

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

MILLENNIUM LABORATORIES, INC., a
California Corporation,

Plaintiff,

vs.

AMERITOX, LTD., a Texas limited
partnership,

Defendant.

CASE NO. 12CV1063-MMA (JMA)

**ORDER DENYING DEFENDANT’S
MOTION TO DISMISS, OR, IN THE
ALTERNATIVE, FOR MORE
DEFINITE STATEMENT**

[Doc. No. 9]

Pending before the Court is Defendant Ameritox, LTD’s (“Ameritox”) motion to dismiss Plaintiff Millennium Laboratories, Inc’s (“Millennium”) complaint for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6), or, in the alternative, for a more definite statement under Rule 12(e). [Doc. No. 9.] The Court, in its discretion, took the matter under submission pursuant to Civil Local Rule 7.1(d)(1). Having considered the briefs, and for the reasons stated herein, the Court **DENIES** Defendant’s motions.

BACKGROUND

Plaintiff Millennium is a specialty diagnostics laboratory which provides services to the chronic pain market. [*Compl.*, Doc. No. 1, ¶ 3.] A key service of Millennium is providing reports to physicians relating to the results of laboratory tests performed by Millennium. [*Id.* ¶ 6.] In 2011, Millennium re-designed its reports to include a specific combination of graphs and charts.

1 [Id.] This combination includes: (1) a bell curve showing the distribution of results from all
2 patients with a prescription for a medication who tested positive for that medication, as well as the
3 test result for the individual patient prescribed that same medication; and (2) a timeline showing
4 the test result for the individual patient along with the patient's recent prior test results for the
5 same prescribed medication. [Id.] Millennium designed a report for physicians where the above-
6 described information is shown pictorially. [Id. ¶ 7.] When the new reports were introduced in
7 June 2011, Millennium's customers immediately expressed strongly favorable opinions. [Id. ¶ 8.]
8 Millennium alleges this report format constitutes a trade dress, which has become a valuable asset
9 of Millennium, symbolizing its high quality services and goodwill. [Id. ¶ 9.]

10 Defendant Ameritox is Millennium's direct competitor in the market for urine and saliva-
11 based drug testing. [Id. ¶ 14.] Plaintiff alleges that Ameritox has offered for sale "confusingly
12 similar reports that copy Millennium's trade dress." [Id. ¶ 10.] "By providing infringing reports to
13 practitioners who must decide whether to utilize Millennium or Ameritox's services, Ameritox is
14 attempting to win, and . . . has won business that otherwise would have been captured by
15 Millennium." [Id. ¶ 15.]

16 On April 30, 2012, Millennium filed the instant complaint alleging infringement of its trade
17 dress and violation of California's unfair business competition law. On June 22, 2012, Ameritox
18 filed a motion to dismiss for failure to state a claim, or, in the alternative, for a more definite
19 statement. [Doc. No. 9.] Millennium opposes the motion, arguing that its complaint contains the
20 necessary elements to state a valid claim of trade dress infringement.

21 DISCUSSION

22 **I. Motion to Dismiss**

23 A Rule 12(b)(6) motion to dismiss tests the sufficiency of the complaint. *Navarro v. Block*,
24 250 F.3d 729, 732 (9th Cir. 2001). "While a complaint attacked by a Rule 12(b)(6) motion to
25 dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of
26 [her] entitlement to relief requires more than labels and conclusions, and a formulaic recitation of
27 the elements of a cause of action will not do. Factual allegations must be enough to raise a right to
28 relief above the speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)

1 (internal quotation marks, brackets and citations omitted).

2 In reviewing a motion to dismiss under Rule 12(b)(6), the court must assume the truth of
3 all factual allegations and must construe them in the light most favorable to the nonmoving party.
4 *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir. 1996). Legal conclusions need not
5 be taken as true merely because they are cast in the form of factual allegations. *Roberts v.*
6 *Corrothers*, 812 F.2d 1173, 1177 (9th Cir. 1987); *W. Mining Council v. Watt*, 643 F.2d 618, 624
7 (9th Cir. 1981). Similarly, “conclusory allegations of law and unwarranted inferences are not
8 sufficient to defeat a motion to dismiss.” *Pareto v. Fed. Deposit Ins. Corp.*, 139 F.3d 696, 699
9 (9th Cir. 1998).

10 A claim has “facial plausibility when the plaintiff pleads factual content that allows the
11 court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”
12 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). “The plausibility standard is not akin to a
13 ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted
14 unlawfully.” *Id.* “Where a complaint pleads facts that are ‘merely consistent with’ a defendant’s
15 liability, it ‘stops short of the line between possibility and plausibility of entitlement to relief.’” *Id.*
16 (citing *Twombly*, 550 U.S. at 557).

17 **A. Trade dress infringement**

18 Millennium’s first claim for relief seeks redress for trade dress infringement under 15
19 U.S.C. section 1125(a)(3). Ameritox argues that the trade dress infringement claim should be
20 dismissed because Millennium fails to plead the elements of the claim with the requisite degree of
21 specificity.

22 Trade dress is “the total image, design, and appearance of a product and ‘may include
23 features such as size, shape, color, color combinations, texture or graphics.’” *Clicks Billiards, Inc.*
24 *v. Sixshooters, Inc.*, 251 F.3d 1252, 1258 (9th Cir. 2001) (citing *Int’l Jensen, Inc. v. Metrosound*
25 *U.S.A., Inc.*, 4 F.3d 819, 822 (9th Cir. 1993)). To state a claim for trade dress infringement, one
26 must allege that the trade dress is (1) nonfunctional, (2) either “inherently distinctive or [has]
27 acquired distinctiveness through a secondary meaning,” and (3) likely to be confused with
28 Defendant[’s] products by the consuming public. *Disc Golf Ass’n, Inc. v. Champion Discs, Inc.*,

1 158 F.3d 1002, 1005 (9th Cir. 1998). “A plaintiff should clearly articulate its claimed trade dress
2 to give a defendant sufficient notice.” *Sleep Sci. Partners v. Lieberman*, 2010 U.S. Dist. LEXIS
3 45385, at *7 (N.D. Cal. May 10, 2010).

4 Initially, Ameritox contends that Millennium failed to describe its trade dress with
5 sufficient specificity. Ameritox claims that Millennium should have attached an image of its
6 purported trade dress to the complaint, so that it could properly understand the aspects of
7 Millennium’s trade dress, as well as decipher which Ameritox reports are said to be infringing.
8 [*Defendant’s Motion to Dismiss (“Mot.”)* at 1.]

9 The Court agrees that an image of the trade dress and of the infringing reports would
10 greatly assist in clarifying Millennium’s position. Nonetheless, Millennium is not required to
11 attach an image of the trade dress to sufficiently state a claim for trade dress infringement. Here,
12 Millennium alleges that the trade dress in its test reports consists of: (1) a bell curve showing the
13 distribution of results from all patients with a prescription for a medication who tested positive for
14 that medication, as well as the test result for the individual patient prescribed that same
15 medication; and (2) a timeline showing the test result for the individual patient along with the
16 patient’s recent prior test results for the same prescribed medication. In its opposition, Millennium
17 asserts these two elements breaks down to sub-elements: “That is, the bell curve shows (A) all
18 patients, and (B) the individual patient’s result. Furthermore, the timeline shows (A) the patient’s
19 current result, and (B) the patient’s recent results.” [*Plaintiff’s Opposition to Defendant’s Motion*
20 (*“Opp.”*) at 2.]

21 Unquestionably, Millennium fails to provide a vivid, in-depth depiction of its purported
22 trade dress. Nonetheless, despite the thoroughly plain description, the Court is satisfied that
23 Millennium alleges sufficient facts to describe and give Ameritox notice of its claimed trade dress.

24 Next, Ameritox suggests that Millennium’s allegations are insufficient to satisfy any of the
25 three elements of a trade dress violation. To the contrary, the complaint contains allegations of
26 trade dress infringement that are sufficient, albeit barely, to state a claim under federal notice-
27 pleading standards.

28 ///

1 **1. Non-Functionality**

2 First, Millennium has alleged sufficient facts to support a plausible inference that its
3 claimed trade dress is nonfunctional. Trade dress protection extends only to product features that
4 are not functional. *Disc Golf Ass’n v. Champion Discs, Inc.*, 158 F.3d 1002, 1006 (9th Cir. 1998).
5 “A product feature is functional and cannot serve as a trademark if the product feature is essential
6 to the use or purpose of the article or if it affects the cost or quality of the article, that is, if
7 exclusive use of the feature would put competitors at a significant, non-reputation-related
8 disadvantage.” *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 165 (1995) (internal quotation
9 marks omitted). The inquiry into whether a product is functional, however, is fact intensive with
10 multiple factors for the Court to consider.¹ Although Millennium may have great difficulty
11 proving that the features it alleges as its trade dress could be denied to other competitors without
12 putting them at a non-reputation-related disadvantage, the question of functionality is a factual one
13 that cannot be resolved on a motion to dismiss. *See DocMagic, Inc. v. Ellie Mae, Inc.*, 745 F.
14 Supp. 2d 1119, 1141 (N.D. Cal. 2012); *Clicks Billiards, Inc. v. Sixshooters Inc.*, 251 F.3d 1252,
15 1258 (9th Cir. 2001); *Axis Imex, Inc. v. Sunset Bay Rattan, Inc.*, No. C 08-3931 RS, 2009 U.S.
16 Dist. LEXIS2667, at *7-8 (N.D. Cal. Jan. 7, 2009) (Seeborg, Mag. J.).

17 At this stage, while Millennium’s design for the test results may prove to be purely
18 functional, the opposite may be true as well. Construing Millennium’s complaint liberally, it has
19 alleged facts showing that competitors would not need the features of its report in order to compete
20 without disadvantage. [*Compl.*, ¶ 22 (“The overall visual impression that the . . . arrangement of
21 the [trade dress] elements create is aesthetic . . . and not functional Ameritox’s services and
22 report would function just as well as they otherwise would without the similar distinctive features
23 it has copied from Millennium The cost or quality of Ameritox’s services and reports are not
24 affected by incorporating those features.”).]

25 ///

26
27 ¹To determine whether a product is functional, a court should consider whether: (1) the design
28 yields a utilitarian advantage; (2) alternative designs are available; (3) advertising touts the utilitarian
advantages of the design; and (4) the particular design results from a comparatively simple or
inexpensive method of manufacture. *Disc Golf*, 158 F.3d at 1006.

1 **2. Secondary Meaning**

2 Second, Millennium’s complaint contains factual allegations to support an inference that its
3 trade dress in the form of its test reports have acquired distinctiveness through secondary meaning.
4 A trade dress has secondary meaning “when, in the minds of the public, the primary significance
5 of a mark is to identify the source of the product rather than the product itself.” *Wal-Mart Stores,*
6 *Inc. v. Samara Bros., Inc.*, 529 U.S. 205, 211 (2000) (internal quotations omitted). Millennium
7 alleges that (1) its use of this trade dress was exclusive from June 2011 until March 2012; (2)
8 reports containing the trade dress were delivered directly to customers and prospective customers;
9 (3) customers immediately expressed strongly favorable opinions regarding the new test report
10 format following its introduction; and (4) test users equate Millennium’s distinctive report format
11 with its high quality services. [*See Compl.* ¶¶ 8-9.] These facts raise a plausible inference that
12 consumers generally viewed the alleged trade dress as primarily identifying Plaintiff as the source
13 of the product, rather than merely identifying the product itself.

14 **3. Likelihood of Confusion**

15 Finally, Millennium has also alleged sufficient facts from which the Court can infer a
16 likelihood of confusion. Specifically, Millennium alleges that (1) Ameritox’s reports resemble
17 Plaintiff’s so closely that consumers are likely to be confused as to the source of Ameritox’s
18 services; (2) Ameritox intentionally copied Millennium’s trade dress; and (3) Ameritox offered its
19 services containing the imitated trade dress to consumers who previously used Millennium’s
20 products, and who associate the trade dress in question with Millennium. [*Compl.* ¶¶ 10, 12-14.]
21 These facts are sufficient to raise a plausible inference of consumer confusion, either as to the
22 source of the test report services or as to any possible affiliation between Millennium and
23 Ameritox.

24 **B. Unfair Competition**

25 Millennium’s second claim for relief asserts violations of California’s Unfair Competition
26 Law, Cal. Bus. & Prof. Code § 17200 (“UCL”). This claim is premised on the infringement
27 claim. Because the Court finds Plaintiff states a valid trade dress infringement claim, the UCL
28 claim also stands. Therefore, the Court **DENIES** Ameritox’s motion to dismiss this claim.

1 **II. Motion For a More Definite Statement**

2 Alternatively, Ameritox moves for a more definite statement under Rule 12(e). “A party
3 may move for a more definite statement of a pleading to which a responsive pleading is allowed
4 but which is so vague or ambiguous that the party cannot reasonably prepare a response.” Fed. R.
5 Civ. P. 12(e); *see Coleman v. Sterling*, 2011 U.S. Dist. LEXIS 47377, at *11 (S.D. Cal. May 3,
6 2011) (*citing Bureerong v. Uvawas*, 922 F. Supp. 1450, 1461 (C.D. Cal.1996)). “[A] motion for a
7 more definite statement should not be granted unless the defendant literally cannot frame a
8 responsive pleading.” *Bureerong*, 922 F. Supp. at 1461 (citation omitted). A motion under Rule
9 12(e) “is used to provide a remedy for an unintelligible pleading rather than a correction for lack of
10 detail.” *Coleman*, 2011 U.S. Dist. LEXIS, at *11–12 (*citing North County Communs Corp. v.*
11 *Sprint Communs Co., L.P.*, 2010 U.S. Dist. LEXIS 35825, at *1 (S.D. Cal. Apr. 12, 2010)).
12 “Motions for a more definite statement are generally viewed with disfavor and are rarely granted.”
13 *Id.* (citation omitted).

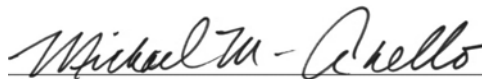
14 In this case, Millennium alleges the essential characteristics of its trade dress, and the
15 necessary elements of a trade dress infringement claim. Though the complaint may not be ideal,
16 the Court finds that it is not so vague, ambiguous, or unintelligible that Defendants cannot
17 reasonably prepare a response. Therefore, Defendant’s motion for a more definite statement is
18 **DENIED**. Through discovery and Millennium’s initial disclosures, Ameritox should be in a
19 position to obtain specificity and an image of the trade dress, the lack of which it complains here.

20 **CONCLUSION**

21 For the reasons stated herein, the Court **DENIES** Defendant’s motions to dismiss and, in
22 the alternative, for a more definite statement.

23 **IT IS SO ORDERED.**

24
25 DATED: October 12, 2012

26 

27 Hon. Michael M. Anello
28 United States District Judge