THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PORTLAND DIVISION

LEE WALTERS, MD,

Plaintiff,

v.

VITAMIN SHOPPE INDUSTRIES, INC.,

Defendant.

No. 3:14-cv-1173-PK

FINDINGS AND RECOMMENDATION

PAPAK, Magistrate Judge:

Plaintiff Lee Walters, M.D., brings this action against Defendant Vitamin Shoppe Industries, Inc., asserting claims for unjust enrichment and fraud on behalf of himself and a proposed nationwide class of Defendant's customers, and claims for violations of Oregon's Unlawful Trade Practices Act (UTPA) on behalf of himself and a proposed subclass of Defendant's Oregon customers. Plaintiff asserts that Defendant's labels on the front-facing portion of its products' packaging (referred to as the Principal Display Panel, or PDP) are misleading because the PDP refers to the volume per serving, rather than the volume per individual pill, capsule, or tablet. For example, Plaintiff alleges that he purchased a package of

Defendant's Calcium 1000 milligram (mg) Caramel Chews, and that the package's PDP noted 1000 mg of calcium per serving, while the reverse side of the packaging (referred to as the Supplemental Facts Panel) stated in smaller print that each "chew" contained 500 mg of calcium, requiring the customer to consume two chews to meet the single serving amount of 1000 mg. Third Am. Compl. ¶¶ 46-51, ECF No. 59. Plaintiff alleges he would not have purchased Defendant's product if the PDP had disclosed that "the listed Supplement Amount was 'per serving' or 'per 2 soft chews', or that the Supplement Amount per Unit was actually 500 mg." Third Am. Compl. ¶ 50.

In 2015, this court granted Defendant's motion to dismiss for failure to state a claim and dismissed Plaintiff's claims with prejudice. *Walters v. Vitamin Shoppe Indus., Inc.*, 2015 WL 3916972 (D. Or. June 25, 2015). On appeal, the Ninth Circuit affirmed this court's dismissal of Plaintiff's claims for breach of contract and breach of warranty, and reversed the dismissal of his claims for unjust enrichment, fraud, and UTPA violations. *Walters v. Vitamin Shoppe Indus., Inc.*, 701 F. App'x 667 (9th Cir. 2017). The Ninth Circuit held that "[b]ecause the parties' transaction did not form a contract, the unjust enrichment claim is not precluded." *Id.* at 669. The Ninth Circuit held that Plaintiff stated a claim for fraud because he was not "required, as a matter of law, to cross-reference statements on a product's label against information found in small print elsewhere on the product." *Id.* at 670.

After remand from the Ninth Circuit, Plaintiff filed his Third Amended Class Action Complaint, which is the operative complaint. Defendant now moves to strike Plaintiff's allegations on the proposed nationwide class of purchasers for the unjust enrichment and fraud claims. Defendant contends that material variations among the fifty states on the legal

requirements to establish claims for fraud and unjust enrichment "make it impossible for Plaintiff -- an Oregon resident who alleges he purchased one of the allegedly deceptive products in Oregon -- to maintain those claims against [Defendant] on behalf of a nationwide class of consumers." Def.'s Mot. 1, ECF No. 60.[1] Plaintiff responds that this court should not address Defendant's motion to strike until the parties have conducted discovery.

For the following reasons, I recommend that this court grant without prejudice Defendant's motion to strike Plaintiff's nationwide class action allegations. I recommend that this court deny Defendant's motion to dismiss Plaintiff's claim for prospective injunctive relief because the Ninth Circuit has rejected the standing argument that Defendant raises here. *See Davidson v. Kimberly-Clark Corp.*, 873 F.3d 1103, 1107 (9th Cir. 2017).

BACKGROUND

Plaintiff alleges that in May 2014, he purchased a package of Defendant's Calcium 1000 mg Caramel Chews at one of Defendant's Vitamin Shoppes in Portland. Third Am. Compl. ¶ 46. The Caramel Chews package contained 60 chews, with each chew containing 500 mg of calcium. The Calcium Chews package's PDP stated that the package contained 60 soft chews, and stated, "Calcium 1000 mg." Third Am. Compl. 23, Fig. 15. On the reverse side of the package, the supplemental facts panel indicated that two soft chew tablets must be consumed to reach the serving amount of 1000 mg indicated on the front of the package.

Plaintiff alleges that when he purchased the product, he "did not know that the package . . . misrepresented the Supplement Amount per Unit of the product, did not know that the '1000

[1] In its initial motion to dismiss, Defendant also moved to strike Plaintiff's nationwide class allegations, Def.'s Mot. Dismiss 13-33, ECF No. 24, but this court did not need to address the motion to strike because it granted Defendant's motion to dismiss on the merits of Plaintiff's claims.

mg' statement purported to represent Serving Size, and did not know that the PDP otherwise misrepresented the net quantity of Supplement contained within the package." Third Am. Compl. ¶ 48. Plaintiff alleges that he would not have purchased the product "if the actual and accurate Supplement Amount per Unit had been disclosed to him on the PDP through indication that the listed Supplement Amount was 'per serving' or 'per 2 soft chews,' or that the Supplement Amount per Unit was actually 500 mg." Third Am. Compl. ¶ 50. Similarly, Plaintiff alleges that he would not have purchased the product if the PDP had indicated that the total amount of calcium in the package was 30,000 mg, rather than a total amount of 60,000 mg that he contends is implied by the PDP.

Plaintiff alleges that as part of Defendant's attempt to mislead customers, Defendant displays its own branded products in its stores on shelves next to similar products made by competing manufacturers. Third Am. Compl. ¶¶ 13, 25-27. Plaintiff alleges that Defendant shelves its products this way "to encourage consumers to use the information on the PDPs to compare quantities, prices, and unit prices of its Nutritional Supplements to its competitors' products. [Defendant] gains an unfair advantage and misleads consumers because the PDPs on each Accused Product overstate[] the quantity of Nutritional Supplements . . . ." Third Am. Compl. ¶ 25.

Plaintiff brings claims for unjust enrichment, fraud, and violations of the Oregon UTPA. Plaintiff also seeks to represent a nationwide class of in-store purchasers who were allegedly misled as Plaintiff alleges that he was misled, by comparing Defendant's products' labels and prices with those of competing products that were shelved next to Defendant's products in its

stores.[2] Plaintiff defines the proposed nationwide class as "all persons within the United States who at any time during the applicable class period[3] purchased one or more Accused Products." Third Am. Compl. ¶ 53. Plaintiff defines "Accused Product" as a product or supplement branded by Defendant "that, within the class period, has or has had a principal display panel that misstates the overall quantity of the package contents." Third Am. Compl. ¶ 4. The complaint includes a table listing about 30 Accused Products, giving each product's number of units per package, the volume per serving, the volume per unit, and the percent of shortfall. Third Am. Compl. ¶ 45.

Plaintiff also seeks to represent a subclass of Oregon customers, allegedly more than 10,000 members, for claims under Oregon's Uniform Trade Practices Act. Defendant does not move to strike the proposed subclass of Oregon customers.

LEGAL STANDARDS

I. Motions to Strike Under Federal Rule of Civil Procedure 12(f)

Under Federal Rule of Civil Procedure 12(f), a district court may strike from the pleadings "an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." When a defendant moves to strike class allegations, particularly before discovery, the defendant "must bear the burden of proving that the class is *not* certifiable." *Bates v. Bankers Life and Cas. Co.*, 993 F. Supp. 2d 1318, 1341 (D. Or. 2014) (Papak, J.).

---

[2] Defendant notes that Plaintiff no longer seeks to include as class members customers who purchased Defendant's products through catalogs or the internet. Def.'s Reply 4 n.2.

[3] The complaint does not allege a class period. Defendant notes that in Plaintiff's discovery requests, Plaintiff defines the Proposed Class Period as "from July 23, 2004 to the present." Colton Decl., Ex. 1, at 3 (Plaintiff's 1st Request for Production of Documents), ECF No. 66-1.

II. Class Certification Under Federal Rule of Civil Procedure 23

Under Federal Rule of Civil Procedure 23(a), plaintiffs seeking to certify a class must show (1) numerosity, requiring that the class is so large that joinder of all members in not practical; (2) commonality, requiring that one or more questions of law or fact are common to the class; (3) typicality, requiring that the named plaintiffs' claims are typical of the class; and (4) adequacy of representation, requiring that the class representatives will fairly and adequately protect the interests of other class members. *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 980 (9th Cir. 2011). In addition to the requirements of Rule 23(a), Plaintiff also must satisfy Rule 23(b)(3), which requires that "questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and . . . a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3). Among the pertinent factors for the court to consider are "the likely difficulties in managing a class action." Fed. R. Civ. P. 23(b)(3)(D). Although the plaintiff has the burden of showing that a proposed class should be certified, "in the context of a motion to *strike* class allegations, in particular where such a motion is brought in advance of the close of class discovery, it is properly the defendant who must bear the burden of proving that the class is *not* certifiable." *Bates*, 993 F. Supp. 2d at 1340-41.

DISCUSSION

I. Is Defendant's Motion to Strike Premature or Procedurally Defective?

Defendant relies on Rule 12(f) in its motion to strike Plaintiff's nationwide class certification allegations. Plaintiff argues that the issues raised by Defendant's motion to strike should not be addressed until after the parties have conducted discovery and Plaintiff has moved

to certify the proposed nationwide class. Plaintiff also argues that Defendant should not have filed its motion under Rule 12(f). I conclude that Defendant's motion to strike is neither premature nor procedurally improper.

A. Defendant's Motion to Strike Is Not Premature

In its motion to strike, Defendant contends that the legal requirements for claims of fraud and unjust enrichment vary materially among the fifty states, preventing Plaintiff from showing that "questions of law or fact common to the members of the class predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). Plaintiff responds that "discovery will flesh out the material issues in the case, which will, in turn, determine whether the laws of different states vary as to material issues relevant to *this* case." Pl.'s Resp. 13, ECF No. 62.

In its motion to strike, Defendant argues that material variations in state law on fraud and unjust enrichment would make a nationwide class unworkable. I agree with Defendant that its motion is not premature because determining variations in state law presents legal issues that may be resolved without discovery. I conclude that Rule 23 permits this court to address these legal issues at the pleading stage. Rule 23(c)(1)(A) requires that this court decide whether to certify a class action "[a]t an early practicable time." Rule 23(d)(1)(D) provides that "in conducting an action under this Rule, the court may issue orders that . . . require the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly."

Plaintiff notes that the primary Ninth Circuit decision Defendant cites, *Mazza v. American Honda Motor Co., Inc.*, 666 F.3d 581, 591 (9th Cir. 2012), addressed whether a claim

should be certified for a nationwide class "at the class certification stage, after the parties had an opportunity to conduct discovery." Pl.'s Resp. 8. Defendant responds that district courts in this circuit have applied *Mazza*'s reasoning at the pleading stage. *See, e.g.*, *Davison v. Kia Motors Am., Inc.*, No. SACV 15-00239-CJC(RNBx), 2015 WL 3970502, at *2 (C.D. Cal. June 29, 2015) ("While *Mazza* was decided at the class certification stage, 'the principle articulated in *Mazza* applies generally and is instructive even when addressing a motion to dismiss.'") (quoting *Frezza v. Google Inc.*, No. 12-cv-00237-RMW, 2013 WL 1736788, at *6 (N.D. Cal. April 22, 2013) (footnote omitted)); *Frenzel v. AliphCom*, 76 F. Supp. 3d 999, 1010 (N.D. Cal. 2014) (dismissing class action claims in part "because they are precluded under *Mazza*").

I note that courts have deferred addressing class allegations at the pleading stage because of unresolved factual issues. *See, e.g.*, *Wolf v. Hewlett Packard Co.*, CV 15-01221-BRO (GJSx), 2016 WL 8931307, at *8 (C.D. Cal. April 18, 2016) ("It is unnecessary at this time to strike Plaintiff's FAC to the extent Plaintiff seeks to represent a class of out-of-state consumers. That issue is more properly addressed at the class certification stage."); *id.* (citing five other district court decisions in accord). I conclude that this court may rule on the sufficiency of class action allegations at the pleading stage if no issues of fact must be resolved. *See Cholly v. Uptain Group, Inc.*, No. 15 C 5030, 2015 WL 9315557, at *3 (N.D. Ill. Dec. 22, 2015) ("Although courts may strike class allegations at the pleading stage when they are 'facially and inherently deficient,' courts will not do so when the dispute is factual and discovery is needed.") (citation omitted)).

Plaintiff argues that Defendant's motion to strike presents factual issues, citing the timing of Defendant's use of the allegedly misleading packaging. But I agree with Defendant that

determining whether variations in state law are material presents legal issues that do not require fact discovery. *See, e.g., Larsen v. Vizio, Inc.*, No.: SACV 14-01865-CJC(JCGx), 2015 WL 13655757, at *2 n.1 (C.D. Cal. April 21, 2015) ("many courts have decided against deferring the choice of law decision until discovery or class certification where, as here, the material differences are sufficiently obvious from the pleadings"); *Feldman v. Mercedes-Benz USA, LLC*, No. 2:11-cv-00984 (WJM), 2012 WL 6596830, at *5 (D. N.J. Dec. 18, 2012) (noting that "courts, including the Third Circuit, frequently determine that choice of law analysis in a putative class action can be done at the motion to dismiss stage").

B. Defendant May Move to Strike Class Allegations under Rule 12(f)

Plaintiff argues that Defendant's motion to strike under Rule 12(f) is procedurally improper. There is an apparent split in this district on the issue. Compare *Bates*, 993 F. Supp. 2d at 1341 (granting motion to strike class allegations) and *Updike v. Clackamas County*, No. 3:15-cv-00723-SI, 2015 WL 7722410, at *11 (D. Or. Nov. 30, 2015) (Rule 12(f) is one of several Rules that "exist to address improper class action allegations") with *Speers v. Pre-Employ.com*, No. 13-cv-1849-HU, 2014 WL 2611259, at *2 (D. Or. May 13, 2014) ("a defendant may move to dismiss class allegations prior to discovery in appropriate cases, although a Rule 12(f) motion is not the appropriate vehicle to challenge the sufficiency of class allegations"), *adopted*, 2014 WL 3672910 (D. Or. July 23, 2014). I adhere to my decision in *Bates* that motions to strike under Rule 12(f) are procedurally appropriate in addressing the sufficiency of class allegations.

II. Are Plaintiff's Nationwide Class Action Allegations Sufficient?

A. Choice of Law

"Federal courts sitting in diversity look to the law of the forum state . . . when making

choice of law determinations." *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1175 (9th Cir. 2014). Here, Defendant contends that for members of Plaintiff's proposed nationwide class, Oregon choice of law rules require applying the law of the state where the alleged tort was committed, that is, the state where each proposed class member purchased Defendant's allegedly misleadingly labeled product. Plaintiff's response brief does not address choice of law. I agree with Defendant that because of the material differences in state law, Oregon choice of law rules require that this court apply the law of the state where each proposed class member purchased Defendant's Accused Products.

Oregon has codified its choice-of-law rules. *See* Or. Rev. Stat. §§ 15.300 to 15.460.[4] For non-contract claims such as the fraud and unjust enrichment claims at issue here, "[i]f the injured person and the person whose conduct caused the injury were domiciled in different states and the laws of those states on the disputed issues would produce a different outcome," then the law of the state where "both the injurious conduct and the resulting injury occurred" will govern "if either the injured person or the person whose conduct caused the injury was domiciled in that state." Or. Rev. Stat. § 15.440(3)(a). Here, I agree with Defendant, as discussed below, that material variations in the laws of the different states would produce different outcomes. *See* Def.'s Mot. Dismiss 7-15, ECF No. 60 (describing multiple material variations in state law requirements for fraud and unjust enrichment).

---

[4] Defendant also analyzes Oregon choice of law under the common law approach. Def.'s Mot. Dismiss 6-16, ECF No. 60. Because "[n]ew choice-of-law rules for torts and other noncontractual claims went into effect in Oregon on January 1, 2010," *Kelly v. Ringler Assocs. Inc.*, No. 3:14-cv-00604-YY, 2017 WL 1363338, at *4 (D. Or., 2017), I need not analyze choice of law under the now-superseded common law approach. *See* Symeon C. Symeonides, *Oregon's New Choice-of-Law Codification For Tort Conflicts: An Exegesis*, 88 Or. L. Rev. 963, 965 n.1 (2009) (Oregon statute "applies to actions filed after its effective date of January 1, 2010, even if the underlying claim arose before that date").

Because variations in state law on fraud and unjust enrichment would produce different outcomes, I conclude that under Oregon choice of law statutes, the law of the state of purchase would govern each proposed class member's claim. *See* Or. Rev. Stat. § 15.440(3)(a). In determining the location of the alleged injury and the injurious conduct, courts have looked to the state where the plaintiff purchased the product. For example, in *Gianino v. Alacer Corp.*, 846 F. Supp. 2d 1096 (C.D. Cal. 2012), the defendant, which was headquartered in California, allegedly falsely represented that its product, Emergen-C, benefitted the immune system. The plaintiff proposed a nationwide class of consumers who had purchased Emergen-C. In addressing the choice of law issue under California law, the court concluded that the place of the wrong was "where the misrepresentations were communicated to the consumer." *Id.* at 1103. Similarly, the court in *Hutson v. Rexall Sundown, Inc.*, 837 So.2d 1090 (Fla. Dist. Ct. App. 2003), addressed a proposed Florida UTPA class action for customers who purchased calcium supplements that allegedly bore deceptive labeling and were sold through deceptive advertising. The court concluded, "The alleged wrong was committed, and the damage done, at the site of the sale of appellees' products; that is, in the various states where members of the purported class made their purchases." *Id.* at 1094. I conclude that under Oregon choice of law statutes, Plaintiff's class action claims are governed by the law of the state where each proposed class member purchased Defendant's products.

B. Do Common Questions of Law Predominate?

1. Legal Standards

Defendant contends that under the Oregon choice of law statutes, applying Oregon law to proposed non-Oregon class members could produce different outcomes than the law of the state

where the class member purchased Defendant's product. Material differences in state law would prevent Plaintiff from showing that "questions of law or fact common to the members of the class predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). This court must "'take a close look at whether common questions predominate over individual ones, and ensure that individual questions do not 'overwhelm questions common to the class.'" *In re Hyundai and Kia Fuel Economy Litig.*, 881 F.3d 679, 691 (9th Cir. 2018) (quoting *Comcast Corp. v. Behrend*, 569 U.S. 27, 34 (2013)). The standard for proving predominance under Rule 23(b)(3) is higher than the standard for proving commonality under Rule 23(a)(2). *See Wolin v. Jaguar Land Rover North America, LLC*, 617 F.3d 1168, 1172 (9th Cir. 2010) ("While Rule 23(a)(2) asks whether there are issues common to the class, Rule 23(b)(3) asks whether these common questions predominate. Though there is substantial overlap between the two tests, the 23(b)(3) test is 'far more demanding,' and asks 'whether proposed classes are sufficiently cohesive to warrant adjudication by representation'") (quoting *see Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623-24 (1997)).

2. Variations in State Law as to Unjust Enrichment and Fraud

a. Unjust Enrichment

Plaintiff claims that Defendant has been unjustly enriched by selling its supplements in packages that contained half or less of the quantity of ingredients stated on the PDP, allowing Defendant to collect the difference between the amount a customer paid for the product and the lower amount that Defendant should have charged for the smaller quantity the customer actually received. Third Am. Compl. ¶¶ 71-77. Defendant has provided an extensive analysis of state law on unjust enrichment in its briefing, arguing that the variations in state law preclude

certifying a nationwide class action. Def.'s Mots. 21-22.

Here, I agree with Defendant that differences in state law on unjust enrichment claims are material and would produce different outcomes. The Ninth Circuit has stated, "The elements necessary to establish a claim for unjust enrichment . . . vary materially from state to state." *Mazza*, 666 F.3d at 591. A district court subsequently noted, "No court in this Circuit has certified a nationwide unjust enrichment class since *Mazza* and Plaintiffs have failed to show how this Court could manage a nationwide class where fifty varying states' laws would apply, as required under Rule 23(b)(3)." *Stitt v. Citibank*, No.: 12-cv-03892-YGR, 2015 WL 9177662, at *4 n.4 (N.D. Cal. Dec. 17, 2015). Defendant cites a decision denying certification for a nationwide class concerning allegedly misleadingly labeled vitamin supplements, in which the district court concluded that unjust enrichment claims were not suitable for nationwide class certification:

> Such variations [as to negligent misrepresentation claims] also exist with respect to Plaintiffs' unjust enrichment claims. Indeed, "courts have determined that the states' unjust-enrichment laws vary in relevant respects." [*In re Grand Theft Auto Video Game Consumer Litigation*, 251 F.R.D. 139, 147 (S.D.N.Y. 2008)] (collecting cases); *Kottler v. Deutsche Bank AG*, 08 CIV. 7773, 2010 WL 1221809, at *4 (S.D.N.Y. Mar. 29, 2010) ("[V]ariations in state law have generally precluded nationwide class certifications based on unjust enrichment theories."); *Keilholtz v. Lennox Hearth Prod. Inc.*, 268 F.R.D. 330, 341 (N.D. Cal. 2010) ("Laws concerning unjust enrichment do vary from state to state."). Without explanation, Plaintiffs indiscriminately cite cases finding that the unjust enrichment laws in relevant States do not vary. But this selective and incomplete citation of cases is insufficient to meet their burden. By contrast, Defendants identify multiple variations in State laws regarding unjust enrichment. As just one example, the States differ as to the relationship or connection that must exist between the parties for an unjust enrichment claim. *See Vista Healthplan, Inc. v. Cephalon, Inc.*, 2:06-CV-1833, 2015 WL 3623005, at *29 (E.D. Pa. June 10, 2015) (explaining differences between various State laws including New York's unique requirement that a "relationship or connection between the parties that is not too attenuated" must be shown).

Hughes v. The Ester C Company, 317 F.R.D. 333, 353 (E.D.N.Y. 2016). Similarly, a district court concluded that differences in state law on unjust enrichment precluded certifying a nationwide class action:

> Courts considering unjust enrichment claims in the context of a nationwide class action have frequently found a lack of predominance due to conflicts in legal standards from state to state. *See, e.g., Thompson v. Jiffy Lube Intern., Inc.*, 250 F.R.D. 607, 626 (D. Kan. 2008); *Clay v. American Tobacco Co.*, 188 F.R.D. 483, 500-01 (S.D. Ill. 1999). In contrast to the legal issues underlying breach of contract claims, which exhibit substantial uniformity from state to state, unjust enrichment claims do not. . . . . Some states require proof of an actual loss or impoverishment, while others do not. *See In re Grand Theft Auto Video Game Consumer Litig.*, 251 F.R.D. 139, 147-48 (S.D.N.Y. 2008). Some states allow an unjust enrichment claim only in the absence of a contract. *See White v. Wachovia Bank, N.A.*, 563 F. Supp. 2d 1358, 1371 (N.D. Ga. 2008) (discussing Georgia law). Some states allow a claim to go forward only "when there is no adequate remedy at law." *Id.* at 147 n.9. Some states require the defendant to have engaged in wrongdoing, *see, e.g., DCB Const. Co., Inc. v. Cent. City Dev. Co.*, 965 P.2d 115, 121-23, while others do not, *see, e.g., Schock v. Nash*, 732 A.2d 217, 232 (Del.1999). . . . . Finally, some states use three elements, some have a five part or four part test, while others use one or two elements. *In re Conagra Peanut Butter Products Liability*, 251 F.R.D. 689, 2008 WL 2885951, at *8-9 (N.D. Ga. July 22, 2008).

Spencer v. Hartford Fin. Servs. Group, Inc., 256 F.R.D. 284, 304 (D. Conn. 2009). I conclude that Defendant has shown state law on unjust enrichment varies materially (i.e., would produce different results) as to the applicable statute of limitations; whether the plaintiff must show wrongful conduct; whether unjust enrichment is a stand-alone claim or a quasi-contract claim; and the accrual date. *See* Def.'s Mot. Dismiss 7-11.

Plaintiff does not address most of these variations in state law on unjust enrichment discussed by Defendant. Plaintiff does argue that differences in the statutes of limitations and in the treatment of unjust enrichment as a stand-alone claim are not significant. I conclude, however, that even assuming Plaintiff is correct that variations on these specific issues are not

important, Defendant has shown that the other variations in state law preclude certification of a nationwide class on the unjust enrichment claim.

2. Fraud

In his fraud claim, Plaintiff asserts that Defendant's statements on the PDP giving the amount of the supplement contained in each unit, and the total quantity of the supplement contained in the package, were false; Defendant knew or should have known that the representations were false and misleading; the representations were material; Defendant intended that Plaintiff and other purchasers would rely on the representations; Plaintiff and other purchasers did not know that the representations were false and were not required to cross-reference the PDP's statements with the information on the back of the packaging; Plaintiff and other purchasers had a right to rely on the representations; and Plaintiff and other purchasers were damaged by the representations because they received substantially less product than was stated on the PDPs. Third Am. Compl. ¶¶ 79-86.

Defendant argues that although many states require similar elements to establish fraud, states vary significantly on "the meaning and application of those elements." Def.'s Mot. Dismiss 11 (emphasis omitted). For example, Defendant cites differences in the level of scienter necessary to show fraud, with some states requiring only that a misrepresentation be made with knowledge that it was false or made with reckless disregard of the truth, while other states require that a defendant have actual knowledge that the statement was false. Def.'s Mot. Dismiss 11; compare *Huzzar v. Certified Realty Co.*, 278 Or. 29, 32, 562 P.2d 1184, 1186 (1977) (scienter may be shown if the defendant made the statement "recklessly without any knowledge of its truth) with *RD & J Props. v. Lauralea-Dilton Enters., LLC*, 600 S.E. 2d 492, 498-99 (N.C.

Ct. App. 2004) (scienter requires actual knowledge that statement was false). State law also materially varies on the plaintiff's burden of proof. Compare *Riley Hill General Contractor, Inc. v. Tandy Corp.*, 82 Or. App. 458, 460, 728 P.2d 577, 578 (1986) ("Fraud must be proved by clear and convincing evidence."); *Barr v. Dyke*, 49 A.3d 1280, 1286 (Me. 2012) (accord) with *Cincinnati Life Ins. Co. v. Mickles*, 148 S.W.3d 768, 778-79 (Ark. Ct. App. 2004) ("the burden of proof for fraud in a case at law is by the preponderance of the evidence"). State law varies on statute of limitations for fraud claims, ranging from two years for Oregon; three years for, e.g., Idaho, California, and Arizona; four years for, e.g., Texas and Ohio; five years for, e.g., Iowa and Missouri; and six years, for, e.g., New York and South Dakota. *See* Def.'s Mot. Dismiss 14 & n.5. State law also varies on determining when a plaintiff has actual or constructive notice of fraud. Def.'s Mot. Dismiss 14 (describing discovery rule as applied in different states).

Plaintiff responds that differences in the scienter states require to show fraud are not relevant here because "it is highly unlikely" that Defendant will contend it had no knowledge of the actual amount of supplement in each tablet. Pl.'s Resp. 10. Defendant replies that under Oregon law, Plaintiff would still need to prove that Defendant had the intent of misleading customers, and the knowledge that it was either misleading customers or acting with reckless disregard on whether it was misleading customers. Plaintiff does not dispute that states' laws vary on whether reliance may be presumed, on the standard for proving justifiable reliance, on the burden of proof, and on when the claim accrues. I conclude that state law on fraud varies materially so that Plaintiff has not shown predominance as to the fraud claim.

3. Conclusions on Predominance

I conclude that Defendant has shown that under Oregon choice of law, this court applies

the law of the state where each class member purchased Defendant's product, and that material variations in state law on unjust enrichment and fraud justify striking Plaintiff's nationwide class action allegations because Plaintiff has not shown predominance under Rule 23(b)(3). *See Miles v. American Honda Motor Co., Inc.*, No. 17 C 4423, 2017 WL 4742193, at *5 (N.D. Ill. Oct. 19, 2017) (granting motion to strike class allegations the claims asserted "must be adjudicated under the laws of so many jurisdictions, [so] a single nationwide class is not manageable"). As I noted at the hearing, it would be impractical if not impossible for this court to draft jury instructions in light of the wide variations in the different states' requirements for fraud and unjust enrichment. Plaintiff's primary argument is that the motion to strike is premature, and should not be addressed until the parties conduct discovery, but I agree with Defendant that the motion to strike presents legal issues that would not be affected by discovery, and that this court should act promptly to address these issues.

Defendant argues that dismissal should be with prejudice because Plaintiff cannot show that a nationwide class is feasible. I conclude that the motion to strike should be granted without prejudice, however. In his response brief, Plaintiff argues that even though "material variations in state law . . . are such that a nationwide class cannot be pursued, the class definition can be narrowed to include only residents of those states where the law does not materially differ." Pl.'s Resp. 12. Plaintiff may be able to create a manageable class or classes for his claims.

III. Defendant's Motion to Dismiss Plaintiff's Claim for Injunctive Relief

Plaintiff seeks injunctive relief prohibiting Defendant from "mislabeling and marketing the Accused Products as alleged in this Complaint." Third Am. Compl. 36. In support of his claim for injunctive relief, Plaintiff states by declaration that he continues to shop at Defendant's

stores, where he purchases only supplements made by competing manufacturers because he is unsure whether the labels of Defendant's packaging are accurate. Walters Decl. ¶ 3, ECF No. 63.

Defendant moves to dismiss Plaintiff's claim for injunctive relief, contending that Plaintiff lacks standing. However, the Ninth Circuit rejected a very similar argument for lack of standing. *Davidson v. Kimberly-Clark Corp.*, 873 F.3d 1103, 1107 (9th Cir. 2017) ("A consumer's inability to rely in the future upon a representation made on a package, even if the consumer knew or continued to believe the same representation was false in the past, is an ongoing injury that may justify an order barring the false advertising."). I conclude that *Davidson* controls here, so Defendant's motion to dismiss Plaintiff's claim for injunctive relief should be denied.

CONCLUSION

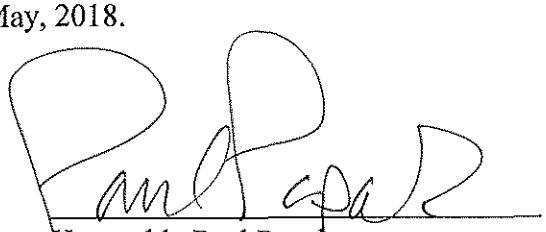
Defendant's Motions to Dismiss and Strike, ECF No. 60, should be GRANTED without prejudice as to Plaintiff's nationwide class allegations, and DENIED as to Plaintiff's claim for prospective injunctive relief.

SCHEDULING ORDER

The Findings and Recommendation will be referred to a district judge. Objections, if any, are due fourteen (14) days from service of the Findings and Recommendation. If no objections are filed, then the Findings and Recommendation will go under advisement on that date.

If objections are filed, then a response is due fourteen (14) days after being served with a copy of the objections. When the response is due or filed, whichever date is earlier, the Findings and Recommendation will go under advisement.

Dated this 8th day of May, 2018.



Honorable Paul Papak
United States Magistrate Judge