

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF ILLINOIS

ERIN SANDERS, individually and on	)	
behalf of all others similarly situated,	)	
	)	
Plaintiff,	)	
	)	Case No. 21-cv-1155-SMY
vs.	)	
	)	
THE HILLSHIRE BRANDS COMPANY,	)	
	)	
Defendant.	)	

**MEMORANDUM AND ORDER**

**YANDLE, District Judge:**

In this putative class action, Plaintiff Erin Sanders alleges that Defendant, The Hillshire Brands Company (“Hillshire”), misrepresented to consumers that its product “Delights English Muffin” by Hillshire’s Jimmy Dean brand (“the Product”) is made predominantly with whole grain wheat flour. Sanders asserts violations of the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/1 *et seq.*; breaches of express warranty, implied warranty, and the Magnuson Moss Warranty Act, 15 U.S.C. §§ 2301, *et seq.*; negligent misrepresentation; fraud; and unjust enrichment (Doc. 1).

Now pending before the Court is Hillshire’s Motion to Dismiss for Failure to State a Claim (Doc. 6), which Sanders opposes (Doc. 16). For the following reasons, the Motion is **GRANTED in part** and **DENIED in part**.

**Background**

The following facts are taken from Plaintiffs’ Second Amended Complaint and are deemed true for the purposes of this motion. *See Tamayo v. Blagojevich*, 526 F.3d 1074, 1081 (7th Cir.

2008): Hillshire manufactures, labels, markets, and sells breakfast sandwiches purporting to be “English muffins made with whole grain.” The packaging in question is shown below:



As indicated by the asterisk, the packaging provides consumers with additional information as to the amount of whole grain in the Product, stating on the side panel, “\*THIS PRODUCT PROVIDES 5g OF WHOLE GRAIN IN A 1 SANDWICH SERVING. USDA RECOMMENDS 48G OF WHOLE GRAIN EVERY DAY.” The Product also includes the following ingredient list:

INGREDIENTS: MUFFIN: ENRICHED WHEAT FLOUR (WHEAT FLOUR, MALTED BARLEY FLOUR, NIACIN, REDUCED IRON, THIAMINE MONONITRATE, RIBOFLAVIN, FOLIC ACID), WATER, WHOLE GRAIN WHEAT FLOUR, YEAST, WHEAT GLUTEN, CONTAINS LESS THAN 2% OF: DEGERMED YELLOW CORN FLOUR, DEGERMED YELLOW CORNMEAL, SODIUM BICARBONATE, FUMARIC ACID, CORN STARCH, SODIUM ACID PYROPHOSPHATE, MONOCALCIUM PHOSPHATE, CALCIUM SULFATE, SALT, AMMONIUM CHLORIDE, HONEY, CALCIUM PROPIONATE AND POTASSIUM SORBATE (PRESERVATIVES), SOYBEAN OIL, HIGH FRUCTOSE CORN SYRUP, VINEGAR.

Sanders alleges the Product's label is misleading because, while the Product's front label prominently states, “MADE WITH WHOLE GRAIN,” the primary ingredient in the sandwich

portion of the Product is enriched wheat flour. The amount of whole grain wheat flour in the Product is slightly above two percent of the total weight of ingredients used in the English muffin portion of the Product and contains only two grams of dietary fiber per serving, consistent with a food with a *de minimis* amount of whole grain. A product must contain at least 8 grams of dry whole grain ingredient per labeled serving size of the meat or poultry product to make a whole grain claim under USDA Rules.

Sanders purchased the Product on at least one occasion between August 2021 and September 2021. She claims the Product does not contain 8 grams of whole grain per serving, nor is the bread predominantly whole grain, despite the reasonable expectation that the “made with whole grain” claim denotes a product with at least a minimum amount of whole grains. Sanders maintains that the marketing of the Product is misleading because the bread contains mostly non-whole grains and only a small amount of whole grains.

Sanders purchased the Product because she expected it would contain a predominant amount of whole grain flour. She would not have purchased the Product absent Hillshire’s false and misleading statements and omissions. She intends to, seeks to, and will purchase the Product again when she can do so with the assurance that the Product’s representations are consistent with its composition.

Sanders requests compensatory and injunctive relief and seeks to represent an Illinois class including: All persons in the State of Illinois who purchased the Product during the statutes of limitations for each cause of action alleged.

### **Discussion**

To survive a motion to dismiss for failure to state a claim under Rule 12(b)(6), a Complaint must “state a claim to relief that is plausible on its face.” *Lodholtz v. York Risk Servs. Group, Inc.*,

778 F.3d 635, 639 (7th Cir. 2015) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (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.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The Court draws all reasonable inferences and facts in favor of the nonmovant. See *Vesely v. Armslist LLC*, 762 F.3d 661, 664 (7th Cir. 2014). Additionally, under Rule 8(a)(2), a Complaint must include “a short and plain statement of the claim showing that the pleader is entitled to relief” and “[giving] the defendant fair notice of what the claim is and the grounds upon which it rests.” Fed. R. Civ. P. 8(a)(2); *Twombly*, 550 U.S. at 555 (citation omitted).

Under Rule 9(b), a party alleging fraud must “state with particularity the circumstances constituting fraud.” Fed. R. Civ. P. 9(b). This “ordinarily requires describing the 'who, what, when, where, and how' of the fraud, although the exact level of particularity that is required will necessarily differ based on the facts of the case.” *AnchorBank, FSB v. Hofer*, 649 F.3d 610, 614 (7th Cir. 2011).

Hillshire argues that Sanders’ claims are subject to dismissal on numerous grounds:

(1) she has not plausibly alleged that the “made with whole grain” label statement is deceptive; (2) her warranty claims fail because she has not alleged privity or that she served proper notice; (3) the Complaint fails to allege facts about Hillshire that give rise to a strong inference of fraudulent intent; (4) her negligent misrepresentation claims are barred under the *Moorman* doctrine; (5) her unjust enrichment claim fails to state a claim; and (6) she lacks standing to seek injunctive relief.

### **Illinois Consumer Fraud and Deceptive Practices Act (“ICFA”)**

The ICFA safeguards “consumers, borrowers, and businesspersons 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). “Although ICFA claims often involve disputed questions of fact not suitable to a motion to dismiss, a court may dismiss the complaint if the challenged statement was not misleading as a matter of law.” *Bober v. Glaxo Wellcome PLC*, 246 F.3d 934, 940 (7th Cir. 2001).

Here, Sanders claims deceptive practices. Specifically, she alleges that the Product’s labeling “Made With Whole Grain” suggests to a reasonable consumer that the sandwich portion of the Product was either predominantly made with whole grain, or at least contains a non *de minimis* amount of whole grain. To state a viable claim for deceptive practices, a plaintiff must plausibly allege that the packaging is likely to deceive reasonable consumers. *Bell v. Publix Super Markets, Inc.*, 982 F.3d 468, 474–75 (7th Cir. 2020). This standard “requires a probability that a significant portion of the general consuming public or of target consumers, acting reasonably in the circumstances, could be misled.” *Beardsall v. CVS Pharmacy, Inc.*, 953 F.3d 969, 973 (7th Cir. 2020) (quoting *Ebner v. Fresh, Inc.*, 838 F.3d 958, 965 (9th Cir. 2016)). A statement is deceptive if “it is likely to mislead a reasonable consumer in a material respect, even if it is not literally false.” *Id.* “What matters most is how real consumers understand and react to the advertising.” *Bell*, 982 F.3d at 476. “[W]here plaintiffs base deceptive advertising claims on unreasonable or fanciful interpretations of labels or other advertising, dismissal on the pleadings may well be justified.” *Id.* at 477.

Hillshire maintains that Sanders is unable to demonstrate that the “Made With Whole Grain\*” statement is likely to mislead a reasonable consumer because the statement is truthful and

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