

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 §§ 1750–84.¹ The court previously dismissed the plaintiff’s initial complaint on the ground that — as a

¹ First Am. Compl. (FAC) – ECF No. 40. Citations refer to material in the Electronic Case File (ECF);

1 matter of law — the labels disclosed the products’ composition and would not deceive a
 2 reasonable consumer.² 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.³ Named plaintiff Danielle Lokey bought the infants’ acetaminophen on several occasions
 12 “between April 2016 and the present. . . .”⁴ The products are identical compositionally, but CVS
 13 charges a higher price (as much as two and a half times) for the infants’ product.⁵

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.⁶) 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.⁷

22 _____
 23 ² Order – ECF No. 36.

24 ³ FAC – ECF No. 40 at 2 (¶ 3).

25 ⁴ *Id.* at 11 (¶ 42).

26 ⁵ *Id.* at 3 (¶ 10), 7 (¶ 27).

27 ⁶ *Id.* at 6 (¶ 22).

28 ⁷ 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); *Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005). The label in the FAC for the Infants’

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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 Weight (lb)	Age (yr)	Dose (mL)*
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 Weight (lb)	Age (yr)	Dose (mL)*
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

17
18
19 The previous complaint said that the two products were displayed on the same shelf in CVS's
20 retail stores (creating confusion).⁸ The amended complaint said that the products are in two
21 different places: the children's product "is principally found some distance away in the 'children's
22 care' section of CVS stores (as opposed to the 'baby care' section of the stores)."⁹

23
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
26

27 ⁸ Compl. – ECF No. 4-1 at 4 (¶ 4).

28 ⁹ ECF No. 4-1 at 4 (¶ 4).

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).¹⁰

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.”¹¹

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.”¹²

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.¹³ The court held a hearing on February 18, 2021.

24 _____
 25 ¹⁰ *Id.* at 6 (¶¶ 21–22).

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

27 ¹² *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
 29 irrelevance). The allegations are conclusory, about a different product, and thus irrelevant.

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