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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 CONSUMER INC., BAUSCH HEALTH US, LLC, f/k/a VALEANT PHARMACEUTICALS NORTH AMERICA LLC, AND DOES 1-25, inclusive,

Defendants.

Case No. 3:19-cv-01345-DMS-AGS

Hon. Dana M. Sabraw

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT JOHNSON & JOHNSON CONSUMER INC.'S MOTION TO DISMISS THE FIFTH AMENDED COMPLAINT

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

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I. INTRODUCTION

This Court provided Plaintiffs with detailed guidance—in a 19-page opinion on Defendants' original motions to dismiss—on the factual details required for a viable complaint. The Court also provided Plaintiffs with ample opportunity to plead viable claims—allowing them to amend *four* times. Now before the Court is Plaintiffs' Fifth Amended Complaint ("FiAC"). It should be dismissed with prejudice, because it does not cure the pleading deficiencies that the Court specified. First, Plaintiffs persist in advancing allegations that the Court dismissed with prejudice—they continue to plead a derivative Proposition 65 claim, despite having failed to serve the mandatory pre-suit notice. Second, the FiAC does not cure the Rule 9(b) pleading deficiencies that the Court found in the Third Amended Complaint ("TAC"). Plaintiffs do not identify specific affirmative misstatements independent of Proposition 65 that they personally reviewed and relied upon in purchasing talcum powder products (the "Talcum Products").

The FiAC should be dismissed on additional grounds as well. Plaintiffs failed to timely serve a pre-suit notice as required under the Consumer Legal Remedies Act (the "CLRA"), and fail to assert any cognizable violations of the CLRA, California Unfair Competition Law ("UCL") or False Advertising Law ("FAL") in connection with sales of Talcum Products.

Plaintiffs' non-compliance with the Court's clear standards shows that they do not have viable claims. Accordingly, Defendant Johnson & Johnson Consumer Inc. ("JJCI") respectfully requests that the FiAC be dismissed in its entirety with prejudice and without leave to replead.

II. PROCEDURAL HISTORY

A. Opinion Dismissing the Third Amended Complaint

On April 27, 2020, this Court issued a detailed opinion that dismissed Plaintiffs' TAC in its entirety.

First, the Court dismissed with prejudice Plaintiffs' failure to warn claims

that center around Defendants' alleged failure to disclose the presence of asbestos and other carcinogens in their Talcum Products as "run[ning] afoul of Proposition 65." Dkt. 41 at 10. The Court held that "any duty [to warn] is inextricably bound up with Proposition 65 because it regulates the level of listed chemicals that can exist . . . without triggering a duty to disclose." *Id.* at 11. Because Plaintiffs had "failed to establish a duty to disclose outside of Proposition 65," the claims "under the CLRA, FAL or UCL predicated on a duty to disclose certain carcinogenic substances [are] dismissed as an attempt to plead around Proposition 65." *Id.* at 11-12.

Second, the Court found that Plaintiffs' claims that center around Defendants' alleged express and implied statements that the Talcum Products are "safe" similarly represent improper attempts to plead around Proposition 65. "Plaintiffs neither allege the Talcum Products contain unsafe levels of hazardous substances nor how statements and advertisements touting product safety are unlawful or misleading in the absence of a duty to disclose the substances at issue." *Id.* at 17. "[A]ny duty to inform the public about the presence of hazardous substances is controlled by Proposition 65." *Id.* at 19. For that reason, the "safety" claims fail.

Third, the Court dismissed Plaintiffs' claims based on alleged affirmative misrepresentations that the Talcum Products are "asbestos-free" for failure to meet Rule 9(b) pleading standards. "Plaintiffs . . . failed to allege in the TAC when and where those representations were made or what representations they relied on[.]" *Id.* at 14. Moreover, "the allegations in question all appear to relate to conduct occurring many years ago in the 1970 to 1990s timeframe—in a world completely detached from Plaintiffs'." *Id.* at 15. The Court found that the Plaintiffs' claims fail "[i]n the absence of more specific allegations setting out how Defendants' alleged misrepresentations regarding asbestos content impacted Plaintiffs themselves." *Id.*

The Court granted Plaintiffs partial leave to replead, instructing that to avoid dismissal they articulate claims based on affirmative representations independent of Proposition 65, with allegations that satisfy Fed. R. Civ. P. 9(b). *Id.* at 19. The Court allowed Plaintiffs to file a Fourth Amended Complaint ("FoAC") within 30 days of the Court's order.

B. The Short-Lived FoAC

On May 27, 2020, Plaintiffs filed a FoAC. Dkt. 42. In accordance with the Court's individual rules, Defendants met and conferred with Plaintiffs concerning deficiencies in the FoAC in advance of moving to dismiss. Following the meet and confer, Plaintiffs sought to amend yet again, to attempt to cure the deficiencies that Defendants raised, and moved for leave to file the FiAC. The Court granted leave on August 20, 2020. Dkt. 49. In doing so, the Court recognized that "Defendants set forth reasoned arguments about the futility of Plaintiffs' amended claims." *Id.* at 6.

C. Allegations of the FiAC[1]

Plaintiffs filed the FiAC on August 24, 2020. Dkt. 50. The FiAC largely repeats the same deficient allegations found in the TAC. Plaintiffs continue to plead improper derivative Proposition 65 claims. In the FiAC, Plaintiffs added allegations about "purity" and added a hodge podge of JJCI's historic advertising for Talcum Products. Those additions do not save Plaintiffs' claims. Plaintiffs fail to plead with specificity how any particular advertising that was contemporaneous to their purchasing decisions had an impact on them. The advertisements that they highlight are either from very long ago or post-date the time that they stopped purchasing Talcum Products, thus precluding reliance. The FiAC does not comply with the pleading standards articulated in the Court's motion to dismiss opinion and does not state a viable claim for relief.

[1] For purposes of this motion to dismiss, JJCI accepts the well-pleaded allegations of Plaintiffs' FiAC as true.

Plaintiffs allege in conclusory fashion that they were "exposed to Defendants' marketing for most of" their lives. FiAC ¶¶ 16-17. They allege that they stopped purchasing the Talcum Products when they read a Reuters article in late 2018 asserting that the products were contaminated with hazardous substances, including asbestos, lead, arsenic, silica, and/or talc containing asbestiform fibers. *Id.* They further allege that, had they known of the dangers of Talcum Powder products, they never would have purchased or used the products. *Id.* But, Plaintiffs fail to specify any particular advertisements that they personally read or relied upon at any time, let alone within the putative class time frame, or even within the last twenty years.

Plaintiffs assert that Defendants' marketing was "false" in representing that the Talcum Products were 1) "safe," 2) "pure" and 3) "asbestos-free." Only the claims about purity are new to the FiAC. The FiAC's allegations for each of these categories of purported misrepresentations are set forth below.

Allegations of Statements that JJCI's Product Is Safe. Plaintiffs continue to allege that Defendants made affirmative misrepresentations that the Talcum Products are safe. *Id.* ¶ 77. Plaintiffs allege that certain specific statements and actions are designed to give the impression that the products are "safe" for use, as follows:

- The product is labeled as "baby powder;"
- Advertisements with babies indicate that the product is safe enough to use on an infant;
- The bottle label states "For over 125 years Johnson's® formulas have been specially designed for baby's unique and delicate skin. Great for kids and adults too."
- The bottle label states "Hypoallergenic & tested with dermatologists."
- Placement of the product in the baby products aisle.
- Marketing of the products as "gentle" and "for the most delicate days

of life."

Id. ¶¶ 77, 89, 90.[2] Plaintiffs' claim that these "safety" statements are false fails as a matter of law.

First, Plaintiffs assert that these safety statements are "false," because talc often is "contaminated with hazardous substances such as lead, arsenic, asbestos, and/or asbestiform fibers." *Id.* ¶ 79. This same allegation was made in the TAC. In this Court's dismissal of the TAC, it ruled that "any duty to inform the public about the presence of hazardous substances is controlled by Proposition 65." Dkt. 41 at 19. Plaintiffs' claims that the product is "unsafe" based on the alleged presence of Proposition 65 chemicals have been dismissed with prejudice and may not be repleaded in the FiAC.

Second, in an attempt to bolster the safety allegations, Plaintiffs make a new assertion that the safety statements are "false," because Plaintiffs contend that "uncontaminated talc can cause cellular inflammation and oxidative stress." FiAC ¶ 78. However, Plaintiffs fail to plead how a potential link to cellular inflammation or oxidative stress might render talc "unsafe." Tellingly, the related *Daubert* opinion that Plaintiffs cite from a multidistrict personal injury litigation made no such factual finding and, in fact, *precluded* the plaintiff expert from testifying that cellular inflammation or oxidative stress *causes ovarian cancer*. *See id.*, Ex. A at 17.

Third, Plaintiffs make a new assertion that these statements that give the impression of safety are "false," because the American Association of Pediatrics in 1981—**more than 30 years ago**—recommended that parents not use baby powder because of a "severe inhalation hazard." *Id.* ¶ 78. Significantly, Plaintiffs neglect to inform the Court that the same labels that they cite as implying safety, and which

[2] Plaintiffs also assert that Defendants represented that the Talcum Products were "#1 Choice for Hospitals, #1 Choice for Parents," but cite an advertisement that *does not include any* Talcum Products. *See id.* ¶ 87, Ex. I.

they incorporate by reference in the FiAC, **explicitly warn about the well-known inhalation risk for infants**. *See id.* ¶ 77; JJCI's Req. for Judicial Notice ("RJN"), Exs. 1 (reflecting label as of 2012), 2 (reflecting label as of 2014 and 2016), 3 (reflecting present day label) (all noting: "Keep powder away from child's face to avoid inhalation, which can cause breathing problems" and "Keep out of reach of children."). Plaintiffs cannot plausibly allege that JJCI statements on a label implying safety hid an inhalation risk that was expressly disclosed on that very same label.

Allegations of Statements that JJCI's Product Is "Pure." In the FiAC, Plaintiffs now allege for the first time that Defendants affirmatively misrepresented that the Talcum Products are "pure" when the products may be "contaminated with asbestos, lead, silica, and/or asbestiform fibers." *See, e.g.*, FiAC ¶ 82. In support of this allegation, Plaintiffs cite **only one website excerpt from the modern-day world** that also pre-dates the time that they ceased purchasing Talcum Products. That website excerpt, ostensibly dated from February 2016, appears at Exhibit T to the FiAC. It states "Johnson's® Baby Powder products contain only U.S. Pharmacopeia (USP") grade talc, which meets the highest quality, purity and compliance standards."

Plaintiffs do not allege that they personally read or relied upon this web content in connection with Talcum Product purchases, nor how this web content might have personally impacted them, which omission by itself requires dismissal. In addition, Plaintiffs also fail to allege that this statement about the talc's characteristic is incorrect in any way. Significantly, the statement that the talc meets the highest purity standards, and is USP-grade, does not represent that the talc is completely free of trace or sub-trace levels of impurities. Instead, the statement addresses the *relative* purity of the talc.

Otherwise, Plaintiffs cite to (i) a disparate smattering of advertisements from prior to 1990; (ii) foreign advertisements; and (iii) statements that post-date the

Reuters article. For example, paragraph 82 of the FiAC shows an undated antique-looking advertisement that states "Since 1920 . . . Johnson's Baby Powder the best you can buy . . . the purest, smoothest, most absorbent, has the nicest perfume[.]" Paragraph 83 of the FiAC shows an advertisement *from India* that appears to post-date the Reuter's article and states "we use only the purest talc to make Johnson's® baby powder." It encourages consumers who want more information to email care@jnjindia.com. The advertisement references recent laboratory testing on Talcum Products commissioned by the Indian government that did not find asbestos. Not surprisingly, Plaintiffs do not claim they relied on these foreign advertisements.

Allegations of Statements that JJCI's Product Is "Asbestos-Free." Finally, the FiAC alleges that Defendants falsely represented that the Talcum Products were "asbestos-free." The specific "asbestos-free" statements that Plaintiffs cite in the FiAC are from web content, social media content and press releases. All but one of those statements appear to *post-date* the Reuters article that Plaintiffs allege caused them to stop purchasing the Talcum Products in late 2018 and therefore cannot support reliance. *See id.* ¶ 91, *citing* Exs. L (October 2019 Press Release); M (December 2019 Press Release); N (December 14, 2018 Press Release titled "Johnson & Johnson Issues Statement on Reuters Talc Article"); O (February 2, 2019 web content concerning JJCI product safety that contains no mention of talc products); P (Johnson & Johnson December 19, 2018 "What We Know" statement, including "We know that we have always cooperated fully and openly with the FDA and other regulators and have given them full access to our talc testing results"); Q (2019 Press Release titled "Johnson & Johnson Issues Statement on April 9 Reuters Article"); R (December 15, 2018 Press Release titled "Johnson & Johnson Issues Statement on December 15 the *New York Times* Article"); S (Johnson & Johnson December 18, 2018 "Science. Not Sensationalism." statement, including "Johnson & Johnson has been in the news lately about the talc in our

Baby Powder."); T (February 24, 2016 "The Facts About Talc Safety"); U ("Facts About Talc" 2020 web content); V (December 18-20, 2018 Johnson & Johnson statements on social media); W (August 2019 "5 Important Facts About the Safety of Talc"); X (December 17, 2018 Twitter content).

Plaintiffs implausibly allege that they and the putative class "viewed and relied upon" all "the statements and advertisements made by Johnson & Johnson that the Talcum Products were pure (or asbestos-free)." *Id.* ¶ 93. **But the named plaintiffs fail to specify a single advertisement that they actually viewed or relied upon and how that statement might have impacted them.**

The only specificity provided for Plaintiff Debbie Luna is that she purchased baby powder believing it "was safe for use on babies." *See id.* ¶ 94. Ms. Luna does not allege that she viewed or relied upon any particular statements that the Talcum Products were asbestos-free. *See id.* The only specificity provided for Plaintiff Louisa Gutierrez is that she used baby powder "believing the product would 'keep her fresh.'" *See id.* ¶ 95. Ms. Gutierrez does not allege that she viewed or relied upon any particular statements that the Talcum Products were asbestos-free.

Despite the Court's specific instructions to plead claims based on affirmative representations independent of Proposition 65 and in accordance with Rule 9(b), Plaintiffs fail to do so in the FiAC.

III. LEGAL STANDARD

Motions to dismiss should be granted where, as here, the plaintiff has failed to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). Dismissal is proper where the complaint either lacks a cognizable legal theory or sufficient facts supporting a cognizable legal theory. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). Thus, the FiAC should be dismissed if it does not "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 *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). And though well-pleaded facts

must be accepted as true, the Court need not assume the truth of legal conclusions. *Iqbal*, 556 U.S. at 678; *see also Cousins v. Lockyer*, 568 F.3d 1063, 1067 (9th Cir. 2009) ("[C]onclusory allegations of law and unwarranted inferences are insufficient to avoid a Rule 12(b)(6) dismissal.") (quotations omitted). After stripping away the "conclusory statements," the remaining factual allegations in a complaint must do more than "create[] a suspicion of a legally cognizable right of action;" they must "raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555.

IV. ARGUMENT

A. The FiAC Improperly Contains Allegations That Are Derivative of Proposition 65 and Already Have Been Dismissed with Prejudice

Plaintiffs continue to attempt to allege improper derivative Proposition 65 claims, despite a clear directive from the Court that the FiAC must eliminate attempts to plead around Proposition 65. This Court held that Plaintiffs may only allege "viable theories of liability under the consumer protection statutes separate and apart from Proposition 65." Dkt. 41 at 19. Plaintiffs attempt to skirt that directive in their latest pleading. Consistent with the law of this case, this Court should dismiss these claims again.

In the FiAC, Plaintiffs assert that JJCI affirmatively misrepresented that the Talcum Products are "safe" notwithstanding that they are "contaminated with hazardous substances such as lead, arsenic, asbestos, and/or asbestiform fibers." FiAC ¶ 79. As the Court already found in its opinion dismissing the same allegations in the TAC, "Plaintiffs neither allege the Talcum Products contain unsafe levels of hazardous substances nor how statements and advertisements touting product safety are unlawful or misleading in the absence of a duty to disclose the substances at issue." Dkt. 41 at 17. "[A]ny duty to inform the public about the presence of hazardous substances is controlled by Proposition 65." *Id.* at 19. Throughout the FiAC, Plaintiffs assert that the Talcum Products are contaminated with these hazardous substances. *See* FiAC ¶¶ 1, 8, 10, 16-17, 20, 22,

etc. They do not allege that contaminants are present in unsafe levels or how the "safety" statements are false or misleading absent a duty to disclose the purported presence of Proposition 65 chemicals.

Plaintiffs' CLRA, UCL, and FAL claims, insofar as those claims are premised on alleged affirmative misrepresentations as to the safety of the Talcum Products, are still wholly derivative of Proposition 65 and should be dismissed with prejudice for failure to satisfy the mandatory pre-suit notice requirements.

B. The FiAC Should Be Dismissed with Prejudice for Failure to Allege That Statements Concerning Safety or Purity Were False

Plaintiffs' UCL, FAL, and CLRA claims also must also be dismissed for failure to plausibly allege that JJCI made affirmative false statements about safety or purity. *See* Dkt. 41 at 12 (quoting *Davidson v. Kimberly-Clark Corp.*, 889 F.3d 956, 964 (9th Cir. 2018), *cert denied*, 139 S. Ct. 640 (2018)) (explaining that to meet Rule 9(b)'s pleading requirement, "'a pleading must identify the who, what, when, where, and how of the misconduct charged, as well as what is false or misleading about the purportedly fraudulent statement, and *why it is false*'") (emphasis added).

Plaintiffs do not allege any facts that JJCI's safety representations are materially untrue. As set forth above, Plaintiffs assert that JJCI's "safety" statements were materially false for three reasons. They say that the Talcum Products allegedly (i) contain hazardous contaminants regulated by Proposition 65; (ii) present an inhalation risk; and (iii) cause oxidative stress and cellular inflammation. The first claim of falsity cannot stand, because it is improperly derivative of Proposition 65. The second and third claims of falsity do not withstand scrutiny. With respect to inhalation, JJCI fully disclosed those risks on its label. With respect to oxidative stress and cellular inflammation, Plaintiffs fail to allege *why* those alleged effects would make the Talcum Products unsafe.

Plaintiffs' new assertion that these "safety" statements are "false" because

the American Association of Pediatrics in 1981 recommended that parents not use baby powder because of a "severe inhalation hazard," fails on its face. FiAC ¶ 78. Plaintiffs neglect to inform the Court that the same labels that they cite as implying safety, and which they incorporate by reference in the FiAC, explicitly warn about inhalation risk.[3] Plaintiffs cannot claim that JJCI statements on a label implying safety hid an inhalation risk that was expressly disclosed on that very same label.

Significantly, Plaintiffs also fail to allege how or why a potential link to cellular inflammation or oxidative stress might be harmful or render talc "unsafe" or risks any injury to consumers. Plaintiffs do not state any facts that support that cellular inflammation or oxidative stress are harmful. In fact, the *Daubert* opinion that they attach to the FiAC (*see* FiAC ¶¶ 4, 76) precluded an expert from opining that oxidative stress or cellular inflammation can cause cancer. That court specifically excluded such testimony as unsupported extrapolation. *See id.*, Ex. A at 17. Exercise, for example, can cause cellular inflammation in humans, *see* RJN, Ex. 4, but exercise is generally regarded as a healthy, not unsafe, activity, *see id.*, Ex. 5. And not all instances of cellular inflammation are recognized as harmful. *See id.*, Ex. 6.

Plaintiffs also allege that Defendants affirmatively misrepresented that the Talcum Products are "pure." *See, e.g.*, FiAC ¶ 82. They assert that this statement is false, because the Talcum Products contain hazardous contaminants. *See, e.g.*, *id.* ¶¶ 5, 82, 83. However, the only present-day statement that Plaintiffs cite that pre-dates their ceasing to purchase Talcum Products addresses only relative purity. *See id.*, Ex. T ("Johnson's® Baby Powder products contain only U.S. Pharmacopeia ('USP') grade talc, which meets the highest quality, purity and compliance

[3] Indeed, throughout the relevant time period in this litigation, JJCI has included the following "warning" on baby powder bottles: "Keep powder away from child's face to avoid inhalation, which can cause breathing problems" and "Keep out of reach of children." RJN, Exs. 1 (reflecting label as of 2012), 2 (reflecting label as of 2014 and 2016), 3 (reflecting present day label).

standards."). It does not represent that the Talcum Products are completely free of any trace or subtrace contaminants. Instead, the statement says that the talc meets the "highest" purity standards. Plaintiffs do not claim that the talc in the Talcum Products is not USP grade talc. Instead, they allege that "talc is a naturally occurring substance which is mined from the earth, and as a result, is often contaminated[.]" *Id.* ¶ 79.

Thus, Plaintiffs have failed to allege materially false statements were made about the safety or purity of the Talcum Products, and all the claims arising from these alleged affirmative misrepresentations should be dismissed with prejudice.

C. The Entirety of the FiAC Should Be Dismissed with Prejudice for Failure to Plead Reliance with Particularity Under Rule 9(b)

Plaintiffs' claims also should be dismissed with prejudice for continued failure to plead reliance with particularity in accordance with Rule 9(b). As this Court has already ruled, to survive a motion to dismiss, Plaintiffs' claims must satisfy the heightened pleading requirement of Rule 9(b). Dkt. 41 at 12; *see also Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1103-04 (9th Cir. 2003). Plaintiffs "'must state with particularity the circumstances constituting fraud.'" Dkt. 41 at 12 (*citing* Fed. R. Civ. P. 9(b) and *Davidson*, 889 F.3d at 964).

To comply with Rule 9(b), "'a pleading must identify the who, what, when, where, and how of the misconduct charged[.]'" *Id.* (*quoting Cafasso, U.S. ex rel. v. Gen. Dynamics C4 Sys., Inc.*, 637 F. 3d 1047, 1055 (9th Cir. 2011)); *see also Vess*, 317 F.3d at 1106 (citation omitted). The same level of specificity is required with respect to pleading reliance on the alleged "fraud." *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1124-25 (9th Cir. 2009) (dismissing claims under CLRA and UCL because plaintiff failed to specify when he was exposed to the representations and which sales material he relied on in making his decision to buy the product); *Michel v. United States*, No. 16-CV-277, 2017 WL 4922831, at *18 (S.D. Cal. Oct. 31, 2017) (plaintiffs asserting violations of the UCL and FAL must plead "actual

reliance on the allegedly deceptive or misleading statements") (citations omitted).

In the FiAC, Plaintiffs generally allege that they were "exposed to Defendants' marketing for most of" their lives. FiAC ¶¶ 16-17. They allege that they stopped purchasing the Talcum Products when they read a Reuters article in late 2018 asserting that the products were contaminated with hazardous substances.[4] *Id.* They further allege that, had they known of the dangers of Talcum Powder products, they never would have purchased or used the products. *Id.* But, Plaintiffs do not allege **any** specific reliance on **any** specific allegedly false or misleading statements in purchasing the Talcum Products. This Court has held that Plaintiffs must allege "what representations they relied on" and provide "specific allegations setting out how Defendants' alleged misrepresentations . . . impacted Plaintiffs themselves." Dkt. 41 at 14-15. The FiAC contains none of that required specificity.

A complaint alleging consumer protection claims must be dismissed when it fails to allege that the named plaintiffs saw or read specific statements made by the defendants in making their purchasing decisions. *See Hall v. Sea World Entm't, Inc.*, No. 3:15-CV-660-CAB-RBB, 2015 WL 9659911, at *5 (S.D. Cal. Dec. 23, 2015), *aff'd sub nom. Hall v. SeaWorld Entm't, Inc.*, 747 F. Appx. 449 (9th Cir. 2018) (dismissing UCL and CLRA claims where "the complaint does not allege that the named plaintiffs actually saw or read *any* advertising or statements made by SeaWorld prior to purchasing their tickets") (emphasis in original); *see also Twombly*, 550 U.S. at 555, 557.

Plaintiffs cannot rely upon *In re Tobacco II Cases* (46 Cal. 4th 298 (2009)) (which they continue to parrot in the FiAC) to argue that they are not required to allege reliance on specific statements (FiAC ¶ 108). In dismissing the TAC, the

[4] Plaintiffs allege that the Reuters article led them to believe that the Talcum Products are contaminated with lead, silica, and arsenic. *See* FiAC ¶¶ 16, 17. This is belied by the Reuters article itself, which does not mention lead, silica, or arsenic. *See* FiAC, Ex. C.

Court already rejected Plaintiffs' attempted reliance on *In re Tobacco II Cases*. *See* Dkt. 41 at 14-15. The Court explained that the *In re Tobacco II Cases* "do[] not stand for the proposition that a consumer who was never exposed to an alleged false or misleading advertising or promotional campaign is entitled to restitution." Dkt. 41 at 14 (citation omitted). In the FiAC, Plaintiffs continue to rely on advertisements from "a world completely detached from" themselves and fail to plead facts that would allow them to rely on this line of case law.

"In *In re Tobacco II*, the California Supreme Court held that in *narrow circumstances*, a plaintiff may state a UCL claim for a fraudulent advertising campaign without alleging reliance on any specific misrepresentations." *Tabler v. Panera LLC*, No. 19-CV-01646-LHK, 2020 WL 3544988, at *8 (N.D. Cal. June 30, 2020) (citing 46 Cal. 4th at 327) (emphasis added). Specifically, in *In re Tobacco II Cases*, the California Supreme Court held that a plaintiff in a UCL action may "'plead and prove actual reliance' without pointing to 'specific misrepresentations' where the alleged misrepresentations 'were part of an extensive and long-term advertising campaign.'" *Id.* (quoting *In re Tobacco II Cases*, 46 Cal. 4th at 328). Here, Plaintiffs have not pleaded a consistent extensive long-term advertising campaign containing any of the alleged affirmative false statements that they trot out here, and may not take advantage of this limited line of case law.

Instead, Plaintiffs cite (i) a disparate smattering of advertisements from prior to 1990; (ii) foreign advertisements; and (iii) statements that post-date the 2018 Reuters article. For example, Paragraph 80 shows two Seventeen magazine advertisements that were published in 1972. The advertisements in paragraphs 81 and 84 are copied from news articles and/or JJCI's response to those news articles. *See* FiAC, Exs. C, G, Q. They all dated before the 1990s. Paragraph 83 of the FiAC appears to show two advertisements—one is for the India marketplace and the other is for South Africa. Further, many of the advertisements that Plaintiffs include in the FiAC contain no statements about safety, purity or asbestos, some do

not even mention Talcum Products and others come from unaffiliated third parties. For example, Paragraph 96 points to a trio of weblinks that include two commercials that make no representations about Talcum Products and an advertisement from FirstCry Parenting. *Id.* ¶ 96, fn. 6-8. There is no consistent messaging in these advertisements about safety, purity or asbestos. This falls far short of an "extensive and long-term" advertising campaign. *Cf. Opperman v. Path, Inc.*, 84 F. Supp. 3d 962, 979 (N.D. Cal. 2015) (finding that plaintiffs adequately plead that defendant engaged in an "extensive" advertising campaign where plaintiff identified "*dozens* of specific examples of what they believe represents the advertising campaign") (emphasis added). Because Plaintiffs do not establish an "extensive and long-term" consistent advertising campaign, Plaintiffs must plead specific reliance on specific misrepresentations, which they fail to do.

Tobacco II should not set the pleading standards in this case for other reasons. That decision was based on a decades-long tobacco industry campaign to conceal science on health risks. 46 Cal. 4th at 327-28. And Plaintiffs cannot allege concealment here when Proposition 65 provides the standards for any duty to disclose—and all of Plaintiffs' claims that were premised on an explicit or implicit Proposition 65 violation were dismissed with prejudice. *See* Section IV.A, *supra*; Dkt. 41 at 11-12.

This is Plaintiffs' sixth pleading in this case and Plaintiffs should not be permitted to amend the FiAC where they have not satisfied the heightened pleading standards despite having ample opportunity to do so. *See Schaefer v. Robbins & Keehn, LLP*, No. 06-CV-821, 2006 WL 8427168, at *3 (S.D. Cal. Nov. 28, 2006) ("[D]ismissal with prejudice is proper where the defect is not curable by amendment or if plaintiff has failed to plead with particularity after repeated opportunities."); *Vess*, 317 F.3d at 1108 ("Given . . . that [plaintiff] has failed to comply with Rule 9(b)[] and that [plaintiff] declined to amend further, we affirm the district court's dismissal with prejudice[.]").

Plaintiffs' sixth attempt fails to resolve the shortcomings outlined in the Court's order dismissing the TAC. Therefore, the FiAC should be dismissed with prejudice. *See, e.g., Watson v. Bank of Am., N.A.*, No. 16-CV-513, 2016 WL 6581846, at *24-26 (S.D. Cal. Nov. 7, 2016) (dismissing with prejudice UCL claim where the second amended complaint failed to state with particularity facts to support the unfair and fraudulent prongs of the UCL).

D. The CLRA Claim Should Be Dismissed with Prejudice

Plaintiffs bring claims pursuant to three different sections of the statute: 1770(a)(2); 1770(a)(5); and 1770(a)(7). FiAC ¶¶ 134-138. Plaintiffs' claims under each of these provisions should be dismissed with prejudice for failure to state a claim.

1. Plaintiffs fail to plead a CLRA violation under Cal. Civ. Code §§ 1770(a)(2), 1770(a)(5), or 1770(a)(7)

Plaintiffs' claims under Sections 1770(a)(2), 1770(a)(5), and 1770(a)(7) should be dismissed. In order to state a claim pursuant to Section 1770(a)(2), Plaintiffs are required to plead that JJCI's purported statements constitute a misrepresentation as to the source, sponsorship, approval or certification of the Talcum Products. In order to state a claim pursuant to Section 1770(a)(5), Plaintiffs are required to plead that JJCI's purported statements represent that the Talcum Products have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have. In order to state a claim pursuant to Section 1770(a)(7), Plaintiffs are required to plead that JJCI's purported statements represent that the Talcum Products are of a particular standard, quality, grade, or style or model when they are of another. Plaintiffs fail to do any of these things in the FiAC.

With regard to Section 1770(a)(2), other than conclusory allegations that JJCI has misrepresented the source, sponsorship, approval, or certification of the Talcum Products, Plaintiffs do not point to a single advertisement representing the

source, sponsorship, approval, or certification of the Talcum Products in any way. This "formulaic recitation of the elements of a cause of action" is insufficient to meet the pleading standard under either Rule 9 or Rule 12(b)(6).

Furthermore, a plaintiff who takes issue with an omission must establish that the alleged omission is "contrary to a representation actually made by the defendant." *Daugherty v. Am. Honda Motor Co., Inc.*, 144 Cal. App. 4th 824, 835 (2006). Because Plaintiffs have failed to identify a single representation as to the source, sponsorship, approval, or certification of the Talcum Products, this claim must fail. Plaintiffs' claims pursuant to Sections 1770(a)(5) and 1770(a)(7) with regard to alleged representations that the Talcum Products have a sponsorship, approval, characteristics, ingredients, uses, or benefits which they do not have, or are of a particular standard, quality, grade, or style or model which they are not, must be dismissed on the same grounds.

2. Plaintiffs' claim for restitution under the CLRA should be dismissed for failure to comply with statutory notice requirements

Plaintiffs have failed to provide JJCI with the requisite thirty-day notice of their CLRA claim seeking restitution, as required by Cal. Civ. Code § 1782. Therefore, their CLRA claim seeking restitution must be dismissed with prejudice.

A claim for damages under the CLRA requires strict compliance with the requirements set forth in Section 1782. *Laster v. T-Mobile USA, Inc.*, 407 F. Supp. 2d 1181, 1196 (S.D. Cal. 2005), *aff'd*, 252 F. App'x 777 (9th Cir. 2007) ("*Laster I*") (Sabraw, J.) ("Strict adherence to the statute's notice provision is required to accomplish the Act's goals of expeditious remediation before litigation."). The purpose of the act to facilitate pre-complaint settlements may only be accomplished by a literal application of the CLRA's notice provisions. *Id.* at 1195-96.

While the thirty-day notice requirement is not applicable where a consumer seeks injunctive relief, it does apply to "monetary damages, regardless of whether

such damages are calculated based upon the unjust enrichment of Defendant or the Plaintiffs' loss," which includes restitution. *Laster v. T-Mobile USA, Inc.*, No. 05-CV-1167, 2008 WL 5216255, at *17 (S.D. Cal. Aug. 11, 2008) ("*Laster II*") (Sabraw, J.) (dismissing CLRA restitution claim with prejudice under Rule 12(b)(6) for failure to comply with notice requirements), *rev'd on other grounds, AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), *and amended in part*, No. 05-CV-1167, 2012 WL 1681762 (S.D. Cal. May 9, 2012). Indeed, as this Court has previously explained, Section 1780 lists the available remedies for a CLRA violation, including "actual damages," injunctive relief and restitution of property. "To interpret Section 1782's notice requirement for 'damages' to be limited to 'actual damages' would render the word 'actual' in Section 1780 redundant." *Id.*; *see also Cuevas v. United Brands Co.*, No. 11-991, 2012 WL 760403, at *4 (S.D. Cal. Mar. 8, 2012) (plaintiff's claim for equitable relief of disgorgement or restitution was still a claim for damages requiring pre-suit notice). Therefore, where a plaintiff seeks restitution, pre-suit notice is required under the statute.

Here, Plaintiffs have sought "restitutionary disgorgement of all earnings, profits, compensation and benefits obtained by Defendants" based on the alleged CLRA violations since the time they initiated the action. Dkt. 1-2, Ex. A (Complaint ¶ 107); Dkt. 1-2, Ex. C (First Amended Complaint ("FAC") ¶ 107); Dkt. 12 (Second Amended Complaint ("SAC") ¶ 110). As such, Plaintiffs were required to serve JJCI with a thirty-day pre-suit notice. Prior to filing the Complaint on May 20, 2019 (Dkt. 1-2), the FAC on June 4, 2019 (*id.*), *and* the SAC on August 30, 2019 (Dkt. 12), Plaintiffs failed to serve JJCI with the required notice. Their CLRA claim seeking restitution therefore should be dismissed with prejudice.

While Plaintiffs served a belated CLRA notice on September 23, 2019 and filed their TAC stating they have allegedly complied with the pre-suit notice requirement, their failure to have done so prior to the initiation of the litigation is

dispositive. *See Laster I*, 407 F. Supp. 2d at 1196 (denying leave to amend for failure to comply with pre-filing notice requirement); *Laster II*, 2008 WL 5216255, at *17 (dismissing CLRA restitution claim with prejudice).

Plaintiffs assert that post-filing notification is permitted and rely on *Morgan v. AT & T Wireless Servs., Inc.* in support. FiAC ¶ 144. However, Plaintiffs' reliance on *Morgan* is misplaced. In *Morgan*, plaintiffs originally sought only *injunctive relief* under Section 1750, for which no notice is required, and later sent a notice letter and amended their complaint to seek damages under the statute. *See* 177 Cal.App.4th 1235, 1260 (2009). The Court held that this was permissible because "the statute expressly allows such an amendment." *Id.*

Morgan is distinguishable from the case at bar, which is factually consistent with two cases from the Southern District: *Cattie* and *Waller*. Each is discussed in turn.

In *Cattie v. Wal-Mart Stores, Inc.*, plaintiffs sought damages first and then later gave notice and amended to include other relief. *See* 504 F. Supp. 2d 939, 950 (S.D. Cal. 2007). The court held that "failure to give notice before seeking damages necessitates dismissal with prejudice, even if a plaintiff later gives notice and amends." *Id.* The court reasoned that permitting amendment "would destroy the notice requirement's utility, and undermine the possibility of early settlement." *Id.*

Likewise, in *Waller v. Hewlett-Packard Co.*, a case in which the plaintiff demanded damages in the original complaint without first providing a notice letter, the court held that subsequent notice and amendment could not cure this defect. No. 11-cv-0454 LAB (RBB), 2011 WL 6325972, at *6 (S.D. Cal. Dec. 16, 2011). Finding that the case was "more like *Cattie* than *Morgan*," the court held that under these facts, "[the] claim for damages under the CLRA must therefore be dismissed *with prejudice*." *Id.* (emphasis in original).

This case is more like *Cattie* and *Waller* than *Morgan*. Plaintiffs' claim for

restitutionary disgorgement—a type of damages per this Court's ruling in *Laster II*—must, therefore, be dismissed with prejudice.

V. CONCLUSION

For the foregoing reasons, Plaintiffs' Fifth Amended Complaint should be dismissed with prejudice without leave to replead.

Dated: September 23, 2020

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