

Ritalin Class Action Litigation:

A Defense Lawyer's Perspective

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By: J. Gordon Cooney, Jr.*

1. INTRODUCTION

Plaintiffs have filed class actions concerning Ritalin in New Jersey, Texas and California against the manufacturer of Ritalin, Ciba-Geigy Corp. USA and Novartis Pharmaceuticals Corp. (collectively “Novartis”), and two non-profit corporations, the American Psychiatric Association (“APA”) and Children and Adults with Attention Deficit/Hyperactivity Disorder (“CHADD”). Plaintiffs assert claims for fraud, civil conspiracy, failure to warn and violations of various consumer protection statutes, and base these claims on the defendants’ alleged conduct concerning Ritalin and its use in treating Attention Deficit Disorder (“ADD”) and Attention Deficit Hyperactivity Disorder (“ADHD”).

Each of these actions either was originally filed in federal court or filed in state court and removed by the defendants. Although there has been significant motion practice in each of these cases, most of the activity to date has concerned the sufficiency of the complaints. Both the

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1/ See *Hernandez v. Ciba-Geigy Corp. USA*, 00-CV-82 (removed May 30, 2000) (S.D. Tex.); *Vess v. Ciba-Geigy Corp. USA*, 00-CV-1839 (filed Sept. 13, 2000) (S.D. Cal.); *Dawson v. Ciba-Geigy Corp. USA*, 00-CV-6162 (removed December 21, 2000) (D.N.J.).

California and Texas courts have dismissed the complaints but given plaintiffs leave to amend. Plaintiffs have not yet moved for class certification. If the complaints ultimately survive scrutiny, the parties' attention will turn to whether the cases should be certified as class actions under Rule 23(b)(3) of the Federal Rules of Civil Procedure. Although the author does not represent any of the defendants in these class actions, this article sets forth an overview of certain arguments likely to be raised by the defendants in opposing class certification.

1. OVERVIEW OF RULE 23

A class action is a procedural mechanism that enables one or more representative plaintiffs to assert similar claims on behalf of a large number of similarly situated individuals. Class actions are “an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.” *Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979).

In order for an action to proceed as a class action, the plaintiff must establish each of the four criteria of Rule 23(a) and satisfy one of the three subsections of Rule 23(b). Rule 23(a) permits a class to be certified only if:

(1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

In general, Rule 23(b)(1) involves cases in which separate actions by individual class members would either risk establishing incompatible standards of conduct for the party opposing the class, or

impair other class members' ability to protect their interests. Rule 23(b)(2) generally concerns actions for declaratory or equitable relief.

Rule 23(b)(3), on the other hand, addresses actions wholly or predominately for damages, such as the Ritalin class actions. Before an action may be certified under Rule 23(b)(3), the court must find both: (1) that “the questions of law or fact common to the members of the class predominate over any questions affecting individual members . . .,” and (2) that “a class action is superior to other available methods for the fair and efficient adjudication of the controversy.” Rule 23(b)(3) also sets forth four non-exhaustive factors that a court should consider in determining whether plaintiffs have carried their burden:

- The interest of class members in individually controlling the prosecution or defense of their own separate actions;
- The extent and any nature of existing litigation;
- The desirability or undesirability of concentrating the litigation in the particular forum; and
- The difficulties likely to be encountered in managing a class action.

The predominance and superiority requirements of Rule 23(b)(3) often provoke the most hotly-contested issues in a class certification motion. The Supreme Court recently explained that these requirements are designed to make sure that an action will be certified as a class action only where it can be both efficient and faithful to the substantive rights of the parties:

In adding “predominance” and “superiority” to the qualification-for-certification list, the Advisory Committee sought to cover cases “in

which a class action would achieve economies of time, effort, and expense, and promote . . . uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about undesirable results.”

Amchem Products, Inc. v. Windsor, 117 S. Ct. 2231, 2246 (1997).

“Predominance is a test readily met in certain cases alleging consumer or securities fraud or violations of the antitrust laws.” *Amchem*, 117 S. Ct. at 2250. On the other hand, the Advisory Committee Notes to the 1966 Amendments to Rule 23 specifically caution that “a fraud case may be unsuited for treatment as a class action if there was material variation in the representations made or in the kinds or degrees of reliance by the persons to whom they were addressed.” Similarly, the Advisory Committee Notes observe that actions involving claims for personal injury generally are unsuitable for class certification:

A “mass accident” resulting in injuries to numerous persons is ordinarily not appropriate for class certification because of the likelihood that significant questions, not only of damages, but of liability and defenses of liability, would be present, affecting the individuals in different ways. In these circumstances an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried.

With regard to the superiority requirement, the Supreme Court also has noted that although Rule 23(b)(3) “does not exclude from certification cases in which individual damages run high, the Advisory Committee had dominantly in mind vindication of the rights of groups of people who individually would be without effective strength to bring their opponents into court at all.” *See*

Amchem, 117 S. Ct. at 2246. See also *In the matter of Rhone-Poulenc Rohrer, Inc.*, 51 F.3d 1293, 1299 (7th Cir.), *cert. denied*, 116 S. Ct. 184 (1995).

2. PROCEDURAL OVERVIEW

The question of class certification is typically raised on plaintiffs' motion. Generally, plaintiffs and defendants have a right to conduct discovery relating to the class certification question prior to a class-certification hearing. See *In re American Medical Systems, Inc.*, 75 F.3d 1069, 1079 (6th Cir. 1996).

Plaintiffs bear the burden of establishing a factual record supporting certification. See *American Medical*, 75 F.3d at 1083; *Castano v. American Tobacco Co.*, 84 F.3d 734, 740 (1996). In ruling on the motion, a court must conduct a "rigorous analysis" of the Rule 23(a) requirements, in particular. *General Telephone Co. v. Falcon*, 457 U.S. 147, 161 (1982).

Although a court is not permitted to base its certification analysis on the perceived likelihood of plaintiff's success on the merits see *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974), it must evaluate the legal elements of plaintiff's claims and the nature of proof that will be offered to establish or defend against those claims. See *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 & n.12 (1978) ("the class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action"); *Castano v. American Tobacco Co.*, 84 F.3d 734, 744 (5th Cir. 1996) ("Going beyond the pleadings is necessary, as a court must understand the claims,

defenses, relevant facts and applicable substantive law in order to make a meaningful determination of the certification issues”).

As a result, courts have become increasingly insistent that plaintiff’s counsel submit a proposed trial plan to detail concretely what issues could be tried in a “common” trial and what issues would have to be left for individual adjudication. *See, e.g., Castano*, 84 F.3d at 743-44 (vacating class certification because district court did not conduct a careful consideration of how plaintiffs’ claims could be tried to judgment in a class action). Requiring such a trial plan not only permits the court to assess in a specific way whether individual or common issues predominate, it also enables the court to determine if the bifurcation of a “common issue” from an “individual issue” runs afoul of the Seventh Amendment’s proscription applicable in federal courts against the reexamination of a first jury’s findings by a second jury. *See, e.g., Rhone-Poulenc Rohrer*, 51 F.3d at 1303 (“The right to a jury trial in federal civil cases, conferred by the Seventh Amendment, is a right to have jurable issues determined by the first jury impaneled to hear them . . . , and not reexamined by another finder of fact”) (citing, *inter alia*, *Gasoline Products Co. v. Champlin Refining Co.*, 283 U.S. 494 (1931)).

3. ISSUES RAISED IN DEFENDANTS’ MOTIONS TO DISMISS THAT MAY BECOME RELEVANT TO CLASS CERTIFICATION

As noted above, neither plaintiffs nor defendants have filed briefs concerning class certification in the Ritalin litigation. Defendants’ motions to dismiss the complaints provide a fair indication, however, of why class certification is inappropriate in these cases.

In addition to advancing other arguments in support of dismissal, defendants have raised at least four categories of arguments that may not only result in dismissal of the complaints, but which also have a direct bearing on class certification:

- (1) Arguments concerning the complaints' failure to plead the specific alleged misrepresentations challenged by each plaintiff;
- (2) Arguments concerning the complaints' failure to plead that each plaintiff was improperly diagnosed with ADD or ADHD;
- (3) Arguments concerning the complaints' failure to plead that plaintiffs' physicians actually relied on any alleged misrepresentation by a defendant in prescribing Ritalin for the plaintiffs; and
- (4) Arguments concerning the complaints' failure to plead that the plaintiffs actually have suffered any personal injury from taking Ritalin.

Both the California and Texas federal courts have ruled on defendants' motions. These orders raise serious questions concerning whether plaintiffs will be able to assert claims against the defendants. In addition, the orders render it likely that, if the actions manage to proceed past the pleadings stage, plaintiffs will have significant difficulties in meeting their burden of proof on the class certification question.

Vess v. Ciba

In the Vess action in San Diego, plaintiff has asserted claims against defendants for: (1) violations of California's Consumer Legal Remedies Act, Cal. Code § 1770, for allegedly unlawful competition, and unfair and deceptive acts; and (2) violations of Sections 17200 and 17500 of California's Business and Professions Code for unfair competition and false and misleading statements.

On March 8, 2001, Judge Rudi Brewster granted defendants' Rule 12(b)(6) and 9(b) motions, providing plaintiff until April 16 to file an amended complaint. A copy of Judge Brewster's Order is included with these materials behind Appendix "A."

Addressing defendants' Rule 9(b) arguments, Judge Brewster held that "Plaintiff failed to plead fraud with the particularity required by [the Rule]." Slip op. at 17. According to the Court, "allegations of a financial relationship between Novartis, CHADD, and the APA do not state an actual claim." *Id.* Setting forth the pleading requirements for each of plaintiff's fraud-based claims, Judge Brewster stated:

Plaintiff failed to plead any allegations of specific representations that were false, when the representations were made, *where* the representations were made, and by *whom*. Finally, Plaintiff has not alleged any *causal connection* to the Defendants or any damages.

Id. (emphasis added).

The Court also granted the Rule 12(b)(6) motions filed by the APA and CHADD, observing that:

There is no causal connection between the APA and this Plaintiff, nor between CHADD and this Plaintiff. Plaintiff does not allege that he, his doctor, or his parents ever read the DSM or any CHADD literature. Nor does he allege that he suffered damage that directly resulted from any alleged misstatements in the DSM or in CHADD literature.

Id. at 23.

In addition, Judge Brewster addressed defendants' motions to strike pursuant to California's anti-Strategic Lawsuits Against Public Participation ("SLAPP") statute, Cal. Code Civ. P. 425.16,

which establishes a procedure for the early dismissal of meritless lawsuits directed against public speech or petitioning activity. The Court concluded that defendants had met their burden of establishing that the complaint challenged speech or government petitioning on matters of public importance. *Id.* at 13 (“APA’s speech at issue is publication of the DSM. . . . CHADD’s speech at issue is government lobbying regarding the laws on Ritalin and general dissemination of allegedly false information through undisclosed fora. . . . Novartis’ speech at issue is speech promoting Ritalin to the APA and to the public.”).

The Court noted that once a defendant makes such a *prima facie* showing, “the plaintiff must demonstrate that the complaint is legally sufficient and supported by a *prima facie* showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.” *Id.* at 6. Reiterating his conclusions regarding the Rule 9(b) and 12(b)(6) motions, Judge Brewster observed:

Plaintiff has not alleged any causal connection to these Defendants. He has not alleged that he, his parents, or his physician relied on the DSM in misdiagnosing him with ADD; he has not alleged that he, his parents, or his physician have ever seen any CHADD literature; he has not alleged that Novartis misdiagnosed him or that he even suffered any damages as the result of taking Ritalin.

Id. at 13-14.

The Court ordered that “[i]f no amended complaint is filed by April 16, 2001, the Court will dismiss Plaintiff’s First Amended Complaint with prejudice and grant each Defendant’s Motion to Strike pursuant to Cal. Code Civ. P. § 425.16 with reasonable attorney’s fees and costs.” The Court further explained that if plaintiff amends his complaint, and the Court determines that the amended

complaint states a claim, it will then complete its consideration of defendants' motions to strike under the SLAPP statute by ascertaining whether plaintiff has submitted sufficient evidence to establish a probability of prevailing on his claims. *Id.* at 23-24.

As will be discussed at greater length in the next section, these determinations are significant, not only on the merits, but also from a class certification perspective. Because each member of the class, or their doctors, may have seen or heard different representations by defendants, proof of "misrepresentation" will vary from plaintiff to plaintiff. Moreover, the ruling makes clear that plaintiffs will have to show: (1) that they "relied" on a specific misrepresentation or that a specific misrepresentation "caused" them to use Ritalin; and (2) that as a result of this "reliance" or "causation" they were damaged. This proof inherently will require individualized analysis of the circumstances of each class member and render a class action inappropriate.

Hernandez v. Ciba

In the *Hernandez* action pending in Brownsville, Texas, plaintiffs have asserted claims for common law fraud, civil conspiracy, violations of the New Jersey Consumer Fraud Act, N.J.S.A. § 56:8, and claims under Article 10 of the United Nations Convention on Psychotropic Substances. On October 17, 2000, Judge Hilda Tagle granted in part and denied in part defendants' motions to dismiss the complaint under Rules 9(b) and 12(b)(6). A copy of Judge Tagle's Order is included with these materials behind Appendix "B."

In reaching her conclusions, Judge Tagle noted that, at the hearing on the pending motions, “the Plaintiff acknowledged that there are a small number of children who can be effectively treated with Ritalin, but alleged that the large majority of children who are prescribed Ritalin do not need it.” Slip op. at 3. Because Judge Tagle found counsel’s position to be inconsistent with the allegations of the complaint, she ordered plaintiffs to “clarify their basic allegations against each Defendant.” *Id.*

Turning to each of plaintiff’s substantive claims, the Court held that Rule 9(b) applied to plaintiffs’ common law fraud and civil conspiracy claims. *Id.* at 4, 7-8. With regard to the claim under the New Jersey Fraud Act, the Court noted that the Act prohibits certain acts grounded in fraud and other acts that are not grounded in fraud. Because the Court concluded that “[i]t is not clear . . . if the plaintiffs intend to assert a distinct violation of the New Jersey Consumer Fraud Act that is not fraud . . ., they must amend their complaint to explicitly differentiate between violations of the New Jersey Consumer Fraud Act that sound in fraud and those that fall outside Rule 9(b)’s pleading requirements.” *Id.* at 6. The Court then noted that it “has not been able to locate a case which holds that the United Nations Convention on Psychotropic Substances provides an implied private right of action.” *Id.* at 7. The Court continued by noting that “[i]f it is later shown that an implied cause of action exists, and that it is grounded in fraud, the Court will require the Plaintiffs to comply with Rule 9(b)’s pleading requirements.” *Id.*

The Court finally provided guidance regarding the level of detail required by Rule 9(b), observing:

In every case based on fraud, Rule 9(b) requires the plaintiff to allege as to each individual defendant the nature of the fraud, some details, a brief sketch of how the fraudulent scheme operated, when and where it occurred, and the participants. The plaintiff must also explain why the statements or omissions of the defendant were fraudulent.

Id. at 8-9 (citations omitted).

Plaintiffs have since filed an amended complaint and defendants have filed renewed motions, which are pending.

4. KEY ARGUMENTS FOR DEFEATING CLASS CERTIFICATION

If the cases reach the class certification stage, defendants will take discovery from plaintiffs to evaluate whether plaintiffs are vulnerable to Rule 23(a) challenges and to further develop the record under Rule 23(b)(3). On the current record, it is likely that defendants will base their opposition to class certification in part on plaintiffs' inability to meet their burden of establishing under Rule 23(b)(3) that common questions of law and fact *predominate* over individual issues and that a class action is *superior* to other means of resolving the controversy.

In particular, defendants will likely focus on the following five key arguments in opposing class certification:

1. Because plaintiffs concede that some patients are properly diagnosed with ADD or ADHD and properly treated with Ritalin, plaintiffs will have to demonstrate on a class-member by class-member basis that, *inter alia*, each class member was misdiagnosed with ADD/ADHD and misprescribed Ritalin;
2. To the extent that plaintiffs assert a claim based on the alleged side effects of Ritalin, plaintiffs will have to prove on a class-member by class-member basis that each class member actually has developed a side effect caused by Ritalin;

3. For each class member who was misdiagnosed with ADD/ADHD or improperly prescribed Ritalin, plaintiffs will have to offer class-member specific proof that a specific misleading statement by a defendant caused the misdiagnosis or prescription;
4. The likely need to determine and apply the laws of every American jurisdiction causes individual issues to predominate and defeats the superiority of a class action; and
5. A class action is inappropriate to resolve the novel theories of liability advanced by plaintiffs.

Each of these arguments and some of the key authorities supporting them are discussed below.

a. *Individual Issues Predominate Because Plaintiffs Will Have To Prove, On A Class-Member By Class-Member Basis, That They Were Misdiagnosed With ADD/ADHD Or Misprescribed Ritalin*

Plaintiffs admit that some children legitimately suffer from ADD or ADHD, and further admit that, for some children, Ritalin has been properly prescribed. Consequently, in order for any particular class member to have been harmed by the conduct at issue in this case, it must be shown that the particular class member was misdiagnosed with ADD/ADHD or that they were misprescribed Ritalin.

This inquiry, of necessity, must be done on an individualized, class-member by class-member basis to determine whether *that* class member actually suffers from ADD or ADHD. In order to accomplish this, significant discovery concerning the individual class member's condition and symptoms may be required. Discovery thus may include testimony and documents from the class member's doctor, parents, clinician, teachers and peers. Expert testimony regarding each class member's medical condition will be necessary. This issue alone will require thousands of individualized factually and medically complex trials, thus implicating the concern raised by the Advisory Committee concerning the

degeneration of a class action into multiple lawsuits, separately tried. *See* discussion *supra* at 4.

Additional authorities supporting this argument will be discussed in Section B, *infra*.

b. To The Extent Plaintiffs Claim They Suffer From Side Effects As A Result Of Ritalin, Individual Medical Causation Issues Will Predominate

Similarly, to the extent that plaintiffs assert claims that patients suffered side effects from taking Ritalin, that issue will have to be resolved on a class-member by class-member basis. Although the issue of whether Ritalin is *capable* of producing certain side effects may be susceptible of more generalized proof, resolution of that question does little to advance the ball with regard to the pertinent question as to whether Ritalin actually has caused a *particular class member* to experience a particular side effect.

As with the first issue discussed above, resolution of this issue will have to be conducted on an individualized class-member by class-member basis, and will require the evaluation of medical proof and expert testimony. Not surprisingly, there is significant authority squarely holding that class certification is inappropriate in a case where there are significant individual questions of medical causation.

Some of these authorities include:

- *Castano v. American Tobacco Co.*, 84 F.3d 734, 747 n.24 (5th Cir. 1996) (“In a case such as this one, where [medical] causation is a key element, disaggregation of claims allows courts to dismiss weak and frivolous claims on summary judgment”).
- *In re Northern District of California Dalkon Shield IUD Products Liability Litigation*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 459 U.S. 1173 (1983) (reversing class certification in part because of highly individualized medical causation questions).

- *In re American Medical Systems, Inc.*, 75 F.3d 1069, 1081 (6th Cir. 1996) (granting mandamus and directing decertification of a class action brought concerning allegedly defective prostheses, in part because “complications with an AMS device may be due to a variety of factors, including surgical error, improper use of the device, anatomical incompatibility, infection, device malfunction or psychological problems. Furthermore, each plaintiff’s urologist would be required to testify to determine what oral and written statements were made to the physician, and what he in turn told the patient, as well as to issues of reliance, causation and damages”).
 - *Barnes v. American Tobacco Co.*, 161 F.3d 127, 149 (3d Cir. 1998), *cert. denied*, 526 U.S. 1114 (1999) (affirming the decertification of a tobacco class action in part because of individual medical issues concerning nicotine addiction and causation).
 - *In the matter of Rhone-Poulenc Rohrer, Inc.*, 51 F.3d 1293, 1302 (7th Cir.), *cert. denied*, 116 S. Ct. 184 (1995) (vacating class certification in class action against manufacturer of antihemophilic factor concentrate and expressing concerns about significant medical causation issues).
 - *Fisher v. Bristol-Myers Squibb Co.*, 181 F.R.D. 365 (N.D. Ill. 1998) (denying class certification against manufacturer of prescription product for causing addiction because in order to obtain relief plaintiff would have to show that the product caused the injuries. “Addiction is not a simple concept. To find that a person is addicted to a particular substance, the fact finder must examine both biological and psychological evidence”).
 - *Arch v. American Tobacco Co.*, 175 F.R.D. 469, 488 (E.D. Pa. 1997) (declining to certify tobacco class action in part because “whether or not an individual is addicted is a highly individualistic inquiry . . . which cannot be resolved on a class-wide basis”).
 - *Dhamer v. Bristol-Myers Squibb Co.*, 183 F.R.D. 520 (N.D. Ill. 1998) (rejecting class certification against a manufacturer of a prescription drug which allegedly caused injuries, in part because of the serious medical causation issues that would have to be resolved on an individualized basis).
- c. ***Individual Issues Predominate Because Plaintiffs Must Prove That They Were Misdiagnosed With ADD/ADHD Or Misprescribed With Ritalin As A Result Of A Misleading Statement***

Because plaintiffs' claims generally sound in fraud or misrepresentation, it is not enough merely for plaintiffs to establish that a particular class member was misdiagnosed with ADD or ADHD, or that he or she was misprescribed with Ritalin. Instead, each class member must show that the misdiagnosis or misprescription was *caused* by a specific false or misleading communication by a defendant. With respect to certain claims, such as common law fraud, this may be described in terms of the need of plaintiff to establish reliance; with respect to other claims, it may be expressed in terms of a causation requirement.

Although individual issues of causation and reliance often preclude class certification in fraud cases, they are particularly difficult in the Ritalin cases because of the role of clinicians and doctors in the diagnosis and prescription processes. Children could not have been diagnosed with ADHD and prescribed Ritalin unless they were seen by a professional clinician who diagnosed ADHD and/or a licensed physician or psychiatrist who examined them, confirmed the diagnosis, and wrote a prescription for Ritalin. These clinicians, physicians and psychiatrists will have used their medical training and judgment to arrive at their diagnoses and prescription decisions. For each patient, their medical professionals' decisions will be based on a variety of different factors, one or more of which may or may not have included a statement or representation by the defendants.

Thus, for each class member, there will be a significant, individualized question concerning the reasons why he or she was diagnosed as having ADD or ADHD and prescribed Ritalin. At a minimum, there will be a threshold issue concerning whether relevant professionals in the diagnosis or

prescription process for a particular class member ever even *saw* or *heard* one of the alleged misrepresentations put at issue in the amended complaints. Moreover, even if those professionals saw or heard one of these representations, there will be a substantial issue concerning whether the representation was a significant factor in causing the diagnoses or prescription.

Authorities supporting this argument include:

- *Simon v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 482 F.2d 880 (5th Cir. 1973) (a fraud class action cannot be certified when individual reliance will be an issue).
- *Castano v. American Tobacco Co.*, 84 F.3d 734, 745 (5th Cir. 1996) (same).
- *In re LifeUSA Inc.*, 2001 W.L. 213975 (3d Cir. March 5, 2001) (reversing class certification in a consumer fraud class action because information provided to class plaintiffs was not identical and proof as to what was said to each class member would vary from class-member to class-member).
- *Andrews v. American Tel. & Tel. Co.*, 95 F.3d 1014, 1025 (11th Cir. 1996) (reversing the district court's class certification and noting: "Even if it could be shown that the appellants were engaged in a scheme to defraud and made misrepresentations to further that scheme, the plaintiffs would still have to show, on an individual basis, that they relied on the misrepresentations, suffered injury as a result, and incurred a demonstrable amount of damages.").
- *Dhamer v. Bristol-Myers Squibb Co.*, 183 F.R.D. 520, 531-32 (N.D. Ill. 1998) (denying motion for class certification in a consumer fraud class action against manufacturer of prescription pain relief product, in part because "even if a given plaintiff does demonstrate his or her addiction to a fact finder, the plaintiff must show that the physician would not have prescribed [the product] if [defendant] had provided adequate warnings." Stating further that "the role of the prescribing physician is central for a number of the issues plaintiff alleges that the proposed classes have in common relevant to product warnings, claimed misrepresentations and proximate causation. The highly individualistic factual determinations associated with issues of addiction and misrepresentation preclude certification.").

- *In re Sofamor Danek Group, Inc.*, 123 F.3d 394 (6th Cir. 1997), cert. *denied*, 523 U.S. 1106 (1998) (in a product liability action against bone screw manufacturer, plaintiff must show actual reliance by the doctor in order to establish that alleged fraud caused injury to plaintiffs).
- *Huntman v. Danek Medical, Inc.*, 1998 U.S. Dist. LEXIS 13431 (S.D. Cal. July 27, 1998) (in a product liability action against bone screw manufacturer raising claims of fraud and failure to warn, plaintiffs were required to present evidence that their surgeons were misled by defendants or relied on defendants' representations to the detriment of plaintiffs).
- *Lyon v. Caterpillar, Inc.*, 194 F.R.D. 206, 221 (E.D. Pa. 2000) (denying class certification in a consumer fraud class action, in part because "potential boat owners may have received different representations (or no representations) and purchased their particular boats (and engines) for different reasons").
- *Young v. Ray Brandt Dodge, Inc.*, 1997 WL 706623, at *2-3 (E.D. La. Nov. 5, 1997) (denying certification of fraud and RICO claims because of individual issues of reliance and noting that "each plaintiff has a different set of personalized circumstances about his decision. . . .").
- *In re Ford Motor Co. Bronco II Products Liability Litigation*, 1997 WL 757686, at *10 (E.D. La. Feb. 27, 1997) (denying certification of fraud claims and noting the "highly individualized fact issue of whether the class members relied on Ford's misrepresentation(s)").
- *Freedman v. Arista Records, Inc.*, 137 F.R.D. 225, 229 (E.D. Pa. 1991) (denying certification of fraud and RICO claims because of the "highly individualized" issue of reliance).

d. *To The Extent The Complaints Seek Nationwide Classes, Choice-Of-Law Issues Render Such Class Actions Inappropriate*

Nationwide class actions based on state-law claims raise two separate, but related, issues arising from the variations in state law: (1) questions of superiority stemming from the difficulties with ascertaining the relevant substantive law and predicting it accurately on the grand scale required by a nationwide class action; and (2) questions of predominance and manageability arising from the potential

need to apply and instruct a jury regarding the varying laws of 50 states (and in some cases, additional jurisdictions).

In *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), the Supreme Court held that the Due Process Clause (if not the Full Faith and Credit Clause) imposes a constraint on a state court's ability to apply one single state's laws to the claims in a nationwide state-law class action. Putative class members have a due process right to have their dispute governed the law of a state that has some connection to their claims. In the context of a class action, the court "may not take a transaction with little or no relationship to the forum and apply the law of the forum in order to satisfy the procedural requirement that there be a common question of law." *Id.* at 821.

Under *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941), a district court must apply the choice-of-law rules of the state in which the district court is located. Thus, as a first step, a district court considering national class certification in the Ritalin cases must turn to the choice-of-law rules of the forum state and predict, on a claim-by-claim basis, what law would apply to each class member's claims against each defendant. Although state choice-of-law rules vary from state to state and from one cause of action to another, the very process of applying state choice-of-law principles to determine the applicable laws may require an exhausting "interest," "contacts" and/or "lex loci" analysis. This analysis alone can be overwhelming.

Moreover, most of the post-*Shutts* cases involving fraud or products liability claims have concluded that: (1) the laws of all 50 jurisdictions would have to be applied in a nationwide class

action; and (2) these laws differ significantly from state to state. Accordingly, most courts have refused to certify products liability or consumer fraud cases for nationwide certification, because the variation-in-state-law issues cause non-class issues to predominate and render the class action an inferior device for resolving the claims. Counsel defending these types of cases must be careful, however, to: (1) scrutinize the applicable forum state's choice-of-law rules; and (2) in most cases, develop an extensive record, supported by case and statutory citations, demonstrating the actual differences among competing states' laws.

Authorities supporting these arguments include:

- *Castano v. American Tobacco Co.*, 84 F.3d 734, 742-44 (5th Cir. 1996) (reversing class certification in part due to the district court's "fail[ure] to perform its duty to determine whether the class action would be manageable in light of state law variations"; in the face of "defendants' extensive analysis of how state law varied on fraud, products liability, affirmative defenses . . . consumer protection statutes, and punitive damages . . .," plaintiffs' surveys "failed to discuss, in any meaningful way, how the court could deal with variations in state law").
- *Walsh v. Ford Motor Co.*, 807 F.2d 1000, 1016-17 (D.C. Cir. 1986), *cert. denied*, 482 U.S. 915 (1987) (rejecting the notion in a UCC class action that a district court may defer considering variations in state law, and noting that "The Uniform Commercial Code is not uniform").
- *In re American Medical Systems, Inc.*, 75 F.3d 1069, 1085 (6th Cir. 1996) (granting mandamus in a multi-state products liability action, in part because "[t]he district court . . . failed to consider how the law of negligence differs from jurisdiction to jurisdiction").
- *Georgine v. Amchem Prods.*, 83 F.3d 610, 618 (3d Cir. 1996) (decertifying class because legal and factual differences in the plaintiffs' claims "when exponentially magnified by choice of law considerations, eclipse any common issues in this case"), *aff'd sub nom., Amchem Products, Inc. v. Windsor*, 117 S. Ct. 2231 (1997) (noting that differences among state laws compounded the disparities among class members).

- *In the matter of Rhone-Poulenc Rohrer, Inc.*, 51 F.3d 1293, 1300 (7th Cir.), *cert.denied*, 116 S. Ct. 184 (1995) (granting mandamus to decertify class action against manufacturers of antihemophilic factor concentrate, in part because of variations in state negligence laws).
 - *In re Ford Motor Co. Bronco II Products Liability Litigation*, 1997 WL 757686 (E.D. La. Feb 27, 1997) (denying class certification in part based on the need to apply 50 different bodies of law and rejecting plaintiffs' argument to apply Michigan law to all claims. "This abbreviated analysis is clearly unacceptable under Louisiana's choice of law principles, where the choice of law determination is a function of the individual defendant, plaintiff and the circumstances of the claim. What is required is a comparative analysis of Michigan law and the law and policies of each state with which the claim has contacts.").
 - *Dhamer v. Bristol-Myers Squibb Co.*, 183 F.R.D. 520, 532 (N.D. Ill. 1998) (rejecting plaintiffs' argument to apply law of the state of defendant in pharmaceutical consumer class action).
 - *In re Ford Motor Co. Ignition Switch Products Liability Litigation*, 174 F.R.D. 332, 348 (D.N.J. 1997) (denying motion for class certification and rejecting the application of Michigan law to all class members' claims).
 - *Lyon v. Caterpillar*, 194 F.R.D. 206, 211-12 (E.D. Pa. 2000) (declining to apply Illinois law to all claims in a breach of contract and consumer fraud class action against Illinois manufacturer of allegedly defective boat engines because "there is not a single jurisdiction that has a greater interest in having its consumer fraud act apply to the entire class. All of the relevant jurisdictions have an interest in utilizing the state statute crafted by their state legislature to protect their consumers and/or residents").
 - *Carpenter v. BMW of North America*, 1999 U.S. Dist. LEXIS 9272 (E.D. Pa. June 21, 1999) (denying class certification in consumer protection, fraud, negligent misrepresentation and breach of contract class action based in part on variation of 50 states' laws, because plaintiffs' charts and affidavits were "overly simplistic" and did not satisfactorily address the significant variations).
- e. ***The Novel Theory Advanced By Plaintiffs Should Not Be Resolved On A Class-Wide Basis***

Plaintiffs' theory in these cases is novel: they allege that a pharmaceutical manufacturer, an esteemed non-profit psychiatric association, and a non-profit organization founded to provide support to parents coping with children diagnosed with deficit disorders, conspired to broaden medical diagnoses and promote the overbroad prescription of a pharmaceutical product. Plaintiffs claim that these parties furthered this conspiracy by engaging in speech on issues of public interest.

Plaintiffs propose to render these defendants liable for their speech to thousands of class members, one impact of which may be to chill speech by other similar speakers regarding other medical products. The social consequences of this action thus could be significant. Would the APA and American Medical Association discontinue providing diagnostic guidelines? Would non-profit groups discontinue educational programs designed to improve public awareness of medical conditions and available treatment? The specter of a class-wide judgement against defendants in a case like this would raise those very types of issues.

As previously noted, Rule 23(b)(3) permits a court to consider the extent and nature of any individual litigation already commenced and the desirability or undesirability of concentrating the litigation of the claims in a particular forum. These criteria are relevant to whether a class action is "superior to other available methods for the fair and efficient adjudication of the controversy."

Given the novelty of these claims and the societal stakes involved, a trial court has discretion to conclude: (a) that it is not desirable to concentrate all of these claims in one forum; (b) that denying class certification nevertheless permits plaintiffs to prosecute their claims as individual actions; and (c)

that the public interest would be best served by the litigation of individual cases brought by those specific Ritalin patients who genuinely believe they are injured and which will be resolved by separate juries and judges under applicable state law.

Principles of litigation efficiency may be paramount in cases involving “established” and “mature” (*i.e.*, frequently brought) causes of action. On the other hand, the awesome power of a class action judgment--rendered by a single jury and shaped by the interpretation of the law by a single judge--is inappropriate for “novel” and “immature” types of claims. *See, e.g., In re: Rhone-Poulenc Rohrer, Inc.*, 51 F.3d 1293, 1299-1300 (7th Cir.), *cert. denied*, 116 S. Ct. 184 (1995) (vacating the certification of a class in part based on the relative immaturity of the types of claims involved and based on the fact that “[o]ne jury, consisting of six persons . . . , will hold the fate of an industry in the palm of its hands. . . . [This] need not be tolerated when the alternative exists of submitting an issue to multiple juries consisting in the aggregate a much larger and more diverse sample of decision-makers”); *Castano v. American Tobacco Co.*, 84 F.3d 734, 740-41, 747-50 (5th Cir. 1996) (reversing certification of the class in part because “at this time, while the tort is immature, the class complaint must be dismissed, as class certification cannot be found to be a superior method of adjudication”).

APPENDIX A

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

TODD D. VESS, a minor, by Deborah	:	CIV. NO. 00CV1839-B(CGA)
Vess, His Guardian Ad Litem,	:	
Individually, on Behalf of Those	:	ORDER GRANTING
Similarly Situated and on Behalf of the	:	DEFENDANTS' MOTION OT
General Public of the State of	:	DISMISS PURSUANT TO FED.
California,	:	R. CIV.P.9(b) AND/OR 12(b)(6)
	:	AND DEFERRING RULING ON
	:	MOTION TO STRIKE
Plaintiffs	:	PURSUANT TO CAL. CODE
vs.	:	CIV. P. § 425.16
	:	
	:	[Docket Nos. 83-88, 89-91, 92-94,
	:	95-97, 98-100, 101-102]
CIBA-GEIGY CORP. USA;	:	
NOVARTIS PHARMACEUTICAL	:	
CORP.; CHILDREN AND ADULTS:	:	
WITH ATTENTION-	:	
DEFICIT/HYPERACTIVITY	:	
DISORDER (CHADD); AMERICAN	:	
PSYCHIATRIC ASSOCIATION, and	:	
DOES 1 through 100, inclusive	:	
	:	
Defendants.	:	
_____	:	

Defendants' Motions to Dismiss pursuant to FED. R. CIV. P. 9(b) and/or 12(b)(6) and Defendants' Motions to Strike pursuant to CAL. CODE CIV. P. § 425.16 came on for hearing on March 5, 2001. Richard Scruggs, Esq., Peggy Reali, Esq., and Sidney Backstrom Esq. appeared on behalf of Plaintiff Todd D. Vess, David J. Nooman, Esq. and Luther Ziegler, Esq.

appeared on behalf of Defendant American Psychiatric Association (“APA”). Edward D. Chapin, Esq. appeared on behalf of Defendant. Edward D. Chapin, Esq. and Gerald Zingone, appeared on behalf of Defendant Children and Adults with American Deficit/Disorder “CHADD”). Bruce Jones, Esq., James O’Neal, Esq., and Roxanne Wilson, Esq. appeared on behalf of Defendants Ciba-Geigy Corp. USA (“Ciba-Geigy”) and Novartis Pharmaceuticals Corp. (“Novartis”). Having reviewed the matter and heard oral presentations, the Court hereby enters the following Order.

1. POSTURE OF THE CASE

Plaintiff filed his original complaint on September 13, 2000. Plaintiff moved for leave to file his First Amended Complaint on January 17, 2001 and the Court granted that Motion on January 26, 2001. By the time Plaintiff moved for leave to file his First Amended Complaint, all of the Defendants had moved to dismiss Plaintiff’s original complaint pursuant to FED. R. CIV. P. 9(b) and/or 12(b)(6) and filed Special Motions to Strike Claims pursuant to CAL. CODE CIV. P. § 425.16. The Court’s Order granting leave to amend invited the parties to submit revised briefing on their motions to specifically address the First Amended Complaint.

The APA filed a revised Special Motion to Strike Claims pursuant to CAL. CODE CIV. P. § 425.16 on February 2, 2001. Defendants Ciba-Geigy and Novartis filed their revised Motion to Dismiss Pursuant to FED. R. CIV P. 9(b) and their revised Special Motion to Strike Claims pursuant to CAL. CODE CIV. P. § 425.16 on February 5, 2001. CHADD also moved on February 5, 2001 to dismiss the First Amended Complaint pursuant to FED. R. CIV. P. 9(b) and 12(b)(6) and to strike

claims pursuant to CAL. CODE CIV. P. § 425.16. Finally, on the same day, the APA filed its Motion to Dismiss First Amended Complaint pursuant to FED.R. CIV. P. 12(b)(6) and joined in the File 9(b) motions of its codefendants.

The Defendants set their motions for the same hearing date. The Court's analysis of the motions leads the Court to consider first Defendants' Motions to Strike pursuant to CAL. CODE CIV. P. § 425.16. That analysis involves the consideration of two issues: (1) Defendants' burden to demonstrate prima facie that the speech at issue is protected speech relating to a public issue and, (2) Plaintiff's burden to demonstrate a probability of prevailing on his claims.

2. STATEMENTS OF FACTS

Plaintiff Todd D. Vess is a minor suing through his Guardian ad Litem, Deborah Vess, on behalf of himself, those similarly situated, and the general public of the state of California. Vess is a San Diego resident whose citizenship is diverse from all of the defendants. Am. Compl. ¶4, 7-10. Plaintiff alleges that he was prescribed Ritalin in June 1994 when he was nine years old and that he purchased and ingested the drug for a non-specific period of time. Am Compl. ¶6.

The defendants are two non-profit groups and a manufacturer of Ritalin. Defendant American Psychiatric Association is a nonprofit organization dedicated to the "advancement of knowledge, education and research in the field of psychiatry as well as to improvement of the diagnosis and treatment of the mentally ill." APA'S Mem. To Strike at 4. The APA publishes the Diagnostic and Statistic Manual of Mental Disorders ("DSM"). Plaintiff claims that the DSM contains false and

misleading information about Attention Deficit Disorder (ADD), Attention Deficit Hyperactivity Disorder (ADHD), and Ritalin.

Defendant CHADD is a nonprofit group that provides support to parents and individuals who have children or have personally been diagnosed as having Attention Deficit/Hyperactivity Disorder. CHADD Mem. To Strike at p. 4. CHADD describes itself as a “support and advocacy organization with over 200 local chapters and 20,000 members.” *I.d.*

Defendant Novartis Pharmaceuticals Corp. Is a Ritalin manufacturer. Novartis’ predecessor, Ciba-Geigy Corp., began manufacturing methylphenidate under the brand name Ritalin in 1955. Novartis Mem. to Strike at 2. Ciba-Geigy’s patent on Ritalin expired in the 1970s and there have been generic forms of the drug since. Plaintiff is suing both Novartis and Ciba-Geigy. Plaintiff alleges that Ciba/Novartis has been the primary or exclusive manufacturer of Ritalin since 1955. Am. Compl. ¶ 13.

Plaintiff alleges Ciba/Novartis has engaged in a variety of misconduct regarding Ritalin. Ciba/Novartis allegedly fails to warn Ritalin users that the full range of side effects has not yet been adequately studied. Am. Compl. ¶ 33. Ciba/Novartis allegedly failed to disclose the limited effectiveness of its product and misled clinicians and the public to believe Ritalin has positive benefits, despite the fact that the drug may not cause any benefits at all. Am. Compl. ¶34.

Plaintiff alleges that Ciba/Novartis conspired with the APA to “develop, promote, broaden[,] and confirm the diagnoses of Attention Deficit Disorder (ADD) and Attention Deficit Hyperactivity

Disorder (ADHD).” Am. Compl. ¶ 15. Plaintiff claims that Ciba/Novartis and the APA have a financial relationship. Am. Compl. ¶ 16. According to Plaintiff, the APA included ADD in the 1980 DSM, even though ADD did not meet the APA’s own criteria for inclusion. Am. Compl. ¶ 19. Plaintiff complains that the current DSM contains further misrepresentations and omits dissenting opinions. Am. Compl. ¶¶ 23, 26. In addition, Plaintiff claims that the APA has fraudulently failed to disclose Novartis’ role in the creation, promulgation, and revision of the DSM or the financial relationship between the APA and Ciba/Novartis. Am. Compl. ¶ 27.

Plaintiff claims that CHADD deliberately attempted to increase the sales of Ritalin, to increase the available supply, and to reduce or eliminate laws and restrictions on the use of Ritalin because of Ciba/Novartis’ significant contributions to CHADD. Am. Compl. ¶ 37. Plaintiff complains that CHADD does not reveal on its website that it receives significant contributions from Ciba/Novartis. Am. Compl. ¶ 37.

The Defendants are sued as coconspirator. Am. Compl. ¶ 41. Plaintiff alleges violations of the Consumer Legal Remedies Act (“CLRS”), CAL. CODE § 1770 for allegedly unlawful competition, and unfair and deceptive acts. Plaintiff sues under CAL. BUS. & PROF. § 17200 for unfair competition. And Plaintiff sues under CAL. BUS. & PROF. § 17500 for false and misleading statements. Plaintiff seeks injunctive relief, disgorgement of revenues and profits, restitution, and punitive damages.

3. SUMMARY OF FINDINGS

a. *Motions to Strike Pursuant to CAL. CODE. CIV. P § 425.16*

The Court finds that the Motions to Strike pursuant CAL. CODE. CIV. P § 425.16 cannot be fully decided at this time. Defendants have met their burden of showing that the anti-SLAPP statute applies because the speech at issue is clearly speech protected under the United States and California Constitutions in connection with a public issue. CAL. CODE. CIV. P § 425.16(b)(1). Plaintiff, however, has not in the Court's view commenced to show that he has a possibility of prevailing on his claims because the Court finds the First Amended Complaint is defective under both FED. R. CIV. P. 9(b) and 12(b)(6).

b. *Motions to Dismiss Pursuant to FED. R. CIV. P. 9(b) and 12(b)(6)*

The Court grants Defendants' FED. R. CIV. P. 9(b) motions. The First Amended Complaint attempts to allege a conspiracy to defraud. Plaintiff's allegations fail to show misrepresentations of any material facts, by whom any misrepresentations were made, when any misrepresentations were made, and where any misrepresentations were made as required by the Federal Rules of Civil Procedure.

The Court grants Defendants FED. R. CIV. P. 12(b)(6) motions. The First Amended complaint fails to state a cause of action because of a number of defects, including the absence of any allegations of causation, actionable conduct, or damage.

Plaintiff is given leave to amend his complaint. At such time as a cause of action is stated by Plaintiff, the Court will be in a position to evaluate whether Plaintiff has shown a probability of prevailing on his claims. If Plaintiff's complaint survives Rule 9(b) and Rule 12(b)(6) challenges, the Court will

consider Defendants' Motions to Strike. If Plaintiff can show a probability of prevailing under an amended complaint, the Motions to Strike will be denied. If Plaintiff's final attempt at amending his complaint does not survive Rule 9(b) and/or Rule 12(b) challenges, the Motions to Strike pursuant to CAL. CODE CIV. P. § 425.16 will be granted, with prejudice, with costs and reasonable attorneys' fee to the Defendants incurred prosecuting the Motions to Strike.

4. DISCUSSION

DEFENDANTS' MOTION TO STRIKE PURSUANT TO CAL. CODE CIV. P. § 425.16

a. *Standard of Law*

CAL. CODE CIV. P. § 425.16 is California's anti-Strategic Lawsuit Against Public Participation, or "SLAPP?" statute.^{1/} It is intended to deter lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. CAL. CODE CIV P. § 425.16(a) A SLAPP? motion may be brought to strike a lawsuit based on a defendant's exercise of free speech. If a defendant prevails on a SLAPP motion, he is entitled to reasonable attorney's fees and costs. CAL. CODE CIV. P. § 425.16(c). If a plaintiff prevails and the court finds the special motion to strike is frivolous or solely intended to cause delay, the court shall award costs and reasonable attorney's fees.

^{1/} The anti-SLAPP statute, although state law, is substantive law that supports a motion to dismiss in federal diversity actions. *United States v. Lockheed Missiles & Space Co. Inc.*, 190 F. 3d 963, 972-73 (9th Cir. 1999)

a to plaintiff.

The anti-SLAPP statute established a procedure for early dismissal of meritless lawsuits against public speech. *Metabolife Int'l Inc. v. Wormick*, 72 F.Supp 2d 1160, 1165 (S.D.Cal. 1999). “Once the defendant establishes prima facie that the statute applies the plaintiff must show a 'reasonable probability' of prevailing on its claim” Id. (citing *Wilcox v. Superior Court* 27 Cal. App. 4th 809, 824.25 (1994)). To establish defendant's prima facie case, it must show that the lawsuit arises from any act “in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue.” CAL CODE CIV. P. § 42116(b)(1).

If the defendant makes the prima facie showing, the plaintiff must demonstrate that “the complaint is legally sufficient and supported by prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.” (quoting *Wilcox*. 27 Cal. App. 4th at 823) “This burden is 'much like that used to determine a motion for nonsuit or directed verdict,' which mandates dismissal when 'no reasonable jury' could find for plaintiff” Id. (quoting *Wilcox*, 27 Cal. App. 4th at 824).

Plaintiff must meet its burden of proving prima facie falsity of statements with admissible evidence. Id. at 1165, 1167, In case where discovery has not yet begun, as in this case, the plaintiff must produce its own evidence, admissible under Fed. R. Evid. 702 that the statements complained of are false. Id. at 1167.

b. *The APA's SLAPP Motion*

According to the APA, Plaintiff is asking this Court to hold a nonprofit educational and scientific association liable in damages for developing and publishing a book about unquestionably important public health issues APA Mem. to Strike at 1. The DSM is a “classification and glossary of mental disorder used to provide a common language for clinicians and research investigator to communicate regarding the disorders for which they have professional responsibility.” Id. 14.

As a threshold miner, the APA explains that the anti-SLAPP statute applies to corporations as well as individuals, and has been applied to two of the causes of actions involved in this cue, the Consume Legal Remedies Act and the California Unfair Practices Act. *DuPont Merck Pharm. Co. v. Superior Court* 78 Cal. App. 4th 562 (2000).

Next, the APA argues that publication of the DSM is core First Amendment speech in connection with a public issue, as is the scientific debate surrounding its publication. Publication of the DSM falls within the anty-SLAPP's definition of speech CAL. CODE CIV. P. § 425. 6(e)(3) defines speech as “any written or oral statement or writing made in a place open to the public or a public forum in connection with en issue of public interest.” Section 425. 16(e)(4) provide an alternative definition of speech that includes petitioning activities. The DSM is a writing made in a public forum. And even Plaintiff admits that the DSM is a matter of public interest Am. Compl. at 17 (the DSM generates “great public attention”).

In support, the APA cites *Metabolife* 72 F.Supp.2d 1160. In that case, the court granted defendant anti-SLAPP motion and dismissed the case with prejudice. The speech at issue was a statement made on a television show that Metabolife was not safe. The Court found these statements protected. “Because the safety of Metabolife 356 remains an open question of substantial public importance, contributions to the debate are protected by the First Amendment.” *Id.* at 1172. The APA also cites a string of cases recognizing generally that scientific expression and debate are protected by the First Amendment.

In addition, the MA argues that its efforts to educate state, national, and international governmental bodies about diagnostic categories and criteria is protected petitioning activity. The APA lists as examples its collaborative activities with the World Health Organization and other federal agencies. The APA has offered its views on ADD and ADHD before Congressional Committees and has worked with WHO to establish uniform standards and guidelines. The APA argues that Plaintiff's Amended Complaint implicates the integrity of the APA's dialogue with government.

After arguing its prima facie case, the APA turns to Plaintiff's probability of success. The APA argues that Plaintiff's Amended Complaint fails to allege any specific facts to support its charges and maintain its claims. Furthermore, the APA claims that the declarations supplied by Plaintiff do not meet the threshold for admissibility prescribed by Fed. R. Evid. 702 and Daubert because none of the declarants is a psychiatrist or medical doctor, was involved in the development of the criteria for ADD

and ADHD, identify specific false or misleading statements, or provide evidence of improper financial relationships.

c. CHADD'S SLAPP Motion

CHADD'S recent mission statement provides:

“CHADD works to improve the lives of people affected by AD/HD through:

- Collaborative Leadership
- Advocacy
- Research
- Education and
- support

CHADD CARES!”

(Cohen Decl. 4). To carry out these goals, CHADD publishes magazines and other printed materials, holds an annual conference, and conducts outreach efforts to governmental agencies and legislative bodies. (Cohen Decl. 9)

CHADD argues that Plaintiff is attacking its right to petition the government "to reduce and eliminate laws and restrictions concerning the use of Ritalin" (Am. Compl. 37) and restrain its communications with its members and the public about AD/HD and its effective treatment (Am. Compl. 36-37, 39, 40). CHADD argues that the anti-SLAPP statute protects these activities.

d. Novartis' SLAPP Motion

Novartis' argues that Plaintiff's claims arise out of Novartis' participation in the public discussion and development of diagnostic criteria for the serious medical conditions of ADD and ADHD. FDA

approval continues for the use of Ritalin in treating ADD/ADHD. Novartis does not diagnose ADD/ADHD or prescribe Ritalin to any patients. Thus, according to Novartis, Plaintiff is only attacking Novartis' speech in connection with Ritalin.

Novartis claims that all of Plaintiff's allegations against Novartis involve speech. The claims include Novartis' alleged promotion, support, facilitation, failure to provide information, and misrepresentations in connection with Ritalin. Am. Compl. 14, 31, 33, 34, 38, 42, 43, 48, 57. Novartis argues that the speech relates to a public issue and a matter of public interest, as evidenced by Plaintiff's own lawsuit.

Novartis cites DuPont-Merck in support of its argument. In that case, a pharmaceutical company was sued under CAL. CODE § 1750 and CAL. BUS. & PROF. § 17500 (the same statutes at issue here) based on the company's lobbying, advertising, marketing, and public relations activity concerning competing versions of a drug. The Court of Appeal found that the company's speech was protected under the anti-SLAPP statute and remanded the case to the trial court to determine whether plaintiffs could show a probability of success on the merits. DuPont-Merck, 787 Cal. App. 4th at 564.

Novartis argues that Plaintiff's claims are exactly the type the anti-SLAPP statute was designed to prevent. Plaintiff is attempting to impose his view on the way doctors practice medicine in California, rather than debating the current DSM standards and FTC approval in the available public form.

Novartis cites authority^{1/} that this Court may look at the litigation history in evaluating its anti-SLAPP motion and points out that the same plaintiff's attorneys have begun multiple class actions in multiple states with classes that overlap. Furthermore, some of the attorneys here sued in the late 1980s and early 1990s making some of the same fraud and conspiracy allegations present here. One of the Plaintiff's lawyers here is quoted as saying "We're going to make it very, very costly for any company to make a profit off of this. It's going to be very, very expensive to prescribe Ritalin from now on." (Drury Decl. Ex. C).

Finally, Novartis argues that Plaintiff cannot establish a probability that he can prevail on his claims. Novartis makes the following arguments:

- Plaintiff failed to plead fraud with the particularity required by FED. R. CIV. P. 9(b). Novartis Mem. to Strike at 13.
- The allegations that Novartis contributed money and information to the APA allege nothing illegal. *Id.* at 13-14
- Plaintiff has not stated a cause of action under the UN Convention because the treaty at issue does not give rise to a private right of action. *Id.* at 14.
- The statute of limitations bars Plaintiff's claims. The CLRA has a three year statute of limitations and the Unfair Competition law has a four year statute of limitations. The last revision of the DSM occurred in 1994, the same year that Plaintiff alleges has was prescribed Ritalin. *Id.* at 15-16.
- Plaintiff cannot maintain a consumer rights action for allegedly being inadequately informed the risks where he never experienced any related damage. *Id.* at 16.

^{1/} *Church of Scientology of Cal. v. Wollersheim*, 42 Cal. App. 4th 628, 649 (1996)

- Plaintiff cannot prove that ADD does not exist or that Ritalin is not an effective treatment. *Id.* at 18.

e. *Plaintiff's Omnibus Opposition*

i. Plaintiff argues that California's anti-SLAPP law is inapplicable.

Plaintiff contends that Defendants failed to prove that his lawsuit is the type of action the California legislature intended the anti-SLAPP statute to encompass. First, Plaintiff argues that his lawsuit is not generally the type the anti-SLAPP statute was designed to deter. Plaintiff points out that the anti-SLAPP statute was intended to deter lawsuit brought primarily to chill the exercise of protected speech. The hallmark of a SLAPP suit is that it lacks merit and is brought to obtain an advantage over another party by imposing litigation costs. Plaintiff contends that the parties are not the usual parties in an anti-SLAPP action, the lawsuit does not seek to weaken Defendant's litigation position or deter future litigation, and California's Legal Remedies and Unfair Practices Acts are not among the favored causes of actions in SLAPPS.

In a lengthy footnote, Plaintiff argues that Defendants' activities do not fall within the realm of protected petitioning because the Constitutional language on petitioning applies to people or group who feel "aggrieved." Plaintiff argues that petitioning activity involves seeking redress from the government for grievances. Plaintiff cites one case including language that the right of petition "is essential to protect the ability of those who perceive themselves to be aggrieved by the activities of governmental authorities to seek redress through all the channels of government." *City of Long Beach v. Bozek*, 31 Cal. 3d 527, 535 (1982).

Second, Plaintiff argues that his experts' testimony establishes that his case is not a strategic lawsuit against public participation, but is instead a lawsuit based on serious and substantial scientific problems. Plaintiff's expert Dr. Kirk reaches the conclusion that "39% of children who do not suffer from ADD/ADHD are diagnosed as having this mental disorder." Dr. Kirk goes on to attack the DSM as unscientific and unreliable. In addition, Plaintiff's expert Dr. Caplan concludes that the APA's process in revising the DSM is unscientific. Moreover, Dr. Kirk claims that his research uncovered a financial connection between Ciba-Geigy and the APA.

Finally, Plaintiff argues that *DuPont-Merck*, 78 Cal. App. 4th 462, and *Metabolife*, 72 F. Supp. 2d 1160, are distinguishable. Plaintiff states that the activities at issue in *DuPont-Merck* were "(1) lobbying and other activities seeking to influence the decisions of regulatory and legislative bodies and (2) advertising, marketing, and public relations activities directed at the medical profession and the general public." Pl. Omnibus Opp. at 13 (citing *DuPont-Merck*, 78 Cal. App. 4th at 555-56.) Plaintiff then claims that the activities at issue here are different because they "involve" the facilitation of and inappropriate broadening of the diagnostic criteria of ADD/ADHD . . . nor does the complaint attempt to harm the ability of the defendants to freely speak of the drug Ritalin." *Id.*

Plaintiff argues that *Metabolife* is distinguishable based on the "identify of the parties who claim to have been victimized by the SLAPP lawsuit." *Id.* at 14. According to Plaintiff, in this case a large pharmaceutical company and two national organizations claim to be the victims of an attack on their free speech and petition rights by a mere teenager. In contrast, *Metabolife* involved a television

broadcast. According to plaintiff, the “anti-SLAPP was not meant to assist these powerful entities in their attempts to prevent an individual from raising claims about a product in the United States Judicial System.” *Id.*

ii. Plaintiff argues that he has a reasonable probability of success.

First, Plaintiff quotes the elements of California Legal Remedies Act § 1770 under which he is suing:

- (1) The following unfair methods of competitions and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or which results in the sale or lease of goods or services to any consumer are unlawful:
- (2) Misrepresenting the sources, sponsorship, approval or certification of goods or services;
- (3) Misrepresenting the affiliation, connection or association with, or certification by another;
- (4) Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits or quantities which they do not have . . . ;
- (5) Representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another.

CAL. CODE § 1770(A)(2), (3), (5), (7).

Next, Plaintiff makes the following points in support of his argument against the APA:

- the Process by which the DSM is constructed is scientifically flawed and not based upon empirical evidence. Pls. Omnibus Opp. at 19.
- The APA has engaged in a pattern and practice of misrepresenting to the public that DSM is grounded in empirical evidence since 1980, *Id.* at 20.

- Ritalin use is much higher in the United States than in European countries and the DSM can account for this difference. *Id.* at 21.
- Plaintiff is a victim of the ever-broadening ADD/ADHD diagnoses. *Id.* at 23.
- The APA misrepresents its affiliation, connection, or association with another by failing to disclose its dependency on pharmaceutical companies for contributions. *Id.* at 24.

Finally, Plaintiff makes the following points in support of his argument against Ciba/Novartis.

- Ciba/Novartis acted in concert with the APA in improperly broadening the criteria for ADD/ADHD. *Id.*
- Ciba/Novartis engaged in improper funding of the APA. *Id.* at 25.

Plaintiff does not make any additional arguments against CHADD.

iii. Plaintiff asks the Court to grant discovery if it finds Defendants' SLAPP motion meritorious.

Plaintiff argues that this Court should find Section 42.16 inconsistent with the federal policy of granting discovery before ruling on summary judgment.

f. CAL.CODE CIV. P. § 425.16 Applies to All of the Speech at Issue.

i. Defendants have carried their prima facie burden.

According to the First Amended Complaint, the APA's speech at issue is public ation of the DSM. First Am. Compl. ¶¶ 15-23, 25-27, 35. CHADD's speech at issue is government lobbying regarding the laws of Ritalin and general dissemination of allegedly false information through undisclosed

fora. First Am. Compl. ¶¶ 37, 40. Novartis' speech at issues is speech promoting Ritaling to the APA and to the public. First Am. Compl. ¶ 38. Plaintiff concedes that the issue is one of public importance.

CAL.CODE CIV. P. § 425.16(e)(3) specifically provided that speech protected by the anti-SLAPP statute includes, "any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest." Defendants have prima facie shown that the speech at issue is protected.

Plaintiff's arguments to the contrary are unpersuasive. The anti-SLAPP law does not specify that it only applies to certain types of parties or specific cases of action. In fact, it specifically provides that "this section shall be construed broadly." CAL.CODE CIV. P. § 425.16(a). Furthermore, Plaintiff's declaration do not provide any support for Plaintiff's argument that this lawsuit does not fall within the anti-SLAPP provisions.

ii. The Court cannot make a finding as to Plaintiff's probability of prevailing on the claim because Plaintiff has not yet stated a claim.

As described in detail herein in connection with the Defendants' motions to dismiss, Plaintiff has not alleged any causal in connection to these Defendants. He has not alleged that he, his parents, or his physician relied on the DSM in misdiagnosing him with ADD; he has not alleged that he, his parents, or his physician have ever seen any CHADD literature; he has not alleged that Novartis misdiagnosed him or that he event suffered any damages as the result of taking Ritalin. Because Plaintiff has not yet stated a claim, the Court cannot yet rule whether there is a probability that Plaintiff will eventually prevail on any claims.

iii. Discovery is not appropriate.

An express purpose of the anti-SLAPP statute is to avoid imposing litigation costs, including discovery, on Defendants protected by the statute. CAL.CODE CIV. P. § 425.16(g) specifically stays discovery. The Court may order specified discovery, notwithstanding 425.16(g), only upon noticed motion and for good cause shown. *Id.* The Court finds that Plaintiff has not shown good cause for lifting the stay and granting discovery. Plaintiff's lawsuit is based on alleged misrepresentations by the Defendants. Plaintiff should be able to specifically alleged the content, source, and date of those misrepresentations and provide its own competent evidence why it believes the representations were false. Plaintiff does not need discovery from Defendants to allege its claims in accordance with the Federal Rules of Civil Procedure.

**DEFENDANTS' MOTIONS TO DISMISS
PURSUANT TO FED. R. CIV. P. 9(b).**

A. *Standard of Law*

FED. R. CIV. P. 9(b) requires that “[i]n all averments of fraud or mistake, the circumstances constituting the fraud or mistake shall be stated with particularity.” As the Ninth Circuit explained in *Blv-Mages v. California*, 236 F.3d 1014 (9th cir. 2001):

Rule 9(b) serves not only to give notice to defendants of the specific fraudulent conduct against which they must defend but also to deter the filing of complaints as a pretext for the discovery of unknown wrongs, to protect [defendants] from the harm that comes from being subject to fraud charges, and to prohibit plaintiffs from unilaterally imposing upon the court, the parties and society the enormous social and economic costs absent some factual basis.

Id. at 1018 (quoting *In re Stac Elec. Sec. Litig.*, 89 F.3d 1399, 1405 (9th Cir. 1996)).

Rule 9(b) imposes a burden beyond FED. R. CIV. P. 8(a)'s pleading requirement that the plaintiff need only give the defendant fair notice of its claim. Rule 9(b) requires particularized allegations of the circumstances constituting fraud. Plaintiff must set forth an explanation as to why the statement or omission complained of was false or misleading. *In re Glenfed, Inc. Secur. Litig.*, 42 F.3d 1541, 1548 (9th Cir. 1994). Plaintiff must include statements regarding the time, place, and nature of the alleged fraudulent activities. *Id.*

B. Defendants' Rule 9(b) Arguments^{1/}

1. The Defendants argue that Rule 9(b) applies to the causes of action alleged by Plaintiff.

FED. R. CIV.P. 9(b) requires that in “all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.” Defendants provide binding authority that Plaintiff's causes of action must be pled with particularity, *See Haskell v. Time, Inc.*, 857 F.Supp. 1392, 1398 n.9 (E.D. Cal. 1994) (Sections 17200 and 17500 unfair business practices and false advertising must be pled in accordance with FED. R. CIV.P. 9(b)); *Khoury v. Maly's of Cal., Inc.*, 14 Cal. App. 4th 612, 619 (1993) (dismissing a complaint that failed to describe the manner in which customers were misled, explaining that a plaintiff suing under Section 17200 “must state with reasonable particularity the facts supporting the statutory elements of the violation”); *Outboard Marine Corp. v. Superior Court*, 52 Cal. App. 3d 30, 37 (1975) (Consumer Legal Remedies Act Section 1770 is a fraud cause of action).

Moreover, Ciba/Novartis argue that FED. R. CIV.P. 9(b)'s pleading requirement applies because Plaintiff's allegations sound in fraud, such as misrepresentation, deception, and inducement.

^{3/} CHADD and Novartis specifically moved to dismiss pursuant to FED. R. CIV.P. 9(b). The APA joined in both motions.

2. Defendants argue that the First Amended Complaint does not meet the pleading requirements provided by Rule 9(b).

Defendants complaint that Plaintiff's allegations fail to explain the time, place, and nature of the alleged fraud beyond broad generalizations. CHADD argues that Plaintiff's Amended Complaint does not identify even one false, misleading, or deceptive statement made by CHADD. CHADD also points out that Plaintiff has not identified any advertisements.

Ciba/Novartis argue that they are not on notice of their apparent misrepresentations and that Plaintiff's allegations are insufficient to justify discovery. Ciba/Novartis argue that if Plaintiff is in a position under Rule 11 to allege that he has been deceived by passages of the DSM, misrepresentations, or advertising, he should be in a position to state what passages, facts, or advertisements misled him.

Civa/Novartis brought to the Court's attention that the Southern District of Texas found that FED. R CIV. P. 9(b)'s pleading requirement applies to a Complaint brought by the same plaintiffs' attorneys alleging facts virtually identical to the instant Amended Complaint when it dismissed plaintiff's complaint with leave to amend.

C. Plaintiff Contends That He Is Not Required to Comply with FED. R CIV. P 9(b), but Has Done So, in Any Event.

Plaintiff claims that FED. R. CIV. 9(b) does not apply to his consumer rights based causes of action. Plaintiff says tthat Rule 9(b) only applies to common law fraud and mistake. Plaintiff objects that the Defendants' authority only discussed the application of Rule9(b) in dicta.

In any event, Plaintiff argues that he has met Rule 9(b)'s mandates. Plaintiff says he has pled the best he can without the benefit of discovery and that this Court should be hesitant to dismiss the Amended Complaint before discovery. Plaintiff claims that the following allegations sufficiently plead fraud:

- a. CHADD received contributions from Ciba/Novartis without disclosing the contributions,
- b. CHADD has attempted to increase the supply of Ritalin,
- c. CHADD's activities have led to a substantial increase in the amount of Ritalin taken by school children,
- d. CHADD has distributed misinformation.

In specific response to Ciba/Novartis' Motion, Plaintiff argues that the following allegations plead fraud with particularity:

- a. Novartis maintained financial relationships with CHADD and the APA,
- b. Novartis failed to disclose the financial relationship;
- c. Novartis took steps to increase the use of Ritalin,
- d. Novartis failed to warn consumers that inadequate studies have been performed on side effects;
- e. Novartis has misled the public about the limited effectiveness of Ritalin.

D. Discussion

Plaintiff failed to plead fraud with the particularity required by RED. R. CIV. P. 9(b). Plaintiff does not persuasively distinguish the binding authority that FED. R. CIV. P.9(b) applies to his claims and is incorrect that Rule 9(b) only applies to common law causes of action.

In addition, allegations of a financial relationship between Novartis, CHADD, and the APA do not state an actionable claim. Plaintiff failed to plead any allegations of specific representations that were false, when the representations were made, where the representations were made, and by whom. Finally, Plaintiff has not alleged any causal connection to the Defendants or any ad damages. Plaintiff should be able to point out some specific misrepresentations to support Plaintiff's claims, but failed to do so. The Court hereby grants Defendants' Rule 9(b) motions.

**DEFENDANTS' MOTION TO DISMISS
PURSUANT TO FED. R. CIV. P. 12(b)(6)**

A. Standard of Law

A motion to dismiss for failure to state a claim pursuant to FED. R. CIV. P. 12(b)(6) tests the legal sufficiency of the claims in the complaint. A claim can only be dismissed with prejudice if “it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). This court must accept as true all material allegations in the complaint, as well as reasonable inferences to be drawn from them, and must construe the complaint in the light most favorable to plaintiff. *NL Indus., Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986); *Parks Sch. of Bus., Inc. v. Symington*, 51 F.3d 1480, 1484 (9th Cir.

1995). The court need not, however, accept every allegation in the complaint as true; rather, the court “will examine whether conclusory allegations follow from the description of the facts as alleged by the plaintiff.” *Holden v. Hagopian*, 978 F.2d 1115, 1121 (9th Cir. 1992) (citations omitted).

“Generally, a district court may not consider any material beyond the pleadings in ruling on a Rule 12(b)(6) motion.” *Hal Roach Studios v. Richard Feiner and Co.*, 896 F.2d 1524, 1555 n. 19 (9th Cir. 1990) (citing *Fort Vancouver Plywood Co. v. United States*, 747 F.2d 547, 552 (9th Cir. 1984)). “However, material which is properly submitted as part of the complaint may be considered.” *Hal Roach Studios*, 896 F.2d at 1555 n. 19 (citing *Amfac Mtg. Corp. v. Arizona Mall of Tempe*, 583 F.2d 426 (9th Cir. 1978)). In addition, a court may, on a motion to dismiss, take judicial notice of facts outside the pleadings as allowed pursuant to Federal Rule of Evidence 201. *Mack v. South Bay Beer Distributors*, 798 F.2d 1279, 1282 (9th Cir. 1986) (abrogated on other grounds by *Astoria Federal Savings and Loan Ass'n. v. Solimino*, 501 U.S. 104 (1991)). Therefore, “on a motion to dismiss a court may properly look beyond the complaint to matters of public record and doing so does not convert a Rule 12(b)(6) motion to one for summary judgment.” *Mack*, 798 F.2d at 1282.

B. *Defendants' Arguments in Support of their Rule 12(b)(6) Motions to Dismiss*^{4/}

The APA and CHADD argue that their activities are not the sort of “unlawful” or “unfair” consumer or business activity covered by the California consumer protection statutes under which Plaintiff sues. The DSM states that it is not intended for consumers, but is instead to be applied by

^{4/} Novartis did not move to dismiss under FED. R. CIV. P. 12(b)(6).

professionanl physchiatrists, physicians, and psychologist. Moreover, neither the APA nor CHADD actually markets or sells Ritalin. Nowhere does the Amended Complaint allege a transaction between the APA and Plaintiff, CHADD and Plaintiff, that Plaintiff purchased or read the DSM, that Plaintiff ever read any CHADD literature, or that Plaintiff saw or relied on any APA or CHADD advertisements.

1. The APA contends that it is protected by a California safe harbor doctrine because California laws incorporate the DSM.

The APA's primary contention is that the DSM is protected under a California law "safe harbor" because the State of California has adopted the DSM language verbatim as part of several statutes, therefore the DSM language may not be considered unlawful. For example, to obtain MediCal coverage for a mental disorder, the disorder must be diagnosed in accordance with the DSM. The MediCal regulations specifically include the DSM defintion for ADD.

The APA cites *Cal-Tech Comm., Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal.4th 163 (1999) in support of its safe harbor argument. In that case, cellular phone manufacturers sued LA. Cellular for selling phones below cost. In relevant part, Plaintiffs allege that L.A. Cellular violated the Cal. BUS. & PROF. § 17200's proscription on unfair competition, which is defined as "any unlawful, unfair or fraudulent business act or practice."

The Cal-Tech court explained that 17200 is "sweeping," but not unlimited. *Id.* at 182. "When specific legislation provides a 'safe harbor,' plaintiffs may not use the general unfair competition law to

assault that harbor.” *Id.* “To forestall an action under the unfair competition law, another provision must actually 'bar' the action or clearly permit the conduct.” *Id.* at 183.

The court recognized a safe harbor where another statute provided that “providers of cellular services shall be permitted to sell cellular telephones below cost” under defined circumstances. *Id.* The court remanded the case to determine whether those defined circumstances were present.^{1/}

2. The APA and CHADD argue that the scope of the relevant statutes does not encompass their not-for-profit activities.

The CLRA forbids certain unfair and deceptive practices that are “undertaken by any person in a transaction intended to result or which results in the sale or lease of goods or services to any consumer.” CAL. CIV. CODE § 1770. Transaction is defined as “an agreement between a consumer and any other person.” *Id.* § 1761(e). Likewise, Section 17200 covers “business act[s] or practice[s]” designed to deceive consumers or competitors. CAL. BUS. & PROP.

§ 17200. “[T]he statute only applies to activities that can properly be called a business practice.”

Isuzu Motors Ltd. V. Consumers Union, Inc., 12 F.Supp.2d 1035, 1048 (C.D. Cal. 1998). The

APA and CHADD argue that these provisions are limited to transactions between a buyer and seller in the sale of consumer goods.

^{5/} The APA also cites *Schnall v. The Hertz Corp.*, 78 Cal. App. 4th 1144 (2000). In that case, a statute provided that “a rental company may charge for an item or service provided” if certain conditions were met. The court upheld dismissal of Plaintiff’s 17200 unfair business practices claim based on a rental agreement that met the statute’s requisite conditions, finding the agreement was protected by the statute’s safe harbor.

In support, the APA cites *Boyd v. Keyboard, Network Magazine*, 2000 WL 274204 (N.D. Cal. March 1, 2000). In that case, the plaintiff attempted to hold a magazine liable for a good purchased through an advertisement in the magazine. Plaintiff sued under two of the statutes at issue here, CAL. BUS. & PROF. § 17500 and CAL. CIV. CODE § 1770. The court found that a publisher has no duty to investigate or otherwise warn readers of a potentially misleading advertisement.

The court explained that Section 17500 was inapplicable because that section only applies to two classes of defendants: “Those who harbor the “intent directly or indirectly to dispose of real or personal property or to perform services ... or to induce the public to enter into any obligations relating thereto ...”; and those who 'make or disseminate or cause to be so disseminated [untrue or misleading statements] as part of a plan or scheme with the intent not to sell that personal property or those services ...” *Id.* at *3. The court found neither category applied because a third party defrauded plaintiff and plaintiff did not allege that the magazine attempted to induce plaintiff to purchase or contract for goods or services.

The court found Section 1770 similarly inapplicable because the defendants' actions were not intended to result in the sale or lease of consumer goods or services. Nor did they occur in the context of a transaction in which consumer goods or services were leased or sold. The APA argues that the CLRA has even less applicability here, where the DSM is intended to guide physicians in diagnosis, not in the use of any specific treatment program or purchase or sale of any product. Plaintiff nowhere

contends that CHADD engages in any transactions, business activities, or advertising of Ritalin that bring it within the scope of these statutes.

The APA also argues that the legislative history makes clear that the CLRA only provides a remedy for consumers who have been deceived by unethical merchants in sales transactions, which is not at issue here.

3. The APA argues that the alleged affirmative misrepresentations are not actionable.

The CLRA makes illegal: “misrepresenting the source, sponsorship, approval, or certification of goods or services” and “misrepresenting the affiliation, connection, or association with, or certification by, another.” CAL. CIV. CODE § 1770(a)(2) & (3). The APA contends that Plaintiff’s allegation that the APA failed to disclose Novartis’ contributions does not fall under either category. The APA provides legislative history that the former category forbids industries from labeling their products as being at the top of a grading standard when no grading standard actually exists. The latter category forbids the labeling of a product as approved by a celebrity, when the celebrity does not in fact endorse the product.

4. The APA argues there is not the requisite causal link.

The CLRA applies to damages “as a result of the” unlawful practice. CAL. CIV. CODE § 1780. The APA argues that Plaintiff cannot maintain his claim unless he can link the APA’s alleged activity with a specific injury, such as the misdiagnosis or wrong prescription of the named plaintiff

caused by the DSM. The Amended Complaint does not contain any allegations of whether or how the DSM played a role in Plaintiff's diagnosis.

5. The APA and CHADD argue that they cannot be held liable for false advertising because they do not advertise Ritalin.

Neither the APA nor CHADD markets or sells pharmaceutical products and the Amended Complaint does not allege that the APA or CHADD sold Ritalin. Plaintiff's cause of action is based on the allegation that "untrue and misleading advertising" presents "a continuing threat to members of the general public of California" because the "prescription and use of the drug methylphenidates presents the serious threat of health consequences." Am. Cmpl. ¶ 65. The APA and CHADD contend that this claim cannot be maintained against them.

C. Plaintiff's Opposition to the 12(b)(6) Motions

1. Plaintiff argues that there is no safe harbor protecting the DSM because California's adoption of DSM language in other statutes is irrelevant.

Plaintiff argues that the California legislature did not specifically consider or decide whether the APA could be sued for publication of the DSM.

2. Plaintiff argues that the consumer protection statutes encompass the APA's and CHAD's activities

In response to the APA's argument, Plaintiff argues that the DSM is widely published and available and there is no language prohibiting consumers from using it, so it falls within the consumer protection statutes. Second, Plaintiff argues that the sale of the DSM is the consumer transaction at issue, not the sale of Ritalin, so it is irrelevant that the APA does not sell Ritalin. Finally, Plaintiff claims

that the misrepresentation at issue is the DSM's misrepresentation that its diagnostic criteria for ADD is scientifically reliable. Plaintiff argues that this misrepresentation is proscribed under Section 1770(a)(5) (the DSM claim to have qualities which it does not actually have) and Section 1770(a)(7) (the DSM is of a particular quality).

Plaintiff argues that CHADD's activities fall within the consumer protection statutes. First, Plaintiff argues that CHADD failed to rebut his allegations that CHADD has not fully disclosed the source of its financial contributions. Second, Plaintiff responds that the CLRA should be literally construed to promote its purpose of protecting consumers against unfair and deceptive business practices. Plaintiff alleges that CHADD sells its magazines and other printed materials. Plaintiff cites a 1954 case to argue that a business practice is anything done habitually that becomes a custom in arguing that both the APA and CHADD engage in business practices.

Finally, Plaintiff argues that virtually any representation made in any manner in connection with the sale of goods, services, or credit is advertising. Plaintiff argues that his allegations that CHADD and the APA made misrepresentations are sufficient to maintain his cause of action for false advertising.

3. Plaintiff argues there is causal connection.

Plaintiff claims that the misrepresentation at issue against the APA are:

- a. Misrepresentation as to the source and sponsorship of the DSM;
- b. Misrepresentation of the APA's affiliation, connection, or association with others including Novartis and CHADD;

- c. Misrepresenting that the DSM has sponsorship, approval, and characteristics that it does not;
- d. Misrepresenting that the DSM is of a particular standard when it is not.

After asserting these grounds, Plaintiff asserts, “[t]hus, the causal link between Plaintiff and the APA's misrepresentations has been adequately alleged.”

4. Plaintiff claims that the false advertising at issue is the advertising of the DSM and CHADD's alleged misstatements.

Plaintiff claims that this court against the APA applies to the DSM because the DSM misleads the public into believing it is based on valid science, when in fact it is not. And Plaintiff argues that this Court against CHADD is based on CHADD's public misrepresentations.

D. *Discussion of the APA's and CHADD's 12(b)(6) Motions*

There is no causal connection between the APA and this Plaintiff, nor between CHADD and this Plaintiff. Plaintiff does not allege that he, his doctor, or his parents ever read the DSM or any CHADD literature. Nor does he allege that he suffered damages that directly resulted from any alleged misstatements in the DSM or in CHADD literature. Plaintiff's late contention that the sale at issue in his claims against the APA is the sale of the DSM is disingenuous and found nowhere in the Amended Complaint. In any event, Plaintiff alleges no misrepresentations in connection with the sale of the DSM or CHADD literature. If the issue is the APA's and CHADD's acceptance of donations, Plaintiff has cited no APA or CHADD statement that it does not accept Novartis' contributions, or even any

statement listing some donors, while omitting Novartis. Finally, Plaintiff has not identified any advertisements. The Court hereby grants the APA's and CHADD's 12(b)(6) Motion to Dismiss.

V. CONCLUSION

The Court hereby GRANTS Defendant American Psychiatric Association's Motion to Dismiss Plaintiff's First Amended Complaint Pursuant to FED. R. CIV. P. 12(b)(6). The Court hereby GRANTS Defendant CHADD Inc.'s Motion to Dismiss the Complaint Pursuant to Rules 9(b) and 12(b)(6) of the Federal Rules of Civil Procedure. The Court hereby GRANTS Defendants Novartis and Ciba-Geigy's Motion to Dismiss Pursuant to Federal Rules of Civil Procedure 9(b). Plaintiff is granted leave to amend. If he elects not to do, he must file his Second Amended Complaint on or before April 16, 2001. If no amended complaint is filed by April 26, 2001, the Court will dismiss Plaintiff's First Amended Complaint with prejudice and grant each Defendant's Motion to Strike pursuant to CAL. CODE CIV. P. § 425.16 with reasonable attorney's fees and costs.

If the Plaintiff elects to amend his complaint, the Defendants shall appear as they deem appropriate within twenty days of service. If the Court finds that the Second Amended Complaint states a claim, the Court will then complete its consideration of Defendant's Motions to Strike under CAL. CODE CIV. P. § 425.16. Defendants may supplement or replace their Motions to Strike the First Amended Complaint with briefing that specifically addresses the Second Amended Complaint and Plaintiff may respond accordingly. The Defendants have already met their prima facie burden of

showing that their speech is protected. Thus, the only issue before the Court, once a claim is stated, will be whether Plaintiff has shown a probability of prevailing on his claims.

IT IS SO ORDERED:

DATED: _____

UNITED STATES SENIOR DISTRICT JUDGE

cc: All Parties
Magistrate Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

Maria Elena Hernandez, et al, §

Plaintiffs, §

v. §

CIBA-GEIGY Corp. USA, et al, §

Defendants. §

CIVIL ACTION NO. B-00-82

MEMORANDUM OPINION AND ORDER

BE IT REMEMBERED, that on October 17, 2000, the Court considered the Defendant Novartis Pharmaceuticals Corp.'s ("Novartis") Rule 9(b) Motion to Dismiss [Dkt. No. 10], Defendant American Psychiatric Association's ("APA") Motion to Dismiss under Federal Rule of Civil Procedure 9(b) [Dkt. No. 12], Defendant Children and Adults with Attention-Deficit/Hyperactivity Disorder s ("CHADD") Rule 9(b) Motion to Dismiss [Dkt. No. 17], Plaintiffs' Motion to Compel Discovery [Dkt. No. 28], and Novartis' Motion for a Protective Order [Dkt. No. 41]. After considering the motions, responses and replies filed by the Parties, and hearing argument on the motions, the Court **GRANTS IN PART** and **DENIES IN PART** the three Defendants' motions to dismiss [Dkt. Nos. 10, 12 and 17], **DENIES** Plaintiffs' Motion to Compel Discovery [Dkt. No. 28], **GRANTS** Novartis' Motion for a Protective Order [Dkt. No. 41], and **ORDERS** the Plaintiffs to replead their complaint with particularity in accordance with this order by November 17, 2000. If the Plaintiffs amend

their complaint and the Defendants wish to file additional Rule 9(b) motions, they must do so by December 15, 2000. Furthermore, the Court **STAYS** discovery until it has ruled on the pending Motion to Bifurcate [Dkt. No. 32], and **ORDERS** the Parties to submit an agreed scheduling order within fifteen days after they receive a ruling on the Motion to Bifurcate [Dkt. No. 32].

I. *Defendants' Motions to Dismiss pursuant to Federal Rule of Civil Procedure 9(b) [Dkt. Nos. 10, 12 and 171]*

A. *An overview of Federal Rule of Civil Procedure 9(b)*

Federal Rule of Civil Procedure 9(b) provides that “[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.” Rule 9(b) was formulated to ensure that defendants can effectively respond to plaintiffs’ allegations, to prevent the filing of baseless complaints to obtain discovery on unknown wrongs, and to protect defendants from unfounded allegations of wrongdoing which might injure their reputations. *See Melder v. Morris*, 27 F.3d 1097, 1100 (5th Cir. 1994); *Frith v. Guardian Life Ins. Co. of America*, 9 F.Supp.2d 734,742 (S.D. Tex. 1998); *Mitchell Energy Corp. v. Martin*, 616 F.Supp. 924, 927 (S.D. Tex. 1985).

Rule 9(b) motions to dismiss are treated in essence like Rule 12(b)(6) motions to dismiss for failure to state a claim. *See United States ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 125 F.3d 899, 901 (5th Cir.1997). There is, however, one significant difference between the two types of motions. While courts routinely dismiss causes of action without leave to replead when they grant motions to dismiss for failure to state a claim, there is a general consensus that plaintiffs should be

provided with an opportunity to amend their complaint to meet Rule 9(b)'s requirements before ordering dismissal. See *Hart v. Bayer Corp.*, 199 F.3d 239, 248 n.6 (5th Cir. 2000); *O'Brien v. National Property Analysts Partners*, 936 F.2d 674, 675-76 (2d Cir.1991); *Cates v. International Telephone and Telegraph Corp.*, 756 F.2d 1161, 1180 (5th Cir.1 985); *Frith*, 9 F.Supp.2d at 743.

To dismiss a complaint outright for failure to comply with Rule 9(b) “would be at odds with the liberal approach to pleading of the [R]ules [of Civil Procedure] as a whole, and could lead to injustice.”

Wright & Miller, FEDERAL PRACTICE & PROCEDURE § 1297.

B. *Allegations underlying the Plaintiffs' causes of action*

The Defendants argued in their motions to dismiss and at the Court's initial pretrial conference held on October 16, 2000 that there are fundamental inconsistencies in the Plaintiffs' complaint that prevents them from preparing an adequate defense to this lawsuit. The Court does not find the Plaintiffs' complaint to be contradictory on its face. It reads the complaint to allege, in short, that Defendants Novartis,^{1/} CHADD, and the APA conspired to create the diagnosis of Attention Deficit Disorder (ADD) and Attention Deficit Hyperactivity Disorder (ADHD) in order to increase the sale of Ritalin, a drug manufactured by Novartis, and that ADD and ADHD do not exist. Moreover, the Plaintiffs — parents who purchased Ritalin for their children — allege that the Defendants failed to provide adequate information on the drug's side effects, and that Novartis misrepresented its efficacy.

^{1/} Novartis is the successor corporation to the fourth defendant named in the Plaintiffs' complaint, Ciba-Geigy Corporation USA. The Plaintiffs state in their complaint that Ciba-Geigy Corporation USA no longer exists.

While the Court finds the Plaintiffs' complaint to be clear, the Plaintiffs made allegations at the initial pretrial conference that vary from their complaint. At the hearing, the Plaintiffs acknowledged that there are a small number of children who can be effectively treated with Ritalin, but alleged that the large majority of children who are prescribed Ritalin do not need it. They further alleged that these children were prescribed Ritalin, not out of medical necessity, but because of the Defendants' individual and collective actions to market Ritalin and create improper diagnosis criteria in the Diagnostic and Statistical Manual of Mental Disorders ("DSM") published by the APA. The argument made to the Court at the initial pretrial conference differs markedly from the allegations in the Plaintiffs' live complaint. Therefore, the Court **ORDERS** the Plaintiffs to clarify their basic allegations against each Defendant.^{1/} In addition, if the Plaintiffs amend their complaint to coincide with their assertions at the initial pretrial conference, they must also clarify the claims of the named Plaintiffs. It is unclear whether the named Plaintiffs allege that their children were prescribed Ritalin when they had no medical need for the drug, or whether there was a legitimate medical need for the prescription but they were not warned of side effects or the limited efficacy of the drug.

C. *Does Federal Rule of Civil Procedure 9(b) apply to the causes of action pled by the Plaintiffs?*

The first step in addressing any Rule 9(b) motion to dismiss is to determine what causes of action are pled by the plaintiff and whether the rule applies to those claims. Rule 9(b) applies to all

^{2/} As noted *infra* in Section 11(C) of this order, the Plaintiffs must make individual allegations against each Defendant to satisfy the particularity requirement of Federal Rule of Civil Procedure 9(b).

allegations that sound in fraud. In other words, Rule 9(b) looks beyond how the plaintiff phrases his or her complaint, and applies “to all cases where the gravamen of the claim is fraud even though the theory supporting the claim is not technically termed fraud.” *Frith*, 9 F.Supp.2d at 742 (citing *Toner v. Allstate Ins. Co.*, 821 F.Supp. 276, 283 (D. Del.1993) (citations omitted)).

The Court reads the Plaintiffs' complaint to allege that each Defendant committed common law fraud, violated Article 10 of the United Nations Convention on Psychotropic Substances, and violated the New Jersey Consumer Fraud Act. In addition, the complaint, alleges that the Defendants engaged in a civil conspiracy to violate the aforementioned provisions of law.

1. *Common law fraud*

Rule 9(b) clearly applies to the Plaintiffs' common law fraud claim. To prevail on a common law fraud cause of action, a plaintiff must prove that the defendant made: (1) a misstatement or omission (2) of a material fact (3) with intent to defraud (4) on which the Plaintiffs relied, and (5) which proximately caused him or her injury. *See Williams v. WMX Technologies, Inc.*, 112 F.3d 175, 177 (5th Cir. 1997). Rule 9(b) requires the Plaintiffs to plead all of the elements of common law fraud with particularity, with one exception. The text of Rule 9(b) explicitly states that intent to defraud “may be averred generally.” Federal Rule of Civil Procedure 9(b).

2. *The New Jersey Consumer Fraud Act*

Section 56:8-2 of the New Jersey Consumer Fraud Act states that “[t]he act, use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing, concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise or real estate, or with the subsequent performance of such person as aforesaid, whether or not any person has in fact been misled, deceived or damaged thereby, is declared to be an unlawful practice.” N.J.S.A. § 56:8-2.^{3/} The New Jersey Consumer Fraud Act prohibits a wide variety of actions that can be classified into three categories: affirmative acts, knowing omissions, and regulations enacted under N.J.S.A. 56:8-4. *See Cox v. Sears. Roebuck & Co.*, 647 A.2d 454, 462 (1994). “When the alleged consumer-fraud violation consists of an affirmative act, intent is not an essential element and the plaintiff need not prove that the defendant intended to commit an unlawful act.” *Id.* Even actions taken in good faith may subject the actor to liability for consumer fraud. *See Gennari v. Weichert Co. Realtors*, 691 A.2d 350, 364-65 (1997); *Ji v. Palmer*, 755 A.2d 1221, 1227 (N.J. Super. A.D. 2000). “However, when the alleged consumer fraud consists of an omission, the plaintiff must show that the defendant acted with knowledge, and intent is an essential element of the fraud.” *Id.* *See also In re National Credit*

^{3/} The Plaintiffs cite to N.J.S.A. § 56:8-13-301 in their complaint; however, that section does not exist. The only provisions in Title 56, Chapter 8, that apply to the Plaintiffs' claims are §§ N.J.S.A. 56:8-2 and 56:8-4, the provisions cited in the body of this order. The Court assumes that the Plaintiffs cited to N.J.S.A. § 56:8-13-301 in error.

Management Group. L.L.C., 21 F.Supp.2d 424, 449 (D. N.J. 1998). The violation of a regulation enacted under N.J.S.A. § 56:8-4 is a per se violation of the New Jersey Consumer Fraud Act and imposes strict liability. *See id.*

Causes of action alleged under the New Jersey Consumer Fraud Act are subject to Rule 9(b) if they sound in fraud. *See Naporano Iron & Metal Co. v. American Crane Corp.*, 79 F.Supp.2d 494, 510 (D. N.J.1999). “[T]he fact that the elements of proof in common law fraud and NJCFA violations differ does not exempt [the plaintiff] from the requirement of particularized pleading. . . . Applying Rule 9(b) does not transform NJCFA claims into common law fraud — it merely requires [the plaintiff] to detail its fraud allegations to put defendants on notice, which is a principal rationale behind the 9(b) requirement.” *See id.* The Plaintiffs state in Paragraph 35 of the “Violations of the New Jersey Consumer Fraud Act” section of their complaint that the “[D]efendants suppressed and concealed their knowledge of the potentially harmful and unreasonably dangerous (sic) of Ritalin, and the lack of need for its use in many cases, with the intent that plaintiff and others similarly situated rely upon their fraudulent misrepresentations.” This allegation sounds in fraud and must be pled with particularity.

It is not clear, however, if the Plaintiffs intend to assert a distinct violation of the New Jersey Consumer Fraud Act that is not grounded in fraud. If the Plaintiffs do intend to state a separate cause of action that is not subject to Rule 9(b), they must amend their complaint to explicitly differentiate between violations of the New Jersey Consumer Fraud Act that sound in fraud and those that fall outside of Rule 9(b) s pleading requirements.

3. *Article 10 of the United Nations Convention on Psychotropic Substances*

Article 10 of the United Nations Convention on Psychotropic Substances states:

“Each Party shall require, taking into account any relevant regulations or recommendations of the World Health Organization, such directions for use, including cautions and warnings, to be indicated on the labels where practicable and in any case on the accompanying leaflet of retail packages of psychotropic substances, as in its opinion are necessary for the safety of the user. Each Party shall, with due regard to its constitutional provisions, prohibit the advertisement of such substances to the general public.”

Article 10 does not appear to be grounded in fraud, and, therefore, the Court will not require the Plaintiffs to replead this claim with particularity. The Court has not been able to locate a case which holds that the United Nations Convention on Psychotropic Substances provides an implied private right of action. If it is later shown that an implied private cause of action exists, and that it is grounded in fraud, the Court will require the Plaintiffs to comply with Rule 9(b)'s pleading requirements.

4. *Civil conspiracy to commit common law fraud, violate the New Jersey Consumer Fraud Act, and violate Article 10 of the United Nations Convention on Psychotropic Substances*

The elements of a civil conspiracy are: (1) two or more persons (2) who have a meeting of the minds (3) on an unlawful objective (4) and who commit one or more unlawful, overt acts in furtherance of the objective (5) that proximately causes damage to the plaintiff. *See Operation Rescue-Nat'l v. Planned Parenthood of Houston & S.E. Tex., Inc.*, 975 S.W.2d 546, 553 (Tex.1998); *Massey v. Armco Steel Co.*, 652 S.W.2d 932, 934 (Tex. 1983). A cause of action for civil conspiracy is not based on the conspiracy in and of itself; it is based on an underlying tort. *See Tilton v. Marshall*, 925

S.W.2d 672, 681 (Tex.1996); *Fisher v. Yates*, 953 S.W.2d 370, 381 (Tex.App.- Texarkana 1997).

In this case, the Plaintiffs appear to allege a civil conspiracy to commit common law fraud, to violate the New Jersey Consumer Fraud Act, and to violate Article 10 of the United Nations Convention on Psychotropic Substances.^{4/}

The weight of Fifth Circuit precedent holds that a civil conspiracy to commit a tort that sounds in fraud must be pleaded with particularity. This makes sense given that the underlying tort is subject to Rule 9(b). *See Castillo v. First City Bancorporation of Texas, Inc.*, 43 F.3d 953, 960 (5th Cir. 1994); *U.S. ex rel. Johnson v. Shell Oil Co.*, 183 F.R.D. 204, 208 (E.D.Tex. 1998); *In re Ford Motor Co. Vehicle Paint Litigation*, 1996 WL 426548 (E.D. La. 1996); *Resolution Trust Corp. v. Hays*, 1993 WL 302150 (W.D.Tex.1993). *See also* Rutter, FEDERAL CIVIL PROCEDURE BEFORE TRIAL: 5TH CIRCUIT EDITION § 8:65(2).^{4/} “In deciding the fraud and fraud based

^{4/} At the Court's initial pretrial conference, the Plaintiffs argued that their civil conspiracy claims are not based on fraud, and, therefore, they should not be required to replead them with particularity. The Court does not read the Plaintiffs' complaint to allege an actionable underlying tort that would support a civil conspiracy claim that is not grounded in fraud, with the exception of Article 10 of the United Nations Convention on Psychotropic Substances and a possible non-fraud-based violation of the New Jersey Consumer Fraud Act.

^{5/} The Court recognizes that some other circuits have not required conspiracy to commit fraud to be pled with particularity. *See Hecht v. Commerce Clearing House, Inc.*, 897 F.2d 21, 26 n.4 (2nd Cir. 1990); *Rose v. Bartle*, 871 F.2d 331, 366 (3rd Cir.1989); *Emcore Corn. v. Pricewaterhouse Coopers LLP*, 102 F.Supp.2d 237, 264 (D. N.J. 2000); *Tufano v. One Toms Point Lane Corp.*, 64 F.Supp.2d 119, 131 (E.D. N.Y. 1999) (“Rule 9(b) is not applicable to civil conspiracy claims, even conspiracy to defraud.”).

conspiracy claim, we address the fraud claim first because it is the underlying basis for the conspiracy claim. The trial court dismissed that fraud claim under Rule 9(b) which states that conclusory allegations of fraud are not sufficient to survive dismissal.” *Askanase v. Fatjo*, 130 F.3d 657, 676 (5th Cir. 1997). Therefore, the Plaintiffs' conspiracy claims that rely on a tort grounded in fraud must comply with Rule 9(b). As determined *supra* in Sections I(C)(1) and (2) of this order, the Plaintiffs' common law fraud and at least part of the New Jersey Consumer Fraud Act causes of action are grounded in fraud. Therefore, the conspiracy claims based on the aforementioned causes of action must be pled with particularity.

C. What level of particularity is required by Federal Rule of Civil Procedure 9(b)?

The Fifth Circuit has fleshed out the contours of Rule 9(b)'s particularity requirement through a long line of case law.^{6/} While the exact pleading requirements of Rule 9(b) are case-specific, there are some essential core requirements that can be distilled from Fifth Circuit precedent. *See Guidry v. Bank of LaPlace*, 954 F.2d 278, 288 (5th Cir.1992). In every case based on fraud, Rule 9(b) requires the plaintiff to allege as to each individual defendant “the nature of the fraud, some details, a brief sketch of how the fraudulent scheme operated, when and where it occurred, and the participants.” *Askanase v. Fatjo*, 148 F.R.D. 570, 574 (S.D. Tex.1993). *See Hart*, 199 F.3d at 248 n.6;

^{6/} Parties cite numerous cases from other circuits, and little precedent from the Fifth Circuit. This Court is bound by the rulings of the Fifth Circuit, and, therefore, the Parties should focus their arguments on those rulings.

Williams, 112 F.3d at 177-78; *Zuckerman v. Foxmeyer Health Corp.*, 4 F.Supp.2d 618, 622 (N.D. Tex.1998) (“[T]he plaintiff is obligated to distinguish among those they sue and enlighten each defendant as to his or her part in the alleged fraud” (citations omitted).); *In re Urcarco Secs. Litigation*, 148 F.R.D. 561, 569 (N.D. Tex. 1993). The plaintiff must also explain why the statements or omissions of the defendant were fraudulent. *See Williams*, 112 F.3d at 177.

Rule 9(b)'s heightened pleading requirement must be interpreted in conjunction with the Federal Rules of Civil Procedure's general emphasis on notice pleading. “In applying Rule 9(b), the Fifth Circuit has noted that the particularity standard of Rule 9(b) must be interpreted in conjunction with Rule 8's requirement that the pleading contain a short and plain statement of the claims. . . . A complaint need not state all facts pertinent to a case in order to satisfy the requirements of Rule 9(b). . . . Thus, the focus of a Rule 9(b) inquiry should be whether, given the nature and facts of the case and the circumstances of the parties, the pleading in question is sufficiently particular to satisfy the purposes of Rule 9(b).”^{7/} *Frith*, 9 F.Supp.2d at 742. *See Williams*, 112 F.3d at 178; *Tuchman*, 14 F.3d at 1067; *Guidry*, 954 F.2d at 288. *See e.g. Wright & Miller*, FEDERAL PRACTICE & PROCEDURE §§ 1297 and 1298. “Perhaps the most basic consideration in making a judgment as to the sufficiency of a pleading is the determination of how much detail is necessary to give adequate

^{7/} Official Form 13 in the appendix of the Federal Rules of Civil Procedure illustrates that the requirements of Rule 9(b) can be met in a few sentences.

notice to an adverse party and enable him to prepare a responsive pleading.” Wright & Miller,

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§ 1298. Therefore, when a cause of action grounded in fraud is based on complicated or lengthy occurrences, courts tend to be less exacting. *See e.g. U.S. ex rel. Johnson*, 183 F.R.D. at 208; Wright & Miller, FEDERAL PRACTICE & PROCEDURE § 1298. Moreover, the plaintiff may plead fraud upon information and belief if the facts required to satisfy Rule 9(b) are within the defendants knowledge and control, and the plaintiff can provide adequate support for his or her allegations. *See United States ex rel. Thompson*, 20 F.Supp.2d at 1039; *United States ex. rel. Thompson*, 125 F.3d at 903 (quoting *Tuchman*, 14 F.3d at 1068); Wright & Miller, FEDERAL PRACTICE & PROCEDURE § 1298.

Many, if not most, recent Fifth Circuit cases that explain the level of specificity required by Rule 9(b) are based on Racketeer Influenced and Corrupt Organizations Act (RICO) and securities fraud causes of action.^{8/} These cases strictly apply the heightened pleading standards of Rule 9(b).^{9/} While

^{8/} *See Williams*, 112 F.3d at 178; *Tuchman*, 14 F.3d at 1067-68; *Melder*, 27 F.3d at 1100 n.5; *Castillo v. First City Bancorporation of Texas, Inc.*, 43 F.3d at 961-62; *Shushany*, 992 F.2d at 519-20; *Guidry*, 954 F.2d at 287-88.

^{9/} “In recent years some courts have shown a tendency to be more demanding in their application of Rule 9(b). This has been most noticeable in securities fraud actions and claims under the Racketeer Influenced and Corrupt Organizations Act. These cases undoubtedly reflect a reaction to the increased numbers of these cases and the desire to filter out frivolous cases.” Wright & Miller, FEDERAL PRACTICE & PROCEDURE § 1297.

these cases provide important guidance as to the requirements of Rule 9(b), the Court recognizes that they require a level of specificity that may not apply to the particular facts of this case in every respect.

III. *Plaintiffs' Motion to Compel Discovery [Dkt. No. 281 and Defendant Novartis Motion for a Protective Order [Dkt. No. 41]*

Given that the Court has ruled that portions of the Plaintiffs' complaint do not comply with the particularity requirements of Federal Rule of Civil Procedure 9(b) and has ordered the Plaintiffs to replead their complaint, the Court **STAYS** discovery until the Plaintiffs have filed an amended complaint and the Court has ruled on the pending Motion to Bifurcate Discovery [Dkt. No. 32]. The Plaintiffs' Motion to Compel Discovery [Dkt. No. 28] is therefore **DENIED** and Defendant Novartis Motion for a Protective Order is **GRANTED** to the extent that it is not required to respond to discovery until after the Court has ruled on the aforementioned matters.

IV *Conclusion*

In conclusion, the Court has made in the following rulings in this order:

- (1) The Plaintiffs are **ORDERED** to replead their causes of action for common law fraud, violation of the New Jersey Consumer Fraud Act, conspiracy to commit common law fraud, and conspiracy to violate the New Jersey Consumer Fraud Act with particularity, as required by Federal Rule of Civil Procedure 9(b). If the Plaintiffs do mean to plead a violation of the New Jersey Consumer Fraud Act that does not sound in fraud, they are not required to replead that cause of action with particularity, however, they are

ORDERED to distinguish that cause of action from the allegations in their complaint that are grounded in fraud;

- (2) If the Plaintiffs amend their complaint and the Defendants wish to file additional Rule 9(b) motions, they must do so by December 15, 2000. As provided by this Court's Chamber Rules, the Plaintiffs' response to such motions will be due twenty days after they are filed. The Court will rule on any additional Rule 9(b) motions in an expedited fashion;
- (3) Discovery is **STAYED** until the Plaintiffs have filed an amended complaint, and the Court has ruled on any subsequent Rule 9(b) motions and the Motion to Bifurcate Discovery [Dkt. No. 32]; and,
- (4) The Parties are **ORDERED** to submit an agreed proposed scheduling order within fifteen days after the Court rules on the pending Motion to Bifurcate Discovery [Dkt. No. 32] since there is no scheduling order currently in place.

DONE at Brownsville, Texas, this 17th day of October 2000.

Hilda G. Tagle
United States District Judge