

MORRISON FOERSTER

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Judge Niemeyer (00:00):

Good morning. We've got a sort of a special method of proceeding here today. We have a three-judge court, and you see two judges here and we have Judge Hamilton sitting, I don't know, virtually or in reality with us there, but I see it. Judge Hamilton. Good morning.

Judge Hamilton (00:21):

Good morning.

Judge Niemeyer (00:22):

[inaudible]. And you can see him here, and let us know if you have any problem in this procedure. This is my first engagement with it, but I think it'll work. I'm told it's worked before, and we're going to still give it the same consideration that we give every case. First case we're going to hear this morning is *Brown v GNC Corporation*, and Mr. Berg, we'll hear from you.

Robert Berg (00:54):

Good morning, Your Honors. May it please the court. I am Robert Berg of the law firm Denlea and Carton representing appellants. This multi-district litigation is a very simple consumer deceptive practices class action lawsuit.

Robert Berg (01:08):

It's brought up—

Judge Niemeyer (01:09):

You know, anytime you start and say, something's very simple. You invite a lot of questions.

Robert Berg (01:14):

That's true. I understand that. It's brought under the consumer protection statutes of seven states, California, Florida, New York, Ohio, Illinois, New Jersey, and Pennsylvania. The defendants are manufacturers and sellers of glucosamine and chondroitin dietary supplements, including products marketed under the GNC brand and under the Rite Aid brand. The lawsuit involves misrepresentations defendants made about the efficacy of their glucosamine and chondroitin products, which they market to persons suffering from osteoarthritis and similar conditions. The actions involve state law only, but they're filed in federal—

Judge Niemeyer (01:53):

Did you say they marketed for osteoarthritis?

Robert Berg (01:57):

Well, they marketed to persons suffering from osteoarthritis and similar conditions. They're not marketed

as a prescription drug for osteoarthritis, but the target market is persons who have ailments which, people—

Judge Niemeyer (02:12):

Well, there's a difference isn't there. In other words, you can have symptoms caused by diseases, and you can have symptoms caused by just wear and tear.

Robert Berg (02:24):

Well.

Judge Niemeyer (02:24):

And the question that's one of the questions, of course, they raise in this case, and it may be a legitimate question. Are your plaintiffs in these cases persons suffering from osteoarthritis?

Robert Berg (02:38):

The persons who have joint pain and joint problems.

Judge Niemeyer (02:43):

No I'm asking are the plaintiffs in this case, the individual plaintiffs, are they suffering from osteoarthritis?

Robert Berg (02:51):

Have they been clinically diagnosed as suffering? I don't believe all of them have. Some may have, some may not.

Judge Niemeyer (02:56):

Have any, have any of them—do they have that disease?

Robert Berg (03:01):

I don't know specifically, Your Honor, because I don't think it really matters because the representations are directed at the symptoms that people with arthritis have and symptoms that—

Judge Niemeyer (03:12):

Oh, that doesn't help much. I mean, vitamin A, they direct at good eyes. They say you're going to get better eyes and so forth. Does that mean you can treat glaucoma with vitamin A? I mean, it's a—I don't think that follows. I think it's that may be one of the difficulties here is that we ought to understand what it's being marketed for and to whom. And, the district court thought that if it's marketed to the disease, there's an exclusion on the label for the disease. And if it's marketed to people with non-arthritis, then you have the issues that the court addressed in its opinion.

Robert Berg (03:51):

Well, these are not prescription medication.

Judge Niemeyer (03:54):

I understand.

Robert Berg (03:54):

These are over the counter, and we don't distinguish in our class definition between persons who have arthritis and persons who suffer from similar issues that people with arthritis have. We say anyone—

Judge Niemeyer (04:07):

I know you don't, but I'm asking you why isn't that important? In other words, if a person has a disease and the label says this is not for disease, then it seems to me that we ought to be looking at persons that don't have the disease and see whether there's a misrepresentation.

Robert Berg (04:25):

Well, the disclaimer that you're referencing, which is in tiny print in a footnote are on the labels, is mandated by the DSHAEA. It's not—it doesn't provide immunity from false advertising claims. The FTC is pretty clear on that in its dietary supplement advertising guide, and various courts have also agreed.

Judge Niemeyer (04:45):

Oh, it tells the scope of what they're trying to represent, and they're saying that this product is not to cure a disease. It's intended to rejuvenate, I guess, over-worn joint parts.

Robert Berg (05:02):

Well, first of all, as a matter of science, it can't rejuvenate anything.

Judge Niemeyer (05:07):

Well, that's—we can address that point. I mean, you're making that point. They claim they have a clinical study and the district court addressed that, but I'm suggesting to you, it may be very important to make the distinction in these cases to plead whether we're talking about persons who have osteoarthritis, the disease, and persons who don't have the disease. And, the district court addressed this and gave you leave to amend. And I guess you chose not to amend, is that it?

Robert Berg (05:42):

Well, the judge—the district court imposed a legal framework—

Judge Niemeyer (05:45):

Oh, let me—just answer the question. My question is, did you choose not to amend?

Robert Berg (05:48):

We chose not to amend that's correct, Your Honor.

Judge Niemeyer (05:50):

So we can conclude that your appeal was a rejection of the court's offer to give you to amend it, because, you know, otherwise we wouldn't have a final judgement.

Robert Berg (05:58):

Well, it was in the context—we wanted to stand on the complaint that we had. We think it met the legal requirements of Quarmby and et al to go forward on a motion to dismiss.

Judge (06:09):

Well, well, my—

Robert Berg (06:10):

We didn't want to be pigeonholed in a legal framework, which we don't think applies to this case.

Judge (06:15):

Well, why didn't you plead, or can you plead, based on what you know about this case? That these representations are literally false and isn't it true that you'd have to plead that?

Robert Berg (06:28):

We do plead that. We pled—we say these representations are false. We say that—

Judge (06:33):

No, not just false, but literally false that there's no other scientific evidence out there against your position.

Robert Berg (06:42):

Well, we're not aware of any scientific evidence supporting the claims made by the defendants here. Now, they refer to some in—on some of their products, they refer to a study that the claim exists. We don't know whether or not exists.

Judge (06:55):

Well, there are two experts out there, as I understand it, that support the other side's position.

Robert Berg (07:02):

You're saying that they support pain reduction.

Judge (07:03):

Right.

Robert Berg (07:05):

Well, the claims include rejuvenating and regenerating cartilage, which scientifically can't happen from ingestion of oral.

Judge Niemeyer (07:13):

Do you see, your complaint doesn't say these things, your complaint says the vast majority. It doesn't say all, and they claim they have some support. And so you're alleging a misrepresentation by them, and if they have a legitimate study that supports what they're saying, you can't say as a matter of law that it's a false misrepresentation.

Robert Berg (07:34):

It's not a matter of law. Well, we can say that first, the consumer protection statutes really address the capacity to mislead of an advertisement. So, you have to look at them in context, what representations are made; how prominently they're displayed; if there are a disclaimer, like we talked about here; if it's in tiny print, does that still have the capacity to mislead.

Judge Niemeyer (07:57):

But the court below, and that's what we're addressing, the 12B6. The court below found that you did not allege that—you just alleged a difference of opinions, because you said the vast majority of opinions go your way.

Robert Berg (08:12):

Well.

Judge Niemeyer (08:12):

You did not plead what Judge Floyd just asked you that there are no opinions the other way. And on that basis, the district court said you haven't alleged a misrepresentation of falsity, and you could have cured that if you could have. Now, you've said today, and that's fair enough, that you're standing on the pleading as filed. But seems to me that might raise a problem.

Robert Berg (08:41):

No, I think, Your Honor, if you look at the laws of—the state laws on false—false advertising, they look at a contextual view of a particular representation, and they determine does that have the capacity to mislead a reasonable consumer? And under that framework—

Judge Hamilton (08:58):

Let me ask a question, please.

Robert Berg (09:00):

Yes, Your Honor.

Judge Hamilton (09:01):

It seems to me, following up on what Judge Floyd said, "that in order to prevail, you needed to allege that no reasonable expert would agree with the help-claim benefits on the products." And you didn't allege that.

Robert Berg (09:21):

Because I don't think—

Judge Hamilton (09:21):

You did a lot of work. You did a lot of work in this case. You couldn't find experts that would say that?

Robert Berg (09:25):

No, we could, but we don't have to. And we shouldn't have to. We shouldn't be pigeonholed into a pleading requirement that's not required by Quarmby and et al and that will create other issues down the road in terms of our burden of proof, which is why we went, we plead as we did plead. Now—

Judge Hamilton (09:44):

Well, I'm not sure—I'm not sure you didn't have to allege that to prevail in this case.

Robert Berg (09:49):

I don't think, Your Honor. I mean, you can always find an expert to say anything. So, if real experts who, like the National Institute of Health, has a whole bunch of studies here. They all say glucosamine and chondroitin don't work for anything. They're basically no better than a placebo, and if you have this enormous body of scientific literature in peer-reviewed journals, and they have some study, which no one has ever seen, because they won't show it to anyone, of 60 subjects in a 30-day trial, how can that possibly insulate them from any claims of false advertising? It, it—

Judge Niemeyer (10:25):

It's not a question of insulating them. It's a question of did they allege falsely if they have a reasonable opinion supporting their claim. If they have a reasonable opinion, and let's assume that then, and they set forth those claims on the label, how can that be a misrepresentation, just because you have experts who disagree?

Robert Berg (10:46):

Because it's the trier of fact's responsibility of the jury here determines—

Judge Niemeyer (10:52):

But as a matter of law, you can't say that they're false; the way you have alleged it. You were given the opportunity to amend the way that Judge Hamilton pointed out and you chose not to.

Robert Berg (11:02):

Judge, we don't even know if the study exists. I've invited them to show us the study. If you call up their 800 number, they don't tell you what the study is.

Judge Niemeyer (11:11):

We're talking about pleading a cause of action.

Robert Berg (11:15):

We just have to allege under *Conley* plausible set of facts. We say the vast multitude of scientists who've studied this extensively have found that these glucosamine and chondroitin has no positive impact on the symptoms.

Judge Niemeyer (11:30):

And the district court said the vast majority of expert's allegation is nothing more than inviting a battle of the experts.

Robert Berg (11:38):

That's correct.

Judge Niemeyer (11:41):

Which precludes a statement that they misrepresented because if they misrepresent—if they relied on a minority of experts who were reasonable, then their label's not a misrepresentation. They had good reasonable support. And then you have the battle of the experts maybe later as an evidentiary question, but you don't have fraud or misrepresentation.

Robert Berg (12:05):

Well, Your Honor. I mean, I think as a matter of law, you can say one unpublished study of 60—

Judge Niemeyer (12:12):

So now, see now, you're arguing the weight of the evidence.

Robert Berg (12:15):

Right.

Judge Niemeyer (12:15):

We're talking about the pleading. And you basically pled that your position is supported by the vast majority.

Robert Berg (12:21):

That's correct.

Judge Niemeyer (12:22):

Leaving open the possibility that their position is supported by the remaining minority, which means that they stated on their label with the support of the remaining minority.

Robert Berg (12:36):

I think, Your Honor, there's junk science and there's good science. I mean, it shouldn't be a battle in terms of like the—

Judge Niemeyer (12:42):

Did you allege theory to have junk science to support them?

Robert Berg (12:45):

Well, all we alleged was that all these studies we cite, I believe 12 studies in the complaint, and there's a— they rely and dozens and dozens of other studies—

Judge Niemeyer (12:55):

Of course, most of your studies related to Osteoarthritis too.

Robert Berg (12:56):

That's right. And we do allege specifically in the complaint that experts say that you can extrapolate from the osteoarthritis to the non-arthritis.

Judge Niemeyer (13:06):

Well, there you also say it's not there are some that say that. I mean, I guess you're not addressing the problem that I'm concerned about because you're sort of saying it doesn't exist, but the theoretical problem is that if somebody has a reasonable expert opinion or two reasonable expert opinions, that a medicine will do a particular thing, and then they put that on their label to accuse them of misrepresentation in that context, regardless of what the other experts say, doesn't fly. And that's what the district court found. It didn't resolve the factual dispute, whether it's junk science or not. Court said it's a battle of the opinions, and that's not the basis for misrepresentation claim.

Robert Berg (14:02):

Well, the—

Judge Niemeyer (14:02):

And you have to address that either with an amended complaint or some argument pointing out the flaw on that logic.

Robert Berg (14:10):

Your Honor, the FTC brings all the time false advertising claims when there's a battle of the expert saying the reasonable medical or scientific evidence doesn't support the claims made. And the defendants typically have a few experts saying, oh yeah, it does. So, I don't think you can say as a matter of law—I mean, if we had to replead—

Judge Niemeyer (14:32):

So we're supposed to accept the fact that you say that the FTC prosecutes claims like this entitles you to go with this complaint?

Robert Berg (14:39):

Well, I think the complaint is sufficient and then it should be a battle of the experts. And the trier fact should make the determination whether or not in the context of the representations made and whatever the scientific evidence is, whether the ad has the capacity to mislead. Now, if we have to amend, we'd be happy to amend. If we're—

Judge Niemeyer (14:58):

Except you made an election. You had the opportunity.

Robert Berg (15:01):

Well, we did.

Judge Niemeyer (15:02):

Yeah.

Robert Berg (15:02):

And we believed complaints—

Judge Niemeyer (15:04):

If it's you wanted to amend, then we wouldn't have jurisdiction. Isn't that right? Under our Domino Sugar case.

Robert Berg (15:10):

Well, Your Honor, if you affirm, and that the district court's decision, I would respectfully urge that it would be with leave to amend below.

Judge Niemeyer (15:24):

Alright. Mr. Berg, you have some rebuttal.

Robert Berg (15:27):

Yes.

Judge Niemeyer (15:27):

And we will give it to you back, right, Mr. Palmore?

Joseph Palmore (15:42):

Thank you, Your Honor. Joseph Palmore here for GNC and Rite Aid, the district court in this case properly dismissed the complaint because plaintiffs failed to adequately allege that the actual representations on the labels at issue were false. Those labels as has been discussed make general claims about joint health, and they do so on behalf of products with a complex set of ingredients. For two independent reasons, the complaint in this case was inadequate. First, the complaint, at most, alleges that a subset of the ingredients of these products are inadequate to treat osteoarthritis, which is a very specifically diagnosed degenerative disease of the joints. Yet, the labels make no representation that they can treat that disease. And, in fact, they disclaim it. Second, none of the studies cited address the products as a whole. Instead, they target only individual ingredients in isolation. So, I'd like to take those in turn with respect to the actual claims on the labels. And there was some discussion of this between plaintiffs' counsel and you, Judge Niemeyer.

Judge Niemeyer (16:46):

Well, you could have made it absolutely clear by saying this has not been shown to cure osteoarthritis and that would put the whole thing to rest. Wouldn't it or not?

Joseph Palmore (16:59):

Well, there's no obligation. I suppose it—

Judge Niemeyer (17:02):

But you have—you have the mandated disease label on there that this is not intended to cure disease. And osteoarthritis is a disease, I guess everybody concedes.

Joseph Palmore (17:12):

Yes.

Judge Niemeyer (17:12):

But.

Joseph Palmore (17:14):

Well, I think it's important to emphasize that the statutory framework here, which is the Dietary Supplement Health and Education Act, and it distinguishes, makes a bright line distinguish, between disease claims on the one hand and structure and function claims on the other. Disease claims have to be preauthorized by the FDA, even if they're appear on supplement labels, but these are structure and function claims. They don't have to be pre-cleared by the FDA, and they have to include just this disclaimer, but we're not relying just on the disclaimer. If you look at the actual representations on the label, they talk about, in very general terms, promoting joint health. The TriFlex sport, which is one of the labels at issue here that plaintiff's challenge, talks about treating joint pain that's caused by the wear and tear of exercise. So, if you look at these claims, they don't—they couldn't reasonably be interpreted to say that they treat the symptoms or will cure osteoarthritis. And then, to the extent that there's any doubt about that, the disclaimer would completely dispel them. And that's critical because every single study in the complaint is an osteoarthritis study. So, plaintiff spends paragraph after paragraph in the complaint, alleging the falsity of a claim that is not made in this case. There is no claim that there—that these products are efficacious to treat the symptoms of the degenerative joint disease of osteoarthritis.

Judge Niemeyer (18:37):

Is there a cure for osteoarthritis?

Joseph Palmore (18:38):

No, Your Honor. There's there is no cure.

Judge Niemeyer (18:43):

If a person had osteoarthritis and diagnosed that, would they receive that information from the doctor that there is no cure for it?

Joseph Palmore (18:52):

I'm sure they probably would. I mean, I think if you look, if you actually read some of the studies that are that are cited in the complaint, and they're incorporated by reference, they discuss the fact that there is no—there's no cure for osteoarthritis. Often, what's recommended is weight loss, exercise, some [inaudible], things like that. But it's critical to emphasize that the labels here don't make any representation that they can cure osteoarthritis. They're talking about general joint comfort, flexibility, and

any number of conditions can lead to joint problems other than osteoarthritis. With respect to non-osteoarthritis consumers, and I think it's important to point out there is a body of district court case law addressing claims very similar to this one, and we cite a number of those at pages 32 through 33 of our brief, including the *Aguilar* case from the Southern District of California, which is a very persuasive explanation of why complaints like this, don't state a claim.

Joseph Palmore (19:51):

A number of those cases dismissed on the ground that all the studies cited in the complaint, both there and here, are osteoarthritis studies and that you can't just flick a switch and translate the findings of those studies into joint—to disprove the allegations on the—sorry—disprove the representations on the actual labels with respect to generalized joint issues in the general population. The plaintiffs tried to address that problem by dropping one footnote. Footnote five in the complaint. And this was the focus of Judge Motz in the district court. And that complaint, at best, is a completely inconclusively. It says experts in the field would testify essentially that these studies are a proxy for the ability of these—the subset of these ingredients to address joint discomfort in the general population. Who are these experts? We don't know. What's their factual basis for saying this? We don't know.

Judge Niemeyer (20:52):

Of course that's evidentiary matters, but.

Joseph Palmore (20:55):

Your Honor, I would respectfully suggest that it's actually a pleading matter under *Iqbal/Twombly*, this court's decision in *Walters*. It's basically an unadorned statement at best. It's an unadorned statement of falsity. It's a legal conclusion masquerading as a factual allegation, and it's simply unelaborated. And it's insufficient. That kind of naked assertion is now insufficient under the pleading standard of Rule 8 as it's been construed by the Supreme Court and this court.

Judge (21:22):

Do they have to plead literal falsity?

Joseph Palmore (21:26):

Yes, I think they did.

Judge (21:27):

And did they?

Joseph Palmore (21:28):

No, they didn't, Your Honor. And I think that's what the Judge Motz was focusing on. That footnote is artfully phrased. It doesn't say these studies are a proxy and therefore prove that the substances would be inefficacious, in consumers without osteoarthritis.

Joseph Palmore (21:48):

I think if it had just said that it would still have the problem of being unelaborated and unsupported, but at least it would've been an assertion. Instead, what the footnote said is experts—we could hire some experts who would say this, and as plaintiff's counsel himself just said, you can hire an expert to say anything. So they've just said there are experts out in the world who would say this. That's not the same as actually a varying and alleging the thing itself that the experts would testify to. They've actually—what the plaintiffs have done in their complaint, and this is, I think what Judge Motz was saying, is that they have done no more than alleged a battle of the experts, and that's plainly insufficient under the fleeting standards of Rule 8 and *Iqbal/Twombly* and *Walters*. There's a second issue, which a number of the district courts that

have dismissed complaints like this have focused on, and it's this: the studies, which all address osteoarthritis as we discussed, also only addressed a certain subset of the ingredients of these products looked at in isolation or in combination within that subset. None of the studies address these actual products, which have a complex list of ingredients.

Joseph Palmore (23:00):

So the district court in *Rosen*, which we cite, talked about the logical fallacy of composition, which is the idea that the whole is no more than the sum of the parts or the idea that qualities and attributes of individual components can be attributed to the whole. And if it could illustrate that by saying that you, if you, if I say that flour and baking powder eaten by themselves tastes bad, that doesn't approve—that doesn't prove that chocolate cake made with flour and baking powder tastes bad. That would be a logical fallacy. It ignores what happens during the cooking process. And it ignores the additional ingredients that you put into the recipe. So too here, these studies, nearly all these studies, focus on glucosamine or [inaudible]. But if you look at the labels, there are many other ingredients in most of these products and the complaint makes doesn't factually support any allegation with respect to the falsity of claims made with respect to the products as a whole, with respect to all these individual ingredients and with respect to what they can do in a synergistic way. And it's not too much to ask plaintiffs who are pleading false advertising to prove, or at least to allege at the pleading stage, that the actual representations on the label are false with respect to the actual products being sold.

Judge Niemeyer (24:20):

Can I ask you a question? I noticed that the complaint also does not allege that the plaintiff tried the product and found it didn't work. Matter of fact, one of the plaintiffs I think had bought it on repeatedly suggesting that at least that person bought, maybe it was helping some, I don't know, but is that a necessary allegation to prove falsity that the person who purchased it was able to conclude that the representation was false?

Joseph Palmore (24:58):

I don't know that that's an allegation that would be strictly required in a false advertising case. I think it is telling though that if you look at these labels, both the GNC labels and the Rite Aid label, all of them say a hundred percent money back guaranteed. So within to the extent that these plaintiffs weren't satisfied, they didn't need to file a class action complaint.

Judge Niemeyer (25:18):

I well then wouldn't, they have to allege they weren't satisfied? In other words, my point is it would be strange in a misrepresentation case, for somebody to buy something and then hear on television, that it doesn't work. And then say, I'm now dissatisfied. I think that's hypothetical. That's not this case.

Joseph Palmore (25:41):

Right.

Judge Niemeyer (25:41):

The question is, would that state cause of action for misrepresentation?

Joseph Palmore (25:45):

I think it would raise questions about the state ending of the plaintiffs. I think that what they've alleged is a pocketbook injury and that they were injured at the point of sale.

Judge Niemeyer (25:54):

I understand they're injured, but they have to be injured by something false, something that caused

dissatisfaction on a reasonable basis. And the question is, how can they, if they don't allege they were dissatisfied or it didn't work. How can they allege that the purchase was improvidently made?

Joseph Palmore (26:14):

No, I think that's right, Judge Niemeyer. I think that does undermine their allegation of falsity. But even apart from that, the allegation is inadequate for all the reasons we've stated. There's another problem with the pleading here too. One is, as came out in the [inaudible] with the count with counsel, none of the patients to extent that he's complaining about the ability of these substances to treat osteoarthritis, they haven't pled that any of these plaintiffs have osteoarthritis.

Judge (26:40):

Well, let's go back to your chocolate cake a minute.

Joseph Palmore (26:42):

Yup.

Judge (26:44):

Is it true that you marketed these products as glucosamine and chondroitin, particularly the Rite Aid products? No one sells chocolate cake under the label, baking soda and flour. So isn't there a flaw in your analogy there?

Joseph Palmore (27:06):

Your Honor, I think there is one—

Judge (27:07):

Just because you actually marketed as chondroitin and glucosamine.

Joseph Palmore (27:13):

With respect to one of the Rite Aid products, you are right, Your Honor. But with respect to and plaintiffs, don't call that one out as something that should be analyzed any differently to than any of the other labels, but with respect to the other labels, that if you look at the TriFlex sports blend, for instance, it lists a whole number of products, including the, a joint cushioning sports blend, which, and you look over on the right side of the panel lists a whole bunch of ingredients. There's MSM; there's hyaluronic acid. There are different components and different ingredients in each of these, which I think actually goes to the point that these are different products with different compositions of ingredients. And to just pull out one or two and say, those are ineffective when used in isolation is insufficient. But going back to the larger point, the real fundamental flaw here is that there's that paragraph after paragraph of the complaint, alleges falsity with respect to a claim that's simply not made here, which is that these dietary supplements can treat the symptoms or can cure osteoarthritis.

Joseph Palmore (28:18):

That's not a claim that's made on these labels. It's in fact, expressly disclaimed, and plaintiffs attempt to bridge or leverage all of that material into the non-osteoarthritic population with respect to the actual claims that are made here is entirely inconclusive and does no more than alleged battle of the experts. If the court has no further questions, we'll rest on our briefs.

Judge Niemeyer (28:43):

And, I think, Judge Hamilton?

Judge Hamilton (28:45):

No, no further questions.

Judge Niemeyer (28:47):

Okay. All right. Mr. Berg.

Robert Berg (28:55):

Your Honors, I'd like to address a few of the points that were just raised with respect to the ingredients, glucosamine and chondroitin are the largest percentage ingredients by a huge margin in these products. Glucosamine is typically 1,500 milligrams and chondroitin is typically 1,200 milligrams. These other trace elements; I call them fairy dust. They include things like in some of the products, willow bark and all sorts of little things like that. We do in the complaint address several of the major, additional ingredients that are included on some of the products, MSM and hyaluronic acid and we explain why those don't provide any benefits to anyone either. And there are some studies supporting that we cite in the complaint. So I don't think you can just sprinkle a little bit of fairy dust in your product and say, you have to look at all the ingredients and make represent that you have to prove that everything—that none of them work when it's really a—it's sold as a glucosamine/chondroitin product.

Robert Berg (29:57):

The defendants refer to a number of decisions that have dismissed similar complaints. There were probably more decisions that uphold the identical complaints that we have here, which we've cited on our briefs. Importantly, a number of the major manufacturers of glucosamine and chondroitin supplements have settled complaints identical to this. They've recognized there is a problem and Rexall, Walmart, and a number of other, Schiff, a number of other major manufacturers and distributors have already entered into settlements to resolve these claims. I note the irony that defendants are challenging the studies that we've identified; they still have not disclosed anything about their own purported study.

Judge Niemeyer (30:40):

But this is not a trial.

Robert Berg (30:42):

No, it's not.

Judge Niemeyer (30:43):

This is a question of what you're able to allege. Let me ask you if one of your plaintiffs had purchased this product and found that it worked, but then heard on television that the experts believe it doesn't work, could that plaintiff bring a suit?

Robert Berg (31:05):

Absolutely. Because there's the placebo effect. You can't falsely advertise something and because there is a—

Judge Niemeyer (31:12):

Well there's no false allegation in my hypothetical.

Robert Berg (31:16):

Well, if you say something can cure cancer.

Robert Berg (31:20):

No, no, we're talking about a hypothetical where we have a product that says it does something and the plaintiff buys it and believes he gets relief from the product. He's not dissatisfied based on his own experience. But then he hears some experts. The vast majority of experts say it's not working. He hears another story where other experts say it does work. Can he bring suit based on the vast majority of experts that he heard in that hypothetical?

Robert Berg (31:55):

In your hypothetical?

Judge Niemeyer (31:56):

Yeah.

Robert Berg (31:56):

He probably can because uh.

Judge Niemeyer (31:58):

He can?

Robert Berg (31:58):

He can, because if you, again, look, if you can establish the trier effects of satisfac—

Judge Niemeyer (32:06):

How he say, how can he say it was false when number one, he alleges, I experienced that it was not false—

Robert Berg (32:13):

Because.

Judge Niemeyer (32:13):

And number two there were experts going both ways on it.

Robert Berg (32:19):

Well, let's talk about the placebo effect. That's a recognized, scientific fact that some people believe that they're getting relief when they're not because of they're taking the medicine. They think it works or the, whatever the product is and taking it. The FTC says you can't rely on placebo effect, impact that to make, to legitimize your advertising in a number of courts that we cited, I believe say the same thing. Uh.

Judge Niemeyer (32:46):

So the way you say that the complaint I hypothesized works, works only if the person's experience was based on a placebo effect?

Robert Berg (32:56):

Correct.

Judge Niemeyer (32:57):

And not have your alleged that in the complaint that these people have experienced a placebo effect?

Robert Berg (33:02):

No, we don't go that way because we don't need to in our particular fact situation. I would like to just point, emphasize is that some of the claims on some of the products is that they rejuvenate or regrow cartilage. There's no scientific evidence that they could possibly do that by anyone. So there are definitely some false, we say they're all false, but there are specific representations where I don't think there's any argument that they're false, such as that one. And if Your Honors don't have anything else.

Judge Niemeyer (33:48):

All right. Thank you, Mr. Berg.

Robert Berg (33:49):

Thank you.

Judge Niemeyer (33:49):

Uh we'll come down and greet counsel and accept Judge Hamilton's greetings, remotely <laugh> and then proceed on to the next case.