IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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FITNESS IQ, LLC,

OPINION AND ORDER

Plaintiff,

11-cv-859-bbc

v.

JOHN POCARI,

Defendant.

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Plaintiff Fitness IQ, LLC manufactures and sells "Shake Weight®" products, which it describes as "special pulsating dumbbells for shaping and toning the upper body." Am. Cpt. ¶ 8, dkt. #8-1. Plaintiff alleges that it hired defendant John Pocari to be an expert witness in a class action lawsuit in Arkansas regarding the quality of those products, but that defendant instead used confidential information it received from plaintiff to help the class members and then made a number of false and damaging statements about the products. Plaintiff asserts six claims under state law in its amended complaint: (1) trade disparagement; (2) defamation; (3) trade libel; (4) breach of contract; (5) breach of fiduciary duty; and (6) "intentional misrepresentation/fraud."

Jurisdiction is present under 28 U.S.C. § 1332 because plaintiff and defendant have

diverse citizenship and the amount in controversy is greater than $75,000. Plaintiff alleges that it is a citizen of California (because both of its members are citizens of California, Hoagland ex rel. Midwest Transit, Inc. v. Sandberg, Phoenix and von Gontard, 385 F.3d 737, 738 (7th Cir. 2004)) and defendant is a citizen of Wisconsin. Plaintiff alleges that the amount in controversy is more than $75,000 and defendant does not dispute this. Because I cannot say that it would be legally impossible for plaintiff to obtain that amount if it prevailed, this requirement is satisfied. Rising-Moore v. Red Roof Inns, Inc., 435 F.3d 813, 815-16 (7th Cir. 2006) ("When the complaint includes a number, it controls unless [the plaintiff's] recovering that amount [in the litigation] would be legally impossible.").

Defendant has filed a motion for judgment on the pleadings under Fed. R. Civ. P. 12(c) and plaintiff has filed a motion to "strike portions of defendant's answer, including affirmative statements, affirmative defenses and exhibits." Dkt. ##13 and 20. I am denying plaintiff's motion to strike as moot; defendant has not shown that the court may consider any of the new allegations in the answer or any of the documents attached to it. I am granting defendant's motion because plaintiff has failed to state a claim upon which relief may be granted with respect to any of its legal theories. However, because plaintiff asks for leave to replead its fraud claim, I will dismiss that claim without prejudice to allow plaintiff to file an amended complaint with additional allegations.

OPINION

A. New Information in the Answer

A threshold question is whether I may consider affirmative allegations that defendant makes in its answer as well as exhibits attached to the answer. Plaintiff has moved to strike the allegations and the exhibits. Defendant says that I may consider both, but he cites no relevant authority to support his view. The only binding case he cites is Northern Indiana Gun & Outdoor Shows, Inc. v. City of South Bend, 163 F.3d 449, 454 (7th Cir.1998), which includes the following discussion:

> Rule 12(c) permits a judgment based on the pleadings alone. See Alexander v. City of Chicago, 994 F.2d 333, 336 (7th Cir. 1993), cert. denied sub nom., Leahy v. City of Chicago, 520 U.S. 1228 (1997). The pleadings include the complaint, the answer, and any written instruments attached as exhibits. Fed. R. Civ. P. 10(c) ("A copy of any written instrument which is an exhibit to a pleading is part thereof for all purposes."); see, e.g., Warzon, 60 F.3d at 1237 (stating that exhibits attached to the complaint are incorporated into the pleading for purposes of Rule 12(c) motions); cf. Beam v. IPCO Corp., 838 F.2d 242, 244 (7th Cir. 1988) (stating that exhibits attached to the complaint are incorporated into the pleading for purposes of Rule 12(b) motions). Under Rule 10(c), the attached documents are incorporated into the pleadings.

Id. at 452-53. Although the court's discussion is broad enough to encompass allegations in the answer and attached exhibits, the actual ruling in the case addressed the extent to which it was appropriate to consider documents attached to *the complaint.* The court concluded it is not appropriate to do so in all cases. The court stated, "[r]ather than accepting every word in a unilateral writing by a defendant and attached by a plaintiff to a complaint as true, it

is necessary to consider why a plaintiff attached the documents, who authored the documents, and the reliability of the documents." Id. at 455. See also Powers v. Snyder, 484 F.3d 929 (7th Cir. 2007) ("A plaintiff does not, simply by attaching documents to his complaint, make them a part of the complaint and therefore a basis for finding that he has pleaded himself out of court.").

Defendant does not cite any cases in which the Court of Appeals for the Seventh Circuit or the Supreme Court considered new allegations or documents in a defendant's answer in deciding a motion under Rule 12(c). This is not surprising. When ruling on a motion for judgment of the pleadings, courts must "accept the allegations in the complaint as true and draw all reasonable inferences in favor of" the plaintiff. Iowa Physicians' Clinic Medical Foundation v. Physicians Insurance Co. of Wisconsin, 547 F.3d 810, 811 (7th Cir. 2008). See also Edgenet, Inc. v. Home Depot U.S.A., Inc., 658 F.3d 662, 665 (7th Cir. 2011) ("When the *complaint itself* contains everything needed to show that the defendant must prevail on an affirmative defense, then the court can resolve the suit on the pleadings under Rule 12(c).") (emphasis added). In other words, to prevail on a Rule 12(c) motion, the defendant must show that it is entitled to prevail as a matter of law even if everything the plaintiff alleges is true. In that context, it makes little sense to allow defendant to obtain dismissal of the case by contradicting plaintiff's allegations or adding his own. The court's role is limited to evaluating the sufficiency of the pleadings, not evaluating the evidence.

General Insurance Co. of America v. Clark Mall Corp., 644 F.3d 375, 378 (7th Cir. 2011).

When a plaintiff attaches documents to the complaint *and* relies on those documents to support his claim, it makes sense to consider those documents in determining whether the plaintiff has stated a claim upon which relief may be granted because, in that context, the plaintiff is vouching for the truth of the documents. Thompson v. Illinois Dept. of Professional Regulation, 300 F.3d 750, 754 (7th Cir. 2002) (court may rely on attached documents when plaintiff relies on them "to form the basis for a claim or part of a claim"). Obviously, the same cannot be said when the defendant throws new allegations or evidence into the mix. A court's consideration of new allegations or documents submitted by the defendant is akin to allowing the defendant to move for summary judgment without giving the plaintiff an opportunity to conduct discovery or even respond to defendant's allegations in a meaningful way. Counsel for defendant should have recognized the unfairness of the approach he was advocating.

In limited circumstances, the court of appeals has held that it is appropriate to consider documents other than those attached to the complaint when they are "documents to which the Complaint had referred, . . . concededly authentic, and . . . central to the plaintiffs' claim." Hecker v. Deere & Co., 556 F.3d 575, 582 (7th Cir. 2009). This rule makes sense because, again, the plaintiff is vouching for those documents by using them to support her claim. Defendant cites a standard from the Court of Appeals for the Second

Circuit that is similar to the rule in Hecker, L-7 Designs, Inc. v. Old Navy, LLC, 647 F.3d 419, 422 (2d Cir. 2011), and defendant seems to acknowledge that the standard should govern the decision to consider the exhibits attached to his answer. Inexplicably, however, defendant fails to make any effort to show that the standard is met with respect to a single document attached to his answer. Accordingly, I decline to consider any new information that defendant cites to support his motion for judgment on the pleadings. This decision moots plaintiff's motion to "strike" that information from plaintiff's answer.

B. Defamation, Libel and Disparagement

These three claims are premised on allegedly false statements defendant made in three documents: (1) a letter to the editor in the Journal of Sports Science and Medicine; (2) an article published by the American Council on Exercise titled "Does the Mega-Selling Shake Weight Live Up to the Hype?"; and (3) an article that appeared in the Montreal Gazette. Defendant advances several arguments for dismissing these claims: (1) plaintiff failed to allege facts showing that defendant acted with "actual malice," which is required for defamation claims against public figures; (2) plaintiff has not identified any false, misleading or disparaging statements that defendant made; and (3) defendant has immunity. Because I agree with defendant that plaintiff has not identified any false statements, I need not consider the other two arguments.

In its amended complaint and brief, plaintiff points to the following statements as the basis for its claims:

- "Based on the results of the study, it would appear that using the Shake Weight activates the muscles of the upper body to a greater degree than using a 2.5 lb (1.13 kg) dumbbell for women or a 5 lb (2.25 kg) dumbbell for men."

- "Sure, its better than a two-and-a half pound dumbbell, but who goes to the gym and lifts two-and-a-half pound dumbbells?"

- "There aren't many things you do in daily life where you just shake the heck out of something. Really, what benefit is that movement? Maybe if you're shaking up a can of spray paint and you have to dislodge that little agitator ball at the bottom. And there might be some carryover to holding something close to your chest, but we do most things in everyday life through a full range of motion."

(Defendant discusses other alleged statements in his opening brief, but the three statements quoted above are the only statements plaintiff discusses in its brief, so plaintiff has waived its claim as to any other statements.)

Of course, an element of each of plaintiff's claims is that defendant made a false statement. Torgerson v. Journal/Sentinel, Inc., 210 Wis. 2d 524, 534, 563 N.W.2d 472 (1997); Kensington Development Corp. v. Israel, 142 Wis. 2d 894, 902, 419 N.W.2d 241, 244 (1988). (Under Wisconsin law, defamation and libel are not separate claims; rather, libel is a kind of defamation involving written statements. Freer v. M & I Marshall & Ilsley Corp., 2004 WI App 201, ¶ 9, 276 Wis. 2d 721, 688 N.W.2d 756. Product disparagement is referred to as "slander of title." Kensington, 142 Wis. 2d at 902; 419 N.W.2d at 244).

Both parties assume for the purpose of defendant's motion that the metric for determining the truth about the Shake Weight® products is an article by graduate student Jennah Hackbarth titled "Muscle Activation When Using the Shake Weight® In Comparison to Traditional Dumbbells." (Defendant was Hackbarth's academic advisor on the article.) In particular, the study concluded that "there is a statistically greater average muscle activation for the Shake Weight in comparison to the traditional dumbbell of equal size. Thus using the Shake Weight may result in strength improvement if used regularly." Plaintiff says that defendant's statements are "inconsistent" with the conclusion of the Hackbarth study. Plt.'s Br., dkt. #21, at 19.

Even if I assume that the conclusion in the Hackbarth study is correct, plaintiff has not shown that any of the quoted statements contradict that study. Hackbarth concluded that the Shake Weight® creates "statistically greater average muscle activation" than a dumbbell of the same size and that the product "may result in strength improvement if used regularly." None of defendant's alleged statements are contrary to that conclusion.

In the first statement, defendant *agrees* that the study shows greater muscle activation by the Shake Weight®. Plaintiff says that defendant's "reference to specific dumbbells for women and men is contrary to the findings of the Hackbarth thesis," Plt.'s Br., dkt. #21, at 19, but it never explains why. Hackbarth's article (which plaintiff attached to its amended complaint) states that the female subjects used a 2.5 pound Shake Weight® or dumbbell and

the male subjects used a 5 pound Shake Weight® or dumbbell, dkt. #8-1, at 27, so defendant's qualification regarding the size of the weights for males and females is consistent with the article.

In any event, even if the article did not include defendant's qualification, plaintiff fails to explain how the difference between the article and the study would "ten[d] to harm [plaintiff's] reputation, lowe[r] [plaintiff] in the estimation of the community or dete[r] third persons from associating or dealing with [plaintiff]," as required to prove defamation, Ladd v. Uecker, 2010 WI App 28, ¶ 8, 323 Wis. 2d 798, 805, 780 N.W.2d 216, 219, or "pla[y] a material or substantial part in inducing others not to deal with the plaintiff," as required by plaintiff's product disparagement claim. Kensington, 142 Wis. 2d at 902, 419 N.W.2d at 244. Presumably, plaintiff agreed at one point that the statement was not damaging because it approached defendant to serve as an expert witness in the Arkansas litigation *after* defendant made this statement. Am. Cpt. ¶¶ 11-13, dkt. #8-1. As defendant points out, plaintiff never explains why, if it believed the statement was false or harmful, it concluded that defendant would be an appropriate expert witness.

In the other two statements, defendant acknowledges the superiority of the Shake Weight® to dumbbells of the same size, but questions the overall benefit of the products by pointing out their dissimilarity to exercises performed at a health club (where most people use heavier weights) and to everyday activities (which generally involve a greater range of

motion). The Hackbarth article says that Shake Weight® products "may result in strength improvement if used regularly," but plaintiff points to nothing in the article that promises a particular result or suggests that better results could not be obtained with heavier weights or a greater range of motion. For his part, defendant points to passages in the Hackbarth article making similar observations. Dkt. #8-1, at 14 ("While the results of the above analysis would indicate that using the Shake Weight® is superior to using either a 2.5 or 5.0 pound dumbbell, it is unrealistic to assume that individuals are going to the gym to lift that amount of weight."); id. at 17 ("The Shake Weight® will probably result in an angular-specific training effect; this elicits strength gains at the specific joint angle, with lesser strength gain across a full range of motion. Thus, the overall carry over to functional abilities comes into question with the Shake Weight®."). Thus, regardless whether defendant's statements are damaging to plaintiff, plaintiff cannot rely on Hackbarth to show that the statements are untrue.

Perhaps realizing this, plaintiff says little in its brief about any inconsistency between the Hackbarth article and these two statements. Instead, plaintiff says the statements are inconsistent with *other* statements that defendant made in an article called "Best Triceps Workout." Dkt. #12-17. In particular, defendant is quoted in that article as saying that "[m]ost people's triceps are relatively weak, especially if you isolate them. If you're doing the kickbacks correctly, it doesn't really take a whole lot of weight to get a good workout."

Id. at 3. However, plaintiff fails to explain how a statement about one exercise for one muscle is inconsistent with an observation that most people who lift weights lift more than 2.5 pounds.

Plaintiff has failed to identify any false statements by defendant. Accordingly, I am granting defendant's motion for judgment on the pleadings with respect to plaintiff's claims for defamation, libel and trade disparagement.

C. Breach of Contract and Breach of Fiduciary Duty

In its breach of contract claim, plaintiff alleges that defendant agreed to serve as its expert witness in the Arkansas litigation, but changed his mind less than three weeks later after he was contacted by counsel for the plaintiffs in that case. Am. Cpt. ¶¶ 59-60, dkt. #8-1. Plaintiff does not allege that it ever paid defendant or that defendant performed any services for plaintiff. Although plaintiff alleges that it gave defendant "confidential and proprietary information," id. at ¶ 15, it does not allege that it had a confidentiality agreement with defendant.

In his opening brief, defendant advances three reasons for dismissing this claim: (1) no agreement regarding serving as an expert was formed because the terms of the agreement were unsettled; (2) to the extent there was an agreement, it was between defendant and *plaintiff's lawyers*, not plaintiff; (3) even if there was an agreement between plaintiff and

defendant, defendant was free to terminate the agreement at any time. In its brief, plaintiff responds to the first argument, but not the other two. By failing to dispute those arguments, plaintiff has conceded them. Bonte v. U.S. Bank, N.A., 624 F.3d 461, 466 (7th Cir. 2010) ("Failure to respond to an argument . . . results in waiver."); Kirksey v. R.J. Reynolds Tobacco Co., 168 F.3d 1039, 1042 (7th Cir.1999) ("If [judges] are given plausible reasons for dismissing a complaint, they are not going to do the plaintiff's research and try to discover whether there might be something to say against the defendants' reasoning."). Accordingly, I am dismissing the breach of contract claim.

Plaintiff's breach of fiduciary claim rises and falls with its breach of contract claim because plaintiff says that a fiduciary relationship arose from the contract. Moreover, even if there was a contract, plaintiff's argument is that defendant had a fiduciary duty simply because he was serving as an expert. As defendant points out, the court of appeals has rejected the view that all experts are fiduciaries, stating, "[t]hat is not the law in Illinois or anywhere else." Burdett v. Miller, 957 F.2d 1375, 1381 (7th Cir. 1992). Defendant argued in his opening brief that plaintiff must show that defendant "dominated" the relationship with plaintiff in order to establish a fiduciary duty. Dft.'s Br., dkt. #14, at 34-36 (citing Production Credit Association of Lancaster v. Croft, 143 Wis. 2d 746, 423 N.W.2d 544 (Ct. App. 1988), and other cases). Because plaintiff failed to respond to this argument, it is forfeited as well.

D. Fraud

Plaintiff alleges that defendant intended to deceive plaintiff when he represented that he would serve as plaintiff's expert, but in fact he planned on turning over confidential information to the plaintiffs in the Arkansas case. The parties agree that Fed. R. Civ. P. 9(b) governs this claim, which means that plaintiff was required to plead the circumstances of fraud with particularity.

Defendant argues that plaintiff's allegations are deficient on this claim for two reasons: (1) plaintiff does not identify any "actual damages," as required by Swanson v. Citibank, N.A., 614 F.3d 400, 406 (7th Cir. 2010); and (2) plaintiff pleads the circumstances of fraud "on information and belief" without identifying the grounds for its suspicion, as required by Pirelli Armstrong Tire Corp. Retiree Medical Benefits Trust v. Walgreen Co., 631 F.3d 436 (7th Cir. 2011). Swanson is a case under Illinois law, so it is not controlling, but Wisconsin law includes a similar requirement that the plaintiff in a fraud case must show that it "relied on the misrepresentation to [its] detriment or damage." Tietsworth v. Harley-Davidson, Inc., 2004 WI 32, ¶ 13, 270 Wis. 2d 146, 677 N.W.2d 233.

In its brief, plaintiff does not deny that it must allege particular harm in its complaint, but says that it satisfied this requirement by alleging that "it incurred increased fees and costs in the Arkansas litigation as a result of relying on [defendant's] intentional misrepresentations." Plt.'s Br., dkt. #21, at 28. In fact, plaintiff does not include that

allegation in its amended complaint. Under its fraud claim, the only allegation regarding an injury is that it "has been irreparably harmed by [defendant's] unlawful actions." Am. Cpt. ¶ 83, dkt. #8-1. It does not identify what the harm is.

A closer look at plaintiff's brief shows that it is citing the allegations from its breach of fiduciary duty to claim to show harm for its fraud claim. In particular, plaintiff alleges that defendant's use of confidential information "*may* detrimentally impact [plaintiff's] position in the [Arkansas] litigation or otherwise increase [plaintiff's] fees and costs in defending against the [Arkansas] litigation." Id. at ¶ 73 (emphasis added). Plaintiff does not allege that its costs and fees have increased, only that they *may* increase in the future. It does not explain why it believes these costs and fees may increase or in what way. In fact, plaintiff does not identify even generally what confidential information it gave defendant or how defendant or the plaintiffs in the Arkansas case could use that information to harm plaintiff. Accordingly, I agree with defendant that plaintiff has failed to allege facts regarding the particular harm it suffered as a result of defendant's alleged fraud.

With respect to plaintiff's allegations regarding the circumstances of fraud, defendant acknowledges that Pirelli is on point because the complaint alleges fraud "on information and belief." "[W]hen someone alleges fraud based on information and belief, not just any grounds will do. The grounds for the plaintiff's suspicions must make the allegations plausible, even as courts remain sensitive to information asymmetries that may prevent a

plaintiff from offering more detail." Pirelli, 631 F.3d at 442. Plaintiff says that there are "plausible grounds to believe that [defendant] intentionally deceived" plaintiff because defendant "attempted to switch sides [in the Arkansas case] in the midst of contentious litigation." Plt.'s Br., dkt. #21, at 29.

This one fact is not enough to "nudg[e] [plaintiff's] clai[m] across the line from conceivable to plausible." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007). Less than three weeks passed between the time plaintiff says defendant agreed to serve as its expert and then withdrew, which is inconsistent with a plan to infiltrate defendant's company and sabotage its case. Although plaintiff says it gave defendant "confidential and proprietary" information during that three-week period, as discussed above, it does not allege any specific facts suggesting that the information could be used to the other side's advantage in the Arkansas case.

Moreover, plaintiff identifies no basis for its belief that defendant provided confidential information to the other side. It does not allege that it has uncovered any confidential information in the possession of the plaintiffs in the other case or even that the plaintiffs have engaged in any suspicious behavior that would support a belief that they had access to information provided by defendant. In other words, plaintiff has nothing but speculation to back up its claim. Particularly because defendant is not acting as an expert witness for *either* side in the Arkansas case, plaintiff's conclusory allegations of wrongdoing

by defendant are not sufficient under Rule 9 and Pirelli.

Plaintiff has asked for leave to replead its fraud claim in the event that defendant's motion to dismiss is granted. Generally, when district courts dismiss a complaint because the allegations are insufficient, the plaintiff is allowed to file an amended complaint in an attempt to fix the deficiencies. Foster v. DeLuca, 545 F.3d 582, 584 (7th Cir. 2008). It is possible that plaintiff could plead additional allegations to satisfy Rule 9 with respect to its fraud claim, so I will give plaintiff leave to file an amended complaint with respect to that claim. However, because plaintiff does not suggest that it could save its other claims with additional allegations, I am dismissing those claims with prejudice.

ORDER

IT IS ORDERED that

1. Defendant John Porcari's motion for judgment on the pleadings, dkt. #13, is GRANTED. Plaintiff Fitness IQ, LLC's amended complaint is DISMISSED WITH PREJUDICE, with the exception of its claim for fraud. Plaintiff may have until June 4, 2012, to file an amended complaint with respect to that claim. If plaintiff does not respond by that date, the clerk of court is directed to enter judgment in favor of defendant and close this case.

2. Plaintiff's motion to strike portions of defendant's answer, dkt. #20, is DENIED

as moot.

Entered this 14th day of May, 2012.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge