IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

J. PODAWILTZ, an Oregon consumer, individually and on behalf of all others similarly situated,

Plaintiff,

v.

ROCKSTAR, INC., a Nevada corporation,

Defendant.

Case No. 3:17-cv-00477-SB

FINDINGS AND RECOMMENDATION

BECKERMAN, Magistrate Judge.

J. Podawiltz ("Podawiltz") filed a "Class Action Allegation Amended Complaint" (ECF No. 7) against Rockstar, Inc. ("Rockstar") alleging two unlawful trade practice claims pursuant to Oregon Revised Statutes ("Or. Rev. Stat.") §§ 646.608(1)(e) and (t), arising from Rockstar's alleged unfair business practice of "misrepresent[ing] the amount of beverage in its energy coffee drink cans . . . ." (Am. Compl. ¶ 6.)

Rockstar filed a motion to dismiss Podawiltz's claims pursuant to Fed. R. Civ. P. 12(b)(6) on the ground that federal law preempts Podawiltz's claims. Alternatively, Rockstar argues that the allegations in Podawiltz's Amended Complaint are insufficient to state a claim. For the

reasons that follow, the Court recommends that the district judge grant Rockstar's Motion to Dismiss (ECF No. 15).

BACKGROUND[1]

Podawiltz alleges that he "purchased Rockstar Inc.'s energy coffee drink can" from Plaid Pantry, a convenience store in Portland, Oregon. (Am. Compl. ¶ 8; *see also* Am. Compl. Ex. 1 ("Rockstar Inc. Can Purchased by Plaintiff").) Exhibit 1 shows a Rockstar Roasted can with the liquid measurement listed as: "15 fl oz [473mL]." (Am. Compl. Ex. 1.)

Podawiltz alleges that the Rockstar label misrepresented that the can contained 473 milliliters of beverage when in fact it contained 444 milliliters. (Am. Compl. ¶ 4 ("Rockstar Inc.'s energy coffee drink contains about 6% less beverage than the amount Rockstar Inc. advertises on its can.");

[1] For the purposes of this motion, the Court accepts as true the facts Podawiltz alleges in the Amended Complaint.

¶ 14 ("Every consumer who purchased Rockstar Inc.'s product shown in Exhibit 1 suffered an actual ascertainable loss of the economic value of about 30 ml of missing beverage . . . ."); ¶ 15 ("Rockstar Inc.'s product shown in Exhibit 1 . . . represents that Rockstar Inc.'s energy coffee drink cans have a quantity of 473 ml of beverage that Rockstar Inc.'s energy coffee drink cans do not actually have.").) Podawiltz alleges that a certified Portland food laboratory measured the amount of beverage in the Rockstar Roasted cans. (Am. Compl. ¶ 4.) The study concluded that the mislabeled Rockstar Roasted cans contain about 6% fewer milliliters (444 milliliters vs. 473 milliliters) than represented on the label. (Am. Compl. ¶ 4.)

What Podawiltz does not acknowledge in the Amended Complaint is that the Rockstar Roasted label accurately represented that the can contained 15 fluid ounces of beverage. (Am. Compl. ¶ 4, Ex. 1.) The erroneous "[473mL]" label equates to 16 fluid ounces.

Podawiltz contends that while the alleged discrepancy "may be hardly noticeable to most average consumers[,]" Rockstar gained a competitive advantage over its competition such as Starbucks and Monster as a result of this "unfair business practice[.]" (Am. Compl. ¶ 5.) Podawiltz seeks to proceed on behalf of a class and requests equitable and injunctive relief, "actual, statutory, and punitive damages, interest, and reimbursement of fees and costs[.]" (Am. Compl. "Prayer for Relief.")

STANDARD OF REVIEW

A well-pleaded complaint requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). A federal claimant is not required to detail all factual allegations, but the complaint must provide "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "Factual allegations must be enough to raise a right to relief above a speculative level." *Id.* While the court must assume that all facts alleged in a complaint

are true and view them in a light most favorable to the nonmoving party, it need not accept as true any legal conclusion set forth in the complaint. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

DISCUSSION

In his Amended Complaint, Podawiltz alleges two violations of Oregon's Unfair Trade Practices Act ("UTPA"), Or. Rev. Stat. §§ 646.605 - 646.656. Specifically, Podawiltz alleges that the Rockstar Roasted label violates Or. Rev. Stat. § 646.608(1)(e) because "15 fl oz [473 mL]" is a misrepresentation of the amount of beverage in the product. (Am. Compl. ¶ 15.) In addition, Podawiltz contends that the Rockstar Roasted representation of "15 fl oz [473 mL]" violates Or. Rev. Stat. § 646.608(1)(t) "because Rockstar fail[ed] to disclose a known material nonconformity" at the time of delivery. (Am. Compl. ¶ 15.)

Rockstar argues that the Court should dismiss Podawiltz's Amended Complaint on four grounds: (1) the Food, Drug, and Cosmetic Act ("FDCA") and the Fair Packaging and Labeling Act ("FPLA") preempt Podawiltz's mislabeling claims, (2) Podawiltz fails to allege that he relied on Rockstar's misrepresentation in purchasing the Rockstar Roasted can as required by Or. Rev. Stat. § 646.608(1)(e), (3) Podawiltz's "alleged harm does not arise from any purported omission regarding the beverage, as the amount of milliliters alleged omitted by Rockstar (444 milliliters) is precisely the number of milliliters received by [Podawiltz,]" and (4) Podawiltz did not incur a cognizable loss under either Or. Rev. Stat. § 646.608(1)(e) or Or. Rev. Stat. § 646.608(1)(t). (Def.'s Mot. Dismiss 3.) As explained below, the Court finds that Podawiltz's Amended Complaint fails to state a claim under either Or. Rev. Stat. § 646.608(1)(e) or Or. Rev. Stat. § 646.608(1)(t).[2]

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[2] In light of the Court's finding that Podawiltz has failed to state a UTPA claim and cannot cure his claims by amendment, the Court declines to reach the broader issue of whether federal law preempts Podawiltz's UTPA claims, or the issue of whether Podawiltz has pleaded a cognizable loss.

I. PODAWILTZ'S UTPA CLAIMS

The Court finds that the allegations in Podawiltz's Amended Complaint are insufficient to state a claim under either Or. Rev. Stat. § 646.608(1)(e) or Or. Rev. Stat. § 646.608(1)(t).[3] Podawiltz's first claim, pursuant to Or. Rev. Stat. § 646.608(1)(e), alleges that Rockstar misrepresented the quantity of beverage in Rockstar Roasted cans. (Am. Compl. ¶ 15.) The second claim, pursuant to Or. Rev. Stat. § 646.608(1)(t), alleges that Rockstar failed to disclose this alleged misrepresentation. (Am. Compl. ¶ 15.) Podawiltz does not allege that he relied on the 473-milliliter label in deciding to purchase the beverage and, in fact, he acknowledges that the milliliter discrepancy "may be hardly noticeable to most average consumers." (Am. Compl. ¶ 5.) Finally, Podawiltz does not dispute that the Rockstar Roasted label represented that the can contained 15 fluid ounces of beverage, or that the can did, in fact, contain 15 fluid ounces of beverage.

A. OR. REV. STAT. § 646.608(1)(e) Claim

Oregon's UTPA, enacted "for the protection of consumers from unlawful trade practices," includes both public and private enforcement provisions. *Pearson v. Philip Morris, Inc.*, 358 Or. 88, 115-16 (Or. 2015). Or. Rev. Stat. § 646.638 authorizes private persons to bring an action to redress a violation of an enumerated unlawful trade practice. However, to prevail on a private cause of action under the UTPA, a plaintiff must prove that (1) defendant committed an unlawful trade practice, (2) plaintiff suffered an ascertainable loss of money or property, and (3)

[3] Under Or. Rev. Stat. § 646.608(1)(e), "[a] person engages in an unlawful trade practice if, in the course of that person's business . . . the person . . . [r]epresents that . . . goods . . . have . . . quantities or qualities that [they] do not have." For purposes of the UTPA, a "representation" includes "any assertion by words or conduct" and includes "a failure to disclose a fact." Or. Rev. Stat. § 646.608(2).

Under Or. Rev. Stat. § 646.608(1)(t), "[a] person engages in an unlawful trade practice if, in the course of that person's business . . . the person . . . [c]oncurrent with tender or delivery of . . . goods . . . fails to disclose any known . . . material nonconformity."

ascertainable loss was the result of the unlawful trade practice. *Pearson*, 358 Or. at 127. In other words, plaintiff must suffer a loss of money or property that was caused by the unlawful trade practice. *Id.*

Rockstar argues that Podawiltz's § 646.408(1)(e) claim fails as a matter of law because he does not allege reliance. (Def.'s Mot. Dismiss 14 ("The Amended Complaint lacks any allegation that Plaintiff relied on the representation of milliliters contained within the language '15 fl oz [473 mL]' to inform his decision to purchase the product. This failure to plausibly allege reliance is fatal to Plaintiff's Section 646.608(1)(e) claim.").) In *Pearson*, the Oregon Supreme Court considered this issue and held that "[w]hether reliance is required to establish causation turns on the nature of the unlawful trade practice and the ascertainable loss alleged." 358 Or. at 125; *see also Silva v. Unique Beverage Co., LLC*, No. 3:17-cv-00391-HZ, 2017 WL 2642286, at *8–12 (D. Or. June 15, 2017) (following a comprehensive discussion of *Pearson*, concluding that the failure to plead reliance could not survive a motion to dismiss); *cf. Silva v. Unique Beverage Co, LLC.*, No. 3:17-cv-00391-HZ, 2017 WL 4896097, at *11 (D. Or. Oct. 30, 2017) (denying motion to dismiss second amended complaint because it included "sufficient allegations of reliance").

Relying on the decision in *Tri-West Constr. Co. v. Hernandez*, 43 Or. App. 961 (Or. App. 1979), Podawiltz responds that he is not required to allege reliance. (Pl.'s Resp. 30-32.) Podawiltz argues that Rockstar's duty to "accurately disclose the amount of milliliters of beverage that its cans contained" relieves him of the requirement to allege reliance. (Pl.'s Resp. 32.) The Court finds that the holding in *Tri-West* does not control here. Although the Oregon Court of Appeals held in *Tri-West* that proof of *justifiable* reliance was not required when the misrepresentation concerned a matter that a party was legally required to disclose (43 Or. App. at

971-72), the same court subsequently held that "the existence of that duty does not relieve a UTPA plaintiff from having to prove reliance." *Pearson v. Phillip Morris, Inc.*, 257 Or. App. 106, 145-46 (Or. App. 2013), *reversed on other grounds*, *Pearson*, 358 Or. at 127 ("It is not the nature of the misrepresentation in this case that requires proof of reliance. It is the misrepresentation coupled with plaintiffs' theory for having suffered a loss in the form of the purchase price because they did not get what they believed they were buying.").

The Court will apply the Oregon Supreme Court's framework set forth in *Pearson*—analyzing the misrepresentation coupled with the theory of loss—to determine whether Podawiltz must allege reliance here. *See Pearson*, 358 Or. at 126 (holding that the determination of whether the causation element of plaintiff's claim "equates with a requirement that plaintiff prove reliance" depends on both the "the nature of the unlawful trade practice and the ascertainable loss alleged").

With regard to the alleged misrepresentation, Podawiltz's Amended Complaint rests on his claim that the milliliter volume on the Rockstar Roasted can was not accurate. With regard to the ascertainable loss, Podawiltz relies on a diminished value theory, or alternatively, a loss of market value theory. (Pl.'s Resp. 42, 45.) Podawiltz's diminished value theory alleges that there is a difference in value between what Rockstar represented (473 ml) and what Podawiltz received (444 ml). *See, e.g.*, *Pearson*, 358 Or. at 124 (explaining diminished value theory). Podawiltz's loss of market value theory suggests that he "was deprived of the full and accurate information he was entitled to receive so that he could make a fully-informed decision about how, and on what product, he would spend his money." (Pl.'s Resp. 46.)

The Court finds that under either theory of loss, Podawiltz must allege reliance to state a claim. Rockstar's label indicated that the can contained 15 fluid ounces of beverage, and it did. Thus, the value of the volume Rockstar represented was the same value Podawiltz received: 15

fluid ounces, measured by the customary unit of measurement for liquid volume in the United States. In light of the fact that Rockstar accurately represented the volume of fluid ounces on its label, Podawiltz must allege that he relied on the amount of milliliters in the can, instead of the amount of fluid ounces, to establish that he received less than the value represented on the label. Similarly, Podawiltz must allege that he relied on the amount of milliliters in the can to establish that he was deprived of the full and accurate information he was entitled to receive.

Podawiltz does not allege that he relied on Rockstar's alleged misrepresentation when he purchased his can of Rockstar Roasted at Plaid Pantry. Accordingly, the district judge should grant Rockstar's motion to dismiss Podawiltz's Or. Rev. Stat. § 646.608(1)(e) claim for failure to state a claim. Furthermore, the district judge should dismiss the claim with prejudice because Podawiltz has already been provided an opportunity to amend his complaint and he did not plead reliance in the amended complaint.[4] Even if Podawiltz had not already had an opportunity to amend, this Court finds that any allegation that Podawiltz relied on the inaccurate milliliter measure when he purchased his Rockstar Roasted can, while ignoring the accurate fluid ounce measure adjacent thereto, "is so contrary to common sense that it does not . . . pass the snicker test." *Kern v. Levolor Lorentzen, Inc.*, 899 F.2d 772, 786 (9th Cir. 1990).

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[4] In response to Rockstar's original Motion to Dismiss (ECF No. 5), Podawiltz amended his complaint rather than oppose the motion. As here, Rockstar's original Motion to Dismiss sought dismissal of Podawiltz's Or. Rev. Stat. § 646.608(1)(e) claim for failure to plead reliance. (Def.'s Mot. Dismiss 13-16.) Despite having notice of Rockstar's argument, Podawiltz did not allege reliance in his Amended Complaint. In any event, Podawiltz does not seek leave to amend his Or. Rev. Stat. § 646.608(1)(e) claim to include allegations of reliance. *See Reyn's Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 749 (9th Cir. 2006) ("[W]e generally will not remand with instructions to grant leave to amend unless the plaintiff sought leave to amend below."); *see also Wagner v. Daewoo Heavy Indus. Am. Corp.*, 314 F.3d 541, 542 (11th Cir. 2002) (en banc) ("A district court is not required to grant a plaintiff leave to amend his complaint sua sponte when the plaintiff, who is represented by counsel, never filed a motion to amend nor requested leave to amend before the district court.").

B. OR. REV. STAT. § 646.608(1)(t) Claim

Podawiltz also alleges that Rockstar violated § 646.608(1)(t) because Rockstar "knew or reasonably should have known that the amounts in its cans did not actually conform to the 473 mL quantity listed on the cans . . . . Despite knowledge of this material nonconformity, Rockstar . . . failed to disclose the material nonconformity to plaintiff." (Am. Compl. ¶ 15.)

Podawiltz's "omission" allegations are premised on Rockstar's alleged misrepresentation allegations, *i.e.*, Rockstar misrepresented the amount of milliliters of beverage in its Rockstar Roasted can. (*See* Am. Compl. ¶ 5 (alleging that Rockstar is "misleading the American public about the amount of beverage in its cans"); ¶ 15 (alleging that Rockstar "represents that [its] energy coffee drink cans have a quantity of 473 ml of beverage that [those] cans do not actually have"); ¶ 20 (alleging that Rockstar "continues to misrepresent the amount of beverage in its energy coffee drink cans to this very day").) Podawiltz cannot shoehorn his misrepresentation claim into an omission claim merely by alleging that the misrepresentation omitted the accurate information. *See Andriesian v. Cosmetic Dermatology, Inc.*, 3:14-cv-01600-ST, 2015 WL 1638729, at *9 (D. Or. Mar. 3, 2015), *adopted*, 2015 WL 1925944 (D. Or. Apr. 28, 2015) (dismissing § 646.608(1)(t) claim because plaintiff's complaint was "based on a misrepresentation contrary to the ingredient list, rather than a failure to disclose a known defect"). The gravamen of Podawiltz's case is that Rockstar provided him with the wrong information, not that Rockstar failed to disclose information, and Podawiltz has failed to allege facts sufficient to state a § 646.608(1)(t) claim.

Accordingly, the district judge should grant Rockstar's motion to dismiss Podawiltz's Or. Rev. Stat. § 646.608(1)(t) claim for failure to state a claim, and dismiss the claim with prejudice because it cannot be cured by amendment.[5]

[5] Podawiltz seeks leave to amend his § 646.608(1)(t) claim "to more overtly allege that Rockstar Inc. knowingly sold him materially nonconforming cans." (Pl.'s Resp. 49). Based on

CONCLUSION

Based on the foregoing, the district judge should GRANT Rockstar's Motion to Dismiss (ECF No. 15), and DISMISS Podawiltz's Amended Complaint (ECF No. 7) with prejudice.

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, the Findings and Recommendation will go under advisement on that date. If objections are filed, 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 9th day of November, 2017.

Stacie F. Beckerman

STACIE F. BECKERMAN
United States Magistrate Judge

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the Court's analysis above, Podawiltz's proposed amendment cannot cure the defects in his § 646.608(1)(t) claim. *See Godwin v. Christianson*, 594 F. App'x 427, 428 (9th Cir. 2015) ("A district court acts within its discretion to deny leave to amend when amendment would be futile." (citation omitted)).