UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

STACY CHIAPPETTA, individually and on behalf of all others similarly situated,	)	
Plaintiff,	)	
v.	)	No. 21-CV-3545
	)	Hon. Marvin E. Aspen
KELLOGG SALES COMPANY	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

MARVIN E. ASPEN, District Judge:

This putative class action concerns the alleged misleading labeling of toaster pastries. Plaintiff Stacy Chiappetta claims that the packaging for Defendant Kellogg Sales Company's ("Kellogg") Unfrosted Strawberry Pop-Tarts (the "Product") is misleading because it "give[s] consumers the impression the fruit filling contains only strawberries and/or more strawberries than it does." (Complaint ("Compl.") (Dkt. No. 1) ¶ 2.)[1] Chiappetta brings claims for violation of the Illinois Consumer Fraud and Deceptive Business Practices Act ("ICFA"), 815 ILCS 505/1 *et seq*.; negligent misrepresentation; breaches of express warranty, implied warranty of merchantability, and the Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301 *et seq*.; fraud; and unjust enrichment. (*Id.* ¶¶ 74–100.) Chiappetta asserts that we have jurisdiction under the Class Action Fairness Act of 2005 ("CAFA"), 28 U.S.C. § 1332(d)(2). (*Id*. ¶ 45.)[2]

[1] For ECF filings, we cite to the page number(s) set forth in the document's ECF header unless citing to a particular paragraph or other page designation is more appropriate.

[2] The CAFA gives federal courts jurisdiction over class actions in which there is at least $5,000,000 in controversy, minimal diversity exists between the parties, and the total number of class members is greater than 100. *See* 28 U.S.C. § 1332(d). Chiappetta alleges that she is a

Kellogg has moved to dismiss Chiappetta's claims under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted. (Motion to Dismiss Plaintiff's Class Action Complaint ("Motion") (Dkt. No. 10) at 1.) Kellogg has also moved to dismiss Chiappetta's request for injunctive under Federal Rule of Civil Procedure 12(b)(1) for lack of standing. (*Id.*) For the reasons set forth below, we grant Kellogg's Motion.

BACKGROUND

We have taken the following facts from the Complaint and deem them to be true for the purposes of this Motion. *See Bell v. City of Chicago*, 835 F.3d 736, 738 (7th Cir. 2016); *see also Tamayo v. Blagojevich*, 526 F.3d 1074, 1081 (7th Cir. 2008).

Chiappetta purchased the Product "on one or more occasions . . . at stores including but not necessarily limited to" a Jewel Osco store in Chicago Heights, Illinois, "in or around March 2021." (Compl. ¶ 58.) The Product was "sold at a premium price, approximately no less than $5.49 for 12 Pop-Tarts (20.3 OZ), excluding tax." (*Id.* ¶ 44.)

A front view of the Product's packaging is found below:

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citizen of Illinois and that Kellogg is a Delaware corporation with its principal place of business in Michigan, which satisfies the minimum diversity requirement. (*See* Compl. ¶¶ 46, 47.) Chiappetta defines the class as "all purchasers of the Product who reside in Illinois during the applicable statutes of limitations." (*Id.* ¶ 65.) It is reasonable to infer that this class includes more than 100 people based on the alleged sale price of the Product ($5.49 for 12 Pop-Tarts) and Kellogg's alleged annual sales of the Product within Illinois (more than $5 million). (*See id.* ¶¶ 44, 49.) Chiappetta does not explain how Kellogg's sales translate to damages, alleging only that she paid more for the Product than it was worth. (*See id.* ¶ 63.) However, she is not required to identify the premium that she and others paid at this stage. *See Tropp v. Prairie Farms Dairy, Inc.*, 20-cv-1035-jdp, 2021 WL 5416639, at *2 (W.D. Wis. Nov. 19, 2021). And Kellogg has not contested that there is at least $5,000,000 in controversy. (*See generally* Memorandum of Law in Support of Kellogg Sales Company's Motion to Dismiss Plaintiff's Class Action Complaint ("Memo") (Dkt. No. 11); Reply in Support of Kellogg Sales Company's Motion to Dismiss Plaintiff's Class Action Complaint ("Reply") (Dkt. No. 15).) Therefore, we conclude for the purposes of this Motion that Chiappetta has properly alleged our subject matter jurisdiction. *See Gubala v. CVS Pharmacy, Inc.*, No. 14 C 9039, 2016 WL 1019794, at *2 n.6 (N.D. Ill. Mar. 15, 2016).

(*Id.* ¶ 1.) Chiappetta claims that the Product packaging misled her and other consumers into believing that the Product's fruit filling contained "only strawberries and/or more strawberries than it does" because it bears the word "Strawberry," and it depicts half of a fresh strawberry and red fruit filling. (*Id.* ¶ 2.) In reality, though, the Product's fruit filling contains more than just strawberries; it also contains dried pears, dried apples, and a food dye known as "red 40," among other ingredients. (*Id.* ¶ 26.)

Strawberries confer certain health benefits. (*Id.* ¶¶ 11–17.) For example, they are an "excellent source of vitamin C," and they have "uniquely high levels of antioxidants known as polyphenols." (*Id.* ¶¶ 12, 14 (internal quotation marks and citations omitted).) However, the "Product is unable to confer any of the[se] health-related benefits because it has less strawberries than it purports to" have. (*Id.* ¶ 23.) Additionally, the red 40 food dye used to color the Product's filling "is connected with learning disorders and hyperactivity in children." (*Id.* ¶ 39.)

Chiappetta contends that but for Kellogg's "misrepresentations and omissions," she either would not have bought the Product or would have paid less for it. (*Id.* ¶¶ 62, 63.) She adds that she intends to purchase the Product again "when she can do so with the assurance that [the] Product's labels are consistent with the Product's components." (*Id.* ¶ 64.) Chiappetta brings

this putative class action on behalf of herself and "all purchasers of the Product who reside in Illinois during the applicable statutes of limitations." (*Id*. ¶ 65.)

LEGAL STANDARD

I. Rule 12(b)(6) Motion to Dismiss

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) tests the sufficiency of a complaint, but not the merits of a case. *McReynolds v. Merrill Lynch & Co*., 694 F.3d 873, 878 (7th Cir. 2012); *Gibson v. City of Chicago*, 910 F.2d 1510, 1520 (7th Cir. 1990). When considering such motions, courts "construe the complaint in the light most favorable to the plaintiff, accepting as true all well-pleaded facts alleged, and drawing all possible inferences in her favor." *Tamayo*, 526 F.3d at 1081. A court may grant a motion to dismiss under Rule 12(b)(6) only if a complaint lacks sufficient facts "to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 1974 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. Although a facially plausible complaint need not give "detailed factual allegations," it must allege facts sufficient "to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555, 127 S. Ct. at 1964–65. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678, 129 S. Ct. at 1949. These requirements ensure that a defendant receives "fair notice of what the . . . claim is and the grounds upon which it rests." *Twombly*, 550 U.S. at 555, 127 S. Ct. at 1964.

Claims sounding in fraud, including a claim alleging deceptive practices in violation of the ICFA, must also meet the heightened pleading standard of Federal Rule of Civil Procedure

9(b). *See* Fed. R. Civ. P. 9(b); *Benson v. Fannie May Confections Brands, Inc.*, 944 F.3d 639, 646 (7th Cir. 2019); *Greenberger v. GEICO Gen. Ins. Co.*, 631 F.3d 392, 399 (7th Cir. 2011). In practice, this means that a plaintiff "must identify the 'who, what, when, where, and how' of the alleged fraud." *Benson*, 944 F.3d at 646 (quoting *Vanzant v. Hill's Pet Nutrition, Inc.*, 934 F.3d 730, 738 (7th Cir. 2019)).

II. Rule 12(b)(1) Motion to Dismiss

A motion to dismiss brought under Federal Rule of Civil Procedure 12(b)(1) challenges the court's subject matter jurisdiction. *See* Fed. R. Civ. P. 12(b)(1). If a court does not have subject matter jurisdiction over a claim, the claim must be dismissed. *See In re Chicago, Rock Island & Pac. R.R. Co.*, 794 F.2d 1182, 1188 (7th Cir. 1986). Where, as here, there is a facial challenge to the court's subject matter jurisdiction, the plaintiff bears the burden of establishing that the court has jurisdiction over the matter. *See Silha v. ACT, Inc.*, 807 F.3d 169, 173 (7th Cir. 2015).

ANALYSIS

I. ICFA

The ICFA safeguards "consumers, borrowers, and business persons against fraud, unfair methods of competition, and other unfair and deceptive business practices." *Siegel v. Shell Oil Co.*, 612 F.3d 932, 934 (7th Cir. 2010) (internal citation and quotation marks omitted). "In order to state a claim under the ICFA, a plaintiff must show: '(1) a deceptive or unfair act or promise by the defendant; (2) the defendant's intent that the plaintiff rely on the deceptive or unfair practice; and (3) that the unfair or deceptive practice occurred during a course of conduct involving trade or commerce.'" *Camasta v. Jos. A. Bank Clothiers, Inc.*, 761 F.3d 732, 739 (7th Cir. 2014) (quoting *Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547, 574 (7th Cir. 2012)).

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