

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 20-10877-RGS

THERESA FITZGERALD, on behalf of  
herself and all others similarly situated,

v.

POLAR CORP.

MEMORANDUM AND ORDER ON  
DEFENDANT'S MOTION TO DISMISS

November 10, 2020

STEARNS, D.J.

Theresa Fitzgerald brought this aspiring class action against Polar Corp. d/b/a Polar Beverages (Polar) alleging common-law fraud, deceit, and misrepresentation (Count I), breach of express and implied warranties (Counts II and III), negligent misrepresentation (Count IV), unjust enrichment/restitution (Count V), and violations of the Massachusetts Consumer Protection Act, Gen. Laws ch. 93A (Count VI). Fitzgerald asserts that Polar's ginger ale brands (Polar Ginger Ale, Polar Green Tea Ginger Ale, and Polar Pomegranate Ginger Ale) are falsely and deceptively labeled, advertised, and marketed "as 'MADE FROM REAL GINGER.'" Compl. ¶ 2. The Complaint appears to have been imperfectly copied from a nearly identical case brought in the Northern District of California involving

Canada Dry ginger ale. *See Fitzhenry-Russell v. Keurig Dr. Pepper*, 345 F. Supp. 3d 1111 (N.D. Cal. 2018); *see also* Compl. ¶ 62 (mistakenly referencing “Canada [D]ry (sic)” as the instant defendant).

In essence, Fitzgerald contends that the claim of “real ginger”<sup>1</sup>

leads consumers to reasonably believe that Polar’s soft drinks are made using real ginger root — i.e., the spice made by chopping or powdering the root of the ginger plant, — and that consumers who drink the soft drink will receive the health benefits associated with consuming real ginger.

Compl. ¶ 2 (footnote omitted). Fitzgerald acknowledges that Polar’s ginger ale “contains some ginger compounds, [however] the miniscule amount that Polar uses provides none of the health benefits consumers associate with real ginger.” *Id.* ¶ 18.<sup>2</sup> Fitzgerald claims that “in a market environment where consumers were fleeing ‘regular’ sodas due to increasing concerns about the

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<sup>1</sup> The term “real ginger” is somewhat of an oxymoron. Ginger is botanically a cultigen, meaning that it has no ancestors in the wild nor is it genetically unique. Rather it is a product of several thousand years of genetic breeding and modification of the *Zingiber officinale* flowering plant. *See* P. N. Ravindran & K. Nirmal Babu, *Ginger: The Genus Zingiber* (CRC Press 2016). Botanically, ginger (as it is most commonly known), is one of the spices that make up the *Zingiberaceae* family. Apart from the version best known to bakers as a ground spice (gingerbread) or to sushi lovers in its pickled form, other gingers familiar to kitchen mavens include turmeric and cardamon.

<sup>2</sup> The proposition that consumers associate a “health benefit” with a sugared carbonated beverage is somewhat dubious, although Confucius is said to have eaten raw ginger with every meal for health reasons. Barbara Pickersgill, *The Cultural History of Plants* at 163-164 (2005).

health problems they cause[,] Polar’s misrepresentations have misled thousands of consumers and caused them to pay a premium for Polar beverages.” *Id.* ¶ 4.<sup>3</sup>

Polar moves to dismiss the Complaint asserting that there is nothing false about Polar’s advertising claims – its ginger ales are made with some ginger (as plaintiff concedes), and the labeling of the drinks makes no representations as to the amount or type of ginger beyond the hyperbolic reference to “real.” Polar notes that Fitzgerald claims that the label, “Made From Real Ginger,” causes “consumers to reasonably believe that the beverage contains ‘ginger root.’” *Id.* ¶ 2 (emphasis added). Polar next argues that, as Fitzgerald’s claims are based on consumer fraud, her Complaint must (and does not) satisfy the “who, what when and where” pleading requirements of Fed. R. Civ. P. 9(b). Polar finally wheels up the “economic loss doctrine” which precludes recovery of economic damages in certain tort actions in the absence of actual personal or property damage.

Relying on *Aspinall v. Philip Morris Companies, Inc.*, 442 Mass. 381 (2004), Fitzgerald counters that to survive a motion to dismiss she “need only allege facts showing it is plausible that a statement ‘has the capacity to

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<sup>3</sup> The proposed class includes “[a]ll persons who, between May 7, 2016 and the present, purchased in the United States, any Polar Ginger Ale.” Compl. ¶ 31.

mislead consumers, acting reasonably under the circumstances, to act differently from the way they otherwise would have acted (i.e., to entice a reasonable consumer to purchase the product).” *Id.* at 396. She further contends “that the claim ‘MADE FROM REAL GINGER’ on Polar ginger ale is literally false because natural flavor and trace amounts of ginger compounds is not real ginger.”<sup>4</sup> Pl.’s Opp’n at 5. Fitzgerald finally argues that her breach of express warranty, breach of implied warranty, and unjust enrichment claims sound in contract and therefore are not subject to the federal Rule 9(b) heightened pleading standard. *See id.* at 15.

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<sup>4</sup> In her Opposition, Fitzgerald backs away from this assertion, arguing instead that

Polar’s “MADE FROM REAL GINGER” claim is literally false because the product *does not contain ginger root* and that Polar made these statements with knowledge of their falsity. Similarly, for Plaintiff’s negligent misrepresentation claim, Plaintiff has alleged that Polar provided false information for the guidance of others. (“Throughout the Class Period, Polar prominently made the claim “MADE FROM REAL GINGER” on the front of its Polar Ginger Ale cans and bottles because it knew that would cultivate a wholesome and healthful image for Polar . . .”). Contrary to Polar’s argument, Plaintiff’s claims do not require literal falsity. The First Circuit has said that “the locus classicus of fraud is a seller’s affirmative false statement or a half-truth, i.e., a statement that is literally true but is made misleading by a significant omission.”

Pl.’s Opp’n at 20 (emphasis added) (internal citations omitted).

## BACKGROUND

Fitzgerald states that she purchased various Polar ginger ales on numerous occasions within Massachusetts over the past four years. She typically purchases one-liter bottles of Polar Ginger Ale at a local grocery, most recently Shaw's in West Wareham, Massachusetts. She contends that in buying Polar ginger ales she relied on the product label claim "MADE FROM REAL GINGER", which she "believe[s] . . . meant that Polar Ginger Ale was made using ginger root and was, as a result, a healthier alternative to regular sodas." Compl. ¶ 28.<sup>5</sup> Fitzgerald alleges that "[c]onsumer research shows that the vast majority of consumers understand the phrase 'MADE FROM REAL GINGER' to mean that Polar Ginger Ale is made using ginger root, and not miniscule amounts of a flavor extract and that they will obtain the health benefits of consuming real ginger." *Id.* ¶ 17.<sup>6</sup>

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<sup>5</sup> A consumer who encountered chunks of ginger root in her drink would likely be bringing a different lawsuit, as ginger in its raw form can have deleterious side effects, particularly for women who are pregnant. WebMD: Ginger, <https://www.webmd.com/vitamins/ai/ingredientmono-961/ginger> (last visited Nov. 10, 2020).

<sup>6</sup> Fitzgerald fails to specify the source of the research or whether Polar was a part of the alleged study. Rather she contends that "[t]his research is consistent with how Polar intended consumers to interpret the phrase. Polar wanted consumers to think the following after seeing the 'MADE FROM REAL GINGER' on the label: This is perfect for me! I can now enjoy a drink that tastes great AND is made with natural healthier ingredients – like REAL ginger." *Id.* ¶ 17.

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