

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

DEC 11 2018

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

ASHLEY FRANZ, On behalf of herself and
all others similarly situated,

Plaintiff-Appellant,

v.

BEIERSDORF, INC., a Delaware
corporation,

Defendant-Appellee.

No. 17-55646

D.C. No.

3:14-cv-02241-LAB-AGS

MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
Larry A. Burns, District Judge, Presiding

Argued and Submitted November 13, 2018
Pasadena, California

Before: GOULD and MURGUIA, Circuit Judges, and AMON,** District Judge.

The district court dismissed Plaintiff-Appellant Ashley Franz's claim on the grounds that she failed to adequately plead that the amount in controversy exceeds the jurisdictional minimum and that she lacks standing. Plaintiff timely appealed

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Carol Bagley Amon, United States District Judge for the Eastern District of New York, sitting by designation.

that decision. We have jurisdiction under 28 U.S.C. § 1291. We reverse and remand for further proceedings.

1. Plaintiff has adequately pled that the amount in controversy exceeds \$5,000,000—the jurisdictional minimum under the Class Action Fairness Act (“CAFA”). 28 U.S.C. § 1332(d)(2). We need not decide which version of Plaintiff’s complaint we should look to in determining jurisdiction, because we conclude that Plaintiff has adequately pled the requisite amount in controversy under each iteration. In her Second Amended Complaint, which proposes the most restrictive class definition, Plaintiff alleges that the proposed class includes all California consumers who purchased NIVEA Skin Firming Hydration Body Lotion with CoQ10 Plus formulated with Co-Enzyme Q10 and Hydra-IQ (“Nivea CoQ10”) “within the applicable statute of limitations period.” Nivea CoQ10 retails for approximately \$10. During the applicable class period, Defendant-Appellee Beiersdorf, Inc. allegedly sold Nivea CoQ10 “online and in virtually every major food, drug, and mass retail outlet.” It is easily conceivable that Defendant sold the product 500,000 times in a state the size of California over a multi-year period. Defendant does not dispute that the amount in controversy exceeds \$5,000,000. We cannot say “to a legal certainty that the claim is really for less than the jurisdictional amount.” *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 289 (1938); *accord Naffe v. Frey*, 789 F.3d 1030, 1039 (9th Cir.

2015); *Lowdermilk v. U.S. Bank Nat'l Ass'n*, 479 F.3d 994, 998 (9th Cir. 2007), *overruling on other grounds recognized by Rodriguez v. AT & T Mobility Servs. LLC*, 728 F.3d 975, 981 (9th Cir. 2013). The district court erred by *sua sponte* dismissing Plaintiff's claim on the ground that Plaintiff did not adequately allege that the amount in controversy exceeds the jurisdictional minimum.

2. Plaintiff has standing under California's Unfair Competition Law ("UCL"). Plaintiff alleges that Defendant sold a "drug"—Nivea CoQ10—without FDA approval. Plaintiff contends that doing so violates the Food, Drug, and Cosmetic Act ("FDCA"), *see* 21 U.S.C. §§ 331(d), 355(a), and California's Sherman Law, *see* Cal. Health & Safety Code § 111550. Plaintiff alleges that, as a result, she spent money on a product that should not have been on the market. Those allegations are sufficient to establish standing under the UCL. *See Medrazo v. Honda of N. Hollywood*, 205 Cal. App. 4th 1, 11–13 (2012), *modified on denial of reh'g* (Apr. 16, 2012). Plaintiff need not plead reliance because neither the alleged FDCA violation nor the alleged Sherman Law violation requires allegations of fraud or deception. *See id.* at 12 (explaining that claims based on a theory of fraud require a plaintiff to demonstrate reliance to establish standing because "reliance is the causal mechanism of fraud." (quoting *In re Tobacco II Cases*, 46 Cal. 4th 298, 326 (2009))). In response, Defendant relies on *Demeter v. Taxi Computer Services*, 21 Cal. App. 5th 903 (2018), and *Medina v. Safe-Guard*

Products, 164 Cal. App. 4th 105 (2008), to contend that Plaintiff lacks standing under the UCL. Because those cases concerned voidable service contracts, *Demeter*, 21 Cal. App. 5th at 913; *Medina*, 164 Cal. App. 4th at 112, whereas *Medrazo* and the present case concern goods that a defendant was allegedly not legally allowed to sell in the form being offered, we believe *Medrazo* to be more directly on point. We therefore hold, consistent with *Medrazo*, that Plaintiff has sufficiently demonstrated standing under the UCL.

3. Plaintiff likewise has standing under Article III of the United States Constitution. Plaintiff alleged injury in fact—she spent money on Nivea CoQ10. Defendant’s allegedly illegal conduct caused that injury, insofar as Defendant allegedly sold a product in commerce that it should not have sold. And the injury is redressable—in restitution—by a favorable court decision. *Spokeo, Inc. v. Robbins*, 136 S. Ct. 1540, 1547 (2016). The district court erred by dismissing Plaintiff’s claim on the ground that she lacked standing.

4. As an alternative ground for affirmance, Defendant urges us to hold that Plaintiff has failed to state a claim. The district court did not reach this issue. Although we may affirm on “any ground supported by the record,” *Canyon Cty. v. Syngenta Seeds, Inc.*, 519 F.3d 969, 975 (9th Cir. 2008), we decline to decide whether Plaintiff has “state[d] a claim to relief that is plausible on its face,” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*,

550 U.S. 544, 570 (2007)), in the first instance. The district court should consider Defendant's contentions on remand in the first instance.

REVERSED and **REMANDED** for further proceedings.

United States Court of Appeals for the Ninth Circuit

Office of the Clerk
95 Seventh Street
San Francisco, CA 94103

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)

Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
 - ▶ A material point of fact or law was overlooked in the decision;
 - ▶ A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
 - ▶ An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ▶ Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ▶ The proceeding involves a question of exceptional importance; or
- ▶ The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms*.
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms*.

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
 - ▶ Thomson Reuters; 610 Opperman Drive; PO Box 64526; Eagan, MN 55123 (Attn: Jean Green, Senior Publications Coordinator);
 - ▶ and electronically file a copy of the letter via the appellate ECF system by using “File Correspondence to Court,” or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
Form 10. Bill of Costs**

Instructions for this form: <http://www.ca9.uscourts.gov/forms/form10instructions.pdf>

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The Clerk is requested to award costs to (*party name(s)*):

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