

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA

---

JENNIFER SONG and SCOTT WERTKIN,  
on behalf of themselves and all others  
similarly situated,

Case No. 18-CV-3205 (PJS/KMM)

Plaintiffs,

v.

ORDER

CHAMPION PETFOODS USA, INC. and  
CHAMPION PETFOODS LP,

Defendants.

---

Raina Borrelli, Daniel E. Gustafson, and Karla M. Gluek, GUSTAFSON  
GLUEK PLLC; Daryl DeValerio Andrews, ANDREWS DEVALERIO;  
Kenneth A. Wexler, Mark Tamblyn, and Michelle Perkovic, WEXLER  
WALLACE LLP; Kevin A. Seely and Steven M. McKany, ROBBINS LLP;  
and Rebecca A. Peterson and Robert K. Shelquist, LOCKRIDGE  
GRINDAL NAUEN PLLP, for plaintiffs.

David A. Coulson, Elisa H. Baca, Jared R. Kessler, Ricky L. Shackelford,  
and Robert S. Galbo, GREENBERG TRAUERIG, P.A.; and Blake Shepard,  
Jr. and William C. Penwell, SIEGEL BRILL, P.A., for defendants.

Plaintiffs Jennifer Song and Scott Wertkin are dog owners who allege that they were misled by claims made on packages of dog food manufactured and distributed by defendants Champion Petfoods USA, Inc. and Champion Petfoods LP (collectively, “Champion”). Plaintiffs bring a wide array of fraud-based claims against Champion. This matter is before the Court on Champion’s motion to dismiss. For the reasons that follow, the motion is granted, and the second amended complaint is dismissed.

## I. BACKGROUND

This lawsuit is one of numerous fraud actions brought against Champion by pet owners who paid high prices for what they believed to be premium pet food and who now allege that the pet food they purchased did not live up to various promises that appeared on the pet food’s packaging.<sup>1</sup> Song and Wertkin began purchasing Acana and Orijen dog food—two varieties of dry kibble manufactured by Champion—in November 2016 and October 2013, respectively. Both Song and Wertkin stopped purchasing the dog food in February 2018. Second Am. Compl. (“SAC”) ¶¶ 7–8.

According to plaintiffs, Champion charges “one of the highest, if not the highest, price premiums in the market for their dog foods.” SAC ¶ 43. Plaintiffs claim that they

---

<sup>1</sup>See *Shaker v. Champion Petfoods USA Inc.*, No. 18-13603, 2020 WL 6887449 (E.D. Mich. Nov. 24, 2020); *Renfro v. Champion Petfoods USA, Inc.*, No. 18-CV-2756-DDD-MEH, 2020 WL 4433027 (D. Colo. July 31, 2020); *Rydman v. Champion Petfoods USA, Inc.*, No. C18-1578 RSM, 2020 WL 4347512 (W.D. Wash. July 29, 2020); *Colangelo v. Champion Petfoods USA, Inc.*, No. 6:18-CV-1228 (LEK/ML), 2020 WL 777462 (N.D.N.Y. Feb. 18, 2020); *Weaver v. Champion Petfoods USA Inc.*, No. 18-CV-1996-JPS-JPS, 2019 WL 7370374 (E.D. Wis. Dec. 31, 2019); *Cesare v. Champion Petfoods USA Inc.*, 429 F. Supp. 3d 55 (W.D. Pa. 2019); *Zarinebaf v. Champion Petfoods USA Inc.*, No. 18 C 6951, 2019 WL 3555383 (N.D. Ill. July 30, 2019); *Simpson v. Champion Petfoods USA, Inc.*, 397 F. Supp. 3d 952 (E.D. Ky. 2019); *Vado v. Champion Petfoods USA, Inc.*, No. 18-CV-7118-JCS, 2019 WL 634644 (N.D. Cal. Feb. 14, 2019); *Loeb v. Champion Petfoods USA Inc.*, 359 F. Supp. 3d 597 (E.D. Wis. 2019); *Leppert v. Champion Petfoods USA Inc.*, No. 18 C 4347, 2019 WL 216616 (N.D. Ill. Jan. 16, 2019); *Ficarelli v. Champion Petfoods USA, Inc.*, No. 3:18-CV-0361, 2018 WL 6832075 (M.D. Tenn. Dec. 28, 2018); *Reitman v. Champion Petfoods USA, Inc.*, No. CV 18-1736-DOC (JPRx), 2018 WL 4945645 (C.D. Cal. Oct. 10, 2018); *Blackburn v. Champion Petfoods USA, Inc.*, No. 1:18-CV-0038 (S.D. Iowa); *Slawsby v. Champion Petfoods USA, Inc.*, No. 1:18-CV-10701-GAO (D. Mass.); *Hodge v. Champion Petfoods USA Inc.*, No. 1:18-CV-0248-TSB (S.D. Ohio).

purchased Champion’s dog food rather than cheaper alternatives in reliance on the representations made by Champion on its packaging. Specifically, plaintiffs allege that they relied on the following four statements: (1) “Biologically Appropriate,” (2) “Fresh Regional Ingredients,” (3) “Nourish as Nature Intended,” and (4) “Delivering Nutrients Naturally.”<sup>2</sup> SAC ¶ 2. Plaintiffs allege that each of these statements is false or misleading because, unbeknownst to plaintiffs, the dog food contained or had a risk of containing heavy metals, Bisphenol A (“BPA”), pentobarbital, and non-fresh, non-regional ingredients.

To be clear: Plaintiffs do not allege that their dogs were harmed in any way by the dog food. Rather, plaintiffs assert that *they* were harmed because they paid a high price for what they were falsely led to believe was premium dog food—dog food that they would not have purchased (especially at such a high price) had they known of its true nature and quality.<sup>3</sup> See SAC ¶ 13.

---

<sup>2</sup>“Nourish as nature intended” appears on Orijen dog-food packaging, and “delivering nutrients naturally” appears on Acana dog-food packaging. The remaining statements appear on both Orijen and Acana packaging. SAC ¶ 188.

<sup>3</sup>In its briefing, Champion argues that plaintiffs lack standing because there is no allegation that plaintiffs’ dogs were actually harmed by the dog food. As Champion acknowledged at oral argument, however, the harm that plaintiffs allege is not physical harm to the dogs, but economic harm to the dog owners. This harm is adequately alleged for standing purposes. See, e.g., *Laughlin v. Target Corp.*, No. 12-CV-0489 (JNE/JSM), 2012 WL 3065551, at \*4–5 (D. Minn. July 27, 2012) (finding allegation that plaintiff paid increased price for defendant’s shoes and would not have purchased them (continued...))

The second amended complaint pleads 12 counts, all aimed at establishing Champion's liability for its allegedly false and misleading packaging representations. Plaintiffs allege violations of five Minnesota consumer-protection statutes, negligence per se, breach of express and implied warranties, fraudulent misrepresentation, fraudulent concealment or nondisclosure, and unjust enrichment.<sup>4</sup>

---

<sup>3</sup>(...continued)

"had she known that the shoes did not provide the advertised benefits" was sufficient to state a cognizable injury); *see also* *Loeb v. Champion Petfoods USA Inc.*, No. 18-CV-494-JPS, 2018 WL 2745254, at \*5 (E.D. Wis. June 7, 2018) (finding that "allegations easily satisfy" standing requirements where plaintiff "pleads that she paid too much for unsafe dog food" because of "Defendants' deceptive and false advertisements").

In support of its standing argument, Champion cites *Wallace v. ConAgra Foods, Inc.*, 747 F.3d 1025 (8th Cir. 2014), in which plaintiffs alleged that some packages of hot dogs marketed as "100% kosher" contained non-kosher beef. The Eighth Circuit found that plaintiffs lacked standing because they did not allege "that *all* or even *most* Hebrew National products were not kosher, which means the particular packages of processed beef they purchased may have been—and indeed more than likely were—prepared in accordance with minimum kosher standards." *Id.* at 1030. Here, by contrast, Song and Wertkin have alleged that *all* Champion dog food is deceptively marketed because *all* Champion dog food comes in packages that contain misleading claims. As *Wallace* itself acknowledges, a plaintiff who, like Song and Wertkin, claims to have "paid a premium price for a deceptively marketed product that failed to meet the manufacturer's guarantee" has stated a "concrete, non-speculative injury" sufficient to satisfy standing requirements. *Id.* at 1029; *see also* *City of Wyoming v. Procter & Gamble Co.*, 210 F. Supp. 3d 1137, 1150–51 (D. Minn. 2016) (distinguishing "breach of warranty and misrepresentation-based case" from *Wallace* for standing purposes).

<sup>4</sup>Plaintiffs agreed to voluntarily dismiss their negligent-misrepresentation claim without prejudice. ECF No. 35.

Champion seeks dismissal of all counts, arguing that plaintiffs have failed to plausibly allege that any of the four challenged packaging claims are false or misleading. Champion also argues that plaintiffs' omission-based claims should be dismissed because Champion was under no legal duty to disclose the presence or risk of presence of heavy metals, BPA, pentobarbital, or non-fresh, non-regional ingredients. The Court largely agrees with Champion and therefore grants its motion to dismiss.

## II. ANALYSIS

### A. Standard of Review

To survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6), a complaint must "state a claim to relief that is plausible on its face." *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). Although the factual allegations in the complaint need not be detailed, they must be sufficient to "raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555. In assessing the sufficiency of the complaint, the Court need not consider legal conclusions that are couched as factual allegations. *Iqbal*, 556 U.S. at 678–79. The Court must, however, accept as true all well-pleaded factual allegations in the complaint and draw all

# Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

## Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

## Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

## Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

## API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

## LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

## FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

## E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.