

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

KAYLA CERRETTI,

Plaintiff,

v.

WHOLE FOODS MARKET GROUP, INC.,

Defendant.

No. 21 CV 5516

Judge Manish S. Shah

**MEMORANDUM OPINION AND ORDER**

Defendant Whole Foods Market Group, Inc. manufactures and markets organic chocolate ice cream bars. Plaintiff Kayla Cerretti bought some of those bars, expecting the coating on the ice cream to be exclusively chocolate. Cerretti alleges that Whole Foods deceived her because the chocolate coating contained more non-chocolate ingredients than actual chocolate. Cerretti wants to represent a class of consumers and brings claims for violation of the Illinois Consumer Fraud and Deceptive Business Practices Act, breach of express and implied warranties, negligent misrepresentation, fraud, and unjust enrichment. Whole Foods moves to dismiss under Rule 12(b)(6). For the reasons discussed below, the motion is granted.

**I. Legal Standards**

To survive a motion to dismiss under Rule 12(b)(6), a complaint must state a claim upon which relief may be granted. Fed. R. Civ. P. 12(b)(6). The complaint must contain “sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl.*

*Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). In reviewing a motion to dismiss, a court must construe all factual allegations as true and draw all reasonable inferences in the plaintiff's favor. *Sloan v. Am. Brain Tumor Ass'n*, 901 F.3d 891, 893 (7th Cir. 2018) (citing *Deppe v. NCAA*, 893 F.3d 498, 499 (7th Cir. 2018)).

## II. Background

Whole Foods sold “Organic Chocolate Ice Cream Bars” under its 365 brand. [1] ¶ 1.<sup>1</sup> The front of the product’s packaging described the bars as “Organic Vanilla Ice Cream Dipped in Organic Chocolate,” and showed the dessert surrounded by chunks of chocolate:



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<sup>1</sup> Bracketed numbers refer to entries on the district court docket. Page numbers are taken from the CM/ECF header placed at the top of filings. The facts are taken from the complaint. [1].

*Id.* A side panel on the box said that “Our Organic Ice Cream Bars are made the old-fashioned way with the finest organic ingredients. We start with fresh cream and cane sugar, then dunk our rich ice cream in chocolate for a smooth, thick shell. Indulge in the pure decadence of our organic ice cream bars.” *Id.* ¶ 2. Whole Foods was known for organic and high-quality grocery products, and the company said that it sought out the “finest natural and organic foods” and maintained “the strictest quality standards.” *Id.* ¶¶ 90–93.

Kayla Cerretti bought Whole Foods ice cream bars, expecting that the coating on the ice cream would only be chocolate. [1] ¶¶ 100–05, 126. Cerretti believed that if the ice cream’s coating included any chocolate substitutes, they would not exceed the amount of actual chocolate ingredients like chocolate liquor and cocoa butter. *Id.* ¶¶ 105, 126. According to the product’s ingredients list, however, the chocolate in Whole Foods’s ice cream bars was more palm kernel oil than it was organic chocolate liquor or organic cocoa butter by weight, although it did include those ingredients. *Id.* ¶¶ 52–53. Relying on Whole Foods’s representations, Cerretti paid more for Whole Foods’s ice cream bars than she would have if she had known what was really in the chocolate. *Id.* ¶¶ 75, 106–08. The ice cream bars were worth less than they appeared and Whole Foods knew that its product wasn’t consistent with the company’s advertising. *Id.* ¶¶ 73–77, 108, 143.

Dictionaries define chocolate as a food prepared from cacao beans, often combined with other ingredients, including sweeteners. *See* [1] ¶¶ 4–9. The Food and Drug Administration defines “milk chocolate” as a food made by “mixing and grinding

chocolate liquor with one or more ... optional dairy ingredients,” along with optional sweeteners or other ingredients. *Id.* ¶ 10; 21 C.F.R. § 163.130(a). All definitions of chocolate exclude fats from sources other than cacao ingredients. [1] ¶ 12. Cacao ingredients, which are natural rather than synthetic, cost more and are more filling than vegetable oils. [1] ¶¶ 32–35, 45–48. Replacing cocoa butter in chocolate with vegetable oils degrades the flavor, creating a “waxy and oily mouthfeel” and an aftertaste as opposed to the “creamy and smooth” taste of chocolate. *Id.* ¶¶ 37–39.

The adulteration of chocolate—by including starches and vegetable fats—has a long history. [1] ¶¶ 18–19. When large confectionary companies sought to redefine chocolate by replacing cacao ingredients, thousands of Americans responded critically, and industry figures spoke out against the redefinition. *Id.* ¶¶ 20–28. In a consumer survey of 400 Americans who saw a product described as coated or dipped in chocolate pictured with chocolate ingredients, sixty percent of respondents expected that they would not be provided lower-quality chocolate substitutes. *Id.* ¶¶ 29–30.

### III. Analysis

#### A. Statutory and Common-Law Fraud

The Illinois Consumer Fraud Act prohibits “unfair or deceptive acts or practices ... in the conduct of any trade or commerce.” 815 ILCS 505/2.<sup>2</sup> Deceptive or

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<sup>2</sup> The court has subject-matter jurisdiction under the Class Action Fairness Act because plaintiff is a citizen of Illinois, Whole Foods (a corporation) is a citizen of Delaware and Texas, the amount in controversy exceeds \$5 million, and plaintiff seeks to represent a class in excess of 100 members. [1] ¶¶ 79–81, 112; 28 U.S.C. § 1332(d). Federal courts sitting in diversity apply the substantive law of the forum state, so Illinois law applies. *See Piltch v.*

unfair practices include any “misrepresentation or the concealment, suppression or omission of any material fact.” *Id.* To state a claim under the Act, Cerretti must show “that the defendant committed a deceptive or unfair act with the intent that others rely on the deception, that the act occurred in the course of trade or commerce, and that it caused actual damages.” *Vanzant v. Hill’s Pet Nutrition, Inc.*, 934 F.3d 730, 736 (7th Cir. 2019) (citing *Siegel v. Shell Oil Co.*, 612 F.3d 932, 934–35 (7th Cir. 2010)). The elements of a common-law fraudulent misrepresentation claim largely overlap with a deceptive-practices claim under the ICFA,<sup>3</sup> and include “a false statement of material fact.” *Newman v. Metro. Life Ins. Co.*, 885 F.3d 992, 1003 (7th Cir. 2018) (quoting *Doe v. Dilling*, 228 Ill.2d 324, 342–43 (2008)). Cerretti must plead both her deceptive-practices statutory and common-law fraud claims with the detail required by Rule 9(b), including the “who, what, when, where, and how” of the fraud. *Vanzant*, 934 F.3d at 736 (citing *Camasta v. Jos. A. Bank Clothiers, Inc.*, 761 F.3d 732, 737 (7th Cir. 2014)); *Newman*, 885 F.3d at 998.

At issue here is the element of a deceptive act or misrepresentation. *See* [11-1] at 9–13.<sup>4</sup> Whole Foods called its product “Organic Chocolate Ice Cream Bars,”

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*Ford Motor Co.*, 778 F.3d 628, 631–32 (7th Cir. 2015) (citing *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938)).

<sup>3</sup> Cerretti does not argue that Whole Foods’s marketing was an unfair practice, just that it was deceptive. *See* [15] at 9–19.

<sup>4</sup> By claiming that Whole Foods’s knew its products were misrepresented, [1] ¶ 143, and otherwise detailing the circumstances of the alleged fraud, Cerretti adequately alleged the intent element for her common-law fraud claim. *See Newman v. Metro. Life Ins. Co.*, 885 F.3d 992, 1003 (7th Cir. 2018) (quoting *Doe v. Dilling*, 228 Ill.2d 324, 342–43 (2008)). Under Rule 9, intent can be alleged generally, and can be inferred from circumstances. Fed. R. Civ. P. 9; *Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547, 569 (7th Cir. 2012).

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