

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF
CALIFORNIA

Magpayo v. Walmart Inc.

Magpayo · No. 24-cv-01350-WHO · Decided March 10, 2025

OPINION

Magpayo v. Walmart Inc.

PER CURIAM.

1 2 3

4 UNITED STATES DISTRICT COURT

5 NORTHERN DISTRICT OF CALIFORNIA

6 7 PEARL MAGPAYO, Case No. 24-cv-01350-WHO 8 Plaintiff,

ORDER GRANTING MOTION TO

9 v. DISMISS SECOND AMENDED

COMPLAINT

10 WALMART INC.,

Re: Dkt. No. 44 Defendant. 11 12 Plaintiff Pearl Magpayo challenges the advertising and label disclosures on defendant's 13 Spring Valley Fish Oil Omega-3 dietary supplements ("Products"). Second Amended Complaint 14 ("SAC," Dkt. No. 43) ¶¶ 11-13. Under the law in this Circuit, in order to plead a 15 structure/function claim as she attempts to do here, she must allege that taking omega 3 fish oil 16 supplements provides no benefit for "heart health" and support that allegation by citing "matched 17 evidence" from identified scientific studies. *Kroessler v. CVS Health Corp.*, 977 F.3d 803, 812 18 (9th Cir. 2020). In the SAC, she still fails to meet that burden. Her complaint is DISMISSED, 19 this time with prejudice.

20 BACKGROUND

21 In my October 2024 Order, I explained that plaintiff's claims regarding the challenged 22 statements on the Products' labels – that "Fish Oil is a source of Omega-3 fatty acids that support 23 heart health," and the use of "Heart Health" and a heart symbol – were "structure function" claims.

24 October 2024 Order, Dkt. No. 42, at 9-10.1 Because the FAC pleaded only preempted implied 25 disease claims, I gave plaintiff leave to amend to either identify additional support to plausibly 26 27 1 The factual background, including plaintiff's allegations regarding consumer use of and 1 support a not-preempted implied disease claim or to plausibly plead facts supporting an actionable 2 structure function claim. *Id.* at 10-12. 3 In the SAC, plaintiff drops the implied disease theory and more clearly attempts to allege a 4 structure/function claim. In support of that claim, plaintiff relies on: (1) scientific studies, papers, 5 and articles that conclude taking omega 3 fish oil

supplements does not help prevent or reduce the incidence of cardiovascular disease or adverse cardiovascular events (SAC ¶¶ 5, 32, 38-44, 46-49, 50, 53, 55); (2) a portion of a study that shows taking omega 3 fish oil supplements does not support a “key” inflammatory marker, homocysteine (SAC ¶ 45 fn. 22); and (3) a study and clinical trial that conclude that taking omega 3 fish oil supplements could cause harm, by increasing the chance of atrial fibrillation. SAC ¶¶ 55-60.

11 DISCUSSION

12 I evaluate plaintiff’s amended claims under the applicable standards governing challenged structure/function claims outlined in Ninth Circuit precedent, including *Greenberg v. Target 14 Corporation*, 985 F.3d 650 (2021), *Kroessler v. CVS Health Corp.*, 977 F.3d 803, 812 (9th Cir. 15 2020), and *Dachauer v. NBTY, Inc.*, 913 F.3d 844 (2019). As the Ninth Circuit made clear in 16 *Kroessler*, in order to plead a structure/function claim plaintiff must allege that taking omega 3 17 fish oil supplements provides no benefit for “heart health” and she must support that allegation by 18 citing “matched evidence” from identified scientific studies. 977 F.3d at 812. She still fails to 19 meet that burden. 20 Plaintiff alleges that “multiple randomized clinical trials have shown no cardiovascular 21 benefits to fish oil supplements.” SAC n.4 & ¶¶ 40, 54. But the article she cites – Joanna N. 22 Assadourian et al., *Health Claims and Doses of Fish Oil Supplements in the US*, 8(10) JAMA

23 *Cardiology* 984, 986 (Aug. 23, 2023) – was reviewing labels. It was not an efficacy study or 24 randomized trial itself; plaintiff does not quote and cite to any of the studies or trials relied on in 25 the Assadourian study as showing “no benefit” to heart health. See SAC ¶ 53 (discussing 26 Assadourian). 27 Instead, plaintiff cites and identifies scientific studies or clinical trials finding that there is 1 adverse cardiovascular events. See SAC ¶¶ 5, 32, 38-44, 46-49, 50, 53, 55. That is not the 2 standard following *Kroessler*. To be clear, these studies are not irrelevant when pleading or 3 evaluating a structure/function claim simply because they focus on cardiovascular disease or 4 adverse events.² Plaintiff may rely on disease studies, but within those studies she must identify 5 evidence or conclusions that are “matched” to her challenge. *Kroessler*, 977 F.3d at 813 6 (“*Kroessler* also alleges that the contents of the studies support the conclusion that glucosamine is 7 ‘ineffective’ at ‘supporting, maintaining, or benefiting the health of human joints.’ Taken as true, 8 those allegations directly refute CVS’s claims.”). Matching evidence here would be evidence or a 9 conclusion in an identified scientific source that taking omega 3 fish oil supplements provides “no 10 benefit” to heart health. She identifies no such evidence or conclusions in the SAC. 11 Plaintiff complains that defendant – by discussing the contents and conclusions of the 12 studies plaintiff relies on in her SAC – is inappropriately asking me to weigh evidence at the 13 motion to dismiss stage. But defendant is simply pointing out that the scientific evidence plaintiff 14 has identified and relies on is not, in fact, matched to her theory of this case as required by 15 *Kroessler*: nothing in those studies says what plaintiff needs them to say, which is that there is no 16 benefit to heart health from taking omega 3 fish oil supplements. 17 The closest plaintiff comes

to satisfying her pleading burden is one assertion, based on one 18 study, that “Omega-3 does not seem to be able to change the inflammatory markers significantly, 19 particularly homocysteine.” SAC ¶ 45 fn. 22. The fact that one inflammation marker – 20 presumably one aspect of heart health – is not impacted by taking omega 3 fish oil supplements 21 does not support the broader assertion that taking omega 3 fish oil supplements provides no 22 support to “heart health.” Plaintiff contends that at this juncture she should be able to plead her 23 claim by identifying any marker of heart health that is not supported by taking omega 3 fish oil 24 supplements, as that is “one small aspect” of heart health. See *Greenberg v. Target Corp.*, 985 25 2 See *Gallagher v. Bayer AG*, No. 14-CV-04601-WHO, 2015 WL 4932292, at *5 (N.D. Cal. Aug. 26 18, 2015 (“Although much of the evidence cited by the SACAC does not directly support plaintiffs’ claim, it provides circumstantial support and is relevant to the falsity of the “support 27 heart health” claim. There is undoubtedly a correlation between health and the absence of disease. 1 F.3d at 655 (a defendant will defeat a challenge to a structure/function claim at summary judgment 2 where it can “show evidence of an effect on a small aspect of the related structure/function.”). She 3 argues that she should not be required to plead and cite evidence in support that taking omega 3 4 fish oil supplements has absolutely no benefit on any aspect of heart health because that will be 5 defendant’s burden on summary judgment. See *id.* But as the Ninth Circuit made clear in 6 *Kroessler and Greenberg*, the evidence plaintiff must cite to support her structure/function claim 7 has to be matched. Plaintiff is not challenging a statement on defendant’s Products that taking 8 omega 3 fish oil supplements supports homocysteine. Her claim, instead, is that taking omega 3 9 fish oil supplements provides no benefit to heart health and that is why defendant’s “heart health” 10 claims on the labels are false and misleading. That is the claim to which evidence must be 11 matched.³ 12 Defendant argues that plaintiff cannot plausibly support her “no benefit claim” because one 13 of the studies she cites in support (*Gholipur-Shahraki et al., Effect of Omega-3 Fatty Acids 14 Supplementation on Homocysteine Level in Patients Undergoing Continuous Ambulatory 15 Peritoneal Dialysis*, *J Res Pharm Pract.* 2022) finds that “Omega-3 fatty acids have cardiovascular 16 protective properties by improving lipid profile and reducing inflammation and oxidative stress,” 17 “omega-3 caused a meaningful reduction in triglyceride concentration” and “omega-3 18 supplementation significantly increased HDL-C [good cholesterol] compared with placebo.” 19 Supplemental Declaration of W. Cole [Dkt. No. 49-3], Ex. 1 at 1, 82, 85. Plaintiff does not 20 dispute that these findings show the supplements support some aspects of “heart health.” 21 That leaves plaintiff’s theory that supports heart health is nonetheless false or misleading 22 because taking omega 3 fish oil supplements can harm consumers, specifically that it can lead to 23 atrial fibrillation. SAC ¶¶ 12, 14, 31, 49, 55-59. She relies first on *Ge Chen et al., Regular Use of 24 3 Plaintiff’s unopposed motion for leave to file supplemental authority, Dkt. No. 53 is GRANTED. 25 I have considered the recent opinion in Hamzeh v. Pharmavite LLC, Case No.: 4:24-CV-00472- HSG (ECF No. 55) (Feb. 26, 2025). The record here is different. Plaintiff does not allege in the 26 SAC – and cites no identified scientific study or other evidence*

in support – that taking omega 3 fish oils provides “no support” to “heart health”. And for its part, defendant also identified recent 27 authority; *Bowler v. Nestlé Health Science U.S., LLC*, No. 2:24-cv-06521-MCS-JPR (C.D. Cal. 1 Fish Oil Supplements and Course of Cardiovascular Diseases: Prospective Cohort Study, 3 *BJM* 2 *Med.* 1, 6, 8 (May 21, 2024) (“Chen”). She alleges that Chen found “regular use of fish oil” by 3 healthy people “was associated with an increased risk of atrial fibrillation” and possible “risk 4 factor” for stroke. SAC ¶ 56. She also relies on the STRENGTH Randomized Clinical Trial,” 5 Stephen J. Nicholls et al., Effect of High-Dose Omega-3 Fatty Acids vs Corn Oil on Major 6 Adverse Cardiovascular Events in Patients at High Cardiovascular Risk: The STRENGTH 7 Randomized Clinical Trial, 324(22) *JAMA* 2268, 2268 (Nov. 15, 2020) (“STRENGTH Trial”). 8 She alleges that the STRENGTH Trial found an increased risk of atrial fibrillation related to 9 taking omega 3 fish oil supplements. SAC ¶ 57 fn. 33. Finally, she relies on the editor’s note 10 from a study, where the study’s author opines that patients “who choose to take omega-3 fatty 11 acids, especially in high doses, should be informed of the risk of [atrial fibrillation].” SAC ¶ 58 12 (“VIRAL” study). 13 Defendant asserts that the harm claim has not been plausibly alleged. It challenges the 14 sufficiency of the allegations because none of the studies cited concerned taking omega-3 15 supplements at the dosage recommended by defendant’s Products. Defendant points out that the 16 Chen study – the primary reference on which plaintiff relies – stated that “information on dose and 17 formulation of the fish oil supplements was not available in this study so we could not evaluate 18 potential dose dependent effects or differentiate between the effects of different fish oil 19 formulation.” Dkt. No. 44-1, Ex. 3 at 64. It concluded that “regular” use of fish oil supplements 20 at an unidentified dose might “be a risk factor for atrial fibrillation and stroke among the general 21 population” but “no causal relations can be drawn from our findings.” *Id.* at 57, 64. Defendant 22 notes that in the STRENGTH trial, the participants were taking 4 grams of omega-3 fish oil, far 23 above the 1 gram recommended in defendant’s product. 24 Defendant contrasts that with the VITAL study, which states that where patients received a 25 standard daily dose of 840 m/d of EPA/DHA – just below the 1g/d recommended amount for the 26 Products – there “was no apparent increase in risk” and a dose of 1.8 g/d (above the recommended 27 use) any increased risk “did not achieve statistical significance.” Dkt. No. 44-1, Ex. 2 at 55. The 1 the findings and there was only significant risk of increased chance of atrial fibrillation at the 2 upper/higher doses that far exceed the Product’s recommended use. *Id.* at 55. Given the failure to 3 address the dose issue, defendant argues, plaintiff’s assertions of harm from use of the Products as 4 recommended are impermissibly speculative and cannot sustain the claim here. 5 Defendant has support in *Dachauer v. NBTY, Inc.*, 913 F.3d 844 (9th Cir. 2019). There, 6 the court reviewed claims that could qualify as false and misleading and explained that “FDCA 7 regulations state that a food label ‘shall be deemed to be misleading if it fails to reveal facts’ that 8 are ‘[m]aterial with respect to consequences which may result from use of the article’ under 9 normal conditions of use or the conditions of use that the label prescribes. 21 C.F.R. § 1.21(a)(2).

10 In other words, if a supplement's label recommends taking one capsule per day and that dose
11 actually causes an increased risk of death—a material fact ‘with respect to consequences which
12 may result from use of the article’—the FDCA would deem it misleading not to reveal that fact
on 13 the label.” Id. at 849. 14 Here, plaintiff has failed to allege and cite evidence in support that
taking omega-3 fish oil 15 supplements at the level the Products recommend increases the risk of
atrial fibrillation. The 16 scientific studies and evidence on which she relies do not support her
claim, given the unspecified 17 or expressly identified “high doses” analyzed in the studies
plaintiff cites. 18 Plaintiff defends her reliance on the “high dose” studies and commentary by
arguing that 19 “normal conditions of use” by consumers could exceed defendant’s recommended
daily use. She 20 notes that in *Krommenhock v. Post Foods, LLC*, 255 F. Supp. 3d 938 (N.D. Cal.
2017), I 21 addressed a scenario where consumers regularly exceeded the recommended servings
for cereal 22 set by the manufacturer. Id. at 963. But unlike the SAC here, the plaintiff in
Krommenhock 23 alleged that typical consumers regularly consumed the product in excess of the
manufacturer’s 24 serving suggestions. Id. There are no similar allegations that reasonable
consumers normally take 25 omega 3 fish oil supplements in excess of defendant’s recommended
daily dose. 26 Even if those allegations could be made, plaintiff cannot rely on alleged “normal 27
conditions” of use to get around the label’s recommended use. The regulation discussed by 1 §
342. That statute provides “normal conditions of use” should only be considered if no 2 ||
conditions of use are suggested or recommended on the labeling, which is not the case here. 3 (f)
Dietary supplement or ingredient: safety

(1) If it is a dietary supplement or contains a dietary ingredient that--

4 (A) presents a significant or unreasonable risk of illness or injury under-- 5 (i) conditions of use
recommended or suggested in labeling, or (ii) if no conditions of use are suggested or
recommended in the 6 labeling, under ordinary conditions of use. 7 21 U.S.C. § 342 (f). Here,
because the Product provides a recommended level of use, allegations 8 || regarding “normal”
conditions of use would be inapposite. 9 Despite having been given leave to amend to attempt to
satisfy her pleading burden, 10 || plaintiff has failed to adequately allege a false and misleading
structure/function claim as required 11 to state a not-preempted consumer protection claim under
California law. See generally October 12 || 2024 Order. Plaintiff does not dispute that this failure
means her other claims — her express and 13 implied warranty, negligent and intentional
misrepresentation claims as well as her claim for 14] injunctive relief — all fail. See Mot. at 14-
15; Oppo. at 19-20; Reply at 12.

15 CONCLUSION

a 16 For the reasons discussed above, defendant’s motion to dismiss is GRANTED WITH = 17 ||
PREJUDICE. 18 IT IS SO ORDERED. 19 Dated: March 10, 2025 20 21 9 . Orrick nited States
District Judge 23 24 25 26 27 28

