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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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ABBOTT LABORATORIES et al.,

Plaintiffs,

-against-

ADELPHIA SUPPLY USA et al.,

Defendants.
---x

NOT FOR PUBLICATION
MEMORANDUM & ORDER
15-CV-5826 (CBA) (LB)

AMON, United States District Judge:

Defendants TDP Trading, Inc. and Dedac Nguyen (collectively "TDP Defendants" or "TDP") brought a number of crossclaims against crossclaim-defendants HMF Distributing, Inc. and Howard Frank (collectively "HMF Defendants" or "HMF"), alleging breach of contract, breach of UCC and common law warranties, and intentional and negligent misrepresentation in relation to HMF's sale of diverted international FreeStyle test strips to TDP for resale in the United States. (See D.E. # 1037 ("Am. Crossclaim") ¶¶ 6, 19–33.) Before the Court is HMF Defendants' motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). For the reasons stated below, the motion is granted in part and denied in part.

BACKGROUND

The parties in this case are all defendants in an action brought by Plaintiffs Abbott Laboratories, Abbott Diabetes Care Inc., and Abbott Diabetes Care Sales Corp. (collectively, "Abbott") alleging that hundreds of defendants violated Abbott's trademark by selling the international version of Abbott's FreeStyle diabetes test strips within the United States. Following an evidentiary hearing, the Court granted Abbott's request for a preliminary injunction barring defendants from selling the international strips in the United States, which the Court extended to additional defendants as they were included in the action, (see D.E. # 131 ("First P.I. M&O"); D.E.

258 ("Second P.I. M&O"); D.E. # 423 ("Third P.I. M&O")). HMF Defendants, who Abbott alleges resold diverted test strips to various defendants, including TDP Trading, (see D.E. # 307 ¶¶ 429, 457), were enjoined in the second preliminary injunction, (see D.E. # 258-1). TDP Defendants were enjoined in the third preliminary injunction. (See Third P.I. M&O).

On February 8, 2017, TDP Defendants asserted crossclaims against HMF Defendants, which they amended on February 15, 2017. (See D.E. # 998; Am. Crossclaim.) TDP Defendants allege that throughout 2014 and 2015, HMF contacted TDP to offer to sell them FreeStyle test strips "with the intent and knowledge that TDP would be re-selling the test strips to retail customers in California." (Am. Crossclaim ¶ 6.) TDP Defendants allege that HMF engaged in this sale even though they were aware or should have been aware that the resale of diverted international FreeStyle strips in the domestic retail marker "potentially violated" the Lanham Act. (Id. ¶ 11.) TDP Defendants add that despite having this alleged knowledge, HMF failed to share it with them, even though HMF knew that TDP

> were relying on HMF's implicit if not express representation and warranty that the Freestyle test strips being sold by HMF were genuine under United States law, that HMF was able to legally sell the FreeStyle test strip to TDP Trading, and that TDP Trading was thereafter able to legally sell the FreeStyle test strips to its retail customers without violation of law or any [of Abbott's] rights . . . .

(Id. ¶ 12.) TDP Defendants further allege that HMF therefore were or should have been aware that by selling the diverted strips to TDP—who were planning to re-sell the strips to consumers—HMF were likely exposing TDP Defendants to the risk that Abbott would name TDP Defendants in the instant underlying suit. (Id. ¶ 16.)

TDP Defendants assert that HMF breached their contract (Count One) and breached the UCC and common law "implied warranties of merchantability and fitness for use and express warranty of title and against infringement" (Counts Two and Three), because the international

strips were not fit for the purpose for which HMF knew TDP intended to use them, namely for resale in the domestic market. (Id. ¶¶ 19–27; D.E. # 1112 ("Opp. Mem.") at 10–11.) They also allege that HMF engaged in intentional and/or negligent misrepresentation (Counts Four and Five), because HMF failed to inform TDP about the potential illegality of selling the strips domestically, despite their knowledge that TDP were relying on HMF's "express and implicit" representations that the strips could legally be resold in the manner in which TDP intended to sell them. (See Am. Crossclaim ¶¶ 28–33; Opp. Mem. at 12, 15–16.) TDP Defendants accordingly allege that as a result of HMF's failure to apprise TDP of their knowledge of the legality of reselling diverted test strips in the domestic market, TDP purchased and resold the strips under the belief that it was legal to do so, resulting in Abbott including TDP Defendants in the instant lawsuit. (Am. Crossclaim ¶¶ 12, 17.)

STANDARD OF REVIEW

In resolving a motion to dismiss, the Court must "construe the Complaint liberally, accepting all factual allegations in the Complaint as true, and drawing all reasonable inferences in plaintiff['s] favor." Galiano v. Fid. Nat'l Title Ins. Co., 684 F.3d 309, 311 (2d Cir. 2012). Nevertheless, the "[f]actual allegations must be enough to raise a right of relief above the speculative level," and the complaint must plead "enough fact[s] to raise a reasonable expectation that discovery will reveal evidence of [plaintiff's claim]." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556 (2007). Put differently, "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Twombly, 550 U.S. at 570). In applying these principles, the Court "must confine its consideration to facts stated on the face of the complaint, in documents appended to the complaint or incorporated in the complaint by reference,

and to matters of which judicial notice may be taken." Tarshis v. Riese Org., 211 F.3d 30, 39 (2d Cir. 2000) (citing Allen v. WestpointPepperell, Inc., 945 F.2d 40, 44 (2d Cir. 1991)).

DISCUSSION

I. Contract Claim

TDP Defendants conceded in their opposition and again at oral argument that the breach of contract is premised on HMF's alleged breach of their express or implied warranties under the California Uniform Commercial Code ("CUCC"), and they do not assert an independent breach of contract under California law.[1] (Opp. Mem. at 9; Transcript of Jul. 6, 2017 Oral Argument ("OA Tr.") at 17–18.) Accordingly, since the breach of contract claim is entirely duplicative of the warranties claims, it is dismissed. See, e.g., Genesis Health Clubs, Inc. v. LED Solar & Light Co., 639 F. App'x 550, 554–55 (10th Cir. 2016) (affirming district court's dismissal of plaintiff's contract claims that were "encompassed by its warranty claims" where plaintiff "ha[d] not explained how it would have gained any advantage by retaining the contract claim"); Spectro Alloys Corp. v. Fire Brick Eng'rs Co., 52 F. Supp. 3d 918, 929–30 (D. Minn. 2014) (dismissing plaintiff's breach of contract claims where the "'obligations' [were] warranty obligations as reflected in the warranty claims, not separate contractual obligations"); cf. Aramony v. United Way of Am., 949 F. Supp. 1080, 1084 (S.D.N.Y. 1996) ("Although the Federal Rules of Civil Procedure allow the pleading of alternative theories, a plaintiff may not plead the same claim more than once.").

II. CUCC Warranties

TDP Defendants assert that by selling international test strips without informing TDP that the resale of gray market goods might be illegal, HMF violated the CUCC warranty against

[1] The parties agreed at oral argument that California law governs this case.

infringement (§ 2-312(3)), warranty of merchantability (§ 2-314), and warranty of fitness for a particular purpose (§ 2-315).[2]

HMF Defendants assert that TDP Defendants cannot claim the protection of the CUCC warranties because TDP were not bona fide or good faith purchasers. (D.E. # 1139 ("Supp. Br.") at 2–4.) In support, HMF Defendants cite to the CUCC's definitions provision, § 1-201(b)(20), which defines "good faith" as "honesty in fact and the observance of reasonable commercial standards of fair dealing." At oral argument, HMF Defendants also cited—for the first time—to § 1-304, which states that "[e]very contract or duty within this code imposes an obligation of good faith in its performance and enforcement." Relying on these two provisions, HMF Defendants argued that TDF Defendants were not enforcing their contract with HMF in good faith because any business that deals in the sale of diverted tests strips has to know that it runs the risk of being sued for infringement by the manufacturer and so cannot turn around and allege a breach of warranty in the event that it is sued. (See OA Tr. at 8–9, 25–26.) Accordingly, HMF Defendants conclude that, to the extent that TDP Defendants claim they were unaware of the dubious legality of the strips, TDP Defendants did not act in a commercially reasonable manner and thus are barred from claiming the protections of the CUCC. The Court disagrees.

As an initial matter, the Court notes that HMF Defendants misunderstand the reach of the "good faith" standard in § 1-304. The commentary to § 1-304 clarifies that the "good faith . . . required in the performance and enforcement of all agreements or duties" that applies to each contract under the UCC "means that a failure to perform or enforce, in good faith, *a specific duty or obligation under the contract*, constitutes a breach of that contract or makes unavailable, under the particular circumstances, a remedial right or power." UCC § 1-304 cmt. 1 (emphasis added).

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[2] TDP Defendants withdrew their claim under CUCC § 2-313 because it was not alleged in their Amended Crossclaim. (D.E. # 1140 ("Supp. Opp.") at 7 n.4.)

Accordingly, the good faith requirement is not "an independent cause of action for failure to perform or enforce in good faith" that governs a party's every move pre- and post-contract, but rather applies only to the specific obligations that a party took upon themselves in the contract. Id. HMF Defendants do not allege that TDP had any discrete responsibilities under the contract (indeed, they deny that TDP has even pleaded the existence of a contract, (see D.E. # 1111-1 ("Br.") at 7)) and so cannot claim that TDP failed to perform or enforce those obligations in good faith. HMF Defendants' attempt to stretch the application of § 1-304's good faith requirement beyond the confines of a contract's express language is therefore unavailing.

Moreover, to the extent that HMF Defendants alternatively assert that, because they did not purchase in good faith, TDP cannot be bona fide purchasers and thus cannot seek CUCC protections, (Supp. Br. at 2), HMF Defendants fail to point the Court to any cases applying the bona fide purchaser rule as a prerequisite to maintaining a warranty claim against a seller, and the relevant sections of the CUCC do not include any such limitation. Tellingly, while HMF Defendants cite various cases defining the good faith and bona fide purchaser standards, they provide no authority to support their bold assertion that "[i]t is a longstanding cornerstone of commercial transactions law . . . that remedies for a purchaser alleging receipt of tainted goods from an alleged devious seller are preserved only for a bona fide purchaser." (Id.) To be sure, although CUCC § 1-201(b)(9) includes a definition of a "Buyer in ordinary course"—akin to a bone fide purchaser—who must purchase in good faith and without knowledge that the purchase violates a third party's rights, there is no indication anywhere in the CUCC that *only* buyers in the ordinary course may invoke the Code's protections, which would be an odd omission considering the significant consequences that would result from such a rule. To the contrary, the various sections of the CUCC establishing rules that apply specifically to buyers in ordinary course

indicate that not every buyer seeking CUCC protection is a buyer in ordinary course, because otherwise the CUCC could simply indicate "buyer," without expressly indicating that it was in the ordinary course. See, e.g., CUCC §§ 2-403(2); 2-702(3); 7-205; 7-504(c); 9-320(a) & (d).

The few cases that HMF Defendants do cite are inapposite, as they concern the CUCC's provisions related to transfer of title to good faith purchasers. They do not concern a party's ability to invoke the CUCC in the first instance. In none of the cases does the court consider, let alone determine, whether a buyer must show—as a threshold matter before obtaining the protections of the CUCC—that he was a bona fide or good faith purchaser for value. The Court therefore declines HMF Defendants' invitation to erect this unfounded hurdle to seeking CUCC protection.

A. Warranty Against Infringement

Under CUCC § 2-312(3), as relevant here, "a seller who is a merchant regularly dealing in goods of the kind warrants that the goods shall be delivered free of the rightful claim of any third person by way of infringement or the like." In California, "the term 'rightful claim' as used in the statute is intended to broadly encompass any nonfrivolous claim of infringement that significantly interferes with the buyer's use of a purchased good." Pac. Sunwear of Cal., Inc. v. Olaes Enters., Inc., 167 Cal. App. 4th 466, 475 (2008). The court in Pacific Sunwear explained that the public policy behind § 2-312(3) is that "the burden of infringement claims is most sensibly placed on the seller who will generally have superior knowledge as to the existence of such claims, and a stronger incentive to seek out and resolve potential infringement claims prior to sale." Id. at 478. Relying upon this language, HMF Defendants urge that the warranty is not intended to protect buyers who deal in the product at issue—which they assert does TDP—because they have just as much knowledge about the product as do sellers. (See Supp. Br. at 7.) However, although the court there recognized that "the most common scenario" for the application of this policy is the case of

an "[a]verage buyer[]" who would "not anticipate that their title to and use of purchased goods will be contingent upon their successful litigation of a subsequent infringement action," the court was clear that this rationale was the basis for a "generally applicable implied warranty" and cited approvingly to a commentary noting that the warranty applies even "where it is sheer imagination to presume that the seller has [superior] knowledge." Pac. Sunwear, 167 Cal. App. 4th at 478–79. This accords with the language of § 2-312(3), which limits its applicability to *sellers* who regularly deal with the product but does not exclude from protection *buyers* who do so, even though they presumably would have equal knowledge.[3] Therefore, even assuming that TDP regularly deal in the goods at issue, this would not remove them from the protections of the warranty against infringement.

HMF Defendants nonetheless contend that TDP Defendants cannot seek recovery based on § 2-312 because they failed to comply with the notice requirements established by CUCC § 2-607(3)(b). (See Supp. Br. 7–8.) Section 607(3)(b) states that "[w]here a tender has been accepted . . . if the claim is one for infringement or the like (subsection (3) of Section 2-312) and the buyer is sued as a result of such a breach he must so notify the seller within a reasonable time after he receives notice of the litigation or be barred from any remedy over for liability established by the litigation." HMF Defendants note that nowhere on the face of TDP Defendants' pleadings is there any indication that such notice was given to HMF Defendants, let alone that the notice was reasonable, and therefore that "TDP Defendants are barred from any remedy with respect to the warranty." (Supp. Br. at 8.) This argument fails for two reasons.

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[3] This is buttressed by the fact that § 2-312(3) does carve out from protection buyers "who furnish[] specifications to the seller," because the CUCC recognizes that in such a case it is the buyer who would generally have superior knowledge of the details surrounding the desired specifications and thus the appropriate default rule is to place the responsibility to avoid creating an infringing product upon the buyer. See Pac. Sunwear, 167 Cal. App. 4th at 479.

First, although it is true that TDP Defendants fail to plead that they provided HMF Defendants notice of Abbott's litigation, the Court takes judicial notice of the fact that HMF was included in that litigation well before TDP Defendants were added, and accordingly were on notice that their sales of these strips were being challenged as violating Abbott's trademark. It is this notification of the *third party's* contention of illegality—not, as in § 2-607(3)(a), of the buyer's intent to claim a breach or seek indemnification—that the notice is intended to provide. To be sure, the commentary to the UCC describes the purpose of such notice as to "give a warrantor against infringement an opportunity to defend or compromise third-party claims or be relieved of his liability." UCC § 2-607 cmt. 7. Here, where HMF Defendants were already aware of—and strenuously defended against[4]—Abbott's claims by virtue of their inclusion in the very same lawsuit that they argue TDP Defendants were obligated to inform them about, the Court finds that they received the notice required under § 2-607(3)(b). See, e.g., Dolori Fabrics, Inc. v. Ltd., Inc., 662 F. Supp. 1347, 1358 (S.D.N.Y. 1987) (finding the identical notice requirement in N.Y. UCC § 2–607(3)(b) met despite the buyer's failure to provide the notice, where the seller and buyer were codefendants in the third party's suit); cf. David's Bridal, Inc. v. The House of Brides, Inc., No. 06-CV-5660 (SRC), 2010 WL 715437, at *4 (D.N.J. Feb. 23, 2010) (finding that a seller lacked notice where the third party previously sued the seller under the same infringement theory used against the buyer, because the prior unrelated suit "in 2004 does not provide any notice to [the seller] that [the buyer] was sued by [the third party] in 2006 over claims of infringement").

Second, even if the Court were to find the notice requirement not met, HMF Defendants are incorrect that this would preclude TDP Defendants from seeking "any remedy with respect to

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[4] Indeed, the docket reflects that HMF Defendants appeared in and challenged Abbott's case multiple times before TDP Defendants were even joined, including by filing an opposition to the preliminary injunction and seeking a pre motion conference on a motion to dismiss. (See D.E. # 168, 194, 207, 218, 220, 230, 242, 253, 288, 300, 332.)

the warranty against infringement." (Supp. Br. at 8). Rather, per the terms of § 2–607(3)(b) this failure would only bar TDP Defendants "from any remedy over for liability established by the litigation." As discussed above, California law makes clear that the warranty against infringement applies to any "nonfrivolous claim of infringement that significantly interferes with the buyer's use of a purchased good," not merely to meritorious claims. Pac. Sunwear, 167 Cal. App. 4th at 475. Indeed, the court there held that "the existence of litigation is neither necessary nor, in itself, sufficient to establish that a claim is 'rightful.' A claim of infringement may be rightful under section 2312(3) whether or not it is ultimately pursued in litigation." Id. at 482. Because the warranty may be invoked even where no litigation is initiated, it is necessarily the case that a buyer may enforce the warranty even where no liability is established by the litigation. Thus, while the failure to provide the notice required by § 2–607(3)(b) may cut off the buyer's ability to seek indemnification from the seller for losses sustained as a result of "liability established by the litigation," it does not on its face bar the buyer from seeking other remedies against the seller that arise incident to a third parties' "rightful claim" but which are not the result of a finding of liability. For this reason, too, TDP Defendants' claims are not barred by their failure to give notice.

There being no policy or procedural bar stopping TDP Defendants from asserting a claim under § 2-312(3), the Court finds that TDP Defendants have adequately pleaded sufficient facts to state a claim under the plain language of the provision. TDP Defendants plead that HMF is a merchant regularly dealing in these test strips, (Am. Crossclaim ¶ 5), and that Abbott has raised a nonfrivolous claim of infringement related to the sale of diverted test strips, (id. ¶¶ 15–17), and there is no indication that TDP furnished any specifications regarding the products to HMF, (id. ¶¶ 6–8). Nor do HMF Defendants contest that these elements are met, instead basing their arguments on the above-rejected contentions that TDP Defendants may not even seek the

protection of the warranty. For these reasons, the Court denies HMF Defendants' motion to dismiss TDP Defendant's claim for breach of the warranty against infringement.

B. Warranty of Merchantability

Section 2-314 of the CUCC states that "a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind." A plaintiff claiming breach of an implied warranty of merchantability must show that the product "did not possess even the most basic degree of fitness for ordinary use." Mocek v. Alfa Leisure, Inc., 114 Cal. App. 4th 402, 406 (2003). The warranty "does not 'impose a general requirement that goods precisely fulfill the expectation of the buyer. Instead, it provides for a minimum level of quality.'" Am. Suzuki Motor Corp. v. Superior Court, 37 Cal. App. 4th 1291, 1296 (1995) (quoting Skelton v. Gen. Motors Corp., 500 F. Supp. 1181, 1191 (N.D. Ill. 1980), rev'd on other grounds, 660 F.2d 311 (7th Cir. 1981)). The focus of the test is therefore whether the product is fit for its traditional or ordinarily use, not some additional use for which the purchasers hope to use it. See, e.g., Carlson v. General Motors Corp., 883 F.2d 287, 297 (4th Cir. 1989) (rejecting claim that the warranty of merchantability protects a car purchaser's purpose to resell the car, explaining that because "cars are designed to provide transportation . . . where a car can provide safe, reliable transportation, it is generally considered merchantable").

TDP Defendants do not allege that the international test strips that they purchased would not work with Abbott meters to test the blood glucose levels of the end users.[5] Rather, they argue that the strips "were not suited for the purpose for which HMF sold them, i.e., re-sale into the domestic market." (D.E. # 1140 ("Supp. Opp.") at 4.) Plainly, this is not the standard set-out in § 2-314, which concerns itself with the ordinary use for the product. TDP Defendants' attempt to

[5] TDP Defendants concede that "it is uncontestable that the ordinary use of the goods at issue—diabetes test strips—is testing of the blood glucose level of patients." (Supp. Opp. at 9.)

circumvent the case law by arguing that the international strips have been rendered "illegal to resell" and thus are "unfit for any purpose," (id. at 7), is not persuasive, because the question is not whether the purchaser is ultimately able to use the goods in the manner they intended, but rather whether the goods intrinsically are fit for their ordinary use. See, e.g., Pisano v. American Leasing, 146 Cal. App. 3d 194, 198 (1983) ("Crucial to the inquiry is whether the product conformed to the standard performance of like products used in the trade."); Thomas v. Costco Wholesale Corp., No. 12-CV-02908 (BLF), 2014 WL 5872808, at *3 (N.D. Cal. Nov. 12, 2014) ("Plaintiff's allegations that the products are 'illegal and unsellable' is not enough to plead a violation of the implied warranty of merchantability."). No one—including Abbott in the main action—asserts that the international strips would not effectively test blood glucose levels if used. TDP Defendants' claim under CUCC § 2-314 therefore fails.

C. Warranty of Fitness for a Particular Purpose

CUCC § 2-315 states that "[w]here the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose." "A 'particular purpose' differs from the ordinary purpose for which the goods are used in that it envisages a specific use by the buyer which is peculiar to the nature of his business." UCC § 2-315, cmt. 2.

TDP Defendants argue that they intended the particularized use of reselling the strips they bought from HMF in the domestic retail market, that they relied upon HMF's skill in selling them strips that they could use for this particularized purpose, and that HMF was aware of this intended use and of TDP's asserted reliance. (Am. Crossclaim ¶ 12.) The Court finds, however, that the

CUCC neither contemplates that a buyer may justifiably rely upon a seller's legal conclusions or that an intent to resell could constitute a particularized purpose.

The particular skill and judgment that TDP were entitled to rely upon is the skill and judgment that HMF had *as a seller of test strips*, namely, that the test strips being sold would be effective for the purpose for which they knew they would be used: testing blood. TDP had no right to rely upon, and HMF no duty to warrant, HMF's skill or judgment in determining the legality of the strips' sale in the United States, which is a competence that falls outside that which is reasonably expected of a simple merchant who deals in a given product. The intended scope of the provision is made clear in the comments to the identical UCC provision, which explains that the warranty for a particular purpose will be triggered if a seller of "shoes [that] are generally used for the purpose of walking upon ordinary ground," sells them to a buyer knowing that that "particular pair was selected to be used for climbing mountains." UCC § 2-315, cmt. 2. Assuming the buyer in that scenario likewise indicated to the seller that the mountain he planned to climb was on private grounds, we certainly could not conclude that the seller was implicitly warranting that the use of the shoes to accomplish an illegal trespass would be legal. This is because the "seller's skill or judgment" that can reasonably relied upon is to select shoes that physically can withstand the pressures of mountain climbing, not to opine on or endorse the legality of the buyers proposed conduct. Because the Court finds that the UCC does not create a warranty of fitness based on a buyer's improper reliance on a seller's alleged and unstated position regarding the legality of the buyer's proposed use of the product, TDP Defendants' fail to state a claim for breach of § 2-315 based on such a theory.

In any event, as TDP Defendants all but conceded at oral argument, (OA Tr. at 19–20), a particular purpose to resell a product where the intended end-use is one of the ordinary uses

contemplated for the product is not a "specific use by the buyer which is peculiar to the nature of his business" sufficient to trigger the § 2-315 warranty. Various courts, in California, New York, and elsewhere, have addressed this issue and have come to the same conclusion. See NuCal Foods, Inc. v. Quality Egg LLC, 918 F. Supp. 2d 1037, 1044 (E.D. Cal. 2013) (finding plaintiff's "implied warranty of fitness claim is inadequately pled" where the plaintiff alleged that its particular purpose was "buying eggs to be repackaged and sold to consumers as unbroken shell eggs" for human consumption, which the court found was the ordinary use for eggs); see also, e.g., Chartis Specialty Ins. Co. v. Vaughan Foods, Inc., No. 16-CV-280 (RLW), 2017 WL 448595, at *2 (E.D. Mo. Feb. 1, 2017) (finding that plaintiff's allegation that defendant "should have known 'that the produce was intended for a particular purpose, including commercial resale and consumption by end consumers'" stated the ordinary use for the produce and failed to demonstrate that the produce was purchased for a special purpose); Innovation Ventures, LLC v. Ultimate One Distrib. Corp., No. 12-CV-5354 (KAM), 2016 WL 1274009, at *5 (E.D.N.Y. Mar. 31, 2016) (finding that plaintiff—a commercial wholesaler—purchased the good "for the purpose of reselling it," which left no indication that "the plaintiff intended to use the [product] for something other than the ordinary purpose for which such [products] were used" (quoting Maeder Bros. Quality Wood Pellets, Inc. v. Hammond Drives & Equip., Inc., No. 320362, 2015 WL 1650814, at *6 (Mich. Ct. App. Apr. 14, 2015))); Sportmart, Inc. v. Spirit Mfg., Inc., No. 97-CV-7120 (HDL), 1999 WL 350662, at *4 (N.D. Ill. May 17, 1999) (finding that an intent to buy treadmills for resale to consumers was an "ordinary use[]" and did not trigger the warranty of fitness for a particular purpose). Accordingly, because TDP Defendants allege that their purpose was to resell international test strips to consumers in the domestic retail market, they state an "ordinary" rather than "particular" use for the strips and therefore fail to state a claim for breach of the § 2-315 warranty.

III. Intentional Misrepresentation[6]

In their crossclaim, TDP Defendants assert that HMF knew or should have known that the "importation, possession and resale of the FreeStyle test strips potentially violated United States laws," that HMF failed to convey this understanding to TDP, and that HMF were aware that TDP were "relying on HMF's implicit if not express representation and warranty that the Freestyle test strips being sold by HMF were genuine under United States law . . . and that TDP Trading was thereafter able to legally sell the FreeStyle test strips to its retail customers." (Am. Crossclaim ¶¶ 10–12.) At the pre motion conference, counsel for TDP Defendants clarified that the claim turned on the allegation that TDP believed that the strips could legally be resold in the United States and that, by their failure to express their legal opinions regarding the resale of the strips, HMF were liable for "misrepresentation by omission." (See D.E. # 1111-4 at 9:3–7; 11:22–24; 13:20–14:1.) Counsel for TDP Defendants added that, although TDP knew or could easily have ascertained that the product they were purchasing were international test strips, they nonetheless were under the belief that these diverted strips could be resold legally in the United States. (Id. at 9:3–7.)

Perhaps in response to the Court's expressions of disbelief that a seller has an obligation to inform a buyer that knows what they are buying about the seller's opinion regarding potential litigation risk inherent in buying that product, (id. at 14:2–8), TDP Defendants in their opposition brief appear to tweak this core allegation. Rather than assert only that HMF were generally (or constructively) aware of the possible legal pitfalls attached to the resale of diverted test strips and

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[6] Although TDP Defendants also asserted a claim for negligent misrepresentation, they fail to plead a cause of action because they do not plead that HMF made any express assertion concerning the legality of reselling the international test strips. Under California law, negligent misrepresentation "differs from intentional misrepresentation in that, while certain nondisclosures may support a claim for intentional misrepresentation, a negligent misrepresentation requires a 'positive assertion,' and hence 'omissions'—that is, nondisclosures—cannot give rise to liability for negligent misrepresentation." Mitsui O.S.K. Lines, Ltd. v. SeaMaster Logistics, Inc., 913 F. Supp. 2d 780, 789 (N.D. Cal. 2012), aff'd in part, rev'd in part, 618 F. App'x 304 (9th Cir. 2015). Thus, although as discussed below a mere failure to disclose can give rise to intentional misrepresentations, it cannot give rise to a claim for negligent misrepresentation. Lopez v. Nissan N. Am., Inc., 201 Cal. App. 4th 572, 596 (2011).

that they failed to share that opinion with TDP, TDP Defendants in their opposition assert that HMF were specifically aware of the fact that Abbott intended to file the instant lawsuit and that it was this *factual* (as opposed to speculative) information that they should have, but failed to, pass on to TDP prior to the sales. (Opp. Mem. at 12.) TDP Defendants, however, have failed to adequately plead facts supporting this revised allegation and have not adduced any case law supporting the duty to disclose a legal conclusion that is actually alleged in their crossclaims.

"To plead fraud by omission under California law, a plaintiff must show (1) the concealment or suppression of material fact, (2) a duty to disclose the fact to the plaintiff, (3) intentional concealment with intent to defraud, (4) justifiable reliance, and (5) resulting damages." Mui Ho v. Toyota Motor Corp., 931 F. Supp. 2d 987, 999 (N.D. Cal. 2013) (quoting SCC Acquisitions Inc. v. Cent. Pac. Bank, 207 Cal. App. 4th 859, 864 (2012)). As with all claims sounding in fraud, an allegation of fraud by omission must be pleaded with particularity under Federal Rule of Civil Procedure 9(b). However, California courts have recognized that the circumstances of a fraud by omission would make it difficult for a plaintiff "to specify the time, place, and specific content of an omission as precisely as would a plaintiff in a false representation claim," Falk v. Gen. Motors Corp., 496 F. Supp. 2d 1088, 1098–99 (N.D. Cal. 2007), and so plaintiffs are afforded additional leeway in pleading the facts to support the cause of action.

A duty to disclose a fact arises "(1) when the defendant is in a fiduciary relationship with the plaintiff; (2) when the defendant had exclusive knowledge of material facts not known to the plaintiff; (3) when the defendant actively conceals a material fact from the plaintiff; and (4) when the defendant makes partial representations but also suppresses some material fact." Baggett v. Hewlett-Packard Co., 582 F. Supp. 2d 1261, 1267–68 (C.D. Cal. 2007). "[A] plaintiff cannot establish a duty by pleading, in a purely conclusory fashion, that a defendant was in a superior

position to know the truth about a product" or actively concealed a fact, Tietsworth v. Sears, 720 F. Supp. 2d 1123, 1134 (N.D. Cal. 2010), but, consistent with Rule 9(b), must provide a specific factual basis for the claims, Oestreicher v. Alienware Corp., 544 F. Supp. 2d 964, 974 (N.D. Cal. 2008), aff'd, 322 F. App'x 489 (9th Cir. 2009). In any case, "[m]ere nondisclosure does not constitute active concealment. Rather, to state a claim for active concealment, Plaintiff must allege specific 'affirmative acts on the part of the [D]efendants in hiding, concealing or covering up the matters complained of.'" Herron v. Best Buy Co. Inc., 924 F. Supp. 2d 1161, 1176 (E.D. Cal. 2013) (internal citations omitted) (quoting Lingsch v. Savage, 213 Cal. App. 2d 729, 734 (1963)). Likewise, a partial representation arises only where the defendant makes an affirmative representation, but omits facts which would "materially qualify the facts disclosed, or which render his disclosure likely to mislead." Id. at 1177 (quoting Warner Constr. Corp. v. City of Los Angeles, 2 Cal. 3d 285, 294 (1970)).

Where parties are under no preexisting fiduciary relationship to one another, a party owes no duty to apprise a counterparty of the legal consequences of entering into an agreement. Hisamatsu v. Niroula, No. 07-CV-04371 (JSW), 2008 WL 114922, at *6 (N.D. Cal. Jan. 10, 2008). Indeed, the Ninth Circuit has distinguishing between the failure to disclose the "*legal* consequences" of entering an agreement, which there is no duty to disclose, and the failure to disclose "a material *fact*" regarding a legal determination that was already made and that was known to the party at the time of the agreement, which a party does have a duty to accurately disclose. Rozay's Transfer v. Local Freight Drivers, Local 208, Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am., 850 F.2d 1321, 1329–30 (9th Cir. 1988). This distinction between known "hard" facts (which may need to be disclosed) and a party's "soft" opinion, potential consequences, or legal conclusions (which need not be disclosed) is recognized

by numerous other courts. See, e.g., Kushner v. Beverly Enters., Inc., 317 F.3d 820, 830–31 (8th Cir. 2003) (upholding district court's determination "that there is no duty to disclose 'soft information,' such as a matter of opinion, predictions, or a belief as to the legality of the company's own actions" unless that information is "virtually as certain as hard facts" (quoting In re Sofamor Danek Grp., Inc., 123 F.3d 394, 402 (6th Cir. 1997))); Frati v. Saltzstein, No. 10-CV-3255 (PAC), 2011 WL 1002417, at *5 (S.D.N.Y. Mar. 14, 2011) ("If Plaintiffs were concerned about the structure or legality of the Shelter or Truk Funds, they could have investigated prior to investing—'[t]he law does not impose a duty to disclose uncharged, unadjudicated wrongdoing or mismanagement.'" (quoting Ciresi v. Citicorp, 782 F. Supp. 819 (S.D.N.Y. 1991), aff'd, 956 F.2d 1161 (2d Cir. 1992))); Halford v. AtriCure, Inc., No. 08-CV-867 (MRB), 2010 WL 8973625, at *13 (S.D. Ohio Mar. 29, 2010) ("[T]here is no affirmative duty on the part of a company to disclose the details of its business practices or opine as to their legality."); In re United Am. Healthcare Corp. Sec. Litig., No. 05-CV-72112 (LPZ), 2007 WL 313491, at *14 (E.D. Mich. Jan. 30, 2007) ("UAHC had no duty to disclose its allegedly illegal consulting agreement, even though Plaintiffs would have liked to have known about it. This is because the legality of UAHC's consulting agreement . . . was soft information . . . .").[7]

Under either articulation of TDP Defendants' theory of misrepresentation, the claim fails. To the extent that TDP Defendants assert that HMF had a duty to disclose their opinion about the potential illegality of reselling diverted test strips—an opinion that, if accurate, was not certain at the time of sale—the Court finds that no such duty to disclose exists, and accordingly that no cause of action for fraud by omission can arise under those facts. Alternatively, even in light of TDP

[7] TDP Defendants complain in their opposition that the case law cited by HMF Defendants, like that cited here, arise in the context of securities fraud, as opposed to fraud in the sale of goods. (Opp. Mem. at 1, 16.) TDP Defendants, however, have not directed the Court to a single case—in any area of law—that finds a duty to disclose a party's opinions, speculation, or beliefs regarding potential legal liability.

Defendants' attempt to recast their allegation to assert that HMF knew as a factual matter that Abbott would bring this lawsuit but failed to inform TDP of this fact, they still fail to state a claim.

The Court has previously determined that Abbott only began preparing for this litigation in June 2015 and that, prior to that date, had "pursued good-faith, non-judicial actions to cease the infringement up until the point where it became clear that its trademark could not be protected without judicial intervention." (First P.I. M&O at 6–7, 22.) The problem with TDP Defendants' revised allegation—aside from the lack of factual basis in the crossclaim—is that it alleges that the discussions and transactions between TDP and HMF took place sometime during 2014 and 2015, but does not specify when the actual sale of test strips took place or how many sales occurred. (Am. Crossclaim ¶¶ 5–6.) Given that this Court has already determined that Abbott itself had not determined by 2014 or early 2015 that it would initiate the instant suit, it is not possible—let alone plausible—that HMF at that time knew to a sufficient degree of certainty that Abbott would pursue this litigation, such that this knowledge could constitute a "fact" that HMF could have a duty to disclose. See Garel v. City of N.Y., No. 04-CV-3506 (CBA), 2005 WL 878571, at *4 (E.D.N.Y. Apr. 12, 2005) ("Rule 12(b)(6) requires the court to draw all reasonable inferences in plaintiff's favor, but not to invent sets of facts that are patently implausible."); see also Iqbal, 556 U.S. at 696 (Souter, J., dissenting) (noting "that a court must take the allegations as true, no matter how skeptical the court may be," with the "sole exception to this rule" being "allegations that are sufficiently fantastic to defy reality as we know it"). It would "defy reality" to attribute to HMF a knowledge of Abbott's plans before Abbott themselves had even made them and Rule 12(b)(6) does not mandate that this Court accept this allegation as true. And because TDP Defendants fail to allege when the purported transactions took place or how many transactions occurred, the Court cannot conclude that TDP Defendants have plausibly alleged that any transaction occurred around

the June 2015 date by which Abbott (privately) had determined to bring this suit, such that HMF could conceivably have known of this intent. TDP Defendants' claims fail for this reason alone.

Even accepting TDP Defendants' allegation of HMF's knowledge as true, however, the claim fails to establish a duty to disclose. In their opposition, TDP Defendants do not explicitly outline the basis for HMF's alleged duty to disclose, but instead focus solely on arguing that they have sufficiently met the pleading standard under Rule 9(b). (See Opp. Mem. at 14–16.) In doing so, TDP Defendants rely primarily on Romero v. Securus Techs., Inc., 216 F. Supp. 3d 1078 (S.D. Cal. 2016), which found that the plaintiff there had sufficiently alleged a fraud by omission claim where the defendant had exclusive knowledge of the undisclosed material facts and where the facts were not known or reasonable accessible to the plaintiff. Romero, 216 F. Supp. 3d at 1093. This Court need not reach the question of how much factual content needs to be pleaded under Rule 9(b) to allege a fraud by omission, because TDP Defendants have failed to even remotely plead any facts to support finding a duty to disclose.

TDP Defendants do not allege the existence of a fiduciary relationship. The gravamen of TDP Defendants' claim is that HMF—who, as is made clear by the underlying litigation brought by Abbott, were not privy to Abbott's confidences—were somehow aware of Abbott's litigation strategy. Ignoring whether TDP Trading was, as HMF Defendants assert, "another equally savvy wholesaler," (Br. at 1), it is nonetheless true that if HMF were able to derive Abbott's litigation plan despite lacking any direct contacts to Abbott, such information cannot be said to be exclusively available to them. At the very least, Abbott was aware of the facts, too, and they would be accessible to other wholesalers of HMF's competence. This case is therefore unlike the one in Romero, where the court found a duty to disclose based on defendants' withholding facts that were exclusively in defendant's possession. In any event, TDP Defendants' mere conclusory allegation

that HMF had this knowledge while TDP were unable to obtain it, devoid of any facts to support HMF's superior position vis-à-vis the information or explaining why TDP could not have come by the information through reasonable investigation (such as by inquiring with counsel), is insufficient to establish exclusive knowledge.[8] See Tietsworth, 720 F. Supp. 2d at 1134; Goodman v. Kennedy, 18 Cal. 3d 335, 347 (1976). Nor can TDP Defendants rely upon HMF's active concealment or partial representations in order to establish a duty to disclose, because TDP Defendants fail to plead that HMF made any affirmative statements or took any affirmative acts in connection to the legality of reselling the diverted strips, which is a predicate to finding a duty to disclose under either of these theories. Herron, 924 F. Supp. 2d at 1176–77. Having failed to plead that HMF had a duty to disclose the information regarding the legality of reselling the diverted test strips, TDP Defendants fail to state a claim for fraud by omission under California law and so Counts 4 and 5 are dismissed.

CONCLUSION

For these reasons, the Court grants HMF Defendants' motion to dismiss TDP Defendants' crossclaims, except as to the claim for breach of warranty against infringement (CUCC § 2-312).

SO ORDERED.

Dated: August 11, 2017
Brooklyn, New York

s/Carol Bagley Amon

Carol Bagley Amon
United States District Judge

[8] Indeed, TDP Defendants do not assert that the information was exclusively held by HMF, but simply that "HMF had greater knowledge than did TDP, and HMF failed to share that knowledge." (Opp. Mem. at 12.) As is made clear above, a company has no duty to affirmatively share its superior understanding of the relevant market with a counterparty, nor can TDP Defendants plausibly assert that such a duty could exist, as it would render pointless any party's attempt to gain a commercial edge by researching more effectively than their trading partner.