Consolidated Appeal Nos. 19-2581, 19-2741

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

ANN BELL, ALFONSO FATA, CARMEN PELLITTERI, NANCY REEVES, ERIN RUDDER, and RODNEY ZACHARY,

Plaintiffs-Appellants,

v.

PUBLIX SUPER MARKETS, INC., ICCO-CHEESE COMPANY, INC., and TARGET CORPORATION,

Defendants-Appellees.

IN RE:
100% GRATED PARMESAN CHEESE MARKETING AND SALES PRACTICE LITIGATION,

ANN BELL, *et al*.,

Plaintiffs-Appellants,

v.

ALBERTSON COMPANIES, INC., *et al*.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 1:16-cv-05802, Judge Gary Feinerman

APPELLANTS' JOINT CONSOLIDATED OPENING BRIEF AND REQUIRED SHORT APPENDIX

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 19-2581,19-2741

Short Caption: Ann Bell, et al. v. Albertsons Companies Inc., et al.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

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(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

Ann Bell; Alfonso Fata; Carmen Pellitteri; Nancy Reeves; Erin Rudder; and Rodney Zachary

Alan Ducorsky, Karen Ford, Dan Lang, Samantha Lewin, Yvette Nash, Rosemary Quinn, Larry Rollinger, Jr.,

Rita Schmoll, Becky Sikes, Adam Weiss, Michael Wills

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

See Schedule A attached

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

N/A

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

Attorney's Signature: s/ Ben Barnow Date: April 14, 2020

Attorney's Printed Name: Ben Barnow

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SCHEDULE A

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- Audet & Partners, LLP
- Keller Rohrback, LLP
- The Wilner Firm, PA

(New)

- Reinhardt Wendorf & Blanchfield
- Clifford Law Offices
- Zimmerman Law Offices, P.C.
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- Pogust Braslow Millrood, LLC
- Levin Fishbein, Sedran & Berman
- Cuneo Gilbert & LaDuca, LLP
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- The Markham Law Firm
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I. INTRODUCTION

This appeal is about whether the district court erred when it resolved a question of fact as a matter of law on the pleadings.

The specific question is whether defendants' packaging, which makes a salient claim on the front label that is belied in small print on the back label, is not deceptive as a matter of law, regardless of evidence of how reasonable consumers perceive the labeling and make purchase decisions.

The front labels of defendants' products prominently claimed the products were "100% Grated Parmesan Cheese." Based on market research, nearly all consumers (85% to 95%) understood this to mean the products contained entirely cheese. Linguistic analyses also found this reading of the front label was the most plausible—that is, "100% Grated Parmesan Cheese" most plausibly means the products contain entirely cheese that is grated. Defendants' products, however, are not 100% cheese. Small print on the back label reveals defendants add wood pulp (also known as cellulose) as filler and potassium sorbate.

Consumer deception cases are inherently fact intensive and may not be dismissed on the pleadings unless the allegations compel the court to conclude as a matter of law that reasonable consumers would not be misled. The district court should be reversed because it strayed from this core principle. Rather than allowing the cases to proceed and grounding its

determinations in evidence, the district court relied on its own intuitions about consumer perceptions and decision making to prematurely resolve a question of fact as a matter of law.

The district court also declined to follow precedential and persuasive case law holding that when an advertiser's salient representation on its front label is contradicted in small print on the back label, the case is not defeated at the pleading stage. When the front and back labels are dichotomous, plaintiff has the opportunity to present evidence showing how a reasonable consumer would perceive the label and make a purchase decision in the given context, including evidence that when advertisers design their labels knowing consumers will rely on the prominent front label claim without checking for contradictory information on the back, consumers act reasonably in relying on the front label claim.

The district court stepped around the front-back dichotomy law, widely espoused by state courts, federal courts (including this Court) and the Federal Trade Commission, in favor of its own "ambiguity" rule. Under the district court's rule, if a front label claim can be deemed "ambiguous" (*i.e.*, there is more than one possible interpretation) a reasonable consumer will ascertain the ambiguity and be compelled to resolve it by reading the back label, as a matter of law.

Most fundamentally, the district court misunderstood a core tenant of false advertising law. False advertising law is designed in the recognition that an advertising claim may be—and often is—susceptible of more than one interpretation. Indeed, multivalent claims permit advertisers to communicate with a wider and more varied audience. Given this, the black letter law is that if any one reasonable interpretation is deceptive, the advertising is deceptive. The district court's "ambiguity" rule upends this core tenant and is directly counter to cases applying the front-back dichotomy approach where the front label claim is multivalent.

The "ambiguity" rule announced by the district court also effectively provides dishonest merchants with a roadmap to engage in false advertising without running afoul of consumer protection statutes, thereby undermining public policy. It invites advertisers to design labels they know will deceive reasonable consumers, yet avoid liability with ineffective small print, back label disclaimers if the front label can possibly (even if not plausibly) convey more than one meaning. The district court's rule thereby upends decades of well-established consumer protection standards, placing the burden on consumers to be hyper-vigilant, rather than placing the burden on businesses to advertise their products and services truthfully and accurately.

The district court should be reversed and plaintiffs given the opportunity to provide evidence that the labels are likely to deceive consumers acting reasonably.

In addition to this merits issue, the Court by order dated February 21, 2020, directed plaintiffs in the Target and Publix cases to address the timeliness of their appeal. As shown in the final section *infra*, the appeals against Target and Publix were timely filed.

II. JURISDICTIONAL STATEMENT

A. The District Court's Jurisdiction

The district court had subject matter jurisdiction under 28 U.S.C. § 1332(d), because each case in this MDL proceeding was brought as a class action, the matter in controversy exceeded $5,000,000, exclusive of interests or costs, and at least one member of the class is a citizen of a state different from defendant as shown below:

Kraft Complaint (ECF 225)[1]	
Party	**Citizenship**
Michael Wills	Alabama
Samantha Lewin	California
Adam Weiss	California
Alfonso Fata	Florida
Ann Bell	Illinois
Yvett Nash	Illinois
Karen Ford	Michigan

[1] The district court presiding over this MDL ordered complaints to be filed on a defendant-track basis. As a result, plaintiffs Bell, Fata, Reeves, Rollinger, Jr., and Wills assert claims in multiple complaints.

Larry Rollinger, Jr.	Minnesota
Rosemary Quinn	New York
The Kraft Heinz Company	Pennsylvania (Place of Incorporation) Illinois (Principal Place of Business)
SuperValu/Albertson's Complaint (ECF 227)	
Party	**Citizenship**
Michael Wills	Alabama
Ann Bell	Illinois
Dan Lang	Illinois
Albertsons Companies, Inc.	Delaware (Place of Incorporation) Idaho (Principal Place of Business)
Albertsons LLC	Delaware (Place of Incorporation) Idaho (Principal Place of Business)
SuperValu, Inc	Delaware (Place of Incorporation) Minnesota (Principal Place of Business)
Target Complaint (ECF 228)	
Party	**Citizenship**
Nancy Reeves	California
Alfonso Fata	Florida
Ann Bell	Illinois
Rodney Zachary	Missouri
Target Corporation	Minnesota (Place of Incorporation) Minnesota (Principal Place of Business)
ICCO-Cheese Company, Inc.	New York (Place of Incorporation) New York (Principal Place of Business)
Wal-Mart Complaint (ECF 229)	
Party	**Citizenship**
Michael Wills	Alabama
Nancy Reeves	California
Becky Sikes	Florida
Larry Rollinger, Jr.	Minnesota
Rita Schmoll	New Jersey
Alan Ducorsky	New York
Wal-Mart Stores, Inc.	Delaware (Place of Incorporation) Arkansas (Principal Place of Business)
ICCO-Cheese Company, Inc.	New York (Place of Incorporation) New York (Principal Place of Business)

Publix Complaint (ECF 226)	
Party	**Citizenship**
Carmen Pellitteri	Florida
Erin Rudder	Florida
Publix Super Markets, Inc.	Florida (Place of Incorporation) Florida (Principal Place of Business) [2]

B. Appellate Jurisdiction

Pursuant to 28 U.S.C. § 1291, the Court has jurisdiction over the claims of Pellitteri, Rudder, and Zachary because they appeal final judgments entered by the district court on August 26, 2019, disposing of their claims. SA88-90. Pellitteri, Rudder, and Zachary filed a notice of appeal on August 15, 2019, which became effective when the district court entered final judgment in the *Pellitteri, Rudder*, and *Zachary* member cases on August 26, 2019. Fed. R. App. P. 4(a)(2). Pellitteri, Rudder, and Zachary filed an amended notice of appeal on September 9, 2019. ECF 385.

Pursuant to 28 U.S.C. § 1291, the Court has appellate jurisdiction over the claims of Bell, Ducorsky, Fata, Ford, Lang, Lewin, Nash, Quinn, Rollinger, Jr., Schmoll, Reeves, Sikes, Weiss, and Wills, because they appeal the district court's August 26, 2019 entry of partial final judgment under Fed. R. Civ. P.

[2] Minimal diversity exists under the Class Action Fairness Act, 28 U.S.C. § 1332(d)(2)(A), even if the named parties are not diverse so long as "any member of a class of plaintiffs is a citizen of a State different from any defendant[.]" Publix has more than 1,100 stores in Alabama, Florida, Georgia, North Carolina, South Carolina, and Tennessee. The complaint against Publix alleges a plaintiff class consisting of persons who purchased Publix products in the State of Florida and all states with laws at issue similar to Florida. As such, there is diversity jurisdiction under CAFA.

54(b) for Plaintiffs' "100% claims" in their consolidated amended class action complaints against Kraft (ECF 225), SuperValu/Albertsons ("Albertsons") (ECF 227), Target/ICCO ("Target") (ECF 228), and Wal-Mart/ICCO ("Wal-Mart") (ECF 229). SA87.

Bell, Fata, and Reeves filed a notice of appeal on August 15, 2019, which became effective on August 26, 2019, when the district court entered partial final judgment under Fed. R. Civ. P. 54(b). Bell, Ducorsky, Fata, Ford, Lang, Lewin, Nash, Quinn, Rollinger, Jr., Schmoll, Reeves, Sikes, Weiss, and Wills timely filed an amended notice of appeal on September 9, 2019. ECF 385.

III. STATEMENT OF ISSUE FOR REVIEW

Did the district court err in ruling that a prominent front label claim that deceived a reasonable consumer as a matter of fact, but was contradicted by back label disclosures, could not deceive a reasonable consumer as a matter of law and without considering evidence of how a reasonable consumer would perceive the label and make purchase decisions?

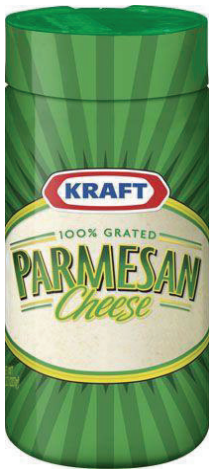
IV. STATEMENT OF THE CASE

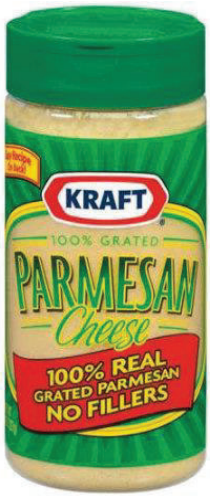
A. Summary of Facts

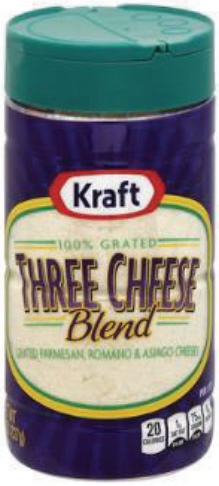
Kraft sells three varieties of grated cheese: "100% Grated Parmesan Cheese," "100% Grated Parmesan & Romano Cheese," and "100% Grated Three Cheese Blend" consisting of "100% Parmesan Romano & Asiago Cheese."

Albertsons and Publix each sell two varieties: "100% Grated Parmesan Cheese" and "100% Grated Parmesan & Romano Cheese." Wal-Mart and Target each sell "100% Grated Parmesan Cheese."[3] For simplicity, the phrase "100% Grated Parmesan Cheese" used by all defendants will be referred to throughout.

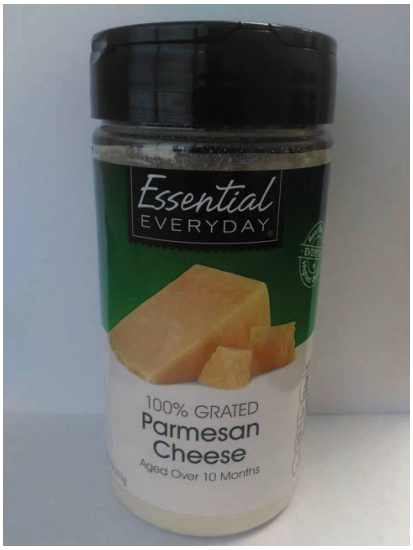
Defendants' front labels prominently represent that the products are 100% grated cheese. Aside from identifying the brand name, the front label of each product is devoted almost exclusively to the statement that the product is "100% Grated [Parmesan] Cheese." The products' front labels are reproduced below:

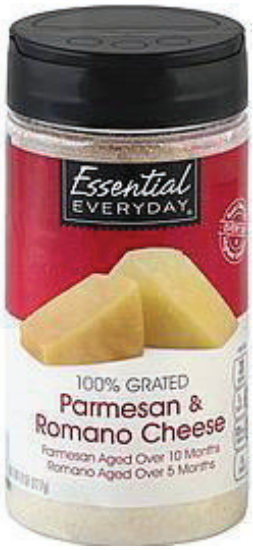


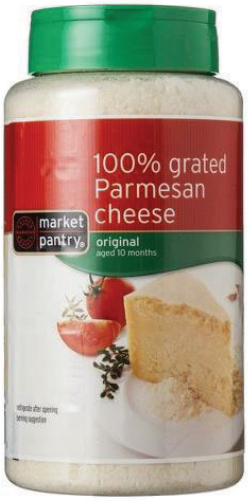


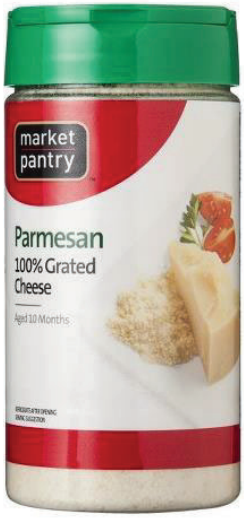


[3] ECF 225, ¶ 21; ECF 226, ¶ 12; ECF 227, ¶ 18; ECF 228, ¶ 18; ECF 229, ¶ 18.

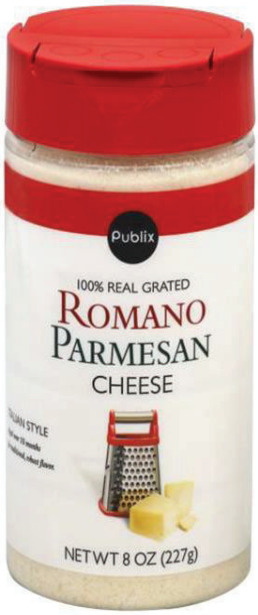

Essential
EVERYDAY
100% GRATED
Parmesan
Cheese
Aged Over 10 Months

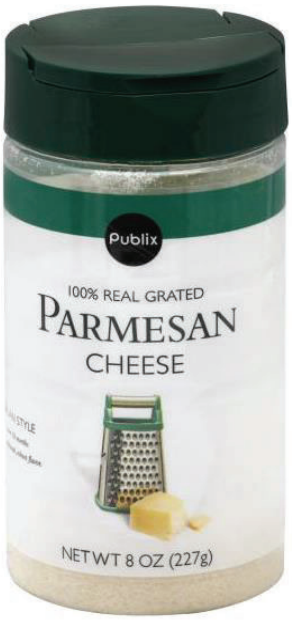

Essential
EVERYDAY
100% GRATED
Parmesan &
Romano Cheese
Parmesan Aged Over 10 Months
Romano Aged Over 5 Months

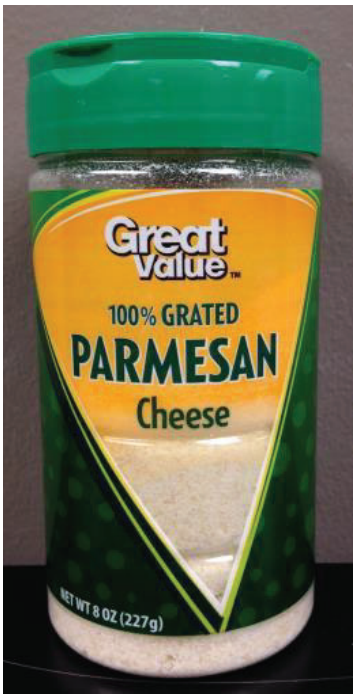

100% grated
Parmesan
cheese
market
pantry
original
aged 10 months

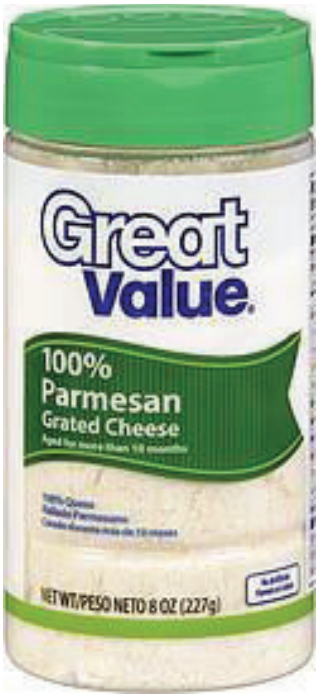

market
pantry
Parmesan
100% Grated
Cheese
Aged 10 Months


MARKET
PANTRY
100% Grated
PARMESAN
CHEESE
Aged
10 MONTHS









[4]

[4] ECF 225, ¶ 21; ECF 226, ¶ 12; ECF 227, ¶ 18; ECF 228, ¶ 18; and ECF 229, ¶ 18.

Other information on the front labels supports the 100% cheese message. Immediately below "100% Grated Parmesan Cheese," Kraft affirms the product is: "100% REAL Grated Parmesan NO FILLERS." Kraft's television advertisements also proclaim its cheese products are 100% real cheese.[5]

Target, Albertson's and Publix use pictures of chunks of cheese next to their 100% cheese representations. Albertsons also states its Parmesan cheese is aged over 10 months and its Romano cheese is aged over 5 months.[6]

Each plaintiff (they all bought at least one of the products) thought they were getting 100% grated cheese.[7] Other consumers think the same. According to consumer surveys conducted in connection with this litigation, nearly every consumer who purchased the products understood the label to mean he or she was getting 100% cheese that is grated. *Over 95%* of people who purchased the Kraft, Target and Publix products thought this. *Over 85%* of those who purchased the Albertsons and Wal-Mart products thought this. Only a small percentage believed the products did not contain entirely cheese.[8]

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5 ECF 225, ¶¶ 21-22.

6 ECF 226, ¶ 12; ECF 227, ¶¶ 18; ECF 228, ¶ 18.

7 ECF 225, ¶¶ 21-22; ECF 226, ¶¶ 12-13; ECF 227, ¶¶ 18-19; ECF 228, ¶¶ 18-19; ECF 229, ¶¶ 18-19.

8 ECF 225, ¶ 29; ECF 226, ¶ 17; ECF 227, ¶ 29; ECF 228, ¶ 29; ECF 229, ¶ 29.

Linguists agree that in common speech the phrase "100% Grated Parmesan Cheese" has only one plausible interpretation: that the product contains nothing other than grated parmesan cheese.

Linguistics professors from the University of Michigan, Anne Curzan, Ph.D. and Ezra Keshet, Ph.D., considered how people understand the phrase "100% Grated Parmesan Cheese." The phrase consists of a head noun ("cheese") and three modifiers ("100%," "grated," and "parmesan"). Given these modifiers, Professors Curzan and Keshet conclude the phrase has multiple possible interpretations but one plausible interpretation. The only plausible reading is: "cheese that is 100% grated parmesan."[9]

A possible interpretation (favored by the court below), is that "100% Grated Parmesan Cheese" means "Parmesan cheese that is 100% grated." This meaning is possible but not plausible in the context of grated cheese. The linguists explain:

> A modifier like "100%" may only apply to a word that is *gradable* (one that has various levels). For instance, a person can be 100% satisfied, since there are various levels of satisfaction, but it's odd to call someone "100% pregnant," since in common speech there aren't different levels of being pregnant.
>
> When you grate a hunk of cheese at home, it does progress through levels of being 50%, 75%, and finally 100% grated. However, in the context of packaged cheese, such levels do not

[9] *See*, *e.g.*, ECF 225-1 (Linguistics Report attached as Exhibit A to Kraft FAC], ¶ 9). The same linguist reports were attached as exhibits to each FAC.

> obtain; no cheese is sold in packages with, for instance, 50% grated, 25% sliced, and 25% whole cheese. Therefore it's odd to call any packaged cheese "100% grated" in the same way it's odd to call someone 100% pregnant.

ECF 225-1, ¶ 3.a. (emphasis in original).

Kyle Johnson, Ph.D., a linguist from the University of Massachusetts at Amherst, agrees that given English language semantics the phrase "100% grated parmesan cheese" has multiple possible meanings but only one salient meaning. He discounts the possible meaning ("parmesan cheese that is 100% grated") because "grated" does not denote a scalable or gradable property. "As a consequence, using a quantity expression like '100%' is odd with 'grated.'" Rather, "100% grated parmesan cheese" has one salient interpretation, which can be paraphrased as "entirely parmesan cheese that is grated." ECF 225-1, ¶ 4.

Contrary to defendants' front label claims, the products are not 100% cheese. The back label's small print reveals the products contain cellulose. The cellulose in defendants' products varies from 3.8% up to 8.8%.[10] Cellulose is an organic polymer. It is not cheese or any other type of dairy product. Its main use is in the production of paperboard and paper. Humans cannot digest cellulose, and it provides no nutritional calories. Cellulose is often used as a filler. It is also used as an anticaking agent. However, cured and grated

[10] SA3, SA28, ECF 225, ¶ 23; ECF 306-1, ¶ 14; ECF 227, ¶ 19; ECF 306-2, ¶ 19; ECF 229, ¶ 19.

parmesan cheese does not require cellulose for anticaking because the cheese is very hard and dried to a moisture level where it keeps almost indefinitely without refrigeration and does not cake or clump.[11]

Defendants' products also contain antimycotics such as potassium sorbate. Potassium sorbate is a synthetic chemical additive that is used in some foods and personal care products. Target's products, in addition to cellulose and potassium sorbate, also contain corn starch.[12]

Plaintiffs allege the labeling is deceptive. Plaintiffs and other customers did not receive what they thought they were buying: 100% cheese. Plaintiffs allege defendants violated the deceptive advertising statutes of plaintiffs' states of residence and purchase: Alabama, California, Connecticut, Florida, Illinois, Michigan, Minnesota, Missouri, New Jersey and New York.[13] They

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11 ECF 225, ¶ 26; ECF 226, ¶ 15; ECF 227, ¶ 21; ECF 228, ¶ 21; ECF 229, ¶ 21.

12 ECF 225, ¶ 28; ECF 226, ¶ 16; ECF 227, ¶ 23; ECF 228, ¶ 23; ECF 229, ¶ 23.

13 Alabama Deceptive Trade Practices Act ("ADTPA"), Ala. Code §§ 8-19-1, *et seq*.; California Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code §§ 17200, *et seq*.; California Consumers Legal Remedies Act ("CLRA"), Cal. Civ. Code §§ 1750, *et seq*.; Connecticut Unfair Trade Practices Act ("CUTPA"), Conn. Gen. Stat. § 42-110b; Florida Deceptive and Unfair Trade Practices Act ("FDUTPA"), Fla. Stat. §§ 501.201, *et seq*.; Illinois Deceptive Practices and Consumer Fraud Act ("ICFA"), 815 ILCS 505/2; Michigan Consumer Protection Act ("MCPA"), Mich. Comp. Laws §§ 445.903, *et seq*.; Minnesota Unlawful Trade Practices Act ("MUTPA"), Minn. Stat. §§ 325D.09, *et seq*.; Minnesota Deceptive Trade Practices Act ("MDTPA"), Minn. Stat. §§ 325D.44, *et seq*.; Minnesota False Statement in Advertising Act ("MFSAA"), Minn. Stat. § 325F.67; Minnesota Prevention of Consumer Fraud Act ("MPCFA"), Minn. Stat. §§ 325F.68, *et seq*.; Missouri Merchandising Practices Act ("MMPA"), Mo. Rev. Stat. §§ 407.010, *et seq*.; New Jersey Consumer Fraud Act ("NJCFA"), N.J. Stat. §§ 56:8-1, *et seq*.; New York General Business Law §§ 349-350.

also plead causes of action for breach of express and implied warranty and unjust enrichment.

B. Procedural Summary

The cases were initially filed as various class actions across the country. The Judicial Panel on Multidistrict Litigation transferred the suits for pretrial proceedings to the Northern District of Illinois. ECF 9. After the MDL transfer, plaintiffs filed five consolidated class action complaints—one consolidated complaint for each of the five defendants: Kraft, Target, Wal-Mart, Albertsons and Publix. Defendants filed 12(b)(1) and 12(b)(6) motions to dismiss. The 12(b)(1) motions were denied and the 12(b)(6) motions were granted with leave to amend. The district court's order on the first motions to dismiss is in Appellants' Short Appendix (SA1), and in the federal reporter: *In re: 100% Grated Parmesan Cheese Mktg. & Sales Practices Litig.*, 275 F. Supp. 3d 910 (N.D. Ill. 2017).

Plaintiffs filed amended consolidated complaints. Defendants again moved to dismiss the amended complaints under Rule 12(b)(6), incorporating by reference many of the arguments they made in their initial motions to dismiss.

The district court granted the motions in part and denied them part. SA26. The district court dismissed in their entirety all claims against all defendants based on the allegations that the "100% Grated Parmesan

Cheese" labeling is likely to deceive a reasonable consumer. The district court found no reasonable consumer could believe the products contained only cheese. SA31-34. It denied in part (as to certain defendants) and granted in part (as to other defendants) dismissal of the anticaking claims. SA34-44.

At the request of the parties so this appeal could proceed, the district court entered final judgments or partial judgements as to the "100% claims," thereby permitting this appeal to proceed. SA87. Accordingly, this appeal concerns only the 100% claims. The surviving claims are stayed pending this appeal. *Id*.

C. The District Court's Opinion

The district court departed from controlling precedent. When the back label small print contradicts a prominent front label representation, the case should not be dismissed as a matter of law on the pleadings. When the advertiser takes away on the back label what it conspicuously states on the front label, whether the label is likely to deceive is a question of fact to be answered based on evidence of how a reasonable consumer would perceive the label and make in-context purchase decisions.

Formulating its own standard, the district court ruled that if the front label content is ambiguous—has more than one possible interpretation—a reasonable consumer, as a matter of law, would read the back label to clarify the multivalent claim.

Applying its newly-minted standard, the district court found that the phrase "100% Grated Parmesan Cheese" is ambiguous because it could conceivably mean (1) "[a] product that is 100% cheese and nothing else," (2) "100% of the cheese is parmesan cheese," or (3) "the parmesan cheese is 100% grated." SA31.

Given these possible interpretations, ruled the district court, a reasonable consumer would discern the ambiguity and turn to the back label to find out which of the three possible meanings the label intended to convey. Reading the back label, the consumer would have seen (albeit in small print) that the products contained cellulose and potassium sorbate and therefore could not reasonably believe that "100% Grated Parmesan Cheese" meant "a product that is 100% cheese." SA16-17, SA19.

The district also found that because the products were "shelf stable," no reasonable consumer could believe the products were 100% cheese because they know the "facts of life" that "pure dairy products spoil, grow blue, green, or black fuzz, or otherwise become inedible if left unrefrigerated for an extended period of time." SA32. Unfortunately, the district court got the facts wrong. It gave zero credence to plaintiffs' factual allegations (with citations) that fully cured parmesan cheese is very hard and, because of its low moisture content, keeps without refrigeration and that grated parmesan cheese also does not require refrigeration. SA33.

As to the linguists, the court found "their opinions are valueless" because they did not consider that reasonable consumers know the "facts of life" regarding dairy products and because a reasonable consumer "does not approach or interpret language in the manner of a linguistics professor." SA31-32.

As to the consumer survey finding 85% to 95% of consumers who bought the products believed they were 100% cheese, the district court found "those surveys are valueless as well." The surveys offered nothing because despite how almost all consumers understood the label, the district court could determine as a matter of law that no reasonable consumer would be deceived by defendants' advertising. SA32-33. If anything, said the district court, the consumer surveys supported the district court's finding the phrase was not uniformly interpreted by all consumers, and therefore ambiguous.

V. SUMMARY OF ARGUMENT

The district court erred by deciding a question of fact as a matter of law on the pleadings. It erred by refusing to follow the well-worn track of the front-back dichotomy cases holding that when a prominent claim on the front label is contradicted by small print on the back label, the case is not dismissed on the pleadings. These cases recognize that a reasonable consumer's understanding of advertising, including a package label, is a question of fact best determined through consumer survey and other evidence. A consumer

may readily expect the back label small print to provide additional information; not that the back label will contradict the claim prominently announced on the front. This notion that one cannot make a false statement up front, only to disclaim it in the prolix, is an established legal principle across many areas of civil law, including the law of deceptive advertising.

Whether a reasonable consumer is likely to be deceived must be answered based on evidence. For example, how do consumers actually perceive the advertising? When purchasing the products, do consumers exhibit predictable decision-making traits (known to and studied by advertisers) such as looking only at the front label focal claim when facing numerous low-value product choices? Do consumers expect the ingredient list on the back to confirm defendants' front label "100% Grated Parmesan Cheese" description?

Evidence regarding defendants' marketing strategies to increase sales, such as focusing on a salient product feature (like 100% cheese) are also relevant. When companies design the front label knowing most consumers will not read the back label, consumers act reasonably when they rely on the front label without turning to and parsing the fine print on the back. The district court ignored this and erred by not grounding its determinations in evidence. Instead, the district court relied on its own opinions about consumer perceptions and behavior to prematurely resolve a question of fact as a matter of law.

The district court's attempt to distinguish the front-back dichotomy precedent is artificial and wrong. It asserted the front-back dichotomy cases apply only when the advertising claim is susceptible to one uniform interpretation; whereas here, "100% Grated Parmesan Cheese" is "ambiguous" and has (according to the district court) three possible interpretations.

The district court's approach misconceives the law of deceptive advertising. Deceptive advertising law is designed in recognition that an advertising claim is generally multivalent; a claim may have multiple meanings and reasonable interpretations permitting the advertiser to communicate with a wider and more varied consumer group. As such, the law is that when an advertisement is capable of conveying more than one meaning to the consumer—and any one of the meanings is likely to deceive a significant number of consumers—the advertisement is deceptive. This fundamental principle is recognized and applied in all deceptive advertising cases, including in the front-back dichotomy situation. The district court's putting aside of this established law was a mistake.

The district court also erred in relying on its own views regarding the "facts of life" of dry, hard and aged cheeses, especially given plaintiffs' allegations that fully cured parmesan cheese lasts without refrigeration. It further erred in dismissing as "valueless" plaintiffs' allegations regarding the

consumer survey and linguists' reports. Consumer surveys are not "valueless," nor should such a determination be made on the pleadings. This Court, for example, has looked to consumer surveys as evidence consumers were confused by the product advertising. The linguists' reports are also of value because the linguists posit the common speech meaning of the front label claim.

Plaintiffs plausibly alleged defendants' labeling is likely to deceive a reasonable consumer and the Rule 12(b)(6) motions should have been denied. The district court's determination to dismiss the cases in contravention of the factual allegations and on the pleadings without evidence was in error and should be reversed.

VI. ARGUMENT

A. Standard of Review

A district court's order on a motion to dismiss is reviewed *de novo*. *Rockwell Automation, Inc. v. Nat'l Union Fire Ins. Co.*, 544 F.3d 752, 756 (7th Cir. 2008). The Court accepts well-pleaded allegations as true and draws all favorable inferences in plaintiffs' favor. *Ashcroft v. Iqbal*, 556 U.S. 662, 677-80 (2009).

B. Deceptive Advertising Laws and Legal Principles the District Court Should Have Applied

A federal court sitting in diversity looks to state law for the substantive rules of decision. *Hess v. Bresney*, 784 F.3d 1154, 1158 (7th Cir. 2015). The substantive state laws at issue are broad and flexible statutes designed to remedy wrongful business conduct, including deceptive advertising, that detrimentally impacts the public or business competitors.[14]

Under these state statutes, known as "little FTC Acts" because they are patterned on the Federal Trade Commission Act, plaintiffs need not plead and prove the elements of common law fraud. Plaintiffs must only prove the advertising "is likely to mislead a reasonable consumer." *Suchanek v. Sturm*

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[14] *See, e.g.*, *Miller v. William Chevrolet/Geo*, 762 N.E.2d 1, 11 (Ill. App. Ct. 2001) (The Act "offers 'a clear mandate to the Illinois courts to utilize the Act to the greatest extent possible to eliminate all forms of deceptive or unfair business practices and provide appropriate relief to consumers'" and "is to be construed liberally to effect its purposes.") (Here, as throughout, all internal citations and quotations are omitted and emphasis is in original unless otherwise stated); *Am. Philatelic Soc'y v. Claibourne*, 3 Cal. 2d 689, 698 (Cal. 1935) (UCL is intentionally framed in broad, sweeping language, precisely to enable judicial tribunals to deal with the innumerable "new schemes which the fertility of man's invention could contrive."); *In re Trilegiant Corp., Inc.*, 11 F. Supp. 3d 132, 142 (D. Conn. 2014); *Conway v. Citimortgage, Inc.*, 438 S.W.3d 410, 416 (Mo. 2014) (MMPA is "unrestricted, all-encompassing and exceedingly broad[]" and "cover[s] every practice imaginable and every unfairness to whatever degree."); *Cox v. Sears Roebuck & Co.*, 647 A.2d 454, 458 (N.J. 1994); *Hauf v. Life Extension Found.*, 547 F. Supp. 2d 771, 780 (W.D. Mich. 2008); *Gaidon v. Guardian Life Ins. Co. of Am.*, 750 N.E.2d 1078, 1082 (N.Y. 2001); *Phillips v. Hobby Lobby Stores, Inc.*, No. 2:16-cv-00837-JEO, 2018 U.S. Dist. LEXIS 166247, at *24-25 (N.D. Ala. Sep. 27, 2018); *Beacon Prop. Mgmt. v. PNR, Inc.*, 890 So. 2d 274, 279 (Fla. Dist. Ct. App. 2004) (recognizing "broad remedial language" of FDUTPA); *State by Humphrey v. Philip Morris, Inc.*, 551 N.W.2d 490, 496 (Minn. 1996) (MCFA and MUTPA are "generally very broadly construed to enhance consumer protection.")

Foods, Inc., 764 F.3d 750, 762 (7th Cir. 2014).[15] Even literally true representations violate deceptive advertising laws if they are misleading or have a capacity, likelihood, or tendency to deceive or confuse the public. *Donaldson v. Read Magazine, Inc.*, 333 U.S. 178, 188 (1948).[16]

Further—and important here—if the representation is capable of more than one meaning (*i.e.*, it is ambiguous) and if any single meaning is false then the advertising is deceptive. *Nat'l Comm'n on Egg Nutrition v. FTC*, 570 F.2d 157, 161 n.4 (7th Cir. 1977); *FTC v. Sterling Drug, Inc.*, 317 F.2d 669, 674-75 (2nd Cir. 1963). A deceptive advertisement is not rendered acceptable merely because one possible interpretation of it is not false.

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[15] *Suchanek* made this finding as to, *inter alia*, the deceptive advertising of Alabama, California, Illinois, New Jersey and New York. *Id.* at 755. The same is true for the other states at issue here: Connecticut, Florida, Michigan, Minnesota and Missouri. *See also* Anthony Paul Dunbar, *Consumer Protection: The Practical Effectiveness of State Deceptive Trade Practices Legislation*, 59 Tul. L. Rev. 427, 428 n.6, 16 (Dec. 1984) (recognizing "[a]ll of the state UDAP statutes were inspired by and to some extent patterned after the Federal Trade Commission Act[.]")

[16] *Pennington v. Travelex Currency Servs.*, 114 F. Supp. 3d 697, 705-06 (N.D. Ill. 2015); *Kasky v. Nike, Inc.*, 27 Cal. 4th 939, 951 (2002); *Miller v. Am. Family Publishers*, 663 A.2d 643, 653 (N.J. Super. Ct. Ch. Div. 1995); *People v. GE*, 302 A.D.2d 314, 315 (N.Y. App. Div. 2003); *Mendelsohn v. Bidcactus, LLC*, No. 3:11-CV-1500 (JCH), 2012 U.S. Dist. LEXIS 42625, at *17 (D. Conn. Mar. 27, 2012); *Webb v. Dr Pepper Snapple Grp., Inc.*, No. 4:17-00624-CV-RK, 2018 U.S. Dist. LEXIS 71270, at *6 (W.D. Mo. Apr. 25, 2018); *Carriuolo v. GM Co.*, 823 F.3d 977, 987 (11th Cir. 2016) ("defendant may not escape FDUTPA liability under Florida law merely because a deceptive or misleading statement later turns out to be true."); *Select Comfort Corp. v. Baxter*, No. 12-2899 (DWF/SER), 2018 U.S. Dist. LEXIS 209527, at *46-49 (D. Minn. Dec. 12, 2018).

Courts evaluate whether the advertising is likely to deceive the public from the vantage of an "ordinary consumer acting reasonably under the circumstances" who "is not versed in the art of inspecting and judging a product." *Colgan v. Leatherman Tool Grp., Inc.*, 135 Cal. App. 4th 663, 682 (2006). Such a consumer need be neither "exceptionally acute and sophisticated" nor "wary or suspicious." *Lavie v. Procter & Gamble Co.*, 105 Cal. App. 4th 496, 509-10 (2003). Deceptive advertising "[l]aws are made to protect the trusting as well as the suspicious" and "[p]eople have a right to assume that fraudulent advertising traps will not be laid to ensnare them." *Donaldson*, 333 U.S. at 189.[17]

Whether advertising is likely to deceive a reasonable consumer generally involves questions of fact and should not be decided on the pleadings unless allegations compel the conclusion as a matter of law that consumers are not likely to be deceived. *Vaughn v. Gen. Foods Corp.*, 797 F.2d 1403, 1415 (7th Cir. 1986). This is because questions of potential deception require "consideration and weighing of the evidence from both sides," which is not

[17] All states use the reasonable consumer standard. *Langan v. Johnson & Johnson Consumer Cos.*, 95 F. Supp. 3d 284, 290 (D. Conn. 2015); *Coleman v. CubeSmart*, 328 F. Supp. 3d 1349, 1361 (S.D. Fla. 2018); *Benson v. Fannie May Confections Brands, Inc.*, 944 F.3d 639, 646 (7th Cir. 2019) (Illinois); *Hillerich & Bradsby Co. v. Christian Bros.*, 943 F. Supp. 1136, 1139-40 (D. Minn. 1996); *Orlander v. Staples, Inc.*, 802 F.3d 289, 300 (2d Cir. 2015) (New York); *Dix v. Am. Bankers Life Assurance Co. of Fla.*, 415 N.W.2d 206, 209 (Mich. 1987); *Murphy v. Stonewall Kitchen, LLC*, 503 S.W.3d 308, 312 (Mo. Ct. App. 2016); *Miller*, 663 A.2d at 653-54; *Carter v. L'Oreal USA, Inc.*, No. 16-00508-CG-B, 2017 U.S. Dist. LEXIS 143598, at *2 (S.D. Ala. Sep. 6, 2017).

possible at the pleading stage. *Linear v. Tech. Corp. v. Applied Materials, Inc.*, 152 Cal. App. 4th 115, 134-35 (2007).[18]

Given the central role of evidence in resolving issues of consumer deception, courts should decide those issues at the pleadings stage only in "rare situation[s]." *Williams v. Gerber Prods. Co.*, 552 F.3d 934, 939 (9th Cir. 2008). And, as with any question of fact, the court's role "is limited to defining the outer boundaries of its answer—*i.e.*, the point at which a juror could reasonably find only one way." *Dumont v. Reily Foods Co.*, 934 F.3d 35, 40 (1st Cir. 2019).

Courts have defined the outer boundaries within which a case should *not* be dismissed on the pleadings. These cases essentially set the minimum level

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[18] *See also, e.g., Benson*, 944 F.3d at 647 ("at this stage of the litigation, we cannot conclude that the information on the boxes is enough as a matter of law to avoid a finding of deception."); *Hughes v. Ester C Co.*, 930 F. Supp. 2d 439, 464 (E.D.N.Y. 2013) ("At this early stage of the litigation, it cannot be determined whether a disclaimer on the back of Ester-C's products, ..., eliminates the possibility of a reasonable consumer being misled[.]"); *Leon v. Rite Aid Corp.*, 774 A.2d 674, 678 (Super. Ct. App. Div. 2001) ("the determination whether an advertisement is misleading is ordinarily for the trier of fact[.]"); *Langan*, 95 F. Supp. 3d at 289 ("Whether the phrases on defendant's sunscreen packaging are deceptive is a question of fact that is not readily susceptible to resolution on a motion to dismiss."); *Murphy*, 503 S.W.3d at 311-13 (how a reasonable consumer would perceive the label claim is appropriately addressed based on evidence at summary judgment or trial); *Prohias v. Pfizer, Inc.*, 490 F. Supp. 2d 1228, 1235 (S.D. Fla. 2007) ("whether such inconsistencies are in fact misleading, are questions of fact which I cannot address at this stage of the litigation [on a motion to dismiss]"); *Buetow v. A.L.S. Enters.*, 650 F.3d 1178, 1185 n.5 (8th Cir. 2011) (recognizing that "consumer confusion is a fact intensive issue").

of attentiveness expected from consumers and the minimal level of conduct advertisers must meet to avoid consumer confusion.

1. Common Sense

"If a claim of misleading labeling runs counter to ordinary common sense or the obvious nature of the product, the claim is fit for disposition at the demurrer stage of the litigation. The breakfast cereal cases are good examples of the triumph of common sense in this context." *Brady v. Bayer Corp.*, 26 Cal. App. 5th 1156, 1165 (2018). For example, the thought that the "Froot Loops" name—note "froot," not even "fruit"—describes the cereal ingredients as containing real fruit "is an idea not to be taken seriously."[19] The idea that the "brightly colored rings" of Froot Loops cereal "resemble any currently known fruit" is not "rational, let alone reasonable."[20] Likewise, the idea that a picture of Captain Crunch holding a spoonful of purple, teal, green and red cereal balls referred to as something called "Crunch Berries" promises real fruit in the cereal received a dismissive "Nonsense."[21]

Similarly, the idea that crackers falsely promised a substantial amount of real, fresh vegetables got the "common sense boot" in *Red v. Kraft Foods, Inc.*, No. CV 10-1028-GW(AGRx), 2012 U.S. Dist. LEXIS 164461 (C.D. Cal. Oct.

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19 *Id.* at 1166 (quoting *McKinnis v. Kellogg USA*, No. CV 07-2611 ABC (RCx), 2007 U.S. Dist. LEXIS 96106, at *11-12 (C.D. Cal. Sept. 19, 2007)).

20 *McKinnis,* 2007 U.S. Dist. LEXIS 96106, at *12-13.

21 *Brady*, 26 Cal. App. 5th at 1165 (quoting *Werbel v. Pepsico, Inc.*, No. C 09-04456 SBA, 2010 U.S. Dist. LEXIS 76289, at *9 (N.D. Cal. July 1, 2010)).

25, 2012). To be sure, those crackers contained some "real vegetables"—well, some small amount of "real vegetables"—at least. But it was still a box of crackers and, as the court noted, everyone knows crackers are not "composed of primarily fresh vegetables." *Id.* at *10.

These cases show that if a claim of deception runs counter to any reasonable person's common sense, it can be dismissed on the pleadings. This is not that case, and the district court was wrong to dismiss the claims as counter to common sense, as discussed *infra*.

2. The Front-Back Dichotomy

Courts have also drawn the outer boundary at which—as a matter of law—qualifiers or disclosures on the packaging do not ameliorate deceptive representations on the front label. What the *Brady* court called the "Front-back Dichotomy." 26 Cal. App. 5th at 1167.

The foremost case on this issue is the Ninth Circuit Court of Appeals' decision in *Williams v. Gerber Products Co.*, 552 F.3d 934 (9th Cir. 2008). In *Williams*, Gerber marketed a food product for toddlers. On the front, the product label made a number of representations including "Fruit Juice Snacks" (reinforced with a picture of a variety of fruits) and that the fruit snack is "just one of a variety of nutritious Gerber Graduates foods and juices that have been specifically designed to help toddlers grow up strong and healthy." 552 F.3d at 939. One had to turn to the back side to discover that

the only fruit juice was white grape juice from concentrate (but no juice from the other pictured fruits) and the two most prominent ingredients were corn syrup and sugar. *Id*. at 936.

Williams held the back label ingredient list could not cure the misleading nature of the front label as a matter of law on the pleadings. 552 F.3d at 939. The *Williams* court explained:

> We do not think that the FDA requires an ingredient list so that manufacturers can mislead consumers and then rely on the ingredient list to correct those misinterpretations and provide a shield for liability for the deception. Instead, reasonable consumers expect that the ingredient list contains more detailed information about the product that confirms other representations on the packaging.

Id. at 939-40. Thus, *Williams*' key insight and holding is "that a back label that did not *confirm* what was on the front label could not defeat a pleading stage challenge" to the plaintiff's deceptive advertising claims. *Brady*, 26 Cal. App. 5th at 1168.[22]

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[22] The front-back dichotomy standard does not mean consumers can close their eyes. A minimal level of attentiveness required by consumers is that they read *adjacent* qualifiers or disclosures. Cases of this ilk are *Freeman v. Time, Inc.*, 68 F.3d 285 (9th Cir. 1995), a sweepstakes come-on case, where the representation the person had won a fortune was qualified by "[i]f [they] return[ed] the … winning number[.]" *Id*. at 287. "The qualifying language is immediately next to the representations it qualifies and no reasonable consumer could ignore it." *Id*. at 289. And *Fink v. Time Warner Cable*, 714 F.3d 739, 741 n.2 (2nd Cir. 2013) where the alleged misrepresentation was "closely accompanied by multiple disclaimers and explanatory language."

Williams' perspicacity has been followed by countless state and federal courts, *including by every state at issue here*.[23] To mention just a few, in *Mantikas v. Kellogg Co.* (New York and California law), the Second Circuit Court of Appeals reversed dismissal on the pleadings of a front-back dichotomy case where the cracker's front label screamed "WHOLE GRAIN" and "MADE WITH WHOLE GRAIN" but the side label ingredient list disclosed the primary ingredient was white flour. 910 F.3d 633, 637 (2d Cir. 2018). Following *Williams*, the *Mantikas* court concluded that "a reasonable consumer should not be expected to consult the Nutrition Facts panel on the

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[23] *Terrazzino v. Wal-Mart Stores, Inc.*, 335 F. Supp. 3d 1074, 1083-84 (N.D. Ill. 2018); *Garcia v. Overland Bond & Inv.* Co., 668 N.E.2d 199, 204 (Ill. App. Ct. 1996) (holding plaintiffs sufficiently alleged a used car dealer engaged in a deceptive act by falsely stating "in large, bold print" on advertisements that it offered "easy credit" reasoning that even assuming the disclaimer in "very small print" appears at the bottom of all defendant's print advertisements, "we do not think that, as a matter of law, it negates the net impression the advertisements make on the general populace, which the plaintiffs allege is that the defendant offers easy, lenient credit terms at low bank interest rates."); *Muir v. Playtex Prods., LLC*, 983 F. Supp. 2d 980, 989 (N.D. Ill. 2013); *Hughes*, 930 F. Supp. 2d at 464; *Koenig v. Boulder Brands, Inc.*, 995 F. Supp. 2d 274, 288 (S.D.N.Y. 2014); *Langan*, 95 F. Supp. 3d at 289-90; *Murphy*, 503 S.W.3d at 313; *Smajlaj v. Campbell Soup Co.*, 782 F. Supp. 2d 84, 98-99 (D.N.J. 2011); *Olson v. Snap Prods., Inc.*, 29 F. Supp. 2d 1027, 1038 (D. Minn. 1998); *Barron v. Snyder's-Lance, Inc.*, No. 13-62496-CIV-LENARD/GOODMAN, 2015 U.S. Dist. LEXIS 189625, at *45-46 (S.D. Fla. Mar. 20, 2015); *Date v. Sony Elecs., Inc.*, No. 07-cv-15474, 2010 U.S. Dist. LEXIS 96870, at *5-6 (E.D. Mich. Sept. 16, 2010); *Morris v. Walmart Inc.*, No. 2:19-cv-650-GMB, 2020 U.S. Dist. LEXIS 14632, at *12-13 (N.D. Ala. Jan. 29, 2020); *Thornton v. Pinnacle Foods Grp. LLC*, No. 4:16-CV-00158 JAR, 2016 U.S. Dist. LEXIS 99975, at *6-7 (E.D. Mo. Aug. 1, 2016); *Blue Buffalo Co. Ltd. v. Nestlé Purina Petcare Co.*, No. 4:15CV384 RWS, 2015 U.S. Dist. LEXIS 74905, at *5 (E.D. Mo. June 10, 2015); *Bohlke v. Shearer's Foods, LLC*, No. 9:14-CV-80727-ROSENBERG/BRAN, 2015 U.S. Dist. LEXIS 6054, at *24-25 (S.D. Fla. Jan. 20, 2015).

side of the box to correct misleading information set forth in large bold type on the front of the box." *Id*.

The Second Circuit rejected defendant's contention that its labeling could not be misleading as a matter of law if the crackers contained at least some whole grain. "Such a rule would permit Defendant to lead consumers to believe its Cheez-Its were made of whole grain so long as the crackers contained an iota of whole grain, along with 99.999% white flour. Such a rule would validate highly deceptive marketing." *Id*. at 638.

In *Dumont v. Reily Foods Co*., the First Circuit Court of Appeals reversed dismissal on the pleadings of a front-back dichotomy case where the coffee's front label promised "Hazelnut Créme" coffee, but the back label revealed no hazelnut at all. 934 F.3d at 37. "[W]e think it best that six jurors, rather than three judges, decide on a full record whether the challenged label has the capacity to mislead reasonably acting [] consumers." *Id*. at 41.

In *Brady*, a California Court of Appeal reversed dismissal on the pleadings of a front-back dichotomy case where "One A Day" vitamins disclosed on the back a two-a-day dosage. "The front label fairly shouts that one per day will be sufficient." 26 Cal. App. 5th at 1172. "The front of the product makes no attempt to warn the consumer that a one-a-day jar of [vitamins] is in fact full of two-a-day products. One must look at the back of the jar, in small print in the upper right hand corner" to discover the two-a-day dosage. *Id*.

The court rejected the contention reasonable consumers would read the back label as a matter of law.

> Bayer feels the reasonable consumer will be so motivated to ascertain the precise amounts of vitamins that of course he or she will scrutinize the back. We don't think such a conclusion can be made as a matter of law at the pleading stage. Nothing in law or logic suggests consumers will take such a belt and suspenders approach[.]

Id.

And most recently, this Court cited *Williams* in a case where the product claims included "100% Pure Aloe Vera Gel." *Beardsall v. CVS Pharmacy, Inc.*, -- F.3d --, No. 19-1850, 2020 U.S. App. LEXIS 9088 (7th Cir. Mar. 24, 2020). Although the Court was not called upon to directly resolve a front-back dichotomy issue, it came close, writing:

> We are skeptical of defendants' position at oral argument that an asterisk pointing to an ingredient list in fine print could save virtually any deceptive slogan claiming purity.
>
> [D]isclosure in an ingredient list cannot cure a clearly misleading statement.

Id. at *19 (citing *Williams*, 552 F.3d at 939).

Williams and its long list of progeny set a minimal level of conduct for advertisers. "You cannot take away in the back fine print what you gave on the front in large conspicuous print. The ingredients list must *confirm* the

expectations raised on the front, not contradict them." *Brady,* 26 Cal. App. 5th. at 1172.

If the advertiser takes away on the back what it announces on the front, the court must allow plaintiffs a chance to present evidence proving a reasonable consumer would be deceived by the dichotomous labeling.

C. A Reasonable Consumer Is Determined by Evidence

A reasonable consumer does not, and need not, act with perfect knowledge, deliberation and analytical rigor. A reasonable consumer is an "ordinary consumer acting reasonably under the circumstances" who "is not versed in the art of inspecting and judging a product." *Colgan*, 135 Cal. App. 4th at 682. A reasonable consumer need be neither "exceptionally acute and sophisticated" nor "wary or suspicious." *Lavie*, 105 Cal. App. 4th at 509-10.

The standard insists on the reasonable exercise of consumers' faculties but recognizes their limitations, both situational ("the circumstances") and cognitive (acuity, sophistication, wariness, suspicion).

Behavioral scientists—and advertisers like defendants—know that consumers acting in the marketplace often cannot focus thoughtfully on each of the many purchases they make. Consumers are imperfect decision-makers, limited by situational constraints, and use predictable behaviors to simplify their decisions. Behavioral science has documented that consumers exhibit foreseeable decision-making traits, especially when overloaded by

information, considering multiple options for many intended purchases, operating under time pressure, or considering relatively trivial decisions (such as the purchase of cheese). "Real people employ mental short cuts, 'heuristics' that sellers can exploit[.]"[24]

> Sellers understand very well the extent of consumers' bounded rationality, although they may not describe it in that way. Billions are spent every year on behavioral research by the marketing industry in order to understand consumer biases and heuristics. Armed with this information, marketers engage in various strategies to increase sales by exploiting consumer search costs, obfuscation, identity group marketing, focusing on salient features [think "100%" cheese] … and other strategies.

Id. at 158.

FDA research, for example, has found that with "Front of Package" labeling, consumers are less likely to check the nutrition panel, which is usually on the back or side packaging.[25] Advertisers also know this. After Congress required nutrition labels on packaged food, companies responded by plastering focal health claims on the front label. "The idea was that consumers would focus on the bright claim rather than turning the box

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[24] Alan M. White, *Behavior and Contract*, 27 Law & Ineq. 135, 150 (2009).

[25] Guidance for Industry: Letter Regarding Point of Purchase Food Labeling at 2 (Oct. 2009).

around to read the dull, black-and-white nutrition label on the back of the box."[26]

Advertisers also know that real consumers in the real marketplace do not have the time to scrutinize labels. For instance, observation of in-store grocery shoppers found 56% spent less than eight seconds examining and deciding which brand to buy.[27] And evidence of consumer behavior in the real-world matters. In *In re Crown Central Petroleum Corp.*, the FTC deemed the advertising deceptive based on expert testimony that in the "few seconds during which many consumers would consider an advertisement of this kind," the focal point would be the headline and pictures, not the small print disclaimers. No. 8851, 1974 FTC LEXIS 25, at *42 n.14, 44 n.15, 100-01, 84 F.T.C. 1493 (1974).

Courts recognizing that context is crucial are in tune. "[A] parent walking down the dairy aisle in a grocery store, possibly with a child or two in tow, is not likely to study with great diligence the contents of a complicated product package, searching for and making sense of fine-print disclosures in asterisked footnotes … *Nor does the law expect this of the reasonable consumer*." *Danone, US, LLC v. Chobani, LLC*, 362 F. Supp. 3d 109, 123 (S.D.N.Y. 2019) (emphasis added). Especially when the advertiser's deceptive

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[26] Karen Bradshaw Schulz, *Information Flooding*, 48 Ind. L. Rev. 755, 782 (2015).

[27] Leslie de Chernatony, et al., *Creating Power Brands* at 95 (4th Ed. 2011).

claim "could easily have been replaced with [a] simple and truthful statement[.]" *Id*. at 123.

Here, for example, defendants could have simply and truthfully labeled the products as "Grated Parmesan Cheese with filler and preservatives." They didn't. They designed their labels so that "100% Grated Parmesan Cheese" was salient on the front (and supported by pictures and sub-text) and put the contradictory information in small print on the back. When companies design the front label knowing consumers may not read the back label, consumers act reasonably when they rely on the front label without parsing the fine print on the back.

Because the reactions of reasonable consumers making snap decisions in the real world may differ from the highly focused consideration judges devote to their deliberation of advertising, courts should be reluctant to dismiss consumer deception cases before taking evidence.

Here, the testimony of consumers and experts might show, for instance, that buying cheese presents consumers with relatively low-stakes decisions, leading them to take shortcuts such as looking only at the front label to save time, or because they expect the ingredient list to confirm the prominent "100% Grated Parmesan Cheese" proclamation on the front. This tendency might be heightened by competing demands on consumers' attention, like the number of options available or additional purchases to make. Evidence may

show purchasers do not think about whether packaged cured, hard cheese requires refrigeration, or they may already know such cheeses do not need refrigeration. Purchasers of the Kraft products might give weight to 75 years of brand recognition and the long-promoted association of the Kraft brand with cheese—Kraft has been selling cheese since 1945. ECF 225, ¶ 19.

In sum, whether a reasonable consumer was likely to be deceived should be determined by the evidence of how consumers perceived the labeling, how the labeling in the context of this product resulted in predictable consumer behavior such as reliance on the front label, and how defendants designed their labeling in light of predictable consumer behavior. The district court erred in making this determination of fact on the pleadings as a matter of law and contrary to the factual allegations.

D. The District Court's Misconceived Ambiguity Rule and Other Errors

The district court declined to apply the front-back dichotomy cases. Instead, it devised and applied its own "ambiguity" rule shifting responsibility for the products' labels from the manufacturers that created the labels to the consumer. The district court also erred in substituting its own (factually incorrect) view of the common sense "facts of life," and in deeming "valueless" the linguists' analyses and the consumer survey results. These missteps are each addressed below.

1. The District Court's Ambiguity Rule Is Counter to the Law and Public Policy

The district court formulated its own rule to analyze a dichotomous label. According to the district court, if the front label content is "ambiguous," the court looks to the back label ingredient list and disclaimers. A front label is "ambiguous" if it has more than one possible interpretation. SA31.

If the back label can cure the ambiguity of the front label, the case is defeated and dismissed on the pleadings. SA34. In other words, faced with advertising that could possibly have more than one meaning, a reasonable consumer will—as a matter of law—discern the ambiguity and turn to the back label to clarify it.

First: The district court's rule is not founded in law or precedent. The district court devised its ambiguity rule in its ruling on the first motions to dismiss based on a truncated and unsystematic review of cases which simply do not apply. Yet, it believed these cases "yield this rule." SA14.

They do not. The district court derived its ambiguity rule from the Froot Loops case (SA16), finding no reasonable consumer would believe "Froot" and colored rings of cereal denoted the product contained real fruit.[28] It also

[28] *McKinnis*, 2007 U.S. Dist. LEXIS 96106, at * 11-12. *Workman v. Plum, Inc,* also relied on by the district court (SA15-17), is of the same ilk. There, the court found a cereal package with pictures of fruit and other food (there were no challenged phrases or statements—only pictures), could not lead a reasonable consumer to believe size of the food pictures directly correlated with the

looked to the *Freeman* and *Fink* cases, where the explanatory language and multiple disclaimers were *on the front, immediately adjacent to the alleged misrepresentation*. *See* SA14-15 and footnote 22 *supra* on *Freeman* and *Fink*. This case is not like those.

The district court stuck to its "ambiguity standard" in ruling on the second motions to dismiss. As authority for its ambiguity rule in the instant opinion on appeal, the district court cited to its first opinion. SA30.[29]

The insight of front-back dichotomy approach articulated by *Williams* and wisely followed by federal and state courts, including by the relevant states here, provides the appropriate standard. The district court should have followed this thoughtfully established law.

Second: The district court wrongly deemed "inapposite" *Williams* and its progeny. It said the front-back dichotomy cases only apply if there is what it called an "affirmative representation" (*i.e.*, where the advertising has only one possible interpretation). SA17-19. Here, said the district court, the challenged phrase—"100% Grated Parmesan Cheese"—was not an

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predominance of the flavors in the puree blend. 141 F. Supp. 3d 1032, 1035 (N.D. Cal. 2015).

[29] In addition to citing to itself, the district court found two other district courts that have cited to its initial opinion. SA31. These two opinions conduct no analysis and add nothing. *See Davis v. Hain Celestial Grp., Inc.*, 297 F. Supp. 3d 327, 334 (E.D.N.Y. 2018); *Solak v. Hain Celestial Grp., Inc.*, No. 3:17cv0704 (LEK/DEP), 2018 U.S. Dist. LEXIS 64270, at *14 (N.D.N.Y. Apr. 17, 2018).

affirmative representation, it was an "ambiguous representation" because it has three possible interpretations. SA14-15.

This displays a fundamental misconception of deceptive advertising law. The law is designed in recognition that an advertising claim may have—in fact, generally does have—multiple meanings and interpretations, allowing the advertiser to appeal to and communicate with a varied audience. Accordingly, the law is:

> [T]he same claim may be susceptible of more than one interpretation by the consumer. If an advertisement is capable of conveying more than one impression to the consumer and any one of them is false or misleading, the advertisement may be found to be false or misleading.

In re Bristol-Meyers Co., No. 8917, 1983 FTC LEXIS 64, at *123, 102 F.T.C. 21 (1983).

In *Rhodes*, this Court wrote: "Advertisements which are capable of two meanings, one of which is false, are misleading." *Rhodes Pharmacal Co. v. Fed. Trade Comm'n*, 208 F.2d 382, 387 (7th Cir. 1953), *rev'd in part on other grounds*, 348 U.S. 940 (1955). And in *Crown Central*, the FTC stated: "It is well settled that where one of two meanings conveyed by an advertisement is false, the advertisement is misleading." 1974 FTC LEXIS 25, at *102

That is, the law accounts for the fact that a representation may have more than one reasonable interpretation and that not all consumers will derive the

same meaning from an advertising claim. Thus, not *all* consumers need be misled for the advertising to be found deceptive. If any single reasonable interpretation is likely to deceive a "significant portion" of consumers, the advertising is deceptive.[30]

This fundamental principle—that an advertising claim will often have multiple reasonable interpretations—is recognized and applied in all deceptive advertising cases, including in front-back dichotomy cases. In *Dumont*, the judges on the First Circuit panel could not themselves agree on the front label's message—*i.e.*, the label was ambiguous. 934 F.3d at 40-41. One judge focused on freshly ground "100% Arabica Coffee" which he believed "makes it clear only coffee is in the package," but no hazelnut. *Id.* at 44; *see also id.* at 41. The other judges acknowledged their colleague's interpretation was not unreasonable. *Id.* at 41. However, they believed the phrase "Hazelnut Crème"—also on the front label—could lead a reasonable consumer to believe the coffee contained some hazelnut. *Id.* at 40-41.

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[30] *Ebner v. Fresh, Inc.*, 838 F.3d 958, 965 (9th Cir. 2016) (reasonable consumer standard requires a probability that a "significant portion" of reasonable consumers could be deceived); *Lavie*, 105 Cal. App. 4th at 508 (same). Thirty to 40% more than meets the "significant minoity" standard. *In the Matter of Novartis Corp.*, No. 9279, 1999 F.T.C. Lexis 63, at *23-24 (May 27, 1999); *Firestone Tire & Rubber Co. v. F.T.C.*, 481 F.2d 246, 249 (6th Cir. 1973) (upholding the FTC's finding of deception where advertisement misled 15% of the buying public).

The point here is that although the front label had at least two reasonable interpretations, that fact did not foreclose application of the front-back dichotomy approach:

> One might presume that a reasonable consumer who, like Dumont, cared whether the coffee she intended to purchase contained real hazelnut would check the list of ingredients. On the other hand, perhaps a reasonable consumer would find in the product name sufficient assurance so as to see no need to search the fine print on the back of the package, much like one might easily buy a hazelnut cake without studying the ingredients list to confirm that the cake actually contains some hazelnut.

Id. at 40.

When a representation on the front is belied by the ingredient list on the back, "we think it best that six jurors, rather than three judges, decide on a full record whether the challenged label 'has the capacity to mislead' reasonably acting [] consumers." *Id*. at 41.

The California Court of Appeal did the same thing in *Brady*—the vitamin case where the "One a Day" front label was belied by the "two a day" dosage on the back. The *Brady* court recognized reasonable consumers could interpret the front label differently. "[T]he market among reasonable consumers of vitamins is not monolithic. … Reasonable consumers will vary. [Defendant] itself targets a variety of submarkets among vitamin consumers." 26 Cal. App. 5th at 1175-76.

As such, some consumers after reading the front label might seek clarifying information on the back. "It may well be that many people—including some judges and lawyers—would make such an inquiry." *Id*. at 1174. Nonetheless, "we cannot declare at the pleading stage that *all* reasonable consumers of vitamins are the label-scrutinizers[.]" *Id*. at 1176. Since the representation on the front label was contradicted by the back label "the front-back contradiction was sufficiently misleading to preclude disposition at the pleading stage[.]" *Id*. at 1177.

The district court's attempt to distinguish the *Williams* line of cases based on whether the advertising has multiple possible interpretations falls flat.

Third: The district court's proposed ambiguity rule would incentivize deceptive advertising and undermine public policy. It invites advertisers, armed with market and behavioral science research, to design an ambiguous front label (it need only have more than one conceivable meaning), knowing the front label will be relied upon by and will deceive most consumers, and yet avoid liability as a matter of law with back label disclaimers. "Such a rule would validate highly deceptive advertising." *Mantikas*, 910 F.3d at 638. Such a rule effectively obviates any responsibility for advertisers to design truthful and non-deceptive labels.

The district court's ambiguity rule also places an inordinate burden on consumers. Under the district court's ruling, consumers must be eternally

wary and suspicious. No reasonable consumer can rely on the veracity of a front label unless, while standing in the market aisleway, they conduct the linguistic analysis of a federal judge and correctly conclude the front label cannot be deemed ambiguous when analyzed by a court of law. This blows to bits the controlling definition of a reasonable consumer who may be neither wary nor suspicious and has the right to assume that deceptive advertising traps will not be laid to ensnare them. *Donaldson*, 333 U.S. at 189; *Lavie*, 105 Cal. App. 4th at 509-10. It precludes consideration of evidence that reasonable consumers rely on salient front label claims, especially when making low value purchases, and that advertisers take this and other predictable behavior into account in designing their labels.

2. The District Court Ignored the Pleadings in Favor of Its Own View of What Reasonable Consumers Know and How They Make Purchase Decisions

The district court believed every reasonable consumer knows the "facts of life" that "pure dairy products" spoil if left unrefrigerated and therefore no reasonable consumer could believe "shelf-stable" packaged cheese contained only cheese. SA32. The district court, as it turns out, is wrong.

With respect, even if it was correct, whether a reasonable consumer walking down the grocery aisle (as opposed to a judge contemplating the nature of dairy products in chambers) makes this connection or determination is open to debate. This is why the relevant evidence is a survey

of consumers' perceptions of the advertising. Indeed, the district court's "well-known facts of life" seem more applicable to milk. Parmesan cheese brings to mind the hard, cured cheese wheels, called truckles, stacked in shop windows of Italy that improve with age, not spoil. Indeed, plaintiffs' complaints allege that parmesan cheese keeps without refrigeration.[31]

The district court gave no credence to these allegations. The fact that parmesan cheese lasts without refrigeration "do[es] not undermine the court's view that a reasonable consumer … would disregard the 'well-known fact[] of life' that pure dairy products spoil if left unrefrigerated." SA33. In other words, the district found—as a matter of law—that reasonable consumers believe and act contrary to the facts of parmesan cheese.

The district court substituted its views for those of a reasonable consumer as determined by evidence, and in doing so, erred. Most certainly, a reasonable consumer's understanding of the shelf life of parmesan cheese, and if and how this enters into their purchase decision of defendants' products, should be made by six jurors based on evidence, instead of one judge on the pleadings. *See Kraft, Inc. v. FTC*, 970 F.2d 311, 318 (7th Cir. 1992) ("The most convincing extrinsic evidence is a survey 'of what consumers thought upon reading the advertisement in question'.").

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[31] ECF 225, ¶ 26; ECF 226, ¶ 15; ECF 227, ¶ 21; ECF 228, ¶ 21; ECF 229, ¶ 21.

3. Consumer Surveys Are Relevant

In response to a survey, 85% to 95% of consumers reported "100% Grated Parmesan Cheese" to them meant the products are 100% cheese that is grated.[32] The district court found the consumer "surveys are valueless" because "a court, on its own" can determine as a matter of law that a reasonable consumer would not be misled. SA32. Well yes, … but only in specific circumstances. A question of fact can be determined as a matter of law only at the "outer boundaries," at the "point at which a juror could reasonably find only one way." *Dumont*, 934 F.3d at 40.

The survey results alleged (which must be taken as true) show a juror could find nearly all consumers could be deceived by the dichotomous labeling. The district court was wrong to take the question away from the jury and substitute its own view (formed without the benefit of evidence) as a matter of law. Indeed, this Court has looked to consumer surveys as evidence "that consumers were confused by the product." *Suchanek*, 764 F.3d at 762. In light of the consumer survey evidence in *Suchanek*, the Court "reversed summary judgment because the surveys created a genuine issue of material fact as to whether the defendant's packaging was likely to deceive reasonable consumers." *Beardsall*, 2020 U.S. App. LEXIS 9088, at *11 (citing *Suchanek*,

[32] ECF 225, ¶¶ 3, 29; ECF 226, ¶¶ 3, 17; ECF 227, ¶¶ 3, 24; ECF 228, ¶¶ 3, 24; ECF 229, ¶¶ 3, 24.

764 F.3d at 762). Similarly, this Court has "relied on survey data to establish that the deception was material" to consumers. *Id*. at *12 (citing *Kraft*, 970 F.2d at 323).

The district court relied on *Goldman v. Bayer AG*, No. 17-cv-0647-PJH, 2017 U.S. Dist. LEXIS 117117 (N.D. Cal. July 26, 2017), as authority that consumer surveys "are valueless." SA32. *Goldman* was vacated by the Ninth Circuit because *Brady* (discussed *supra*) "constitutes new relevant authority on the state law issues raised in the complaint." *Goldman v. Bayer AG*, 742 Fed. Appx. 325 (9th Cir. 2018). The district court erred in disregarding the consumer survey allegations a "valueless."

4. Linguistic Analyses Are Not Valueless

The district court also disregarded the linguists' opinions because "a reasonable consumer [] does not approach or interpret language in the manner of a linguistics professor." SA31. This is not exactly correct. A linguist studies language as used by a given population. Here, the purpose of the linguists' analyses was to determine what the phrase "100% Grated Parmesan Cheese" means "in common speech."[33] Analyzing the syntax and semantics of the phrase is just a fancy way of saying the linguists derived the common speech meaning (the semantics) based on the arrangement of the words (syntax). The allegations regarding the linguists should not have been

[33] ECF 225-1, ¶ 1; ECF 225-2 at 1.

disregarded as a matter of law.

Plaintiffs plausibly alleged defendants' advertising is likely to deceive consumers acting reasonably in the circumstances. The judgments should be reversed and plaintiffs permitted the opportunity to present evidence proving their claims.

VII. APPEALS OF THE JUDGMENTS IN THE PUBLIX AND TARGET CASES ARE TIMELY

The Court's February 21, 2020 order instructs plaintiffs in the Publix and Target complaints to address the timeliness of their appeal, including whether their appeal must be limited to the district court's July 16, 2019 order denying their motion for leave to file second amended complaints and the application or waiver of the 150-day judgment deeming rules of Fed. R. App. P. 4(a)(7)(A) and Fed. R. Civ. P. 58(c)(2)(B).

These plaintiffs' appeals were timely filed and Target and Publix forfeited potential application of the 150-day judgment deeming rules.

A. While Premature, Plaintiffs Filed a Notice of Appeal from the July 16, 2019 Order on August 15, 2019, Perfecting the Appeal on August 26, 2019

Plaintiffs in the Target and Publix cases filed a notice of appeal from the district court's July 16, 2019 order dismissing with prejudice Rudder and Pellitteri's claims against Publix, and Bell, Fata, Reeves, and Zachary's claims against Target. SA58. That notice of appeal was likely premature, and

Target and Publix treated it as such. If the notice was not prematurely filed, it was timely. If it was prematurely filed, it became effective after the district court entered judgment on August 26, 2019. Either way, the notice of appeal is timely.

When a party files a notice of appeal after the district court makes an order—but before entry of final judgment—the notice of appeal is treated as if filed on the date of entry of the judgment. Fed. R. App. P. 4(a)(2); *Feldman v. Olin Corp.*, 692 F.3d 748, 758 (7th Cir. 2012) "The Rule is effective when there is a notice of appeal from a 'nonfinal decision' that '*would be* appealable if immediately followed by the entry of judgment.'" *Outlaw v. Airtech Air Conditioning & Heating, Inc.*, 412 F.3d 156, 161 (D.C. Cir. 2005) (quoting *FirsTier Mtg. Co. v. Investors Mtg. Ins. Co.*, 498 U.S. 269, 276 (1991)). That is, in "a multi-party or multi-claim suit, a premature notice of appeal from the dismissal of a party or claim will ripen upon the entry of a belated Rule 54(b) judgment under Rule 4(a)(2) and *FirsTier*." *Brown v. Columbia Sussex Corp.*, 664 F.3d 182, 189 (7th Cir. 2011).

The district court's July 16, 2019 order dismissed with prejudice Rudder and Pellitteri's claims against Publix, and Bell, Fata, Reeves, and Zachary's claims against Target. SA58. But that order did not resolve the claims of all parties to those proceedings and no separate judgment was entered in the immediate aftermath of the order. *Id*. Indeed, because the district court

organized this MDL on multiple interrelated tracks, Bell, Fata, and Reeves still had claims pending against other defendants.

Although no final judgment had been entered, plaintiffs nonetheless filed a notice of appeal on August 15, 2019, because the district court used the phrase "dismissed with prejudice" in the order and the timing for appeal was uncertain. ECF 374. The same day, they filed a docketing statement explaining that jurisdiction of the appellate court would lie upon entry of final judgment in the *Pellitteri, Rudder,* and *Zachary* cases, and entry of partial final judgment on the 100% claims under Fed. R. Civ. P. 54(b). ECF 375. Publix and Target had until April 29, 2019, to file a "complete" docketing statement if they believed appellants' docketing statement to be "not complete and correct." Circuit Rule 3(c)(1). Publix and Target filed nothing.

Consequently, at the latest, the August 15, 2019, notice of appeal became effective on August 26, 2019, when the district court entered final judgment in the *Rudder*, *Pellitteri*, and *Zachary* cases, and partial final judgment with respect to the 100% claims. The Target and Publix plaintiffs' appeals were timely filed.

B. The 150-day Judgment Deeming Rules Do Not Apply

Fed. R. Civ. P. 58(c)(2)(B) and Fed. R. App. 4(a)(7)(A)(ii) provide that a judgment requiring entry of a separate document is deemed entered when entered in the civil docket and either set forth in a separate document or 150

days have run since entry of the judgment in the civil docket, whichever occurs first. These rules do not apply here.

First, the 150-day judgment rules do not apply because the district court's November 1, 2018 order did not resolve all claims for all parties. "A final decision is one by which a district court disassociates itself from a case." *Gelboim v. Bank of Am. Corp.*, 574 U.S. 405, 408-09 (2015). It is one that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin v. U.S.,* 324 U.S. 229, 233 (1945).

The November 1, 2018 order is not a final judgment. The order did not resolve all claims for all parties, and, in fact, denied defendants' motions to dismiss plaintiffs' claims against Kraft, Albertsons, and Wal-Mart—including claims brought by Bell, Reeves, and Fata—that the ingredient lists were deceptive because they omitted that cellulose was added to the products as a filler. SA56-57.

This also reflects the manner in which the district court managed this MDL proceeding. It purposefully did not enter a final judgment. It was not until the July 16, 2019 order that the district court expressly began to consider whether to enter judgment. ECF 369 (requesting the parties' views on whether judgment should be entered as to the claims dismissed with prejudice). Even without the district court's active management of when a final judgment would be entered and as to which aspects of the cases, a

district court's dismissal of only certain parties is a tell-tale sign of a nonfinal decision. *See U.S. v. Ettrick Prods., Inc.*, 916 F.2d 1211, 1217 (7th Cir. 1990).

Second, Publix and Target waived the right to apply the 150-day judgment deeming rules. Fed. R. App. P. 4(a)(7)(A)(ii) and Fed. R. Civ. P. 58(c)(2)(B) are mandatory claim-processing rules, not jurisdictional requirements. Therefore, "a litigant may waive or forfeit the benefit of" these rules. *Walker v. Weatherspoon*, 900 F.3d 354, 356-57 (7th Cir. 2018). When addressing waiver, courts "look to litigants' (and their attorneys') words and actions as objective manifestations, rather than asking what parties were thinking when they said or did something." *Hamer v. Neighborhood Hous. Servs. of Chicago*, 897 F.3d 835, 840 (7th Cir. 2018).

Here, Publix and Target forfeited any rights under Rules 4 and 58. To begin with, Publix and Target argued in their December 21, 2018 opposition for leave to file second amended complaints that the November 1, 2018 order constituted a final judgment and, as a result, that the district court lacked jurisdiction to resolve plaintiffs' motion. ECF 324 at 7-8; ECF 325 at 1. A year later, they abandoned that position in their Joint Jurisdictional Memorandum, conceding that no Rule 58(a) judgment was entered by the district court following entry of the November 1, 2018 order. ECF 11 at 3.

Publix and Target then joined in the filing of two joint status reports requesting entry of final and partial judgments so this appeal could proceed.

They joined the July 31, 2019 Joint Status Report requesting that the district court enter final judgment in the *Rudder*, *Pellitteri*, and *Zachary* member cases and enter partial final judgment on the "100% claims" dismiss by the district court. ECF 371. They also joined the August 19, 2019 Joint Status Report—four days after the filing of the initial notice of appeal—again requesting (with added detail) entry of final and partial final judgments. ECF 379. By twice requesting entry of final judgment and partial final judgment, Publix and Target waived any right to argue that final judgment was entered months earlier by operation of Fed. R. Civ. P. 58(c)(2)(B).

And there is more. Plaintiffs' August 15, 2019 docketing statement set forth the bases of the Court's jurisdiction. If Publix or Target believed the docketing statement not to be "complete and correct," they were to file a "complete" docketing statement. Cir. Ct. R. 3(c)(1). They did not do so, forfeiting their rights under the Rule 4(a)(7)(A)(ii). Their September 11, 2019 jurisdictional memorandum filed in response to the Court's inquiry regarding the 150-day rule does not alter such forfeiture. *Walker*, 900 F.3d at 357 (rejecting the appellees' "belated" attempt to invoke 150-day rule in a supplemental jurisdictional memorandum filed after being alerted by the Court "to a problem with the appeal's timing").

Finally, this Court's analysis in *Walker* is instructive. There, the district court entered an order granting summary judgment in favor of the

defendants but waited sixteen months before releasing its opinion. 900 F.3d at 356. Recognizing the appeal—filed the same day as the district judge's opinion—"came many months too late" under appellate rule 4, the Court held that appellees forfeited their rights under the Rule 4(a)(7)(A)(ii) "[b]y treating the appeal as early rather than late" in the jurisdictional section of their brief. *Id.* at 356-57. Here, as in *Walker*, Publix and Target forfeited their rights under the 150-day judgment deeming rules.

VIII. CONCLUSION

For the foregoing reasons, plaintiffs respectfully request that the Court reverse the district court's judgments and remand these cases for further proceedings.

Respectfully submitted,

Dated: April 14, 2020

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CERTIFICATE OF COMPLIANCE WITH WORD LIMIT, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

1. This document complies with the word limit of Cir. R. 32(c) and Fed. R. App. P. 32(a)(7) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 12,273 words.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 13-point Century Schoolbook.

Executed on April 14, 2020.

s/ Ben Barnow
BEN BARNOW

CERTIFICATE OF SERVICE

I hereby certify that on April 14, 2020, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all registered participants via the CM/ECF system.

s/ Ben Barnow
BEN BARNOW

CIRCUIT RULE 30(d) CERTIFICATION

Pursuant to Circuit Rule 30(d), I hereby certify that all materials required by Circuit Rules 30(a) and (b) are included in the Required short Appendix.

s/ Ben Barnow
BEN BARNOW

REQUIRED SHORT APPENDIX

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

IN RE: 100% GRATED PARMESAN CHEESE MARKETING AND SALES PRACTICES LITIGATION	)	16 C 5802
	)	MDL 2705
	)	Judge Gary Feinerman
This Document Relates to All Cases	)	

MEMORANDUM OPINION AND ORDER

Defendants in this multidistrict litigation are purveyors of grated parmesan cheese products with labels stating "100% Grated Parmesan Cheese" or some variation thereof. Plaintiffs allege that they were misled by the labels because the products contain ingredients other than cheese—in particular, a nontrivial amount of cellulose. After the Judicial Panel on Multidistrict Litigation consolidated these suits before the undersigned judge, Doc. 1, Plaintiffs filed five consolidated class action complaints, which allege violations of various state consumer protection statutes, breaches of express and implied warranty, and unjust enrichment. Docs. 120-123, 143. Defendants move to dismiss the complaints under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). Docs. 156, 160, 163, 167, 173. The Rule 12(b)(1) motions are denied, but the Rule 12(b)(6) motions are granted.

Background

On a facial challenge to subject matter jurisdiction under Rule 12(b)(1) or a motion to dismiss under Rule 12(b)(6), the court assumes the truth of the operative complaints' factual allegations, though not their legal conclusions. *See Zahn v. N. Am. Power & Gas, LLC*, 815 F.3d 1082, 1087 (7th Cir. 2016) (Rule 12(b)(6)); *Apex Dig. Inc. v. Sears, Roebuck & Co.*, 572 F.3d 440, 443-44 (7th Cir. 2009) (Rule 12(b)(1)). The court must also consider "documents attached to the complaint[s], documents that are critical to the complaint[s] and referred to in [them], and

information that is subject to proper judicial notice," along with additional facts set forth in Plaintiffs' brief opposing dismissal, so long as those additional facts "are consistent with the pleadings." *Phillips v. Prudential Ins. Co. of Am.*, 714 F.3d 1017, 1020 (7th Cir. 2013). Where a complaint attaches only part of a relevant document, the court may consider the entire document if the defendant appends it to its motion. *See Rosenblum v. Travelbyus.com*, 299 F.3d 657, 661-62 (7th Cir. 2002) (holding that the court could consider the remainder of a contract referenced in the complaint, where the plaintiff "appended only a part of the relevant instrument" and the defendant attached the rest). The facts are set forth as favorably to Plaintiffs as those materials allow, and all reasonable inferences are drawn in their favor. *See Pierce v. Zoetis, Inc.*, 818 F.3d 274, 277 (7th Cir. 2016). In setting forth those facts at the pleading stage, the court does not vouch for their accuracy. *See Jay E. Hayden Found. v. First Neighbor Bank, N.A.*, 610 F.3d 382, 384 (7th Cir. 2010).

Defendants The Kraft Heinz Company, Albertsons Companies, Inc. and Albertsons LLC (together, "Albertsons"), Supervalu, Inc., Target Corporation, Wal-Mart Stores, Inc., ICCO-Cheese Company, Inc., and Publix Super Markets, Inc. design, develop, manufacture, sell, test, package, label, distribute, promote, market, and/or advertise grated parmesan cheese products. Doc. 120 at ¶¶ 16-17; Doc. 121 at ¶¶ 10-14; Doc. 122 at ¶¶ 11-12; Doc. 123 at ¶¶ 13-14; Doc. 143 at ¶ 9. The products all bore labels stating "100% Grated Parmesan Cheese," Doc. 120 at ¶¶ 7, 9-15; Doc. 121 at ¶¶ 7-9; Doc. 122 at ¶¶ 7-11; Doc. 123 at ¶¶ 7-12, or some similar variation, Doc. 120 at ¶ 8 ("100% Grated Parmesan and Romano Cheese"); Doc. 122 at ¶¶ 7-8, 10 ("Parmesan 100% Grated Cheese"); Doc. 123 at ¶¶ 7-12 ("100% Parmesan Grated Cheese"); Doc. 143 at ¶ 7 ("100% Real Grated Romano Parmesan Cheese"); *id*. at ¶ 8 ("100% Real Grated Parmesan Cheese"); *see also* Doc. 120 at ¶ 20 ("100% Grated Three Cheese Blend"). In

addition, Kraft "developed and paid for [television commercials] throughout the years and the class period [which] reinforced the message that the Products are comprised of only 100% real cheese." Doc. 120 at ¶ 21.

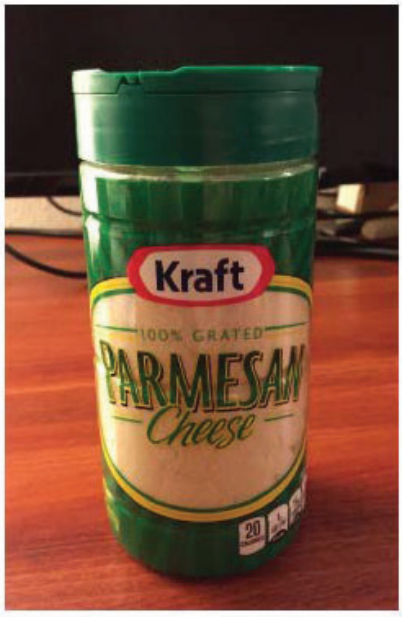
Plaintiffs are consumers who purchased Defendants' products at grocery stores around the country. Doc. 120 at ¶¶ 7-15; Doc. 121 at ¶¶ 7-9; Doc. 122 at ¶¶ 7-10; Doc. 123 at ¶¶ 7-12; Doc. 143 at ¶¶ 7-8. Plaintiffs purchased the products believing that they contained only cheese, and nothing else. Doc. 120 at ¶¶ 7-15; Doc. 121 at ¶¶ 7-9; Doc. 122 at ¶¶ 7-10; Doc. 123 at ¶¶ 7-12; Doc. 143 at ¶¶ 7-8. The products, however, contain not just cheese, but also anywhere from 3.8% to 8.8% cellulose, an organic polymer with no nutritional value that is "often used as a filler." Doc. 120 at ¶¶ 19, 22 (complaint against Kraft, alleging 3.8% cellulose); Doc. 121 at ¶¶ 16, 18 (complaint against Albertsons and Supervalu, alleging 8.8% cellulose); Doc. 122 at ¶¶ 16, 18 (complaint against Target and ICCO, not specifying a percentage); Doc. 123 at ¶¶ 17-18, 20 (complaint against Wal-Mart and ICCO, alleging 7.8% cellulose); Doc. 143 at ¶¶ 11, 13 (complaint against Publix, alleging "a significant portion" of cellulose). Some of the products also contained other ingredients, including potassium sorbate, Doc. 120 at ¶ 19; Doc. 122 at ¶ 16; Doc. 123 at ¶ 18, and corn starch, Doc. 122 at ¶¶ 15-16.

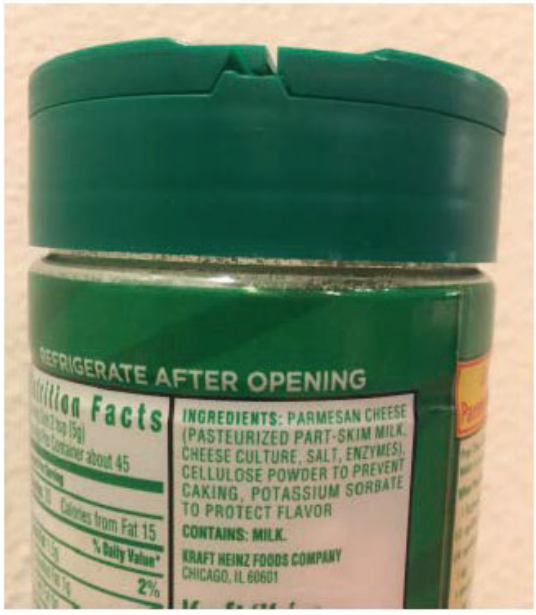
Each product has an ingredient list somewhere on its label, and each ingredient list disclosed the non-cheese ingredients. Doc. 157 at 11-12; Doc. 162 at 14; Doc. 164-1; Doc. 168-1; Doc. 174 at 8. While "100% Grated Parmesan Cheese" (and the other, similar descriptions) are prominently featured on the products' front labels, the ingredient lists are smaller, less conspicuous, and located near the nutritional facts on the rear labels. Doc. 157 at 11-12; Doc. 162 at 14; Doc. 164-1; Doc. 168-1; Doc. 174 at 8. Each ingredient list states that the cellulose is

added "to prevent caking." Doc. 157 at 11-12; Doc. 162 at 14; Doc. 164-1; Doc. 168-1; Doc. 174 at 8.

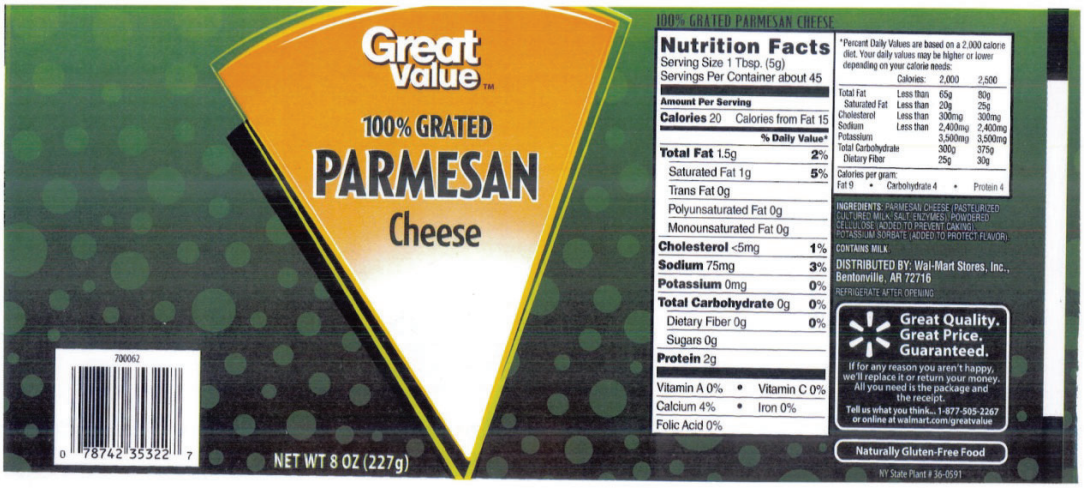
As a representative example, Kraft's "100% Grated Parmesan Cheese" packaging includes, on the back of the container, the following list in a relatively small, all-capital-letters font: "Ingredients: Parmesan Cheese (pasteurized part-skim milk, cheese culture, salt, enzymes), cellulose powder to prevent caking, potassium sorbate to protect flavor." Doc. 162 at 14. The "100% Grated Parmesan Cheese" description is featured prominently on the front label. *Ibid*. The packaging advises purchasers to "refrigerate after opening," *ibid*., plainly indicating that the unopened product is shelf-stable and need not be refrigerated.

The following images show the products' general appearance and the labels' layout and design.

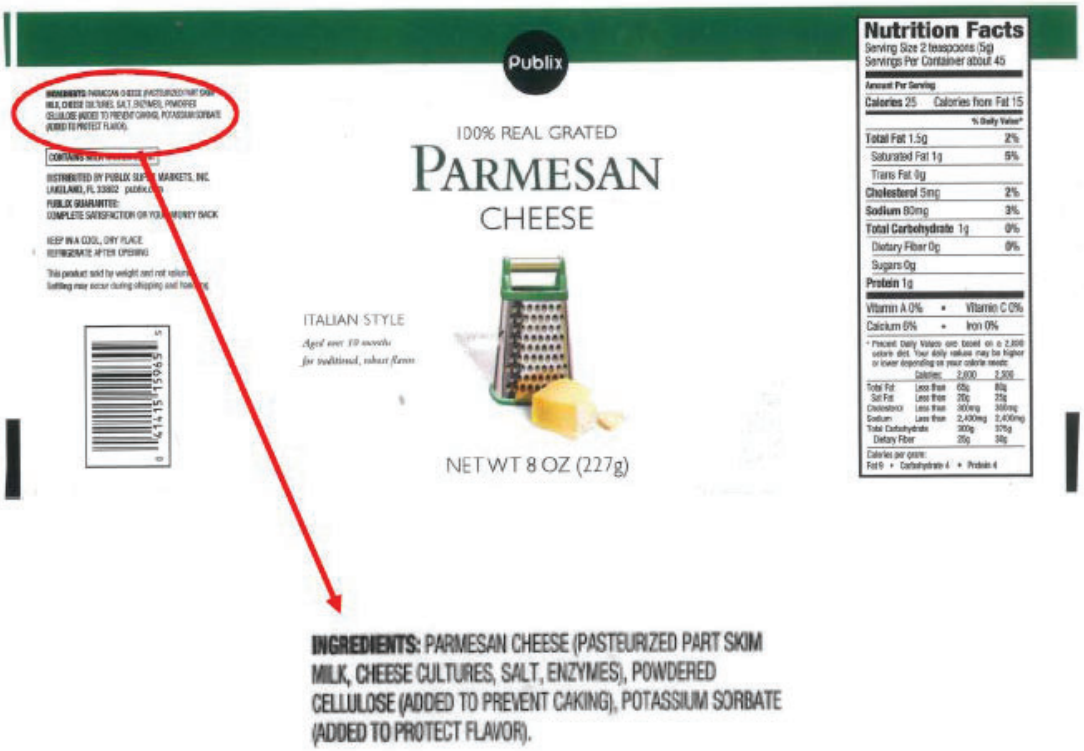




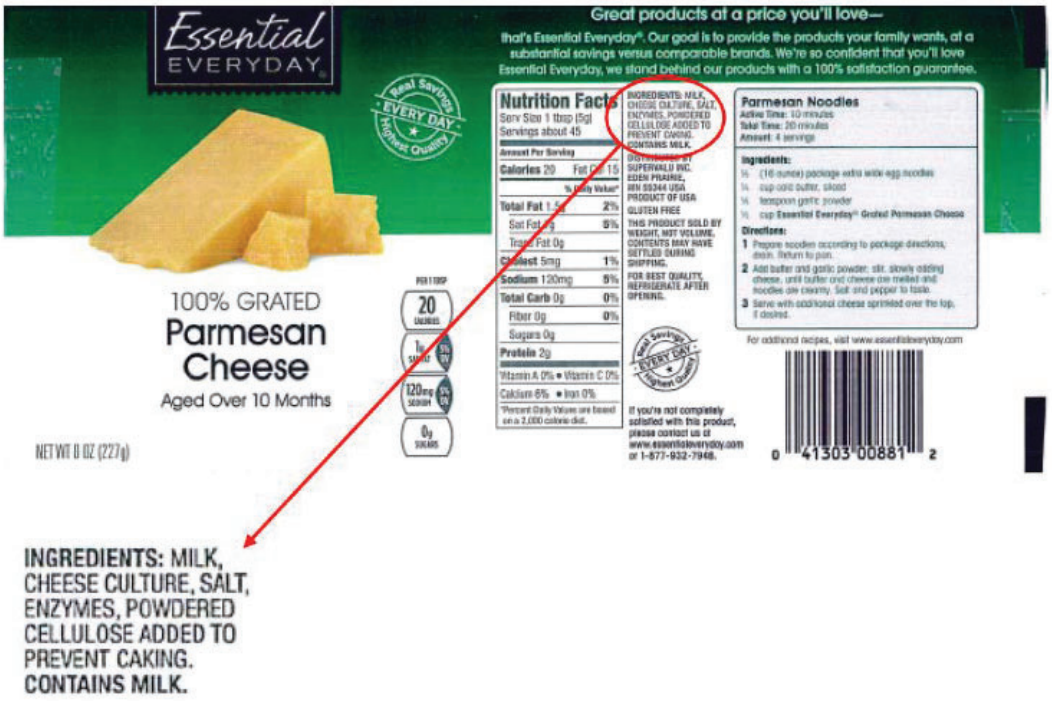
Doc. 162 at 14 (Kraft).



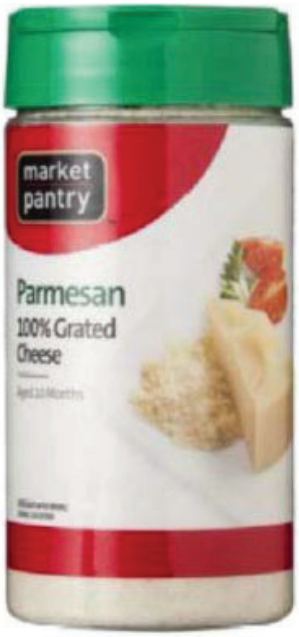
Doc. 168-1 at 2 (Wal-Mart and ICCO).



Doc. 174 at 8 (Publix).



Doc. 157 at 12 (Albertsons and Supervalu).



INGREDIENTS: PARMESAN CHEESE (PASTEURIZED CULTURED COW'S MILK, SALT, ENZYMES), POWDERED CELLULOSE AND CORN STARCH (ADDED TO PREVENT CAKING), POTASSIUM SORBATE (ADDED TO PROTECT FLAVOR).
CONTAINS MILK

Doc. 164-1 at 2 (Target and ICCO).

Discussion

Defendants seek dismissal under Rule 12(b)(1) for lack of Article III standing and under Rule 12(b)(6) for failure to state a claim. Because standing is jurisdictional, the court must consider it before reaching the merits. *See Hinrichs v. Speaker of House of Representatives of Ind. Gen. Assembly*, 506 F.3d 584, 590 (7th Cir. 2007).

I. Article III Standing

Defendants assert that Plaintiffs do not adequately plead two necessary components of Article III standing, injury and causation. Doc. 164 at 23-25. The Supreme Court recently reiterated the requirements for Article III standing:

> [T]he irreducible constitutional minimum of standing consists of three elements. The plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision. The plaintiff, as the party invoking federal jurisdiction, bears the burden of establishing these elements.

Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1547 (2016) (citations and internal quotation marks omitted); *see also Lewert v. P.F. Chang's China Bistro, Inc.*, 819 F.3d 963, 966 (7th Cir. 2016) ("[Plaintiffs] must demonstrate that they have 'suffered a concrete and particularized injury that is fairly traceable to the challenged conduct, and is likely to be redressed by a favorable judicial decision.'") (quoting *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2661 (2013)).

Plaintiffs' alleged injuries are financial. They claim that they purchased a product worth less than what they paid because it contained non-cheese ingredients, and also that they received something different—and less valuable—than what they were promised, because the front label misleadingly states that the product is 100% cheese. Doc. 120 at ¶ 24; Doc. 121 at ¶ 20; Doc. 122 at ¶ 20; Doc. 123 at ¶ 22; Doc. 143 at ¶ 15. For the reasons given in *In re Aqua Dots*

Products Liability Litigation, 654 F.3d 748 (7th Cir. 2011), these allegations are sufficient to establish standing.

The plaintiffs in *Aqua Dots* sued the manufacturer and distributors of a children's toy consisting of little beads that could be fused together to create designs. *Id*. at 749. When swallowed, a chemical in the beads metabolized into gamma-hydroxybutyric acid, commonly known as the "date rape" drug. *Ibid*. Children who swallowed a large number of beads became sick, with some falling into comas. *Id*. at 749-50. The plaintiffs were not physically injured children or their parents, but instead were the parents of children who suffered no physical injury. *Id*. at 750. The Seventh Circuit held that the plaintiffs had Article III standing. According to the court, the fact that the plaintiffs "did not suffer physical injury, … [did] not mean that they were uninjured. The plaintiffs' loss is financial: they paid more for the toys than they would have, had they known of the risks the beads posed to children. A financial injury creates standing." *Id*. at 751; *see also United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 686 (1973) (noting that "those who could show economic harm" have standing) (citation omitted).

The same result obtains here. The complaints allege, among other things, that Plaintiffs overpaid for Defendants' products because the non-cheese ingredients made the products less valuable than what they cost. Doc. 120 at ¶ 24; Doc. 121 at ¶ 20; Doc. 122 at ¶ 20; Doc. 123 at ¶ 22; Doc. 143 at ¶ 15. As in *Aqua Dots,* that is sufficient to establish standing. *See Muir v. Playtex Prods., LLC*, 983 F. Supp. 2d 980, 986-87 (N.D. Ill. 2013) (holding that the plaintiff had standing where she alleged that she paid a premium for a diaper-disposal product based on the false representation that it had been "Proven #1 in Odor Control"); *Lipton v. Chattem, Inc.*, 2012 WL 1192083, at *3-4 (N.D. Ill. Apr. 10, 2012) (same, where the plaintiff alleged that she paid

more for a weight loss product than she would have paid had she known that it contained hexavalent chromium); *Askin v. Quaker Oats Co.*, 818 F. Supp. 2d 1081, 1084 (N.D. Ill. 2011) (same, where the plaintiff alleged that she paid a premium for a food product based on the defendant manufacturer's false representations that the product did not contain unhealthy trans fats); *Chacanaca v. Quaker Oats Co.*, 752 F. Supp. 2d 1111, 1124-25 (N.D. Cal. 2010) (same); *Gonzalez v. Pepsico, Inc.*, 489 F. Supp. 2d 1233, 1240-41 (D. Kan. 2007) (same, where the plaintiff alleged that she paid more for beverages than they were worth because they potentially contained benzene). And if Plaintiffs are correct that Defendants' labels are misleading, then the complaints—which assert that Plaintiffs viewed the allegedly misleading labels and formed a belief that the products contained only cheese—provide an adequate basis to conclude that the challenged conduct caused their injuries. *See Muir*, 983 F. Supp. 2d at 991 (holding that the plaintiff adequately alleged causation because "it suffices at the pleading stage to allege that the plaintiff incurred a financial injury upon purchasing a product based on the defendant's deceptive statements"). The complaints therefore allege an injury-in-fact that is sufficiently concrete and particularized, fairly traceable to Defendants' conduct, and redressable by the court.

Defendants' other "standing" arguments are not standing arguments at all. Albertsons and Supervalu contend that Plaintiffs' injuries are merely conjectural, not concrete, because "'100% cheese' is *not* what Supervalu's labels promised" and because "Supervalu's labels were in full compliance with FDA regulations." Doc. 157 at 18. Target and ICCO contend that there is no causation because Plaintiffs "do not allege how or why they formed th[e] belief" that the products contained only cheese, given that the labels (in Target and ICCO's view) do not make any such representations when viewed as a whole. Doc. 164 at 25. Those arguments are just merits arguments repackaged as standing arguments. *See Aurora Loan Servs., Inc. v. Craddieth*,

442 F.3d 1018, 1024 (7th Cir. 2006) ("The point is not that to establish standing a plaintiff must establish that a right has been infringed; that would conflate the issue of standing with the merits of the suit. It is that he must have a colorable *claim* to such a right."). Plaintiffs therefore have standing to pursue their claims.

II. Merits

A. Consumer Protection Claims

Plaintiffs bring claims under various state consumer protection statutes: Alabama Deceptive Trade Practices Act, Ala. Code § 8-19-1 *et seq*. ("ADPTA"), Doc. 120 at 29-30; Doc. 121 at 11-12; Doc. 123 at 23-25; California Consumers Legal Remedies Act, Cal. Civ. Code § 1750 *et seq*. ("CLRA"), Doc. 120 at 19-20; Doc. 122 at 20-21; Doc. 123 at 27-28; California Unfair Competition Law, Cal. Bus. & Profs. Code § 17200 *et seq.* ("UCL"), Doc. 120 at 17-19; Doc. 122 at 18-20; Doc. 123 at 25-27; Connecticut Unfair Trade Practices Act, Conn. Gen. Stat. § 42-110b ("CUTPA"), Doc. 120 at 26-27; Florida Deceptive and Unfair Trade Practices Act, Fla. Stat. § 501.201 *et seq*. ("FDUTPA"), Doc. 120 at 27-29; Doc. 122 at 16-18; Doc. 123 at 20-22, Doc. 143 at 8-10; Illinois Deceptive Practices and Consumer Fraud Act, 815 ILCS 505/2 ("ICFA"), Doc. 120 at 25-26; Doc. 121 at 10-11; Doc. 122 at 13-14; Michigan Consumer Protection Act, Mich. Comp. Laws § 445.903 *et seq*. ("MCPA"), Doc. 120 at 31-32; Minnesota Unlawful Trade Practices Act, Minn. Stat. § 325D.09 *et seq*. ("MUTPA"), Doc. 120 at 22-23; Doc. 123 at 17-18; Minnesota Deceptive Trade Practices Act, Minn. Stat. § 325D.44 *et seq*. ("MDTPA"), Doc. 120 at 24-25; Doc. 123 at 19-20; Minnesota False Statement in Advertising Act, Minn. Stat. § 325F.67 ("MFSAA"), Doc. 120 at 23-24; Doc. 123 at 18-19; Minnesota Prevention of Consumer Fraud Act, Minn. Stat. § 325F.68 *et seq*. ("MPCFA"), Doc. 120 at 21-22; Doc. 123 at 15-17; Missouri Merchandising Practices Act, Mo. Rev. Stat. § 407.010 *et seq*.

("MMPA"), Doc. 122 at 14-16; New Jersey Consumer Fraud Act, N.J. Stat. § 56:8-1 *et seq*. ("NJCFA"), Doc. 123 at 22-23; and New York General Business Law §§ 349, 350 ("NYGBL"), Doc. 120 at 15-16; Doc. 123 at 14-15.

The parties cite precedents applying these laws interchangeably and agree that, while they differ in certain particulars, all share a common requirement: to state a claim, a plaintiff must allege conduct that plausibly could deceive a reasonable consumer. *See*, *e.g.*, Doc. 162 at 16 & n.4 ("The state laws invoked by Plaintiffs require proof that the challenged statement is likely to mislead a reasonable consumer."); Doc. 185 at 31 & n.14 ("Generally, state consumer protection claims alleging deceptive trade practices may be satisfied by proof that a statement is likely to mislead a reasonable consumer."); *see also*, *e.g.*, *Ebner v. Fresh, Inc.*, 838 F.3d 958, 965 (9th Cir. 2016) ("Plaintiff's claims under [UCL and CLRA] are governed by the reasonable consumer test.") (citation omitted); *Suchanek v. Sturm Foods, Inc.*, 764 F.3d 750, 755-57 (7th Cir. 2014) (holding that the question of whether a "reasonable consumer" would likely be deceived was common to all members of a proposed class that included Alabama consumers suing under state consumer protection law) (citing *Chrysler Corp. v. Schiffer*, 736 So. 2d 538, 543-44 (Ala. 1999)); *ibid*. (holding the same for New Jersey consumers) (citing *Turf Lawnmower Repair, Inc. v. Bergen Record Corp.*, 655 A.2d 417, 430 (N.J. 1995)); *Fink v. Time Warner Cable*, 714 F.3d 739, 741 (2d Cir. 2013) ("To prevail on their consumer fraud claims under New York and California law, Plaintiffs must establish that Time Warner's allegedly deceptive advertisements were likely to mislead a reasonable consumer acting reasonably under the circumstances."); *Zlotnick v. Premier Sales Grp., Inc.*, 480 F.3d 1281, 1284 (11th Cir. 2007) ("[D]eception [under the FDUTPA] occurs if there is a representation, omission, or practice that is likely to mislead the consumer acting reasonably in the circumstances … .") (quoting *PNR,*

Inc. v. Beacon Prop. Mgmt., Inc., 842 So.2d 773, 777 (Fla. 2003)); *In re Gen. Mills Glyphosate Litig.*, 2017 WL 2983877, at *5-6 (D. Minn. July 12, 2017) (applying the "reasonable consumer" standard when analyzing motion to dismiss a class action complaint asserting violations of the MPCFA, the MDTPA, and other consumer protection laws); *Nelson v. MillerCoors, LLC*, 2017 WL 1403343 (E.D.N.Y. Mar. 31, 2017) ("The reasonable consumer standard applies to [NYGBL] section 349 and 350 claims … ."); *Thornton v. Pinnacle Foods Grp. LLC*, 2016 WL 4073713, at *3 (E.D. Mo. Aug. 1, 2016) (inquiring whether "a reasonable consumer would be deceived by a product label" when examining an MMPA claim); *Smith v. Wells Fargo Bank, N.A.*, 158 F. Supp. 3d 91, 101 (D. Conn. 2016) ("[A] plaintiff can plead a deceptive act or practice [under CUTPA] by establishing … the defendant made a representation, omission, or other practice likely to mislead consumers … [and] the plaintiff, a consumer, interpreted the message reasonably under the circumstances … .") (citing *Caldor, Inc. v. Heslin*, 577 A.2d 1009, 1013 (Conn. 1990)), *aff'd*, 666 F. App'x 84 (2d Cir. 2016); *Phillips v. DePaul Univ.*, 19 N.E.3d 1019, 1031 (Ill. App. 2014) ("[T]he analysis [under the ICFA] must consider whether the act was deceptive as reasonably understood in light of all the information available to plaintiffs.") (emphasis omitted); *Dix v. Am. Bankers Life Assurance Co. of Fla.*, 415 N.W.2d 206, 209 (Mich. 1987) (asking under the MCPA whether "a reasonable person would have relied on" the allegedly deceptive representations); *Curtis v. Philip Morris Cos.*, 2004 WL 2776228, at *4 (Minn. Dist. Ct. Nov. 29, 2004) (holding that under Minnesota consumer protection law, whether marketing is deceptive turns on whether "it has the capacity to mislead consumers, acting reasonably under the circumstances … (i.e. to entice a reasonable consumer to purchase the product)").

Thus, for purposes of state consumer protection statutes, "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, 938 (7th Cir. 2001); *see also Ebner*, 838 F.3d at 965 ("Plaintiff[s] must show that members of the public are likely to be deceived.") (internal quotation marks omitted). "Whether an advertisement is misleading must be judged by the effect it would have on a reasonable consumer." *Davis v. HSBC Bank Nev., N.A.*, 691 F.3d 1152, 1161 (9th Cir. 2012). So on a motion to dismiss, the question is "whether the allegedly false and misleading statements can be read to create a likelihood of deception or to have the capacity to deceive" a reasonable consumer. *Bober*, 246 F.3d at 938. To clear this bar, there must be "more than a mere possibility that [a] label might conceivably be misunderstood by some few consumers viewing it in an unreasonable manner. Rather, the reasonable consumer standard requires a probability that a significant portion of the general consuming public … , acting reasonably in the circumstances, could be misled." *Ebner*, 838 F.3d at 965 (internal quotation marks and citations omitted); *see also Fink*, 714 F.3d at 741 ("To prevail on their consumer fraud claims … Plaintiffs must establish that [the] allegedly deceptive advertisements were likely to mislead a reasonable consumer acting reasonably under the circumstances."); *Zlotnick*, 480 F.3d at 1284 ("[D]eception occurs if there is a representation, omission, or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer's detriment."). "This standard requires a showing of probable, not possible, deception." *Zlotnick*, 480 F.3d at 1284 (internal quotation marks omitted). Put another way, "a representation does not become 'false and deceptive' merely because it will be unreasonably misunderstood by an insignificant and unrepresentative segment of the class of persons to whom the representation is addressed." *Davis*, 691 F.3d at 1162 (internal citation omitted).

Although a marketing practice's deceptiveness is often a question of fact inappropriate for resolution at the pleading stage, *see ibid*., "the primary evidence in a false advertising case is the advertising itself," *Williams v. Gerber Prods Co.*, 552 F.3d 934, 938 (9th Cir. 2008); *accord Fink*, 714 F.3d at 742. It therefore "is well settled that a court may determine as a matter of law that an allegedly deceptive advertisement would not have misled a reasonable consumer." *Fink*, 714 F.3d at 741.

The "allegedly deceptive act must be looked upon in light of the totality of the information made available to the plaintiff." *Davis v. G.N. Mortg. Corp.*, 396 F.3d 869, 884 (7th Cir. 2005); *see also Fink*, 714 F.3d at 742 ("[I]n determining whether a reasonable consumer would have been misled by a particular advertisement, context is crucial."); *Tudor v. Jewel Food Stores, Inc.*, 681 N.E.2d 6, 8 (Ill. 1997). This means that the "context of the packaging as a whole" must be considered in evaluating whether deception has occurred. *Williams*, 552 F.3d at 393 n.3; *see also Freeman v. Time, Inc.*, 68 F.3d 285, 290 (9th Cir. 1995). So even if a statement on a package or advertisement might be ambiguous or unclear in isolation, "the presence of a disclaimer or similar clarifying language may defeat a claim of deception." *Fink*, 714 F.3d at 742; *see also Freeman*, 68 F.3d at 290 ("Any ambiguity that [the plaintiff] would read into any particular statement is dispelled by the promotion as a whole.").

These principles yield this rule: Where a plaintiff contends that certain aspects of a product's packaging are misleading in isolation, but an ingredient label or other disclaimer would dispel any confusion, the crucial issue is whether the misleading content is ambiguous; if so, context can cure the ambiguity and defeat the claim, but if not, then context will not cure the deception and the claim may proceed. *Compare Williams*, 552 F.3d at 939 (holding that deceptive marketing claims survived a motion to dismiss where there were "a number of features

of the [front of the packaging] … which could likely deceive a reasonable consumer," and a consumer thus "should [not] be expected to look beyond misleading representations on the front of the box to discover the truth from the ingredient list"), *and Thornton*, 2016 WL 4073713, at *3 ("As for Pinnacle's 'ingredient list defense,' the Court finds it plausible that a consumer might rely on the representation 'Nothing Artificial' without looking at the ingredients … ."), *and Ackerman v. Coca-Cola Co.*, 2010 WL 2925955, at *17 (E.D.N.Y. July 21, 2010) ("[I]t seems clear that such an impression was precisely what defendant intended to convey. If that were not the case, it is difficult to understand what defendant had in mind. Accordingly, I cannot conclude as a matter of law that the statements could not have been reasonably relied on by consumers.") (citation omitted), *with Bober*, 246 F.3d at 939 (holding that, although the defendants' marketing statements were open to misinterpretation, the plaintiff failed to state a claim because other information available to consumers would "dispel[] any tendency to deceive that the statements at issue might otherwise have had"), *and Freeman*, 68 F.3d at 290 ("Any ambiguity that Freeman would read into any particular statement is dispelled by the promotion as a whole."), *and Workman v. Plum Inc.*, 141 F. Supp. 3d 1032, 1035 (N.D. Cal. 2015) (holding that, where "a reasonable consumer would simply not … assume that the size of the items pictured [on the front of a package] directly correlated with their predominance [in the product]," and where "any potential ambiguity could be resolved by the back panel of the products," the packaging was not deceptive).

In other words, while a reasonable consumer, lulled into a false sense of security by an unavoidable interpretation of an allegedly deceptive statement, may rely upon it without further investigation, *see Williams*, 552 F.3d at 939 (depicting certain fruits prominently on a product called "fruit juice snacks" was deceptive, where neither "those fruits [n]or their juices [we]re

contained in the product," even though the ingredient list accurately revealed the product's ingredients), consumers who interpret ambiguous statements in an unnatural or debatable manner do so unreasonably if an ingredient label would set them straight, *see McKinnis v. Kellogg USA*, 2007 WL 4766060, at *3-5 (C.D. Cal. Sept. 19, 2007) (holding that a reasonable consumer would check the ingredient list to determine whether there was actual fruit in "Froot Loops" breakfast cereal, where the product's allegedly misleading characteristics included the "fanciful" word "F-R-O-O-T" in its name, depictions of "ring-shaped cereal resembling fruit" and "illustrations of fruit surrounding [a] banner stating 'NATURAL FRUIT FLAVORS,'" but not any "specific affirmation" that the product contained actual fruit). This distinction rests on the principle that, when product descriptions are merely vague or suggestive, "[e]very reasonable shopper knows the devil is in the details." *Workman*, 141 F. Supp. 3d at 1035. Indeed, Plaintiffs concede that an "ingredient list … may … clarify potential ambiguities" under the reasonable consumer standard. Doc. 185 at 20.

Turning to the present suits, the description "100% Grated Parmesan Cheese" is ambiguous—as are the other, similar descriptions of Defendants' products—so Plaintiffs' claims are doomed by the readily accessible ingredient panels on the products that disclose the presence of non-cheese ingredients. Although "100% Grated Parmesan Cheese" *might* be interpreted as saying that the product is 100% cheese and nothing else, it also might be an assertion that 100% of the cheese is parmesan cheese, or that the parmesan cheese is 100% grated. Reasonable consumers would thus need more information before concluding that the labels promised only cheese and nothing more, and they would know exactly where to look to investigate—the ingredient list. Doing so would inform them that the product contained non-cheese ingredients. *See Williams*, 552 F.3d at 939-40 ("[R]easonable consumers expect that the ingredient list

contains more detailed information about the product … ."); *Workman*, 141 F. Supp. 3d at 1035 (same); *McKinnis*, 2007 WL 4766060, at *4 ("[T]he side panel lists all of the ingredients, which do not include fruit. Plaintiffs cannot claim surprise over these labels, which have long been required on food products and are familiar to a reasonable consumer."). Defendants' labeling and marketing, when viewed as a whole, thus are not deceptive.

Plaintiffs take a different view, casting this case as one about "affirmative misrepresentations," not ambiguous statements. Doc. 185 at 34. But, as noted, there are at least three reasonable ways to interpret "100% Grated Parmesan Cheese"—and Plaintiffs' nothing-but-cheese reading is, in context, the weakest of the three. The products are packaged and shelf-stable at room temperature, a quality that reasonable consumers know is not enjoyed by pure cheese. Cheese is a dairy product, after all, and reasonable consumers are well aware that pure dairy products spoil, grow blue, green, or black fuzz, or otherwise become inedible if left unrefrigerated for an extended period of time. *See Veal v. Citrus World, Inc.*, 2013 WL 120761, at *4 n.4 (N.D. Ala. Jan. 8, 2013) ("The plaintiff makes much ado about believing the packaged containers of orange juice contained 'fresh squeezed' orange juice. As a matter of common sense, whatever is in a container on a store shelf with an expiration date some weeks hence cannot contain 'fresh' anything. Even if the product began its life as 'fresh squeezed orange juice,' common sense dictates that by the time the same makes its way to a grocery store and sits on a shelf waiting purchase, it is no longer 'fresh.'"); *Red v. Kraft Foods, Inc.*, 2012 WL 5504011, at *3 (C.D. Cal. Oct. 25, 2012) ("Plaintiffs' theory of the case is that the packaging suggests the product is *healthy* and contains a *significant amount* of vegetables, because the packaging boasts that the crackers are made with real vegetables and depicts vegetables. The fact remains that the product is a box of crackers, and a reasonable consumer will be familiar

with the fact of life that a cracker is not composed of primarily fresh vegetables.") (internal quotation marks omitted).

Plaintiffs protest that "there is no contention that cellulose has anything to do with the Products' shelf life or that a reasonable consumer should be expected to know whether or not cellulose is connected to shelf life," Doc. 185 at 35, and that reasonable consumers cannot be expected to understand "intricacies relating to the shelf life and processing of" grated cheese, *id.* at 36. All of that is beside the point. It does not matter whether reasonable consumers would expect to find *cellulose* (or any other specific additive) in a container of unrefrigerated, shelf-stable cheese; they would still suspect that *something* other than cheese might be in the container, and so would turn it around, enabling them to learn the truth from a quick skim of the ingredient label. *See Ibarrola v. Kind, LLC*, 83 F. Supp. 3d 751, 758 (N.D. Ill. 2015) ("Even though a reasonable consumer may not understand everything that happens to sugar cane before its derivative can be added as an ingredient in Vanilla Blueberry Clusters, a reasonable consumer would know that all sugar cane-derived sweeteners suitable for human consumption must be at least partially refined.").

In pressing the contrary result, Plaintiffs rely primarily on two cases. Both are distinguishable. In *Williams v. Gerber Products Co.*, the plaintiffs alleged deceptive marketing of fruit snacks for toddlers. 552 F.3d at 936. As relevant here, they claimed that the "use of the words 'Fruit Juice' juxtaposed alongside images of fruits such as oranges, peaches, strawberries, and cherries" was deceptive because the snacks contained no juice from any of those fruits and instead only white grape juice from concentrate; they further alleged that the statement "made 'with real fruit juice and other all natural ingredients'" was deceptive because "the two most prominent ingredients were corn syrup and sugar." *Ibid*. The Ninth Circuit held that those

allegations sufficed to state a claim, observing that the product's label "potentially suggest[ed] *(falsely)* that [the prominently pictured] fruits or their juices were contained in the product," and concluding that because the "all natural ingredients" statement "could easily be interpreted by consumers as a claim that all the ingredients in the product were natural, *which appears to be false*," a reasonable consumer might be deceived even though the ingredient label was accurate. *Id*. at 939 (emphases added). Key to the Ninth Circuit's conclusion was that the allegedly deceptive term "Fruit Juice" on the front of the package was an affirmatively false impression; there was no ambiguity. *Ibid*. ("We disagree with the district court that reasonable consumers should be expected to look beyond misleading representations on the front of the box to discover the truth from the ingredient list … ."); *see also Ebner*, 838 F.3d at 966 ("Stated straightforwardly, *Williams* stands for the proposition that *if* the defendant commits an act of deception, the presence of fine print revealing the truth is insufficient to dispel that deception."). Here, by contrast, Defendants' "100%" assertion is ambiguous, rendering *Williams* inapposite. *See Workman*, 141 F. Supp. 3d at 1036-37 (distinguishing *Williams* as "limited to affirmative misrepresentations"); *Manchouck v. Mondelez Int'l Inc.*, 2013 WL 5400285 at *3 (N.D. Cal. Sept. 26, 2013) (same).

It bears mention that additional contextual factors in *Williams* weighed in favor of finding deception. As the Ninth Circuit noted, the plaintiffs there alleged that they "sought healthy snacks for their children (ages two and three)" and "trusted the Gerber name," and thus "the claim that [the product] is 'just one of a variety of nutritious Gerber Graduates foods and juices that have been specifically designed to help toddlers grow up strong and healthy' adds to the potential deception." *Williams*, 552 F.3d at 936, 939. Here, given the cheese products' shelf-stability, context and common sense weigh in the opposite direction. *See Red*, 2012 WL

5504011, at *3 ("[A] number of courts have dismissed [UCL] claims as a matter of law post-*Williams*, especially where … the claim alleges that a consumer will read a true statement on a package and will then disregard well-known facts of life and assume things about the products *other than* what the statement actually says.") (internal quotation marks omitted).

Plaintiffs' second principal authority, *Gubala v. CVS Pharmacy, Inc.*, 2016 WL 1019794, (N.D. Ill. Mar. 15, 2016), does not help them either because it, too, involved an unambiguous misrepresentation. The alleged misleading statement in *Gubala* was clear; the product was called "Whey Protein Powder" and promised "26 grams of high-quality protein" on the label, but it actually contained 21.8 grams of whey protein and 4.2 grams of "free form amino acids and other non-protein ingredients, which are cheaper and less nutritionally beneficial." *Id*. at *1. The court held that the alleged "use of the term 'protein' to include both actual protein and non-protein substances" created "a disputed issue of fact whether the Product name is misleading in that it suggests that the protein in the Product is comprised exclusively of pure whey protein." *Id*. at *12. So the challenged statement in *Gubala* had a clear, specific import that was false, because "protein" unambiguously does not include "non-protein ingredients." *See ibid*. (likening the facts of *Gubala* to another case in which the plaintiffs "sufficiently alleged that the collective effect of the challenged statements was to mislead a reasonable consumer"). As discussed, the same is not true of "100% Grated Parmesan Cheese."

B. Express Warranty Claims

Plaintiffs' express warranty claims suffer from the same fatal flaw as their consumer protection claims: A reasonable consumer would not understand Defendants' labels to warrant that the products contain only cheese. As the parties agree, the express warranty claims can succeed only if a "reasonable consumer could plausibly read [Defendants' statements] to be

specific, factual representations that the products contain" solely cheese, but must fail if the labels, viewed objectively, make no such promise. Doc. 185 at 45 (quoting *Bohac v. Gen. Mills Inc.*, 2014 WL 1266848, at *9 (N.D. Cal. Mar. 26, 2014)); *see also*, *e.g.*, *id*. at 44-45 (Plaintiffs arguing, in opposition to dismissal of the express warranty claims, that "*a reasonable buyer* would be justified in relying on [the alleged cheese-only promise] … in navigating the marketplace," and that "[p]laintiffs and other consumers *reasonably understood* these statements to mean the Products were 100% cheese") (internal quotation marks omitted) (emphases added); Doc. 157 at 29-30 (Albertsons and Supervalu arguing that "Plaintiffs cannot ignore the express and unambiguous statement on the labels that the grated cheese products include cellulose as an anticaking agent and claim a conflicting *subjective interpretation or expectation* that the products contained 'all cheese'") (emphasis added); Doc. 164 at 27 (ICCO and Target arguing that "no defendant can be liable for warranties that they did not make, and that are based upon *subjective interpretations* that ignore the ingredient list on the Products' labels.") (emphasis added). In other words, the question is whether Plaintiffs' (alleged) subjective belief that the products promised only cheese was objectively reasonable, and for the reasons given above, the answer is no. Defendants' express warranty claims thus fall along with their consumer protection claims. *See Bohac*, 2014 WL 1266848, at *9 (holding that express warranty claims, like consumer protection claims, can succeed only where "a reasonable consumer could plausibly read [the terms at issue] to be specific factual representations that the products contain no non-natural ingredients").

This conclusion follows from the basic contract principles that govern express warranty claims. *See*, *e.g.*, *Burns v. Winnebago Indus., Inc.*, 492 F. App'x 44, 48 (11th Cir. 2012) ("Florida courts generally treat warranties like contracts … .") (collecting cases); *Loeffel Steel*

Prods., Inc. v. Delta Brands, Inc., 379 F. Supp. 2d 968, 983 (N.D. Ill. 2005) ("Express warranties are contractual in nature … ."); *Ex parte Miller*, 693 So. 2d 1372, 1376 (Ala. 1997) ("Express warranties should be treated like any other type of contract and interpreted according to general contract principles."). Those principles require courts to look to the entire contract—or, for an express warranty claim, product label—and construe ambiguous terms in light of the document as a whole. *See Premcor USA, Inc. v. Am. Home Assurance Co.*, 400 F.3d 523, 529 (7th Cir. 2005) (holding that a contract term should be interpreted "in light of the contract as a whole" to resolve its "apparent ambiguity" when "viewed out of context"). As explained above, a reasonable consumer would not understand "100% Grated Parmesan Cheese" to warrant that the product contains only cheese without first inspecting the ingredient list, because "100% Grated Parmesan Cheese" is ambiguous. *See Chin v. Gen. Mills, Inc.*, 2013 WL 2420455, at *7 (D. Minn. June 3, 2013) (holding that express warranty claims under New York and New Jersey law failed because "'100% Natural' cannot be viewed in isolation and must be read in the context of the entire package, including the ingredient panel"); *Specialized Mach. Transp., Inc. v. Westphal*, 872 So. 2d 424, 426 (Fla. App. 2004) ("[T]he meaning is not to be gathered from any one phrase, but from a general view of the whole writing, with all of its parts being compared, used, and construed, each with reference to the others."). That defeats Plaintiffs' express warranty claims as a matter of law.

C. Implied Warranty of Merchantability Claims

Plaintiffs' implied warranty of merchantability claims fail for the same reason: Defendants' labels cannot reasonably be read to promise that the products contain only cheese. Defendants argue that because their products were fit for ordinary use as grated cheese, they breached no implied warranty of fitness. Doc. 162 at 33-34; Doc. 164 at 27; *see also* Doc. 168 at

22-23 ("The Complaint lacks any allegation suggesting that the Products were not fit for their ordinary purpose or could not be consumed or used as grated Parmesan cheese."); Doc. 174 at 18 ("[T]he grated cheese was of merchantable quality and fit to consume as grated cheese."). Plaintiffs' sole response is that the products "do not conform to the promise made on their label that they are 100% cheese," citing several cases that refuse to dismiss implied warranty claims concerning food products that, while edible, fell short of promises on their labels. Doc. 185 at 50; *see also id*. at 50-51 ("Plaintiffs paid for '100%' cheese and received a product that was comprised partially of non-cheese filler and thus not merchantable *as such*.") (emphasis added).

Even assuming Plaintiffs are correct that making a specific promise and then failing to satisfy it could breach the implied warranty of merchantability even though the product is otherwise fit for ordinary use—an arguable proposition, *see Ackerman*, 2010 WL 2925955, at *25 ("A warranty of merchantability … does not mean that the product will fulfill a buyer's every expectation but rather simply provides for a minimum level of quality.") (internal quotation marks omitted)—the labels here make no promise that the product consists of cheese only. It follows that Plaintiffs' implied warranty claims fail, too. *See Sugawara v. Pepsico, Inc.*, 2009 WL 1439115, at *5 (E.D. Cal. May 21, 2009) (holding that "because the Product packaging was not misleading or deceptive … Plaintiff received exactly what was described on the box," and so failed to state an implied warranty claim).

D. Unjust Enrichment Claims

Although the parties skirmish over the particularities of various States' unjust enrichment laws, Plaintiffs acknowledge that, generally speaking, "[t]o state a cause of action based on the theory of unjust enrichment, a plaintiff must allege that the defendant has unjustly retained a benefit to the plaintiff's detriment, and that the defendant's retention of the benefit violates

fundamental principles of justice, equity, and good conscience." Doc. 185 at 51. Plaintiffs' only basis for asserting that Defendants' marketing violated principles of justice, equity, and good conscience is their contention that "Defendants marketed their Products as '100%' grated cheese" while delivering something less, and so "deceived" them. *Ibid*.

For the reasons set forth above, that is not a reasonable characterization of Defendants' conduct. No reasonable consumer would think Plaintiffs delivered something other than what their labels promised. So Plaintiffs' unjust enrichment claims fail, too. *See Bober*, 246 F.3d at 943 ("[I]n the absence of any deception on the part of the defendants, the requisite violation of 'fundamental principles of justice, equity, and good conscience' is not present."); *Girard v. Toyota Motor Sales, U.S.A., Inc.*, 316 F. App'x 561, 563 (9th Cir. 2008) (holding that the plaintiff's "unjust enrichment claim also fails since [the defendant's] non-deceptive advertising does not entitle [the plaintiff] to restitutionary relief"); *Hillen v. Blistex, Inc.*, 2017 WL 2868997, at *4 (N.D. Ill. July 5, 2017) ("Plaintiff's failure to plead any actionable deception eviscerates not only her fraud claims but her unjust enrichment claim as well. … I agree with defendant that because it sells all of the ointment it claims to … it was not unjustly enriched by plaintiff's purchases of the product.") (internal quotation marks and citations omitted); *Storey v. Attends Healthcare Prod., Inc.*, 2016 WL 3125210, at *13 (E.D. Mich. June 3, 2016) (holding under Michigan law that the plaintiffs could not succeed on their unjust enrichment claim because they had "not established that it would be inequitable for Defendant to retain the benefit that Plaintiffs (indirectly) conferred on Defendant," where they did not "set forth facts that would make plausible their conclusory allegations" that a product was unsafe and, as such, "the Court [could not] conclude that Plaintiffs did not get what they paid for"); *cf. Koenig v. Boulder Brands, Inc.*, 995 F. Supp. 2d 274, 290-91 (S.D.N.Y. 2014) (holding under New York law that, where

"Plaintiffs claim that they purchased Smart Balance because of Defendants' purported misrepresentations," "if [their] other claims are defective, an unjust enrichment claim cannot remedy the defects") (internal quotation marks omitted).

Conclusion

For the foregoing reasons, Defendants' motions to dismiss are granted. The complaints are dismissed without prejudice to Plaintiffs' filing amended complaints that attempt to correct the deficiencies identified above. *See Runnion v. Girl Scouts of Greater Chi. & Nw. Ind.*, 786 F.3d 510, 519 (7th Cir. 2015) ("Ordinarily, … a plaintiff whose original complaint has been dismissed under Rule 12(b)(6) should be given at least one opportunity to try to amend her complaint before the entire action is dismissed."). Plaintiffs have until September 14, 2017 to amend their complaints. If they do not do so, the dismissals will convert automatically to dismissals with prejudice, and judgment will be entered. If Plaintiffs amend their complaints, Defendants shall answer or otherwise plead by October 5, 2017.

August 24, 2017

United States District Judge

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

IN RE: 100% GRATED PARMESAN CHEESE MARKETING AND SALES PRACTICES LITIGATION	)	16 C 5802
	)	MDL 2705
	)	Judge Gary Feinerman
This Document Relates to All Cases	)	

MEMORANDUM OPINION AND ORDER

Defendants in this multidistrict litigation are purveyors of grated parmesan cheese products with labels stating "100% Grated Parmesan Cheese" or some variation thereof. After the Judicial Panel on Multidistrict Litigation assigned these suits to the undersigned judge, Doc. 1, Plaintiffs filed five consolidated class action complaints, Docs. 120-123, 143, which alleged that they were misled by the labels because the products contain non-cheese ingredients such as cellulose. Defendants moved to dismiss the complaints under Civil Rules 12(b)(1) and 12(b)(6). The court denied the Rule 12(b)(1) motions but granted the Rule 12(b)(6) motions without prejudice to repleading. Docs. 215-216 (reported at 275 F. Supp. 3d 910 (N.D. Ill. 2017)).

Plaintiffs then filed five amended consolidated class action complaints. Doc. 225 (against Kraft Heinz Company); Doc. 226 (against Publix Super Markets, Inc.); Doc. 227 (against Albertsons Companies, Inc., Albertsons LLC, and SuperValu, Inc.); Doc. 228 (against Target Corp. and ICCO-Cheese Company, Inc.); Doc. 229 (against Wal-Mart Stores, Inc. and ICCO-Cheese Company, Inc.). Like the initial complaints, the amended complaints allege that Plaintiffs were misled by the "100% Grated Parmesan Cheese" labels because the products contained cellulose and other non-cheese ingredients. In addition, the amended complaints except for the one against Publix allege that the products' ingredient lists are misleading because they say that the cellulose was added to prevent caking, when in fact it also acted as filler.

Defendants move to dismiss the amended complaints under Civil Rule 12(b)(6), Docs. 237, 238, 243, 246, 249, incorporating by reference many of the arguments they made in litigating the motions to dismiss the initial complaints. The motions are granted in part and denied in part.

Background

On a Rule 12(b)(6) motion, the court assumes the truth of the operative complaints' factual allegations, though not their legal conclusions. *See Zahn v. N. Am. Power & Gas, LLC*, 815 F.3d 1082, 1087 (7th Cir. 2016). The court must also consider "documents attached to the complaint[s], documents that are critical to the complaint[s] and referred to in [them], and information that is subject to proper judicial notice," along with additional facts set forth in Plaintiffs' brief opposing dismissal, so long as those additional facts "are consistent with the pleadings." *Phillips v. Prudential Ins. Co. of Am.*, 714 F.3d 1017, 1020 (7th Cir. 2013) (internal quotation marks omitted). The facts are set forth as favorably to Plaintiffs as those materials allow. *See Pierce v. Zoetis, Inc.*, 818 F.3d 274, 277 (7th Cir. 2016). In setting forth the facts at the pleading stage, the court does not vouch for their accuracy. *See Jay E. Hayden Found. v. First Neighbor Bank, N.A.*, 610 F.3d 382, 384 (7th Cir. 2010).

Defendants Kraft Heinz Company, Albertsons Companies, Inc., Albertsons LLC (the Albertsons entities will be referred to together as "Albertsons"), SuperValu, Inc., Target Corporation, Wal-Mart Stores, Inc., ICCO-Cheese Company, Inc., and Publix Super Markets, Inc., design, develop, manufacture, sell, test, package, label, distribute, promote, market, and/or advertise grated parmesan cheese products. Doc. 225 at ¶ 19; Doc. 226 at ¶ 10; Doc. 227 at ¶ 16; Doc. 228 at ¶¶ 13-14; Doc. 229 at ¶¶ 15, 29. (Albertsons and SuperValu, as close corporate relatives, are named in one complaint. Doc. 227. ICCO manufactures the products for both

Target and Wal-Mart, and is named as a defendant in both the Target and Wal-Mart complaints. Docs. 228-229.) The products all bore labels stating "100% Grated Parmesan Cheese," Doc. 225 at ¶ 21; Doc. 227 at ¶ 18; Doc. 228 at ¶ 17; Doc. 229 at ¶ 18, or some variation thereof, Doc. 225 at ¶ 21 ("100% Grated Parmesan & Romano Cheese" and "100% Grated Three Cheese Blend"); Doc. 226 at ¶ 12 ("100% Real Grated Romano Parmesan Cheese" and "100% Real Grated Parmesan Cheese"); Doc. 227 at ¶ 18 ("100% Grated Parmesan and Romano Cheese"); Doc. 228 at ¶ 17 ("Parmesan 100% Grated Cheese"); Doc. 229 at ¶ 18 ("100% Parmesan Grated Cheese"). For ease of exposition, the variations will be ignored. Publix and Wal-Mart removed the term "100%" from their labels after this litigation began. Doc. 225 at ¶¶ 31-32; Doc. 226 at ¶¶ 19-20; Doc. 227 at ¶¶ 26-27; Doc. 228 at ¶¶ 26-27; Doc. 229 at ¶ 27-28.

The products are comprised largely of cured, dried hard Italian cheeses that can keep (*e.g.*, not spoil or clump) a long time without refrigeration. Doc. 225 at ¶ 26; Doc. 226 at ¶ 15; Doc. 227 at ¶ 22; Doc. 228 at ¶ 21; Doc. 229 at ¶ 22. The products also include a small but nontrivial percentage of cellulose, an organic polymer with no nutritional value that is "often used as a filler." Doc. 225 at ¶¶ 23-24 (Kraft, 3.8%); Doc. 226 at ¶ 13 (Publix, "a significant portion"); Doc. 227 at ¶¶ 19-20 (Albertsons/SuperValu, 8.8%); Doc. 228 at ¶ 19 (Target/ICCO, no percentage specified); Doc. 229 at ¶¶ 19-20 (Wal-Mart/ICCO, 7.8%). Some of the products contain other ingredients, including potassium sorbate, Doc. 225 at ¶ 24; Doc. 226 at ¶ 13; Doc. 228 at ¶ 19; Doc. 229 at ¶ 20, and corn starch, Doc. 228 at ¶ 19.

Each product container has an ingredient list that discloses the non-cheese ingredients. Doc. 239 at 6; Doc. 240 at 7-8; Doc. 244 at 7-8; Doc. 247 at 7; Doc. 250 at 6-7. While "100% Grated Parmesan Cheese" is prominently featured on the containers' front labels, the ingredient lists are smaller, less conspicuous, and located near the nutritional facts on the rear labels. Doc.

239 at 6; Doc. 240 at 7-8; Doc. 244 at 7; Doc. 247; Doc. 250 at 6-7. A more detailed description of the products' appearance and labeling, along with representative images, are set forth in this court's earlier opinion on the motions to dismiss the initial consolidated class action complaints. 275 F. Supp. 3d at 915-17.

Plaintiffs are consumers who purchased Defendants' products at grocery stores in Alabama (Kraft, Albertsons/SuperValu, Wal-Mart/ICCO), California (Kraft, Target/ICCO, Wal-Mart/ICCO), Connecticut (Kraft), Florida (Kraft, Publix, Target/ICCO, Wal-Mart/ICCO), Illinois (Kraft, Albertsons/SuperValu, Target/ICCO), Michigan (Kraft), Minnesota (Kraft, Wal-Mart/ICCO); Missouri (Target/ICCO), New Jersey (Wal-Mart/ICCO), and New York (Kraft, Wal-Mart/ICCO). Doc. 225 at ¶¶ 9-17; Doc. 226 at ¶¶ 8-9; Doc. 227 at ¶¶ 9-11; Doc. 228 at ¶¶ 9-12; Doc. 229 at ¶¶ 9-14. Plaintiffs purchased the products believing that they contained only cheese. Doc. 225 at ¶¶ 9-17; Doc. 226 at ¶¶ 8-9; Doc. 227 at ¶¶ 9-11; Doc. 228 at ¶¶ 9-12; Doc. 229 at ¶¶ 9-14. Plaintiffs allege that they are not alone in that belief; the operative complaints reference a survey, conducted in connection with this litigation, purporting to find that more than 85-90% of consumers stated that they believed that the products "are 100% cheese and fully grated." Doc. 225 at ¶ 29; Doc. 226 at ¶ 17; Doc. 227 at ¶ 24; Doc. 228 at ¶ 24; Doc. 229 at ¶ 25. In addition, two reports authored by linguistics professors opine that the phrase "100% Grated Parmesan Cheese" is "linguistically subject to only one plausible interpretation … that the Product contains nothing other than grated parmesan cheese." Doc. 225 at ¶ 30; Doc. 226 at ¶ 18; Doc. 227 at ¶ 25; Doc. 228 at ¶ 25; Doc. 229 at ¶ 26.

Each amended complaint except the one against Publix adds a claim not made in the initial complaints: that although the ingredient lists state that cellulose is added "to prevent caking," Doc. 239 at 6; Doc. 240 at 7; Doc. 244 at 7; Doc. 247 at 7; Doc. 250 at 7, the amount of

cellulose added exceeds what is necessary to prevent caking, Doc. 225 at ¶ 27; Doc. 227 at ¶ 23; Doc. 228 at ¶ 22; Doc. 229 at ¶ 23, and thus the cellulose must also serve the undisclosed purpose of acting as filler, Doc. 225 at ¶ 4; Doc. 227 at ¶ 4; Doc. 228 at ¶ 2; Doc. 229 at ¶ 4.

Discussion

The amended complaints assert violations of various state consumer protection statutes, breaches of express and implied warranty, and unjust enrichment stemming from two alleged misrepresentations: (1) the representation on the containers' front labels that the products are "100% Grated Parmesan Cheese," when in fact they contain non-cheese ingredients ("100% claims"); and (2) the representation on the ingredient lists that cellulose is used to prevent caking, when in fact it is also used as filler ("Anticaking claims"). The 100% claims are dismissed, while the Anticaking claims are dismissed in large part.

I. 100% Claims

The court's earlier opinion—familiarity with which is assumed—dismissed the 100% claims on the ground that, given the context provided by the ingredient lists and the products' placement on unrefrigerated shelves, no reasonable consumer could be misled by the "100% Grated Parmesan Cheese" labels into thinking that the products were 100% cheese. 275 F. Supp. 3d at 919-27. Plaintiffs contend that three new allegations in the amended complaints warrant a different result: (1) a consumer survey showing that "the vast majority of purchasers" believed, based on the labels, that the products are "100% cheese and fully grated"; (2) two reports from linguistics professors opining that "100% Grated Parmesan Cheese" is susceptible only to the interpretation that the products "consist entirely of grated parmesan cheese"; and (3) a Kraft patent stating that fully cured parmesan cheese "keeps almost indefinitely." Doc. 255 at 7-8. Those new allegations do not save the 100% claims.

A. Consumer Protection Claims

The state consumer protection statutes that Plaintiffs invoke, and the framework adopted to evaluate claims brought under those statutes, are set forth in the court's earlier opinion. 275 F. Supp. 3d at 919-23. In short, when "a plaintiff contends that certain aspects of a product's packaging are misleading in isolation, but an ingredient label or other disclaimer would dispel any confusion, the crucial issue is whether the misleading content is ambiguous; if so, context [such as an ingredient label] can cure the ambiguity and defeat the claim, but if not, then context will not cure the deception and the claim may proceed." *Id*. at 922; *see also Solak v. Hain Celestial Grp., Inc.*, 2018 WL 1870474, at *5 (N.D.N.Y. Apr. 17, 2018) (adopting this rule under New York and California law); *Davis v. Hain Celestial Grp., Inc.*, 297 F. Supp. 3d 327, 334 (E.D.N.Y. 2018) (same under New York law). The court declines Plaintiffs' invitation, Doc. 255 at 10-15, to reconsider that standard.

As for applying the standard, the court's earlier opinion held that "the description '100% Grated Parmesan Cheese' is ambiguous," reasoning that although "'100% Grated Parmesan Cheese' *might* be interpreted as saying that the product is 100% cheese and nothing else, it also might be an assertion that 100% of the cheese is parmesan cheese, or that the parmesan cheese is 100% grated." *Id*. at 923. In challenging that conclusion, Plaintiffs cite two reports from linguistics professors opining that the phrase "100% Grated Parmesan Cheese" conveys only the message that the products consist entirely of cheese. Doc. 255 at 7-8. The linguists do not advance Plaintiffs' cause. As an initial matter, a reasonable consumer—the touchstone for analysis under the consumer fraud statutes—does not approach or interpret language in the manner of a linguistics professor. *See Rugg v. Johnson & Johnson*, 2018 WL 3023493, at *2 (N.D. Cal. June 18, 2018) (noting that a "reasonable consumer need not be exceptionally acute

and sophisticated," and that "the reasonable consumer test focuses on the perspective of ordinary minds") (internal quotation marks omitted).

In any event, the reports do not indicate that the professors examined the phrase "100% Grated Parmesan Cheese" in the context of shelf-stable, unrefrigerated containers of cheese. As the court explained, that context is important given that the "products are packaged and shelf-stable at room temperature, a quality that reasonable consumers know is not enjoyed by pure cheese," and that "reasonable consumers are well aware that pure dairy products spoil, grow blue, green, or black fuzz, or otherwise become inedible if left unrefrigerated for an extended period of time." 275 F. Supp. 3d at 923. Even assuming (incorrectly) that reasonable consumers view language through the same lens as linguistics professors, because the linguists did not take account of that context, their opinions are valueless in deciding whether "100% Grated Parmesan Cheese" is ambiguous.

Plaintiffs also cite consumer surveys purporting to show that the "vast majority" of consumers believe that "100% Grated Parmesan Cheese" means that the product contains only cheese. Doc. 255 at 7-9. Those surveys are valueless as well. As the Seventh Circuit has held, it is "well settled" that a court, on its own, may "determine as a matter of law" that "an allegedly deceptive advertisement would not have misled a reasonable consumer." *Fink v. Time Warner Cable*, 714 F.3d 739, 741 (7th Cir. 2013). The Seventh Circuit has also recognized that "context is crucial" in that, "under certain circumstances, the presence of a disclaimer or similar clarifying language may defeat a claim of deception." *Ibid*. Accordingly, consumer surveys do not assist the analysis where, as here, the court can determine as a matter of law that the challenged statement is ambiguous standing alone and particularly given its context. *See Goldman v. Bayer AG*, 2017 WL 3168525, at *10 (N.D. Cal. July 26, 2017) (denying leave to amend after

dismissing statutory consumer fraud claims, even though the plaintiff wished to "arrange for consumer surveys to be conducted," because surveys would not assist the plaintiff in plausibly "alleg[ing] that he was deceived by information that is plainly accurate"); *cf. Groupe SEB USA, Inc. v. Euro-Pro Operating LLC*, 774 F.3d 192, 201 (3d Cir. 2014) (in a Lanham Act suit, noting that "words may be used plainly enough and carry baseline meanings such that consumer survey evidence is irrelevant"). Moreover, it bears mention that the surveys find that some consumers do *not* believe that the products are 100% cheese; the disagreement between those consumers and those who *do* believe that the products are 100% cheese supports, rather than refutes, the notion that the label is ambiguous.

Finally, Plaintiffs cite a Kraft patent teaching a method for manufacturing grated parmesan cheese, which states that "[f]ully cured Parmesan cheese is very hard and keeps almost indefinitely," and a U.S. Department of Agriculture Food Safety and Inspection Service webpage, which states that, "[a]s a general rule … grated Parmesan do[es] not require refrigeration for safety, but … will last longer if kept refrigerated." Doc. 255 at 16 & n.1. These materials do not render unambiguous the phrase "100% Grated Parmesan Cheese." There is no reason to believe that either the patent or the Department of Agriculture report would be familiar to a reasonable consumer with an ordinary understanding of how dairy products generally fare when unrefrigerated. In any event, by saying that pure grated parmesan "keeps *almost* indefinitely" and, "[a]s a *general* rule," "will last *longer* if kept refrigerated," the materials necessarily imply that pure grated parmesan will *not* keep indefinitely if left unrefrigerated. The materials therefore do not undermine the court's view that a reasonable consumer would not presume that a shelf-stable dairy product was 100% cheese or would disregard the "well-known fact[] of life" that pure dairy products spoil if left unrefrigerated. *Red v. Kraft Foods, Inc.*, 2012

WL 5504011, at *3-4 (C.D. Cal. Oct. 25, 2012) (dismissing a statutory consumer fraud claim on the ground that "it strains credulity to imagine that a reasonable consumer will be deceived into thinking a box of crackers … contains huge amounts of vegetables simply because there are pictures of vegetables and the true phrase 'Made with Real Vegetables' on the box").

For these reasons, Plaintiffs' new allegations do not save their 100% claims to the extent they arise under state consumer fraud statutes.

B. Warranty and Unjust Enrichment Claims

As the court's earlier opinion explained, Plaintiffs' warranty and unjust enrichment claims may succeed only if a reasonable consumer could plausibly understand the label "100% Grated Parmesan Cheese," on a shelf-stable dairy product whose easily accessible ingredient list identifies non-cheese ingredients, to mean that the product contains only cheese. 275 F. Supp. 3d at 925-27. Because a reasonable consumer would not reach that understanding, particularly given the important contextual clues discussed above and in the earlier opinion, the warranty and unjust enrichment 100% claims are dismissed. *Ibid*.

II. Anticaking Claims

As noted, the operative complaints also claim that the products' ingredient lists (except for Publix's) falsely assert that cellulose is added only to prevent caking, when in fact it also serves as "filler." Doc. 255 at 8.

A. Rules 8(a)(2) and 9(b)

Defendants argue that the Anticaking claims fail to satisfy the pleading requirements of Rule 8(a)(2). Doc. 239 at 16-17; Doc. 240 at 15-17; Doc. 244 at 15-17; Doc. 250 at 11 n.4; Doc. 267 at 8. To satisfy Rule 8(a), a plaintiff need only provide "enough detail[] … to present a story that holds together." *Swanson v. Citibank, N.A.*, 614 F.3d 400, 404 (7th Cir. 2010). Upon

accomplishing this task, the plaintiff receives "the benefit of imagination, so long as the hypotheses are consistent with the complaint." *Chapman v. Yellow Cab Coop.*, 875 F.3d 846, 848 (7th Cir. 2017) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 563 (2007)). With the exceptions noted below, the Anticaking claims satisfy this standard.

Plaintiffs allege the following. Grated parmesan "usually available in the marketplace" is cured and dried in such a way that there is "little problem of clumping or agglomeration," so there is little need to ensure that grated parmesan does not clump or "cake." Doc. 225 at ¶ 26; Doc. 227 at ¶ 22; Doc. 228 at ¶ 21; Doc. 229 at ¶ 22. Yet the ingredient lists assert that cellulose is added to prevent caking. Doc. 225 at ¶ 4; Doc. 227 at ¶ 4; Doc. 228 at ¶ 4; Doc. 229 at ¶ 4. This assertion is false or misleading because the products contain more cellulose than necessary to accomplish this "anticaking" purpose. Doc. 225 at ¶¶ 4, 23; Doc. 227 at ¶¶ 4, 19; Doc. 228 at ¶¶ 4, 22; Doc. 229 at ¶¶ 4, 19. The excess cellulose serves as "filler," a use that the labels do not disclose. Doc. 225 at ¶ 24; Doc. 227 at ¶ 20; Doc. 228 at ¶ 2; Doc. 229 at ¶ 20.

These allegations provide Defendants sufficient "notice of what the case is all about"—that their ingredient lists falsely suggest that cellulose is used only to prevent caking—and show "how, in the plaintiff's mind at least, the dots should be connected"—that the products contain suspiciously high percentages of cellulose given that grated parmesan cheese is unlikely to clump or "cake." *Swanson*, 614 F.3d at 405. No more is required under Rule 8(a)(2).

Defendants also contend that the Anticaking claims fail to satisfy the more stringent pleading requirements of Rule 9(b). Doc. 239 at 19; Doc. 240 at 17; Doc. 244 at 17. Plaintiffs do not dispute that their claims (except for those under New York law) are subject to Rule 9(b). Doc. 185 at 37 & n.16. That concession is correct; because Plaintiffs' allegations sound in fraud, Rule 9(b) applies. *See Borsellino v. Goldman Sachs Grp., Inc.*, 477 F.3d 502, 507 (7th Cir.

2007) ("A claim that 'sounds in fraud'—in other words, one that is premised upon a course of fraudulent conduct—can implicate Rule 9(b)'s heightened pleading requirements."); *see also*, *e.g.*, *Haywood v. Massage Envy Franchising, LLC*, 887 F.3d 329, 334-35 (7th Cir. 2018) (Illinois consumer fraud statute); *Davidson v. Kimberly-Clark Corp.*, 889 F.3d 956, 964 (9th Cir. 2018) (California consumer fraud statutes); *E-Shops Corp. v. U.S. Bank N.A.*, 678 F.3d 659, 665 (8th Cir. 2012) (Minnesota consumer fraud statutes); *Frederico v. Home Depot*, 507 F.3d 188, 200 (3d Cir. 2007) (New Jersey consumer fraud statute). And the court need not decide whether Rule 9(b) applies to Plaintiffs' New York law claims—which are brought only against Kraft and Wal-Mart/ICCO—because, as explained below, Plaintiffs have pleaded those claims with enough particularity to satisfy Rule 9(b).

"Rule 9(b) requires a pleading to state with particularity the circumstances constituting fraud." *Camasta v. Jos. A. Bank Clothiers, Inc.*, 761 F.3d 732, 737 (7th Cir. 2014) (internal quotation marks omitted). As a general matter, a plaintiff must describe the "who, what, when, where, and how of the fraud." *Ibid*. (quoting *AnchorBank, FSB v. Hofer*, 649 F.3d 610, 615 (7th Cir. 2011)). That said, the "requisite information" needed to satisfy the Rule "may vary on the facts of a given case," *Pirelli Armstrong Tire Corp. Retiree Med. Benefits Trust v. Walgreen Co.*, 631 F.3d 436, 442 (7th Cir. 2011), and a "plaintiff who provides a general outline of [a] fraud scheme sufficient to reasonably notify the defendants of their purported role in the fraud" will comply with Rule 9(b), *In re Rust-Oleum Restore Mktg., Sales Practices & Prod. Liab. Litig.*, 155 F. Supp. 3d 772, 812 (N.D. Ill. 2016) (quotation marks omitted) (collecting cases); *see also Camasta*, 761 F.3d at 737 (noting that a plaintiff need not "provide the precise date, time, and location that he saw [an] advertisement or every word that was included on it").

With the exceptions noted below, the Anticaking claims satisfy these requirements because Plaintiffs allege that Defendants (the "who") misrepresented on their ingredient lists (the "where" and "how") the role of cellulose in their products (the "what"), which were purchased by Plaintiffs at retail locations (the "when"). *See Wagner v. Gen. Nutrition Corp.*, 2017 WL 3070772, at *8 (N.D. Ill. July 19, 2017) ("By including the relevant labels in the [operative complaint], alleging what the information on the labels means, alleging the results of the various scientific studies [suggesting that glutamine supplements do not have the benefits claimed on the products' labels], and alleging how the information on the labels deceived him, Plaintiff has met his pleading burden [under Rules 8(a) and 9(b)]."); *Murillo v. Kohl's Corp.*, 197 F. Supp. 3d 1119, 1130 (E.D. Wis. 2016) (same, where the plaintiffs alleged the date they visited the stores, the items they purchased, the "regular" prices of the purchased merchandise, and the "sale" prices on the merchandise); *Aliano v. Louisville Distilling Co., LLC*, 115 F. Supp. 3d 921, 930-31 (N.D. Ill. 2015) (same, where the plaintiff alleged that "specific statements … on [the defendants' products'] label and website caused him to believe the whiskey was distilled, aged, and finished in small batches in Kentucky"). This is all that is necessary under Rule 9(b).

Target/ICCO argue that the Anticaking claims against them do not provide sufficient detail to satisfy Rule 8(a)—let alone Rule 9(b)—because Plaintiffs do "not even allege how much cellulose is in the product that ICCO makes for Target." Doc. 239 at 17. Target/ICCO are right. The particularity requirement of Rule 9(b) is "designed to discourage a sue first, ask questions later philosophy," *Pirelli*, 631 F.3d at 441 (internal quotation marks omitted), and to "force[] the plaintiff to conduct a careful pretrial investigation" so as to operate "as a screen against spurious fraud claims," *Fid. Nat'l Title Ins. Co. of N.Y. v. Intercounty Nat'l Title Ins. Co.*, 412 F.3d 745, 749 (7th Cir. 2005). The Target/ICCO complaint alleges only that Plaintiffs

believe that Target's product contains excess cellulose; unlike the complaints against Albertsons, Kraft, and Wal-Mart/ICCO, the Target/ICCO complaint does not allege how much cellulose is in the Target/ICCO product, and therefore cannot plausibly allege that the product includes more cellulose than necessary for anticaking purposes. *Compare* Doc. 225 at ¶¶ 23-24 (Kraft, 3.8%), Doc. 227 at ¶¶ 19-20 (Albertsons/SuperValu, 8.8%), *and* Doc. 229 at ¶¶ 19-20 (Wal-Mart/ICCO, 7.8%), *with* Doc. 228 at ¶ 19 (Target/ICCO, no percentage specified). It follows that the Anticaking claims against Target/ICCO do not satisfy Rule 9(b).

Wal-Mart/ICCO argue that Plaintiffs fail to plead any "non-conclusory factual allegations regarding Wal-Mart's alleged participation in the fraud." Doc. 240 at 17 (Wal-Mart) (internal quotation marks omitted); *see* Doc. 237 at 2 (ICCO joining Wal-Mart's brief). As the Seventh Circuit has held, "because fair notice is the most basic consideration underlying Rule 9(b), in a case involving multiple defendants, the complaint should inform each defendant of the nature of his alleged participation in the fraud." *Rocha v. Rudd*, 826 F.3d 905, 911 (7th Cir. 2016) (internal quotation marks omitted). The Wal-Mart/ICCO complaint alleges that several named plaintiffs purchased "100% Grated Parmesan Cheese" products at Wal-Mart stores in different States, Doc. 229 at ¶¶ 9-14; that Wal-Mart is "the registered owner of the trademark 'Great Value,'" the brand name under which the products were sold, *id*. at ¶ 15; and that Wal-Mart and ICCO are "co-participants in committing the acts of consumer fraud alleged," *id*. at ¶ 29. These allegations do not impermissibly "lump[] together" ICCO and Wal-Mart; to the contrary, they provide Wal-Mart with sufficient notice of its alleged participation in the fraud. *Rocha*, 826 F.3d at 911; *see also United States ex rel. Derrick v. Roche Diagnostics Corp.*, 2018 WL 2735090, at *5 (N.D. Ill. June 7, 2018) (noting that the plaintiff "would not be expected to know the particulars of [the defendant's] internal operations," and holding that the "critical question"

under Rule 9(b) is simply whether the plaintiff's allegations are sufficient "to inform each defendant of the nature of his alleged participation in the fraud") (internal quotations omitted); *Clay Fin. LLC v. Mandell*, 2017 WL 3581142, at *7 (N.D. Ill. Aug. 18, 2017) (same).

Finally, Albertsons contends that because Plaintiffs fail to allege that they "purchased any product from any store owned, operated, or connected in any way to Albertsons" in Alabama, the Alabama claims against Albertsons should be dismissed. Doc. 192 at 10-11. Albertsons is correct. The Albertsons/SuperValu complaint alleges that "six containers of Essential Everyday '100% Grated Parmesan Cheese,'" a brand whose trademark is owned by SuperValu, were purchased "at various stores in Alabama." Doc. 227 at ¶¶ 11, 15. There is no indication, however, that the products were purchased at a store owned by Albertsons in Alabama or that Albertsons played any other role in the distribution, marketing, or sale of the products purchased in Alabama. It follows that the Anticaking claims against Albertsons under Alabama law are dismissed.

* * *

In sum, the Anticaking claims against Target/ICCO are dismissed, as are the Alabama Anticaking claims against Albertsons. The Anticaking claims against SuperValu, Kraft, and Wal-Mart/ICCO, and the Anticaking claims against Albertsons other than those under Alabama law, survive Rules 8(a)(2) and 9(b), although they face the additional hurdles set forth below.

B. Statutory Consumer Protection Claims

Plaintiffs assert claims under the following state consumer protection statutes against Albertsons/SuperValu, Kraft, and/or Wal-Mart/ICCO: Alabama Deceptive Trade Practices Act, Ala. Code § 8-19-1 *et seq*. ("ADPTA"), Doc. 225 at ¶¶ 160-171 (Kraft); Doc. 227 at ¶¶ 62-73 (Albertsons/SuperValu); Doc. 229 at ¶¶ 130-141 (Wal-Mart/ICCO); California Consumers Legal

Remedies Act, Cal. Civ. Code § 1750 *et seq*. ("CLRA"), Doc. 225 at ¶¶ 91-97 (Kraft); Doc. 229 at ¶¶ 151-155 (Wal-Mart/ICCO); California Unfair Competition Law, Cal. Bus. & Profs. Code § 17200 *et seq.* ("UCL"), Doc. 225 at ¶¶ 81-90 (Kraft); Doc. 229 at ¶¶ 142-150 (Wal-Mart/ICCO); Connecticut Unfair Trade Practices Act, Conn. Gen. Stat. § 42-110b ("CUTPA"), Doc. 225 at ¶¶ 140-147 (Kraft); Florida Deceptive and Unfair Trade Practices Act, Fla. Stat. § 501.201 *et seq*. ("FDUTPA"), Doc. 225 at ¶¶ 148-159 (Kraft); Doc. 229 at ¶¶ 110-121 (Wal-Mart/ICCO); Illinois Deceptive Practices and Consumer Fraud Act, 815 ILCS 505/2 ("ICFA"), Doc. 225 at ¶¶ 132-139 (Kraft); Doc. 227 at ¶¶ 74-81 (Albertsons/SuperValu); Michigan Consumer Protection Act, Mich. Comp. Laws § 445.903 *et seq*. ("MCPA"), Doc. 225 at ¶¶ 172-182 (Kraft); Minnesota Unlawful Trade Practices Act, Minn. Stat. § 325D.09 *et seq*. ("MUTPA") pursuant to Minn. Stat. § 8.31 sub div. 3a, Doc. 225 at ¶¶ 108-117 (Kraft); Doc. 229 at ¶¶ 86-95 (Wal-Mart/ICCO); Minnesota Deceptive Trade Practices Act, Minn. Stat. § 325D.44 *et seq*. ("MDTPA"), Doc. 225 at ¶¶ 126-131 (Kraft); Doc. 229 at ¶¶ 104-109 (Wal-Mart/ICCO); Minnesota False Statement in Advertising Act, Minn. Stat. § 325F.67 ("MFSAA") pursuant to Minn. Stat. § 8.31 sub div. 3a, Doc. 225 at ¶¶ 118-125 (Kraft); Doc. 229 at ¶¶ 96-103 (Wal-Mart/ICCO); Minnesota Prevention of Consumer Fraud Act, Minn. Stat. § 325F.68 *et seq*. ("MPCFA"), pursuant to Minn. Stat. § 8.31 sub div. 3a, Doc. 225 at ¶¶ 98-107 (Kraft); Doc. 229 at ¶¶ 76-85 (Wal-Mart/ICCO); New Jersey Consumer Fraud Act, N.J. Stat. § 56:8-1 *et seq*. ("NJCFA"), Doc. 229 at ¶¶ 122-129 (Wal-Mart/ICCO); and New York General Business Law §§ 349, 350 ("NYGBL"), Doc. 225 at ¶¶ 170-180 (Kraft); Doc. 229 at ¶¶ 65-75 (Wal-Mart/ICCO).

Wal-Mart contends that Plaintiffs have no Anticaking claim under the consumer protection statutes of Alabama, California, Florida, New Jersey, or New York, or the MPCFA,

MUTPA, or MFSAA, because they do not allege that they were "injured as a result of any conduct by Wal-Mart." Doc. 168 at 28; *see id*. at 25, 27-28, 29, 31-34. The court will consider this argument as to Albertsons/SuperValu, Kraft, and ICCO as well because Defendants generally joined each other's arguments (from the motions to dismiss the original complaints and the present motions), and because the argument applies with equal force to them all.

The operative complaints allege that Plaintiffs purchased the products believing them to be "100% Grated Parmesan Cheese." Doc. 225 at ¶¶ 9-17; Doc. 227 at ¶¶ 9-11; Doc. 229 at ¶¶ 9-14. The necessary implication is that Plaintiffs never consulted, let alone relied upon, the ingredient labels' assertion that cellulose was added to prevent caking. This dooms Plaintiffs' claims under the above-referenced statutes, all of which require some form of causal connection between the alleged misrepresentation and the plaintiff's alleged injury. *See Dolphin LLC v. WCI Communities, Inc.*, 715 F.3d 1243, 1250 (11th Cir. 2013) (holding that the defendant was entitled to summary judgment on a FDUTPA claim where the plaintiff "made no allegation and presented no evidence that the alleged misleading statement caused [its] damages");[*] *Sateriale v.*

[*] Some explanation is warranted as to the FDUTPA. "To state an FDUTPA claim, [a plaintiff] must allege (1) a deceptive act or unfair trade practice; (2) causation; and (3) actual damages." *Dolphin LLC*, 715 F.3d at 1250. Courts have split on the precise role that causation or reliance plays in alleging an FDUTPA claim. Some courts hold that the "FDUTPA does not require proof of actual, individualized reliance; rather, it requires only a showing that the practice was likely to deceive a reasonable consumer." *Rikos v. Procter & Gamble Co.*, 799 F.3d 497, 515 (6th Cir. 2015); *see also Cold Stone Creamery, Inc. v. Lenora Foods I, LLC*, 332 F. App'x 565, 567 (11th Cir. 2009) (same). Others hold that where a plaintiff does not allege that the misrepresentation played some role in her alleged damages, particularly where the plaintiff has not actually seen the alleged misrepresentation, she fails to adequately allege an FDUTPA claim. *See Dolphin LLC*, 715 F.3d at 1250 (cited in the text); *Molina v. Aurora Loan Servs., LLC*, 635 F. App'x 618, 627 (11th Cir. 2015) (holding that the plaintiff failed to state an FDUTPA claim where she "made no allegation as to causation; she did not allege that, but for the quoted statement on [the defendants'] websites, she would not have applied for (or would have received) a loan modification"); *Kais v. Mansiana Ocean Residences, LLC*, 2009 WL 825763, at *1-2 (S.D. Fla. Mar. 26, 2009) (dismissing an FDUTPA claim where the plaintiff did not "state that the[] alleged deceptive acts caused him to enter into the contract with Defendant or caused him

R.J. Reynolds Tobacco Co., 697 F.3d 777, 793-94 (9th Cir. 2012) (holding that because the plaintiffs' UCL and CLRA claims sounded in fraud, they had to prove reliance); *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 606 (3d Cir. 2012) (noting that while the NJCFA does not "require proof of reliance … the alleged unlawful practice must be a proximate cause of the plaintiff's ascertainable loss"); *Bykov v. Radisson Hotels, Int'l Inc.*, 221 F. App'x 490 (8th Cir. 2007) (holding that the plaintiff failed to establish the casual nexus required by the MFSAA and the MPCFA where he alleged that statements on Radisson's website regarding room rates at a hotel were misleading, but had "never examined the Radisson website … prior to staying at the hotel"); *Friest v. Luxottica Grp. S.P.A.*, 2016 WL 7668453, at *7 (D.N.J. Dec. 16, 2016) (dismissing NJCFA claims where the plaintiff did not "sufficiently allege[] that the advertisement caused [his] purported loss," as the complaint did not "allege Plaintiff saw the advertisement before purchasing prescription glasses from Defendants"); *Goldemberg v. Johnson & Johnson Consumer Cos., Inc.*, 8 F. Supp. 3d 467, 480 (S.D.N.Y. 2014) ("To properly allege causation [under NYGBL § 349], a plaintiff must state in his complaint that he has seen the misleading statements of which he complains before he came into possession of the products he purchased."); *Ackerman v. Coca-Cola Co.*, 2010 WL 2925955, at *22 (E.D.N.Y. July 21, 2010) ("To prevail on a claim under [NY]GBL § 350, a plaintiff must demonstrate reliance on defendants' false advertising."); *Cooper v. Bristol-Myers Squibb Co.*, 2009 WL 5206130, at *9 (D.N.J. Dec. 30, 2009) (dismissing an ADTPA claim because the plaintiff "fail[ed] to allege with

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to act differently in any way"). The court agrees with the latter set of decisions, including the Eleventh Circuit's published decision in *Dolphin LLC*, which affirmed the district court's holding that the plaintiff's failure to allege that it "relied on the allegedly misleading statement in signing the contract … is fatal to [its] claim because an FDUTPA claim must allege that the deceptive act or unfair practice actually caused plaintiff's claimed damages." *Dolphin, LLC v. WCI Communities, Inc.*, 2008 WL 6894512, at *5 (S.D. Fla. Feb. 20, 2008).

specificity the connection between Defendants' conduct and Plaintiff's resultant injury"); *Grp. Health Plan, Inc. v. Philip Morris Inc.*, 621 N.W.2d 2, 13 (Minn. 2001) (holding that, for purposes of MPCFA, MUTPA, and MFSAA claims brought pursuant to Minn. Stat. § 8.31, "[c]ausation is … a necessary element of an action to recover damages," and that "where … plaintiffs allege that their damages were caused by deceptive, misleading, or fraudulent statements … as a practical matter it is not possible that the damages could be caused by a violation without reliance on the statements or conduct alleged to violate the statues"). Accordingly, Plaintiffs' Anticaking claims under the ADTPA, CLRA, UCL, FDUTPA, NJCFA, NYGBL, MPCFA, MUTPA, and MFSAA are dismissed.

Finally, Defendants argue that the MDTPA claims fail because "injunctive relief is the sole remedy under th[is] statute," Doc. 168 at 26, and because Plaintiffs have "not plausibly alleged that they are likely to suffer future harm from [Defendants'] alleged misrepresentations," Doc. 162 at 26; *see* Doc. 168 at 17-18, 26. Defendants are right that injunctive relief is the sole remedy available under the MDTPA. *See Johnson v. Bobcat Co.*, 175 F. Supp. 3d 1130, 1140 (D. Minn. 2016) ("[U]nder Minnesota law, the sole statutory remedy for [a plaintiff's MDTPA claim] is injunctive relief."); *Damon v. Groteboer*, 937 F. Supp. 2d 1048, 1070 (D. Minn. 2013) (same). And the "general rule" is "that consumer plaintiffs cannot seek injunctive relief once they are aware of a deceptive practice." *Forth v. Walgreen Co.*, 2018 WL 1235015, at *14 (N.D. Ill. Mar. 9, 2018) (distinguishing cases in which plaintiffs "plausibly allege that they will have no choice but to be injured in the future") (collecting cases); *cf. Johnson v. Wal-Mart Stores Inc.*, 2016 WL 3753663, at *3 (S.D. Ill. July 14, 2016) (denying injunctive relief under the Illinois Uniform Deceptive Trade Practices Act ("IUDTPA") because the "plaintiffs' awareness of the defendants' tendency to mislabel products means the plaintiffs can avoid future harm by

exercising consumer choice" and not purchasing the defendants' products). This is so because once a plaintiff is aware of the defendant's allegedly unlawful "sales practices, he is not likely to be harmed by the practices in the future." *Camasta*, 761 F.3d at 740-41 (denying injunctive relief under the IUDTPA); *see also Demedicis v. CVS Health Corp.*, 2017 WL 569157, at *2 (N.D. Ill. Feb. 13, 2017) (dismissing an IUDTPA claim where the plaintiff had not "alleged that he is likely to keep buying products from Defendants with the knowledge of their allegedly deceptive practices," and noting that because the plaintiff "is now aware that Defendants allegedly deceptively label products … [he] is not likely to be harmed in the future"); *Mednick v. Precor, Inc.*, 2016 WL 5390955, at *8-9 (N.D. Ill. Sept. 27, 2016) (collecting cases).

The amended complaints do not adequately allege that Plaintiffs will purchase Defendants' products again now that they are aware of Defendants' alleged misrepresentations. Doc. 225 at ¶ 130; Doc. 229 at ¶ 108. It follows that Plaintiffs may not seek injunctive relief, and because only injunctive relief is available under the MDTPA, their MDTPA Anticaking claims are dismissed.

* * *

In sum, Plaintiff's Anticaking claims under the ADTPA, CLRA, UCL, FDUTPA, MPCFA, MUTPA, MFSAA, MDTPA, NJCFA, and NYGBL are dismissed. The Anticaking claims under the CUTPA (against Kraft), ICFA (against Kraft and Albertsons/SuperValu), and MCPA (against Kraft) may proceed.

C. Express Warranty Claims

Like the statutory consumer fraud claims, the express warranty claims allege that although the products' ingredient lists state that cellulose was added to prevent caking, the

amount of cellulose exceeded what was necessary for anticaking purposes. Doc. 225 at ¶¶ 46, 50; Doc. 228 at ¶¶ 40, 44; Doc. 229 at ¶ 46.

Kraft contends that Plaintiffs cannot bring an express warranty claim on behalf of a nationwide class given the "material and significant differences in express warranty law across the fifty states." Doc. 162 at 30-31. This contention is premature and more appropriately addressed during class certification proceedings. True enough, Rule 23(c)(1)(A) provides that the court may reject a plaintiff's attempt to represent a class as soon as it becomes obvious that she will be unable to satisfy Rule 23. *See* Fed. R. Civ. P. 23(c)(1)(A) ("At an early practicable time after a person sues … as a class representative, the court must determine by order whether to certify the action as a class action."). In limited circumstances, that time can arise at the pleading stage. *See Pilgrim v. Universal Health Card, LLC*, 660 F.3d 943, 949 (6th Cir. 2011); *Hill v. Wells Fargo Bank, N.A.*, 946 F. Supp. 2d 817, 829-30 (N.D. Ill. 2013).

But Seventh Circuit precedent teaches that certifying multistate or nationwide classes is not categorically prohibited. *See Martin v. Reid*, 818 F.3d 302, 308 (7th Cir. 2016) (noting, in a state law warranty and consumer fraud case, that Seventh Circuit precedent should not be understood to hold that "nationwide classes are impermissible as a matter of law"); *Pella Corp. v. Saltzman*, 606 F.3d 391, 393 (7th Cir. 2010) ("While consumer fraud class actions present problems that courts must carefully consider before granting certification, there is not and should not be a rule that they never can be certified."). Indeed, the Seventh Circuit has upheld decisions to certify a nationwide class so long as "the central questions in the litigation are the same for all class members." *Pella Corp.*, 606 F.3d at 394. Accordingly, class certification analysis is necessarily contextual, and the context—including whether and how to create subclasses—is better explored in this case under Rule 23, on a developed record, than under Rule 12. *See id*. at

396; *Alea v. Wilson Sporting Goods Co.*, 2017 WL 5152344, at *7 (N.D. Ill. Nov. 7, 2017); *Kostovetsky v. Ambit Energy Holdings, LLC*, 2016 WL 105980, at *8 (N.D. Ill. Jan. 8, 2016).

Albertsons/SuperValu and Wal-Mart/ICCO argue that the express warranty claims should be dismissed because Plaintiffs failed to provide them with pre-suit notice. Doc. 157 at 27-28; Doc. 168 at 20-21. Yet the Albertsons/SuperValu and Wal-Mart/ICCO complaints allege that "[a]ll conditions precedent [of the express warranty claims] have occurred or been performed," Doc. 227 at ¶ 42; Doc. 229 at ¶ 45, which suffices at this stage to satisfy Plaintiffs' obligation to allege that they met the notice requirement. Where, as here, notice is a "condition precedent" to asserting an express warranty claim, a plaintiff may rely on such general allegations. *See* Fed. R. Civ. P. 9(c) ("In pleading conditions precedent, it suffices to allege generally that all conditions precedent have occurred or been performed."); *Kmart Corp. v. Footstar, Inc.*, 2010 WL 1541296, at *4-5 (N.D. Ill. Apr. 14, 2010) (noting that courts "have allowed parties seeking insurance coverage to plead conditions precedent" by alleging simply that "all of the conditions precedent to coverage provided in the Policy have been complied with"); *Smith v. Apple, Inc.*, 2009 WL 3958096, at *1 (N.D. Ala. Nov. 4, 2009) (treating notice as a condition precedent for breach of warranty); *Collins v. Pfizer*, 2009 WL 126913, at *2 (S.D. Ind. Jan. 20, 2009) (same, "[u]nless some exception applies").

Kraft and Albertsons/SuperValu contend that the Alabama, Connecticut, Florida, Illinois, and Michigan express warranty claims should be dismissed because Plaintiffs "lack vertical privity of contract with Defendants." Doc. 157 at 30-32; *see also* Doc. 162 at 32-33. Plaintiffs implicitly concede that lack of privity can defeat an express warranty claim, but argue that the privity requirement is waived when: (1) the plaintiff relies on a manufacturer's written representations; (2) the plaintiff is an "intended beneficiary of the contract for sale"; or (3) the

plaintiff purchased a product from an agent of the manufacturer. Doc. 185 at 47-48. Plaintiffs are correct as to Alabama, Florida, and Illinois, but not as to the other States.

Where, as here, a plaintiff would not expect a retailer to provide her with "detailed information" about a product and the warranty is reflected in the manufacturer's advertisements, Florida law does not require the plaintiff to establish privity between herself and the manufacturer. *See Alea*, 2017 WL 5152344, at *4-5 (analyzing Florida law in detail). Alabama similarly permits express warranty claims where a manufacturer "intended to extend the express warranty [at issue] directly to the ultimate purchaser," which is alleged to be the case here. *Johnson v. Anderson Ford, Inc.*, 686 So.2d 224, 228-29 (Ala. 1996). (Albertsons/SuperValu argue that this exception does not apply because Plaintiffs do not allege that SuperValu was a remote manufacturer of the Essential Everyday 100% Grated Parmesan Cheese. Doc. 192 at 13. However, it is reasonable to conclude, when drawing all reasonable inferences in Plaintiffs' favor, that SuperValu falls within this exception given the complaints' allegation that SuperValu is "the registered owner of the 'Essential Everyday' trademark and distributes [these] products" to various stores. Doc. 227 at ¶ 15.)

These exceptions to the privity requirement do not apply under Connecticut law. Plaintiffs contend that Connecticut will relax the privity requirement where a plaintiff "relies on a manufacturer's written representations," Doc. 185 at 46-47, but this exception applies only where the plaintiff suffers a physical injury—not where, as here, only economic injury is alleged. *See Hamon v. Digliani*, 174 A.2d 294, 297 (Conn. 1961) (holding that the plaintiff could maintain an express warranty claim against a manufacturer arising from its advertising where she was "severely burned" after the manufacturer's detergent spilled on her); *Fraiser v. Stanley Black & Decker, Inc.*, 109 F. Supp. 3d 498, 506-07 (D. Conn. 2015) (noting that under

Connecticut law, "the privity requirement is relaxed where injured parties seek warranty recovery for personal injury damages—but parties seeking to state a claim for breach of express warranty for economic losses … still have to establish privity"); *Cavanaugh v. Subaru of Am., Inc.*, 2017 WL 2293124, at *3 (Conn. Super. Ct. May 4, 2017) (same). Plaintiffs' fallback position, that Connecticut "recognizes an exception to the privity requirement where other avenues of recovery are foreclosed," Doc. 185 at 47 n.19, is inapplicable here, as the Connecticut statutory consumer protection and unjust enrichment claims have not been dismissed.

Plaintiffs also contend that Michigan creates an exception where the consumer purchases a product from the manufacturer's agent. Doc. 185 at 48. Yet Plaintiffs plead no facts suggesting an agency relationship between Kraft—the only defendant whose products Plaintiffs purchased in Michigan—and the "retail locations in Plymouth, Michigan" where they acquired Kraft's products. Doc. 225 at ¶ 17.

Finally, Plaintiffs contend that Illinois will relax its privity requirements when a plaintiff relies on a manufacturer's written representations, is the intended beneficiary of the sale, or purchases a product from an agent of the manufacturer. Doc. 185 at 46-48. The first two exceptions do not apply here. As to the first, Plaintiffs fail to allege that they saw, let alone relied on, Defendants' anticaking representations. As to the second, while it is true that the Illinois privity requirement is relaxed when a manufacturer "knows the identity, purpose and requirements of the dealer's customer and manufactured or delivered the goods specifically to meet those requirements," the exception applies only where the manufacturer is aware of the individual customer's identity—a situation not alleged here. *Canadian Pac. Ry. Co. v. Williams-Hayward Protective Coatings, Inc.*, 2005 WL 782698, at *12-13 (N.D. Ill. Apr. 6, 2005) (holding that the exception applied where a remote manufacturer delivered goods specifically to

meet the plaintiff's requirements); *see also Schwebe v. AGC Flat Glass N. Am., Inc.*, 2013 WL 2151551, at *4 (N.D. Ill. May 16, 2013) ("This Court reads this privity exception narrowly to apply to cases where the component manufacturer knows the identity of the manufacturer's customer."); *Walsh v. Ford Motor Co.*, 588 F. Supp. 1513, 1529 (D.D.C. 1985) (holding that the exception did not apply where there had "been neither direct dealing by Ford with the ultimate consumer nor were the vehicles manufactured to the requirements of the ultimate user").

As to the third exception to the privity requirement under Illinois law, Defendants do not dispute the existence of an agency exception. Accordingly, the Illinois express warranty claim against Albertsons survives, as Plaintiffs adequately allege the existence of an agency relationship between the "various Jewel Osco retail store locations" at which the Illinois plaintiffs bought Essential Everyday "100% Grated Parmesan Cheese" and Albertsons, which "operates" stores under the "Jewel-Osco" brand. Doc. 227 at ¶¶ 9-10, 12; *see Johnke v. Espinal-Quiroz*, 2016 WL 454333, at *9 (N.D. Ill. Feb. 5, 2016) ("Ordinarily, the question of whether an agency relationship existed is a question of fact that is not properly resolved on a motion to dismiss."). The Illinois express warranty claims against Kraft and SuperValu, by contrast, are dismissed, as Plaintiffs fail to plead any facts suggesting the existence of an agency relationship between those defendants and the locations in Illinois where the plaintiffs acquired the products. Doc. 225 at ¶¶ 10 ("local Jewel grocery store"), 14 ("local Costco, Jewel Osco, Mariano's, Meijer, and Target"); Doc. 227 at ¶¶ 9-10 ("Jewel Osco retail store").

Finally, as Wal-Mart notes, Plaintiffs cannot assert a New York express warranty claim because such a claim requires "proof of reliance" and Plaintiffs make clear that they never actually saw the Anticaking statements. Doc. 168 at 23-24; *see In re Scotts EZ Seed Litig.*, 304 F.R.D. 397, 410 (S.D.N.Y. 2015); *Goldemberg v. Johnson & Johnson Consumer Cos., Inc.*, 8 F.

Supp. 3d 467, 482 (S.D.N.Y. Mar. 27, 2014) (noting that to "state a claim for breach of express warranty under New York law, a plaintiff must allege … the buyer's reliance on th[e] warranty as a basis for the contract with the immediate seller"); *Weiner v. Snapple Beverage Corp.*, 2010 WL 3119452, at *11 (S.D.N.Y. Aug. 5, 2010). Likewise, Plaintiffs do not allege that they relied on Kraft's Anticaking statements, so the New York express warranty claim against Kraft is dismissed as well.

* * *

In sum, the Connecticut, Michigan, and New York express warranty claims are dismissed, as are the Illinois express warranty claims against Kraft and SuperValu. The express warranty claims under Alabama law (against Kraft, SuperValu, and Wal-Mart/ICCO), California law (against Kraft and Wal-Mart/ICCO), Florida law (against Kraft and Wal-Mart/ICCO), Illinois law (against Albertsons only), Minnesota law (against Kraft and Wal-Mart/ICCO), and New Jersey law (against Wal-Mart/ICCO) may proceed.

D. Implied Warranty Claims

Plaintiffs allege that Albertsons/SuperValu, Kraft, and Wal-Mart/ICCO breached an implied warranty of merchantability because their products "do not pass without objection in the trade and are not of … average quality within the contract description because they contain cellulose powder in excessive quantities." Doc. 225 at ¶ 67; Doc. 227 at ¶ 59; Doc. 229 at ¶ 62. Defendants' arguments regarding pre-suit notice and multistate classes, Doc. 157 at 27-28; Doc. 162 at 32; Doc. 168 at 20-21, fail for the reasons set forth above in discussing the express warranty claims.

Kraft and Wal-Mart/ICCO contend that the implied warranty claims fail because Plaintiffs do not allege that their products were "inedible" or lacked "even the most basic degree of fitness of ordinary use." Doc. 162 at 33; *see also* Doc. 168 at 22-23. Yet the statutes

governing implied warranty claims in the States (Alabama, California, Connecticut, Florida, Illinois, Michigan, Minnesota, New Jersey, and New York) where Plaintiffs purchased the Albertsons, Kraft, and Wal-Mart/ICCO products require not only that goods be fit for ordinary use, but also that they "[c]onform to the promises or affirmations of fact made on the container or label if any." Ala. Code. § 7-2-314(2)(f); *see also* Cal. Com. Code § 2314(2)(f); Conn. Gen. Stat. § 42a-2-314(2)(f); Fla. Stat. Ann. § 672.314(2)(f); 810 ILCS 5/2-314(2)(f); Mich. Comp. Laws § 440.2314(2)(f); Minn. Stat. Ann. § 336.2-314(2)(f); N.J. Stat. Ann. § 12A:2-314(2)(f); N.Y. U.C.C. Law § 2-314(2)(f). As their text suggests, those statutes permit a plaintiff alleging solely a misrepresentation on a product's label to pursue an implied warranty claim. *See Perez v. Monster Inc.*, 149 F. Supp. 3d 1176, 1186 (N.D. Cal. 2016) (California law) ("Here … Mr. Perez alleges a false promise or affirmation of fact made on the container or label [of the product]. Accordingly, the Court shall not dismiss [his] state law implied warranty claim."); *In re Ferrero Litig.*, 794 F. Supp. 2d 1107, 1118 (S.D. Cal. 2011) (same under California law, where the plaintiff alleged that the manufacturer of Nutella falsely stated that it was "healthy" or "nutritious" breakfast food, even though the product was otherwise "fit for its ordinary purpose of consumption"); *In re Lumber Liquidators Chinese-Manufactured Flooring Prod. Mktg., Sales Practices & Prod. Liab. Litig.*, 2017 WL 2646286, at *12-13 (E.D. Va. June 20, 2017) (holding that implied warranty claims under California, Florida, Illinois, and New York law, in which the plaintiff alleged that the defendant's products did not conform to the promises or affirmations made on the label, survived summary judgment); *In re ConAgra Foods, Inc.*, 908 F. Supp. 2d 1090, 1111-12 (C.D. Cal. 2012) (holding that New Jersey implied warranty claims could proceed where the plaintiffs "alleged that Wesson Oils do not conform to the representation on their labels that they are '100% Natural'").

Albertsons/SuperValu argue that the Alabama and Illinois implied warranty claims should be dismissed for lack of privity. Doc. 157 at 30-32. The Alabama implied warranty claims are dismissed because Plaintiffs do not cite, and the court has not found, any exceptions to the general rule that, "in cases of strictly economic harm," the absence of privity "is fatal to an implied warranty claim" under Alabama law. *Johnson v. Anderson Ford, Inc.*, 686 So.2d 224, 228 (Ala. 1996). The Illinois implied warranty claims survive only as to Albertsons. As explained above, Plaintiffs adequately allege the existence of an agency relationship between Albertsons and the retailers where Plaintiffs purchased the Albertsons product, but not between SuperValu and those retailers.

Kraft suggests in passing that the California, Connecticut, and Michigan implied warranty claims against it fail for lack of privity. Doc. 162 at 34 n.19. Because Kraft does not cite any case law in support, it forfeits the argument for purposes of this motion. *See G & S Holdings LLC v. Cont'l Cas. Co.*, 697 F.3d 534, 538 (7th Cir. 2012) ("We have repeatedly held that a party waives an argument by failing to make it before the district court."); *Judge v. Quinn*, 612 F.3d 537, 557 (7th Cir. 2010) ("[P]erfunctory and underdeveloped arguments, and arguments that are unsupported by pertinent authority, are waived."). (Kraft cannot benefit from Albertsons/SuperValu's privity arguments under Alabama or Illinois law because Plaintiffs do not bring Alabama or Illinois implied warranty claims against Kraft. Doc. 225 at 16.)

Finally, Wal-Mart/ICCO argue that the New York implied warranty claims should be dismissed because Plaintiffs do not allege reliance. Doc. 168 at 23-24 (Wal-Mart); Doc. 164 at 28 (ICCO adopting Wal-Mart's brief). However, Wal-Mart/ICCO cite no authority for the proposition that reliance is an element of a New York implied warranty claim, and thus forfeit

the argument for purposes of this motion. *See G & S Holdings*, 697 F.3d at 538; *Judge*, 612 F.3d at 557.

* * *

In sum, Plaintiffs' Alabama and Illinois implied warranty claims against SuperValu are dismissed, while the other implied warranty claims may proceed.

E. Unjust Enrichment Claims

Finally, Plaintiffs bring unjust enrichment claims against Albertsons/SuperValu, Kraft, and Wal-Mart/ICCO. Doc. 225 at ¶¶ 53-59; Doc. 227 at ¶¶ 46-52; Doc. 229 at ¶¶ 49-55. Defendants' arguments regarding the propriety of nationwide classes, Doc. 162 at 28, fail for the reasons set forth above in discussing the express warranty claims.

Defendants contend that the unjust enrichment claims should be dismissed because the laws of Alabama, California, Connecticut, Florida, Minnesota, New Jersey, and New York do not permit such claims if the plaintiff has an "adequate remedy at law." Doc. 157 at 33-34; Doc. 162 at 28-29; Doc. 168 at 28, 30, 32. True enough, some courts dismiss unjust enrichment claims where a plaintiff also pursues tort, contract, or state consumer protection claims based on the same allegedly wrongful conduct. *See*, *e.g.*, *Licul v. Volkswagen Grp. of Am., Inc.*, 2013 WL 6328734, at *7-8 (S.D. Fla. Dec. 5, 2013); *Arena Dev. Grp., LLC v. Naegele Commc'ns, Inc.*, 2008 WL 1924179, at *5 (D. Minn. Apr. 29, 2008). Yet there is an equally robust line of cases holding that because Rule 8(d)(2) permits parties to "set out two or more statements of a claim or defense alternatively or hypothetically," it would be premature to dismiss unjust enrichment claims at the pleading stage simply because the plaintiff also pursues claims at law. *See*, *e.g.*, *Astiana v. Hain Celestial Grp., Inc.*, 783 F.3d 753, 762-63 (9th Cir. 2015) (reinterpreting an unjust enrichment claim as a quasi-contract claim, and holding that the fact that it might be "duplicative of or superfluous to [the plaintiff's] other claims … was not grounds for dismissal");

McMillan v. Lowe's Home Ctrs., LLC, 2016 WL 232319, at *7 (E.D. Cal. Jan. 20, 2016) (declining to dismiss an unjust enrichment claim "on the ground that it is duplicative of relief available under plaintiff's false advertising and consumer fraud claims"); *In re Fluidmaster, Inc.*, 149 F. Supp. 3d 940, 963 (N.D. Ill. 2016) (same); *Gate Techs., LLC v. Delphix Capital Mkts., LLC*, 2013 WL 3455484, at *5-6 (S.D.N.Y. July 9, 2013) (same); *Talon Indus., LLC v. Rolled Metal Prods., Inc.*, 2016 WL 11325768, at *2 (D.N.J. Apr. 12, 2016) (same); *PNY Techs., Inc. v. Salhi*, 2013 WL 4039030, at *7 (D.N.J. Aug. 5, 2013) (same); *Marty v. Anheuser-Busch Cos., LLC*, 43 F. Supp. 3d 1333, 1349-50 (S.D. Fla. 2014) (same); *see also In re Dairy Farmers of Am., Inc. Cheese Antitrust Litig.*, 2015 WL 3988488, at *36 (N.D. Ill. June 29, 2015) (observing that dismissing unjust enrichment claims as duplicative of other claims "is not a widely-accepted theory for dismissal at the motion-to-dismiss stage"). The court agrees with the second line of cases and thus declines to dismiss the unjust enrichment claims at the pleading stage on the ground that they are duplicative of the warranty or consumer protection claims.

Albertsons/SuperValu and Kraft contend that Plaintiffs' Alabama and Illinois unjust enrichment claims "rise and fall" with the Alabama and Illinois warranty and state consumer protection claims because the underlying allegations rest on the same underlying conduct. Doc. 157 at 33; Doc. 162 at 30. In *Cleary v. Philip Morris Inc.*, 656 F.3d 511 (7th Cir. 2011), the Seventh Circuit held that because the "improper conduct" underlying an ICFA claim and an unjust enrichment claim "was insufficient to support" the ICFA claim, it was also "insufficient to establish unjust enrichment." *Id*. at 518. There is no reason to run this issue to ground, however; because the Alabama express warranty claims against SuperValu and Kraft, the ICFA claims against Albertsons/SuperValu and Kraft, and the Illinois express and implied warranty claims

against Albertsons survive dismissal, there remain several claims on which to ground the Alabama and Illinois unjust enrichment claims.

Finally, Kraft argues that the Michigan unjust enrichment claims fail because Michigan law requires a plaintiff to show that he "directly conferred a benefit on the defendant." Doc. 162 at 29 (quoting *Storey v. Attends Healthcare Prods., Inc.*, 2016 WL 3125210, at *12 (June 3, 2016)) (emphasis omitted). Courts have split on whether Michigan unjust enrichment law requires that a plaintiff confer a direct benefit on a defendant, or whether a benefit "may be unjustly obtained by a defendant through an intermediary." *Compare Schechner v. Whirlpool Corp.*, 237 F. Supp. 3d 601, 617-18 (E.D. Mich. 2017) ("To state a claim for unjust enrichment, Michigan law requires a direct benefit or some sort of direct interaction between Plaintiffs and Whirlpool."), *In re Gen. Motors LLC Ignition Switch Litig.*, 257 F. Supp. 3d 372, 426-28 (S.D.N.Y. 2017), *and Los Gatos Mercantile, Inc. v. E.I. DuPont De Nemours & Co.*, 2015 WL 4755335, at *29 (N.D. Cal. Aug. 11, 2015), *with State Farm Mut. Auto. Ins. Co. v. Vital Cmty. Care, P.C.*, 2018 WL 2194019, at *8 (E.D. Mich. May 14, 2018) (holding that "individual participants in a fraud scheme who benefitted indirectly can be liable under an unjust enrichment theory"), *In re Opana Er Antritrust Litig.*, 2016 WL 4245516, at *2-3 (N.D. Ill. Aug. 11, 2016) (holding that the critical inquiry under Michigan law is whether the plaintiff's detriment and the defendant's benefit are related), *In re Solodyn (Minocycline Hydrochloride) Antitrust Litig.*, 2015 WL 5458570, at *18 (D. Mass. Sept. 16, 2015) (noting that courts have held that Michigan unjust enrichment law does "not necessarily require a plaintiff to plead a conferral of a direct benefit"), *and Hoving v. Transnation Title Ins. Co.*, 545 F. Supp. 2d 662, 670 (E.D. Mich. 2008) ("Numerous cases have held that a benefit may be unjustly obtained by a defendant through an intermediary, especially if there is some wrongdoing on the defendant's part."). The court

believes that the latter cases have the better of the argument, and accordingly will allow the Michigan unjust enrichment claims to proceed.

* * *

In sum, other than those dismissed under Rule 9(b), the Anticaking unjust enrichment claims may proceed.

Conclusion

The 100% claims are dismissed in their entirety, as are all Anticaking claims against Target/ICCO and all Anticaking claims under Alabama law against Albertsons. The Anticaking claims under the ADTPA, CLRA, UCL, FDUTPA, MUTPA, MDTPA, MFSAA, MPCFA, NJCFA, and NYGBL are dismissed as well. The Anticaking claims under Connecticut, Michigan, and New York express warranty law are dismissed, as are the Anticaking claims against Kraft and SuperValu under Illinois express warranty law. The Anticaking claims against SuperValu under Alabama and Illinois implied warranty law are also dismissed.

Plaintiffs may proceed on their Anticaking claims against Kraft under the CUTPA, ICFA, and MCFA, and against Albertsons/SuperValu under the ICFA. They may proceed with their Anticaking express warranty claims against Kraft under Alabama, California, Florida, and Minnesota law; against Albertsons under Illinois law; against SuperValu under Alabama law; and against Wal-Mart/ICCO under Alabama, California, Florida, Minnesota, and New Jersey law. They may proceed with their Anticaking implied warranty claims against Kraft under California, Connecticut, Michigan, and Minnesota law; against Albertsons under Illinois law; and against Wal-Mart/ICCO under Alabama, California, Florida, New Jersey, New York, and Minnesota law. Finally, Plaintiffs may proceed with their Anticaking unjust enrichment claims against Kraft, Albertsons/SuperValu, and Wal-Mart/ICCO, except for the claims against

Albertsons under Alabama law. No Anticaking claims may proceed against Publix and Target, which are dismissed from this litigation.

November 1, 2018

United States District Judge

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

IN RE: 100% GRATED PARMESAN CHEESE MARKETING AND SALES PRACTICES LITIGATION	)	16 C 5802
	)	MDL 2705
	)	Judge Gary Feinerman
This Document Relates to All Cases	)	

MEMORANDUM OPINION AND ORDER

Defendants in this multidistrict litigation are purveyors of grated parmesan cheese products with labels stating "100% Grated Parmesan Cheese" or some variation thereof. After the Judicial Panel on Multidistrict Litigation assigned these suits to the undersigned judge, Doc. 1, Plaintiffs filed five consolidated class action complaints, Docs. 120-123, 143, which alleged that they were misled by the "100% Grated Parmesan Cheese" labels because the products contained non-cheese ingredients such as cellulose. Defendants moved to dismiss the complaints under Civil Rules 12(b)(1) and 12(b)(6). The court denied the Rule 12(b)(1) motions but granted the Rule 12(b)(6) motions without prejudice to repleading. Docs. 215-216 (reported at 275 F. Supp. 3d 910 (N.D. Ill. 2017)).

Plaintiffs then filed five amended consolidated class action complaints. Doc. 225 (against Kraft Heinz Company); Doc. 226 (against Publix Super Markets, Inc.); Doc. 227 (against Albertsons Companies, Inc., Albertsons LLC, and SuperValu, Inc.); Doc. 228 (against Target Corp. and ICCO-Cheese Company, Inc.); Doc. 229 (against Wal-Mart Stores, Inc. and ICCO-Cheese Company, Inc.). Like the initial complaints, the amended complaints allege that Plaintiffs were misled by the "100% Grated Parmesan Cheese" labels because the products in fact contained cellulose. In addition, the amended complaints except for the one against Publix

allege that the products' ingredient lists were misleading because they represented that the cellulose was added to prevent caking, when in fact the cellulose also acted as filler.

Defendants moved to dismiss the amended complaints under Rule 12(b)(6). Docs. 237, 238, 243, 246, 249. Those motions were granted as to the claims based on the "100% Grated Parmesan Cheese" label (the "100% claims") and granted in part and denied in part as to the claims based on the ingredient lists' representation that cellulose was added to prevent caking (the "Anticaking claims"), and Publix and Target/ICCO were dismissed as defendants. Docs. 296-297 (reported at 348 F. Supp. 3d 797 (N.D. Ill. 2018)). Plaintiffs now move under Rule 15(a)(2) to amend their complaints to allege an Anticaking claim against Publix and to cure the defects in their Anticaking claim against Target/ICCO, Doc. 306; Albertsons/SuperValu moves under Rule 56 for partial summary judgment and under Rule 12(c) for partial judgment on the pleadings, Doc. 309; and Kraft moves under Rule 12(c) for judgment on the pleadings, Doc. 314. Plaintiffs' motion is denied, and Albertsons/SuperValu's and Kraft's respective motions are granted in part and denied in part.

Background

When considering Albertsons/SuperValu's motion for partial summary judgment, the facts are construed as favorably to Plaintiffs, the non-movants, as the record and local Rule 56.1 permit. *See Johnson v. Advocate Health & Hosps. Corp.*, 892 F.3d 887, 893 (7th Cir. 2018). When considering Albertsons/SuperValu's and Kraft's Rule 12(c) motions, the court assumes the truth of the operative complaints' well-pleaded factual allegations, though not their legal conclusions. *See Bishop v. Air Line Pilots Ass'n, Int'l*, 900 F.3d 388, 397 (7th Cir. 2018). The court must also consider "documents attached to the complaint[s], documents that are critical to the complaint[s] and referred to in [them], and information that is subject to proper judicial

notice," along with additional facts set forth in Plaintiffs' opposition briefs, so long as those additional facts "are consistent with the pleadings." *Phillips v. Prudential Ins. Co. of Am.*, 714 F.3d 1017, 1019-20 (7th Cir. 2013) (internal quotation marks omitted); *see also N. Ind. Gun & Outdoor Shows, Inc. v. City of S. Bend*, 163 F.3d 449, 452 (7th Cir. 1998). The facts are set forth as favorably to Plaintiffs as those materials allow. *See Brown v. Dart*, 876 F.3d 939, 940 (7th Cir. 2017). The court must assume the truth of the facts relevant to each motion, but does not vouch for them. *See Donley v. Stryker Sales Corp.*, 906 F.3d 635, 636 (7th Cir. 2018); *Goldberg v. United States*, 881 F.3d 529, 531 (7th Cir. 2018).

A detailed description of Plaintiffs' allegations appears in the court's prior opinions, familiarity with which is assumed. In brief, Defendants Kraft Heinz Company, Albertsons Companies, Inc., Albertsons LLC (the two Albertsons entities will be referred to together as "Albertsons"), SuperValu, Inc., Target Corporation, Wal-Mart Stores, Inc., ICCO-Cheese Company, Inc., and Publix Super Markets, Inc. design, develop, manufacture, sell, test, package, label, distribute, promote, market, and/or advertise grated parmesan cheese products. Doc. 225 at ¶ 19; Doc. 226 at ¶ 10; Doc. 227 at ¶ 16; Doc. 228 at ¶¶ 13-14; Doc. 229 at ¶¶ 15, 29. (Albertsons and SuperValu, close corporate relatives, are named in one complaint. Doc. 227. ICCO manufactures the products for both Target and Wal-Mart, and is named as a defendant in both the Target and Wal-Mart complaints. Docs. 228-229.) At all relevant times, Defendants' products bore labels stating "100% Grated Parmesan Cheese," Doc. 225 at ¶ 21; Doc. 227 at ¶ 18; Doc. 228 at ¶ 18; Doc. 229 at ¶ 18, or some variation thereof, Doc. 225 at ¶ 21; Doc. 226 at ¶ 12; Doc. 227 at ¶ 18; Doc. 228 at ¶ 18; Doc. 229 at ¶ 18.

Defendants' products are comprised largely of cured, dried hard Italian cheeses, Doc. 225 at ¶ 26; Doc. 226 at ¶ 15; Doc. 227 at ¶ 22; Doc. 228 at ¶ 21; Doc. 229 at ¶ 22, but also include a

small but nontrivial percentage of cellulose, an organic polymer with no nutritional value that is "often used as a filler." Doc. 225 at ¶¶ 23-24 (Kraft, 3.8%); Doc. 226 at ¶ 13 (Publix, "a significant portion"); Doc. 227 at ¶¶ 19-20 (Albertsons/SuperValu, 8.8%); Doc. 228 at ¶ 19 (Target/ICCO, no percentage specified); Doc. 229 at ¶¶ 19-20 (Wal-Mart/ICCO, 7.8%). Each product's ingredient list, located on the rear label, lists cellulose and asserts that the cellulose is used to prevent "caking." Doc. 225 at ¶ 4; Doc. 227 at ¶ 4; Doc. 228 at ¶ 4; Doc. 229 at ¶ 4. However, grated parmesan "usually available in the marketplace" is cured and dried in such a way that there is "little problem of clumping or agglomeration," so there in fact is little need to ensure that grated parmesan does not clump or "cake." Doc. 225 at ¶ 26; Doc. 227 at ¶ 22; Doc. 228 at ¶ 21; Doc. 229 at ¶ 22. According to the U.S. Food and Drug Administration ("FDA"), dried cheese products should be, at most, 2% cellulose. Grated Cheeses; Amendment of the Standard of Identity, 51 Fed. Reg. 30,210, 30,210 (Aug. 25, 1986). After commissioning an independent laboratory to test several cured, dried cheese products, Bloomberg reported that many such products contained significantly more than 2% cellulose and specified the percentage of cellulose found in the Albertsons/SuperValu, Wal-Mart/ICCO, and Kraft products. *See* Lydia Mulvaney, *The Parmesan Cheese You Sprinkle on Your Penne Could Be Wood*, Bloomberg (Feb. 16, 2016, 4:00 AM), https://www.bloomberg.com/news/articles/2016-02-16/the-parmesan-cheese-you-sprinkle-on-your-penne-could-be-wood.

Plaintiffs are consumers who purchased Defendants' products at grocery stores in Alabama (Kraft, Albertsons/SuperValu, Wal-Mart/ICCO), California (Kraft, Target/ICCO, Wal-Mart/ICCO), Connecticut (Kraft), Florida (Kraft, Publix, Target/ICCO, Wal-Mart/ICCO), Illinois (Kraft, Albertsons/SuperValu, Target/ICCO), Michigan (Kraft), Minnesota (Kraft, Wal-Mart/ICCO), Missouri (Target/ICCO), New Jersey (Wal-Mart/ICCO), and New York

(Kraft, Wal-Mart/ICCO). Doc. 225 at ¶¶ 9-17; Doc. 226 at ¶¶ 8-9; Doc. 227 at ¶¶ 9-11; Doc. 228 at ¶¶ 9-12; Doc. 229 at ¶¶ 9-14. Plaintiffs purchased the products believing that they contained only cheese. Doc. 225 at ¶¶ 9-17; Doc. 226 at ¶¶ 8-9; Doc. 227 at ¶¶ 9-11; Doc. 228 at ¶¶ 9-12; Doc. 229 at ¶¶ 9-14. In addition, in every amended complaint except the one against Publix, Plaintiffs allege that the products' ingredient lists stated that cellulose was added "to prevent caking," Doc. 225 at ¶ 46; Doc. 227 at ¶ 39; Doc. 228 at ¶ 40; Doc. 229 at ¶ 4, but that the amount of cellulose exceeded what was necessary to prevent caking, Doc. 225 at ¶ 27; Doc. 227 at ¶ 23; Doc. 228 at ¶ 22; Doc. 229 at ¶ 23, and therefore that the cellulose must also serve the undisclosed purpose of acting as filler, Doc. 225 at ¶ 4; Doc. 227 at ¶ 4; Doc. 228 at ¶ 2; Doc. 229 at ¶ 4.

Discussion

I. Standing

As noted, Plaintiffs' 100% claims have been dismissed, leaving only their Anticaking claims. Kraft argues that Plaintiffs cannot bring those claims in federal court because their allegations do not satisfy the causation requirement of Article III standing. Doc. 316 at 19-21. As the court explained in its more recent opinion in this case—and as reiterated below—Plaintiffs by necessary implication allege in the operative complaints that they did not see the Anticaking representation on the products' ingredient labels before purchase. 348 F. Supp. 3d at 810. Kraft reasons that because Plaintiffs never saw the Anticaking representation, they cannot have sustained an injury that is "fairly traceable to" that statement and thus do not have standing. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016).

Kraft's argument fails for the reasons given in the court's first opinion in this case. 275 F. Supp. 3d at 918-19. As the court explained, under *In re Aqua Dots Products Liability*

Litigation, 654 F.3d 748, 750-51 (7th Cir. 2011), a plaintiff has standing to bring a consumer protection claim if the allegedly deceptive practice caused her to pay more for the product than she otherwise would have paid. That test is satisfied here: If Defendants had disclosed on their labels that cellulose was added in part as filler, at least some consumers would not have purchased the products or would not have been willing to pay as much for them, which—applying basic supply-and-demand principles—would have driven down the price for all consumers, even those who did not read the labels. Indeed, that Defendants included the Anticaking representation on the products' ingredient labels—even though, as they conceded at the motion hearing, the representation is not required by law, Doc. 341—strongly suggests that the representation helped Defendants sell more cheese at higher prices, thereby driving up the price for all consumers. Plaintiffs therefore have Article III standing to pursue the Anticaking claims.

II. Plaintiffs' Motion for Leave to Amend as to Publix and Target/ICCO

Plaintiffs move for leave to file second amended consolidated complaints against Publix and Target/ICCO. Doc. 306. The court's more recent opinion dismissed Publix and Target as defendants after holding that Plaintiffs did not bring an Anticaking claim against Publix and that their Anticaking claims against Target/ICCO were too vague to satisfy federal pleading standards because they did not allege the percentage of cellulose in the Target/ICCO products. 348 F. Supp. 3d at 803, 808, 818. Plaintiffs attempt in their proposed second amended complaints to remedy both defects by bringing Anticaking claims against Publix and by alleging the amount of cellulose in the Publix and Target/ICCO products. Doc. 306 at 2.

The parties dispute which standard governs Plaintiffs' motion. Plaintiffs contend that the lenient Rule 15(a)(2) standard applies. Doc. 306 at 2; Doc. 327 at 2-4. Publix and Target/ICCO

contend that the court's more recent order must be considered a final judgment dismissing all claims against them with prejudice, and therefore that the more demanding standards for amending a judgment under Rule 59(e) or Rule 60(b) govern. Doc. 324 at 5-9; Doc. 325 at 10-11. The court need not resolve the dispute because Plaintiffs' motion fails even under the more lenient Rule 15(a)(2) standard.

Rule 15(a)(2) provides that leave to amend "shall be freely given when justice so requires." Fed. R. Civ. P. 15(a)(2). That said, district courts "have broad discretion to deny leave to amend where there is undue delay, bad faith, dilatory motive, repeated failure to cure deficiencies, undue prejudice to the defendants, or where the amendment would be futile." *Right Field Rooftops, LLC v. Chi. Cubs Baseball Club, LLC*, 870 F.3d 682, 693 (7th Cir. 2017). Although a plaintiff ordinarily should be given at least one opportunity to amend, *see Pension Trust Fund for Operating Eng'rs v. Kohl's Corp.*, 895 F.3d 933, 941 (7th Cir. 2018), she is not entitled to additional opportunities if she fails to remedy defects apparent at the time of the prior amendment, nor is she entitled to amend if she made a considered, strategic choice not to include information known to her at that time. *See Mulvania v. Sheriff of Rock Island Cnty.*, 850 F.3d 849, 855 (7th Cir. 2017) (affirming the district court's denial of leave to amend to assert an ADA claim where the plaintiff "could have alleged the ADA claim at the beginning of the suit," "[t]he lengthy delay could not be justified by newly discovered information," and "the [district] court suggested that the delay was strategic"); *McCoy v. Iberdrola Renewables, Inc.*, 760 F.3d 674, 687 (7th Cir. 2014) ("Outland presented no excuse for omitting … three [proposed legal] theories originally, and the unexplained delay looks more like procedural gamesmanship than legitimate ignorance or oversight."); *First Wis. Fin. Corp. v. Yamaguchi*, 812 F.2d 370, 373 (7th Cir. 1987) ("By its own account, First Wisconsin did not try to amend the complaint for six

months after learning of Yamaguchi's complicity. First Wisconsin explains that it waited because it did not want to risk a postponement of the trial scheduled for May 1986. This damns rather than justifies the delay, however; First Wisconsin concedes that it tried to split this case and, for its own convenience, obtain two trials. District courts are entitled to protect themselves, and other litigants whose cases would be affected, against such strategic conduct.").

Here, Plaintiffs were on notice after the court issued its first opinion, which dismissed without prejudice their 100% claims, that those claims suffered from serious and potentially irremediable defects. When Plaintiffs filed their amended complaints, they not only repleaded their 100% claims, but also added Anticaking claims (except against Publix), undoubtedly because they realized that their 100% claims might again be dismissed. Docs. 225 at ¶ 50; Doc. 227 at ¶ 43; Doc. 228 at ¶ 44; Doc. 229 at ¶ 46. To support their Anticaking claims against Kraft, Wal-Mart/ICCO, and Albertsons/SuperValu, Plaintiffs alleged the percentage of cellulose in those Defendants' products, but their Target/ICCO amended complaint did not allege comparable information about the Target/ICCO product. Doc. 225 at ¶ 23; Doc. 227 at ¶ 19; Doc. 229 at ¶ 19.

At a hearing shortly after Plaintiffs filed their present motion for leave to amend, the court asked them to explain the discrepancies between the Publix amended complaint (which did not bring an Anticaking claim) and Target/ICCO amended complaint (which brought an Anticaking claim but did not allege the amount of cellulose in the Target/ICCO product), on the one hand, and the amended complaints against the other Defendants (which brought Anticaking claims and alleged the amount of cellulose in the other Defendants' products), on the other. In response, Plaintiffs stated that even though "there were people in the [Plaintiff] group that had done some tests" to determine the amount of cellulose in the Publix and Target/ICCO products,

Plaintiffs decided to base their Anticaking allegations solely on the Bloomberg data—which did not include the amounts of cellulose in the Target/ICCO and Publix products—because the Bloomberg tests were "publicly done by an independent organization." Doc. 324-2 at 14-15; *see also* Doc. 327 at 6 ("Plaintiffs decided to plead certain test results from a single, publicly available report in complaints filed against certain other defendants in this MDL, but not private testing results relating to Publix's and Target/ICCO's products … .").

Thus, when they filed their amended complaints, Plaintiffs knew that their 100% claims might not survive, were sufficiently attuned to that danger that they added Anticaking claims, and had the information needed to allege the amount of cellulose in *all* Defendants' products, including the Publix and Target/ICCO products. Yet Plaintiffs' amended complaint against Target/ICCO did not allege the percentage of cellulose in the Target/ICCO product, and their amended complaint against Publix did not bring an Anticaking claim at all. Those choices had consequences during the second round of Rule 12(b)(6) motions: (1) with the dismissal of Plaintiffs' amended 100% claims against Publix, Publix was dismissed from the suit altogether because there were no Anticaking claims to consider; and (2) the court was put to the task of evaluating whether the Anticaking claims against Target/ICCO could survive dismissal given that Plaintiffs did not allege the percentage of cellulose in the Target/ICCO product, and held that they could not, which led to the dismissal of the Target/ICCO amended complaint in its entirety. 348 F. Supp. 3d at 803, 808, 818.

Given these circumstances, Plaintiff will not be given an opportunity to do in second amended complaints against Publix and Target/ICCO what they should and easily could have done in their first amended complaints. The court "can only assume that [Plaintiffs'] decisions not to attempt" to plead an Anticaking claim against Publix despite having information about the

percentage of cellulose in the Publix product, and not to use the information they had to allege the percentage of cellulose in the Target/ICCO product, "were strategic, and so their attempts to take those steps now are unavailing." *Lowinger v. Oberhelman*, 924 F.3d 360, 370 (7th Cir. 2019). Plaintiffs certainly were entitled to withhold the Anticaking claim from the Publix amended complaint, and to withhold the percentage of cellulose in the Target/ICCO product from the Target/ICCO amended complaint, and hope that their claims against those Defendants would nonetheless satisfy federal pleading standards. But having gambled and lost, Plaintiffs "must live with the consequences of [their] strategic decision." *Int'l Coll. of Surgeons v. City of Chicago*, 153 F.3d 356, 366 (7th Cir. 1998); *see also Dyson, Inc. v. SharkNinja Operating LLC*, 2019 WL 1454509, at *9 (N.D. Ill. Mar. 31, 2019) (collecting cases).

In so holding, the court acknowledges that "[d]elay by itself is normally an insufficient reason to deny a motion for leave to amend. Delay must be coupled with some other reason … , [t]ypically, … prejudice to the non-moving party … ." *Liebhart v. SPX Corp.*, 917 F.3d 952, 965 (7th Cir. 2019). But there are reasons other than delay to deny leave to amend here, namely, Plaintiffs' strategic conduct in purposely omitting from the Publix and Target/ICCO amended complaints the claim (as to Publix) and factual content (as to Publix and Target/ICCO) they now seek to add. Granting leave to amend would be particularly inappropriate as to Publix because Publix's motion to dismiss the original complaint expressly highlighted the weaknesses in the 100% claim for which the new Anticaking claim is designed to compensate. Doc. 174 at 7-13. An amendment at this late stage, following two hard-fought Rule 12(b)(6) rounds that took significant time and effort for the parties to litigate and for the court to resolve, would therefore prejudice Publix and Target/ICCO by "forcing [them] to articulate [even more] reasons for dismissal, and, at the same time providing [Plaintiffs] with the opportunity to correct mistakes

facially apparent since the first complaint after the defendants had shown their hand." *Thompson v. Ill. Dep't of Prof'l Regulation*, 300 F.3d 750, 759 (7th Cir. 2002).

For these reasons, Plaintiffs' motion for leave to file second amended complaints against Publix and Target/ICCO is denied.

III. Consumer Protection Claims

The court's more recent opinion dismissed Plaintiffs' Anticaking claims under the Alabama, California, Florida, Minnesota, New Jersey, and New York consumer protection statutes, reasoning that those statutes "require some form of causal connection between the alleged misrepresentation and the plaintiff's alleged injury" and that the Anticaking representation could not have caused (under the causation standard applicable to those statutes) Plaintiffs' injury because they did not see that representation prior to purchase. 348 F. Supp. 3d at 809-11. Kraft and Albertsons/SuperValu now argue that Plaintiffs' claims under the Connecticut Unfair Trade Practices Act, Conn. Gen. Stat. § 42-110b ("CUTPA"), Doc. 225 at ¶¶ 140-147 (Kraft), the Michigan Consumer Protection Act, Mich. Comp. Laws § 445.903 *et seq*. ("MCPA"), Doc. 225 at ¶¶ 172-182 (Kraft), and the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/2 ("ICFA"), Doc. 225 at ¶¶ 132-139 (Kraft); Doc. 227 at ¶¶ 74-81 (Albertsons/SuperValu), fail on the same ground. Doc. 311 at 9-11; Doc. 316 at 12-14. (Contrary to Plaintiffs' understanding, Doc. 336 at 5, the court's more recent opinion did not consider and reject those arguments, as no Defendant has yet argued that causation is a necessary element of a CUTPA, ICFA, or MCPA claim.)

Plaintiffs retort that their Kraft and Albertsons/SuperValu amended complaints do, in fact, allege that they saw the ingredient lists' Anticaking representations because the complaints allege that (1) each Plaintiff saw the label on Defendants' products, (2) the label contained an Anticaking representation, and (3) Defendants' "affirmations of fact and descriptions of the

Products formed the basis of the bargain between" Plaintiffs and Defendants. Doc. 335 at 11-12 (citing Doc. 225 at ¶¶ 34, 46-47); *but see* Doc. 336 at 5 (admitting that the amended complaints do not "explicitly state" that the Plaintiffs saw the ingredient list). That is an implausible reading of the amended complaints. The amended complaints' allegations that the Anticaking representations formed the basis of the bargain between Defendants and Plaintiffs is disregarded because the court does not credit a complaint's legal conclusions in resolving a Rule 12(c) motion. *See Bishop*, 900 F.3d at 397. Plaintiffs' factual allegations, which the court does credit, show that Plaintiffs saw the *100% statement* on the products' labels and inferred from that statement that the products contained no non-cheese ingredients. Doc. 225 at ¶¶ 9-17; Doc. 227 at ¶¶ 9-11. Had Plaintiffs *also* seen the ingredient lists, they of course would have known that the products contained cellulose—and thus could not possibly have alleged as an essential predicate of their 100% claims that they were fooled into thinking that the products were composed of 100% cheese. Doc. 225 at ¶ 46; Doc. 227 at ¶ 39. Therefore, the only plausible inference from Plaintiffs' well-pleaded factual allegations is that they did not read the products' ingredient lists before purchase. 348 F. Supp. 3d at 810.

Plaintiffs' failure to allege that they saw the ingredient lists' Anticaking representations dooms their ICFA, CUTPA, and MCPA claims. ICFA does not require a plaintiff to prove reliance, but it does require the plaintiff to show that the ICFA violation proximately caused her damages. *See Oshana v. Coca-Cola Co.*, 472 F.3d 506, 513-14 (7th Cir. 2006) ("[A] damages claim under the ICFA requires that the plaintiff was deceived in some manner and damaged by the deception."); *Connick v. Suzuki Motor Co.*, 675 N.E.2d 584, 593 (Ill. 1996) ("[A] valid claim must show that the consumer fraud proximately caused plaintiff's injury."). "[T]o properly plead the element of proximate causation in a private cause of action for deceptive advertising brought

under the [ICFA], a plaintiff must allege that he was, in some manner, deceived." *Oliveira v. Amoco Oil Co.*, 776 N.E.2d 134, 164 (Ill. 2002); *see also Oshana*, 472 F.3d at 513-14 ("[A] damages claim under the ICFA requires that the plaintiff was deceived in some manner and damaged by the deception."). As noted, Plaintiffs did not see the ingredient lists' Anticaking representations, so those representations could not possibly have deceived them. Plaintiffs therefore have no viable Anticaking claim under ICFA.

As under ICFA, a CUTPA plaintiff need not show reliance, but must prove proximate cause. *See Landmark Inv. Grp., LLC v. CALCO Const. & Dev. Co.*, 124 A.3d 847, 868 (Conn. 2015); *Hinchliffe v. Am. Motors Corp.*, 440 A.2d 810, 814 (Conn. 1981) (holding that a CUTPA plaintiff must prove that the challenged practice caused her to suffer an "ascertainable loss" by demonstrating that she "purchased an item partially as a result of an unfair or deceptive practice or act and that the item is different from that for which [s]he bargained"); *see also Collins v. Anthem Health Plans, Inc.*, 880 A.2d 106, 120 (Conn. 2005) ("emphasiz[ing] that, in order for a class member to obtain relief from the defendant under [CUTPA], the plaintiffs must prove, inter alia, that that class member suffered a loss that was caused by the challenged policies of the defendant," and holding that individualized inquiries were required to determine "whether the challenged business policies were the cause of [each plaintiff's] injury"); *D'Angelo Dev. & Const. Corp. v. Cordovano*, 995 A.2d 79, 89-90 (Conn. App. 2010) (holding that the plaintiffs could not recover under CUTPA because they did not establish that the challenged practice caused their damages). Plaintiffs contend that a plaintiff may satisfy CUTPA's causation requirement merely by alleging that the defendant's statement was false or likely to mislead. Doc. 335 at 19 (citing *Izzarelli v. R.J. Reynolds Tobacco Co.*, 117 F. Supp. 2d 167, 176 (D. Conn. 2000)). That contention cannot be reconciled with the Connecticut Supreme Court's

holding that "in order to prevail in a CUTPA action, a plaintiff must establish both that the defendant has engaged in a prohibited act *and* that, as a result of this act, the plaintiff suffered an injury." *Abrahams v. Young & Rubicam, Inc.*, 692 A.2d 709, 712 (Conn. 1997) (internal quotation marks omitted). Kraft therefore is entitled to judgment on Plaintiffs' Anticaking claim under CUTPA.

As for the MCPA, Plaintiffs acknowledge that they must plead reliance to state an MCPA claim based on a fraudulent misrepresentation, but they argue that they need not plead reliance to state an MCPA claim based on a material omission. Doc. 335 at 17. Plaintiffs contend that their Anticaking claim is omission-based, alleging that Kraft misled consumers by stating that cellulose was used to prevent caking while omitting the fact that it also was used as filler. *Id*. at 17-18. But an omission can ground an MCPA claim only if it is "material," *i.e.*, only if it is "important to the transaction or affects the consumer's decision to enter into the transaction." *Zine v. Chrysler Corp.*, 600 N.W.2d 384, 398 (Mich. App. 1999). The Anticaking representation and corresponding "filler" omission could not have been material to Plaintiffs' decisions to buy the Kraft product because they did not see the ingredient label, and thus they neither knew that the product contained cellulose nor saw the representation (that cellulose was used to prevent caking) that allegedly made Kraft's failure to disclose additional information (that the cellulose was also used as filler) deceptive and misleading. Kraft therefore is entitled to judgment on the Anticaking claims under MCPA. *See ibid*. (holding that the plaintiff did not state an MCPA claim where the omission did not affect the plaintiff's decision to purchase the product). Nor does reframing the Anticaking claim as omission-based change the outcome under ICFA or CUTPA because, under both statutes, the plaintiff must show that the omission contributed in some way to the plaintiff's damages, and the Anticaking representation cannot have done so

because Plaintiffs did not see it. *See De Bouse v. Bayer*, 922 N.E.2d 309, 316 (Ill. 2009) ("[W]e have repeatedly emphasized that in a consumer fraud action, the plaintiff must actually be deceived by a statement or omission. If there has been no communication with the plaintiff, there have been no statements and no omissions. In such a situation, a plaintiff cannot prove proximate cause."); *Haesche v. Kissner*, 640 A.2d 89, 92 (Conn. 1994) (affirming judgment on a CUPTA claim based on the defendant's failure to warn the plaintiff that a BB gun could cause eye injuries, where the summary judgment record showed that the plaintiff would have used the BB gun anyway).

Accordingly, Plaintiffs' ICFA, CUTPA, and MCPA claims against Kraft and their ICFA claims against Albertsons/SuperValu are dismissed. Given this disposition, the court need not reach Kraft's argument that Plaintiffs cannot state a claim under those statutes because the Anticaking representation is accurate and not misleading. Doc. 316 at 14-16.

II. Express and Implied Warranty Claims

A. Albertsons/SuperValu

Albertsons/SuperValu's second Rule 12(b)(6) motion sought dismissal of the amended complaint's express and implied warranty claims on the ground that Plaintiffs did not provide Albertsons/SuperValu with pre-suit notice in a reasonable time as required by 810 ILCS 5/2-607(3)(a) and Ala. Code. § 7-2-607(3)(a). Doc. 157 at 27-28. The court rejected that argument because the amended complaint alleged generally that Plaintiffs satisfied all conditions precedent to their warranty claims. 348 F. Supp. 3d at 812-13, 815. Albertsons/SuperValu now move for summary judgment based on evidence that they did not, in fact, receive pre-suit notice from Plaintiffs. Doc. 311 at 11-16. In response, Plaintiffs admit that they did not send Albertsons or SuperValu a pre-suit notice letter, Doc. 336-1 at ¶¶ 20-21, 28-29, 36-37, but they argue that the

notice requirement was satisfied because the Bloomberg article gave Albertsons/SuperValu actual notice of the defect at the heart of the Anticaking claims. Doc. 336 at 10-12.

Under Illinois warranty law, "direct notice is not required when … the seller has actual knowledge of the defect of the particular product." *Connick*, 675 N.E.2d at 589. "Actual knowledge" for this purpose does not mean knowledge of "the facts" underlying the plaintiff's claim—"which the seller presumably knows quite as well as, if not better than, the buyer"—but rather knowledge "of [the] *buyer's claim* that [those facts] constitute a breach." *Id*. at 590 (internal quotation marks omitted). Put another way, "[i]t is essential that the seller be notified that this *particular transaction* is troublesome and must be watched." *Ibid*. (internal quotation marks omitted). Thus, the actual knowledge exception to the direct notice requirement "is satisfied only where the manufacturer is somehow apprised of the trouble with the particular product purchased by a particular buyer"—not where "a manufacturer is aware of problems with a particular product line." *Ibid*. Applying that principle in *Connick*, the Supreme Court of Illinois held that the defendant did not have actual knowledge that the car it sold to the plaintiffs posed certain safety risks, even though the very same risks had caused a consumer organization to give that make and model a "not acceptable" rating and had prompted investigations by seven state attorneys general. *Id*. at 589-91; *see also Anthony v. Country Life Mfg., LLC*, 2002 WL 31269621, at *4 (N.D. Ill. Oct. 9, 2002) (holding that the defendant did not have actual knowledge of the plaintiff's claim that the defendant's snack bars contained unwholesome ingredients, even though the defendants knew that those ingredients were in their snack bars), *aff'd*, 70 F. App'x 379 (7th Cir. 2003).

Here, Plaintiffs argue that Albertsons/SuperValu had actual knowledge that cellulose was used as filler because Bloomberg published a report showing that its product was 8.8% cellulose,

while FDA standards provided that a dried cheese product should be 2% cellulose or less. Doc. 336 at 11-12. At best, Plaintiffs allege that Albertsons/SuperValu was aware of "problems with [its] particular product line." *Connick*, 675 N.E.2d at 590. This falls far short of an allegation that Albertsons/SuperValu was on notice that the "particular transaction[s]" in which the "particular product[s]" at issue were "purchased by [the] particular buyers" now bringing suit were "troublesome and must be watched." *Id*. at 590. Accordingly, Albertsons/SuperValu did not receive adequate pre-suit notice under Illinois warranty law.

As for the Alabama warranty claims, Plaintiffs make no argument and cite no authority to support their contention that Alabama law recognizes an actual knowledge exception to the notice requirement, thereby forfeiting the issue. *See M.G. Skinner & Assocs. Ins. Agency, Inc. v. Norman-Spencer Agency, Inc.*, 845 F.3d 313, 321 (7th Cir. 2017) ("Perfunctory and undeveloped arguments are waived, as are arguments unsupported by legal authority."). Even if Alabama recognized an actual knowledge exception, *but see Smith v. Apple, Inc.*, 2009 WL 3958096, at *1 (N.D. Ala. Nov. 4, 2009) ("declin[ing] plaintiffs' invitation to create" an exception to the notice requirement for circumstances where the defendant is "aware of the alleged defects," and predicting that the Alabama Supreme Court would not endorse such an exception) (internal quotation marks omitted), Plaintiffs have forfeited any argument that the Alabama actual notice exception differs from the Illinois exception, which as shown above is not satisfied here.

For these reasons, Albertsons/SuperValu is entitled to judgment on Plaintiffs' Illinois and Alabama express and implied warranty claims.

B. Kraft

Kraft moves under Rule 12(c) for judgment on the Connecticut implied warranty claims, the Florida express warranty claims, and the Minnesota and California express and implied

warranty claims on the ground that Plaintiffs do not allege reliance (Florida, Minnesota, and California) or privity (Connecticut and California). Doc. 316 at 16-18. (Again, Plaintiffs are wrong to say that the court already "upheld" those warranty claims against all challenges to their sufficiency. Doc. 335 at 11. Kraft did not previously raise, and the court has not yet decided, the reliance and privity issues presented in the current motion.)

Kraft contends that a plaintiff can bring a Connecticut implied warranty claim only if she is in privity with the defendant. Doc. 316 at 16-17. Plaintiffs effectively concede that they are not in privity with Kraft and admit that privity is ordinarily required. But citing *Hamon v. Digliani*, 174 A.2d 294, 297-98 (Conn. 1961), Plaintiffs argue that Connecticut law relaxes the privity requirement where (1) "the manufacturer or producer makes representations in his advertisements or by the labels on his products as an inducement to the ultimate purchaser," (2) the purchaser "buys the product in reliance on the representations," and (3) she "later suffers an injury because the product fails to conform to them." Doc. 335 at 21.

That argument fails for two reasons. First, as noted, Plaintiffs did not see the ingredient label's Anticaking representation, and thus could not have bought "the product[s] in reliance on" it. Second, as the court explained in its more recent opinion, the exception described in *Hamon* applies only when the product causes physical injury, which is not alleged here. 348 F. Supp. 3d at 813. Kraft therefore is entitled to judgment on the Connecticut implied warranty claims.

Kraft next contends that a plaintiff can bring a Florida express warranty claim only if she relied on the warranty. Doc. 316 at 17-18. The great weight of authority—including every Florida intermediate appellate court decision the parties cite, *see In re Zimmer, NexGen Knee Implant Prod. Liab. Litig.*, 884 F.3d 746, 751 (7th Cir. 2018) (instructing that where a state's highest court has not resolved an issue of state law, a federal court should follow decisions

issued by the state intermediate appellate court absent a strong countervailing reason)—supports Kraft's position. *See*, *e.g.*, *Hobco, Inc. v. Tallahassee Assocs.*, 807 F.2d 1529, 1533 (11th Cir. 1987) ("Under Florida law, an express warranty may arise only where justifiable reliance upon assertions or affirmations is part of the basis of the bargain."); *Royal Typewriter Co. v. Xerographic Supplies Corp.*, 719 F.2d 1092, 1101 (11th Cir. 1983) (similar); *Spolski Gen. Contractor, Inc. v. Jett-Aire Corp. Aviation Mgmt. of Cent. Fla.*, 637 So. 2d 968, 970 (Fla. App. 1994) (affirming judgment on the pleadings on an express warranty claim, in part, because the plaintiff did not plead reliance); *Thursby v. Reynolds Metals Co.*, 466 So. 2d 245, 250 (Fla. App. 1984) ("[A]n express warranty is generally considered to arise only where the seller asserts a fact … on which the buyer justifiably relies as part of the basis of the bargain.") (internal quotation marks omitted); *Escambia Chem. Corp. v. Indus.-Marine Supply Co.*, 223 So. 2d 773, 775 (Fla. App. 1969) (similar). Given this authority, including the Eleventh Circuit's published decisions in *Hobco* and *Royal Typewriter*, the court declines Plaintiffs' invitation to follow *Southern Broadcast Group, LLC v. Gem Broadcasting, Inc.*, 145 F. Supp. 2d 1316, 1324 (M.D. Fla. 2001), *aff'd without opinion sub nom. S. Broad. v. GEM Broad*., 49 F. App'x 288 (11th Cir. 2002), which reached the opposite conclusion.

Plaintiffs retort that *Southern Broadcast Group* finds support in Comment 3 to the Uniform Commercial Code's express warranty provision, which states that "affirmations of fact made by the seller about the goods during a bargain are regarded as part of the description of those goods; hence no particular reliance on such statements need be shown in order to weave them into the fabric of the agreement." U.C.C. § 2-313 cmt. n.3. But Florida courts have held that they are not bound by U.C.C. comments, *see PMT NPL Fin. 2015-1 v. Centurion Sys., LLC*, 257 So. 3d 516, 519 n.2 (Fla. App. 2018); *Corfan Banco Asuncion Paraguay v. Ocean Bank*, 715

So. 2d 967, 971 (Fla. App. 1998), and, more to the point, have consistently held (notwithstanding Comment 3) that reliance is required to state an express warranty claim. It also bears noting that Comment 3 has appeared in the U.C.C. commentary since 1952, *see* U.C.C. § 2-313 (Am. Law Inst. & Unif. Law Comm'n 1952); *see also Carter Hawley Hale Stores, Inc. v. Conley*, 372 So. 2d 965, 968 (Fla. App. 1979) (quoting the comment)—long before the above-cited Eleventh Circuit and Florida appellate decisions were issued. Accordingly, Kraft is entitled to judgment on the Florida express warranty claims.

Kraft next argues that Plaintiffs must allege reliance to state express or implied warranty claims under Minnesota law. Doc. 316 at 17-18. Minnesota law is somewhat unsettled on that point. The Minnesota Supreme Court endorsed a reliance requirement in *Midland Loan Financial Co. v. Madsen*, 14 N.W.2d 475, 481 (Minn. 1944), and applied that requirement in *Alley Construction Co. v. State*, 219 N.W.2d 922, 924-25 (Minn. 1974). (Contrary to Plaintiffs' understanding, Doc. 335 at 25, *Midland* did not limit the reliance rule to cases alleging observable defects, but rather held categorically that reliance is required and pointed to observable defects merely as an example of a situation where the requirement would not be met.) In setting forth the elements of a warranty claim in *Peterson v. Bendix Home Systems, Inc.*, 318 N.W.2d 50, 52-53 (Minn. 1982), however, the court did not mention reliance or cite *Midland* or *Alley*. The plaintiff in *Lyon Financial Services, Inc. v. Illinois Paper & Copier Co.*, 848 N.W.2d 539 (Minn. 2014), brought that discrepancy to the Minnesota Supreme Court's attention, arguing that *Peterson* had implicitly overruled *Midland* and *Alley*, but the court did not reach that issue. *See id*. at 544 n.6.

Federal courts are bound by state supreme court decisions interpreting state law. *See Wash. State Dep't of Licensing v. Cougar Den, Inc.*, 139 S. Ct. 1000, 1010 (2019); *Trytko v.*

Hubbell, Inc., 28 F.3d 715, 719 (7th Cir. 1994). *Midland* directly addressed the issue at hand, holding that reliance is a required element of a Minnesota warranty claim; *Peterson* did not expressly overrule *Midland* or explicitly hold that reliance was not required; and *Lyon Financial* did not resolve whether *Midland* remains good law. Therefore, despite the uncertainty created by *Peterson*, the court will follow the Minnesota Supreme Court's only explicit pronouncement on the issue (in *Midland*) and hold that Plaintiffs must show reliance to succeed on an express or implied warranty claim. *See Hendricks v. Callahan*, 972 F.2d 190, 194 (8th Cir. 1992) (following *Midland*'s reliance rule, in part, "because the Minnesota Supreme Court has not expressly overruled *Midland*"); *Residential Funding Co. v. Americash*, 2014 WL 3577312, at *2 n.3 (D. Minn. July 21, 2014) (same, given the Minnesota Supreme Court's decision not to resolve the issue in *Lyon Financial*). Although Plaintiffs are correct that at least one unpublished, non-precedential Minnesota intermediate court decision went the other way, *see Krause v. City of Elk River*, 2015 WL 3823093, at *3 & n.2 (Minn. App. June 22, 2015), intermediate state court opinions countermanding state supreme court decisions do not relieve federal courts of their obligation to follow state supreme court decisions. *See Luna v. United States*, 454 F.3d 631, 636 (7th Cir. 2006) (holding that the district court erred in failing to follow a state supreme court decision and instead adhering to later intermediate appellate court decisions suggesting that the supreme court case was wrongly decided). Accordingly, because Plaintiffs have not alleged that they relied on the ingredient labels' Anticaking representations, Kraft is entitled to judgment on the Minnesota express and implied warranty claims.

Finally, Kraft argues that California requires express warranty plaintiffs to plead reliance. As in Minnesota, the issue is unsettled in California. Pre-U.C.C. California Supreme Court decisions held that express warranty plaintiffs must plead and prove reliance. *See*, *e.g.*, *Burr v.*

Sherwin Williams Co., 268 P.2d 1041, 1048-49 (Cal. 1954) (holding that reliance is required absent privity); *Grinnell v. Charles Pfizer & Co.*, 79 Cal. Rptr. 369, 378 (Cal. App. 1969) (holding that reliance is an "essential ingredient[ ]" of any express warranty claim). But the court later recognized in *Hauter v. Zogarts*, 534 P.2d 377 (Cal. 1975) (en banc), that the U.C.C.'s adoption in California worked "a significant change in the law of warranties" by replacing the traditional reliance element with a requirement that the challenged representation form the "basis of the bargain." *Id*. at 383 (citing *Grinnell*). Specifically, *Hauter* held that this basis-of-the-bargain requirement either "shift[ed] the burden of proving non-reliance to the seller" or "eliminat[ed] the concept of reliance altogether." *Id*. at 384. *Hauter* found support for each of those competing views in the U.C.C. commentary and scholarly work on the subject, and ultimately declined to decide between them. *Ibid*. (citing Cal. Com. Code § 2313 cmt. nn.3-4).

No consensus on that question has emerged since *Hauter*. Most decisions hold that the basis-of-the-bargain requirement has one of three effects: (1) eliminating the reliance requirement, *see*, *e.g.*, *Weinstat v. Dentsply Internat., Inc.*, 103 Cal. Rptr. 3d 614, 626-29 (Cal. App. 2010); *Rikos v. Procter & Gamble Co.*, 799 F.3d 497, 513 (6th Cir. 2015); *In re Nexus 6P Prod. Liab. Litig.*, 293 F. Supp. 3d 888, 915-16 (N.D. Cal. 2018); *Karim v. Hewlett-Packard Co.*, 311 F.R.D. 568, 574-75 (N.D. Cal. 2015); (2) keeping the reliance requirement, but shifting the burden to the defendant to show that the "bargain d[id] not rest at all on the representation," *Keith v. Buchanan*, 220 Cal. Rptr. 392, 398 (Cal. App. 1985); *see also*, *e.g.*, *Davis v. Louisiana-Pac. Corp.*, 2008 WL 2030495, at *12 (Cal. App. May 13, 2008); *Ibrahim v. Ford Motor Co.*, 214 Cal. App. 3d 878, 890 (1989); *Wilson v. Metals, USA, Inc.*, 2017 WL 2972608, at *13 (E.D. Cal. July 12, 2017); *Karim v. Hewlett-Packard Co.*, 2014 WL 555934, at *6 (N.D. Cal. Feb. 10, 2014); or (3) changing the role of reliance where the parties are in privity, but maintaining the

reliance requirement where the parties are not in privity, *see Hardage Hotels X, LLC v. First Co.*, 2010 WL 1512138, at *9 (Cal. App. Apr. 16, 2010); *Wiley v. Yihua Int'l Grp.*, 2009 WL 3720903, at *6 (Cal. App. Nov. 9, 2009); *Keegan v. Am. Honda Motor Co.*, 284 F.R.D. 504, 546 (C.D. Cal. 2012); *Coleman v. Bos. Sci. Corp.*, 2011 WL 3813173, at *4 (E.D. Cal. Aug. 29, 2011).

Two considerations persuade the court that the California Supreme Court likely would not adopt the first approach and eliminate the reliance requirement altogether, but instead would adopt the second or third approaches and merely modify the requirement. First, the second and third approaches have greater purchase with California Courts of Appeal. This court has not identified, and the parties have not cited, any California Court of Appeal case other than *Weinstat* to have eliminated the reliance requirement altogether, while multiple California Court of Appeal decisions have adopted either the second or third approaches. Second, as noted, reliance and privity played important roles in the California Supreme Court's pre-U.C.C jurisprudence, suggesting that, if asked to choose between two defensible approaches that are equally consistent with the U.C.C. commentary, the state supreme court would preserve at least some role for reliance. *See Sutula-Johnson v. Office Depot, Inc.*, 893 F.3d 967, 971 (7th Cir. 2018) ("Under *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), our role is to decide questions of state law as we predict the [state] [s]upreme [c]ourt would decide them."); *Hendricks v. Novae Corp. Underwriting*, 868 F.3d 542, 547 (7th Cir. 2017) ("When a state supreme court has not squarely addressed a question, our task is to predict what the state's highest court would do if presented with the same issue.") (internal quotation marks omitted). As an additional consideration, even if the three theories' likelihood of adoption were in equipoise, this court would follow the Seventh Circuit's instruction to favor a "narrower

interpretation [of state law] which restricts liability"—here, one of the two approaches that preserves some role for reliance—over a "more expansive interpretation which creates substantially more liability"—here, the approach that eliminates the reliance requirement altogether. *Home Valu, Inc. v. Pep Boys*, 213 F.3d 960, 963 (7th Cir. 2000); *see also Pisciotta v. Old Nat. Bancorp*, 499 F.3d 629, 635-36 (7th Cir. 2007) (same); *S. Ill. Riverboat Casino Cruises, Inc. v. Triangle Insulation & Sheet Metal Co.*, 302 F.3d 667, 676 (7th Cir. 2002) (same).

Having determined that the California Supreme Court would not adopt the first approach, the court need not decide between the second and third approaches because Kraft would prevail under either—Plaintiffs are not in privity with Kraft, and the Kraft amended complaint necessarily shows that Plaintiffs did not rely on the Anticaking representation prior to purchase. Kraft therefore is entitled to judgment on the California express warranty claims.

Kraft argues that it is also entitled to judgment on the California implied warranty claims because implied warranty claims based on a product's failure to "conform to the promises or affirmations of fact" on the label rise or fall with express warranty claims based on the same representation. Doc. 316 at 17 n.5 (quoting *Hadley v. Kellogg Sales Co.*, 243 F. Supp. 3d 1074, 1106 (N.D. Cal. 2017), and *Hendricks v. StarKist Co.*, 30 F. Supp. 3d 917, 933 (N.D. Cal. 2014)); Doc. 338 at 17 (same). Plaintiffs do not respond to that argument, thereby forfeiting the issue and the California implied warranty claims. *See Lee v. Ne. Illinois Reg'l Commuter R.R. Corp.*, 912 F.3d 1049, 1054 (7th Cir. 2019) ("[The forfeiture] rule applies when a party fails to develop arguments related to a discrete issue or when a litigant effectively abandons the litigation by not responding to alleged deficiencies in a motion to dismiss."); *Alioto v. Town of Lisbon*, 651 F.3d 715, 721 (7th Cir. 2011) ("We apply [the forfeiture] rule … where a litigant

effectively abandons the litigation by not responding to alleged deficiencies in a motion to dismiss.").

Accordingly, Kraft is entitled to judgment on the California, Florida, and Minnesota express warranty claims and the California, Minnesota, and Connecticut implied warrant claims.

IV. Unjust Enrichment Claims

Albertsons/SuperValu and Kraft move for judgment on all remaining unjust enrichment claims against them.

Kraft contends that the Illinois unjust enrichment claims fail because Plaintiffs do not sufficiently allege that they suffered a detriment or that there was a "connection between the detriment and the defendant's retention of the benefit." *Cleary v. Philip Morris Inc.*, 656 F.3d 511, 518-19 (7th Cir. 2011). (Kraft relies on *Cleary* for judgment on Plaintiffs' unjust enrichment claims under New York, Connecticut, Minnesota, Florida, California, Alabama, and Michigan law, Doc. 316 at 18-19, but *Cleary* interpreted Illinois law, and Kraft makes no argument and cites no authority to support the proposition that *Cleary* reflects the law of any other State. Accordingly, any such argument is forfeited. *See G & S Holdings LLC v. Cont'l Cas. Co.*, 697 F.3d 534, 538 (7th Cir. 2012) ("We have repeatedly held that a party waives an argument by failing to make it before the district court."); *Alioto*, 651 F.3d at 721 ("We apply [the forfeiture] rule where a party fails to develop arguments related to a discrete issue … .").) In *Cleary*, a class of Illinois cigarette purchasers to whom the health risks of cigarettes were not adequately disclosed argued that they could prevail on an unjust enrichment claim against the cigarette manufacturer without proving "deception, causation, or actual harm with regard to individual members of the plaintiff class." *Cleary*, 656 F.3d at 518. The Seventh Circuit disagreed, holding that "the mere violation of a consumer's legal right to know about a product's

risks … cannot support a claim that the manufacturer unjustly retained the revenue from the product's sale to the consumer's detriment." *Id*. at 519. As the Seventh Circuit explained, a plaintiff must show a "greater connection" between the unjust enrichment and the detriment to the plaintiff—for example, that "the revenue was obtained in a manner that caused injury to the plaintiffs, or … by deceiving the plaintiffs, or … by an inadvertent misrepresentation relied upon by the plaintiffs." *Id*. at 519-20.

Plaintiffs maintain that they have shown the requisite connection by alleging that they suffered damages as a result of the Anticaking representation. Doc. 335 at 27-28. The only damages that can be inferred from the Kraft amended complaint are the kinds of damages that support Plaintiffs' standing, namely, the generalized effect of the Anticaking representation on the Kraft product's purchase price. But *Cleary* held that that a consumer cannot make out an unjust enrichment claim merely by alleging that the defendant withheld information about a product's undesirable qualities, even though disclosure of such information would have affected overall consumer behavior in such a way as to drive down the price for every consumer. *See Cleary*, 656 F.3d at 518-20 (holding that the plaintiffs did not state an unjust enrichment claim where they alleged that the defendants had not adequately disclosed cigarettes' health hazards and that the omission was "to plaintiffs' detriment"). It follows that a plaintiff cannot establish the requisite connection between her detriment and the defendant's alleged unjust enrichment by showing that the defendant's representations or omissions affected the price that all consumers paid. Accordingly, Kraft is entitled to judgment on the Illinois unjust enrichment claims against it; the same holds for the materially identical Illinois unjust enrichment claims against Albertsons/SuperValu.

SuperValu argues that the Alabama unjust enrichment claims fail because: (1) unjust enrichment under Alabama law "sounds in the nature of quasi-contract," (2) courts generally do not find implied contracts, including quasi-contracts, where the parties have entered into an express contract concerning the same subject matter, (3) the allegations supporting Plaintiffs' express warranty claim show that the parties entered into an express contract based on the Anticaking representations, and therefore, (4) Plaintiffs cannot maintain an unjust enrichment cause of action based on an implied quasi-contract. Doc. 311 at 18-19 (citing *White v. Microsoft Corp.*, 454 F. Supp. 2d 1118, 1132 (S.D. Ala. 2006) (collecting cases)). That argument fails to persuade. Although Plaintiffs cannot recover for unjust enrichment if an express contract covers the same subject matter, they still may pursue express warranty claims and unjust enrichment claims in the alternative so long as a factfinder could plausibly determine that no express contract existed. *See* Fed. R. Civ. P. 8(d)(2); *Kennedy v. Polar-BEK & Baker Wildwood P'ship*, 682 So. 2d 443, 447 (Ala. 1996) (holding that "the existence of an express contract … [is] a question of fact" and that a court "may recognize an implied contract where the existence of an express contract on the same subject matter is not proven"). SuperValu has not even attempted to establish that an express contract indisputably existed here, and thus it has not shown that Plaintiffs are precluded from pleading unjust enrichment in the alternative.

SuperValu retorts that if the court grants its motion for summary judgment as to the Alabama express warranty claims—which, for the reasons given above, the court has done—then the court must also find that there was an express warranty in the first place. Doc. 338 at 10-11. That is incorrect. SuperValu is entitled to judgment on the Alabama express warranty claim because *even if* the Anticaking representation created an express warranty under Alabama law, Plaintiffs *still* could not recover because they did not provide SuperValu with adequate pre-suit

notice. In so holding, the court did not reach the question whether the Anticaking representation in fact created an express warranty, and SuperValu has not provided any argument or cited any case law showing that it did, thereby forfeiting the issue. *See G & S Holdings*, 697 F.3d at 538; *Alioto*, 651 F.3d at 721. Accordingly, SuperValu is not entitled to judgment on the Alabama unjust enrichment claims.

In sum, Plaintiffs' Illinois unjust enrichment claims against Albertsons/SuperValu and Kraft are dismissed, but their remaining unjust enrichment claims can proceed.

Conclusion

Plaintiffs' motion for leave to file second amended complaints against Publix and Target/ICCO is denied. The claims against Publix and Target/ICCO remain dismissed.

As to Kraft, Plaintiffs' CUTPA, ICFA, and MCPA claims; their California, Florida, and Minnesota express warranty claims; their California, Connecticut, and Minnesota implied warranty claims; and their Illinois unjust enrichment claims are dismissed. Plaintiffs' New York, Connecticut, Minnesota, Florida, California, Alabama, and Michigan unjust enrichment claims against Kraft may proceed, along with their Alabama express warranty claims and Michigan implied warranty claims (neither of which were addressed in Kraft's Rule 12(c) motion).

As to Albertsons/SuperValu, Plaintiffs' ICFA claims; their Illinois and Alabama express warranty claims; their Illinois implied warranty claims; and their Illinois unjust enrichment claim are dismissed. Plaintiffs' Alabama unjust enrichment claim against SuperValu may proceed. As there are no remaining claims against Albertsons, it is dismissed as a defendant.

The dismissed claims against Publix, Target/ICCO, Kraft, and Albertsons/SuperValu are dismissed with prejudice. Plaintiffs were on notice of the reliance and causation issues that resulted in the dismissals at least since the court issued its more recent opinion. They have not

proposed, in either their motion for leave to amend or their responses to Kraft's and Albertsons/SuperValu's present motions, a way to amend their complaint to sufficiently allege reliance or causation. Moreover, Plaintiffs have from the beginning of this litigation known what information they saw and relied upon at the time they purchased Defendants' products. Permitting them to amend those allegations at this late stage, following three protracted and resource-intensive rounds of briefing, would prejudice Defendants and waste judicial resources. *See Thompson*, 300 F.3d at 759 (holding that defendants are prejudiced when they are forced to respond to new allegations that could have been raised earlier in the litigation).

July 16, 2019

United States District Judge

UNITED STATES DISTRICT COURT
FOR THE Northern District of Illinois − CM/ECF LIVE, Ver 6.3.1
Eastern Division

In Re: 100% Grated Parmesan Cheese Marketing and Sales Practices Litigation, et al.

Plaintiff,

v.

Case No.: 1:16−cv−05802
Honorable Gary Feinerman

Albertson Companies, Inc, et al.

Defendant.

NOTIFICATION OF DOCKET ENTRY

This docket entry was made by the Clerk on Monday, August 26, 2019:

MINUTE entry before the Honorable Gary Feinerman:At the parties' request [379] and with the court's agreement, final judgment under Civil Rule 54(b) is entered as to the "100% claims" in the consolidated amended class action complaints [225] [227] [228] [229]. See 11/1/2018 order and opinion [296][297] (dismissing the "100% claims" of all Plaintiffs against all Defendants). Given the Civil Rule 58 judgments entered in three MDL cases (16 C 6172, 16 C 11272, 16 C 11273), the court certifies that there is no just reason for delaying the entry of final judgment in the remaining MDL cases on the "100% claims." See Gelboim v. Bank of Am. Corp., 135 S. Ct. 897, 906 (2015) ("District courts may grant certifications under... Rule [54(b)], thereby enabling plaintiffs in actions that have not been dismissed in their entirety to pursue immediate appellate review."); FedEx Ground Package Sys., Inc. v. U.S. JPML, 662 F.3d 887, 890 (7th Cir. 2011) (noting the "obvious advantages" of this approach). There is no need for a separate certification under 28 U.S.C. 1292(b). Also at the parties' request [379] and with the court's agreement [379], all remaining claims in this MDL are stayed pending resolution of the forthcoming appeals.Mailed notice.(jlj,)

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

Zachary,

Plaintiff(s),

v.

Target Corporation,

Defendant(s).

Case No. 16 C 6172
Judge Gary Feinerman

JUDGMENT IN A CIVIL CASE

Judgment is hereby entered (check appropriate box):

☐ in favor of plaintiff(s)
and against defendant(s)
in the amount of $,

which ☐ includes pre–judgment interest.
☐ does not include pre–judgment interest.

Post-judgment interest accrues on that amount at the rate provided by law from the date of this judgment.

Plaintiff(s) shall recover costs from defendant(s).

☐ in favor of defendant(s)
and against plaintiff(s)

.

Defendant(s) shall recover costs from plaintiff(s).

☒ other: Judgment is entered in favor of Defendant Target Corporation, and against Plaintiff Rodney Zachary. Plaintiff's claims are dismissed.

This action was *(check one)*:

☐ tried by a jury with Judge presiding, and the jury has rendered a verdict.
☐ tried by Judge without a jury and the above decision was reached.
☒ decided by Judge Gary Feinerman.

Date: 8/26/2019

Thomas G. Bruton, Clerk of Court

/s/ Jackie Deanes , Deputy Clerk

ILND 450 (Rev. 10/13) Judgment in a Civil Action

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

Rudder

Plaintiff(s),

v.

Publix Super Markets, Inc.,

Defendant(s).

Case No. 16 C 11272
Judge Gary Feinerman

JUDGMENT IN A CIVIL CASE

Judgment is hereby entered (check appropriate box):

☐ in favor of plaintiff(s)
and against defendant(s)
in the amount of $,

which ☐ includes pre–judgment interest.
☐ does not include pre–judgment interest.

Post-judgment interest accrues on that amount at the rate provided by law from the date of this judgment.

Plaintiff(s) shall recover costs from defendant(s).

☐ in favor of defendant(s)
and against plaintiff(s)

.

Defendant(s) shall recover costs from plaintiff(s).

☒ other:
Judgment is entered in favor of Defendant Publix Super Markets, Inc., and against Plaintiff Erin Rudder. Plaintiff's claims are dismissed.

This action was *(check one)*:

☐ tried by a jury with Judge presiding, and the jury has rendered a verdict.
☐ tried by Judge without a jury and the above decision was reached.
☒ decided by Judge Gary Feinerman.

Date: 8/26/2019

Thomas G. Bruton, Clerk of Court

/s/ Jackie Deanes , Deputy Clerk

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

Pellitteri Plaintiff(s), v. Publix Super Markets, Inc., Defendant(s).	Case No. 16 C 11273 Judge Gary Feinerman

JUDGMENT IN A CIVIL CASE

Judgment is hereby entered (check appropriate box):

☐ in favor of plaintiff(s)
and against defendant(s)
in the amount of $,

which ☐ includes pre–judgment interest.
☐ does not include pre–judgment interest.

Post-judgment interest accrues on that amount at the rate provided by law from the date of this judgment.

Plaintiff(s) shall recover costs from defendant(s).

☐ in favor of defendant(s)
and against plaintiff(s)

.

Defendant(s) shall recover costs from plaintiff(s).

☒ other:
Judgment is entered in favor of Defendant Publix Super Markets, Inc., and against Plaintiff Carmen Pellitteri. Plaintiff's claims are dismissed.

This action was *(check one)*:

☐ tried by a jury with Judge presiding, and the jury has rendered a verdict.
☐ tried by Judge without a jury and the above decision was reached.
☒ decided by Judge Gary Feinerman.

Date: 8/26/2019

Thomas G. Bruton, Clerk of Court

/s/ Jackie Deanes , Deputy Clerk