

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION
CASE NO.: 1:19-CV-20592-MARTINEZ-OTAZO REYES**

VASSILIOS KUKORINIS, on behalf of
himself and all others similarly situated,

Plaintiff,

v.

WALMART, INC., a Delaware corporation,

Defendant.

_____ /

ORDER DENYING DEFENDANT'S MOTION TO DISMISS

THIS CAUSE is before the Court upon the Motion to Dismiss filed by Walmart, Inc. The Court has carefully reviewed the Motion (DE 24), the Response (DE 25), and the Reply thereto (DE 26). The Court is otherwise fully advised on the premises. For the reasons that follow, the Motion to Dismiss is **DENIED**.

I. BACKGROUND

Plaintiff brings this class action suit against Walmart on behalf of himself and others similarly situated to redress what he alleges are unfair, deceptive, and unconscionable business practices on the part of Walmart. (*Id.* at ¶1). Plaintiff alleges that from February 7, 2015 to the present (the “class period”), Walmart advertised false unit prices for perishable goods (“Weighted Goods”) that were nearing expiration. (*Id.* at ¶2). The gravamen of the complaint is that Walmart has, throughout the class period, consistently reduced the price of Weighted Goods nearing expiration but continually states incorrect unit prices on the labels of said Weighted Goods. (*Id.*). As a result, Plaintiff alleges that Walmart overcharged for reduced-priced Weighted Goods and

that he and others similarly situated did not receive the promised value for Weighted Goods purchased throughout the class period. (*Id.*).

In Walmart stores, Weighted Goods such as beef, poultry, and pork, contain white price labels that include the total price, the unit price (per pound), and the item's weight in pounds. (*Id.* at ¶ 23). When Weighted Goods approach expiration, Walmart reduces the price of said goods and affixes a bright yellow sales label in addition to the original white label. (*Id.*). The yellow label states the weight of the item in pounds, the unit price, the total price, and the amount saved (the difference between the original price and the sales price). (*Id.*).

The problem with Walmart's pricing system, as alleged by the Plaintiff, is that the unit prices stated on the yellow sales labels do not reflect the total price charged for the item. (*Id.* at ¶¶ 24–27, 32–36). Everything besides the unit prices listed on the yellow labels is correct, i.e., the weight of the item, the total price charged, and the difference between the original price and the sale price. (*Id.* at ¶¶ 33–35). Plaintiff identified three specific instances in which he personally purchased Weighted Goods with yellow sales labels. *See* (*Id.* at ¶¶ 33–35). On April 19, 2018, Plaintiff purchased a spiral ham at a Walmart store in Delray Beach, Florida. (*Id.* at ¶ 33). The yellow sales label stated that the ham weighed 11.61 pounds at a unit price of \$0.64 per pound, but the total price on the yellow label stated \$16.45. (*Id.*). As alleged, Walmart received an extra \$9.02 (i.e., the difference between \$16.45 and \$7.43) on the sale because the unit price reflected that the ham should have only cost \$7.43. (*Id.*).

On January 4, 2018, Plaintiff purchased a pork loin at a Walmart store in Davie, Florida. (*Id.* at ¶ 34). The yellow sales label stated that the pork loin weighed 1.77 pounds at a unit price of \$2.28 per pound, but the total price stated \$4.05. (*Id.*). Accordingly, Plaintiff contends that Walmart received an extra \$0.02 (i.e., the difference between \$4.05 and \$4.03) because the pork

loin should have only cost \$4.03 by calculation of the unit price. (*Id.*). Finally, Plaintiff purchased another spiral ham at a Walmart store in Orlando, Florida. (*Id.* at ¶ 35). This time, the yellow sales label stated that the ham weighed 9.13 pounds at a unit price of \$0.69 per pound. The total price was listed as \$10.10. (*Id.*). Accordingly, Walmart received an extra \$3.80 (i.e., the difference between \$10.10 and \$6.30) because the ham should have only cost \$6.30 as per the listed unit price. (*Id.*).

Plaintiff also identifies thirteen other instances in which Weighted Goods at Walmart stores throughout Florida contained yellow sales labels with incorrect unit prices. (*Id.* at 36). He does not, however, identify any details pertaining to these additional thirteen instances. (*Id.*). For example, he does not state what items are included in this list and whether or not anyone actually purchased these particular items. (*Id.*). He does, however, allege that based on the incorrect unit prices identified throughout the class period, a reasonable consumer would have believed that they were purchasing more of the product than they actually received. (*Id.* at ¶¶ 24–27, 33–35, 37). As framed in the Amended Complaint, the yellow sales labels are designed to, and do, induce consumers into believing they are getting more of the product for their money. (*Id.* at 31–35). Plaintiff further contends that he and class members relied on the listed unit prices to their detriment and that he and class members would not have purchased these items or, at least, would have demanded the appropriate price upon purchase had they known the unit prices were incorrect. (*Id.*).

Based on these events, Plaintiff asserts two causes of action against Walmart. (*Id.* at ¶¶ 49–71). Count I alleges that these practices constitute a violation of the Florida Deceptive and Unfair Trade Practices Act (“FDUTPA”). (*Id.* at ¶¶ 49–61). Count II asserts a claim, in the alternative, for unjust enrichment. (*Id.* at ¶¶ 62–75). Walmart has moved to dismiss the claims

for four reasons. (DE 24 at 1–2). First, Walmart contends that Plaintiff’s allegations fail to meet the requisite particularity requirement for claims sounding in fraud. (*Id.* at 1). Second, Walmart argues that Plaintiff lacks Article III standing to bring a claim because Plaintiff fails to allege that he suffered a concrete injury in fact. (*Id.* at 2). Third, Walmart argues that the Amended Complaint fails to state a FDUTPA claim. (*Id.* at 2). Finally, Walmart argues that Plaintiff’s unjust enrichment claim is barred as a matter of law because it is duplicative of his FDUTPA claim. (*Id.* at 2). For the reasons set forth herein, Defendant Walmart’s Motion to Dismiss is denied.

II. LEGAL STANDARD

When reviewing a motion to dismiss for failure to state a claim upon which relief can be granted, the Court must accept all factual allegations within the complaint as true and construe them in the light most favorable to the plaintiff. *Pielage v. McConnell*, 516 F.3d 1282, 1284 (11th Cir. 2008). Federal Rule of Civil Procedure 8(a)(2) only requires that the pleading contain “a short and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). “[T]he pleading standard Rule 8 announces does not require “detailed factual allegations,” but it demands more than an unadorned, the-defendant-has-unlawfully-harmed-me accusation.” *Coleman v. CubeSmart*, 328 F. Supp. 3d 1349, 1359 (S.D. Fla. 2018) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). The pleading must assert enough facts “to state a claim for relief that is plausible on its face.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 554, 570 (2007).

A claim for relief is facially plausible if the facts alleged allow the Court to reasonably infer that the Defendant is liable for the alleged misconduct. *Iqbal*, 556 U.S. at 678. The allegations need not be such that it is probable that the defendant is liable but it must be more than merely possible that the defendant is liable. *Id.* “Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Id.*

A heightened pleading standard must be satisfied for claims sounding in fraud or mistake. Fed. R. Civ. P. 9(b); *U.S. ex rel. Matheny v. Medco Health Sols., Inc.*, 671 F.3d 1217, 1222 (11th Cir. 2012). To satisfy Rule 9(b), the party must “state with particularity the circumstances constituting fraud or mistake.” Fed. R. Civ. P. 9(b); *Matheny*, 671 F.3d at 1222. The particularity requirement serves to put the defendant on notice of the “precise misconduct with which they are charged.” *Ziemba v. Cascade Int’l, Inc.*, 256 F.3d 1194, 1202 (11th Cir. 2001).

III. ANALYSIS

In its motion, Walmart asserts four arguments in support of dismissal. Because the issue of standing is ultimately a jurisdictional issue, it should be addressed at the outset. *See Stalley ex rel. United States v. Orlando Reg’l Healthcare Sys., Inc.*, 524 F.3d 1229, 1232 (11th Cir. 2008). Accordingly, section A will address whether Plaintiff has standing to bring this action. Because the same allegations resolve the issues of whether Plaintiff sufficiently pleaded a cause of action under the FDUTPA with enough particularity, those arguments will be addressed together in section B. Section C will address Walmart’s argument that Plaintiff has failed to state a claim for unjust enrichment.

A. Standing

Walmart contends that Plaintiff’s FDUTPA and unjust enrichment claims should be dismissed under Rule 12(b)(1) because Plaintiff lacks standing. *See* Fed. R. Civ. P. 12(b)(1); (DE 24 at 12). Because Walmart only challenges Plaintiff’s standing on the grounds that Plaintiff has failed to allege an actual injury, the Court will only address that issue.

“Because standing is jurisdictional, a dismissal for lack of standing has the same effect as a dismissal for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1).” *Stalley*, 524 F.3d at 1232. To establish Article III standing, “the plaintiff must have suffered or be

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