

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

LATONYA JACKSON, individually and on
behalf of all others similarly situated,

Plaintiff,

v.

KRAFT HEINZ FOODS COMPANY,

Defendant.

Case No. 1:21-cv-05219

Hon. Charles R. Norgle

ORDER

Defendant's motion to dismiss [11] is granted with prejudice. Civil case terminated.

STATEMENT

Plaintiff Latonya Jackson brings this putative class action against Defendant, Kraft Heinz Foods Company. Defendant sells a product called "Bagel Bites" ("the Product"), frozen bite-size pizza bagels containing mozzarella cheese and tomato sauce, among other ingredients. Dkt. 1 ¶ 1. Plaintiff claims the Product's label is misleading to consumers because it omits that (1) starch, nonfat milk, and whey are added to the "REAL" mozzarella cheese, and (2) tomatoes are replaced with non-tomato thickeners including cornstarch. *Id.* ¶ 3. Plaintiff proposes an Illinois class and a multi-state class, including all persons in the States of Iowa and Arkansas.¹ *Id.* ¶ 96. Plaintiff asserts the following claims individually and on behalf the proposed classes: (1) violations of the Illinois Consumer Fraud and Deceptive Business Practices Act ("ICFA"), 815 ILCS 505/1, *et seq.*; (2) violations of the Consumer Fraud Acts of the States in the Consumer Fraud Multi-State Class;

¹ The States in the proposed Consumer Fraud Multi-State Class are limited to those States with similar consumer fraud laws: Iowa (Consumer Fraud and Private Right of Action for Consumer Frauds Act, Iowa Code Ann. § 714.16 *et seq.*) and Arkansas (Arkansas Deceptive Trade Practices Act, Ark. Code § 4-88-101, *et. seq.*). Dkt. 1 ¶ 96, n.6.

(3) breaches of express warranty, implied warranty of merchantability, and the Magnuson Moss Warranty Act (“MMWA”), 15 U.S.C. § 2301, *et seq.*; (4) negligent misrepresentation; (5) fraud; and (6) unjust enrichment. Defendant moved to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(6). Dkt. 11. The Court notes this action is nearly identical to Lemke v. Kraft Heinz Food Co., No. 21-cv-278, 2022 WL 1442922 (W.D. Wis. May 6, 2022), which was decided by Judge William M. Conley of the United States District Court for the Western District of Wisconsin on a motion to dismiss presenting substantially the same arguments as those considered here.² Because Plaintiff has not plausibly pleaded a deceptive act, the Court grants Defendant’s motion and dismisses each count with prejudice.

I. BACKGROUND

Defendant manufactures, markets, and sells the Product with the following labeling:



INGREDIENTS: BAGEL HALVES (ENRICHED FLOUR [WHEAT FLOUR, ENZYME, ASCORBIC ACID, NIACIN, REDUCED IRON, THIAMINE MONONITRATE, RIBOFLAVIN, FOLIC ACID], WATER, SALT, INVERT CANE SYRUP, YEAST, SOYBEAN OIL) TOPPING (CHEESE BLEND [(CHEESE [MOZZARELLA CHEESE (CULTURED MILK, SALT, ENZYMES), MODIFIED FOOD STARCH, NONFAT MILK, WHEY PROTEIN CONCENTRATE)], CHEDDAR CHEESE (CULTURED MILK, SALT, ENZYMES, ANNATTO COLOR), MONTEREY JACK CHEESE (CULTURED MILK, SALT, ENZYMES)]) SAUCE (WATER, TOMATO PASTE, INVERT CANE SYRUP, MODIFIED CORN STARCH, SALT, METHYLCELLULOSE, CITRIC ACID, POTASSIUM CHLORIDE, AMMONIUM CHLORIDE, SPICE, YEAST EXTRACT, NATURAL FLAVOR, CALCIUM LACTATE), INVERT CANE SYRUP, WATER.

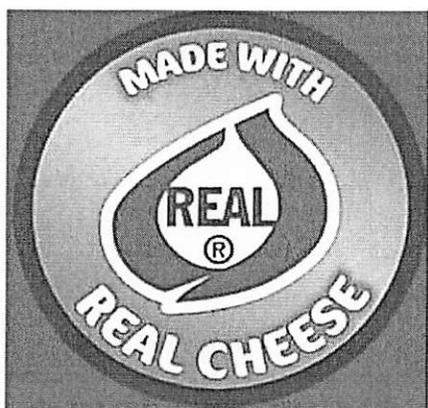
Dkt. 1 ¶¶ 1, 6. Plaintiff complains specifically about the Product’s label’s unambiguous description of the product as “mini bagels with mozzarella, cheddar, Monterey Jack cheeses and tomato

² The Court notes further that the Western District of Wisconsin presumably has far more expertise in cheese and what reasonable cheese consumers expect in cheese products.

sauce.” Id. ¶ 1. Plaintiff theorizes that the label promises consumers three cheeses, but the ingredient list shows they receive a “topping,” consisting of a “cheese blend,” cheddar cheese and Monterey Jack cheese. Id. ¶ 6. The “cheese blend” includes mozzarella as an ingredient. Id. Plaintiff complains that though the Product contains mozzarella cheese, the front label omits that it is combined with starch, nonfat milk, and whey to make a “cheese blend,” and these “cheaper, filler” ingredients adulterate the cheese by reducing its milkfat. Id. ¶¶ 13-14. Plaintiff theorizes this omission is misleading because the “cheese blend” describes a lower quality, or imitation, mozzarella cheese and claims “the ingredient list fails to disclose that the Product does not contain mozzarella cheese.” Dkt. 1 ¶¶ 7, 47-51. Plaintiff contends reasonable consumers do not expect starch, whey, and nonfat milk when promised “mozzarella” and “REAL” cheese, but rather expect mozzarella to mean cheese from milkfat. Id. ¶¶ 23-24, 42.

Plaintiff challenges the Product’s label’s use of the “REAL” dairy seal, a trademark owned by the National Milk Producers Federation (“NMPF”), which has a vetting process to authorize use of the REAL to third parties. Id. ¶¶ 26-30, 34. In a small box in the upper-right-hand corner, the Product’s front label (left) displays the REAL seal (right) with the words “MADE WITH”:

Defendant’s Front Label



“REAL” Dairy Seal



Id. The REAL Seal can be used where a food contains dairy ingredients that meet federal standards of identity. Id. ¶ 36. Plaintiff alleges the Product does not qualify for the traditional REAL seal because the “cheese blend” contains starch, but Defendant “misappropriated” the original REAL Seal by adding the statement, “MADE WITH” the REAL Seal Id. ¶¶ 39-40. Plaintiff alleges nothing pertaining to NMPF’s stance on Defendant’s use of the REAL Seal. Plaintiff claims that the use of the REAL seal misleads consumers as to the quality of the Product. Id. ¶ 45.

Plaintiff suggests it is misleading to call the Product’s tomato sauce, “tomato sauce,” because it contains non-tomato thickening agents—specifically modified corn starch and methylcellulose—designed to give the impression the sauce contains more tomatoes than it does. Id. ¶¶ 55-65. Plaintiff suggests consumers of tomato sauce understand tomato sauce to be a tomato product that is not as thick as tomato puree but thicker than tomato juice, with flavor enhanced through herbs and spices. Id. ¶ 55. The USDA defines tomato sauce as “the concentrated product prepared from . . . whole tomatoes; [residue from preparing tomatoes for canning or from partial extraction of juice]; reconstituted or remanufactured tomato paste; or any combination of these ingredients to which is added salt and spices.” Id. ¶ 56. The Product’s “sauce” contains the following ingredients: water, tomato paste, invert cane syrup, modified corn starch, salt, methylcellulose, citric acid, potassium chloride, spice, yeast extract, natural flavor, and calcium lactate. Id. ¶ 6.

II. STANDARD

To survive a motion to dismiss under Rule 12(b)(6), the complaint must contain a “short and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a); Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 554-557 (2007). The complaint “must provide enough factual information to ‘state a claim to relief that is plausible on its face’ and ‘raise a right

to relief above a speculative level.” Doe v. Village of Arlington Heights, 782 F.3d 911, 914 (7th Cir. 2015) (quoting Twombly, 550 U.S. at 555, 570). “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. (cleaned up). In reviewing the Plaintiff’s claim, the court must construe all of the plaintiff’s factual allegations as true, drawing all reasonable inferences in the plaintiff’s favor. Virnich v. Vorwald, 664 F.3d 206, 212 (7th Cir. 2011).

III. DISCUSSION

Central to all of Plaintiff’s claims is the notion that the Product’s label misleads consumers by representing that the Product contains “mozzarella cheese,” “REAL cheese,” and “tomato sauce,” but omitting that it contains additives. However, a product that says it contains mozzarella cheese and tomato sauce when the Product does, in fact, contain mozzarella cheese and tomato sauce is not misleading to the reasonable consumer simply because its label does not list its additives. Weaver v. Champion Petfoods USA Inc., 3 F.4th 927, 937 (7th Cir. 2021) (“[Defendant’s] representations that its food is made with fresh regional ingredients are not clearly misleading—its food does, in fact, contain some ingredients that are fresh and sourced regionally.”). Plaintiff’s ultimate theory of deception fails because Plaintiff has not plausibly shown that the Product’s label would mislead a reasonable consumer of the Product and because nothing about the Product’s label is false, misleading, or deceptive as a matter of law. Ultimately, the Court finds all of Plaintiff’s claims, each based on the same misconceived theory of deception, fail to plausibly state a claim upon which the Court may grant relief.

A. Illinois Consumer Fraud and Deceptive Business Practices Act

The ICFA “protect[s] consumers . . . against fraud, unfair methods of competition, and other unfair and deceptive business practices.” Robinson v. Toyota Motor Credit Corp., 201 Ill.2d

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