IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 22-14010-A

ZACHARY JAMES MCALEXANDER,

Plaintiff - Appellant

versus

OTSUKA AMERICA PHARMACEUTICAL, INC.,

Defendant - Appellee

Appeal from the United States District Court
for the Northern District of Georgia

ORDER: Pursuant to the 11th Cir. R. 42-1(b), this appeal is DISMISSED for want of prosecution because the appellant Zachary James McAlexander failed to pay the filing and docketing fees to the district court, or alternatively, file a motion to proceed in forma pauperis in district court within the time fixed by the rules.

Effective January 05, 2023.

DAVID J. SMITH
Clerk of Court of the United States Court
of Appeals for the Eleventh Circuit

FOR THE COURT - BY DIRECTION

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

ZACHARY JAMES MCALEXANDER,	*	
Plaintiff,	*	
v.	*	1:21-CV-02514-ELR
OTSUKA AMERICA PHARMACEUTICAL, INC.,	*	
Defendant.	*	

ORDER

Presently before the Court is Defendant Otsuka America Pharmaceutical, Inc.'s "Renewed Motion to Dismiss." [Doc. 16]. For the reasons set forth below, the Court grants Defendant's motion.

I. Background[1]

This dispute stems from side effects Plaintiff Zachary James Alexander alleges he experienced from taking the prescription drug Rexulti, which Defendant manufactures. See Am. Compl. ¶¶ 12–13 [Doc. 15]. Plaintiff's psychiatrist, non-

[1] For purposes of the present motion only, the Court "accept[s] the allegations in the complaint as true and construe[es] them in the light most favorable to the plaintiff." Hill v. White, 321 F.3d 1334, 1335 (11th Cir. 2003).

party Dr. Munjal Shroff, purportedly prescribed one milligram tablets of Rexulti to Plaintiff as treatment for his depression and anxiety in July 2019. See id. ¶ 11. Plaintiff claims that he filled his prescription for a thirty (30)-day supply of Rexulti once per month for three (3) months, from July through September 2019. See id. ¶ 12. Plaintiff alleges that he began experiencing "extreme and rapid weight gain" as early as October 2019 and that a pharmacist later "advised" him that Rexulti was the cause.[2] See id. ¶ 13. Further, Plaintiff claims that although he "discontinued" taking Rexulti, he is "continually attempting to lose the weight [he] gained" while on the medication; according to Plaintiff, his weight "[a]t the time of discontinuation" was 238 pounds, and, as of May 17, 2021, his weight was 217.4 pounds. See id. ¶¶ 13, 17. Nevertheless, Plaintiff alleges that a "risk of . . . rapid weight gain . . . persists after discontinuation [of] the Rexulti 1 mg tablets[,]" and that Defendant failed to adequately warn of this purported hazard. See id. ¶¶ 15–16.

Consequently, on May 17, 2021, Plaintiff initiated this action in the Superior Court of Fulton County, Georgia, bringing several claims against Defendant pursuant to Georgia law. See generally Compl. [Doc. 1-1]. On June 21, 2021, Defendant timely removed this case and alleged diversity jurisdiction as the sole

[2] The Court observes that Plaintiff does not allege what he weighed before taking Rexulti. See generally Am. Compl.

basis for this Court's subject matter jurisdiction. See Notice of Removal ¶¶ 7–8 [Doc. 1].

On July 9, 2021, Defendant timely filed its "Motion to Dismiss for Failure to State a Claim."[3] [See Docs. 5, 8]. Despite Defendant's timely motion in response to the Complaint, on July 19, 2021, Plaintiff filed a "Motion for Default Judgment." [Doc. 9]. By an Order dated November 20, 2021, the Court denied Plaintiff's motion for default judgment given Defendant's timely response to the Complaint. [See Doc. 14]. By the same Order, the Court determined *sua sponte* that Plaintiff's Complaint was a shotgun pleading, directed Plaintiff to amend his Complaint, and denied as moot Defendant's then-pending motion to dismiss. [See Doc. 14]. Plaintiff submitted his Amended Complaint on December 6, 2021, by which he brings the following claims against Defendant: Count I—Negligent Failure to Warn; Count II—Strict Products Liability; Count III—Punitive Damages; Count IV—Georgia Unfair Trade Practices; and Count V—Unjust Enrichment. See generally Am. Compl.

On December 20, 2021, Defendant filed its instant "Renewed Motion to Dismiss," which Plaintiff opposes. [See Docs. 16, 17, 18]. Having been fully

[3] On June 23, 2021, Defendant filed a "Consent Motion for Extension of Time for Defendant Otsuka America Pharmaceutical, Inc. to File First Responsive Pleadings." [Doc. 4]. In an Order dated June 25, 2021, the Court granted Defendant's motion, providing Defendant through and including July 9, 2021, to answer or otherwise plead in response to Plaintiff's Complaint. [See Doc. 5].

briefed, Defendant's motion is ripe for the Court's review. The Court begins by setting forth the pertinent legal standard.

II. Legal Standard

When considering a Rule 12(b)(6) motion to dismiss, the Court must accept as true the allegations set forth in the complaint, drawing all reasonable inferences in the light most favorable to the plaintiff. See Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555–56 (2007); U.S. v. Stricker, 524 F. App'x 500, 505 (11th Cir. 2013) (per curiam). Even so, a complaint offering mere "labels and conclusions" or "a formulaic recitation of the elements of a cause of action" is insufficient. See Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Twombly, 550 U.S. at 555); accord Fin. Sec. Assurance, Inc. v. Stephens, Inc., 500 F.3d 1276, 1282–83 (11th Cir. 2007). To survive a Rule 12(b)(6) motion to dismiss, the complaint must "contain sufficient factual matter, accepted as true, 'to state a claim to relief that is plausible on its face.'" See Iqbal, 556 U.S. at 678 (citing Twombly, 550 U.S. at 570). Put differently, a plaintiff must plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." See id. This so-called "plausibility standard" is not akin to a probability requirement; rather, the plaintiff must allege sufficient facts such that it is reasonable to expect that discovery will lead to evidence supporting the claim. See id.

III. Discussion

Having set forth the relevant legal standard, the Court now applies it to the case at bar. By its instant motion to dismiss, Defendant argues that Plaintiff's Amended Complaint should be dismissed because: (1) the Amended Complaint is an improper shotgun pleading, (2) Plaintiff's claims are federally preempted by the Food Drug and Cosmetic Act, and (3) Plaintiff fails to state any claim pursuant to Georgia law. [See generally Doc. 16 at 7–30]. The Court's analysis begins and ends with Defendant's final argument.[4] [See id.]

A. Count I—Negligent Failure to Warn

Defendant argues that Plaintiff does not adequately allege his failure to warn claim because (1) Plaintiff does not identify an inadequacy in Rexulti's labeling and (2) Plaintiff does not plead that any such "deficient warning proximately caused [his] alleged injury." [See id. at 22–26] (quoting Dietz v. Smithkline Beecham Corp., 598 F.3d 812, 816 (11th Cir. 2010)). As to Defendant's first argument, Plaintiff asserts that Rexulti's label is inadequate because it contains only a general warning about "weight gain" as a potential side effect, but does not warn that such weight gain can be "rapid, aggressive, [or] persist[] after discontinuation of the drug[.]" [See Doc. 17 at 3]; see also Am. Compl. ¶ 15. Further, Plaintiff asserts in a conclusory

[4] Because the Court finds that Plaintiff fails to state any cognizable claim, as detailed below, the Court declines to address the other arguments Defendant offers in support of its motion to dismiss. [See generally Doc. 8].

fashion that "as a direct and proximate result of [Defendant's] negligence" in labeling Rexulti, Plaintiff suffered "rapid and persistent weight gain[.]" [See id.]

Georgia law recognizes two (2) distinct, but related, types of failure to warn claims: one based on strict liability and one based on negligence. See Bryant v. Hoffman-La Roche, Inc., 585 S.E.2d 723, 730 n.6 (Ga. Ct. App. 2003) ("A claim for negligent failure to warn exists separately from strict liability claims."); see also Frazier v. Mylan Inc., 911 F. Supp. 2d 1285, 1299 (N.D. Ga. 2012). A strict liability failure to warn claim requires

> a plaintiff [to allege] that (1) the defendant knew, or had reason to know, that the product [was] likely to be dangerous for the intended use; (2) the defendant had no reason to believe that the user would realize the danger; and (3) the defendant failed to exercise reasonable care to inform the user about the danger.

Brazil v. Janssen Rsch. & Dev. LLC, 196 F. Supp. 3d 1351, 1360 (N.D. Ga. 2016) (internal quotation marks omitted) (quoting Carmical v. Bell Helicopter Textron, Inc., 117 F.3d 490, 494–95 (11th Cir. 1997)). Additionally, a plaintiff must allege that the defendant's failure to warn proximately caused the plaintiff's injury. See Dietz, 598 F.3d at 815.

To state a claim for negligent failure to warn, "a plaintiff [must allege] that the defendant had a duty to warn, that the defendant breached that duty, and that the breach proximately caused the plaintiff's injury." Henderson v. Sun Pharm. Indus., Ltd., Civil Action No. 4:11-CV-0060-HLM, 2011 WL 4024656, at *5 (N.D. Ga.

Jun. 9, 2011) (quoting Dietz, 598 F.3d at 815). As relevant here, a duty to warn arises when the "manufacturer of a product . . . [possesses] actual or constructive knowledge" that its product "involves danger to users[.]" Id. (internal quotation marks omitted) (quoting Battersby v. Boyer, 526 S.E.2d 159, 162 (Ga. Ct. App. 1999)).

Here, it is unclear whether Plaintiff intends to assert a strict liability or negligent failure to warn claim.[5] See Am. Compl. ¶¶ 18–23. However, this pleading deficiency ultimately does not bear on the Court's conclusion because the Court finds that—for at least two (2) reasons—Plaintiff fails to state either type of failure to warn claim. The Court examines both reasons in turn.

1. Defendant's knowledge of Rexulti's risks

As set forth above, the requirement that the defendant "knew or should have known" of the risk posed by its product is common to both types of failure to warn claims. See Love v. Weeco (TM), 774 F. App'x 519, 521 (11th Cir. 2019) ("whether

[5] Plaintiff—who is proceeding *pro se*—titles his Count I as "Negligent Failure to Warn." See Am. Compl. at 5. However, in the allegations related to this claim and in his briefing, Plaintiff indicates he may have intended to bring a strict liability failure to warn claim. See id. ¶ 23; [Doc. 17 at 4]. Additionally, Defendant's brief contains arguments pertaining to a strict liability failure to warn claim. [See Doc. 16 at 15–20]. Accordingly, and in light of the Court's obligation to "liberally construe[]" the Amended Complaint, the Court analyzes whether Plaintiff has stated a claim for either strict liability failure to warn or negligent failure to warn. See Erickson v. Pardus, 551 U.S. 89, 94 (2007); see also Darrisaw v. Pa. Higher Educ. Assistance Agency, 949 F.3d 1302, 1311 (11th Cir. 2020) (Martin, J., dissenting) (quoting Means v. Ala., 209 F.3d 1241, 1242 (11th Cir. 2000)) ("Th[e] more liberal pleading standard for *pro se* plaintiffs requires federal courts to 'look beyond the labels' used in a complaint and instead to the substance of the plaintiff's allegations when determining if the plaintiff has stated a claim.").

[the defendant] knew or should have known that the [product] was dangerous at the time of sale is an element essential to [a p]laintiff's claim[] for . . . negligent failure-to-warn"); see also Brazil, 196 F. Supp. 3d at 1360 ("To establish a failure to warn claim, a plaintiff must show that . . . the defendant knew, or had reason to know, that the product is likely to be dangerous for the intended use[.]"). To survive a motion to dismiss, a plaintiff must plead more than mere "'bare assertions' that [the defendant] 'knew or should have known' about the risk" or danger associated with its product. See Love, 774 F. App'x at 521–22 (quoting Iqbal, 556 U.S. at 678, 681); accord Brazil, 196 F. Supp. 3d at 1360 ("allegations simply stating that, for instance, [the defendants] 'knew or should have known that [their prescription drug] created an unreasonable risk of serious and dangerous side effects, . . . ' are legal conclusions and mere recitations of the element of the claim[]"); Henderson, 2011 WL 4024656, at *4 (finding that the plaintiff sufficiently pled that the defendants "knew or should have known of the risks of phenytoin" where the plaintiff identified specific studies and data available demonstrating that use of phenytoin could lead to side effects such as organ failure or death).

Here, Plaintiff alleges only that "Defendant has failed to consider the seriousness of the dangers of . . . Rexulti," and that Defendant "knew or should have known that the potential risks of these drugs outweighed their potential benefits." Am. Compl. ¶¶ 14, 21. Plaintiff fails to plead any factual support for these

conclusory statements, and the Court finds that such bare assertions that merely recite the elements of failure to warn claims cannot support a reasonable inference that Defendant knew or should have known that Rexulti posed a risk of causing "rapid and excessive weight gain[.]" See id. ¶ 21; see also Brazil, 196 F. Supp. 3d at 1360.

Accordingly, the Court dismisses Plaintiff's failure to warn claim based on Plaintiff's failure to allege Defendant's knowledge of the purported risks posed by Rexulti.

2. Proximate causation

Similarly, both types of failure to warn claims also require that the defendant's failure to warn be the proximate cause of the plaintiff's injury. See Dietz, 598 F.3d at 815 (internal citation omitted) ("proximate cause is [a] necessary element of [a] plaintiff's case whether proceeding under [a] strict liability or negligence theory"). Even taking as true Plaintiff's allegations that Defendants "knew or should have known" that Rexulti could cause "rapid and excessive weight gain[,]" and that Defendant failed to adequately warn both Plaintiff and his psychiatrist of this risk, Plaintiff fails to allege that either he or his psychiatrist would have acted differently had they been so warned. See generally Am. Compl. Absent such an allegation, Plaintiff's current pleading fails to adequately plead proximate causation. See Brazil, 196 F. Supp. 3d at 1361 (finding that plaintiff sufficiently alleged causation

where she contended that she would not have used the medication if the defendants had "properly disclosed the risks associated with its use, as safer alternatives were available."); see generally Am. Compl. Instead, Plaintiff baldly alleges that "[a]s a direct and proximate cause of ingesting Rexulti, [he] has suffered rapid and persistent weight gain, resulting in emotional distress and anxiety." Am. Compl. ¶ 22. The Court finds that Plaintiff's "formulaic recitation" of this supposed proximate cause cannot plausibly support a claim for failure to warn pursuant to either available theory—strict liability or negligence. See Iqbal, 556 U.S. at 678 (quoting Twombly, 550 U.S. at 555). Therefore, for this independent reason, Plaintiff's failure to warn claim is due to be dismissed.

B. Count II—Strict Products Liability

Next, Defendant argues that Plaintiff's strict products liability claim should be dismissed because he fails to allege any specific defect in Rexulti. [See Doc. 16 at 26–27]. In response, Plaintiff restates his allegation that Defendant has "designed and manufactured a defective product[.]" [See Doc. 17 at 4].

To state a claim for strict products liability pursuant to Georgia law, a plaintiff must allege that "the property[,] when sold by the manufacturer[,] was not merchantable and reasonably suited to the use intended[] and [that] its condition when sold [was] the proximate cause of the injury sustained." Goodson v. Boston Sci. Corp., Civil Action No. 1:11-CV-3023-TWT, 2011 WL 6840593, at *4 (N.D.

Ga. Dec. 29, 2011) (quoting O.C.G.A. § 51-1-11(b)(1)). Alleging "[t]he existence of a defect is crucial, because a manufacturer is not an insurer against all risks of injury associated with its product." Id. (internal citation omitted). "Under Georgia law, '[t]here are three general categories of product defects: manufacturing defects, design defects, and marketing/packaging defects.'" Sharp v. St. Jude Med., S.C., Inc., 838 F. App'x 462, 466 (11th Cir. 2020) (internal citation omitted).

In the matter at hand, the Amended Complaint does not specify which type of the "three general categories of products defects" Plaintiffs alleges in support of his strict products liability claim. See id.; see also Am. Compl. ¶¶ 24–28. However, Plaintiff's response brief clarifies that he intends to allege that Rexulti has both manufacturing and design defects. [See Doc. 17 at 4] ("Defendant has designed and manufactured a defective product, which has caused aggressive and persistent weight gain for the Plaintiff."). The Court evaluates whether Plaintiff has adequately alleged a strict products liability claim based on either category of defect in turn.[6]

1. Manufacturing defect

First, "[t]o allege a manufacturing defect, a plaintiff must 'allege the existence of a specific manufacturing defect that proximately caused the harm.'" Sharp, 838 F. App'x at 466 (quoting Brazil, 196 F. Supp. 3d at 1358). "[A] manufacturing

[6] The Court notes that "[f]or each category [of defect], the questions are the same: 'whether a product was defective, and if so, whether the defect was the proximate cause of a plaintiff's injury.'" S K Hand Tool Corp. v. Lowman, 479 S.E.2d 103, 106 (Ga. Ct. App. 1996).

defect [must] always be identifiable as a deviation from some objective standard or a departure from the manufacturer's specifications established for the creation of the product." Id. (quoting Brazil, 196 F. Supp. 3d at 1358). Here, Plaintiff makes numerous allegations regarding Defendant's purportedly defective manufacture of Rexulti, yet none identify "a deviation from some objective standard or a departure from the manufacturer's specifications[.]" See id.; see also Am. Compl. ¶¶ 10, 20, 23, 26(i), 26(u), 27, 29. For example, paragraph 26(i) of the Amended Complaint alleges that Defendant "is liable for causing injuries to Plaintiff . . . [by] manufacturing a product which it knew or should have known was defective[.]" However, Plaintiff does not allege how that Defendant's manufacturing process deviated from any objective standard for antidepressant pharmaceuticals or from Defendant's own specifications. Because Plaintiff "does not allege any specific design or manufacturing defect that proximately caused [his] harm[,]" the Court finds that Plaintiff fails to state a claim for strict products liability based on a manufacturing defect. See Henderson, 2011 WL 4024656, at *5.

2. Design defect

The Court finds Plaintiff's claim for strict products liability based on a design defect to be deficient for a similar reason. To determine whether a design defect exists that gives rise to a claim for strict products liability, "the finder of fact . . . employ[s] a loose balancing test to determine whether the manufacturer properly

designed the product." Brazil, 196 F. Supp. 3d at 1359 (quoting Jones v. Amazing Prods., Inc., 231 F. Supp. 2d 1228, 1326 (N.D. Ga. 2002)).

> Unlike a manufacturing defect case, wherein it is assumed that the design of the product is safe and had the product been manufactured in accordance with the design it would have been safe for consumer use, in a design defect case the entire product line may be called into question and there is typically no readily ascertainable external measure of defectiveness. It is only in design defect cases that the court is called upon to supply the standard for defectiveness: the term "defect" in design defect cases is an expression of the legal conclusion to be reached, rather than a test for reaching that conclusion.

Id. (quoting Banks v. ICI Americas, Inc., 450 S.E.2d 671, 673 (Ga. 1994)). Though whether a design defect ultimately exists is a fact-intensive inquiry, a plaintiff must point to a specific defect in the design of a product with some degree of specificity in order to survive a motion to dismiss. See Henderson, 2011 WL 4024656, at *5.

Plaintiff makes numerous allegations regarding Rexulti's supposed defective design, yet fails to allege any *specific* defect. See Am. Compl. ¶¶ 26(j), 26(m), 26(u). For example, paragraph 26(j) of the Amended Complaint alleges that "[Defendant] is liable for causing injuries to Plaintiff . . . [by] designing a product which it knew or should have known was defective[.]" Plaintiff appears to contend that the defect in Rexulti's design is its potential to cause weight gain. See id. ¶ 25. However, this district has previously found similar allegations insufficient to state a strict products liability claim based on a purported design defect. See Brazil, 196 F. Supp. 3d at 1359 (finding that the allegation that a drug could "lead to serious complications,

including diabetic ketoacidosis" was insufficient to state a design defect claim because the court could not reasonably infer from such an allegation that the drug was defective or unreasonably dangerous). Thus, the Court finds that Plaintiff has not plausibility pled that Rexulti is "defective or unreasonably dangerous[.]" See id.; see also Am. Compl.

Therefore, the Court finds that Plaintiff fails to state a claim for strict products liability based on either a manufacturing or design defect. Accordingly, Count II is due to be dismissed.

C. Count IV—Georgia Unfair Trade Practices

Defendant seeks to dismiss Plaintiff's Count IV—Claim for Georgia Unfair Trade Practices for two (2) reasons. [See Doc. 16 at 27–28]. First, Defendant argues that Plaintiff fails to "allege a future harm caused by the unfair practice," as required by the applicable statute, the Georgia Uniform Deceptive Trade Practices Act, O.C.G.A. § 10-1-372 ("GUDTPA"). [See id.] Second, Defendant contends Plaintiff fails to identify which of the twelve (12) business practices prohibited by the GUDTPA serve as the basis for his instant claim.[7] [See id.] In his response brief, Plaintiff attempts to clarify his claim and asserts Defendant violated O.C.G.A. § 10-1-372(a)(7). [Doc. 17 at 5]. That subsection provides:

[7] Though the Amended Complaint does not mention GUDTPA by name, Plaintiff cites to the GUDTPA statute. See Am. Compl. ¶ 31 (citing O.C.G.A. § 10-1-372).

> A person engages in a deceptive trade practice when, in the course of his business, vocation, or occupation, he[] . . . [r]epresents that goods or services are of a particular standard, quality, or grade or that goods are of a particular style or model, if they are of another[.]

O.C.G.A. § 10-1-372(a)(7). Also, in his response brief, Plaintiff argues that Defendant is "marketing [Rexulti] to physicians and encouraging its prescription, as a drug having a quality of safety that it does not have." [Doc. 17 at 5]. Further, Plaintiff posits that he adequately alleges "future suffering" because he continues to suffer from the weight he gained secondary to consuming Rexulti. [See id.]; see also Am. Compl. ¶¶ 13, 17. Notably, in the Amended Complaint, Plaintiff's sole allegation in support of his GUDTPA claim is that:

> Defendant's conduct was deceptive and unfair. Defendant presented Rexulti as a safe medication when in fact it can cause excessive and recurring weight gain to patients who consume Rexulti. Defendant's conduct was in and affecting commerce. Defendant's conduct caused damages to the Plaintiff.

Am. Compl. ¶ 31.

To state a GUDTPA claim, a plaintiff must allege that he is likely to be damaged in the future by a deceptive trade practice of the defendant. See Cheoun v. Infinite Energy, Inc., 363 F. App'x 691, 695 (11th Cir. 2010); see also O.C.G.A. § 10-1-373(a). This is because "the sole remedy provided under [the GUDTPA] is injunctive relief[,]" and "[t]o obtain an injunction, the [claimant] must show that he is likely to be damaged by the defendant's deceptive trade practice in the future." USI Ins. Servs. LLC v. Southeast Series of Lockton Cos., LLC, Civil Action No.

1:20-CV-02490-SCJ, 2021 WL 912258, at *7 (N.D. Ga. Mar. 10, 2021) (citing Lauria v. Ford Motor Co., 312 S.E.2d 190, 193 (Ga. App. 1983); Sharpe v. Wells Fargo Home Mortg., Civil Action No. 1:12-CV-04292-CC-GGB, 2013 WL 12109445, at *4 (N.D. Ga. Apr. 4, 2013), report and recommendation adopted, No. 1:12-CV-04292-CC, 2013 WL 12106955 (N.D. Ga. July 15, 2013)). "Redress for past injuries alone does not support a claim for injunctive relief." Id.

Here, Plaintiff alleges that Rexulti "can cause excessive and recurring weight gain to patients who consume [it]" despite Defendant's representation that it is a "safe" medication, and that Rexulti "caused damages to [him]." See Am. Compl. ¶ 31. Construing Plaintiff's Amended Complaint liberally, the Court presumes that the "damages" Plaintiff references in the instant claim stem from his purported weight gain. See id. ¶¶ 13, 17, 31. In his general factual allegations, Plaintiff claims that he is still "continually attempting to lose the weight *gained* from Defendant's product" and that he has lost 20.6 pounds since discontinuing the medication. See id. ¶¶ 13, 17 (emphasis added). Additionally, Plaintiff makes the general allegation that obesity causes an increased risk of certain health problems. See id. ¶ 17. But, importantly, Plaintiff does not claim that he has been diagnosed with any obesity-related health conditions or that he continues to gain weight as a result of Defendant's supposed failure to accurately represent the "particular standard, quality, or grade" of its product (as required by GUDTPA). See id. ¶¶ 13, 17, 31;

see also O.C.G.A. § 10-1-372(a)(7). To the contrary, Plaintiff appears to have had some degree of success in losing the allegedly gained weight, which is not the same as continuing to gain more. See id. ¶¶ 13, 17. And of course, Plaintiff cannot state a plausible future harm based on his speculation that he may one day be diagnosed with an obesity-related health issue. See id.; see also Steel Co. v. Citizens for a Better Env., 523 U.S. 83, 103 (1998) (internal quotation marks and citation omitted) (explaining that the harm alleged must be "concrete and actual or imminent, not conjectural or hypothetical"). Nor does Plaintiff allege that he continues to use Rexulti—in fact, he maintains that he will never use the product again. See Am. Compl. ¶¶ 13, 17.

The Court finds the present issue to be analogous to that confronted by the district court in Silverstein v. Procter & Gamble Mfg. Co., No. CV 108-003, 2008 WL 4889677 (S.D. Ga. Nov. 12, 2008). In that case, a putative class of plaintiffs alleged a GUDPTA claim against defendant after they purchased and used a particular name-brand mouthwash, which plaintiffs claimed stained their teeth and impaired their senses of taste. See id. at *1. In assessing whether plaintiffs sufficiently alleged an ongoing or future harm, the district court explained:

> [h]ere, [p]laintiffs have alleged past harm—browned teeth and a loss of taste. An injunction could not right these wrongs. Plaintiffs have not alleged ongoing or future harm, however, and could not reasonably do so—since they are now aware of [the mouthwash's] alleged deficiencies, [p]laintiffs have stopped buying the product. Their harm, therefore, is entirely in the past and will not recur unless [p]laintiffs buy

> the product again. Because [p]laintiffs cannot plausibly allege ongoing or future harm, they fall well short of [making] . . . "particular and concrete" allegations of future injury.

See id. at *3 (internal citations omitted).

Here, Plaintiff's purported weight gain appears to have ceased (and indeed, he claims to have lost over twenty (20) pounds since discontinuing the medication). See Am. Compl. ¶¶ 11–13, 17, 31. Accordingly, in line with the above persuasive authority, the Court finds that Plaintiff fails to allege any "real and immediate threat of future harm[]" that would entitle him to injunctive relief because the harm he alleges occurred in the past (July 2019–October 2019). See id.; see also USI Ins. Servs., 2021 WL 912258 at *7; Silverstein, 2008 WL 4889677, at *3. Therefore, Plaintiff's claim for injunctive relief pursuant to the GUDTPA is due to be dismissed.

D. Count V—Unjust Enrichment

Finally, Defendant argues that Plaintiff fails to plead any facts to support his unjust enrichment claim and, even if he did, "it would not be inequitable for [Defendant] to retain payment 'because Plaintiff received the benefit of [his] bargain' by obtaining Rexulti[]." [Doc. 16 at 28–29] (quoting Breckenridge Creste Apartments, Ltd. v. Citicorp Mortg., Inc., 826 F. Supp. 460, 465–66 (N.D. Ga. 1993)). In response, Plaintiff argues that he purchased Rexulti, Defendant received

profit therefrom, and it would be inequitable for Defendant to retain the profit because Plaintiff suffered harm as a result of using the Rexulti. [See Doc. 17 at 6].

The "essential elements of the claim of unjust enrichment, under Georgia law, are that (1) a benefit has been conferred, (2) compensation has not been given for receipt of the benefit, and (3) the failure to so compensate would be unjust." Amin v. Mercedes-Benz USA, LLC, 349 F. Supp. 3d 1338, 1362 (N.D. Ga. 2018) (internal citation and quotation omitted). Plaintiff alleges that he filled his prescription and "provided payment for" a thirty (30)-day supply of Rexulti one milligram tablets once per month for three (3) months, from July through September 2019. See Am. Compl. ¶¶ 12, 32. Plaintiff contends that he was "harmed" by Defendant because ingesting Rexulti "caus[ed] him excessive and recurring weight gain." Id. ¶ 32. For this reason, Plaintiff alleges that his payments unjustly enriched Defendant. Id. ¶ 33. This district has found similar allegations to be sufficient to state a claim for unjust enrichment in cases where a plaintiff claims that the defective nature of a product he purchased deprived him of the benefit of his bargain. See Elder v. Reliance Worldwide Corp., 563 F. Supp. 3d 1221, 1233–34 (N.D. Ga. 2021) (finding that plaintiffs sufficiently stated a claim for unjust enrichment where they "[]paid . . . for the product based on [the defendant's] representation that it was 'fit for its marketed purpose, of high quality, and would provide peace of mind'" but were deprived of the benefit of their bargain when, instead, they received defective products).

However, an unjust enrichment claim cannot survive where, as here, the plaintiff "receive[s] the performance bargained for and agreed to" such that the defendant "has not been unjustly enriched beyond that to which the parties agreed." See Breckenridge, 826 F. Supp. at 465–66. As discussed above, Plaintiff has failed to adequately allege that he received defective Rexulti or that the product was otherwise deficient. See generally Am. Compl. The Court does not find that it would be unjust for Defendant to retain Plaintiff's payments because, despite his dissatisfaction with the product, Plaintiff ultimately received the benefit of his bargain—he paid for Rexulti and received Rexulti. See Breckenridge, 826 F. Supp. at 465–66 (finding that the plaintiff "received the benefit of its bargain" where the defendant agreed to lend the plaintiff money to finance an apartment complex, the defendant indeed extended a loan to the plaintiff, but the plaintiff contended that the amount of the loan extended was "unacceptable" based on the plaintiff's external loan commitments); accord Tatum v. Takeda Pharm. N. Am., Inc., Civil Action No. 12-1114, 2012 WL 5182895, at *4–5 (E.D. Pa. Oct. 19, 2012) (finding that unjust enrichment was not appropriate where the plaintiff, who allegedly suffered weakened bones after consuming the prescription drug Prevacid, did not allege that the defendants failed to provide the drugs purchased by the plaintiff); see also Am.

Compl. ¶¶ 12, 32. Thus, the Court finds that Plaintiff fails to state a claim for unjust enrichment.[8]

IV. Conclusion

For the reasons set forth above, the Court **GRANTS** Defendant's "Renewed Motion to Dismiss" [Doc. 16]. Accordingly, the Court **DISMISSES WITH PREJUDICE** this action and **DIRECTS** the Clerk to **CLOSE** this case.

SO ORDERED, this 18th day of August, 2022.

Eleanor L. Ross

Eleanor L. Ross
United States District Judge
Northern District of Georgia

[8] Plaintiff also asserts a separate claim for punitive damages. See Am. Compl. ¶¶ 29–30. But a claim for punitive damages is not a "separate and independent cause of action" pursuant to Georgia law. See Franklin Credit Mgmt. Corp. v. Friedenberg, 620 S.E.2d 463, 468 (Ga Ct. App. 2005); see also Robinson v. SunTrust Mortg., Inc., 785 F. App'x 671, 674 n.2 (11th Cir. 2019) (describing a claim for punitive damages as "derivative"). Accordingly, because the Court dismisses Plaintiff's substantive claims, his derivative claim for punitive damages fails as well. See Robinson, 785 F. App'x at 674 n.2 (declining to review the dismissal of "[a] derivative claim[] for . . . punitive damages" when dismissal of the substantive claims on which [the] derivative claim depended was affirmed); Goodson, 2011 WL 6840593, at *6 (dismissing the plaintiff's punitive damages claim where she failed to properly plead her "underlying tort" claims of negligence and strict liability).