

United States District Court  
Northern District of California

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
San Francisco Division

DANIELLE LOKEY, individually and on behalf  
of a class of similarly situated individuals,  
  
Plaintiff,  
  
v.  
  
CVS PHARMACY, INC.,  
  
Defendant.

Case No. 20-cv-04782-LB

**ORDER DISMISSING FIRST  
AMENDED COMPLAINT**

Re: ECF No. 42

**INTRODUCTION**

In this putative class action, the plaintiff challenges CVS Pharmacy’s marketing of its CVS-branded pain-and-fever medicine for infants (called Infants’ acetaminophen) at a higher price than its CVS-branded pain-and fever medicine for children (called Children’s acetaminophen), even though the ingredients in the two products are the same. She claims that this practice violates three California consumer-protection laws: (1) California’s False Advertising Law (FAL), Cal. & Prof. Code § 17500; (2) California’s Unfair Competition Law (UCL), Cal. Bus. & Prof. Code §§ 17200–08; and (3) California’s Consumer Legal Remedies Act (CLRA), Cal. Civ. Code §§ 1750–84.<sup>1</sup> The court previously dismissed the plaintiff’s initial complaint on the ground that — as a

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<sup>1</sup> First Am. Compl. (FAC) – ECF No. 40. Citations refer to material in the Electronic Case File (ECF); pinpoint citations are to the ECF-generated page numbers at the top of documents.

1 matter of law — the labels disclosed the products’ composition and would not deceive a  
 2 reasonable consumer.<sup>2</sup> The amended complaint changes the allegations about product placement in  
 3 the store and adds allegations about consumer confusion. Given the labels, however, the new  
 4 allegations do not alter the court’s earlier conclusion that the labels would not deceive a  
 5 reasonable consumer. The court thus dismisses the complaint.

## 7 STATEMENT

### 8 1. Allegations in the Complaint

9 CVS markets and sells its CVS-branded products in its stores and online — including an  
 10 infants’ liquid acetaminophen and a children’s liquid acetaminophen — under the “CVS Health”  
 11 label.<sup>3</sup> Named plaintiff Danielle Lokey bought the infants’ acetaminophen on several occasions  
 12 “between April 2016 and the present. . . .”<sup>4</sup> The products are identical compositionally, but CVS  
 13 charges a higher price (as much as two and a half times) for the infants’ product.<sup>5</sup>

14 The front labels for the two products describe their composition identically (including their  
 15 concentrations of 160 mg/5 mL) but brand them for infants (with a syringe for administering the  
 16 dosage and with no representation about infant age) and children (with a dosage cup and a  
 17 representation that the product is for children from ages two to 11 years). (The FDA requires that  
 18 liquid acetaminophen must be available for infants and children only in concentrations of 160  
 19 milligrams per 5 milliliters.<sup>6</sup>) The complaint has the front labels, and CVS submitted the full  
 20 labels. The following are the images of the labels: the first two are from CVS, and the third is the  
 21 slightly different (but virtually identical) Infants’ label in the complaint.<sup>7</sup>

22 \_\_\_\_\_  
 23 <sup>2</sup> Order – ECF No. 36.

24 <sup>3</sup> FAC – ECF No. 40 at 2 (¶ 3).

25 <sup>4</sup> *Id.* at 11 (¶ 42).

26 <sup>5</sup> *Id.* at 3 (¶ 10), 7 (¶ 27).

27 <sup>6</sup> *Id.* at 6 (¶ 22).

28 <sup>7</sup> The court takes judicial notice of the labels and considers them under the incorporation-by-reference doctrine. Order – ECF No. 36 at 2 n.9; Req. for Judicial Notice – ECF Nos. 11, 31; Fed. R. Evid. 201(b); *Kniewel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005). The label in the FAC for the Infants’ formula has a mother, not a father, but is essentially the same. FAC – ECF Nos. 40 at 8 (¶ 29b).

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**Infants'** NDC 59779-161-16

# Pain & Fever

**ACETAMINOPHEN 160 mg/5 mL**  
Pain reliever; Fever reducer

Free of:  
Alcohol, Aspirin,  
Ibuprofen & Gluten




Cherry Flavor

Use only with enclosed syringe.  
See side panel for more information.

**2 FL OZ (59 mL)** Package Contains One Bottle and One Syringe

**CVS Health.** Compare to the active ingredient in Children's, Tylenol® Oral Suspension  
Oral Suspension NDC 59779-126-26

# Children's Pain & Fever

**ACETAMINOPHEN 160 mg/5 mL**  
Pain reliever; Fever reducer  
Ages 2 to 11 years

Free of: Alcohol, Aspirin,  
Ibuprofen & Gluten




Bubble Gum Flavor

**4 FL OZ (118 mL)**

**CVS Health.** Compare to the active ingredient in Infants' Tylenol® Oral Suspension  
Oral Suspension NDC 59779-590-16

# Infants' Pain & Fever

**ACETAMINOPHEN 160 mg/5 mL**  
Pain reliever; Fever reducer

Free of:  
Alcohol, Aspirin, Ibuprofen, Gluten  
& High fructose corn syrup

**DYE FREE**




Non-Staining  
Cherry Flavor

Use only with enclosed syringe.  
See side panel for more information.

**2 FL OZ (59 mL)** Package Contains One Bottle and One Syringe

1 The infants' label has the following instructions for dosages:

2 Dosing Chart

3 <b>Weight (lb)</b>	<b>Age (yr)</b>	<b>Dose (mL)*</b>
4 under 24	under 2 years	ask a doctor
5 24–35	2–3 years	5 mL

6 \*or as directed by a doctor

7  
8 The children's label has the following instructions for dosages:

9 <b>Weight (lb)</b>	<b>Age (yr)</b>	<b>Dose (mL)*</b>
10 under 24	under 2 years	ask a doctor
11 24–35	2–3 years	5 mL
12 36–47	4–5 years	7.5 mL
13 48–59	6–8 years	10 mL
14 60–71	9–10 years	12.5 mL
15 72–95	11 years	15 mL

16 \*or as directed by a doctor

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20 The previous complaint said that the two products were displayed on the same shelf in CVS's  
21 retail stores (creating confusion).<sup>8</sup> The amended complaint said that the products are in two  
22 different places: the children's product "is principally found some distance away in the 'children's  
23 care' section of CVS stores (as opposed to the 'baby care' section of the stores)."<sup>9</sup>

24 The complaint explains why the products' compositions are identical. Before 2011, the  
25 acetaminophen concentrations in infants' and children's products were different, which led  
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27 <sup>8</sup> Compl. – ECF No. 4-1 at 4 (¶ 4).

28 <sup>9</sup> FAC – ECF No. 40 at 8 (¶ 30).

1 consumers to give incorrect doses, causing overdoses. By December 2011, to prevent overdoses, the  
2 FDA said that liquid acetaminophen marketed for infants would be available only in concentrations  
3 of 160 milligrams per 5 milliliters (the 160 mg/5 ml reflected on the labels).<sup>10</sup>

4 The complaint’s allegations address consumer habits and confusion. Parents are careful when  
5 they buy medicines for infants. CVS exploits this caution by packaging that suggests that its  
6 Infants’ products are specially formulated for infants. Parents have a conventional understanding  
7 that they should buy medicine branded for infants: “Numerous parenting resources, such as the  
8 popular parenting website ‘What to Expect,’ express the conventional understanding that infants  
9 always should be given the infant formulations. Similarly, the frequently visited website  
10 KidsHealth.org instructs parents to know ‘the name and purpose of the medicine’ and to ‘never give  
11 a child medicine that is meant for adults.’” The acetaminophen-awareness coalition  
12 KnowYourDose.org warns parents to “always look at the minimum age recommended for taking  
13 the medication and don’t give it to your child if he/she is younger than the recommended age unless  
14 you have discussed it with your healthcare provider.”<sup>11</sup>

15 The products are “wholly interchangeable in all material respects.” CVS’s deceptive practices  
16 “harness the fear of acetaminophen toxicity to trick consumers . . . into purchasing and overpaying  
17 for Infants’ acetaminophen when Children’s acetaminophen would be equally safe and effective at a  
18 fraction of the price.”<sup>12</sup>

## 20 **2. Relevant Procedural History**

21 The court dismissed the plaintiff’s earlier complaint with leave to amend. The plaintiff  
22 amended the complaint, and CVS moved to dismiss it. All parties consented to magistrate-judge  
23 jurisdiction.<sup>13</sup> The court held a hearing on February 18, 2021.

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25 <sup>10</sup> *Id.* at 6 (¶¶ 21–22).

26 <sup>11</sup> *Id.* at 9–10 (¶¶ 34–36, 38) (website citations omitted).

27 <sup>12</sup> *Id.* at 11 (¶ 40). The FAC also references a consumer survey about Infants’ Tylenol, where customers  
28 believed it to be specially formulated for infants. *Id.* at 10–11 (¶ 39); Mot. – ECF No. 42 at 10 (arguing  
irrelevance). The allegations are conclusory, about a different product, and thus irrelevant.

<sup>13</sup> Order – ECF No. 36; FAC – ECF No. 40; Mot. – ECF No. 42; Consents – ECF Nos. 12, 14.

**STANDARD OF REVIEW**

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2 A complaint must contain a “short and plain statement of the claim showing that the pleader is  
3 entitled to relief” to give the defendant “fair notice” of what the claims are and the grounds upon  
4 which they rest. Fed. R. Civ. P. 8(a)(2); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A  
5 complaint does not need detailed factual allegations, but “a plaintiff’s obligation to provide the  
6 ‘grounds’ of his ‘entitlement to relief’ requires more than labels and conclusions, and a formulaic  
7 recitation of the elements of a cause of action will not do. Factual allegations must be enough to  
8 raise a claim for relief above the speculative level[.]” *Twombly*, 550 U.S. at 555 (cleaned up).

9 To survive a motion to dismiss, a complaint must contain sufficient factual allegations, which  
10 when accepted as true, “state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556  
11 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). “A claim has facial plausibility when  
12 the plaintiff pleads factual content that allows the court to draw the reasonable inference that the  
13 defendant is liable for the misconduct alleged.” *Id.* “The plausibility standard is not akin to a  
14 ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted  
15 unlawfully.” *Id.* (citing *Twombly*, 550 U.S. at 557). “Where a complaint pleads facts that are  
16 merely consistent with a defendant’s liability, it stops short of the line between possibility and  
17 plausibility of ‘entitlement to relief.’” *Id.* (cleaned up) (quoting *Twombly*, 550 U.S. at 557).

18 If a court dismisses a complaint, it should give leave to amend unless the “pleading could not  
19 possibly be cured by the allegation of other facts.” *United States v. United Healthcare Ins. Co.*,  
20 848 F.3d 1161, 1182 (9th Cir. 2016) (cleaned up).

**ANALYSIS**

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23 CVS moved to dismiss the amended complaint on the ground that the plaintiff did not  
24 plausibly plead that the products’ packaging — which disclosed that the products were  
25 compositionally identical and differ in that they display different pictures of children and different  
26 dosing devices (a syringe for infants and a cup for children) — would deceive a reasonable  
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1 consumer.<sup>14</sup> The plaintiff countered that she plausibly alleged consumer confusion, and it is a fact  
2 question — not suitable for resolution at a motion to dismiss — whether the labels are misleading  
3 or deceptive.<sup>15</sup> The labels here are not deceptive. As a result, the plaintiff’s challenge is only to the  
4 different pricing, which is not justiciable.

5 Claims under the CLRA, FAL, and UCL are governed by the “reasonable consumer” test.  
6 *Williams v. Gerber Prods. Co.*, 552 F.3d 934, 938 (9th Cir. 2008). “Under the reasonable  
7 consumer standard, [plaintiffs] must show that members of the public are likely to be deceived.”  
8 *Id.* (cleaned up). “[W]hether a business practice is deceptive will usually be a question of fact not  
9 appropriate for decision on [a motion to dismiss]” because [it] requires “consideration and  
10 weighing of evidence from both sides.” *Id.* at 938–39 (cleaned up) (quoting *Linear Tech. Corp. v.*  
11 *Applied Materials, Inc.*, 152 Cal. App. 4th 115, 134–35 (2007)). “The California Supreme Court  
12 has recognized that these laws prohibit ‘not only advertising which is false, but also advertising  
13 which, although true, is either actually misleading or which has a capacity, likelihood or tendency  
14 to deceive or confuse the public.’” *Id.* at 938 (cleaned up) (quoting *Kasky v. Nike, Inc.*, 27 Cal. 4th  
15 939, 951 (2002)). “A perfectly true statement couched in such a manner that it is likely to mislead  
16 or deceive the consumer, such as by failure to disclose other relevant information, is actionable  
17 under these sections.” *Day v. AT&T Corp.*, 63 Cal. App. 4th 325, 332–33 (1998).

18 As the court held previously, the labels are not deceptive. The front labels for both products  
19 show their concentrations of 160 milligrams per 5 milliliters (the 160 mg/5 ml reflected on the  
20 labels). Obviously, the products are targeting different markets: parents of infants and parents of  
21 children. Obviously, the CVS labeled the products differently, branding them an infants’ product  
22 and a children’s product (shown by the names, the photographs of the children, and the different  
23 devices to deliver the doses: a syringe for infants and a cup for children). But nothing about the  
24 labels is misleading about the products or their composition. To the contrary, the labels are  
25 accurate. *Bush v. Mondelez Int’l, Inc.*, No. 16-CV-02460-RS, 2016 WL 7324990, at \*2–3 (N.D.

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27 <sup>14</sup> Mot. – ECF No. 42 at 6.

28 <sup>15</sup> Opp’n – ECF No. 46 at 7.



1 Cal. 2016) (consumer-deception claim was implausible because no reasonable consumer was  
2 likely to be deceived by packaging that disclosed the net weight and number of cookies per  
3 container); *Sponchiado v. Apple Inc.*, 18-CV-07533-HSG, 2019 WL 6117482, at \*4–5 (N.D. Cal.  
4 Nov. 18, 2018) (dismissing CLRA, UCL, and FAL claims challenging Apple’s alleged  
5 misrepresentations about pixel resolution because disclaimer language appearing 10 lines below  
6 contradicted the plaintiffs’ interpretation).

7 This case is like *Boris v. Wal-Mart Stores*, addressed in the earlier order. 35 F. Supp. 3d 1163  
8 (C.D. Cal. 2014), *aff’d*, 659 F. App’x 424 (9th Cir. 2016). In *Boris*, a putative class action, the  
9 plaintiffs challenged two Wal-Mart headache-relief products that had the same composition  
10 (ingredients and amounts), were branded differently (Equate Migraine with a red background and  
11 Equate Extra Strength Headache Relief with a green background), and were priced differently (the  
12 migraine product was priced higher than the other product). *Id.* at 1166. The plaintiffs alleged that  
13 the difference in pricing conveyed that the higher-priced medicine was more effective. *Id.* at 1168.  
14 The court dismissed the FAL, UCL, CLRA claims (and similar claims under New York and New  
15 Jersey consumer-protection statutes), holding that the product background was not deceptive and  
16 the plaintiffs’ challenge to the merchant’s pricing decisions was not justiciable. *Id.* at 1169–70.

17 Plaintiffs have not pointed to any specific constitutional, statutory, or regulatory provision  
18 that embodies a policy that Equate Migraine’s price and red packaging violate. And the  
19 Court is aware of none. Absent some legislative enactment, price setting is ordinarily left  
20 to the business judgment of merchants. Taken to its logical conclusion, Plaintiffs’ claim  
21 requires the judiciary to make pricing decisions, such as ruling that pharmacologically  
22 identical drugs must be the same price or may have only a limited price differential, or  
23 imposing liability for differential pricing on a necessarily unpredictable case-by-case  
24 basis. . . . To state this reality is to demonstrate that it is untenable: price regulation is a  
25 political question beyond the judiciary’s authority. A question is a political question and  
26 therefore nonjusticiable when, for example, there is “a lack of judicially discoverable and  
manageable standards for resolving it [ ] or the impossibility of deciding without an initial  
policy determination of a kind clearly for nonjudicial discretion . . .” *Baker v. Carr*, 369  
U.S. 186, 217, 82 S. Ct. 691, 7 L.Ed.2d 663 (1962). California courts have consistently  
described price regulation as “a question of economic policy . . . [i]t is the Legislature’s  
function, not ours, to determine the wisdom of economic policy. Judicial intervention in  
such economic issues is improper.

27 *Id.* at 1171–72 (cleaned up) (collecting cases). Like *Boris*, this case involves compositionally  
28 identical products targeted at two audiences (there, migraine sufferers and headache sufferers and



1 here, parents of infants and parents of children). Both involve different branding (the backgrounds  
2 in *Boris* and the images of infants and children here) to entice different audiences. Both cases  
3 involve a price premium on a product marketed to one audience. Applying *Boris*, because there is  
4 no deception beyond the price differential, the plaintiff’s challenge is a non-justiciable challenge  
5 to CVS’s pricing decisions. *Id.* at 1172.

6 The plaintiff cites two out-of-district cases, *Elkies* and *Youngblood* — both involving  
7 challenges to pain relievers with identical compositions that were marketed to different audiences  
8 (parents of infants and parents of children) — to support her contention that she plausibly pleads a  
9 case of deception.<sup>16</sup> In *Elkies*, the products were infants’ Tylenol and children’s Tylenol. *Elkies v.*  
10 *Johnson & Johnson Servs., Inc.*, No. 17-cv-07320-GW, Order – ECF No. 53 at 2 (C.D. Cal. Feb.  
11 22, 2018). In *Youngblood*, the products were the products in this case. *Youngblood. v. CVS*, No.  
12 2:20-cv-06251-MCS-MRW, Order – ECF No. 31 at 2 (C.D. Cal. Oct. 15, 2020).

13 As the court held previously, *Elkies* is distinguishable: there was no express disclosure that the  
14 “medicine in the [Infants’] bottle is exactly the same, and provided at the exact same  
15 concentration, as Children’s[.]”<sup>17</sup> Order, No. 17-cv-07320-GW, ECF No. 53 at 9. In *Elkies*, the  
16 picture of a mother and baby (“along with the word ‘Infants’” but without the express disclosure  
17 that the medicine was the same) could lead a “significant portion of the general consuming public”  
18 to conclude that the infants’ product was “unique or specially formulated for children under two.”  
19 *Id.* By contrast, the front label here expressly discloses the medicine’s composition.

20 In *Youngblood*, involving the products in this case, the court held that the front labels — with  
21 their different photographs of children of different ages — plausibly pleaded consumer deception  
22 (in the form of a belief that the product was formulated for infants) in part because the label  
23 branded the products for “children under two.” Order, No. 2:20-cv-06251-MCS-MRW, ECF No.  
24 31 at 7–8. To support that conclusion, the court cited *Mullins v. Premier Nutrition* for the  
25 proposition that a reasonable consumer would believe that the offending product was “specially  
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27 <sup>16</sup> *Id.* at 21–22.

28 <sup>17</sup> Order – ECF No. 36 at 9.

1 formulated for infants.” *Id.* at 7 (citing *Mullins*, 178 F. Supp. 3d 867, 891 (N.D. Cal. 2016)).  
 2 *Mullins* involved a dietary product that claimed it promoted joint health. 179 F. Supp. 3d at 891.  
 3 On summary judgment, the *Mullins* court held that the plaintiff raised triable issues of fact that  
 4 consumers bought the product to reduce joint pain and stiffness and that the product (characterized  
 5 as snake oil) did not work. *Id.* at 875–76, 892.

6 But here (and in *Youngblood*), the plaintiffs do not challenge the efficacy of the product (a fact  
 7 disputed in *Mullins*) and instead challenge marketing that allegedly misleads a consumer into  
 8 believing that the medicine is specially formulated for children under age two. Like the products in  
 9 *Boris*, products that are identical can be marketed to different audiences: migraine-headache  
 10 sufferers and regular-headache sufferers, parents of infants and parents of children, adults and  
 11 children (or other age ranges), professional athletes and weekend athletes, or different genders, to  
 12 name a few. If the labels are accurate, and the difference is only the pricing, then the claim is not  
 13 justiciable. *Boris*, 35 F. Supp. 3d at 1169–71. *Mullins* — a case about an allegedly ineffective  
 14 product — does not compel the conclusion that the plaintiff pleads plausible claims when the label  
 15 discloses what the consumer is purchasing. “What ultimately dooms Plaintiff’s claims is that  
 16 Defendant tells the consumer exactly what she is getting: the package actually discloses the fact  
 17 that Plaintiff complains it omits.” *Dinan v. Sandisk LLC*, No. 18-CV-05420-BLF, 2019 WL  
 18 2327923, at \*7 (N.D. Cal. May 31, 2019) (cleaned up).

19 For this reason, the plaintiff’s citation to other cases involving products that were marketed as  
 20 effective (when they allegedly were not) does not compel a contrary conclusion.<sup>18</sup> *See, e.g., Brady*  
 21 *v. Bayer Corp.*, 26 Cal. App. 5th 1156, 1172–73 (2018) (label for one-a-day vitamins was  
 22 misleading because the serving size was two vitamins); *Warner-Lambert Co. v. BreathAsure, Inc.*,  
 23 204 F.3d 87, 89, 97 (3rd Cir. 2002) (BreathAsure was a misleading name because there was no  
 24 scientific foundation for the conclusion that the capsules were effective against bad breath);  
 25 *Novartis v. Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharm. Co.*, 290 F.3d  
 26 578, 589 (3rd Cir. 2002) (“Night Time Strength” necessarily implied a false message that the  
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28 <sup>18</sup> Opp’n – ECF No. 46 at 15–16.

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product possessed “a quality that is particularly efficacious for those suffering from heartburn at night”). The claim here is not that the Infants’ product was ineffective or did not perform as advertised. To the contrary, the representations on the label are accurate.

A final point is that the products are different. They are marketed in different quantities (two ounces for the infants’ product and four ounces for the children’s product) and with different devices to deliver the doses (a syringe for infants and a cup for children).

Often claims involving misleading labels involve questions of fact “not appropriate for decision” on a motion to dismiss. *Williams*, 552 F.3d at 938; *Zeiger v. WellPet LLC*, 304 F. Supp. 3d 837, 852 (N.D. Cal. 2018). That is not the case here. The labels are accurate. The challenge in the end is to pricing, which is not justiciable. *Boris*, 35 F. Supp. 3d at 1171–72.

**CONCLUSION**

The court grants the motion to dismiss with prejudice. This disposes of ECF No. 42.

**IT IS SO ORDERED.**

Dated: February 18, 2021



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LAUREL BEELER  
United States Magistrate Judge