

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

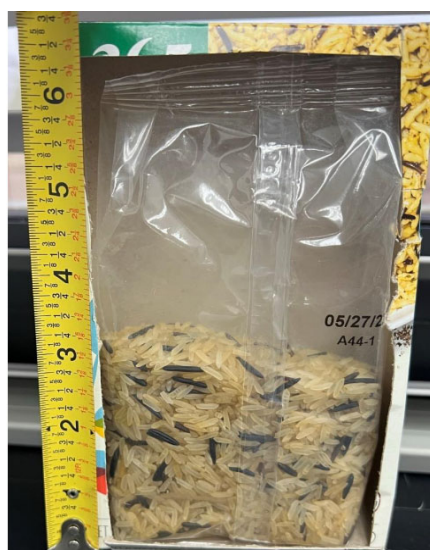
Leroy Jacobs, individually and )  
on behalf of all others )  
similarly situated )  
 )  
Plaintiff, )  
 )  
v. ) No. 22 C 2  
 )  
 )  
Whole Foods Market Group, )  
Inc., )  
 )  
Defendant. )

Memorandum Opinion & Order

In this action, plaintiff Leroy Jacobs alleges on behalf of himself and putative Illinois and multistate classes that Whole Foods Market ("WFM") violates the consumer protection statutes and common law of Illinois and fifteen other states by selling its private label "Long Grain & Wild Rice - Rice Pilaf," in boxes that are larger than necessary for the amount of product they contain. Plaintiff claims that notwithstanding WFM's commitment to reducing waste in food packaging, it intentionally misleads consumers about the amount of product they are purchasing by sizing the boxes to fit store shelves, rather than to fit the volume of product they contain. This practice, plaintiff claims, is designed to deceive consumers, as it "makes the shelves look full, which appeals to

consumers and makes them willing to spend more money.” Compl. at ¶ 50-51.

As plaintiff acknowledges, federal and state regulations recognize that there may be legitimate reasons for food packaging to contain empty space (known in the industry as “slack fill”). Plaintiff alleges, however, that none of those reasons justify the practice he challenges here. The images below illustrate the disparity between the box size and the amount of product within:



Compl. at ¶¶ 19, 21.

Based on this disparity, plaintiff asserts violation of the Illinois Consumer Fraud and Deceptive Practices Act (“ICFA”) and unidentified consumer protection statutes of Pennsylvania, Michigan, Iowa, Rhode Island, Minnesota, Ohio, Georgia, North Dakota, Texas, New Mexico, North Carolina, Virginia, New Hampshire, South Dakota, and Oklahoma, which plaintiff claims are

similar to the ICFA. He also asserts claims for breach of express warranty, breach of the implied warranty of merchantability, and violation of the Magnusson Moss Warranty Act, 15 U.S.C. §§ 2301. Finally, plaintiff claims negligent misrepresentation, fraud, and unjust enrichment under the common law of the foregoing states.

WFM moves to dismiss the complaint in its entirety, offering a cascade of reasons plaintiff's claims fail as a matter of law. At the fore is its argument that because the front, back, and side panels of each box contain conspicuous and accurate information about the weight of the product; instructions for preparation; and the serving size and approximate number of servings each box yields when prepared, the packaging is not deceptive as a matter of law under the statutes plaintiff asserts. Defendant emphasizes that plaintiff does not challenge the accuracy or the conspicuousness of this information—in fact, he alleges affirmatively that he “relied on the words and images on the Product [and] on the labeling” when purchasing the product, Compl. at ¶ 99—and that this information dispels any uncertainty a reasonable consumer might have about the amount of rice pilaf one box yields. Because, as explained below, the law supports this argument, plaintiff's consumer deception claims do not withstand defendant's motion. And because plaintiff's remaining claims either hinge on his flawed theory of deception or suffer from separate procedural or

substantive shortcomings, I grant defendant's motion in its entirety.

Defendant's broadest arguments target plaintiff's class claims under the ICFA and other states' consumer protection statutes. Plaintiff does not identify the statutes he relies upon for his multistate class claims, but he alleges that they are "similar to the ICFA and prohibit the use of unfair or deceptive business practices in the conduct of trade or commerce." Compl. at ¶ 124. Accordingly, I assume that all of the statutes plaintiff asserts require, as the ICFA does, that plaintiff plead and prove "that the relevant labels are likely to deceive reasonable consumers," which "requires a probability that a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled." *Bell v. Publix Super Markets, Inc.*, 982 F.3d 468, 474-75 (7th Cir. 2020).

Plaintiff does not dispute that the packaging he challenges discloses accurate information about the weight and approximate yield of the product as prepared. His theory of consumer deception is that he nevertheless "could not and did not reasonably understand or expect any of the net weight or serving disclosures to translate to an amount of rice meaningfully different from his expectation of an amount which would fill up the box." Resp., ECF 20, at 2. In plaintiff's view, *Benson v. Fannie May Confections Brands, Inc.*, 944 F.3d 639 (7th Cir. 2019), supports this theory

of deception because in that case, the court observed that “the presence of an accurate net weight statement does not eliminate the misbranding that occurs when a container is made, formed, or filled so as to be misleading.” *Id.* at 647 (quoting *Misleading Containers; Nonfunctional Slack-Fill*, 58 Fed. Reg. 64123-01, 64128 (Dec. 6, 1993) (codified at 21 C.F.R. pt. 100)). But *Benson* does not support plaintiff’s claims on the facts alleged here.

*Benson* involved boxed, ready-to-eat chocolates. As the court explained, a consumer might reasonably expect to be able to estimate the approximate number of chocolates in a particular box based on the box size. *See id.* at 646. But any reasonable consumer surely knows that rice pilaf sold in a box must be cooked in water or another liquid prior to consumption, and understands further that the cooking process will cause the rice to expand in volume. In other words, a reasonable consumer expects the size of the box to bear only a loose relationship to the amount of cooked product its contents will yield. Accordingly, a shopper uncertain about how many boxes of rice pilaf to buy for the family dinner would know not to rely on the size of the box and would look for additional information of precisely the kind plaintiff admits defendant’s rice pilaf box contains: the number of servings each box will produce based on a specified serving size. Because that information dispels any tendency to mislead that the box size alone might create, there is no deception as a matter of law. *See Killeen*

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