

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF SOUTH CAROLINA  
CHARLESTON DIVISION

In re Bausch & Lomb Inc. Contacts Lens Solution Products Liability Litigation	)	
	)	
	)	MDL No. 1785
	)	
<i>This order relates to:</i>	)	C/A No. 2:06-MN-77777-DCN
	)	
Solo v. Bausch & Lomb, Inc.,	)	
C/A No. 2:06-CV-02716-DCN	)	<b>ORDER and OPINION</b>
	)	
_____	)	

This matter is before the court on defendant’s motion to dismiss plaintiffs’ second amended consolidated class action complaint pursuant to Federal Rule of Civil Procedure 12(b)(6).<sup>1</sup> Plaintiffs allege they have suffered economic losses as a result of alleged defects in ReNu with MoistureLoc (“ReNu”), a contact-lens solution manufactured by defendant. To that end, they have asserted various causes of action under California and Pennsylvania law individually and on behalf of a purported class of ReNu purchasers. The named plaintiffs seek to represent a class comprised of all California and Pennsylvania consumers who purchased ReNu between September 1, 2004 and April 10, 2006, and who discarded any unused quantity after defendant advised consumers to do so. For the reasons set forth below, defendant’s motion to dismiss is granted in part and

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<sup>1</sup>This references the complaint filed on November 6, 2007. Although captioned by plaintiffs as the “First Amended, Consolidated, Class-Action Complaint,” it is apparently the second amended consolidated class action complaint because plaintiffs captioned the previous complaint, filed January 31, 2007, as the “Consolidated, Amended Class-Action Complaint.” Labels aside, this order acts on docket entry 76, which is a motion to dismiss the complaint filed as docket entry 73 in the case management number, 2:06-MN-77777-DCN. The November 6, 2007 complaint is referenced herein as the “second amended complaint.”

denied in part.

### **I. BACKGROUND**

On a motion to dismiss, the court must take the complaint's well-pleaded factual allegations as true and draw all reasonable inferences in the plaintiff's favor. McNair v. Lend Lease Trucks, Inc., 95 F.3d 325, 327 (4th Cir. 1996). The statement of the facts in this case is made accordingly.

Defendant manufactured ReNu, a multipurpose contact-lens solution that cleaned and disinfected contact lenses. The Food and Drug Administration (FDA) approved ReNu in May 2004 and Bausch & Lomb released the solution for sale to the American public in September 2004. ReNu was released for sale in Asia, including Hong Kong, Singapore, and Malaysia, shortly thereafter.

Plaintiffs allege ReNu was defective because it caused or had the propensity to cause fusarium keratitis. Fusarium keratitis is a fungus that causes a serious infection to the cornea, sometimes resulting in significant damage to the eyes. Treatment for fusarium keratitis requires a quick administration of antifungal medication and/or surgery to remove the fungus. Without proper treatment, fusarium keratitis can cause severe vision loss or blindness, and necessitate corneal transplants.

Health officials in Asia were the first to link ReNu with fusarium keratitis. In April 2006, Singapore's Ministry of Health issued a press release stating that seventy-five cases of fusarium keratitis had been reported in contact-lens wearers between November 1, 2004 and April 12, 2006. This was a sharp increase over the January 1, 2004 to October 31, 2004 period, during which only two cases of fusarium keratitis were

reported. The press release linked the outbreak to ReNu and encouraged consumers to stop using the solution. Officials in Hong Kong subsequently requested that defendant remove ReNu from stores.

As of March 2006, the Centers for Disease Control (CDC) had noticed an increased number of fusarium keratitis cases in the United States. A CDC study fully investigated thirty cases, and found that twenty-six of twenty-eight patients who wore soft contact lenses also used ReNu. The CDC and FDA issued a joint press release on April 10, 2006, noting that wearers of soft contact lenses who used ReNu were at an increased risk of being infected with fusarium keratitis. The same day, defendant announced that it was ceasing shipments of ReNu to retailers in the United States. Three days later, on April 13, 2006, defendant asked retailers to stop selling ReNu to consumers and recommended that consumers switch to another solution. The FDA issued a statement supporting defendant's decision to withdraw ReNu.

The second amended complaint has two named plaintiffs: Susan McKay, for the California purchasers, and Meghan Eveland, for the Pennsylvania purchasers. In January 2006, McKay purchased four or five bottles of ReNu. She discarded all four or five bottles in or about May 2006 after defendant directed her and the consuming public to do so. In March 2006, Eveland purchased two bottles of ReNu. She discarded one and three-quarters bottles of ReNu following defendant's directive to do so. They both allege they have suffered monetary damages from discarding the unused ReNu.

On August 14, 2006, the Judicial Panel on Multi-District Litigation consolidated cases relating to ReNu for pretrial proceedings and assigned the Multi-District Litigation

(MDL) to this court. McKay and Eveland filed their suits directly in the MDL. This court dismissed plaintiffs' first amended complaint using choice-of-law principles to the extent it alleged causes of action under New York law. Plaintiffs' causes of action under California and Pennsylvania law were dismissed for factual insufficiency because the named plaintiffs failed to allege that they had actually discarded any unused portion of ReNu and thus failed to allege that they suffered damages.

The current class-action complaint alleges eight causes of action:

Under California law: (1) violation of the Song-Beverly Consumer Warranty Act, Cal. Civ. Code § 1791 et seq.; (2) breach of the implied warranty of merchantability, Cal. Com. Code § 2314; (3) violation of Cal. Bus. & Prof. Code § 17200 et seq. for unfair and deceptive trade practices; (4) violation of Cal. Bus. & Prof. Code § 17500 et seq. for false advertising; (5) violation of the Consumer Legal Remedies Act, Cal. Civ. Code § 1750 et seq.; and (6) unjust enrichment.

Under Pennsylvania law: (1) breach of the implied warranty of merchantability, 13 Pa. Cons. Stat. § 2314; and (2) unjust enrichment.

## **II. STANDARD OF REVIEW**

Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." The purpose of a Rule 12(b)(6) motion is to test the sufficiency of the complaint and not to decide the merits of the action. Edwards v. City of Goldsboro, 178 F.3d 231, 243-44 (4th Cir. 1999). At this stage of the litigation, a plaintiff's well-pleaded allegations are taken as true, and the complaint, including all reasonable inferences, is liberally construed in the plaintiff's

favor. See McNair v. Lend Lease Trucks, Inc., 95 F.3d 325, 327 (4th Cir. 1996). To withstand a motion to dismiss, the complaint need only “give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.” Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955, 1964 (2007) (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)). But the plaintiff must nonetheless provide “more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” Id. at 1965.

### **III. DISCUSSION**

#### **A. The Parties’ Initial Arguments**

##### **1. Economic Losses and Defendant’s Refund Program**

Defendant initially argues that the complaint fails to state a claim because plaintiffs have not addressed the effect of a refund system defendant instituted after it advised consumers to stop using ReNu. At bottom, defendant argues that plaintiffs had to do more than merely allege that they discarded an unused portion of ReNu because the same press release that advised consumers to stop using ReNu also provided information on how to obtain a refund. Thus, defendant asserts that, in order to sufficiently plead economic losses, plaintiffs must have alleged that they discarded some unused portion of ReNu, that they sought a refund from defendant, and that defendant refused to provide that refund. Def. Mem. Supp. Motion to Dismiss at 3.

To begin, it is clear that the allegations of the complaint sufficiently allege that plaintiffs have suffered economic losses. Following this court’s order on the first motion to dismiss, plaintiffs have alleged that they purchased ReNu and then, following defendant’s advice, discarded some unused portion of the product. Accordingly, their

allegations fairly allege that they have not received the benefit of the bargain and have suffered a monetary loss (e.g., the purchase price) as a result of discarding the unused product.

Defendant asks the court to go beyond the allegations of the complaint and, by referencing extrinsic evidence, declare that those allegations are insufficient to plead economic loss. “Although as a general rule extrinsic evidence should not be considered at the 12(b)(6) stage, [the Fourth Circuit has] held that when a defendant attaches a document to its motion to dismiss, a court may consider it in determining whether to dismiss the complaint if it was integral to and explicitly relied on in the complaint and if the plaintiffs do not challenge its authenticity.” Amer. Chiropractic Ass’n v. Trigon Healthcare, Inc., 367 F.3d 212, 234 (4th Cir. 2004) (internal quotations and alterations omitted) (quoting Phillips v. LCI Int’l Inc., 190 F.3d 609, 619 (4th Cir. 1999)).

Following that rule, defendant argues the court should look to an April 13, 2006 press release it issued that advised consumers to stop using ReNu and provided information on obtaining a refund. Although defendant asserts the complaint relies on that press release and that the press release is an integral part of the complaint, references to the press release are conspicuously absent from the complaint. Though there is an allegation that defendant advised consumers to stop using ReNu on April 13, 2006, it is not at all clear that the complaint relies on the press release and it certainly does not “explicitly” rely on the release as required by Fourth Circuit precedent. Thus, the court will not consider the press release in connection with the instant motion to dismiss. The court therefore concludes that the second amended complaint adequately alleges that

plaintiffs have suffered economic losses.

## 2. The Law of the Case Doctrine and Waiver of Arguments

Plaintiffs generally assert that the court's ruling on the earlier motion to dismiss precludes some of defendant's arguments on the instant motion. First, plaintiffs argue that the court previously "declined" to dismiss their California and Pennsylvania claims, thereby precluding defendant from arguing that they should be dismissed in light of the law of the case doctrine. Pls. Mem. Opp. Mot. to Dismiss at 4-5. Second, plaintiffs argue defendant waived any arguments presented for the first time on the instant motion because it failed to raise them as part of the earlier motion to dismiss. *Id.* at 22.

Under the law of the case doctrine, "when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 816-17 (1988) (internal citations and quotations omitted) (quoting Arizona v. California, 460 U.S. 605, 618 (1983)). Contrary to plaintiffs' argument, the court's order on the earlier motion to dismiss did not "decline" to dismiss their California and Pennsylvania causes of action. Rather, the court dismissed those claims without prejudice because plaintiffs failed to adequately allege that they suffered damages as a result of defendant's purported wrongdoing. See In re Bausch & Lomb Contact Lens Solution Prods. Liability Litig., MDL No. 1975, C/A No. 2:06-MN-77777 (D.S.C. filed Oct. 11, 2007). The court therefore did not consider the arguments defendant has presented in the instant motion. Accordingly, the law of the case doctrine does not preclude consideration of the arguments defendant has presented in this motion.

Nor is defendant's new argument concerning the Pennsylvania unjust enrichment claim foreclosed by its failure to raise that argument in the first motion to dismiss. There is no support for plaintiffs' assertion. The court has been unable to locate any authority for the proposition that a party must raise arguments on a first motion to dismiss or else waive those arguments on subsequent motions that attack amended complaints. In any event, allowing defendant to assert that argument is harmless because, as discussed in more detail below, the court disagrees with defendant and declines to dismiss that cause of action.

**B. Breach of Implied Warranty: Notice Requirements (Counts I, II, & VII)**

Defendant argues that the California and Pennsylvania implied warranty causes of action (Counts I, II, & VII) must be dismissed because plaintiffs have not adequately alleged that they provided defendant with reasonable notice of the defect. Article 2 of the Uniform Commercial Code states that, where tender of goods has been accepted by the buyer, "the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy." U.C.C. § 2-607(3)(a). Pennsylvania and California have enacted that section verbatim. See Cal. Com. Code § 2607(3)(A); 13 Pa. Cons. Stat. § 2607(c)(1). The notice requirement first appeared in section 49 of the Uniform Sales Act, and its purpose was to clearly codify the elimination of the common law's caveat emptor rule, while at the same time protecting the seller against stale claims and enabling prudent investigation of claims and preparation for negotiation. Patrick A. Milberger, Section 2-607(3)(a): Effective Notification of Breach Under the Uniform Commercial Code, 44 U. Pitt. L. Rev. 733,

734 (1983). Courts have applied Judge Learned Hand's analysis of Uniform Sales Act § 49 to U.C.C. § 2-607(3)(a):

The plaintiff replies that the buyer is not required to give notice of what the seller already knows, but this confuses two quite different things. The notice of the breach required is not of the facts, which the seller presumably knows quite as well, if not better than, the buyer, but of buyer's claim that they constitute a breach. The purpose of the notice is to advise the seller that he must meet a claim for damages, as to which, rightly or wrongly, the law requires he shall have an early warning.

American Mfg. Co. v. U.S. Shipping Board Emergency Fleet Corp., 7 F.2d 565, 566 (2d Cir. 1925). The notice requirement can be harsh when strictly applied, and it has been generally criticized as such. See Milberger, supra; John C. Reitz, Against Notice: A Proposal to Restrict the Notice of Claims Rule in U.C.C 2-607(3)(a), 73 Cornell L. Rev. 534 (1988). But see Harry G. Prince, Overprotecting the Consumer? Section 2-607(3)(a) Notice of Breach in Nonprivity Contexts, 66 N.C. L. Rev. 107, (1987) (stating that courts have overprotected the consumer by minimizing, and in some cases eliminating, the notice requirement).

Some states have adopted ameliorative provisions, relaxing stringent application of the notice requirement where a personal injury is involved.<sup>2</sup> California and Pennsylvania have not adopted statutory language relieving the retail consumer of the obligation to give a merchant seller notice of breach. Plaintiffs cited in their response to the first motion dismiss (which they apparently incorporate by reference in their response

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<sup>2</sup>South Carolina added language stating "no notice of injury to the person in the case of consumer goods shall be required." S.C. Code Ann. § 36-2-607(3)(a). Maine added more precise language in the form of an additional subsection stating that 2-607(3)(a) "shall not apply where the remedy is for personal injury resulting from any breach." Me. Rev. Stat. Ann. tit. 11, § 2-607(7).

to the instant motion) to a California Supreme Court opinion in support of their position that notice is not required. What plaintiffs fail to recognize, however, is that the California Supreme Court specifically considered whether notice is required when the defective product caused a personal, rather than an economic, injury. See Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 61 (1963) (Traynor, J.). The result in Greenman can be ascribed to the distinction between products liability actions sounding in tort and those sounding in contract. See 1 David G. Owen et al., Madden & Owen on Products Liability §§ 4.1, 4.5 (2007). Although plaintiffs have cited to one Pennsylvania case to support of their position, McKeesport Mun. Water Auth. v. McCloskey, 690 A.2d 766 (Pa. Commw. Ct. 1997), that court did not actually decide whether notice was required where the water authority sold defective water. Rather, the court expressly noted that it was assuming arguendo that notice was required. Id. at 769.

Absent case law to the contrary, this court must apply the plain language of the UCC as adopted by California and Pennsylvania and require that plaintiffs allege they gave notice of defendant's purported breach of the implied warranty within a reasonable time. Superficially, it may seem absurd to require thousands of consumers to give notice of the breach, but the UCC treats all goods alike, regardless of whether the good is a \$5 bottle of ReNu purchased by thousands or a \$5 million widget purchased by one person. Although plaintiffs note that the law should not require the doing of a useless thing, the plain language of the statute requires the doing of that "thing," however useless. Moreover, as Judge Hand recognized in American Manufacturing, the giving of notice is not useless even if the seller knows of the breach because it also puts the seller on notice

that the buyer is dissatisfied with the transaction.

There is no allegation in the complaint that McKay or Eveland gave notice of the alleged breach, either within a reasonable time or otherwise.<sup>3</sup> Accordingly, Counts I, II, and VII must be dismissed.

**C. California Consumer Protection Statutes (Counts III, IV, & V)**

Defendant argues that McKay's claims under the California consumer protection statutes must be dismissed because she has not pleaded her claims with the requisite particularity under Rule 9. The California Supreme Court has held that the consumer protection statutes do not require a plaintiff to plead with heightened particularity.

Committee on Children's Television, Inc. v. Gen. Foods Corp., 35 Cal. 3d 197, 212 n.11 (1983).

Despite the California Supreme Court's holding in Committee on Children's Television, a federal court must apply its own procedural rules when sitting in diversity. See 5A Wright & Miller, Federal Practice & Procedure: Civil § 1297 (Supp. 2007). There is a high likelihood that plaintiffs would need to plead these causes of action with particularity because they contain elements amounting to fraud. See id. At least one federal district court in California has required compliance with Rule 9(b) as to claims under California's consumer protection statutes. See Meridian Project Sys., Inc. v. Hardin

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<sup>3</sup>There is an allegation contained in another cause of action that Skandros (who was a plaintiff in the last complaint but has since been removed) gave defendant notice of its "unfair and deceptive acts." Second Amend. Comp. ¶77. That allegation cannot save the implied warranty claims because it concerns notice provided by an individual who is not one of the representative plaintiffs, who apparently did not give notice of the asserted breach of implied warranty, and when there is no allegation that such notice was provided within reasonable time.

Constr. Co., 404 F. Supp. 2d 1214 (E.D. Cal. 2005).

Regardless of whether Rule 9(b) applies, McKay has pleaded her California consumer protection causes of action with enough specificity to meet the rule's heightened pleading requirement. As the Fourth Circuit has stated, Rule 9(b) requires the plaintiff to plead the time, place, contents of the misrepresentations, the identity of the person making the representation, and what was obtained as a result of the misrepresentation. Harrison v. Westinghouse Savannah River Co., 176 F.3d 776, 784 (4th Cir. 1999) (citing 5 Wright & Miller, supra, § 1397, at 590) (2d ed. 1990)). The Fourth Circuit summarized the standard as follows:

A court should hesitate to dismiss a complaint under Rule 9(b) if the court is satisfied (1) that the defendant has been made aware of the particular circumstances for which she will have to prepare a defense at trial, and (2) that plaintiff has substantial pre-discovery evidence of those facts.

Id. Here, McKay has provided detailed factual allegations in the complaint concerning the circumstances of the alleged defects, defendant's allegedly fraudulent conduct in hiding the defect for a length of time before alerting consumers, McKay's purchase and disposal of the product, and the source of the alleged misrepresentations. The court concludes that McKay has met Rule 9(b)'s heightened pleading requirement to the extent that rule applies to Counts III, IV, and V of the second amended complaint. Thus, defendant's motion to dismiss is denied as to those causes of action.

**D. California Unjust Enrichment/Restitution (Count VI)**

Defendant argues that California does not recognize unjust enrichment as a cause of action. While defendant is correct that unjust enrichment is not itself a cause of action, at least one recent California Court of Appeals decision has recognized that unjust

enrichment “synonymous” with restitution—which is a recognized cause of action under California law. See McBride v. Boughton, 20 Cal. Rptr. 3d 115, 121 (Ct. App. 2004) (citing Melchior v. New Line Productions, Inc., 131 Cal. Rptr. 2d 347 (Ct. App. 2003)); see also 55 Cal. Jur. 3d Restitution § 1 (2008) (noting that the terms “restitution” and “unjust enrichment” have slightly different meanings, but recognizing that unjust enrichment is “the result of a failure to make restitution”). In McBride, the court treated the plaintiff’s unjust enrichment claim as a claim for restitution. 20 Cal. Rptr. 3d at 121-22; see also Hinson v. Untied Fin. Servs., Inc., 473 S.E.2d 382, 472-73 (N.C. Ct. App. 1996) (treating an improper claim for unjust enrichment as one for restitution because it “seem[ed] obvious that the cause of action plaintiff intended was for restitution based on unjust enrichment”). This court will do the same because McKay’s unjust enrichment claim and her pleading of the elements of restitution gave defendant sufficient notice that it was really a claim for restitution, particularly given that California has stated that the legal principles of unjust enrichment and restitution are synonymous, or at least very closely related.<sup>4</sup>

Defendant further argues that, even if the court treats McKay’s unjust enrichment claim as one for restitution, California requires a further allegation that she lacks an adequate remedy at law. This court has not been able to locate any decision from a California court that requires a plaintiff to plead the lack of an adequate legal remedy as

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<sup>4</sup>Moreover, it is common among lawyers to use the terms “unjust enrichment” and “restitution” interchangeable. Indeed, many states style their equitable causes of action as one for “unjust enrichment” rather than “restitution.” See, e.g., Engram v. Engram, 463 S.E.2d 12, 15 (Ga. 1995).

an element of the restitution cause of action. See, e.g., County of San Bernardino v. Walsh, 69 Cal. Rptr. 3d 848 (Ct. App. 2007) (discussing restitution and unjust enrichment at length but making no mention of whether the plaintiff had an adequate remedy at law); 55 Cal. Jur. 3d Restitution §§ 1-2 (2008) (same). Plaintiff cites only to an unpublished federal district court decision in support of its argument. See Stationary Eng'rs Local 39 v. Phillip Morris, Inc., 1998 WL 476265, at \*18 (N.D. Cal. 1998). However, the federal court relied on Supreme Court and Ninth Circuit precedent for the proposition that equitable relief is not appropriate when an adequate remedy at law exists. See id. (citing Morales v. Trans World Airlines, Inc., 504 U.S. 374, 381 (1992); Mort v. Untied States, 86 F.3d 890 (9th Cir. 1996)). In the absence of California law to the contrary, this court—as a federal court sitting in diversity—is reluctant to establish a new element for that state's restitution cause of action. If plaintiff is successful on her legal causes of action, she might be denied equitable relief. However, answering that question and applying it to the instant motion would go beyond the limited scope of a motion to dismiss. Accordingly, defendant's motion to dismiss McKay's cause of action under California law for unjust enrichment is denied.

**E. Pennsylvania Unjust Enrichment (Count VIII)**

Defendant argues that Eveland's unjust enrichment claim under Pennsylvania law should be dismissed because she has not alleged that she gave defendant sufficient notice. Under Pennsylvania law, the unjust enrichment cause of action has three elements: (1) benefits conferred on defendant by plaintiff, (2) appreciation of such benefits by defendant, and (3) acceptance and retention of the benefits under such circumstances that

it would be inequitable for defendant to retain the benefit without payment of value. Pappert v. TAP Pharm. Prods., Inc., 885 A.2d 1127, 1137 (Pa. Commw. Ct. 2005); Styer v. Hugo, 619 A.2d 347, 350 (Pa. Super. 1993). “Whether the doctrine applies depends on the unique factual circumstances of each case.” Id. Contrary to defendant’s assertion, the Pennsylvania state courts have not imposed notice as a necessary element of unjust enrichment.<sup>5</sup>

Plaintiff’s allegations sufficiently allege unjust enrichment. First, she has alleged that she conferred a benefit upon defendant in the form of payment for her bottles of ReNu. Second, she has alleged that defendant retained that payment, thus signaling an appreciation of the benefit. Finally, plaintiff has alleged, inter alia, that plaintiff’s acceptance and retention of the benefit involved fraud and misrepresentation, which sufficiently alleges circumstances making it inequitable for defendant to retain the benefit without payment of value. For those reasons, defendant’s motion to dismiss is denied as to the Pennsylvania unjust enrichment claim.

#### IV. CONCLUSION

For the reasons set forth above, it is hereby **ORDERED** that defendant’s motion to dismiss be **GRANTED** as to Counts I, II, and VII of the amended complaint filed

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<sup>5</sup>Defendant cites to Sachs v. Continental Oil Co., 454 F. Supp. 614 (E.D. Pa. 1978), to support its argument. However, a critical reading of that case reveals that the district court was not establishing a blanket rule that notice is always required as part of an unjust enrichment claim. Instead, the district court, following the rule that application of the doctrine “depends on the unique factual circumstances of each case,” concluded that notice was required in that case in order for the defendant’s retention of benefits to be inequitable. Unlike the analysis in Sachs, which was before the court on a motion for summary judgment, it is not appropriate in this case to look beyond the complaint’s sufficient allegations to resolve the instant motion to dismiss.

November 6, 2007, and that those claims be **DISMISSED** without prejudice. It is further **ORDERED** that the motion to dismiss be **DENIED** as to the remaining claims.

**AND IT IS SO ORDERED.**



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**DAVID C. NORTON**  
**CHIEF UNITED STATES DISTRICT JUDGE**

**April 9, 2008**  
**Charleston, South Carolina**