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

Eric Wilim,
Plaintiff,

v.

Mondelez Global LLC,

Defendants.

No. 21-cv-06855

Honorable Nancy L. Maldonado

ORDER

Plaintiff Eric Wilim brings this putative class action against Defendant Mondelez Global LLC, alleging that a box of Honey Wheat Ritz crackers contains deceptive labeling. The Court has jurisdiction pursuant to the Class Action Fairness Act of 2005, 28 U.S.C. § 1332(d). Defendant filed a motion to dismiss, which is ripe for review. For the reasons below, the motion to dismiss (Dkt. 10) is granted and the Complaint is dismissed without prejudice. If Wilim believes in good faith that he can amend the Complaint to correct the deficiencies identified in this order, he may seek leave to file an amended complaint by October 19, 2023.

Background[1]

The Court takes the factual background from the allegations in the Complaint (Dkt. 1) and assumes the factual allegations to be true for the purposes of the motion to dismiss. *See Lewert v. P.F. Chang's China Bistro, Inc.*, 819 F.3d 963, 966 (7th Cir. 2016); *Kubiak v. City of Chicago*, 810 F.3d 476, 480–81 (7th Cir. 2016).

Mondelez Global LLC ("Mondelez") manufactures, labels, and sells "Honey Wheat" crackers under the Ritz brand. (Dkt. 1 ¶ 1.) Wilim alleges that the representations on the crackers box deceive consumers into thinking the crackers contain more fiber, whole grains, and honey than they actually do. The front of the Honey Wheat crackers box says, "5g whole grain per 16g serving" and "honey wheat," and includes a picture of a honey dipper and stalks of wheat poking out from behind a large cracker. (*Id.* ¶ 2.)

The Complaint includes images of the front of the box, the Nutrition Facts label, and the Ingredients label, which are reproduced below:

[1] In citations to the record, page numbers are taken from CM/ECF headers on filings.

Nutrition Facts

about 24 servings per container

Serving size 5 crackers (16g)

Amount per serving

Calories 80

	% Daily Value*
Total Fat 4g	**5%**
Saturated Fat 1g	**5%**
Trans Fat 0g	
Cholesterol 0mg	**0%**
Sodium 110mg	**5%**
Total Carbohydrate 10g	**4%**
Dietary Fiber less than 1g	**3%**
Total Sugars 2g	
Includes 2g Added Sugars	**4%**
Protein less than 1g	
Vitamin D 0mcg	0%
Calcium 20mg	0%
Iron 0.5mg	2%
Potassium 30mg	0%

* The % Daily Value (DV) tells you how much a nutrient in a serving of food contributes to a daily diet. 2,000 calories a day is used for general nutrition advice.

INGREDIENTS: UNBLEACHED ENRICHED FLOUR (WHEAT FLOUR, NIACIN, REDUCED IRON, THIAMINE MONONITRATE {VITAMIN B1}, RIBOFLAVIN {VITAMIN B2}, FOLIC ACID), WHOLE GRAIN WHEAT FLOUR, CANOLA OIL, SUGAR, PALM OIL, HONEY, LEAVENING (CALCIUM PHOSPHATE, BAKING SODA), SALT, SOY LECITHIN, ARTIFICIAL FLAVOR, NATURAL FLAVOR.

Wilim's Complaint focuses on the quantity of fiber, whole grains, and honey.

1. Fiber

According to the Complaint, consumers seek whole grains because they want more fiber. (*Id.* ¶ 11.) Almost 75% of consumers who are presented with front labels claiming that a product contains whole grains will expect the product to be a good source of fiber, meaning it contains 10% of the recommended daily value. (*Id.* ¶¶ 11, 13.) In a survey, almost half of consumers viewing a claim that a food contains five grams of whole grains per serving believed that the food would deliver at least five grams of fiber. (*Id.* ¶ 19.) The Nutrition Facts label here, however, reveals that Honey Wheat crackers contain less than one gram of fiber per serving, or only 3% of the daily value. (*Id.* ¶ 20.)

2. Whole Grains

Wilim alleges that consumers believe "honey wheat" is a type of wheat that has more whole grains than refined wheat. (*Id.* ¶ 35.) The Honey Wheat crackers are also darkened from honey, and consumers associate darker-colored grain products with a significant amount of whole grains. (*Id.* ¶¶ 36, 37.) The Honey Wheat crackers box does not tell consumers how much refined grain is in the crackers, but Wilim believes the ratio of whole grains to refined grains to be only 25%. (*Id.* ¶¶ 25–26, 31.)

3. Honey

Consumers strongly favor honey as a sugar substitute. (*Id.* ¶ 47.) Honey is a naturally occurring substance and there is a common marketplace perception that honey is healthier than sugar, so consumers place a greater value on products sweetened with honey rather than sugar and will pay a higher price for those products. (*Id.* ¶¶ 55–59.) The Ingredients label on the Honey Wheat crackers box indicates that sugar, not honey, is the predominant sweetening agent. (*Id.* ¶ 60.) The amount of honey in the crackers is de minimis and insufficient to provide a honey taste, and instead the honey flavor comes from other natural and artificial flavors added to the crackers. (*Id.* ¶¶ 65, 69.)

Wilim alleges that consumers are deceived into thinking the crackers contain more fiber, whole grains, and honey than they do. Specifically, the "honey wheat" label, the "5g whole grains per 16g serving" label, the failure to disclose the quantity of refined grains, and the use of honey to darken the crackers, mislead consumers into thinking the crackers contain more fiber and whole grains than they do. (*Id.* ¶ 40.) In addition, the label "honey," combined with the honey dipper image and the natural and artificial flavors imitating a honey flavor, mislead consumers into thinking that honey, not sugar, is a significant or the primary sweetener. (*Id.* ¶¶ 41, 67, 69, 70.) Wilim alleges that he bought Honey Wheat crackers expecting the crackers to contain more fiber, whole grains, and honey than they did, and that he would not have bought them or would have paid a lower price had he known the truth. (*Id.* ¶¶ 97–98, 101.)

Wilim brings claims for: a violation of the Illinois Consumer Fraud and Deceptive Business Practices Act ("ICFA"), 815 ILCS 505/1 *et seq.* (Count I); violations of other state consumer fraud acts on behalf of a multi-state putative class (Count II); breaches of express and implied warranties and a violation of the Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301 *et seq.* (Count III); and other Illinois common law claims, including negligent misrepresentation (Count IV), fraud (Count V), and unjust enrichment (Count VI). Wilim seeks injunctive relief and money damages. (Dkt. 1 at 18.)

Legal Standard

A motion to dismiss under Rule 12(b)(6) challenges the sufficiency of a complaint, not its merits. Fed. R. Civ. P. 12(b)(6); *Gibson v. City of Chicago*, 910 F.2d 1510, 1520 (7th Cir. 1990). In considering a Rule 12(b)(6) motion, the Court accepts as true all well-pleaded facts in the plaintiff's complaint and draws all reasonable inferences in the plaintiff's favor. *Kubiak v. City of Chicago*, 810 F.3d 476, 480–81 (7th Cir. 2016). To survive a Rule 12(b)(6) motion, the complaint must assert a facially plausible claim and provide fair notice to the defendant of the claim's basis. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *see also Reger Dev., LLC v. Nat'l City Bank*, 592 F.3d 759, 764 (7th Cir. 2010). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678.

A party alleging fraud must "state with particularity the circumstances constituting fraud." Fed. R. Civ. P. 9(b). In other words, a plaintiff must "describe the 'who, what, when, where, and how' of the fraud." *United States ex rel. Presser v. Acacia Mental Health Clinic, LLC*,

836 F.3d 770, 776 (7th Cir. 2016) (quoting *United States ex rel. Lusby v. Rolls-Royce Corp.*, 570 F.3d 849, 853 (7th Cir. 2009)).

Discussion

The Court first addresses Wilim's ICFA claim and then turns to the other claims, the dismissal of which depends on the ICFA analysis.

A. ICFA Claim

An ICFA claim "must be pled with the same specificity as that required under common law fraud." *Davis v. G.N. Mortg. Corp.*, 396 F.3d 869, 883 (7th Cir. 2005) (quoting *Elson v. State Farm Fire & Cas. Co.*, 691 N.E.2d 807, 816 (Ill. App. Ct. 1998)). To state an ICFA claim, Wilim must allege the following: (1) the defendant undertook a deceptive act or practice; (2) the defendant intended for the plaintiff to rely on the deception; (3) the deception occurred in the course of trade and commerce; and (4) the plaintiff suffered actual damage, which was (5) proximately caused by the deception. *Davis*, 396 F.3d at 883 (citing *Capiccioni v. Brennan Naperville, Inc.*, 791 N.E.2d 553, 558 (Ill. App. Ct. 2003)); *see also Zahora v. Orgain LLC*, No. 21 C 705, 2021 WL 5140504, at *3 (N.D. Ill. Nov. 4, 2021). The Court focuses here on the first element: whether Mondelez undertook a deceptive act.

A statement is "deceptive" if it "creates a likelihood of deception or has the capacity to deceive." *Bober v. Glaxo Wellcome PLC*, 246 F.3d 934, 940 (7th Cir. 2001). The element of deception is based on the "reasonable consumer" standard, 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." *Beardsall v. CVS Pharmacy, Inc.*, 953 F.3d 969, 972−73 (7th Cir. 2020); *Bell v. Publix Super Markets, Inc.*, 982 F.3d 468, 474–75 (7th Cir. 2020); *see also Mullins v. Direct Digital, LLC*, 795 F.3d 654, 673 (7th Cir. 2015) (citation omitted). "[A] court may dismiss the complaint if the challenged statement was not misleading as a matter of law." *Ibarrola v. Kind, LLC*, 83 F. Supp. 3d 751, 756 (N.D. Ill. 2015) (citing *Bober*, 246 F.3d at 940). Dismissal may be justified "where plaintiffs base deceptive advertising claims on unreasonable or fanciful interpretations of labels." *Bell*, 982 F.3d at 477 (collecting cases). Courts considering deceptive advertising claims "should take into account all the information available to consumers and the context in which that information is provided." *Id.*

Mondelez argues that Wilim has not stated an ICFA claim because he has not plausibly alleged that the Honey Wheat labeling is misleading. Wilim responds that his allegations of deception are plausible. For the reasons below, the Court finds that the labeling on the crackers box is not misleading as a matter of law. In other words, even taking the factual allegations as true, the Court finds that a significant portion of the general consuming public, acting reasonably in the circumstances, could not be misled in the ways Wilim alleges.

1. Fiber

First, regarding fiber, the Court cannot see how a reasonable consumer reaching for a box of Honey Wheat crackers could think, based on the labeling, that there is more fiber in the crackers than there actually is. The cold fact is that the front labels do not say or even hint anything about fiber.

Wilim's allegations about consumer surveys do not save the claim. Even with the allegation that consumers associate whole grains and fiber, there is no indication that reasonable consumers could be *misled* about fiber content here, for they have not been led anywhere: the front of the box is silent on fiber. It would be a different matter if the box contained any indication that Mondelez was exploiting a consumer association. In *Kraft, Inc. v. F.T.C.*, for instance, Kraft advertised cheese slices in a way to "emphasize visually and verbally" the link between milk and calcium content, thereby "strongly implying" that the cheese slices had a higher calcium content than they did. 970 F.2d 311, 322 (7th Cir. 1992).[2] In other words, Kraft's advertisements exploited, or made use of, the consumer association between milk and calcium content, and the court found that the advertisements could mislead reasonable consumers about calcium content. *Id.* at 322. Here, in contrast, the Honey Wheat crackers do not emphasize or imply anything about fiber content. The Court accepts as true that consumers associate whole grains and fiber, but the box here does not make use of that consumer association in any way; rather, the only mention of fiber, either explicit or implicit, is the clear statement of fiber content in the Nutrition Facts. In these circumstances, no reasonable consumer could be misled about fiber content.

2. Whole Grains

Second, regarding the quantity of whole grains relative to refined grains, reasonable consumers could not be misled because the front of the box is clear that there are only "5g whole grains per 16g serving." Again, the box neither says nor implies that the amount of whole grains exceeds the amount of refined grains. If anything, the label "5g whole grains per 16g serving" implies to the reasonable consumer that refined grains likely dwarf whole grains.

Wilim relies on *Mantikas v. Kellogg Co.*, 910 F.3d 633 (2d Cir. 2018), but the labeling in that case is distinguishable. In *Mantikas*, the court held that dismissal of the complaint was inappropriate because reasonable consumers could be misled into thinking that the grain in Cheez-It crackers was predominantly whole grain. *Id.* at 634. Two boxes were at issue. One box bellowed "WHOLE GRAIN" in large print in the center of the box, with a small-print label at the bottom

[2] In that case, Kraft's advertisements stated that a Kraft cheese slice was made from five ounces of milk and was "concentrated with calcium," allowing children's bones to "get calcium they need to grow." *Kraft*, 970 F.2d at 314–15. The advertisements implied that because a Kraft slice was made from five ounces of milk, it both contained the same amount of calcium as five ounces of milk and contained more calcium than competitors' slices, but both claims were misleading. *Id.* at 314–15, 322. Although the case arose from a Federal Trade Commission (FTC) Act claim rather than an ICFA claim, the FTC Act also uses a "reasonable consumer" standard and is therefore instructive here. *See id.* at 314 ("[A]n advertisement is deceptive under the [FTC] Act if it is likely to mislead consumers, acting reasonably under the circumstances, in a material respect.").

stating that there were five grams of whole grain per serving. *Id.* The second box trumpeted "MADE WITH WHOLE GRAIN" in large print in the center of the box, again with a small-print label at the bottom stating that there were eight grams of whole grain per serving. *Id.* The front labels did not state the serving size, which was tucked away in the side labels in the Nutrition Facts, which revealed that a serving size was 29 grams. *Id.* The court found that both boxes, emblazoned with "WHOLE GRAIN," could give reasonable consumers the false impression that the crackers were predominantly or even completely whole grain, when in fact they were predominantly made of refined white flour. *Id.* at 637–38.

Here, in contrast, the crackers are not characterized as "whole grain" crackers, and the only mention of whole grain is in the front label "5g whole grain per 16g serving," which explicitly puts the five grams of whole grain in the context of a 16-gram serving. This front label indicates that the grain content is almost certainly *not* predominantly whole grain. The labeling here is therefore distinguishable from that in *Mantikas*, first because the crackers here are not characterized as being whole-grain crackers, and second because the "5g whole grain per 16g serving" label does not require a consumer to hunt for information to understand the proportion of whole grain to other ingredients.

Wilim attempts to bolster the whole-grains claim by alleging that consumers believe "honey wheat" is a type of wheat with more whole grain than refined wheat, but that notion would be fanciful or unreasonable in this context, where a label placed directly below "honey wheat" clearly states exactly how much whole grain is in each 16-gram serving. Likewise, the crackers' honey-darkened color is not misleading because the "5g whole grain per 16g serving" label is obvious and expressly states how much whole grain a consumer can expect in each 16-gram serving. In these circumstances, reasonable consumers could not be misled into thinking there is more whole grain in these crackers than there actually is.

3. Honey

Third, reasonable consumers could not be misled into thinking that honey is a substantial or the primary sweetener, or indeed into concluding anything about the quantity of the honey beyond the fact that the crackers contain some honey.

Mondelez argues that "honey wheat" merely indicates the "sweeter, wheat-forward" flavor of the crackers as distinguished from other Ritz varieties, such as Roasted Vegetable and Garlic & Butter. (Dkt. 11 at 15.) Wilim responds that honey is not a flavor but an ingredient. (Dkt. 17 at 13.)

Wilim has plausibly alleged that honey is an ingredient. It is true that a "honey wheat" label might indicate the flavor of crackers, the way a "vanilla" label indicates the flavor of one ice cream among many. *See Steele v. Wegmans Food Markets, Inc.*, 472 F. Supp. 3d 47 (S.D.N.Y. 2020); *Zahora v. Orgain LLC*, No. 21 C 705, 2021 WL 5140504, at *4 (N.D. Ill. Nov. 4, 2021) (collecting cases holding that "vanilla" labels designate flavor). But it is simultaneously plausible that reasonable consumers could view the "honey wheat" label and the image of a real honey dipper as an indication that honey is an ingredient.

Nevertheless, it does not follow that a reasonable consumer would draw any conclusion about the *quantity* of honey in the crackers relative to sugar, as opposed to concluding that honey is present as an ingredient. This is not a situation where the product makes a claim about the quantity or concentration of ingredients, such as when a label says "100%" or "maximum strength." *See, e.g.*, *Bell*, 982 F.3d at 474–74 (holding that prominent "100% Grated Parmesan Cheese" label could plausibly mislead reasonable consumers about proportion of parmesan cheese to other ingredients); *Beardsall v. CVS Pharmacy, Inc.*, 953 F.3d 969 (7th Cir. 2020) (noting in dicta that "100% Pure Aloe Vera Gel" label could plausibly mislead reasonable consumers about quantity of aloe vera); *Al Haj v. Pfizer Inc.*, 338 F. Supp. 3d 741, 754–55 (N.D. Ill. 2018) (denying motion to dismiss where "Maximum Strength" label could plausibly mislead reasonable consumers about medication's concentration of ingredients). Rather, this is a situation where the "honey wheat" label indicates the presence of honey but does not plausibly imply anything about the quantity or concentration of honey. *See Floyd v. Pepperidge Farm, Inc.*, 581 F. Supp. 3d 1101 (S.D. Ill. 2022) (dismissing allegations that "Golden Butter" crackers misled consumers about the quantity of butter relative to vegetable oils, because crackers, which were golden and did contain butter, could not plausibly mislead as to the quantity of butter).

Perhaps different labeling that emphasized honey more could plausibly lead to deception about the quantity of honey. *See, e.g.*, *Tucker v. Post Consumer Brands, LLC*, No. 19-cv-03993-YGR, 2020 WL 1929368, at *5 (N.D. Cal. April 21, 2020) (denying motion to dismiss where the words "HONEY BUNCHES OF OATS" and prominent honey dripper image "occupy about two-thirds of the front of the packaging," and cereal box also included image of a flying bee); *Campbell v. Whole Foods Market Grp.*, 516 F. Supp. 3d 370, 377, 386 (S.D.N.Y. 2021) (denying motion to dismiss based in part on "packaging's prominent use of 'honey' and honey imagery," including large "Honey Graham" center label and large honey dipper rising from a bowl "full of honey"). But here, taking into account all of the information available to consumers, including the size of the word "honey" and honey dipper image, the lack of any explicit claim about quantity or concentration of honey, and the fact that sugar precedes honey on the Ingredients label,[3] the Court finds that the honey ICFA claim as currently alleged fails as a matter of law.

In sum, the Court finds as a matter of law that the Honey Wheat crackers labeling is not deceptive as alleged, so the ICFA claim is dismissed and the Court declines to reach Mondelez's argument that the ICFA claim is preempted.

B. Other Claims

Wilim's other claims are for: violations of other state consumer fraud acts on behalf of a multi-state putative class (Count II); breaches of express and implied warranties and a violation of the Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301 *et seq.* (Count III); negligent misrepresentation (Count IV); common law fraud (Count V); and unjust enrichment (Count VI).

The claims brought under other state consumer fraud acts, which allegedly prohibit deceptive business practices and are "similar to the ICFA" (Dkt. 1 ¶ 122), are dismissed for the

[3] Ingredients on food labels are listed in descending order by weight. *See* 21 C.F.R § 101.4(a)(1).

same reason the ICFA claim is dismissed: the Complaint does not plausibly allege that the representations here are deceptive.

Similarly, the state warranty claims, like the ICFA claim, are premised on the assertion that the crackers did not conform to Mondelez's misleading representations; but because the product is not misleading as alleged, the state warranty claims are dismissed. *See, e.g.*, *Hayes v. Gen. Mills, Inc.*, No. 19-cv-05626, 2021 WL 3207749, at *4 (N.D. Ill. July 29, 2021) (noting that common law warranty and fraud claims "rise and fall with [the] ICFA claim"). The Magnuson-Moss Warranty Act claim thus also fails. *See Zylstra v. DRV, LLC*, 8 F.4th 597, 609 (7th Cir. 2021) (noting that a Magnuson-Moss Warranty Act claim "depends on the existence of an underlying viable state-law warranty claim, and so the two claims . . . succeed or fail together").

The negligent misrepresentation and fraud claims, again based on the assertion that Mondelez misrepresented the quantities of fiber, whole grain, and honey, are dismissed for the same reasons the ICFA claim is dismissed. *See Ibarrola*, 83 F. Supp. 3d at 759–61 (dismissing ICFA and common law fraud claims together for lack of deception).

The unjust enrichment claim must be dismissed because here it is not a standalone claim, but rather is based on the fraud allegations; it therefore falls with the other claims. *See id.*; *Cleary v. Philip Morris Inc.*, 656 F.3d 511, 517 (7th Cir. 2011) ("[I]f an unjust enrichment claim rests on the same improper conduct alleged in another claim, then the unjust enrichment claim will be tied to this related claim—and, of course, unjust enrichment will stand or fall with the related claim."); *Bober*, 246 F.3d at 943 (dismissing unjust enrichment claim after dismissing ICFA claim due to absence of deception). With no surviving claims upon which relief can be granted, the Court need not reach the issue of the availability of injunctive relief.

Conclusion

For the foregoing reasons, the Complaint is dismissed without prejudice. If Wilim believes in good faith that he can amend the Complaint to correct the deficiencies identified in this order, he may seek leave to file an amended complaint by October 19, 2023.

ENTERED: 9/27/23

Nancy L. Maldonado
United States District Court Judge