UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

MELISSA CHAPPELL, et al.,

Plaintiffs,

v.

BOIRON, INC.,

Defendant.

Case No. 22-cv-00035-JST

ORDER DENYING MOTION TO DISMISS

Re: ECF No. 26

Before the Court is Defendant Boiron, Inc's motion to dismiss. ECF No. 26. The Court will deny the motion.

I. BACKGROUND

In this putative class action, Plaintiffs Melissa Chappell and Kylie Putney allege that the labels on the arnica products Defendant Boiron, Inc. markets and sells under its Arnicare brand falsely state that the products provide pain relief. Plaintiffs allege that the pain relief labels on the Arnicare products are false because "(1) the active ingredient [in them], arnica montana, does not provide pain relief; and (2), even if it could [do so] under some circumstances, the dosage is far too low to provide any physiological benefit." ECF No. 25 at 2. Plaintiffs bring six claims: (1) breach of express warranty, (2) breach of implied warranty of merchantability, (3) fraud, (4) violation of California's Consumers Legal Remedies Act, California Civil Code § 1750, et seq., (5) violation of California's false advertising law, California Business & Professions Code § 17500 et seq., and (6) unlawful business practices in violation of California's Unfair Competition Law ("UCL"), Business & Professions Code §§ 17200 et seq.

Boiron moves to dismiss the complaint in its entirety under Rule 12(b)(6), Rule 12(b)(1), and on grounds of preemption and primary jurisdiction. Boiron raises four arguments under Rule

12(b)(6). First, Boiron argues that Plaintiffs' breach of warranty claims should be dismissed because Plaintiffs "are unable to demonstrate that the [Arnicare] products generally did not or will not provide any pain relief." ECF No. 26 at 24. Second, Boiron argues that Plaintiffs' fraud-based claims, i.e., their common law fraud, CLRA, FAL, and UCL claims, should be dismissed because they do not meet the particularity requirements of Rule 9. Third, Boiron argues that Plaintiffs' CLRA, FAL, and UCL claims should be dismissed because they rest on a lack-of-substantiation theory, which is not actionable under California law. Fourth, Boiron argues that Plaintiffs' FAL claim fails because Plaintiffs have not shown that Boiron made claims that are false or misleading. Boiron makes two arguments under Rule 12(b)(1). First, it argues that Plaintiffs lack standing to assert claims for products they did not buy. Second, it contends that Plaintiffs lack standing to sue for injunctive relief.[1] Finally, Boiron argues that Plaintiffs' claims fail under the doctrines of preemption and primary jurisdiction.

II. JURISDICTION

This Court has subject matter jurisdiction under the Class Action Fairness Act, 28 U.S.C. § 1332(d)(2)(A), because: (i) the aggregate amount in controversy exceeds $5,000,000, exclusive of interest and costs, (ii) there are 100 or more putative class members, and (iii) the parties are minimally diverse. This Court has supplemental jurisdiction over any state-law claims under 28 U.S.C. § 1367.

III. LEGAL STANDARDS

A. Rule 12(b)(6)

A complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Dismissal under Rule 12(b)(6) of the Federal Rules of Civil Procedure "is appropriate only where the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory." *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008). A complaint need not contain detailed factual allegations, but facts pleaded by a plaintiff must be "enough to raise a right to relief above the speculative

[1] After Boiron filed its motion to dismiss, Plaintiffs abandoned their claim for injunctive relief.

level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). To survive a Rule 12(b)(6) motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* While this standard is not a probability requirement, "[w]here a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." *Id.* (quotation marks and citation omitted). In determining whether a plaintiff has met this plausibility standard, a court must "accept all factual allegations in the complaint as true and construe the pleadings in the light most favorable" to the plaintiff. *Knievel v. ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005).

Fraud claims are governed by the heightened pleading standard of Rule 9(b), which requires that "a party . . . state with particularity the circumstances constituting fraud or mistake" but allows that "[m]alice, intent, knowledge, and other conditions of a person's mind . . . be alleged generally." Fed. R. Civ. P. 9(b). Allegations of fraud must "be specific enough to give defendants notice of the particular misconduct so that they can defend 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 how of the misconduct charged." *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003) (simplified).

B. Rule 12(b)(1)

A plaintiff has standing to sue in federal court only if she has (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016). "A suit brought by a plaintiff without Article III standing is not a 'case or controversy,' and an Article III federal court therefore lacks subject matter jurisdiction over the suit." *Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1174 (9th Cir. 2004). "In that event, the suit should be dismissed under Rule 12(b)(1) [of the Federal Rules of Civil Procedure]." *Id.* "A Rule 12(b)(1) jurisdictional attack

complaint are insufficient on their face to invoke federal jurisdiction. By contrast, in a factual attack, the challenger disputes the truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction." *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004) (citation omitted).

IV. DISCUSSION

A. Rule 12(b)(6)

1. Breach of Warranty

"Under California law, to state a claim for breach of express warranty, Plaintiff must allege that the seller: (1) made an affirmation of fact or promise or provided a description of its goods; (2) the promise or description formed the basis of the bargain; (3) the express warranty was breached; and (4) the breach caused injury to the plaintiff." *Jovel v. Boiron Inc.*, No. 2:11-CV-10803-SVW-SH, 2013 WL 12164622, at *7 (C.D. Cal. Aug. 16, 2013) (cleaned up). "Statements made by a manufacturer through its advertising efforts can be construed as warranty statements." *Id.* (cleaned up). To state a claim for breach of implied warranty under California law, Plaintiffs must allege that the product (1) is not "fit for the ordinary purposes for which such good [is] used," or (2) does not "[c]onform to the promises or affirmations of fact made on the container or label if any." *Hadley v. Kellogg Sales Co.*, 243 F. Supp. 3d 1074, 1106 (N.D. Cal. 2017) (citations omitted).

Boiron contends that Plaintiffs fail to state a claim of breach of warranty because Plaintiffs have not "produce[d] evidence showing that Defendant's representations are false." ECF No. 26-1 at 24. Boiron acknowledges that "Plaintiffs allege that they 'did not experience any pain relief,'" but contends that "the FAC is devoid of any facts to support this conclusory statement." *Id.* (internal citation omitted). As for the studies Plaintiffs cite in the complaint, Boiron argues that they "tested arnica montana for very specific ailments that were not alleged by Plaintiffs or within the scope of Plaintiffs' claims on Boiron's products." *Id.*

The Court rejects Boiron's arguments. As an initial matter, Plaintiffs need not produce any evidence at the pleading stage. *Locklin v. StriVectin Operating Co.*, Inc., No. 21-CV-07967-VC, 2022 WL 867248, at *4 (N.D. Cal. Mar. 23, 2022) ("at the motion to dismiss stage, complaints

need not 'show' or 'establish' anything"). On the merits, Plaintiffs allegations properly state breach of warranty claims. Plaintiffs allege that they experienced no pain relief after taking Boiron's arnica products, and they cite studies which suggest that arnica provides no pain-relief benefits. Those allegations support the plausible inference that Boiron promises its Arnicare products provide pain relief when they in fact provide none. Moreover, Plaintiffs' allegations track the allegations other courts have found sufficient to make out plausible warranty claims. *See, e.g.*, *Forcellati v. Hyland's, Inc.*, 876 F. Supp. 2d 1155, 1162-63 (C.D. Cal. 2012) (denying motion to dismiss claim for breach of express warranty when plaintiff alleged that cold and flu products failed to deliver the benefits promised on the packaging). The Court therefore denies Boiron's motion to dismiss Plaintiffs' warranty claims.

2. Fraud Claims

Boiron first argues that Plaintiffs' fraud-based claims – their common law fraud, CLRA, FAL, and UCL claims – should be dismissed because they do not meet the who-what-when-where-how particularity requirements of Rule 9. Boiron next argues that Plaintiffs' fraud claims should be dismissed because "because Plaintiffs are unable to establish that Boiron made a misrepresentation regarding Arnicare Cream or Arnicare Tablets, knew it was a false representation, or had an intent to defraud Plaintiffs." ECF No. 26-1 at 18.

Boiron's arguments are unpersuasive. First, Plaintiffs' complaint satisfies Rule 9's requirements because it states that Boiron (the 'who') labeled Arnicare products with a label promising pain relief (the 'what') during at least the four years before the complaint was filed (the 'when') and submitted examples of the labels of several Arnicare products (the 'where') and why they were deceived by the label (the 'how'). *See Von Koenig v. Snapple Bev. Corp.*, 713 F. Supp. 2d 1066 (E.D. Cal. 2010). By arguing that Plaintiffs do not meet Rule 9's requirements because they "do not identify the pain they were experiencing, the reasons for the purchase of the specific product at issue, how they used it, and for how long, and whether they continue to experience the pain symptoms after using the product," Boiron impermissibly expands Rule 9's requirements. ECF No. 26-1 at 18. Rule 9 does not require "absolute particularity," "a recital of the evidence,"

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