UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 12-61703-CIV-DIMITROULEAS/SNOW

KATLIN MOORE & ADAM ZAINTZ,
on behalf of themselves and all others
similarly situated,

Plaintiffs,

vs.

GNC, HOLDINGS, INC., a Delaware corporation,

Defendant.
_____/

ORDER GRANTING IN PART DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

THIS CAUSE is before the Court upon Defendant's Motion for Summary Judgment (the "Motion") [DE 41], filed herein on August 16, 2013. The Court has carefully considered the Motion [DE 41], the Response [DE 46], the Reply [DE 52], and the record herein. The Court is otherwise fully advised in the premises.

I. BACKGROUND[1]

The parties to this action are plaintiffs Katlin Moore ("Moore") and Adam Zaintz ("Zaintz" and together with Moore, "Plaintiffs") and Defendant GNC Holdings, Inc. ("Defendant"). Plaintiffs purchased GNC's Pro Performance Creatine Monohydrate (2.2 lb) dietary supplement (the "Product"). [DE 42 ¶ 1; DE 47 ¶ 1]. Some creatine monohydrate

[1] The parties' Statements of Material Facts [DE 42; DE 47] include various citations to specific portions of the record. Any citations herein to the Statements of Material Facts [DE 42; DE 47] should be construed as incorporating and referring to those citations to the record. Additionally, the Court notes that Plaintiffs failed to comply with Local Rule 56.1(a), which provides that "[s]tatements of material facts submitted in opposition to a motion for summary judgment shall correspond with the order and with the paragraph numbering scheme used by the movant." Given the Plaintiffs' failure to comply with that Local Rule, the Court *could* deem Defendant's Statement of Material Facts [DE 42] admitted in its entirety. *See* Local Rule 56.1(b). Nonetheless, the Court has delved into the substance of the parties' filings and considered the instant Motion [DE 41] on the merits.

products include warnings/disclaimers telling consumers to drink adequate amounts of water or fluids when using those products. [DE 47 ¶¶ 10-11; DE 47-1 at 32; DE 47-2]. The Product, however, did not contain a warning that a consumer should drink large amounts of water to avoid side effects. [DE 42 ¶ 3; DE 47 ¶¶ 2, 7-9; 47-1 at 32]. Plaintiffs assert that GNC was able to charge a premium price for the Product, as compared to similar competing creatine monohydrate products, because the Product did not contain such a "hydration warning." [DE 42 ¶ 4; DE 14 ¶¶ 17, 39, 41].

Based on those circumstances, Plaintiffs initiated this class action against Defendant on August 30, 2012. *See* [DE 1]. Plaintiffs' Amended Complaint includes two causes of action: Count I for Violation of the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA") and Count II for Unjust Enrichment. [DE 14 ¶¶ 34-51]. On October 16, 2013, the Court certified a class (the "Class")—as to the FDUTPA claim only—consisting of "all persons in the State of Florida who purchased [the Product] at any time up to the date notice is provided to the Class." *See* [DE 61]. Through the instant Motion [DE 41], Defendant seeks summary judgment with respect to the FDUTPA and unjust enrichment claims.

II. STANDARD OF REVIEW

Under Rule 56(a), "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The movant bears "the stringent burden of establishing the absence of a genuine issue of material fact." *Suave v. Lamberti*, 597 F. Supp. 2d 1312, 1315 (S.D. Fla. 2008) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)).

The movant "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the

absence of a genuine issue of material fact." *Celotex Corp*., 477 U.S. at 323. To discharge this burden, the movant must point out to the Court that there is an absence of evidence to support the nonmoving party's case. *Id*. at 325. After the movant has met its burden under Rule 56(c), the burden of production shifts, and the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). The non-moving party must come forward with "specific facts showing a genuine issue for trial." *Matsushita*, 475 U.S. at 587.

"A fact [or issue] is material for the purposes of summary judgment only if it might affect the outcome of the suit under the governing law." *Kerr v. McDonald's Corp*., 427 F.3d 947, 951 (11th Cir. 2005) (internal quotations omitted). Furthermore, "[a]n issue [of material fact] is not 'genuine' if it is unsupported by the evidence or is created by evidence that is 'merely colorable' or 'not significantly probative.'" *Flamingo S. Beach I Condo. Ass'n, Inc. v. Selective Ins. Co. of Southeast*, 492 F. App'x 16, 26 (11th Cir. 2013) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249–50 (1986)). "A mere scintilla of evidence in support of the nonmoving party's position is insufficient to defeat a motion for summary judgment; there must be evidence from which a jury could reasonably find for the non-moving party." *Id.* at 26-27 (citing *Anderson*, 477 U.S. at 252). Accordingly, if the moving party shows "that, on all the essential elements of its case on which it bears the burden of proof at trial, no reasonable jury could find for the nonmoving party" then "it is entitled to summary judgment unless the nonmoving party, in response, comes forward with significant, probative evidence demonstrating the existence of a triable issue of fact." *Rich v. Sec'y, Fla. Dept. of Corr.*, 716 F.3d 525, 530 (11th Cir. 2013) (citation omitted).

III. DISCUSSION

Defendant argues that it is entitled to summary judgment on the class-wide FDUTPA claim and Plaintiffs' individual unjust enrichment claim. The Court will consider each claim in turn.

A. The FDUTPA Claim (Count I)

"A consumer claim for damages under FDUTPA has three elements: (1) a deceptive act or unfair practice; (2) causation; and (3) actual damages." *Virgilio v. Ryland Grp., Inc.*, 680 F.3d 1329, 1338 n.25 (11th Cir. 2012) (internal quotations omitted). "[A] deceptive practice is one that is likely to mislead consumers and an unfair practice is one that offends established public policy and one that is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers." *Washington v. LaSalle Bank Nat'l Assoc.*, 817 F. Supp. 2d 1345, 1350 (S.D. Fla. 2011). As set forth, *infra*, Defendant asserts that Plaintiffs have not presented sufficient evidence as to the first and third elements.

1. A Deceptive Act or Unfair Practice

The purported deceptive act or unfair practice consists of Defendant's sale of the Product without a hydration warning. Defendant maintains that Plaintiffs have failed to provide any reliable evidence that a hydration warning is necessary with respect to the Product. Defendant, on the other hand, has submitted scientific evidence that creatine monohydrate products do not cause dehydration and, therefore, do not require hydration warnings. *See* [DE 42 ¶¶ 18-20]. For example, Defendant submitted, *inter alia*, a peer-reviewed article from the *Journal of Athletic Training* concluding that "[n]o evidence supports the concept that creatine supplementation either hinders the body's ability to dissipate heat or negatively affects the athlete's body fluid

balance" and that "[c]ontrolled experimental trials of athletes exercising in the heat resulted in no adverse effects from creatine supplementation at recommended dosages." *See* [DE 42-10 at 2].

In response, Plaintiffs assert that summary judgment is not warranted because the record contains competing evidence on the issue of whether the Product requires a hydration warning. Plaintiffs identify the following evidence:

- The identification by Defendant's expert of at least (20) other creatine monohydrate products that warn consumers to drink an ample amount of fluid;
- Defendant's instruction to its own clinical trial subjects testing creatine to consume a minimum of twenty (20) oz. of water;
- Defendant's receipt of reports from consumers claiming to have suffered harm from using the Product;
- Defendant's instruction to "[t]ake product with at least 8 ounces of a liquid, preferably juice. Keep fluids up with water throughout the day," as stated to a single consumer who reported an adverse reaction to the Product; and
- Defendant's sale of comparable products that include warnings and/or disclaimers regarding side effects associated with creatine and the need to drink extra water.

[DE 46 ¶¶ 6, 10-15, 23].

The Court finds that the parties' competing evidence does create a genuine issue of material fact as to whether a hydration warning was necessary. To determine whether a hydration warning was necessary, one must weigh Defendant's scientific evidence—which suggests that creatine supplementation does not require additional hydration—against Plaintiffs' evidence—which reveals that some creatine products contain hydration warnings and suggests that some consumers of the Product experienced side effects potentially related to a lack of hydration. Weighing that evidence is within the province of the jury.[2] And a reasonable jury could find either way on the key issue of whether the Product required a hydration warning.

[2] Although Defendant's Reply presents some compelling responses to Plaintiffs' evidence—and those responses may ultimately rebut that evidence—the Court will not usurp the jury's role as fact-finder by crediting, discrediting, or otherwise weighing the parties' evidence at this stage. *See* [DE 52 at 8-10]

Accordingly, there is a genuine dispute of material fact as to the first element of the class-wide FDUTPA claim.

2. Actual Damages

Defendant asserts that Plaintiffs have not provided any evidence that Defendant charged a premium price for the Product or that the absence of a hydration warning otherwise impacted the price charged for the Product. Defendant, on the other hand, has proffered an expert witness who opines that there is no correlation between the price of creatine products and the absence/presence of hydration warnings on those products. Specifically, Defendant's expert, Mr. Doug King, compared various creatine monohydrate products in terms of hydration warnings and pricing and concluded as follows:

> Based on our analysis to date, in my opinion, expressed to a reasonable degree of professional certainty, no correlation exists between a premium price and the lack of language concerning fluid intake or hydration. In fact, the average price observed for creatine products with no mention of hydration actually had no material price difference to those creatine products with language concerning hydration. In addition, the Product-in-Suit's net price-per-gram is actually lower than the average net price-per-gram charged by all retailers with a mention of hydration. Therefore, the claim that the GNC Pro Performance Creatine Monohydrate Dietary Supplement is able to command a premium retail price over and above creatine products that contain a warning/disclaimers informing consumers to consume extra water is false.

See [DE 42-14 at 8]. Defendant submits that summary judgment is warranted because Defendant has provided expert evidence negating the existence of actual damages, Plaintiffs have failed to rebut that evidence, and Plaintiffs have failed to provide any affirmative evidence on the issue.

In response, Plaintiffs assert three main arguments. First, they assert that injunctive relief is available under FDUTPA. Therefore, even if there were no genuine dispute as to damages, the class-wide FDUTPA claim should survive in terms of potential injunctive relief requiring Defendant to alter its deceptive act or unfair practice.

Second, Plaintiffs argue that they can seek damages equivalent to the Product's full purchase price because Defendant's deceptive act/unfair practice rendered the Product valueless. Plaintiffs, without citing any supporting authority, submit that "[a] product has no market value if it fails to warn consumers of a material fact—such as consumption of adequate amounts of fluid when using the Product" and "[t]here is zero market value for a useless product so there is no way to calculate a price premium of a valueless product." [DE 46 at 11]. Accordingly, Plaintiffs seek reimbursement for the aggregate purchase price for the retail sales of the Product during the class period.

Third, Plaintiffs assert that a price premium measure of damages is both unworkable in this context and inconsistent with the policies underlying FDUTPA claims. According to Plaintiffs, a strict application of a price premium measure of damages would generally allow entities to avoid FDUTPA liability by underpricing their deceptive products. Therefore, the Court should allow Plaintiffs to seek damages equivalent to the Product's full purchase price.

For the following reasons, the Court finds that there is no genuine dispute of fact as to the issue of damages. "FDUTPA does not provide for the recovery of nominal damages, speculative losses, or compensation for subjective feelings of disappointment." *City First Mortg. Corp. v. Barton*, 988 So. 2d 82, 86 (Fla. 4th DCA 2008) (internal quotations omitted). Accordingly, "a plaintiff may recover only actual damages incurred as a consequence of a violation of the statute." *Id.* (internal quotations omitted). "Generally, the measure of actual damages is the difference in the market value of the product or service in the condition in which it was delivered and its market value in the condition in which it should have been delivered according to the contract of the parties." *Rollins, Inc. v. Heller*, 454 So. 2d 580, 585 (Fla. 3d DCA 1984).

However, "[a] notable exception to the rule may exist when the product is rendered valueless as a result of the defect—then the purchase price is the appropriate measure of actual damages." *Id.*

Here, Defendant has provided evidence of the actual damages, as determined by the traditional measure. Defendant's expert, Mr. King, identified the market value of the Product in the condition in which it was delivered—*i.e.*, the market value of creatine monohydrate without a hydration warning—and the market value of the Product in the condition in which it should have been delivered—*i.e.*, the market value of creatine monohydrate with a hydration warning. Mr. King concluded that both products have an average net price-per-gram of $0.02.[3] *See* [DE 42-14 at 8]. That evidence reveals that anyone who purchased creatine monohydrate without a hydration warning did not pay a premium over the price of creatine monohydrate with a hydration warning. Hence, if Defendant's deceptive act/unfair practice of omitting a hydration warning enticed a consumer to purchase creatine monohydrate, that consumer suffered no actual damages. The value of the consumer's product, as purchased without the hydration warning, was the same as the value of the same product untainted by Defendant's deception.[4]

Furthermore, Plaintiffs have failed to identify any facts or raise any arguments that create a genuine dispute as to the appropriate calculation of actual damages. Plaintiffs have not provided any expert testimony to rebut Mr. King's conclusions, nor have they challenged those conclusions through a *Daubert* motion. Plaintiffs have not provided any evidentiary or legal support for their assertion that the Product was valueless. Indeed, there are no indications that the Product—or any creatine monohydrate without a hydration warning—is wholly useless as a

[3] The Court rounded these figures down from $0.02171 for creatine monohydrate with a hydration warning and $0.02178 for creatine monohydrate without a hydration warning.

[4] According to Mr. King, the exact Product purchased by Plaintiffs had a net price-per-gram of $0.01919, which is fractionally lower than the average net price-per-gram for creatine monohydrate with or without a hydration warning. Thus, anyone who was deceived into purchasing the Product did not pay a premium over the market rate.

creatine supplement.[5] Finally, the premium price theory is neither unworkable nor inequitable in this context. There is clear evidence as to the Product's price, the price of similar products with the same purported defect, and the price of similar products without the purported defect. Because those prices are virtually identical, no consumer paid a premium, or suffered actual damages, by being enticed to purchase creatine monohydrate without a hydration warning. And given the availability of injunctive relief to curb any deceptive acts or unfair practices by sellers, it is not inequitable or against FDUTPA's purpose to decline financial relief where consumers have not suffered actual damages.[6]

Thus, the Court finds that there is no genuine dispute as to the existence of actual damages, as required under the third element of Plaintiffs' FDUTPA claim. Defendant is entitled to partial summary judgment, establishing that the Plaintiffs and the Class are not entitled to actual damages under the FDUTPA claim. Nonetheless, Plaintiffs may be entitled to a declaratory judgment and injunctive relief if they can establish at trial that Defendant engaged in a deceptive act or unfair practice. *See* Fla. Stat. § 501.211 (allowing for declaratory and injunctive relief under FDUTPA "[w]ithout regard to any other remedy or relief to which a person is entitled"); *see also* Fed. R. Civ. P. 56(g) (allowing courts to "enter an order stating any material fact — including an item of damages or other relief — that is not genuinely in dispute and treating the fact as established in the case").

[5] Additionally, the Court has already limited class damages to a premium price theory. *See* [DE 80; DE 85].

[6] The Court is unconvinced by Plaintiffs' argument that a "flexibility theory" of damages should be utilized. As stated, courts calculate actual damages in FDUTPA actions.

B. Plaintiffs' Individual Unjust Enrichment Claim (Count II)

Defendant moves for summary judgment on Plaintiffs' individual unjust enrichment claim.[7] "A claim for unjust enrichment has three elements: (1) the plaintiff has conferred a benefit on the defendant; (2) the defendant voluntarily accepted and retained that benefit; and (3) the circumstances are such that it would be inequitable for the defendants to retain it without paying the value thereof." *Virgilio*, 680 F.3d at 1337 (citing *Fla. Power Corp. v. City of Winter Park*, 887 So. 2d 1237, 1241 n.4 (Fla. 2004)).

Plaintiffs have failed to submit evidence establishing the third element. Even if Plaintiffs were deceived into purchasing the Product, they paid only the market value of that Product in its actual state. In other words, they paid a normal sum for creatine monohydrate without a hydration warning, and in exchange, they received and retained creatine monohydrate without a hydration warning. It would not be inequitable for Defendant to retain the money received from Plaintiffs' purchase of the Product. Thus, Defendant is entitled to summary judgment on Plaintiffs' unjust enrichment claim.

IV. CONCLUSION

Accordingly, it is **ORDERED AND ADJUDGED** as follows:

1. The Motion [DE 41] is **GRANTED IN PART**;
2. Defendant is entitled to summary judgment on the issue of damages under the FDUTPA claim (Count I), and Plaintiffs and the Class are not entitled to any award of actual damages pursuant to the FDUTPA claim (Count I);
3. Defendant is entitled to summary judgment on the unjust enrichment claim (Count II), and Plaintiffs shall take nothing from Defendant pursuant to the unjust enrichment claim (Count II);

[7] Plaintiffs did not seek class certification with respect to that claim. *See* [DE 61].

4. Defendant is not entitled to summary judgment on the issue of whether Defendant engaged in a deceptive act or unfair practice warranting injunctive relief, and trial shall proceed on that issue; and

5. Judgment shall be entered by a separate order at the close of proceedings.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 17th day of March, 2014.

WILLIAM P. DIMITROULEAS
United States District Judge

Copies provided to:

Counsel of record