UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES—GENERAL

Case No.	**CV 22-04732-DMG (MARx)**	Date	May 9, 2023
Title	***Maria Mendez Whitaker v. Pharmavite LLC***	Page	1 of 8

Present: The Honorable DOLLY M. GEE, UNITED STATES DISTRICT JUDGE

Kane Tien	Not Reported
Deputy Clerk	Court Reporter
Attorneys Present for Plaintiff(s)	Attorneys Present for Defendant(s)
None Present	None Present

Proceedings: IN CHAMBERS—ORDER RE DEFENDANT'S MOTION TO DISMISS [19]

Plaintiffs Maria Mendez Whitaker and David Wittman allege, on behalf of themselves and three proposed classes, that the manufacturing, labeling, and advertising of Defendant Pharmavite LLC's NatureMade Extra Strength Chewable Vitamin C tablets violates California's Consumer Legal Remedies Act ("CLRA"), Cal. Civ. Code. § 1750 *et seq*., False Advertising Law ("FAL"), Cal. Bus. § Prof. Code § 17500 *et seq*., and Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code § 17200 *et seq*., as well as New York's General Business Law ("GBL") sections 349 and 350. Plaintiffs filed the operative First Amended Complaint ("FAC") on September 16, 2022. [Doc. # 16.] Pharmavite now moves to dismiss all claims ("MTD"). The MTD is fully briefed. [Doc. ## 23 ("Opp."), 24 ("Reply").] For the reasons set forth below, the Court **GRANTS in part** and **DENIES in part** the MTD.

I.
FACTUAL BACKGROUND[1]

Between 2020 and early 2022, Whitaker, who is a California resident, purchased NatureMade Extra Strength Chewable Vitamin C tablets from two stores in in Burbank, California. FAC ¶ 6. Between 2021 and early 2022, Wittman, who is a New York resident, purchased the same tablets from stores in Long Island. *Id*. at ¶ 7.

The tablets Plaintiffs purchased are labeled "Extra Strength Chewable C" and "1,000 mg per serving" on the front label (the "Extra Strength" products). *Id.* at ¶ 15. Pharmavite also sells chewable vitamin C tablets that are labeled "Chewable C" and "500 mg" on the front label (the "Regular Strength" products). *Id*. at ¶ 16. Based on the "Extra Strength" labeling, Plaintiffs understood each Extra Strength tablet to contain a higher dose of vitamin C than each Regular Strength tablet. *Id*. at ¶¶ 6-7. But in fact, both the Extra Strength and the Regular Strength products

[1] The Court assumes the truth of the FAC's material factual allegations solely for the purpose of deciding Defendant's MTD.

each contain 500 mg of vitamin C per tablet. *Id*. at ¶ 18. The Extra Strength product merely contains an instruction on the back label that consumers should take two tablets per day. *Id*. at ¶¶ 15, 18.

Plaintiffs would not have purchased the Extra Strength tablets, or would have paid substantially less for them, had they known that the Extra Strength tablets contained the same amount of vitamin C as the Regular Strength tablets. FAC ¶¶ 6-7, 25. Online reviews on Amazon.com and Walmart.com indicate that other customers were similarly confused by the labeling. *Id*. at ¶ 21. Consumers pay a premium of between $.04 and $.06 per 1,000 mg serving for the Extra Strength tablets. *Id*. at ¶ 24, Table 1.[2]

II.
LEGAL STANDARD

Under Federal Rule of Civil Procedure 12(b)(6), a defendant may seek to dismiss a complaint for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). To survive a Rule 12(b)(6) motion, a complaint must articulate "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Although a pleading need not contain "detailed factual allegations," it must contain "more than labels and conclusions" or "a formulaic recitation of the elements of a cause of action." *Id*. at 555 (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). In evaluating the

[2] Defendant asks the Court to take judicial notice of a screenshot from its website showing that it sells a 60-count bottle of the Regular Strength product, to which Plaintiffs do not refer in their FAC. [Doc. # 20 ("RJN").] Although Defendant is correct that factual information contained on the internet may be a proper subject of judicial notice, "private corporate websites, particularly when describing their own business, generally are not the sorts of sources whose accuracy cannot reasonably be questioned." *Spy Optic, Inc. v. Alibaba.Com, Inc.*, 163 F. Supp. 3d 755, 763 (C.D. Cal. 2015) (quoting *Victaulic Co. v. Tieman*, 499 F.3d 227, 237 (3d Cir. 2007)). The Court therefore **DENIES** Defendant's RJN. Even if the Court had granted the RJN, it would not have changed the Court's analysis. Defendant only sought judicial notice of the *existence* of that product, not its price. Defendant nevertheless discusses the product's existence only to call into question Plaintiffs' comparison of the per-tablet price of the Extra Strength and Regular Strength product. *See* MTD at 14; *id*. at 23 n.12, 32 n.15 (discussing purported apples-to-oranges nature of Plaintiffs' price comparison). Defendant's argument—that factually there is no price differential between the Extra Strength and Regular Strength products—is better suited to a motion for summary judgment than this MTD.

sufficiency of a complaint, courts must accept all factual allegations as true. *Id.* (citing *Twombly*, 550 U.S. at 555). Legal conclusions, in contrast, are not entitled to the assumption of truth. *Id*.

Should a court dismiss certain claims, "[l]eave to amend should be granted unless the district court 'determines that the pleading could not possibly be cured by the allegation of other facts.'" *Knappenberger v. City of Phoenix*, 566 F.3d 936, 942 (9th Cir. 2009) (quoting *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (*en banc*)).

III.
DISCUSSION

Pharmavite moves to dismiss the FAC on two grounds: (1) Plaintiffs' claims fail to satisfy the governing "reasonable consumer" standard; and (2) Whitaker cannot seek restitution on her FAL and UCL claims because she has an adequate remedy at law.

A. Reasonable Consumer Standard

The core of Pharmavite's MTD is that Plaintiffs' claims fail as a matter of law because no reasonable consumer would be deceived by the Extra Strength tablets' label and expect the tablets to contain 1,000 mg of vitamin C per tablet.

Deceptive packaging claims under the UCL, CLRA, FAL, and sections 349 and 350 of the GBL are all evaluated based on whether a "reasonable consumer" is likely to be deceived. *Williams v. Gerber Prods. Co.*, 552 F.3d 934, 938 (9th Cir. 2008); *Fink v. Time Warner Cable,* 714 F.3d 739, 741 (2d Cir. 2013). To satisfy the reasonable consumer test, Plaintiff must show "a probability that a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled" by the product's packaging. *Ebner v. Fresh*, 838 F.3d 958, 965 (9th Cir. 2016) (internal quotation marks and citation omitted); *accord Oswego Laborers' Loc. 214 Pension Fund v. Marine Midland Bank, N.A.*, 85 N.Y.2d 20, 26 (1995) (deceptive acts and practices are "those likely to mislead a reasonable consumer acting reasonably under the circumstances"). Such questions of fact are not usually appropriate for decision on a motion to dismiss, but dismissal may be appropriate where the packaging "itself made it impossible for the plaintiff to prove that a reasonable consumer was likely to be deceived." *Williams*, 552 F.3d at 938-39; *accord Fink*, 714 F.3d at 741 (reasonableness may be determined as a matter of law, depending on the circumstances).

In deceptive labeling claims,

> What matters most is how real consumers understand and react to the advertising. [A]n accurate fine-print list of ingredients does not foreclose as a matter of law a claim that an ambiguous front label deceives reasonable consumers. Many reasonable consumers do not instinctively parse every front label or read every back label before placing groceries in their carts.

Bell v. Publix Super Markets, Inc., 982 F.3d 468, 476 (7th Cir. 2020). As such, an accurate description on the back of a label does not necessarily negate a misleading representation on the front. *See Williams,* 552 F.3d at 939 ("[W]e disagree…that reasonable consumers should be expected to look beyond misleading representations on the front of the box to discover the truth from the ingredient list in small print on the side of the box"); *see also Brady v. Bayer Corp.*, 26 Cal. App. 5th 1156, 1169 (2018) (collecting cases and holding that reasonable consumer was likely to be misled by a vitamin product called "One-A-Day" that failed to provide the serving size on the front label, but clarified on the back label that the serving size was actually two-a-day). Instead, "context is crucial." *Fink*, 714 F.3d at 742.

Pharmavite distinguishes its labeling from that at issue in *Cimoli v. Alacer Corporation*, 546 F. Supp. 3d 897 (N.D. Cal. 2021), and *Walters v. Vitamin Shoppe Industries, Inc.*, 701 F. App'x 667 (9th Cir. 2017), in which the courts found dispositive the fact that a vitamin's label failed to specify whether the dosage amount listed on the label was *per serving* or *per unit*. *See Walters*, 701 F. App'x at 669-70 (plaintiff stated fraudulent misrepresentation claim under Oregon law because product labeled "1,000 mg," which required consumers to chew two chews to obtain 1,000 mg of calcium, failed to specify on the front label whether the product was 1,000 mg per serving or 1,000 mg per unit); *Cimoli*, 546 F. Supp. 3d at 903 (reasonable customer could have been misled where front label said product contained 750 mg of vitamin C without specifying whether this was per gummy or per serving, even though back label clarified that the serving size was three gummies). It is true that Pharmavite's product unambiguously states that it contains 1,000 mg *per serving* on the front label. But Plaintiffs' claims here are different from those in *Cimoli* and *Walters*. Plaintiffs claim that Defendant's "Extra Strength" labeling was misleading when combined with the dosage amounts.

Pharmavite's citation to *Boris v. Wal-Mart Stores, Inc*, 35 F. Supp. 3d 1163 (C.D. Cal. 2014), is similarly inapposite. In that case, the defendant allegedly charged significantly more for its "Equate Migraine" product than it charged for its "Equate Extra Strength Headache Relief" product—even though the products contained the exact same active ingredients. *See id*. at 1166. The plaintiffs asserted that the price differential, along with the packaging of the products (the "Migraine" product had a red package, and the "Extra Strength" product had a green package), misled them into believing that the Migraine product was more effective. *Id*. at 1168-69. The

court dismissed the plaintiff's FAL, CLRA, UCL, and New York General Business Law claims because (a) the pricing differences and colors were not a "statement" or "representation," and (b) California law does not require that identical products be priced identically. *Id*. at 1170, 1172, 1171-72. Plaintiffs' theory here is quite different, and *Boris* does not control.

Plaintiffs cite three cases, on the other hand, that are more on point. In *Al Haj v. Pfizer, Inc.*, 338 F. Supp. 3d 741 (N.D. Ill. 2018), the court considered whether the defendant's labeling was misleading where its Maximum Strength Robitussin product actually contained *less* of one of the active ingredients per unit of volume than did the defendant's Regular Strength Robitussin product, but the recommended dosage for Maximum Strength Robitussin was twice the recommended dosage for Regular Strength Robitussin. *Id*. at 747. Both products listed the recommended dosage and the amount of active ingredient per dosage on the packaging. *Id*. at 755. Still, the *Al Haj* court held, under Illinois law, that it was "at least plausible that a reasonable consumer would expect that Maximum Strength Robitussin contains more DXM Hbr and guaifenesin per unit of volume than does Regular Strength Robitussin." *Id*. In *Woodhams v. Pfizer, Inc.*, No. 18-CV-3990 (JPO), 2021 WL 5304309 (S.D.N.Y. Nov. 15, 2021), a New York district court applying Michigan law refused to dismiss identical claims on the same grounds. *See id*. at *2. Finally, in *Stevens v. Walgreen Co.*, ---- F. Supp. 3d ----, 2022 WL 3681279 (S.D.N.Y. 2022), the court evaluated a claim under GBL sections 349 and 350 in which the plaintiff asserted he had been misled by the defendant's labeling of its "Maximum Strength" lidocaine patch, which actually contained the same amount of lidocaine per patch as did the defendant's "Regular Strength" patch. 2022 WL 3681279, at *5. The court concluded that it was plausible that a reasonable consumer would believe the "Maximum Strength" product to contain more lidocaine than the "Regular Strength" product. *Id*. (citing *Al Haj*, 338 F. Supp. 3d at 755).

Here, the Extra Strength product label could mislead a reasonable consumer to believe that each unit has greater potency. Pharmavite also has a vitamin C product that is not labeled "extra" strength. The *Al Haj* court persuasively reasoned that "it is at least plausible that a reasonable consumer would construe an assertion about a product's relative strength ('Regular' vs. 'Maximum') as one that concerns the product's relative potency and therefore that depends on the concentration of the product's active ingredients, not the total quantity consumed." 338 F. Supp. 3d at 754. Similarly, here, it is at least plausible that a reasonable consumer would expect that the "Extra Strength" label would describe the product's potency, and not merely reflect a higher dosage. Plaintiffs have therefore stated a claim under California and New York law.

Pharmavite's assertion that its "per serving" qualification undermines Plaintiffs' claims—and distinguishes this case from *Al Haj*—is wrong. Pharmavite argues that a reasonable consumer could not be misled by the "Extra Strength" statement because its "per serving" statement provides

a "context clue" that puts consumers on notice to check the back of the label for the serving size. MTD at 21.[3] But as in *Al Haj*, the "context clue" to which Pharmavite points would have required Plaintiffs to take both the Regular Strength and the Extra Strength product off the shelf and compare their labels. *See* 338 F. Supp. 3d at 755. The Court concludes that, as in *Al Haj*, "it is not reasonable to expect a consumer to cross-check a product's ingredient list against another product's list and then perform arithmetic to make sure she is comparing equivalent dosage volumes, all to ensure that the product she intends to purchase has the qualities it purports to have." *Id*. at 756.[4]

This case is not exactly like any of the other cases discussed by the parties. Pharmavite's inclusion of the "serving size" qualification on the front label does help address the problem faced by the defendants in *Cimoli*, *Walters*, and *Brady*, and distinguishes this case somewhat from *Al Haj*, *Woodhams*, and *Stevens*. Nonetheless, the Court concludes that it is plausible that the combination of the "extra strength" denotation and the "1,000 mg" label, even with the "per serving" qualification, could mislead a reasonable consumer.

Plaintiffs have alleged facts plausibly showing that a reasonable consumer could be deceived by the Extra Strength product's packaging. The Court therefore **DENIES** the MTD insofar as it is based on Pharmavite's failure to satisfy the reasonable consumer test.

[3] Page citations herein refer to the page numbers inserted by the CM/ECF system.

[4] As Plaintiffs correctly point out, Pharmavite's argument also relies heavily on outdated law. Pharmavite cites to a discussion in *Al Haj* of *In re 100% Grated Parmesan Cheese Marketing and Sales Practices Litigation*, 275 F. Supp. 3d 910 (N.D.Ill. 2017), and also relies on the reasoning in *Parmesan Cheese* itself. In *Parmesan Cheese*, a district court in Illinois reasoned that the ambiguity of a product's label ("100% Grated Parmesan Cheese") would have prompted any reasonable consumer to check the ingredient list to determine whether the product was 100% cheese, 100% grated, or 100% Parmesan. 275 F. Supp. 3d at 923. The court also concluded that no reasonable consumer could have thought that a shelf-stable product contained 100% cheese. *Id.* But in *Bell*, 982 F.3d at 475, the Seventh Circuit rejected the district court's ambiguity rule and held that the question of whether a reasonable consumer could believe that a shelf-stable product contained only cheese was a factual question inappropriate for resolution on a motion to dismiss.

Pharmavite argues in its Reply that *Bell* did not reverse the *Parmesan Cheese* decision on which it relies, but reversed a different decision. Although it is true that *Bell* reversed a different decision, it *rejected* the ambiguity rule that *Parmesan Cheese* had applied and upon which the lower court had relied. *See* 982 F.3d at 475 (describing the reasoning in *Parmesan Cheese*, 275 F. Supp. 3d at 923, stating "we disagree with all three grounds for dismissal" in that order, and reversing the lower court decision that relied on *Parmesan Cheese*). Pharmavite erroneously relies on the fact that Westlaw fails to recognize that the rationale of the *Parmesan Cheese* decision was roundly rejected by the Seventh Circuit. *See* Reply at 15-16.

B. Equitable Remedies

Pharmavite also seeks to dismiss Whitaker's claims for restitution under the FAL and UCL because she has failed to show she lacks an adequate remedy at law.[5]

The Ninth Circuit has held that "[t]he traditional principles governing equitable remedies in federal courts, including the requisite inadequacy of legal remedies, apply when a party requests restitution under the UCL and CLRA in a diversity action." *Sonner v. Premium Nutrition Corp.*, 971 F.3d 834, 844 (9th Cir. 2020). Thus, a plaintiff "must establish that she lacks an adequate remedy at law before securing equitable restitution for past harm under the UCL and CLRA." *Id.*

In her Opposition, Whitaker does not argue that she lacks an adequate remedy at law, but merely contends that she may plead her restitution claims in the alternative. While it is, of course, generally true that the Federal Rules of Civil Procedure permit alternative pleading, the inadequacy of remedies at law is an element of pleading an equitable restitution claim. *See Sonner*, 971 F.3d at 844 (citing *O'Shea v. Littleton*, 414 U.S. 488, 502 (1974)); *see also Antonyan v. Ford Motor Co.*, Case No. CV 21-0945-DMG (RAOx), 2022 WL 1299964, at *6 (C.D. Cal. Mar. 30, 2022) (concluding same). The fact that Whitaker's equitable claims are pled in the alternative does not save them.

Accordingly, the MTD with respect to the claims for restitution is **GRANTED**. Because it is uncertain whether Plaintiffs could amend the FAC to plead that Whitaker lacks an adequate remedy at law, the Court **GRANTS** leave to amend as to those claims.

IV.
CONCLUSION

For the foregoing reasons, Pharmavite's MTD is **GRANTED, with leave to amend**, as to Whitaker's claims for equitable restitution under the FAL and UCL. Pharmavite's MTD is

[5] Pharmavite appears to concede that Whitaker has properly pleaded her claim for injunctive relief, *see* Reply at 30, yet also argues that her FAL and UCL claims should be dismissed entirely because only equitable remedies are available under those statutes. *Id.* As explained herein, the Court agrees that Whitaker's restitution claims should be dismissed, because it appears that her damages remedy under the CLRA is adequate. But that conclusion does not warrant dismissal of Whitaker's claims for injunctive relief under the FAL and UCL. Because Defendant does not argue that Whitaker lacks standing or otherwise cannot seek an injunction, the Court declines to dismiss her FAL and UCL claims in their entirety on that basis.

otherwise **DENIED**. Plaintiffs shall file their Second Amended Complaint, or a notice of intent not to amend, by **May 30, 2023**. Pharmavite shall file its response within 21 days thereafter.

IT IS SO ORDERED.