21.) For the following reasons, the Court denies Defendant BG Medical’s motion to dismiss.

Background

The following facts are taken from the allegations in Plaintiff’s first amended complaint. (Doc. No. 15.) Defendant BG Medical is an Illinois-based distributor for

1 SurgiMesh. (Id. ¶¶ 2, 29, 97.) Plaintiff alleges that Defendant SurgiMesh dba Aspide
2 Medical (“Defendant SurgiMesh”) and Defendant BG Medical manufacture SurgiMesh, a
3 hernia mesh. (Id. ¶ 11.) Plaintiff alleges that the hernia mesh constitutes an unreasonable
4 risk of danger and injury as it is “biologically incompatible with human tissue and actually
5 promotes negative immune responses in a large subset of the population.” (Id. ¶¶ 15, 18.)

6 Plaintiff asserts that, on August 14, 2016, he was implanted with the hernia mesh to
7 repair an inguinal hernia. (Id. ¶¶ 11, 19.) He alleges that he “experienced pain, seroma,
8 scarring, mesh migration and had to undergo removal surgery on or about October 31,
9 2013.” (Id. ¶ 21.) Plaintiff contends that as a result, he “has suffered injuries and will
10 require continual monitoring and care.” (Id. ¶ 42.)

11 Discussion

12 **I. Legal Standards**

13 A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) tests the legal
14 sufficiency of the pleadings and allows a court to dismiss a complaint if the plaintiff has
15 failed to state a claim upon which relief can be granted. See Conservation Force v. Salazar,
16 646 F.3d 1240, 1241 (9th Cir. 2011). The Federal Rule of Civil Procedure 8(a)(2)’s
17 plausibility standard governs Plaintiff’s claims. The Supreme Court has explained Rule
18 8(a)(2) as follows:

19 Under Federal Rule of Civil Procedure 8(a)(2), a pleading must contain a short
20 and plain statement of the claim showing that the pleader is entitled to relief.
21 As the Court held in [Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007)],
22 the pleading standard Rule 8 announces does not require detailed factual
23 allegations, but it demands more than an unadorned, the-defendant-
unlawfully-harmed-me accusation. A pleading that offers labels and
conclusions or a formulaic recitation of the elements of a cause of action will
not do. Nor does a complaint suffice if it tenders naked assertions devoid of
further factual enhancement.

24 Ashcroft v. Iqbal, 556 U.S. 662, 677–78 (2009) (citations, quotation marks, and brackets
25 omitted).

26 In reviewing a Rule 12(b)(6) motion to dismiss, “[a] claim has facial plausibility
27 when the plaintiff pleads factual content that allows the court to draw the reasonable
28 inference that the defendant is liable for the misconduct alleged.” Iqbal, 556 U.S. at 678.

1 “Factual allegations must be enough to raise a right to relief above the speculative level.”
2 Twombly, 550 U.S. at 555 (citation omitted). In addition, a court need not accept legal
3 conclusions as true. Iqbal, 556 U.S. at 678. Further, it is improper for a court to assume
4 that the plaintiff “can prove facts which it has not alleged or that the defendants have
5 violated the . . . laws in ways that have not been alleged.” Assoc. Gen. Contractors of Cal.,
6 Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 526 (1983). Finally, a court may
7 consider documents incorporated into the complaint by reference and items that are proper
8 subjects of judicial notice. See Coto Settlement v. Eisenberg, 593 F.3d 1031, 1038 (9th
9 Cir. 2010).

10 If the court dismisses a complaint for failure to state a claim, it must then determine
11 whether to grant leave to amend. See Doe v. United States, 58 F.3d 494, 497 (9th Cir.
12 1995). “A district court may deny a plaintiff leave to amend if it determines that allegation
13 of other facts consistent with the challenged pleading could not possibly cure the
14 deficiency, or if the plaintiff had several opportunities to amend its complaint and
15 repeatedly failed to cure deficiencies.” Telesaurus VPC, LLC v. Power, 623 F.3d 998,
16 1003 (9th Cir. 2010) (internal quotation marks and citations omitted).

17 **II. Analysis**

18 **A. Strict Liability Claim**

19 Plaintiff claims that Defendant BG Medical is strictly liable for his injuries. (Doc.
20 No. 15 ¶¶ 96–113.) Defendant argues that although distributors can be strictly liable,
21 several exceptions to strict liability apply in this case. Plaintiff concedes that manufactures
22 and distributors of implantable medical devices cannot be held liable for design defects,
23 but contends that he has properly alleged a strict liability claim stemming from both
24 manufacture defects as well as inadequate warnings. (Doc. No. 20 at 4.) The Court agrees
25 with Plaintiff.¹

26
27 ¹ Insofar as Defendant BG Medical seeks to preclude Plaintiff from asserting a specific type of strict
28 liability claim, Defendant may do so through a motion for partial summary judgment when the record is
more fully developed. See Fed. R. Civ. P. 56(a).

1 **B. Breach of Express Warranty**

2 Plaintiff brings a claim for breach of express warranty against Defendant BG
3 Medical. (Doc. No. 15 ¶¶ 118–27.) Defendant BG Medical argues that Plaintiff’s express
4 warranty claim fails because no representation was made directly to Plaintiff. (Doc. No.
5 19-1 at 12.) Plaintiff argues that he may rely on assertions made to the physician that
6 selected the product. (Doc. No. 20 at 5.)

7 The Court agrees with Plaintiff. An express warranty is “a contractual promise from
8 the seller that the goods conform to the promise.” Daugherty v. Am. Honda Motor Co.,
9 144 Cal. App. 4th 824, 830 (2006). To allege a claim for breach of express warranty, a
10 plaintiff must allege “the exact terms of the warranty, plaintiff’s reasonable reliance
11 thereon, and a breach of that warranty which proximately causes plaintiff injury.”
12 Moreover, generally, “privity of contract is required in an action for breach of [express
13 warranty].” Burr v. Sherwin Williams Co., 42 Cal. 2d 682, 695 (1954). One “possible
14 exception to the general rule is found in a few cases where the purchaser of a product relied
15 on representations made by the manufacturer in labels or advertising material, and recovery
16 from the manufacturer was allowed on the theory of express warranty without a showing
17 of privity.” Burr, 42 Cal. 2d at 696; see also Seely v. White Motor Co., 63 Cal. 2d 9, 14
18 (1965) (“Since there was an express warranty to plaintiff in the purchase order, no privity
19 of contract was required.”); Cardinal Health 301, Inc. v. Tyco Elecs. Corp., 169 Cal. App.
20 4th 116, 143–44 (2008) (“Privity is generally not required for liability on an express
21 warranty because it is deemed fair to impose responsibility on one who makes affirmative
22 claims as to the merits of the product, upon which the remote consumer presumably
23 relies.”).

24 In addition, under the learned intermediary doctrine, express warranties run to the
25 physician, not the plaintiff. Tapia v. Davol, Inc., 116 F. Supp. 3d 1149, 1162 (S.D. Cal.
26 2015); see also Stevens v. Parke, Davis & Co., 9 Cal. 3d 51, 65 (1973) (“[T]he . . . supplier
27 of a prescription drug has a duty to adequately warn the medical profession of its dangerous
28 properties or of facts which make it likely to be dangerous. . . .”).

1 Here, Plaintiff alleges an express warranty based on Defendant BG Medical's
2 representations to hospital surgeons as well as through the product's labeling, advertising,
3 and marketing. (Doc. No. 15 ¶¶ 121–23.) Plaintiff also alleges that his physicians relied
4 upon the express warranties, including the product labeling, in deciding to use the hernia
5 mesh product. (Id. ¶ 121–125.) Based on these allegations, the Court denies Defendant
6 BG Medical's motion to dismiss Plaintiff's express warranty claim. Defendant BG
7 Medical's contentions in its reply that Plaintiff's allegations are not sufficiently specific
8 are better suited for resolution at a later stage in the proceedings when the record is more
9 fully developed.

10 **C. Breach of Implied Warranty**

11 Plaintiff brings a claim for breach of implied warranty. (Doc. No. 15 ¶¶ 128–44.)
12 Defendant argues that Plaintiff's implied warranty claim fails because Plaintiff has not
13 alleged that he relied on advice other than his doctor's in selecting a suitable implanted
14 medical device. (Id. at 12–13.) Plaintiff does not address Defendant's claim in his
15 opposition.

16 The Court concludes that Plaintiff has sufficiently alleged privity and reliance on
17 Defendant BG Medical's representations as required for his implied warranty claim. As
18 with an express warranty, generally, “privity of contract is required in an action for breach
19 of [implied warranty].” Burr, 42 Cal. 2d at 695. Unlike his express warranty claim,
20 Plaintiff has not provided a case that makes an exception to the privity requirement
21 applicable to his implied warranty claim. Nor has the Court found an exception applicable
22 to this case. See Tapia, 116 F. Supp. 3d at 1160 (collecting cases) (“[C]ourts have applied
23 the privity requirement to both breach of the implied warranty of fitness, and breach of the
24 implied warranty of merchantability.”).

25 Nonetheless, the Court concludes that Plaintiff sufficiently allege privity and
26 reliance to support his implied warranty claim. Plaintiff alleges that Defendant BG medical
27 represented directly to him that the mesh was safe for its intended use. (Doc. No. 15 ¶
28 137.) Plaintiff also alleges that he relied on those representations and that he was implanted

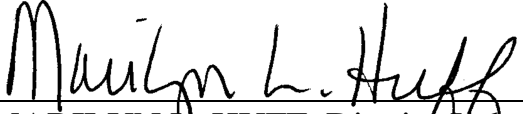
1 with the hernia mesh to repair an inguinal hernia. (Id. ¶¶ 11, 19, 138.) Accordingly, the
2 Court denies Defendant BG Medical’s motion to dismiss Plaintiff’s implied warranty
3 claim. Defendant BG Medical’s contention that Plaintiff is not sufficiently specific about
4 Defendant BG Medical’s alleged representations is better suited for resolution at a later
5 stage in the proceedings when the record is more fully developed.

6 **Conclusion**

7 For the foregoing reasons, the Court denies Defendant BG Medical’s motion to
8 dismiss. The Court orders Defendant BG Medical to file a response to the first amended
9 complaint on or before **September 16, 2019**.

10 **IT IS SO ORDERED.**

11 DATED: August 8, 2019

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14 MARILYN L. HUFF, District Judge
15 UNITED STATES DISTRICT COURT
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