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U.S. COURT OF APPEALS

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LEE WALTERS, MD, an Oregon resident, Plaintiff - Appellant, v. VITAMIN SHOPPE INDUSTRIES, INC., a Delaware corporation, Defendant - Appellee.	No. 15-35592 D.C. No. 3:14-cv-01173-PK MEMORANDUM*

Appeal from the United States District Court
for the District of Oregon
Anna J. Brown, District Judge, Presiding

Argued and Submitted July 14, 2017
Portland, Oregon

Before: WATFORD and OWENS, Circuit Judges, and NAVARRO,** Chief District Judge.

1. The district court properly dismissed Dr. Lee Walters' (Walters) breach of contract claim. We have found no authority under Oregon law holding that the mere purchase of a consumer good, without more, suffices to establish a valid and

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The Honorable Gloria M. Navarro, Chief United States District Judge for the District of Nevada, sitting by designation.

enforceable contract. To accept Walters' theory of contract formation, we would have to conclude that the display of a price term and quantity information on or immediately surrounding a product's packaging constitutes an offer to sell. But the traditional rule is that advertisements of goods by sign or display "are not ordinarily intended or understood as offers to sell." Restatement (Second) of Contracts § 26 cmt. b (1981).

What little precedent we have found from Oregon's courts suggests that they, too, adhere to the rule that an advertisement is not ordinarily considered an offer to sell, absent unusually definite and explicit language. *See Sherry v. Bd. of Accountancy*, 157 P.3d 1226, 1232 (Or. Ct. App. 2007). No such language is present here.

Because we conclude that no contract was formed, we do not reach Walters' unconscionability argument. That obviates the need to address the parties' dispute over whether Vitamin Shoppe Industries' (VSI) labeling practices comply with the Food and Drug Administration's regulations (and if so, whether these regulations preempt Walters' state law claims).

2. The district court properly dismissed Walters' breach of warranty claim because Walters cannot state such a claim under state or federal law. Oregon warranty protections specifically exclude "[c]onsumable" goods, defined as "any

product which is intended for consumption by individuals." Or. Rev. Stat. § 72.8010(7). That definition encompasses the dietary supplements at issue in this case.

Nor can Walters plead breach of warranty under the federal Magnuson-Moss Warranty Act (MMWA), which provides a cause of action for breach of written or implied warranties. 15 U.S.C. § 2310(d). Walters cannot allege a breach of implied warranty because the MMWA incorporates state law in its definition of implied warranties. 15 U.S.C. § 2301(7); *see Birdsong v. Apple, Inc.*, 590 F.3d 955, 958 n.2 (9th Cir. 2009). Since there are no implied warranty protections for consumables under Oregon law, there can be no implied warranty protections under federal law.

Walters' argument that the statements on VSI's products amount to a written warranty under the MMWA fails as well. The MMWA defines a written warranty as a promise that (1) the product is "defect free"; (2) the product will "meet a specified level of performance over a specified period of time"; or (3) the supplier will "take . . . remedial action" if the product "fails to meet the specifications." 15 U.S.C. § 2301(6). VSI's product label contains no such promises. The quantity statements on the label describe the product's contents, but do not affirm that the product is free from imperfections.

3. We reverse the dismissal of Walters' unjust enrichment claim. Under Oregon law, once a court determines that a valid contract exists, an unjust enrichment claim must fail. *See Mount Hood Cmty. Coll. ex rel. K & H Drywall, Inc. v. Fed. Ins. Co.*, 111 P.3d 752, 759 (Or. Ct. App. 2005); *Prestige Homes Real Estate Co. v. Hanson*, 951 P.2d 193, 195 (Or. Ct. App. 1997). The district court dismissed Walters' unjust enrichment claim on this basis, after concluding that a contract had been formed. Because the parties' transaction did not form a contract, the unjust enrichment claim is not precluded.

4. We reverse the dismissal of Walters' fraudulent misrepresentation claim. To allege a viable fraud claim under Oregon law, Walters must plead that he justifiably relied on VSI's alleged misrepresentations. *See In re Brown*, 956 P.2d 188, 196 (Or. 1998). This element requires that a plaintiff "tak[e] reasonable precautions" to safeguard his interests. *Gregory v. Novak*, 855 P.2d 1142, 1144 (Or. Ct. App. 1993). Contrary to VSI's contention, the operative question is not whether Walters unreasonably failed to read the terms of a contract—as explained above, no contract exists in this case. Instead, the question is whether Walters was 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. This court has answered that question in the negative. Consumers review the small print on a

product's label to learn additional details about a product, not to correct potentially misleading representations found on the front. *Williams v. Gerber Prods. Co*., 552 F.3d 934, 939–40 (9th Cir. 2008). Applying the logic of *Williams* to this case, Walters did not have a duty to validate claims on the front of a product's label by cross-checking them against information contained in small print on the back. His failure to read the clarifying serving-size information does not constitute a failure to reasonably safeguard his interests.

5. The district court improperly dismissed Walters' UTPA claim. To prevail under the UTPA, a private plaintiff must suffer "an ascertainable loss of money or property . . . as a result of another person's willful use or employment of a method, act or practice declared unlawful" under the UTPA. Or. Rev. Stat. § 646.638(1). "Ascertainable" loss is construed to mean any loss "capable of being discovered, observed, or established." *Scott v. W. Int'l Surplus Sales, Inc.*, 517 P.2d 661, 663 (Or. 1973). The loss need be only "objectively verifiable." *Pearson v. Philip Morris, Inc.*, 361 P.3d 3, 22 (Or. 2015).

Walters adequately pleaded his UTPA claim. He alleges that VSI made representations that violate Or. Rev. Stat. § 646.608, and that he would not have purchased the product but for the alleged misrepresentations. The ascertainable loss, therefore, is the monetary value of a product that Walters would not otherwise

have bought. Because Walters alleges that he relied on VSI's representations, he sufficiently pleaded that VSI's conduct caused his loss. *See Pearson*, 361 P.3d at 27.

To conclude, we affirm the district court's dismissal of Walters' breach of contract and breach of warranty claims. We reverse the district court's dismissal of Walters' unjust enrichment, fraud, and UTPA claims.

Walters' motion for judicial notice (Docket Entry 25) is **DENIED** as moot. VSI's motion for leave to submit supplemental briefing (Docket Entry 30) is **GRANTED**. VSI's alternative request to strike portions of Walters' reply brief (Docket Entry 30) is **DENIED**.

AFFIRMED in part, REVERSED in part, and REMANDED.

The parties shall bear their own costs.

United States Court of Appeals for the Ninth Circuit

Office of the Clerk
95 Seventh Street
San Francisco, CA 94103

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)
Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
  - ► A material point of fact or law was overlooked in the decision;
  - ► A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
  - ► An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ► Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ► The proceeding involves a question of exceptional importance; or
- ► The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms.*
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms.*

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
  - ► Thomson Reuters; 610 Opperman Drive; PO Box 64526; Eagan, MN 55123 (Attn: Jean Green, Senior Publications Coordinator);
  - ► and electronically file a copy of the letter via the appellate ECF system by using "File Correspondence to Court," or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

Form 10. Bill of Costs .....***(Rev. 12-1-09)***

United States Court of Appeals for the Ninth Circuit

BILL OF COSTS

This form is available as a fillable version at:
http://cdn.ca9.uscourts.gov/datastore/uploads/forms/Form%2010%20-%20Bill%20of%20Costs.pdf.

Note: If you wish to file a bill of costs, it MUST be submitted on this form and filed, with the clerk, with proof of service, within 14 days of the date of entry of judgment, and in accordance with 9th Circuit Rule 39-1. A late bill of costs must be accompanied by a motion showing good cause. Please refer to FRAP 39, 28 U.S.C. § 1920, and 9th Circuit Rule 39-1 when preparing your bill of costs.

_____ v. _____ 9th Cir. No. _____

The Clerk is requested to tax the following costs against: _____

Cost Taxable under FRAP 39, 28 U.S.C. § 1920, 9th Cir. R. 39-1	**REQUESTED** *(Each Column Must Be Completed)*				**ALLOWED** *(To Be Completed by the Clerk)*			
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* *Costs per page*: May not exceed .10 or actual cost, whichever is less. 9th Circuit Rule 39-1.

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Name of Counsel: _____

Attorney for: _____

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Date _____ Costs are taxed in the amount of $ _____

Clerk of Court

By: _____ , Deputy Clerk