UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 23-7629 PA (MRWx)	Date	December 12, 2023
Title	Kristi Hazard v. Johnson & Johnson Consumer, Inc.		

Present: The Honorable	PERCY ANDERSON, UNITED STATES DISTRICT JUDGE	
Lynnie Fahey	Not Reported	N/A
Deputy Clerk	Court Reporter	Tape No.

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
None	None

Proceedings: IN CHAMBERS — COURT ORDER

Before the Court is a Motion to Dismiss filed by defendant Johnson & Johnson Consumer, Inc. ("J&J" or "Defendant") (Docket No. 34). J&J challenges the sufficiency of the Complaint filed by plaintiff Kristi Hazard as parent and legal guardian of P.H., a minor ("P.H." or "Plaintiff"). Pursuant to Rule 78 of the Federal Rules of Civil Procedure and Local Rule 7-15, the Court finds that this matter is appropriate for decision without oral argument. The hearing calendared for December 18, 2023, is vacated and the matter taken off calendar.

Plaintiff filed this action in this Court alleging diversity jurisdiction. P.H., who is 13, was diagnosed with Acute Myeloid Leukemia ("AML") in 2020. The Complaint alleges that when she was growing up, Plaintiff's parents "regularly purchased" various sunscreen products manufactured and sold by J&J, including "Neutrogena Beach Defense Aerosol Sunscreen" and "Neutrogena Ultra Sheer Aerosol Sunscreen" and used those products on Plaintiff "regularly and typically on a weekly basis" from approximately June of 2010 until approximately July of 2021. Plaintiff alleges that Plaintiff was exposed to benzene. Specifically, in 2020, an analytical pharmacy tested numerous lots of Neutrogena sunscreen and discovered that "certain" of the tested Neutrogena sunscreen products contained benzene with "values ranging from less than 0.1 parts per million ('ppm'), 0.10 ppm to 2 ppm, and more than 2 ppm, and even above 6 ppm." The Complaint alleges that the EPA classifies benzene as a known human carcinogen and that the International Agency for Research on Cancer, part of the World Health Organization, classifies benzene as a human carcinogen based on evidence that benzene causes AML.

The Complaint asserts claims for: (1) strict liability based on design defect; (2) strict liability based on failure to warn; (3) strict liability based on manufacturing defect; (4) negligence; (5) breach of implied warranty; and (6) breach of express warranty. J&J's Motion to Dismiss argues that Plaintiff has failed to satisfy the applicable federal pleading standard because the Complaint does not plead sufficient facts allowing J&J to identify the specific products Plaintiff used, including lot numbers, sun protection factor ("SPF"), size, or expiration

date, which J&J claims is crucial information because the third-party testing found benzene in only "certain" sunscreen product batches a year after Plaintiff's AML diagnosis. According to J&J, without such information, and well-pleaded facts with information that the specific products Plaintiff used contained benzene, and in what concentrations, the Complaint fails to adequately allege that J&J's products caused Plaintiff's AML. J&J also seeks dismissal of the Complaint's breach of implied warranty claim because Plaintiff was not in privity with J&J.

Generally, plaintiffs in federal court are required to give only "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a). While the Federal Rules allow a court to dismiss a cause of action for "failure to state a claim upon which relief can be granted," they also require all pleadings to be "construed so as to do justice." Fed. R. Civ. P. 12(b)(6), 8(e). The purpose of Rule 8(a)(2) is to "'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 1964, 167 L. Ed. 2d 929 (2007) (quoting Conley v. Gibson, 355 U.S. 41, 47, 78 S. Ct. 99, 103, 2 L. Ed. 2d 80 (1957)). The Ninth Circuit is particularly hostile to motions to dismiss under Rule 12(b)(6). See, e.g., Gilligan v. Jamco Dev. Corp. , 108 F.3d 246, 248-49 (9th Cir. 1997) ("The Rule 8 standard contains a powerful presumption against rejecting pleadings for failure to state a claim.") (internal quotation omitted).

However, in Twombly, the Supreme Court rejected the notion that "a wholly conclusory statement of a claim would survive a motion to dismiss whenever the pleadings left open the possibility that a plaintiff might later establish some set of undisclosed facts to support recovery." Twombly, 550 U.S. at 561, 127 S. Ct. at 1968 (internal quotation omitted). Instead, the Court adopted a "plausibility standard," in which the complaint must "raise a reasonable expectation that discovery will reveal evidence of [the alleged infraction]." Id. at 556, 127 S. Ct. at 1965. For a complaint to meet this standard, the "[f]actual allegations must be enough to raise a right to relief above the speculative level." Id. at 555, 127 S. Ct. at 1965 (citing 5 C. Wright & A. Miller, Federal Practice and Procedure §1216, pp. 235-36 (3d ed. 2004) ("[T]he pleading must contain something more . . . than . . . a statement of facts that merely creates a suspicion [of] a legally cognizable right of action") (alteration in original)); Daniel v. County of Santa Barbara, 288 F.3d 375, 380 (9th Cir. 2002) ("'All allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party.'") (quoting Burgert v. Lokelani Bernice Pauahi Bishop Trust, 200 F.3d 661, 663 (9th Cir. 2000)). "[A] plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Twombly, 550 U.S. at 555, 127 S. Ct. at 1964-65 (internal quotations omitted). In construing the Twombly standard, the Supreme Court has advised that "a court considering a motion to dismiss

can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." Ashcroft v. Iqbal, 556 U.S. 662, 679, 129 S. Ct. 1937, 1950, 173 L. Ed. 2d 868 (2009).

The Court concludes that Plaintiff has alleged sufficient well-pleaded facts to satisfy the federal standard. But see Bodle v. Johnson & Johnson Consumer Inc., Case No. CV 21-7742 EMC, 2022 WL 18495043 (N.D. Cal. Feb. 24, 2022) (dismissing complaint with leave to amend). Plaintiff has alleged sufficient facts to plausibly allege that the J&J products she used contained benzene, that her use of those products exposed her to benzene, and that such an exposure caused her AML. J&J's additional concerns about identifying the particular products Plaintiff used, whether they in fact contained benzene, and if so, whether they contained benzene in sufficient concentrations to cause Plaintiff's illness, are best resolved at later stages of these proceedings. The Court also concludes that sunscreen is sufficiently similar to drugs, foodstuffs, and pesticides, that a personal injury claim alleging a breach of an implied warranty arising out of the use of sunscreen qualifies for the exception under California law to the privity requirement that generally applies to implied warranty claims. See Arnold v. Dow Chemical Co., 91 Cal. App. 4th 698, 720, 110 Cal. Rptr. 2d 722, 739 (2001) ("An exception to the general rule has been recognized in the case of foodstuffs, and has been extended to drugs, on the basis that a drug is intended for human consumption quite as much as is food.").

For all of the foregoing reasons, the Court denies J&J's Motion to Dismiss. J&J shall file an Answer to Plaintiff's Complaint by no later than December 28, 2023. The Court orders the Clerk to issue the Court's Order Setting Scheduling Conference.

IT IS SO ORDERED.