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., a New Jersey Corporation, BAUSCH HEALTH US, LLC, f/k/a VALEANT PHARMACEUTICALS NORTH AMERICA LLC, a New Jersey Limited Liability Company,

Defendants.

Case No.: 19-cv-1345 DMS (AGS)

ORDER GRANTING DEFENDANTS JOHNSON & JOHNSON CONSUMER, INC.'S AND BAUSCH HEALTH US, LLC'S MOTIONS TO DISMISS PLAINTIFFS' THIRD AMENDED COMPLAINT

Pending before the Court are Defendants Johnson & Johnson Consumer, Inc.'s ("Johnson & Johnson" or "JJCI") and Bausch Health US, LLC's ("Bausch" or "BHUS") motions to dismiss Plaintiffs' Third Amended Complaint ("TAC"). The motions have been fully briefed and submitted. For the foregoing reasons, the motions are granted.

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I.

BACKGROUND

This case arises out of Plaintiffs' putative class action against Defendants JJCI and BHUS for the sale of baby powder containing talc and "Shower-to-Shower" products ("Talcum Products") in California. Defendants allegedly failed to warn Plaintiffs of carcinogenic ingredients in their Talcum Products and engaged in an ongoing decades-long campaign to convince the public, and therefore Plaintiffs, that their products were safe, despite knowing since the 1970s that talc based products contain hazardous substances like asbestos, asbestiform fibers, lead, silica, and arsenic. (TAC ¶¶ 5, 20–24, 29, 86.) Plaintiffs allege Defendants and the Cosmetic, Toiletry & Fragrance Association ("CTFA") engaged in a scheme dating back to the 1970s, in which they deceived consumers, the media, and government regulatory agencies by concealing "results of testing performed internally and externally indicating the presence of asbestos and other carcinogens in the talc being used to manufacture cosmetic products[,]" (*id.* ¶ 51), misrepresenting that "no asbestos was detected in cosmetic talc," (*id.*), and using substandard testing methods to avoid "detection of asbestos at greater concentrations than 0.5%, a concentration that could allow more than a billion asbestos fibers per gram of talc to be passed off as 'asbestos-free.'" (*Id.*) The FDA and other regulatory agencies, according to Plaintiffs, relied upon and were fooled by Defendants' false representations and use of imprecise testing methods when other testing methods with "greater sensitivity" for detecting asbestos existed. (*Id.* ¶ 69.) Plaintiffs allege the FDA responded to a "citizen petition to require an asbestos warning label on cosmetic talc on July 1, 1986," by relying on Defendants' substandard testing methods and stating that an "'analytical methodology was sufficiently developed' to ensure that 'such talc [is] free of fibrous amphibole ….'" (*Id.*) Finally, Plaintiffs allege Defendants and the CTFA have represented to the media and public at large that their products are "'asbestos-free,' when, in fact, their products did test positive for asbestos and those that did not were merely the result of inadequate and imprecise testing methods." (*Id.* ¶¶ 1, 54.)

Plaintiff Louisa Gutierrez alleges she "continuously purchased" Johnson & Johnson's baby powder for her own use because she was convinced it was safe based on the "affirmative statements" on the baby powder label, as well as "decades of marketing stating that baby powder was safe for use on infants, children and adults." (*Id.* ¶ 88.) Plaintiff Debbie Luna, "convinced by Johnson & Johnson's marketing that baby power was safe" and Defendant BHUS's "marketing that the "Shower-to-Shower" product were sold for 'nearly 50 years'", alleges she "consistently purchased the Talcum Products" and "assumed that a product marketed as safe for infants, or which has been sold for 'nearly 50 years' would not include hazardous substances." (*Id.* ¶ 89.) Plaintiff Luna purchased baby powder for her own use and for her infant's use until the end of 2018 when she learned of the connection between talcum products and "hazardous substances," by "reading, amongst other things, the report by Reuters that the Talcum Products contained asbestos and/or talc containing asbestiform fibers." (*Id.* ¶¶ 11, 89.)

Based on these alleged facts, Plaintiffs filed a Class Action Complaint in the California Superior Court on May 20, 2019 against Defendant Johnson & Johnson. On July 18, 2019, Defendant removed the case to federal court. (ECF No. 1.) Since the filing of the initial Complaint, Plaintiffs have filed a First Amended Complaint ("FAC") naming Defendant Bausch as the correct manufacturer of the "Shower-to-Shower" product, a Second Amended Complaint ("SAC") (ECF No. 12), and a Third Amended Complaint. (ECF No. 21.)

In the original Complaint and FAC, Plaintiffs alleged violations of California's Consumer Legal Remedies Act ("CLRA"), Civil Code § 1750, *et seq.*, False Advertising Law ("FAL"), Business & Professions Code § 17500, *et seq.*, and Unfair Competition Law ("UCL"), Business & Professions Code § 17200, *et seq.*, predicated upon Defendants' alleged failure to warn of known carcinogens in violation of California's Safe Drinking Water and Toxic II Enforcement Act of 1986, Health & Safety Code §§ 25249.6 *et seq.* ("Proposition 65") and false representations that its Talcum Products are safe and "free of asbestos." (*See* Compl. ¶ 3 (alleging on-going "failure to warn … and knowing sale of

Talcum Products containing asbestos … without providing the notice required by law, and worse, making false representations that the Talcum Products are safe and 'free of asbestos'.")) In their SAC, Plaintiffs disclaimed reliance on Proposition 65, but maintained their CLRA, UCL, and FAL claims based on a violation of the California Safe Cosmetics Act of 2005 ("CSCA"). (ECF No. 12.) Thereafter, the parties met and conferred and on November 4, 2019, Plaintiffs filed their TAC, alleging violations of the CLRA, UCL, and FAL and omitting their CSCA claims. (ECF No. 21.) Plaintiffs seek injunctive relief, restitution, and disgorgement on behalf of a California class of purchasers of Talcum Products based on Defendants' alleged failure to warn of known carcinogens in their products and affirmative misrepresentations regarding product safety and absence of asbestos. (*See, e.g.*, TAC ¶¶ 3–5, 54, 86.)

II.

DISCUSSION

A. Motion to Dismiss for Failure to State a Claim

Federal Rule of Civil Procedure 8(a) requires a plaintiff to plead a claim with enough specificity to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 545 (2007) (internal quotation marks omitted). A motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) tests the legal sufficiency of the claims asserted in the complaint. Fed. R. Civ. P. 12(b)(6); *Navarro v. Block*, 250 F.3d 729, 731 (9th Cir. 2001). In deciding a motion to dismiss, all material factual allegations of the complaint are accepted as true, as well as all reasonable inferences to be drawn from them. *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 338 (9th Cir. 1996). A court, however, need not accept all conclusory allegations as true. Rather it must "examine whether conclusory allegations follow from the description of facts as alleged by the plaintiff." *Holden v. Hagopian*, 978 F.3d 1115, 1121 (9th Cir. 1992) (citation omitted). A motion to dismiss should be granted if a plaintiff's complaint fails to contain "enough facts to state a claim to relief that is plausible." *Twombly*, 550 U.S. at 544. "A claim has facial plausibility when the plaintiff pleads factual content that allows

the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 556). In deciding a motion to dismiss, the Court "accept[s] the plaintiffs' allegations as true and construe[s] them in the light most favorable to the plaintiffs." *See Siracusano v. Matrixx Initiatives, Inc.*, 585 F.3d 1167, 1177 (9th Cir. 2009).

B. Judicial Notice

Defendant JJCI seeks judicial notice of several documents related to a case filed in the Central District of California, *Hermelinda Luna, et al. v. Johnson & Johnson, et al.* (ECF No. 28), an action based on Defendants' alleged failure to comply with Proposition 65 and warn consumers through suitable disclosures about the presence of carcinogens in the Talcum Products. Plaintiffs seek judicial notice of six exhibits: (1) a summary of associated cases from the District Court for New Jersey; (2) a list of coordinated cases in the Superior Court of California, Los Angeles; (3) the plaintiffs' steering committees response and opposition to Johnson & Johnson's motion to exclude plaintiffs' expert opinions arising out of multi-district litigation in the District of New Jersey; (4) a post-Daubert hearing summation brief related to Exhibit 3; (5) a letter from plaintiffs' counsel related to Exhibits 3 and 4; and (6) the class action complaint filed in *Mona Estrada, et al. v. Johnson & Johnson, et al.*, No. 3:16-cv-07492-FLW-LHG, from the Eastern District of California. Defendants object to Plaintiffs' request for judicial notice of Exhibits 3, 4 and 5. (ECF No. 36; ECF No. 39.)

The Court may judicially notice facts that are "not subject to reasonable dispute in that [they are] . . . capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned." Fed. R. Evid. 201(b)(2). The Court will take judicial notice of the existence of the foregoing documents; however, Defendants' objections to Exhibits 3 through 5 are sustained as the content of those matters is subject to reasonable dispute.

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II.

DISCUSSION

Defendants contend Plaintiffs' claims should be dismissed because: (1) Plaintiffs did not comply with Proposition 65's pre-suit notice requirement; (2) Plaintiffs' claims are premised upon a purported duty to disclose that only arises under Proposition 65; and (3) Plaintiffs failed to plead their claims with particularity as required by Federal Rule of Civil Procedure 9(b). These arguments are addressed below.[1]

A. Proposition 65

Defendants contend Plaintiffs' claims should be dismissed for failing to provide notice under Proposition 65, and as attempts to "plead around" Proposition 65's mandatory notice requirements. In response, Plaintiffs contend they are excused from the notice requirements because a similar Proposition 65 compliant action was filed in the Central District of California, and, in any event, they are not subject to the notice requirements because they disclaimed all relief under Proposition 65 claims in the TAC.

Proposition 65 is an initiative measure approved by California voters, enacted through the Safe Drinking Water and Toxic Enforcement Act of 1986, which is now set forth in California Health and Safety Code §§ 25249.5, *et seq*. Under Proposition 65, "no person in the course of doing business shall knowingly and intentionally expose any individual to a chemical known to the state to cause cancer or reproductive toxicity without first giving clear and reasonable warning to such individual where the amount exceeds the no significant risk level established by the California Environmental Protection Agency's Office of Environmental Health Hazard Assessment." *Sciortino v. Pepsico, Inc.*, 108 F.

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[1] Defendant JJCI also argues that Plaintiffs failed to state a claim under the UCL and CLRA, and Defendant Bausch argues Plaintiffs' allegations pertaining to false, deceptive and misleading advertising are insufficient to support any cause of action. Both Defendants also argue Plaintiffs failed to provide pre-suit notice pursuant to the CLRA. These arguments are deferred pending leave to file a fourth amended complaint and further briefing.

Supp. 3d 780, 787 (N.D. Cal. 2015). Persons doing business in California have a duty to warn consumers about the presence of Proposition 65-regulated chemicals, except when there is "no significant risk level" pursuant to the statutory safe harbor. *See* Cal. Health and Safety Code § 25249.10(c).

Proposition 65 allows private parties to bring civil actions in the public interest if "the private action is commenced more than 60 days from the date that the person has given notice of the alleged violation" to the defendant, the California Attorney General, and the "district attorney, city attorney, or prosecutor in the jurisdiction in which the violation is alleged to have occurred." Cal. Health & Safety Code § 25249.7(d)(1). The notice must include "a certificate of merit" that affirms the party has "consulted with one or more persons with relevant and appropriate experience or expertise . . . regarding the exposure" and that "based on that information, the person executing the certificate believes there is a reasonable and meritorious case for the private action." *Id.* "[T]he purpose of the notice provision is to encourage public enforcement, thereby avoiding the need for a private lawsuit altogether, and to encourage resolution of disputes outside the courts." *Yeroushalmi v. Miramar Sheraton*, 88 Cal. App. 4th 738, 750 (2001). In light of the legislative purposes behind Proposition 65, "California cases strictly enforce the notice requirements and hold that pre-filing notice is mandatory." *Sciortino*, 108 F. Supp 3d at 790 (discussing cases). Thus, "if a Plaintiff commenced an action under Proposition 65 without providing suitable statutory notice, the Plaintiff should not be able to maintain that action." *Id.* "Dismissal with prejudice would be proper, because improper notice cannot be retroactively cured." *Id.* (listing cases).

Plaintiffs contend without citing any authority that they need not provide such notice because Defendants already faced a similar suit under Proposition 65 in the Central District of California, *Hermelinda Luna, et al. v. Johnson & Johnson, et al.* (ECF No. 28), and the purpose of the notice requirement is to "inform the Defendants that their products contained carcinogens[] and allow Defendants time to cure their behavior." (Opp'n to JJCI MTD at 2.) Defendant JJCI argues Plaintiffs "may not piggy-back on a notice provided in another

case, particularly not in a case that was voluntarily dismissed with the payment of nearly $600,000 from the plaintiffs' attorneys to JJCI, after the plaintiffs' own expert reports showed that any alleged asbestos contamination was below Proposition 65's 'safe harbor' of 100 fibers inhaled per day." (JJCI Reply Br. at 7.) JJCI also argues that the notice in that action "was not applicable to arsenic, lead or silica." (*Id.*, n. 6.) In addition, where notice is required by Proposition 65 before filing a private action, it appears the statute itself requires notice to be provided by the party filing that action. *See* Cal. Health & Safety Code § 25249.7(d)(1) (stating action under Proposition 65 may be brought "by a person in the public interest if … [t]he private action is commenced more than 60 days from the date the person has given notice[.]") Accordingly, the Court declines Plaintiffs' invitation to find that notice, if required, is satisfied through another party's "similar" action.

Plaintiffs also contend they are not required to provide pre-suit notice because they are "pursuing a claim completely independent from Prop. 65." (Opp'n to JJCI MTD at 2.) Because Plaintiffs expressly disclaim relief under Proposition 65, (*see* TAC ¶ 4 ("Plaintiffs seek no remedy under Prop. 65")), they must comply with the pre-filing notice requirement only if their asserted claims under the CLRA, FAL and UCL are attempts to "plead around" Proposition 65's requirements.

Defendants contend all of Plaintiffs' claims should be barred as improper attempts to skirt Proposition 65. "A plaintiff may not bring an action under the unfair competition law if some other provision bars it. That other provision must actually bar it, however, and not merely fail to allow it." *Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal. 4th 163, 184, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (1999); *see also Harris v. R.J. Reynolds Vapor Company*, 2016 WL 6246415 at *2 (N.D. Cal. Sept. 30, 2016) (stating plaintiff cannot sidestep Proposition 65's notice requirements by using the UCL or CLRA to "plead around a claim that would be barred under Proposition 65.") It is "settled that unfair competition claims . . . which are predicated on Proposition 65 warning violations must be dismissed if the underlying Proposition 65 claim is dismissed." *Sciortino*, 108 F. Supp. at 790. To determine whether claims are attempts to "plead around" Proposition 65,

courts assess "whether the claims asserted in the initial complaint … are entirely derivative of an unspoken Proposition 65 violation, or whether they assert claims independent of Proposition 65." *Id.* at 792.

Sciortino is instructive. There, the two named plaintiffs asserted claims under the CLRA, UCL and FAL, among others. Plaintiff Ibusuki alleged defendant Pepsi failed to warn consumers that its product contained a Proposition 65-listed chemical. Specifically, Ibusuki's complaint alleged a but-for causation theory of loss: that he would "have never purchased Pepsi One had he known it contained 4-Mel at a level that required a Proposition 65 warning." *Sciortino*, 108 F. Supp. 3d at 792 (internal citations and quotation marks omitted). Applying the framework set forth above, the district court found the "gravamen of … Ibusuki's initial complaint was a Proposition 65 claim seeking to vindicate a right created by Proposition 65" and "all his claims were derivative of Proposition 65." *Id.* Thus, the court did not allow retroactive notice to cure the notice deficiency and Ibusuki's complaint was dismissed.

In contrast, the court found plaintiff Hall's complaint was not based on a violation of Proposition 65, but rather on Pepsi's "separate misrepresentation" of its actions and the amounts of 4-Mel in Pepsi beverages. *Id.* at 794. Specifically, Hall "alleged that Pepsi 'feigned action' in response to the changing regulatory environment in California, misleading consumers into believing that the amounts of 4-Mel in the Pepsi Beverages were lower than they were[,]" and failed to disclose the presence of 4-Mel in Pepsi "irrespective of Proposition 65, including, *e.g.,* in its advertising and public statements." *Id.* (internal citations omitted). Because the basis of Hall's complaint was a "separate misrepresentation to consumers regarding what actions Pepsi had taken and what levels of 4-Mel were present in Pepsi beverages," rather than a failure to warn pursuant to Proposition 65, the court denied the motion to dismiss Hall's complaint. *Id.* As discussed below, some of Plaintiffs' claims here are like those of Ibusuki, while others are like those of Hall.

All of Plaintiffs' claims under the CLRA, FAL and UCL are based on the same general course of conduct attributed to Defendants. Consumer protection claims under the CLRA, FAL and UCL are often analyzed together because they share similar attributes. As noted in *Sony Gaming Networks & Customer Data Security Breach Litig.*, 996 F.Supp.2d 942, 985 (S.D. Cal. 2014):

> The UCL prescribes business practices that are 'unlawful, unfair or fraudulent,' … the FAL prohibits the dissemination of any advertising 'which is untrue or misleading,' … and the CLRA declares specific acts and practices in the sale of goods or services to be unlawful, including making affirmative misrepresentations or omissions regarding the 'standard, quality, or grade' of a particular good or service ….

Here, Plaintiffs' claims center around Defendants' alleged failure to disclose the presence of asbestos and other carcinogens in their Talcum Products; misleading advertising and labeling regarding the baby powder and Shower-to-Shower products; and affirmative misrepresentations that the Talcum Products are "safe" and "do not contain asbestos." Plaintiffs allege Defendants were "required as a matter of law to inform [class members] that their Talcum Products contained … carcinogenic substances, namely asbestos, and talc containing asbestiform fibers" and that Defendants deceived the public through their labeling and advertising by "hid[ing] the fact that the Talcum Products contain such hazardous substances" and falsely portraying their products as "safe." (TAC ¶¶ 4–5.) The first of these alleged wrongs—failure to warn—runs afoul of Proposition 65 and any claim arising therefrom must be dismissed.

Although Plaintiffs disclaim reliance on Proposition 65 and allege they "seek no remedy under Prop. 65 and its related statutes," (TAC ¶ 2), Defendant JJCI correctly contends Plaintiffs' claims include "both explicit and implicit Proposition 65 allegations." (JJCI MTD at 7.) Plaintiffs' Complaint and FAC rested on Proposition 65 as the basis for wrongdoing giving rise to all of their claims under the CLRA, UCL and FAL. Plaintiffs alleged Defendants were required under Proposition 65 "to inform the public that their products contained, or possibly contained carcinogens such as asbestos and talc containing

asbestiform fibers[.]" (FAC ¶ 75.) Plaintiffs further alleged Defendants "failed to place a clear and reasonable Proposition 65 warning for asbestos and talc containing asbestiform fibers on their marketing materials[,] … "store shelves[,]" … [and] on their 16 websites." (*Id.* ¶¶ 87–89.) These violations, according to Plaintiffs, gave rise to numerous common questions of fact and law, including "whether Defendants failure to label the Talcum Products" violated Proposition 65 and "whether Defendants could lawfully sell the Talcum Products" without complying with Proposition 65. (*See, e.g.*, *id.* ¶ 94, subps. (iii), (v)-(ix).)

Plaintiffs now allege in the TAC that Defendants made misrepresentations "to avoid FDA, CalEPA, OEHHA and other governmental agency regulations that, like California's Proposition 65, would have required them to place warnings regarding the asbestos and talc containing asbestiform fibers content on their Talcum Products." (TAC ¶ 52.) But with the scrubbing of Proposition 65 from the TAC, Plaintiffs fail to allege any regulation that would require this warning. Instead, Plaintiffs cite cases for the principle that a duty to disclose exists when a fact is material and raises a safety issue (Opp'n to JJCI MTD at 17–18), but these cases do not involve a duty to disclose Proposition 65-regulated chemicals. Proposition 65 includes a "safe harbor," under which companies are not required to disclose the presence of chemicals in their products. *See* Cal. Health & Safety Code § 25249.10. As such, any duty is inextricably bound up with Proposition 65 because it regulates the level of listed chemicals that can exist in a product without triggering a duty to disclose. Plaintiffs also argue Defendants had a duty to disclose because they had "exclusive knowledge of material facts not known or reasonably accessible to the plaintiff." (Opp'n to JJCI MTD at 17.) However, as Defendant JJCI points out, Plaintiffs had access to numerous publicly available scientific publications and other widely disseminated articles from The New York Times and The Washington Post regarding the presence of contaminants in talc products. (JJCI Reply Br. at 3.) Further, the presence of a carcinogen may not be a "material" fact subject to disclosure if it exists in levels accepted under the law. Plaintiffs have failed to establish a duty to disclose outside of Proposition 65.

Therefore, any 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' other allegations, however, involve not a failure to disclose under Proposition 65 but separate alleged misleading statements and affirmative misrepresentations that the Talcum Products are safe and free of asbestos. Plaintiffs allege misconduct on the part of Defendants occurring over many years. (TAC ¶¶ 17–91.) These allegations are based on Defendants' "decades-long" marketing campaign and branding; concealment of the presence of carcinogenic substances in its Talcum Products and use of imprecise testing regimes for the presence of such substances; and misrepresentations that the products in question are safe and asbestos free. Defendants argue these claims fail, as they are not pled with sufficient specificity. The Court agrees.

B. Rule 9(b)

Plaintiffs must clear additional hurdles when bringing claims based on fraudulent conduct: "[i]n alleging fraud …, a party must state with particularity the circumstances constituting fraud." Fed. R. Civ. P. 9(b). *See Davidson v. Kimberly-Clark Corp.*, 889 F.3d 956, 964 (9th Cir. 2018), *cert denied*, 139 S. Ct. 640 (2018) (applying Rule 9(b)'s heightened pleading standards to claims for fraudulent conduct under the CLRA, FAL and UCL). To meet this standard, '"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.'" *Id.* (quoting *Cafasso, U.S. ex rel. v. Gen. Dynamics C4 Sys., Inc.*, 637 F. 3d 1047, 1055 (9th Cir. 2011)). Plaintiffs accept this standard and argue they have met it.

Setting aside allegations that arise under Proposition 65, Plaintiffs generally allege under the CLRA that Defendants engaged in misrepresentations by using the "product name baby powder", (TAC ¶ 111), by representing that baby powder and their Talcum Products are safe and do not contain hazardous substances, (*Id.* ¶¶ 110, 113), and by engaging in practices and acts in connection with its sale of these products that were "likely to mislead a reasonable consumer acting reasonably under the circumstances to his or her

detriment." (*Id.* ¶ 112.) *See* Cal. Civ. Code § 1770(a)(2),(5), (7). Plaintiffs' FAL claim is based on Defendants' representations "that the Talcum Products are safe for their intended and foreseeable use and 'free of asbestos,'" and "[i]ssuing promotional literature and commercials deceiving potential users of the talcum products by relaying positive information and concealing material relevant information regarding the safety and efficacy of the Talcum Products." (TAC ¶ 119.) Under the UCL, Plaintiffs' generally allege Defendants' concealment and misrepresentations regarding the "safety and efficacy of the Talcum Products" are misleading, unfair, unlawful and fraudulent. (TAC ¶ 133.)

Plaintiffs argue in their briefing that they "relied on" Defendants' "decades-long scheme to tell the public that the talc they use … does not contain asbestos or harmful substances," advertising campaigns that stated their products were "asbestos free" and "safe for use on infants, children, and adults," and publication of a website that "extols the virtues of talc and its supposed safety." (Opp'n to JJCI MTD at 22–23.) Plaintiffs contend they relied on these statements and representations to "frequently" purchase Defendants' products at various locations in San Diego "more or less continuously until Reuters published its article detailing the decades long effort by Defendants to deceive the public regarding the safety of Talcum Products in 2018." (*Id.* at 23.) Accordingly, the representations at issue here are: (1) the affirmative misrepresentations that Defendants' products are free from asbestos, and (2) the express and implied statements by Defendants that their products are safe. Each of these assertions is addressed in turn.

1. Alleged Misrepresentations that Defendants' Product are "Asbestos-free"

Plaintiffs allege that "[t]o this day, … the Talcum Products contain asbestos, lead, arsenic, silica and talc containing asbestiform fibers." (TAC ¶ 57.) Plaintiffs further allege the Talcum Products "do and did contain hazardous substances not listed on the ingredients list[.]" (*Id.* ¶ 87.) Assuming these allegations to be true, as the Court must at this stage of the proceedings, a representation by Defendants that their products do not contain asbestos would be categorically false, and a representation of "no asbestos detected" could be

misleading, if Defendants are gaming the testing protocol through substandard testing regimes designed to avoid detecting trace amounts of carcinogens. (*See id.* ¶ 54.)

Plaintiffs, however, have failed to allege in the TAC when and where those representations were made or what representations they relied on—and arguments in their briefs are not sufficient. Plaintiffs do not allege anywhere in the TAC that they relied on a representation by JJCI or BHUS that their products are asbestos free. Plaintiffs argue they "need not state exactly which of the Defendants' advertisements induced them to originally purchase the Talcum products." (Opp'n to JJCI MTD at 23) To this end, Plaintiffs cite *In re Tobacco II Cases*, in which the California Supreme Court permitted a class of plaintiffs to state a claim under the UCL against tobacco companies for selling nicotine-laced products without demonstrating "individualized reliance on specific misrepresentations to satisfy the reliance requirement." 46 Cal. 4th 298, 327 (2009). However, *Tobacco II* "does 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." *Hall v. Sea World Entertainment, Inc.*, 2015 WL 9659911, at *4 (S.D. Cal. Dec. 23, 2015); *see also In re 5-hour ENERGY Mktg. & Sales Prac. Litig*, No. MDL 13–2438 PSG PLAX, 2014 WL 5311272, at *16 (C.D. Cal. Sept. 4, 2014) ("The existence of a prolonged marketing and advertising strategy does not relieve Plaintiffs of the need to allege exposure to the marketing strategy and particular misrepresentations relied upon.")

The alleged campaign by Defendants to conceal and misinform the public about the presence of asbestos and other carcinogens in the Talcum Products appears to have occurred more than ten years ago. The TAC generally alleges that since the 1970s and through the 2000s Defendants and CTFA concealed from the FDA and other regulatory agencies tests that confirmed the presence of asbestos in talc products, (*see, e.g.*, *id.* ¶¶ 43, 51, 53, 55–56, 68, 73), and "affirmatively obscure[d] the existence of hazardous substances necessarily found in talc, such as asbestos, asbestiform fibers, lead, silica, and arsenic." (*Id* ¶ 86.) But it is unclear from the TAC whether this specific alleged misinformation campaign is presently ongoing. The TAC simply alleges without providing dates or any

other detail that Defendants "contended" their Talcum Products "did not contain hazardous substances such as asbestos, asbestiform fibers, lead, arsenic, and silica[,]" (*id.* ¶ 113, CLRA claim), "[r]epresent[ed] that the Talcum Products are … 'free of asbestos,'" (*id.* ¶ 119, FAL claim), and "engaged in a decades-long advertising campaign ... to convince the general public, including Plaintiffs and the Class Members, that the Talcum Products are safe to use and do not contain any harmful substances, such as asbestos, asbestiform fibers, lead, silica, and/or arsenic." (*Id.* ¶ 131, UCL claim.) That is not sufficient, as 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'.[2] In the absence of more specific allegations setting out how Defendants' alleged misrepresentations regarding asbestos content impacted Plaintiffs themselves, Defendants' motions to dismiss this aspect of Plaintiffs' claims are granted.

BHUS also argues that Plaintiffs "improperly conflate the actions of J&J with BHUS, pleading against 'Defendants' collectively in nearly every paragraph." (BHUS Reply Br. at 6.) To satisfy Rule 9(b)'s pleading requirements in a case against two or more defendants, "a plaintiff must, at a minimum, identify the role of each defendant in the alleged fraudulent scheme." *Swartz v. KPMG LLP*, 476 F.3d 756, 765 (9th Cir. 2007) (internal quotations omitted). "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." *Destfino v. Reisewig*, 650 F.3d 952, 958 (9th Cir. 2011) (internal quotation marks and citations omitted).

Bausch notes Plaintiffs fail to distinguish between acts allegedly committed by JJCI and those committed by BHUS, dedicating only two paragraphs in the TAC—Paragraphs 81 and 82 regarding Shower-to-Shower product labeling—to specific conduct attributed to

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[2] All of Plaintiffs' alleged common questions of fact and law on matters of misleading representations are specific to whether Defendants' statements regarding product safety (not asbestos content) violate the consumer protection statutes. (*See* TAC ¶ 97.)

BHUS. (BHUS Reply Br. at 7.) BHUS contends it is unfairly lumped in with JJCI, particularly regarding the allegations of a "decades long" advertising campaign to convince the public that Talcum Products were safe. (*See, e.g.*, TAC ¶¶ 97, 131.)

In response, Plaintiffs argue BHUS is liable because they "benefited from J&J's decades long" subterfuge to convince the public that the Talcum Products were "safe to use." (Opp'n to BHUS MTD at 12.) But Plaintiffs fail to link BHUS to JJCI's alleged campaign of deception in any way. Indeed, Plaintiffs admit BHUS did not purchase the "Shower to Shower" product line from JJCI until "around 2013." (TAC ¶ 13.) BHUS also argues it could not have been involved in a coordinated conspiracy with the CTFA because it was never a member of the organization. (BHUS Reply Br. at 3.). Nevertheless, Plaintiffs contend BHUS should be liable for these actions even though they "did not necessarily take part in the long-term effort" because they "made no effort to correct the deception from 2013 onward." (Opp'n to BHUS MTD at 23.) However, Plaintiffs fail to allege facts that BHUS had knowledge of any deception or a duty to disclose the information at the heart of the alleged deception. Accordingly, on this separate basis for dismissal, Plaintiffs' allegations involving a decades long campaign of deception by "Defendants" and the CTFA are not plead with sufficient particularity. BHUS' motion to dismiss is therefore granted on this ground.

2. Express and Implied Statements that Defendant's Product is "Safe"

Plaintiffs allege they purchased the Talcum Products because they were convinced the products were safe for use based on affirmative statements made on the bottles of baby powder and the decades of marketing stating the products were safe for use on infants, children and adults. (TAC ¶¶ 88–89.) Specifically, Plaintiffs allege Defendants "deceive[d] the public" through an "extensive marketing campaign, utilizing social media websites, such as Twitter and Facebook, to proclaim that the Talcum Products are safe to use" (TAC ¶ 76), a webpage that states Talcum products are "safe, but neglects to mention that the Talcum Products may contain asbestos, asbestiform fibers, arsenic, lead, and silica[,]" (TAC ¶ 77), and advertisements stating that their "products geared toward infants

are safe to use." (TAC ¶ 78).[3] Plaintiffs allege they relied on these advertisements and affirmative representations to infer that Defendants' products were "safe for use on infants, children, and adults, when in fact, Defendants knew or should have known that the Talcum Products contain numerous hazardous substances, such as asbestos, asbestiform fibers, silica, lead, and arsenic." (TAC ¶ 80). But 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.

Plaintiffs' claims based on Defendants' product labeling fair no better. Plaintiffs contend Defendants misled them by "calling their product baby powder and stating that it has been sold for over 125 years, indicating that it is safe to use." (Opp'n to JJCI MTD at 22–23); (TAC ¶ 5) ("For over 125 years Johnson's formulas have been designed for baby's unique and delicate skin. Great for kids and adults too!")). In *Balser v. Hain Celestial Group*, the Ninth Circuit found plaintiffs satisfied the 9(b) pleading requirement when they "alleged that they viewed the 'natural' labeling on certain Alba Botanica products and, because of that labeling, paid a premium as compared to 'products that do not purport to be natural.'" 640 Fed. Appx. 694, 695 (9th Cir. 2016). There, Plaintiffs successfully established the meaning of the term "natural" as "free of synthetic ingredients," and the phrase "100% Vegetarian" on the back of the products' packaging as meaning "products derived from plants." *Id.* at 695. The Ninth Circuit found Plaintiffs successfully established the two necessary components of their claim: a definition of the words used on the labeling that comports with a "reasonable consumer's understanding," and enough facts to demonstrate reliance. *Id.* at 695–96. Here, use of the words "baby powder" and "For

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[3] Plaintiffs reference three specific advertisements they attribute to JJCI. (TAC ¶ 78, n. 3–5) (*e.g.*, "Gentle is Everything," "Your Whole Life")). JJCI argues one of those advertisements was not created by it and the other two "make no representations about Talcum Products." (JJCI MTD at 23.)

over 125 years Johnson's formulas have been designed for baby's unique and delicate skin. Great for kids and adults too!", and other similar terminology, may suggest to a reasonable consumer the product is safe, but that implication is not misleading unless the product actually presents a safety hazard.

The same is true for Bausch's products. Plaintiffs allege Defendant's "representation that its Shower to Shower® products have been sold for over fifty years" is an "affirmative statement of safety[,]" which "induced Plaintiff Debbie Luna to purchase its products." (Opp'n to BHUS MTD at 10) (citing TAC ¶¶ 81–82, 88–89). The Shower-to-Shower label states: "For nearly 50 years SHOWER TO SHOWER® Absorbent Body Powders have delivered long-lasting freshness," and the product's website "encourages the use of Shower to Shower® products to prevent foot odor, to use as a shampoo substitute, to help keep sand from clinging to the user's body when at the beach, to keep cool in the summer, and to 'Lightly dust your sleepwear or sheets to make bedtime peaceful and luxurious.'" (TAC ¶ 81.)

Plaintiffs argue these statements are part of Bausch's fraudulent concealment of material facts, and that a reasonable consumer reading such statements would infer that these products are safe and do not include carcinogens. But 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. As noted with JJCI's baby powder product, although the Shower-to-Shower labeling and product statements may suggest to a reasonable consumer that the product is safe, that implication is not misleading unless the product is actually unsafe.

Plaintiffs also argue "no reasonable consumer would purchase [] talc products when other, non-hazardous products exist[,]" (Opp'n to JJCI MTD at 11; TAC ¶ 2), and that "no one" would purchase the Shower-to-Shower product if advised "that talc is derived from the same substance from which asbestos is derived, or that asbestos often finds its way into talc, or that the use of talc is associated with ovarian cancer, lung disease, and other harms[.]" (Opp'n to BHUS MTD at 12.) Plaintiffs quote an FDA official from over 45

years ago who stated, "No mother was going to powder her baby with 1% of a known carcinogen []regardless of the large safety factor," in a report testing Defendant's product dated February 13, 1975. (Ex. 3 to TAC). Defendant JJCI argues that "[c]hemicals that have hazardous potential are found throughout the environment at non-hazardous levels[,]" and notes that "drinking water may contain acceptable trace lead levels, and still be safe to drink." (JJCI Reply Br. at 1, n.1) (citing Cal. Health & Safety Code § 25249.9(b); 25 C.C.R. § 25705 (b)(1).) But more importantly, as noted, Plaintiffs have not alleged the products at issue contain carcinogens at unsafe levels. And any duty to inform the public about the presence of hazardous substances is controlled by Proposition 65. The Court therefore grants Defendants' motion to dismiss the remainder of Plaintiffs' claims for failure to plead with particularity pursuant to Rule 9(b).

C. Leave to Amend

Generally, leave to amend is granted "even if no request to amend the pleading was made, unless [the court] determines that the pleading could not possibly be cured by the allegation of other facts." *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (en banc) (citation omitted)). Plaintiffs have attempted to plead viable theories of liability under the consumer protection statutes separate and apart from Proposition 65. The Court therefore grants Plaintiffs leave to amend.

III.

CONCLUSION AND ORDER

For the foregoing reasons, the Court grants Defendants' motion to dismiss with leave to file a Fourth Amended Complaint within 30 days of the filing of this Order.

IT IS SO ORDERED.

Dated: April 27, 2020

Hon. Dana M. Sabraw
United States District Judge