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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

LOUISA GUTIERREZ, an individual, DEBBIE LUNA, an individual, on behalf of themselves and all persons similarly situated,

Plaintiffs,

v.

JOHNSON & JOHNSON, a New Jersey Corporation, JOHNSON & JOHNSON CONSUMER, INC., a New Jersey Corporation, BAUSCH HEALTH US, LLC, f/k/a VALEANT PHARMACEUTICALS NORTH AMERICA LLC, a New Jersey Limited Liability Company, AND DOES 1 - 100, inclusive

Defendants.

CASE NO. 3:19-cv-01345-DMS-AGS

CLASS ACTION

DEFENDANT BAUSCH HEALTH US, LLC f/k/a VALEANT PHARMACEUTICALS NORTH AMERICA LLC'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS OR IN THE ALTERNATIVE MOTION TO STRIKE PLAINTIFFS' FIFTH AMENDED COMPLAINT IN ITS ENTIRETY; FED. R. CIV. P. 12(b)(6)

Date: October 30, 2020
Time: 1:30 p.m.
Ctrm: 13A
Judge: Hon. Dana M. Sabraw

Action Filed: May 20, 2019
Trial Date: None Set

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Defendant Bausch Health US, LLC f/k/a Valeant Pharmaceuticals North America LLC ("BHUS") hereby moves to dismiss or, in the alternative, strike each cause of action in Plaintiffs' Louisa Gutierrez and Debbie Luna (collectively, "Plaintiffs") Fifth Amended Complaint ("5AC"). Despite having the benefit of the Court's detailed Order dismissing the Third Amended Complaint ("TAC") which explained what Plaintiffs must do to cure the deficiencies of their pleading (the "Dismissal Order"), and despite this being their ***sixth*** bite at the apple, Plaintiffs still utterly fail to comply with pleading rules and the Court's unambiguous directives. They should not get another opportunity to try to plead a cognizable claim as to BHUS and this Complaint should be dismissed *with prejudice*.

First and foremost, despite clear direction from the Court, Plaintiffs' 5AC still fails to plead the who, what, where, when, and how necessary to meet Rule 9(b)'s heightened pleading with particularity standard as to BHUS. Instead, Plaintiffs simply add in claims of old advertisements directed to Johnson's Baby Powder ("JBP"), all of which were presumably published well before Plaintiffs ever purchased the products at issue and which could not have been relied upon by Plaintiffs in making their purchasing decisions and are entirely unrelated to Shower to Shower® ("STS") or BHUS. These advertisements are not only related to products with which BHUS was not involved, but all occurred years or even decades before BHUS acquired STS. Plaintiffs attempt to argue that ingredients of JBP and STS are "virtually" identical, and thus a reasonable consumer would rely on all JBP advertisements when purchasing STS, but they ignore that JBP and STS are marketed and labeled for different purposes and to different customer populations – JBP is marketed and labeled for use on babies to control diaper moisture, while STS is marketed for use by adults as a cosmetic body powder to provide moisture and odor control and fragrance. By only adding allegations concerning advertisements for JBP in the 5AC, Plaintiffs implicitly admit

that they have no STS-specific or BHUS-specific conduct to allege on this, their sixth try at pleading their claims.

Similarly, the 5AC continues to lump Defendants together as a single entity responsible for all the talc products at issue, which is simply not true, as this Court has previously acknowledged. For example, Plaintiffs allege "Defendants" made "pure" and "asbestos free" advertising claims, but do not provide even one example of such claims being made by BHUS about STS. This impermissible lumping together of Defendants and attempted attribution of old conduct by other entities to BHUS flies in the face of the Court's specific instructions to Plaintiffs not to lump the defendants together and attribute conduct to BHUS that occurred before BHUS purchased STS in 2012. Dkt. 41 at pp. 15-16. Nonetheless, the 5AC continues to refer to alleged conduct of the "Defendants" and their decades-long advertising campaign. The very few new allegations added to the 5AC directed to BHUS allege conduct that is not related in any way to safety claims and that is not alleged to have occurred at any specific time. In fact, the vast majority of allegations relating to BHUS still predate BHUS' purchase of STS. Even where Plaintiffs have added allegations about Plaintiffs' reliance on certain advertisements, there is not one reference to reliance on advertisements made by BHUS or relating to STS. 5AC ¶¶ 94, 95, 107.

Even if Plaintiffs could meet the Rule 9(b) pleading standard, the main advertising claim applicable to BHUS and STS in the 5AC—the statement "*nearly 50 years of use*"—is not an actionable representation for two reasons. First, it is not an affirmative representation of something that is demonstrably false; on the contrary, it is a factually accurate claim that Plaintiffs contend deceptively implies safety. For a facially true statement to be an actionable misrepresentation, BHUS must have a duty to disclose further information, but the Court has already ruled such a duty does not exist, as the derivative Proposition 65 claims failed. The 5AC does add an advertising claim alleged to be found on directed to an STS Twitter account: the phrase "*stay fresh.*" This is Plaintiffs' only addition directed to marketing for STS that allegedly occurred "during the Class Period."

5AC ¶ 104. This Twitter statement about freshness, however, has no bearing on product safety and is not alleged to have deceived Plaintiffs, nor is it alleged to be false.

Second, Plaintiffs have failed to identify how any claims allegedly implying "safety" are deceptive, how or when Plaintiffs relied on such claims, or how Plaintiffs were harmed. The Court's Dismissal Order instructed Plaintiffs to explain with the requisite particularity in the 5AC how the safety claims were deceptive to Plaintiffs. In response, Plaintiffs added conclusory statements about the talc products causing cellular inflammation and oxidative stress, but Plaintiffs still fail to plead the inflammation or oxidation leads to cancer or other injury, or even that inflammation or oxidative stress render the products unsafe.

Moreover, the only injury pled by the Plaintiffs is economic injury, which is not supported by the pleadings. Plaintiffs admit they purchased and used the products for years and do not allege dissatisfaction with their performance. It was not until Plaintiffs learned of a hypothetical cancer risk years later that they wished they had not bought the products. Thus, Plaintiffs received the benefit of their bargain, and the claims are not deceptive.

On their sixth chance to state legally cognizable claims, Plaintiffs were provided a clear roadmap by the Court of what allegations would be necessary for their claims to survive. Plaintiffs failed. Therefore, BHUS respectfully requests that the 5AC be dismissed *with prejudice*, and that further leave to replead be denied as futile.

II. PROCEDURAL HISTORY AND FACTUAL ALLEGATIONS

A. Plaintiffs' Prior Complaints

Plaintiffs filed their original Complaint in San Diego Superior Court on May 20, 2019, against Defendants Johnson & Johnson and Johnson & Johnson Consumer Inc. (collectively, "J&J"), and Valeant Pharmaceuticals North America LLC, alleging three causes of action: (1) violation of the Consumer Legal Remedies Act (Cal. Civ. Code § 1750, *et seq.*) ("CLRA"); (2) violation of the False Advertising Law (Cal. Bus. & Prof. Code § 17500, *et seq.*) ("FAL"); and (3) violation of the Unfair Competition Law (Cal. Bus & Prof. Code § 17200, *et seq.*) ("UCL"). After the case was removed, on June 4, 2019, Plaintiffs

filed a First Amended Complaint ("FAC") to replace defendant Valeant Pharmaceuticals North America LLC with BHUS (together with J&J, the "Defendants"). FAC ¶ 12. Like the original Complaint, the First Amended Complaint alleged that Defendants' sale of JBP and STS (collectively, the "Talcum Products") deceived consumers because the labels and product advertising failed to warn consumers of certain health risks. *Id*. ¶ 1. Specifically, the FAC focused on Defendants' purported failure to disclose the presence of carcinogenic substances in the Talcum Products, which allegedly required health hazard warnings under Proposition 65 or otherwise. *See, e.g*., FAC ¶ 2.

Neither of the first two iterations of the Complaint were based on affirmative misrepresentations; instead, they were based specifically on Proposition 65 and the alleged omission of warnings regarding potential carcinogenicity. Notably, nowhere in either version of the Complaint did the Plaintiffs plead an affirmative misrepresentation of safety related to STS that they relied on to purchase STS or that they were damaged by such a misrepresentation.[1]

Following meet and confer efforts in which Defendants informed Plaintiffs of the statutory pre-suit notice requirement of Proposition 65 claims, and of the fatal nature of their failure to issue such notice, Plaintiffs filed their Second Amended Complaint ("SAC") on August 30, 2019. While Plaintiffs tried to plead around this problem by removing references to Proposition 65 and adding references to the California Safe Cosmetics Act of 2005, the SAC continued to implicitly rely on Proposition 65. Once Plaintiffs realized their statutory omission claims failed as a matter of law, their narrative began to shift. Regarding STS, Plaintiffs added a new deceptive advertising allegation—appearing for the first time in Plaintiffs' third version of the complaint:

> The bottles of Shower to Shower® products and their website, https://www.showertoshower.com/, both state "For nearly 50 years SHOWER TO SHOWER® Absorbent Body Powders have delivered long-lasting freshness. Our silky-soft powder pampers your skin, while our unique absorption formula keeps you feeling drier longer."

[1] Those Complaints do reference "asbestos free" claims, but Plaintiffs have never identified a single example of asbestos free claims made by BHUS regarding STS.

SAC ¶ 80. The Plaintiffs did not allege in the SAC that they viewed, relied on, or were damaged by this representation.

After reviewing Defendants' first set of Motions to Dismiss, Plaintiffs filed the Third Amended Complaint ("TAC") without leave of the Court on November 4, 2019, disclaiming reliance on any statutory disclosure requirement such as Proposition 65. TAC ¶ 4. However, the Plaintiffs identified no duty to disclose on the part of Defendants to support an omission theory. Instead, the TAC relied on a "decades-long advertising campaign" to conceal the presence of carcinogenic substances in the Talcum Products. *Id*. ¶¶ 5, 78–84. The TAC also added—for the first time—allegations regarding the alleged materiality of the "nearly 50 years of use" claim made in connection with STS:

> The natural implication of Bausch's statements on the bottles of Shower to Shower® products is that these products are safe for use. After all, any reasonable consumer would be led to believe that a product for sale for "nearly 50 years" would be safe for use, and not contain such hazardous substances as asbestos, asbestiform fibers, lead, arsenic, and/or silica.

TAC ¶ 82. Defendants' Motions to Dismiss the TAC were filed after the Court denied the Motion to Strike and set a briefing schedule, and the Court opted to decide the Motions on the papers without oral argument. (Dkt. 40.)

B. <u>The Dismissal Order</u>

On April 27, 2020, the Court issued its Order dismissing the TAC. The Court ruled any allegations that Talcum Products required warnings for carcinogenic substances were derivative of Proposition 65, which failed for lack of presuit notice, and no other affirmative duty to disclose existed. Dkt. 41 at 11–12. The Court then considered the affirmative misrepresentation allegations raised by Plaintiffs and dismissed them as insufficiently pled under Rule 9(b)'s heightened pleading standard, and because the "free of asbestos" claims were not relied upon by Plaintiffs since they were made "many years ago in the 1970 to 1990s timeframe—in a world completely detached from Plaintiffs'." *Id.* at 14–15.

The Court also took issue with the Plaintiffs repeatedly lumping BHUS in with J&J, attributing all allegedly deceptive conduct to "Defendants," despite specifically pleading that BHUS did not purchase STS until 2013. *Id*. at 15–16. Nearly all the conduct alleged in the TAC pre-dates BHUS' ownership of STS, often by decades. The Court dismissed the TAC as to BHUS on this independent basis under Rule 9(b). *Id.*

Finally, the Court analyzed "safety" claims, including claims the products had been in use for nearly 50 years, noting "Plaintiffs neither allege the Talcum Products contain unsafe levels of hazardous substances nor how these statements and advertisements are unlawful or misleading in the absence of a duty to disclose the substances at issue." *Id.* at 18. The Court held the statements and advertisements were not misleading "unless the product is actually unsafe," and the only duty to disclose the presence of carcinogenic substances arises under Proposition 65. *Id*. at 18–19. Thus, the Court also dismissed the TAC to the extent it relied on claims of misrepresentation of the Talc Products' safety.

C. Plaintiffs' Fourth Amended Complaint

Plaintiffs filed their Fourth Amended Complaint ("4AC") on May 27, 2020. Notwithstanding the Court's clear guidance as to what defects would need to be cured for Plaintiffs to establish cognizable claims that could survive another motion, Plaintiffs did little in the 4AC to cure the deficiencies outlined in the Dismissal Order.

In response to the Court's demand that Plaintiffs identify how the Talcum Products were unsafe or whether the Talcum Products contained toxic levels of substances, Plaintiffs added a narrow subset of allegations regarding cellular oxidation: "Defendants have known for decades that the Talcum Products pose a deadly inhalation risk to infants and children, cause cellular inflammation and oxidative stress to the users." 4AC ¶ 1. As evidence of the cellular oxidation theory, Plaintiffs attached a *Daubert* ruling from the currently pending MDL regarding the Talcum Products.[2] *Id.* ¶ 4. In that order, the MDL Court specifically ruled the expert's opinion was not relevant to cancer risk and thus the expert could not

[2] BHUS is not a party to the MDL cases in which the *Daubert* rulings were issued, and those rulings are not indicative of anything about BHUS' knowledge about any risks of STS.

testify regarding carcinogenic effects of talcum powder—the very point on which Plaintiffs cite the order in the 4AC. (Dkt. 42 Ex. A, pp. 15–25.)

Plaintiffs added only the following allegations regarding injury in fact to the 4AC: "all members of the Class sustained injury in fact by losing money as a result of Defendants' wrongful conduct." 4AC ¶ 113. They did not allege how much money any individual purchaser lost or their basis for this allegation, such as a difference between purchase price and value of the product. They never alleged they themselves suffered any personal injury or health risk as a result of using the Talcum Products.

The 4AC also continued to conflate the conduct of BHUS with J&J, even for alleged conduct predating BHUS' purchase of STS in 2012–2013. *See id.* ¶ 10 ("throughout the past 50 plus years, Defendants have made numerous and consistent representations that their products are safe, 'pure' and 'asbestos-free.'"). This deficiency is glaringly obvious in paragraphs 23–76, which repeatedly describe the "decades long deception" of "Defendants" despite the 4AC again pleading that BHUS did not purchase STS until 2012. *Id.* ¶ 12.

Plaintiffs added allegations regarding the Talcum Products being marketed as "pure." *See, e.g.*, *id.* ¶ 2. However, the purity claims identified in the 4AC are still specific to JBP and have nothing to do with STS. *Id.* ¶¶ 82–86. There is not one example provided in the 4AC of STS being advertised as "pure," much less within the timeframe of BHUS' ownership. The same is true for allegations relating to marketing the products as asbestos-free—those advertisements have no nexus to STS or BHUS. And even if a nexus between asbestos-free advertising and BHUS could be established, Plaintiffs also still do not plead they ever viewed such advertisements, relied on them, or were damaged as a result.

The only allegations regarding advertising for STS that Plaintiffs added to the 4AC are again directed to old activities that *predate* BHUS' acquisition or responsibility, which the Court has already held to be improper. Plaintiffs referenced for the first time an old J&J advertising campaign for STS with the jingle "a sprinkle today, keeps the shower away." 4AC ¶ 60. Plaintiffs do not contend BHUS produced or participated in the jingle, which

clearly predated its ownership, and the jingle makes no representation about the safety of STS. In sum, the 4AC simply incorporates the cellular oxidation allegations, notes the jingle used by J&J (without tying it to a relevant time period), and reasserts the allegation that STS's "nearly 50 years of use" website advertising misleads the average consumer regarding the Product's safety:

> 96. The statements on the bottles and on the website falsely implicate that their product "pampers" the skin, while obscuring the reality that talc is regularly contaminated with asbestos, causes lung inflammation, and harms the user on a cellular level, with cellular inflammation and oxidative stress.
>
> 97. More ominously, by referring to the "nearly 50 years" Bausch has ratified the advertisements of Johnson & Johnson, and incorporated them. In particular, Johnson & Johnson advertised the Shower to Shower ® products through a jingle, "Just a sprinkle today, keeps the shower away" which encouraged women, such as Plaintiffs, and the Class Members to use the Shower to Shower ® products in their underwear, leading directly to cellular inflammation and oxidative stress to their ovaries. See Exh. B and G.
>
> 98. Additionally, the natural implication of Bausch's statements on the bottles of Shower to Shower® products is that these products are safe for use. After all, any reasonable consumer would be led to believe that a product for sale for "nearly 50 years" would be safe for use, and not contain such hazardous substances as asbestos, asbestiform fibers, lead, arsenic, and/or silica.
>
> 99. As alleged above and herein, Defendants have implemented a long-term advertising campaign to convince Plaintiffs and the Class Members that the Talcum Products are safe for use. . . .

The 4AC was devoid of any facts about how or when Plaintiffs viewed, much less relied on, the "50 year" statement on the internet or any other marketing of STS. Further, beyond the hypothetical harm caused by alleged cellular oxidation, there are no further allegations of personal injury. Nor do they allege STS did not provide its advertised benefits to them. In short, Plaintiffs plead no facts that can be reasonably inferred to show they did not receive the benefit of their bargain for their purchases of STS after BHUS acquired it.

Simply put, the 4AC attributed no new actionable conduct to BHUS, failed to cure the many defects outlined in the Dismissal Order, and did not explain why BHUS should be liable for conduct pre-dating its ownership of STS. Pursuant to the Court's meet and confer rules, the parties met to discuss the foregoing deficiencies of the 4AC. Plaintiffs'

counsel stated during the telephonic conference that Plaintiffs believe the 4AC to be sufficient, and Defendants prepared to file motions directed to the 4AC.

D. Plaintiffs' Fifth Amended Complaint

Shortly after the meet and confer, Plaintiffs retracted their statement that they were standing on their 4AC, and requested instead to file a Fifth Amended Complaint, now recognizing "additional facts might be necessary to plead with specificity required under Rule 9." Dkt. 45-7 at 5. In light of the previous five opportunities to plead, Defendants declined to consent to yet another amendment. Plaintiffs filed a motion for leave to amend, which Defendants opposed, and this Court granted, noting that "Defendants set forth reasoned arguments about the futility of Plaintiffs' amended claims." Dkt. 49 at 6. While Plaintiffs have added a few new allegations (and all other allegations from the 4AC remain intact), the 5AC does remarkably little to cure the failures this Court identified in the Order dismissing the TAC.

Plaintiffs have added new allegations about affirmative statements allegedly related to the safety of Talcum Products ("#1 Choice for Hospitals" or "gentle"), but (*again*) not one such statement is attributed to BHUS or alleged to have been made specifically about STS. 5AC ¶¶ 87, 94, 95. In an attempt to bridge the gap between advertisements for JBP (most of which predate BHUS' ownership of STS) and STS, Plaintiffs allege a "reasonable consumer, upon reading the back label of the [STS] products would naturally notice that the ingredient list of the [STS] products are virtually identical to those in baby powder." 5AC ¶ 106. Plaintiffs allege that because the ingredients are similar, "the deceptions made by Johnson & Johnson [], regarding the safety of talc in the Talcum Products equally deceive the purchasers of the [STS] products." *Id.* In an effort to attribute the JBP marketing undertaken by J&J to BHUS, Plaintiffs allege that consumers who saw advertising for JBP chose to purchase STS because they were "equally deceived" by advertising for a different product made by a different company and marketed for a different user. Plaintiffs are thus asking the Court to assume—even though STS has never been marketed for babies and is

thus unlikely to be shelved in the baby products aisle alongside JBP—that consumers of STS would nonetheless have reviewed and compared the labels of both products and may have been deceived by the marketing specific to JBP after noting the similarity of ingredients between the products. Not only does this allegation impermissibly speculate about hypothetical actions of potential class members, but it seeks to hold BHUS responsible for representations it did not make about products for which it bore no responsibility. Plaintiffs still fail to establish the necessary nexus between STS and the allegedly deceptive advertising to plead a cognizable claim against BHUS.

Generally, Plaintiffs' allegations in the 5AC remain insufficient under Rule 9(b), despite the detailed roadmap provided by this Court in the Dismissal Order. Rather than plead the specifics of any actionable affirmative misrepresentation by BHUS that Plaintiffs specifically relied upon to their detriment, Plaintiffs make conclusory allegations that they relied on *all* of Defendants' alleged safety-related statements. 5AC, ¶¶ 93, 113, 114. There is still no allegation identifying any statement by BHUS about STS that Plaintiffs relied upon at any specific time. Rather, Plaintiffs point to JBP advertisements marketed "during the Class Period" that Plaintiff Luna allegedly relied upon to purchase STS. The only allegation specific to STS is that Plaintiff Luna "purchased the [STS] as deodorants to keep herself 'fresh' and odor free." *Id.* at ¶ 107. Plaintiffs do not allege that she *relied* on those statements, much less alleging these were false or misleading or caused her any damages.

The few new allegations added to this *sixth* version of Plaintiffs' complaint fail to cure the deficiencies identified by the Court as to BHUS. *Id.* at 15-16. The 5AC does not plead any new statements made by BHUS on the STS label or otherwise that could possibly have deceived a reasonable consumer. This amendment is just more of the same lumping together of BHUS into allegations directed to conduct of other parties that the Court has already said is subject to dismissal. *Id.* The 5AC should be dismissed *with prejudice* with no further amendment, as Plaintiffs' myriad amended complaints have demonstrated the futility of amendment.

III. STANDARD ON MOTION TO DISMISS

As fully set forth in the last Motion to Dismiss, a Rule 12(b)(6) motion to dismiss tests the legal sufficiency of a complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). Dismissal is warranted where the complaint lacks a cognizable legal theory. *Shroyer v. New Cingular Wireless Serv., Inc.*, 622 F.3d 1035, 1041 (9th Cir. 2010). Conclusory allegations and unwarranted inferences are not sufficient to defeat a motion to dismiss. *Pareto v. Fed. Deposit Ins. Corp.*, 139 F.3d 696, 699 (9th Cir. 1998).

CLRA, UCL, and FAL claims "that sound in fraud are subject to the heightened pleading requirements of Federal Rule of Civil Procedure 9(b)." *In re: Apple Inc. Device Performance Litig.*, 347 F. Supp. 3d 434, 443 (N.D. Cal. 2018), *on reconsideration in part*, No. 18-md-02827-EJD, 2019 WL 1979915 (N.D. Cal. May 3, 2019). Rule 9(b) requires a complaint "state with particularity the circumstances constituting fraud." Fed. R. Civ. P. 9(b). Allegations of fraud must set forth "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) (internal quotations omitted).

IV. ARGUMENT

A. The Fifth Amended Complaint Still Does Not Meet Rule 9(b).

The Dismissal Order made clear an omission claim, based implicitly on Proposition 65's duty to disclose, was barred. In granting leave to amend, the Court identified several discrete areas where the TAC was deficient and outlined what factual allegations would be necessary to state a claim that could survive the pleading stage. Plaintiffs plead nothing in the 5AC to cure the enumerated deficiencies, notwithstanding the clear roadmap provided by the Court. Plaintiffs were asked to identify the specific conduct of BHUS at issue, rather than lumping in BHUS and J&J together as "Defendants," but Plaintiffs failed to do so. Plaintiffs were instructed to identify misrepresentations from "a world [not] completely detached" from their purchasing decisions and on which they relied to purchase Talcum Products, but did not. Plaintiffs needed to identify how the safety claims were deceptive or

caused injury, but did not. The requisite "who, what, where, when, and how" supporting an affirmative misrepresentation claim are still unequivocally lacking, especially regarding BHUS. On their sixth iteration of the Complaint, Plaintiffs seem to be scrambling to create new allegations after the Court made clear they cannot hang their hat on Proposition 65, explicitly or implicitly. Plaintiffs do not have an actionable claim because they never relied on or were damaged by deceptive advertising by BHUS. The conduct on which they rely was unrelated to BHUS, at a time well before BHUS purchased STS, and thus BHUS is not responsible for it.

1. Plaintiffs' continued failure to distinguish BHUS from "Defendants" and Shower to Shower® from "Talcum Products."

The Dismissal Order was clear: Under Rule 9(b), the TAC inappropriately conflated the conduct of BHUS with J&J, and to satisfy Rule 9(b) as to BHUS, Plaintiffs must "allege facts that BHUS had knowledge of any deception or a duty to disclose the information at the heart of the alleged deception." Dkt. 41 at 16. "Rule 9(b) does not allow a complaint to … lump multiple defendants together but require[s] plaintiffs to differentiate their allegations when suing more than one defendant." *Id.* at 15, citing *Destfino v. Reiswig*, 630 F.3d 952, 958 (9th Cir. 2011) (internal quotations omitted). Plaintiffs ignore this directive, continuing to conflate BHUS with J&J throughout the 5AC. For example, paragraphs 23 through 76 still describe the conduct of "Defendants" for many decades, despite stating BHUS did not purchase STS until 2012–2013. In fact, "Defendants" are collectively referenced approximately 220 times in the 5AC, including more than 40 times just between paragraph 23 and 76, describing a timeframe before BHUS owned STS. Plaintiffs do not add a single fact to the 5AC indicating that BHUS had knowledge of the alleged deception or a duty to disclose any safety issue after it acquired STS. It is difficult to imagine how Plaintiffs thought this pleading would overcome the hurdles identified in the Dismissal Order specifically instructing them to distinguish between the Defendants.

Plaintiffs also conflate the advertising of STS with JBP in a troubling way. Plaintiffs allege "pure" and "asbestos free" claims were made in connection with the "Talcum Products," defined to encompass both STS and JBP. 5AC ¶ 10. However, the 5AC does not provide a single example of either claim being made in connection with STS *after* BHUS purchased STS. Plaintiffs make much ado about the implied safety representation by virtue of JBP being marketed for use on babies, but those arguments do not apply to STS—it was never marketed for use on babies and Plaintiffs identify no marketing statements suggesting it could be used on babies. Tellingly, Plaintiffs allege JBP and Talcum Products were placed in retailers' baby aisles, but never once reference STS specifically as having been placed there. *See e.g.,* 5AC ¶¶ 94, 95, 138. This continued intentional conflation of claims and conduct involving JBP and STS as well as BHUS and its co-defendants is wholly inappropriate, given the Dismissal Order directing Plaintiffs to plead with specificity regarding BHUS. The 5AC largely left this improper pleading intact as to BHUS.

While the 5AC includes many advertisement images for JBP, not one is included for STS. Plaintiffs did add a reference to an advertising campaign by J&J for STS several decades before BHUS acquired the product, which stated "a sprinkle a day, keeps the shower away." 5AC ¶ 60. Plaintiffs seem to have added this allegation to support their claims against both Defendants, but they do concede the campaign was run by J&J. *Id.* In any case, this advertisement in no way implies product safety, meaning it is not actionable under the Court's Order, nor is it attributable to BHUS.

Finally, having tried and failed to attribute other parties' statements to BHUS and JBP advertisements to STS, and having added allegations about marketing statements that have nothing to do with safety, Plaintiffs' latest amendment makes a last-ditch effort to conflate JBP and STS. This time, Plaintiffs ask the Court to assume a reasonable consumer would have read the labels of STS and JBP (notwithstanding that JBP is generally in the baby aisle while STS has never been marketed for use on babies), noticed the ingredient list of STS is "virtually" identical to baby powder because both contain talc and fragrances and

would have been "equally deceive[d]" due to the alleged "deceptions made by Johnson & Johnson, [] regarding the safety of talc in the Talcum Products" *Id.* at ¶ 106. This convoluted set of ridiculous assumptions is a tacit admission that Plaintiffs cannot allege any statement made by BHUS about the safety of STS that gives rise to a cognizable claim.

In trying to lump the Defendants together and attribute J&J's marketing to BHUS, Plaintiffs conveniently omit the fact that each product is marketed to different customer populations for different uses (on babies in the diaper area versus on adults as a body powder), have unique fragrances and varying concentrations of each ingredient, and more importantly, ignores that BHUS reformulated STS in 2018 to eliminate talc, and thus JBP and STS do not have, and may never have had "virtually identical" ingredients.

Plaintiffs piggy-back on this false "same ingredient" narrative to unsuccessfully plead the "who, what, where, when and how" necessary to meet Rule 9(b)'s pleading standard. Plaintiffs allege for the first time that Plaintiff Luna relied on "Defendants' marketing" (*again, without a single specific reference to BHUS*), during the Class Period (*no specific time alleged either*), that "Talcum Products were safe for use and asbestos-free" and "the #1 Choice for Hospitals" (*Plaintiffs only allege this language as to JBP and J&J*), to purchase STS products, allegedly believing they were safe to use because STS "contained the same ingredients as baby powder". 5AC at ¶ 107. The only allegation specific to STS is that "[s]he purchased the [STS] products as deodorants to keep herself 'fresh' and odor free." *Id.*

This Court previously held "Plaintiffs fail to link BHUS to JJCI's alleged campaign of deception in any way" in dismissing the claims against BHUS, and Plaintiffs' latest amendment does nothing to change that. Dkt. 41 at 16. The 5AC still fails to distinguish the Defendants and their respective statements as to JBP and STS, and utterly fails to address the who, what, where, when and how to meet the applicable pleading standard.

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2. Plaintiffs' ratification theory has no basis in law.

Because Plaintiffs cannot identify any conduct by BHUS and cannot rely on conflating the Defendants' conduct, they attempt to allege in the 5AC that BHUS "ratified" J&J's advertisements by acquiring STS in 2012-2013 despite presumed awareness of its advertising history. 5AC ¶ 103. Plaintiffs' theory is not cognizable under California law.

"Ratification is a permeation of the law of agency." *C.R. v. Tenet Healthcare Corp.*, 169 Cal. App. 4th 1094, 1112 (2009). In California, ratification is defined as the "voluntary election by a person to adopt in some manner as his own an act which was purportedly done on his behalf by another person, the effect of which, as to some or all persons, is to treat the act as if originally authorized by him." *Rakestraw v. Rodrigues*, 8 Cal. 3d 67, 73 (1972). Ratification "may result in the creation of an agency relationship where none previously existed, [and] it also works to authorize an existing agent's otherwise unauthorized act." *Dickinson v. Cosby*, 37 Cal. App. 5th 1138, 1159 (2019). "An agent *is* a fiduciary." *Michelson v. Hamada*, 29 Cal. App. 4th 1566, 1579 (1994) (emphasis in original).

Plaintiffs' ratification theory suffers from two fatal deficiencies. First, the 5AC fails to allege J&J was or is an agent of BHUS. The only allegation regarding the relationship between BHUS and J&J is paragraph 19, which alleges BHUS "purchased from [J&J] the Shower to Shower® product line in and around 2012 for $150 million." 5AC ¶ 19. Such an allegation, even if true, does not give rise to a principal-agent relationship. *See* Cal. Civ. Code § 2295 ("An agent is one who represents another, called the principal, in dealings with third persons."). It would prove only that BHUS and J&J previously engaged in an arm's length commercial transaction, which is an insufficient basis to allege a principal-agent relationship. *See Music Grp. Macao Commercial Offshore Ltd. v. Foote*, No. 14-CV-03078-JSC, 2015 WL 3882448, at *16 (N.D. Cal. June 23, 2015) ("Mere contractual relationships, without more, do not give rise to fiduciary relationships."); *Oakland Raiders v. NFL*, 131 Cal. App. 4th 621, 642 (2005) (signing of a settlement agreement insufficient to establish an agency relationship because "[t]here is no evidence here of the essential characteristic of

the right of control required for a finding of agency") (internal quotation marks omitted). Absent allegations that J&J was acting as BHUS's agent in conducting its alleged advertising campaign, BHUS could not legally ratify such advertisements.

Second, the 5AC never alleges the "decades-long" deceptive advertising campaign was "done on [BHUS's] behalf." *Rakestraw*, 8 Cal. 3d at 73. "Ratification is possible only when the person whose unauthorized act is to be accepted purported to act as an agent for the ratifying party." 3 Witkin, Summary of Cal. Law (11th ed.), Agency § 104 (2020); *see also Emery v. Visa Int'l Serv. Ass'n*, 95 Cal. App. 4th 952, 961 (2002) ("A principal cannot ratify the act of the alleged agent, unless the 'agent' purported to act on behalf of the principal."). Indeed, there is no allegation of any relationship between J&J and BHUS whatsoever prior to 2012. *See generally* 5AC. Presumably, J&J conducted its advertising campaign simply to sell products it owned at the time. BHUS could not legally ratify such statements. *See Watkins v. Clemmer*, 129 Cal. App. 567, 570 (1933) ("A ratification can only be effectual between the parties, when the act is done by the agent avowedly for or on account of the principal, and not when it is done for or on account of the agent himself[.]") (internal quotation marks and italics omitted). Because BHUS did not ratify J&J's alleged statements or omissions, they cannot form the basis of liability against BHUS.

3. Plaintiffs do not specifically allege they ever viewed deceptive advertising, relied on that advertising, or draw a connection between the "decades long" deceptive advertising campaign and Plaintiffs.

The 5AC continues to fail to adequately plead that Plaintiffs viewed or relied on any of the purportedly deceptive advertising. The progression of the allegations in Plaintiffs' various complaints demonstrates why Plaintiffs cannot meaningfully plead reliance on any particular advertising in purchasing Talcum Products. When Plaintiffs filed the initial Complaint, their theory was not premised on affirmative misrepresentations, but rather on the alleged failure to provide health hazard warnings under a Proposition 65-based duty to disclose. Besides a passing reference to an asbestos-free claim related to JBP, the original

Complaint and FAC did not discuss affirmative misrepresentations or reliance by Plaintiffs. It was only after Plaintiffs began to understand their omission theory would fail that they started to add bare bones allegations regarding affirmative misrepresentations. The only allegation in the SAC regarding a "misrepresentation" as to STS was a short reference to the website language: "For nearly 50 years SHOWER TO SHOWER® …." SAC ¶ 80. The TAC simply characterized the 50-year statement as making a claim about product safety. TAC ¶ 82.

Following the Court's dismissal of Plaintiffs' omission claim in the TAC as derivative of Proposition 65, the Plaintiffs tried to bolster their complaint with new advertising claims (nearly all directed at JBP alone), and now hope the Court will believe they viewed and relied on these various representations prior to purchasing the Talcum Products. Why are these purported representations about product safety material only now, when the Plaintiffs did not even consider them important enough to reference in the first several iterations of their Complaint? Plaintiffs' attempts to recast them as product safety representations and merely imply their reliance are plainly insufficient.

Even ignoring the shifting narrative of the various amended complaints, Plaintiffs' 5AC contains no facts regarding reliance on the STS advertising identified. The only claim made in a timeframe relevant to BHUS is the "50 years" of use statement and newly added "stay fresh" allegation, which is not alleged to have anything to do with product safety. 5AC at ¶¶ 104, 107. There is therefore nothing deceptive about them. Plaintiffs also do not reference if and when they viewed either statement (only available online), nor whether and how they relied on them in making their purchasing decisions.[3] Rather, as detailed above, Plaintiffs reference their reliance on statements such as "#1 Choice for Hospitals" and "asbestos-free"—neither statement was alleged to be made by BHUS or regarding STS.

[3] Throughout the 5AC, Plaintiffs allege they purchased STS for many years prior to 2018 and were already purchasing it before BHUS acquired STS in 2012-2013 (and assumed control of the showertoshower.com website). This makes specific pleading of exactly when Plaintiffs viewed the website that purportedly influenced their purchase important to determine whether they have pled reliance on a BHUS representation. Merely referencing that a website containing marketing statements existed is insufficient.

This is insufficient under Rule 9(b). *Williams v. Apple, Inc.*, No. 19-CV-04700-LHK, 2020 U.S. Dist. LEXIS 55069, at *44 (N.D. Cal. Mar. 27, 2020) (dismissing UCL and FAL claims because "the [class action complaint] does not properly allege, in compliance with Rule 9(b), that Plaintiffs read or relied upon Apple's purported misrepresentations"). Instead, Plaintiffs state generically they were "exposed" to the advertising campaign, not alleging specific reliance on the 50-year claim or any other STS-specific claim. 5AC ¶¶ 16-17 ("After being exposed to Defendants' marketing for most of her life informing her that the Talcum Products were safe for use.") There is no explanation of what it means to be "exposed" to advertising. The who, what, where, when, and how of Plaintiffs' reliance on the 50-year claim are nonexistent and given the many opportunities to amend and specific instructions from the Court, this Court can assume this failure to plead specifics is due to lack of reliance.

More generally, as the Court noted, Plaintiffs previously only identified claims made "many years ago in the 1970 to 1990s timeframe—*in a world completely detached from Plaintiffs*'." Dismissal Order at 14–15 (emphasis added). Plaintiffs do not remedy this deficiency in the 5AC. While Plaintiffs' reference to marketing via Twitter is likely an attempt to allege more recent marketing statements, the 5AC does not reference a single safety-related statement made via Twitter, nor does it allege whether Plaintiffs relied on such statements, and if so, when. 5AC ¶ 104. The 5AC does not identify the general timeframe in which Plaintiffs purchased Talcum Products, despite the Court's specific admonition. Rather, Plaintiffs merely added allegations about reliance on advertisements "during the Class Period." *Id.* ¶¶ 96, 104, 107. Indeed, nearly every advertisement allegation added to the 5AC was from a time "completely untethered" to Plaintiffs' specific time period of purchase and use of the Talcum Products. The supporting facts necessary for reliance are absent here and none of the statements allegedly relied upon were made by BHUS.

B. Plaintiffs Identify No Actionable Misrepresentations Regarding Shower to Shower® that Injured Plaintiffs.

1. Plaintiffs have not identified an actionable affirmative misrepresentation made by BHUS.

Even if Plaintiffs were able to overcome the above identified shortcomings under Rule 9(b) regarding STS's 50-years of use claim, it is a factually accurate statement and therefore cannot be an affirmative misrepresentation. It is in fact pleaded by Plaintiffs as a "perfectly true statement couched in such a manner that it is [allegedly] likely to mislead or deceive the consumer, such as by failure to disclose other relevant information." *Rubenstein v. The Gap, Inc.*, 14 Cal. App. 5th 870, 876–77 (2017). In *Rubenstein*, plaintiff alleged under the UCL, FAL, and CLRA, Gap misled consumers by implying clothing sold in factory outlet stores was of the same quality as clothing sold in traditional stores. *Id.* at 876. The plaintiff alleged "only that Gap's use of its own brand names—Gap and Banana Republic—in naming factory stores and on the labels of factory store clothing items was deceptive because the apparel is not of the brand name quality …." *Id.* The Court sustained Gap's demurrer on the basis that Gap's conduct was not deceptive merely because it labeled its lower quality factory clothing with the Gap logo. *Id.* at 877. Gap's conduct did not amount to an affirmative misrepresentation, because Gap published no advertisements promoting the quality of its outlet clothing, and therefore the Court determined that a duty to disclose must exist for the claim to be actionable. *Id.* at 877–79; *see also Gutierrez v. Carmax Auto Superstores California*, 19 Cal. App. 5th 1234, 1260, (2018) (identifying the four times at which a duty to disclose material safety concerns is owed, none of which are implicated here).

The same analysis applies here. Plaintiffs do not argue that the 50-years of use claim is an affirmative misrepresentation. It is entirely truthful to say that STS has been in use for 50 years, and Plaintiffs make no contrary allegations, instead only alleging the 50 years statement implies safety. 5AC ¶ 105. This is not an actionable allegation, as nothing about the length of time a product has been sold is either inaccurate or misrepresents other

unmentioned characteristics of a product. Plaintiffs have identified no other conduct in which BHUS made representations as to the safety of STS in any way, and Plaintiffs have failed to identify any duty to disclose. The Court has already ruled Defendants do not have a duty to disclose under Proposition 65 or otherwise. *See* Dkt. 41 at 11–12. ("[A]ny claim under the CLRA, FAL or UCL predicated on a duty to disclose certain carcinogenic substances is dismissed as an attempt to plead around Proposition 65").

Plaintiffs make passing reference to a marketing representation about how STS "pampers" the user, which they allege was also on the website. 5AC ¶ 102. A representation that a product "pampers" also does not imply safety and is still not actionable for the exact reasons identified above. Plaintiffs also reference the "stay fresh" language allegedly found on an STS Twitter account. *Id.* at ¶ 104. But they make no allegation explaining how "stay fresh" implies product safety or is otherwise false or misleading. Nor is there any indication Plaintiffs relied on any STS marketing posted on Twitter, much less even saw it. The statements amount, at most, to mere puffery that is not actionable.[4] Thus, none of the representations about STS identified in the 5AC are actionable and Plaintiffs still have not stated a claim.

2. Plaintiffs have not pleaded facts demonstrating increased cancer risk or otherwise shown the alleged safety claims were deceptive.

As the Court noted in the Dismissal Order, any representations or claims about the safety of the Talcum Products would only be deceptive if the Talcum Products were actually unsafe, contained substances in a concentration sufficient to be toxic, or caused harm. Dkt.

[4] "Puffery is exaggerated advertising, blustering, and boasting upon which no reasonable buyer would rely." *Silver v. BA Sports Nutrition, LLC*, No. 20-CV-00633-SI, 2020 WL 2992873, at *4 (N.D. Cal. June 4, 2020) (internal quotation marks omitted); *see also Radware, Inc. v. U.S. Telepacific Corp.*, No. 19-CV-03835-LHK, 2020 WL 836731, at *3 (N.D. Cal. Feb. 20, 2020); *accord Silver*, 2020 WL 2992873, at *6, *10 (statements that sports drink provides "Superior Hydration" and "More Natural Better Hydration" are non-actionable puffery); *Ahern v. Apple Inc.*, 411 F. Supp. 3d 541, 556 (N.D. Cal. 2019) (statement that a computer monitor is "clear and remarkably vivid" amounted to puffery because it "do[es] not say anything about specific characteristics or components—or even how clear or vivid the screens actually are").

41 at 18. However, Plaintiffs have not alleged that STS contained unsafe levels of carcinogenic toxicants or otherwise injured Plaintiffs in any way. *See generally,* 5AC.

In an attempt to remedy this dearth of allegations about a safety risk of the Talcum Products that was deceptively concealed through misrepresentation, Plaintiffs allege it is theoretically possible they will be injured in the future by "cellular inflammation and oxidative stress" caused by exposure to STS and/or JBP. 5AC ¶ 1. In an effort to support the theoretical risk of injury, Plaintiffs attach a *Daubert* order from the *In Re Johnson & Johnson Talcum Powder Products Marketing, Sales Practices & Products Liability* MDL in New Jersey (the "Talc MDL"). While the Talc MDL court did permit a plaintiffs' expert to opine regarding the inflammation and oxidation theory, it did *not* allow the expert to testify that Talcum Products caused cancer, and instead specifically excluded such opinions. *Id.* at Ex. A at 15–25. Additionally, the Talc MDL order does not establish anything that this Court can consider on this motion, as it was an order on expert qualifications that followed general causation expert discovery on personal injury claims in an MDL in which BHUS was not even involved. Further, the 5AC does not allege the cellular oxidation theory leads to an increased risk of cancer for users of Talcum Products, leaving it very unclear what actual harm is even alleged here. Thus, the oxidation and inflammation allegations added by the Plaintiffs do not plausibly demonstrate that the "nearly 50 years of use" claim is deceptive by implication.

The lack of an actionable deceptive claim in the 5AC is underscored by Plaintiffs alleging only an *economic* injury in fact. The Plaintiffs state "all members of the Class sustained injury in fact by losing money as a result of Defendants' wrongful conduct." *Id.* ¶ 122. No other injury in fact is alleged, nor do Plaintiffs specify what money they lost. It is unclear if they are claiming as injury the difference between purchase price and actual value (or how they would demonstrate that), or if they are alleging the Talcum Products were somehow worthless, even though Plaintiffs apparently found such value in their regular use that they continued to do so for years. *Id.* ¶¶ 16-17. Based on Plaintiffs' own

pleading, it seems clear that they received the benefit of the bargain in purchasing the Talcum Products and used them for many years without issue, and without specific physical injury as none is alleged in the 5AC. On this pleading, it does not appear Plaintiffs have suffered any actual injury or damages at all.

Plaintiffs seem to believe economic harm occurred because they would not have purchased the Talcum Products if they had known of the alleged carcinogenicity when purchasing. However, the case law is clear such alleged "injury" is not sufficient to pursue a deceptive advertising claim. In fact, the MDL court specifically concluded actionable harm does not exist under the UCL or CLRA when a consumer receives the benefit of the bargain and is not otherwise personally injured. *Estrada v. Johnson & Johnson*, 2017 WL 2999026, at *6 (D.N.J. July 14, 2017), *aff'd sub nom. In re Johnson & Johnson Talcum Powder Prod. Mktg., Sales Practices & Liab. Litig.*, 903 F.3d 278 (3d Cir. 2018); *see also Koronthaly v. L'Oreal USA, Inc.*, 374 F. App'x 257, 258 (3d Cir. 2010); *Medley v. Johnson & Johnson Consumer Cos.*, 2011 WL 159674, at *2 (D.N.J. Jan. 18, 2011).[5]

Plaintiffs' 5AC fails—as did the TAC and 4AC—to identify either a deceptive representation about STS' safety or any cognizable harm caused by such representation and thus should be dismissed *with prejudice*.

C. The CLRA Damages Claim Must Be Dismissed.

Finally, Plaintiffs did not issue a CLRA demand letter to BHUS before filing the initial Complaint, FAC, or SAC. Nevertheless, in each of these prior iterations of the Complaint, the Plaintiffs sought "restitutionary disgorgement of all earnings, profits, compensation and benefits" to BHUS. *See* Complaint ¶ 107; FAC ¶ 107; SAC ¶ 110. Before filing the TAC, Plaintiffs finally sent BHUS a belated CLRA demand letter. TAC ¶ 115.

The CLRA mandates that 30 days prior to commencing an action for damages, "the consumer shall ... [n]otify the person alleged to have" violated the CLRA "of the particular

[5] *Kwikset Corp. v. Superior Court*, 51 Cal. 4th 310 (2011) does not apply here because the Court held that the false "Made in U.S.A." claims deprived consumers of the benefit of their bargain. They bargained for products Made in the U.S.A., expending extra money on such products, but did not receive that advertised benefit. Here, Plaintiffs received Talcum Products as bargained for.

alleged violations" and "[d]emand that the person correct, repair, replace, or otherwise rectify" the violations. Cal. Civ. Code § 1782(a). Claims for unjust enrichment and restitution under the CLRA, such as those asserted in each version of this Complaint, seek damages within the meaning of Civil Code § 1782(a). *Laster v. T-Mobile USA, Inc.*, No. 05cv1167 DMS (AJB), 2008 WL 5216255, at *17 (S.D. Cal. Aug. 11, 2008), *rev'd on other grounds by AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011); *In re Ford Tailgate Litig.*, No. 11-CV-2953-RS, 2014 WL 1007066, at *9 (N.D. Cal. Mar. 12, 2014).

Plaintiffs' failure to issue the demand letter prior to seeking "damages" in their first Complaint is fatal to the CLRA claim. *Waller v. Hewlett-Packard Co.*, No. 11CV0454-LAB RBB, 2011 WL 6325972, at *6 (S.D. Cal. Dec. 16, 2011) ("Waller demanded damages under § 1750 in his original complaint, before he provided a notice letter and when he had the statutory obligation to do just that. His claim for damages under the CLRA must therefore be dismissed with prejudice.") Plaintiffs' failure to issue the demand letter until the fourth iteration of their Complaint contradicts the remedial purpose of the CLRA demand letter requirement and precludes Plaintiffs from pursuing restitution damages.

V. CONCLUSION

This sixth version of Plaintiffs' complaint eliminates any doubt about whether Plaintiffs can cure the deficiencies identified by the Court—they have failed to do so notwithstanding clear direction from this Court and six opportunities now to plead a claim that complies with Rule 8(a) and Rule 9(b) standards and states a claim upon which relief may be granted. At this point there is no doubt that further amendment would be futile, and the Court has been more than patient and forgiving on the prior failed attempts to plead these claims. Permitting further pleading would just increase the effort and expense for all parties and this Court unnecessarily and could even give rise to a basis for the Defendants to seek costs. Thus, for all the foregoing reasons, BHUS respectfully requests that its Motion to Dismiss Plaintiffs' 5AC be granted in its entirety, *with prejudice*, and for any other relief

the Court believes is appropriate. Due to the complex issues presented, BHUS requests oral argument.

Dated: September 23, 2020

Respectfully submitted,

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