2021 WL 1940645
United States District Court, W.D. Missouri, Western Division.

Megan BROWNING, et al., Plaintiffs,

v.

ANHEUSER-BUSCH, LLC, Defendant.

Case No. 20-cv-00889-SRB
|
Signed 05/13/2021

Synopsis

Background: Consumers brought putative class action against beverage company for violation of the Missouri Merchandising Practices Act (MMPA), breach of express warranty, breach of implied warranty of merchantability, fraud, and unjust enrichment or quasi-contract, based on allegation that packaging and advertising misrepresented that malt beverage products contained liquor. Company filed motion to dismiss for failure to state a claim.

Holdings: The District Court, Stephen R. Bough, J., held that:

[1] consumers stated a claim for deceptive trade practices under the MMPA;

[2] consumers stated a claim for fraud under Missouri law;

[3] economic loss doctrine did not bar claim for fraud;

[4] consumers were not obligated to provide company with pre-suit notice as to claim for breach of express warranty under Missouri law;

[5] consumers stated a claim for breach of implied warranty of merchantability under Missouri law;

[6] consumers stated a claim for unjust enrichment under Missouri law; and

[7] consumers had standing to pursue injunctive relief under Missouri law.

Motion granted in part and denied in part.

West Headnotes (28)

[1] Federal Courts Substance or procedure; determinativeness

A United States District Court sitting in diversity jurisdiction applies the substantive law of the forum state.

[2] Antitrust and Trade Regulation Purpose and construction in general

The Missouri Merchandising Practices Act (MMPA) is interpreted broadly to promote its purpose to protect consumers. Mo. Ann. Stat. § 407.010 et seq.

[3] **Federal Civil Procedure** Fraud, mistake and condition of mind

When a Missouri Merchandising Practices Act (MMPA) claim sounds in fraud, it must satisfy the heightened pleading requirements for fraud under the Federal Rules of Civil Procedure. Fed. R. Civ. P. 9(b); Mo. Ann. Stat. § 407.010 et seq.

[4] **Pretrial Procedure** Fact questions

For purposes of a claim for deceptive trade practices under the Missouri Merchandising Practices Act (MMPA), the issue of whether a reasonable consumer would be deceived by a product label is generally a question of fact that cannot be resolved on a motion to dismiss. Mo. Ann. Stat. § 407.025.1(2).

[5] **Antitrust and Trade Regulation** Particular cases

Consumers plausibly alleged that representations in beverage company's packaging and advertising would likely mislead a reasonable consumer to believe that malt beverage products contained liquor or wine, as required to state a claim for deceptive trade practices under the Missouri Merchandising Practices Act (MMPA); consumers alleged that representations were misleading due to company's use of terms “Margarita,” “Mojito,” “Sangria,” and “Rosé” and use of language such as “sparkling classic cocktails” in combination with images of cocktail and wine glasses, consumers alleged that a commercial advertisement for company's wine products included a woman in a wine cellar, and products were only identified as malt beverages in small font at bottom of packaging. 27 C.F.R. § 7.29(a)(7)(iii); Mo. Ann. Stat. § 407.025.1(2); Mo. Code Regs. Ann. tit. 15, § 60-9.030(1).

[6] **Antitrust and Trade Regulation** Particular cases

Consumers plausibly alleged that presence of liquor or wine in company's malt beverage products was material to a reasonable consumer, as required to state a claim for deceptive trade practices under the Missouri Merchandising Practices Act (MMPA); consumers alleged that the type of alcohol was important to consumer decisions because it related to products' content and alleged they would not have purchased company's products, or would have paid less for them, absent company's misrepresentations. Mo. Ann. Stat. § 407.025.1(2); Mo. Code Regs. Ann. tit. 15, § 60-9.010(1)(C).

[7] **Antitrust and Trade Regulation** Particular cases

Consumers plausibly alleged that they suffered ascertainable loss as a result beverage company's packaging and advertising which allegedly misrepresented that malt beverage products contained liquor or wine, as required to state a claim sounding in fraud for deceptive trade practices under the Missouri Merchandising Practices Act (MMPA); consumers alleged that products were overpriced compared to their actual value given their lack of tequila, rum, or wine content. Mo. Ann. Stat. § 407.025.1(2).

[8] **Federal Civil Procedure** Fraud, mistake and condition of mind

The level of particularity required to state a claim for fraud under the Federal Rules of Civil Procedure depends on, inter alia, the nature of the case and the relationship between the parties. Fed. R. Civ. P. 9(b).

[9] **Antitrust and Trade Regulation** Reliance; causation; injury, loss, or damage

A plaintiff adequately pleads a claim sounding in fraud under the Missouri Merchandising Practices Act (MMPA) if he alleges an ascertainable loss under the benefit-of-the-bargain rule, which compares the actual value of the item to the value of the item if it had been as represented at the time of the transaction. Mo. Ann. Stat. § 407.010 et seq.

[10] **Fraud** Elements of Actual Fraud

To state a claim for fraud under Missouri law, a plaintiff must adequately allege: (1) a representation, (2) its falsity, (3) its materiality, (4) the speaker's knowledge of its falsity or ignorance of its truth, (5) the speaker's intent that it should be acted on by the person and in the manner reasonably contemplated, (6) the hearer's ignorance of the falsity of the representation, (7) the hearer's reliance on the representation being true, (8) the hearer's right to rely thereon, and (9) the hearer's consequent and proximately caused injury.

[11] **Federal Civil Procedure** Fraud, mistake and condition of mind

Consumers adequately alleged that beverage company had intent to mislead with regard to packaging and advertising for malt beverage products which allegedly misrepresented that products contained liquor or wine, and thus consumers stated a claim against company for fraud under Missouri law; consumers pleaded particular details as to how packaging and advertising allegedly misrepresented products' contents, alleged that representations were made to induce consumers to purchase company's products, and alleged that company knew or reasonably should have known that such representations were false. Fed. R. Civ. P. 9(b).

[12] **Federal Civil Procedure** Fraud, mistake and condition of mind

Although the Federal Rules of Civil Procedure allow general allegations of knowledge and intent when pleading a claim for fraud, the pleader is not given license to evade the less rigid – though still operative – strictures of the general requirements for pleading. Fed. R. Civ. P. 8, 9(b).

[13] **Fraud** Effect of existence of remedy by action on contract

Economic loss doctrine did not bar consumers' claim against beverage company for fraud under Missouri law, based on allegations that packaging and advertising for malt beverage products misrepresented that products contained liquor or wine.

[14] **Products Liability** Economic losses; damage to product itself

Under Missouri law, the economic loss doctrine prohibits a commercial buyer of goods from seeking to recover in tort for economic losses that are contractual in nature.

[15] **Fraud** Effect of existence of remedy by action on contract

Under Missouri law, the economic loss doctrine forbids commercial contracting parties, as distinct from consumers, and other individuals not engaged in business, to escalate a contract dispute into a charge of tortious misrepresentation.

[16] **Sales** Breach and elements thereof in general

To state a claim for a breach of express warranty under Missouri law, a plaintiff must adequately allege: (1) the defendant sold goods to the plaintiff, (2) the seller made a statement of fact about the kind or quality of those goods, (3) the statement of fact was a material factor inducing the buyer to purchase the goods, (4) the goods did not conform to that statement of fact, (5) the nonconformity injured the buyer, and (6) the buyer notified the seller of the nonconformity in a timely fashion.

[17] **Sales** Parties entitled to notice

Consumers were not obligated to provide beverage manufacturer with pre-suit notice, as required by Article 2 of the Uniform Commercial Code (UCC) for a buyer's claim of breach against a seller, with regard to consumers' claim for breach of express warranty under Missouri law, alleging that malt beverage products did not conform to representations in packaging and advertising that products contained liquor or wine; manufacturer was not the immediate seller of products at issue. Mo. Ann. Stat. § 400.2-607(3)(a).

[18] **Sales** Parties entitled to notice

For purposes of a claim for breach of express warranty under Missouri law, a buyer is only under a duty to notify the immediate seller, rather than the manufacturer, that a product does not conform to the seller's statements. Mo. Ann. Stat. § 400.2-607(3)(a).

[19] **Sales** Breach and elements thereof in general

To state a claim for breach of implied warranty of merchantability under Missouri law, a plaintiff must adequately allege: (1) that a merchant sold goods, (2) which were not merchantable at the time of the sale, (3) injury and damages to the plaintiff or his property (4) which were caused proximately or in fact by the defective nature of the goods, and (5) notice to the seller of the injury. Mo. Ann. Stat. § 400.2-314(2)(c).

[20] **Sales** Food and beverages

Consumers plausibly alleged that malt beverage products did not conform to promises or affirmations of fact made on containers or labels, as required for products to be deemed merchantable under Article 2 of the Uniform Commercial Code (UCC), and thus consumers stated a claim against beverage manufacturer for breach of implied warranty of merchantability under Missouri law; consumers alleged that packaging and advertisements plausibly constituted a promise or affirmation that products contained liquor or wine even though products did not contain either substance. Mo. Ann. Stat. § 400.2-314(2)(c, f).

[21] **Implied and Constructive Contracts** Unjust enrichment

Under Missouri law, a claim for unjust enrichment requires (1) the plaintiff conferred a benefit on the defendant, (2) the defendant appreciated the benefit, and (3) the defendant accepted and retained the benefit under inequitable and/or unjust circumstances.

[22] **Implied and Constructive Contracts** Effect of Express Contract

Consumers' remedy at law against beverage company for breach of express warranty, based on allegation that malt beverage products failed to conform to representations on packaging that products contained liquor or wine, did not preclude consumers' claim for unjust enrichment under Missouri law; unjust enrichment claim was based on company's alleged deception rather than violation of a warranty. Fed. R. CIv. P. 8(d)(3).

[23] **Implied and Constructive Contracts** Unjust enrichment

Consumers plausibly alleged that they conferred a benefit on beverage company by purchasing company's malt beverage products from a third-party seller, as required to state a claim for unjust enrichment under Missouri law, based on company's alleged misrepresentations that products contained liquor or wine; consumers alleged that company retained revenues from their purchases of said products.

[24] **Injunction** Persons entitled to apply; standing

To have Article III standing to seek injunctive relief, a plaintiff must show that he is under threat of suffering injury in fact that is concrete and particularized, the threat must be actual and imminent, not conjectural or hypothetical, it must be fairly traceable to the challenged action of the defendant, and it must be likely that a favorable judicial decision will prevent or redress the injury. U.S. Const. art. 3, § 2, cl. 1.

[25] **Injunction** Persons entitled to apply; standing

The fact of past damages does nothing to establish a real, immediate threat that the plaintiff would again suffer similar injury in the future, as required to have Article III standing to seek injunctive relief; some-day intentions, without any description of concrete plans, or indeed any specification of when the some day will be, do not support a finding of actual or imminent injury. U.S. Const. art. 3, § 2, cl. 1.

[26] **Antitrust and Trade Regulation** Private entities or individuals

Under Missouri law, consumers alleged an ongoing injury sufficient to confer Article III standing to pursue injunctive relief against beverage company based on company's packaging which allegedly misrepresented that malt beverage products contained liquor or wine; consumers alleged that they were continually at risk of being deceived absent knowing for certain that company would not one day include liquor or wine in said products and alleged that they would purchase products if they were confident in company's packaging. U.S. Const. art. 3, § 2, cl. 1.

[27] **Products Liability** Persons Entitled to Sue

A court's review of the scope of a named plaintiff's Article III standing is necessarily limited at the motion to dismiss stage in a products liability class action regarding unpurchased products; factual allegations that raise a reasonable inference that the products are substantially similar to ones that were purchased may suffice. U.S. Const. art. 3, § 2, cl. 1.

[28] **Antitrust and Trade Regulation** Private entities or individuals

Under Missouri law, consumers adequately alleged that beverage company's malt beverage products which consumers did not purchase were substantially similar to products which consumers did purchase, for purposes of determining whether consumers had Article III standing to pursue injunctive relief in class action against company alleging that packaging misrepresented that products contained liquor; consumers alleged that packaging for both purchased and

unpurchased products used cocktail names and associated imagery which suggested the presence of liquor. U.S. Const. art. 3, § 2, cl. 1.

Attorneys and Law Firms

Benjamin Heikali, Pro Hac Vice, Los Angeles, CA, Timothy J. Peter, Pro Hac Vice, Faruqi & Faruqi, LLP, Philadelphia, PA, Tim Eugene Dollar, Dollar, Burns, Becker & Hershewe, L.C., Kansas City, MO, for Plaintiff Megan Browning.

Tim Eugene Dollar, Dollar, Burns, Becker & Hershewe, L.C., Kansas City, MO, for Plaintiff Allen Kesselring.

James F. Bennett, Adam J. Simon, Hannah Preston, Dowd Bennett LLP, Clayton, MO, for Defendant.

ORDER

STEPHEN R. BOUGH, UNITED STATES DISTRICT JUDGE

***1** Before the Court is Defendant Anheuser-Busch, LLC's ("AB") Motion to Dismiss. (Doc. #10.) For the reasons stated below, the motion is GRANTED IN PART and DENIED IN PART.

I. BACKGROUND

This lawsuit is a consumer protection class action brought by Megan Browning ("Browning") and Adam Kesselring ("Kesselring") (collectively "Plaintiffs"). It arises out of AB's alleged false and misleading packaging and advertising of its Ritas Margarita, Mojito, Rosé, and Sangria beverages sold in enclosed packages (the "Products"). The relevant facts taken from Plaintiffs' Complaint are set forth below.

Plaintiffs primarily argue that AB misleadingly labels and advertises the Products as containing certain types of alcohol when, in fact, they do not. For example, AB manufactures and sells packaged beverages as "SPARKLING MARGARITA" (the "Margarita Products"), which, in addition to the use of the word margarita, contain images of a margarita glass on the packaging. Plaintiffs argue that margaritas are cocktails which typically contain tequila, and therefore a reasonable consumer would be led to believe the Margarita Products contain tequila. However, they do not. Similarly, AB manufactures and sells packaged beverages as "MOJITO" and "SPARKLING CLASSIC COCKTAIL" (the "Mojito Products") that do not contain rum, as well as beverages labelled as "ROSÉ," "SANGRIA" "SPRITZ" (the "Wine Products"), which do not actually contain any wine. The only indication that the Products are simply flavored beers is a statement located at the bottom of the packaging which, in a small font, identifies the Products as "malt beverages."

At different points over the course of 2019 and 2020, Plaintiffs Browning and Kesselring allegedly purchased various Margarita Products and Wine Products. Plaintiffs claim they never saw a disclaimer regarding the purchased Products' true contents, and both allegedly relied on the Products' respective representations, which caused them to falsely believe that the Margarita Products contained tequila and the Wine Products contained wine. Plaintiffs state they would not have purchased the Products had they known they did not contain liquor or wine, or would have paid significantly less for them.

Plaintiffs subsequently filed this lawsuit asserting AB's Product representations violated: the Missouri Merchandising Practices Act ("MMPA") (Count I); breach of express warranty (Count II); breach of implied warranty of merchantability (Count III); fraud (Count IV); and unjust enrichment/quasi-contract (Count V). Plaintiffs seek certification for five nationwide classes and Missouri subclasses, one for each Count. Plaintiffs also seek damages and injunctive relief enjoining AB from continuing to

package and advertise the Products as discussed. AB now moves the Court to dismiss the Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). Plaintiffs oppose the motion.

II. LEGAL STANDARD

Rule 12(b)(6) provides that a defendant may move to dismiss for "failure to state a claim upon which relief can be granted." "To survive a motion to dismiss [for failure to state a claim], a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (citations and quotation marks omitted). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ash v. Anderson Merchs., LLC*, 799 F.3d 957, 960 (8th Cir. 2015) (quoting *Iqbal*, 556 U.S. at 678, 129 S.Ct. 1937). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678, 129 S.Ct. 1937.

III. DISCUSSION

***2** **[1]** "A United States District Court sitting in diversity jurisdiction applies the substantive law of the forum state." *Fogelbach v. Wal-Mart Stores, Inc.*, 270 F.3d 696, 698 (8th Cir. 2001). The parties do not dispute that Missouri law governs the Court's analysis. The arguments are addressed in the order presented by the parties.

A. Count I – Violation of Missouri's Merchandising Practices Act

[2] The MMPA prohibits the "act, use or employment by any person of any deception, false pretense, false promise, misrepresentation, unfair practice or the concealment, suppression, or omission of any material fact in connection with the sale or advertisement of any merchandise in trade or commerce[.]" Mo. Rev. Stat. § 407.020.1. To state a claim under the MMPA, a plaintiff must adequately allege that it: "(1) purchased merchandise from the defendant; (2) for personal, family, or household purposes; and (3) suffered an ascertainable loss of money or property; (4) as a result of defendant's use of one of the methods, acts, or practices declared unlawful by the Act." *Kelly v. Cape Cod Potato Chip Co.*, 81 F. Supp. 3d 754, 757 (W.D. Mo. 2015) (citing Mo. Rev. Stat. § 407.025.1). "The MMPA is interpreted broadly to promote its purpose to protect consumers." *Thornton v. Pinnacle Foods Grp. LLC*No. 16-CV-00158 JAR, 2016 WL 4073713,*2 (E.D. Mo. Aug. 1, 2016) (citing *Huch v. Charter Commc'ns, Inc.*, 290 S.W.3d 721, 724 (Mo. banc 2009)).

[3] When an MMPA claim sounds in fraud, as Plaintiffs' claims do here, it must satisfy the heightened pleading requirements of Rule 9(b). *See Muhammad v. Pub. Storage Co.*, No. 14-0246-CV-W-ODS, 2014 WL 3687328, at * 3 (W.D. Mo. July 24, 2014) (listing MMPA cases where Rule 9(b) pleading standards were applied to claims sounding in fraud). Rule 9(b) states that when "alleging fraud ... a party must state with particularity the circumstances constituting fraud[.]" Fed. R. Civ. P. 9(b). This requires a plaintiff to "plead the who, what, when, where, and how" of the alleged fraudulent conduct. *Summerhill v. Terminix, Inc.*, 637 F.3d 877, 880 (8th Cir. 2011) (quotations omitted).

AB argues Count I should be dismissed because Plaintiffs fail to plausibly allege that AB's packaging would likely deceive a reasonable consumer and that the type of alcohol used in the Products is material to the reasonable consumer. AB also argues that Plaintiffs' allegations of loss do not satisfy Rule 9(b).[1] Plaintiffs disagree, stating they have done enough at this early stage to survive dismissal.

1. Likely to Deceive a Reasonable Consumer

[4] "A court may dismiss [an MMPA] claim as a matter of law where the claim fails to show a likelihood that the method, act, or practice alleged to be unlawful would mislead a reasonable consumer." Mo. Rev. Stat. § 407.025.1(2). "Whether a

reasonable consumer would be deceived by a product label is generally a question of fact that cannot be resolved on a motion to dismiss." *Thornton*, 2016 WL 4073713, at *3; *see Murphy v. Stonewall Kitchen, LLC*, 503 S.W.3d 308, 312 (Mo. App. E.D. 2016) ("whether a practice is unfair or deceptive are questions of fact").

***3** **[5]** The Court finds Plaintiffs have adequately alleged that AB's representations would likely mislead a reasonable consumer. Plaintiffs allege that the use of the terms "Margarita," "Mojito," "Sangria," and "Rosé" mislead a reasonable consumer into believing that the respective Products contain either tequila, rum, or wine. Plaintiffs also allege that the Products' respective packaging contains a combination of misleading images and language, such as "sparkling classic cocktails" with images of cocktail and wine glasses. The Wine Products' commercial advertisement includes a woman in a wine cellar. Taken together, Plaintiffs' factual allegations plausibly show that a reasonable customer would believe the Products contain tequila, rum, or wine. AB's contention that these representations are merely puffery or represent flavor and style do not defeat the lawsuit at this early stage.

AB primarily argues no reasonable consumer would be deceived because the Alcohol Tax and Trade Bureau ("TTB") regulations permit the use of cocktail names for malt beverage products. However, the regulation cited by AB permits "[t]he use of a cocktail name as a brand name or fanciful name of a malt beverage, provided that the overall label does not present a misleading impression about the identity of the product." 27 C.F.R. § 7.29(a)(7)(iii). Plaintiffs have adequately alleged the overall label is misleading. AB also relies on *Cruz v. Anheuser-Busch, LLC*, 2015 WL 3561536 (C.D. Cal. June 3, 2015) for the proposition that comparing the Products to actual cocktails, like margaritas, is unreasonable. However, *Cruz* involved whether the use of the "light" on Bud Light Lime-A-Ritas was misleading. Here, Plaintiffs do not allege AB deceptively used a comparative term such as "light," but instead allege AB's representations mislead a reasonable consumer to believe the Products contained liquor or wine. Plaintiffs also compare the Products to other canned beverages with similar packaging that do contain liquor or wine, which the Court finds is an adequate comparison at this stage of the litigation.

The Court also finds unpersuasive AB's argument that the "malt beverages" disclosure nullifies any possible deception. In support of this argument, AB relies on non-binding cases which are factually distinguishable from this case. The relevant inquiry under the MMPA is whether the Products' "overall appearance" is deceptive. 15 C.S.R. § 60-9.030(1). Plaintiffs identify more than just a single word on the Products' packaging to support its allegations, and the impact of the packaging disclosure, as well as other advertisement disclosures, on the overall appearance of the Products is a question of fact best answered at a later stage in this case.

2. Materiality

[6] AB argues Plaintiffs have not adequately alleged that the presence of liquor or wine is material to a reasonable consumer because consumers consider other factors. The Court disagrees. Under the MMPA, a "material fact" is "any fact which a reasonable consumer would likely consider to be important in making a purchasing decision." 15 C.S.R. § 60-9.010(1)(C). Plaintiffs allege that the type of alcohol is important to consumer decisions because it relates to the Products' content, and further allege they would not have purchased the Products, or paid less for them, absent ABs misrepresentations. Plaintiffs thus adequately allege materiality.

3. Ascertainable Loss

[7] **[8]** **[9]** AB argues that Plaintiffs fail to allege an ascertainable loss in compliance with Rule 9(b)'s heightened pleading standard. Plaintiffs argue the Complaint satisfies Rule 9(b) as it pertains to an MMPA claim. Rule 9(b) "is designed to enable defendants to respond specifically, at an early stage of the case, to potentially damaging allegations of immoral and criminal conduct." *BJC Health System v. Columbia Cas. Co.*, 478 F.3d 908, 917 (8th Cir. 2007) (citations and quotation marks omitted). "The level of particularity required depends on, *inter alia*, the nature of the case and the relationship between the parties."

Id. Regarding an MMPA claim, "[a] plaintiff adequately pleads ... if he alleges an ascertainable loss under the benefit-of-the-bargain rule, which compares the actual value of the item to the value of the item if it had been as represented at the time of the transaction." *Murphy*, 503 S.W.3d at 313.

***4** Plaintiffs allege they paid a premium for the Products and would not have purchased the Products absent AB's alleged misrepresentations. In essence, Plaintiffs allege the Products were overpriced compared to their actual value given their lack of tequila, rum, or wine content. In turn, Plaintiffs adequately plead "what was obtained or given up" as a result of AB's alleged misrepresentations. *See Abels v. Farmers Commodities Corp.*, 259 F.3d 910, 920 (8th Cir. 2001) (discussing Rule 9(b) pleading requirements). Plaintiffs need not prove specific damages at this early stage.

B. Count IV - Fraud

[10] To state a claim for fraud under Missouri law, a plaintiff must adequately allege:

> (1) a representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity or ignorance of its truth; (5) the speaker's intent that it should be acted on by the person and in the manner reasonably contemplated; (6) the hearer's ignorance of the falsity of the representation; (7) the hearer's reliance on the representation being true; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximately caused injury.

Hess v. Chase Manhattan Bank, USA, N.A., 220 S.W.3d 758, 765 (Mo. banc 2007).

AB argues "all of the same deficiencies discussed ... with respect to Plaintiffs' MMPA claims requires dismissal of their Count IV for fraud." (Doc. #11, p. 18.)[2] This argument fails for the same reasons discussed above. AB also argues Plaintiffs do not adequately allege AB's intent, and contend the fraud claim is barred by the economic loss doctrine.

1. AB's Intent

[11] **[12]** AB argues Plaintiffs fail to plead any facts which support an inference of AB's intent to mislead. Plaintiffs argue they are allowed to plead the intent element generally. "Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally." Fed. R. Civ. P. 9(b). "Although Rule 9(b) allows general allegations of knowledge and intent, 'generally' is a relative term....Rule 9(b) does not give a pleader license to evade the less rigid – though still operative – strictures of Rule 8." *OmegaGenesis Corp. v. Mayo Found. for Medical Ed. and Rsch.*, 851 F.3d 800, 804 (8th Cir. 2017) (citations and quotation marks omitted).

The Court finds Plaintiffs adequately plead facts showing AB's intent. Plaintiffs plead particular facts regarding the alleged misrepresentation of the Products' contents, that these representations were made to induce consumers to purchase the Products, and that AB knew, or reasonably should have known, these representations were false. While the allegations regarding intent are general, the nature and circumstances of the alleged fraud are pled with sufficient particularity to satisfy Plaintiffs' pleading requirement.

2. Economic Loss Doctrine

[13] AB contends the economic loss doctrine bars Plaintiffs' fraud claims because they are based on Plaintiffs' breach of warranty claims. Plaintiffs argue the economic loss doctrine only applies to commercial transactions, not consumer transactions or fraud claims. The Court agrees with Plaintiffs.

[14] **[15]** "The economic loss doctrine prohibits a commercial buyer of goods 'from seeking to recover in tort for economic losses that are contractual in nature.' " *Dannix Painting, LLC v. Sherwin-Williams Co.*, 732 F.3d 902, 905–06 (8th Cir. 2013) (quoting *Autry Morlan Chevrolet Cadillac, Inc. v. RJF Agencies, Inc.*, 332 S.W.3d 184, 192 (Mo. App. S.D. 2010)). "The [doctrine] ... forbids commercial contracting parties (as distinct from consumers, and other individuals not engaged in business) to escalate their contract dispute into a charge of tortious misrepresentation[.]" *Id.* at 908 (citation and quotation marks omitted). Because Plaintiffs are consumers alleging fraud, the Court finds the economic loss doctrine does not bar Plaintiffs' Count IV claim.

C. Count II – Breach of Express Warranty

***5** **[16]** To state a claim for a breach of express warranty under Missouri law, a plaintiff must adequately allege:

> (1) the defendant sold goods to the plaintiff; (2) the seller made a statement of fact about the kind or quality of those goods; (3) the statement of fact was a material factor inducing the buyer to purchase the goods; (4) the goods did not conform to that statement of fact; (5) the nonconformity injured the buyer; and (6) the buyer notified the seller of the nonconformity in a timely fashion.

Renaissance Leasing, LLC v. Vermeer Mfg. Co., 322 S.W.3d 112, 122 (Mo. 2010).

[17] AB argues its use of cocktail names are not a "statement of fact" because "the inferences Plaintiffs draw from isolated terms like 'margarita' are not reasonable" and the type of alcohol is not material. (Doc. #11, p. 19.) The Court finds these arguments repeat AB's MMPA arguments and finds them unpersuasive for reasons previously stated. AB also argues Plaintiffs' express warranty claim fails because they do not allege they provided pre-suit notice. Plaintiffs argue pre-suit notice only applies to the immediate seller, not the manufacturer.

[18] The Court agrees with Plaintiffs and denies AB's motion on this point. A "buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy." Mo. Rev. Stat. § 400.2-607(3)(a). "The buyer is only under a duty to notify the immediate seller, not the manufacturer." *Kansas City v. Keene Corp.*, 855 S.W.2d 360, 369 (Mo. banc 1993). Here, AB manufactured the Products but was not the immediate seller. In turn, Plaintiffs were not required to provide AB with pre-suit notice.

AB urges the Court to disregard *Keene* due to its age, but no subsequent case has overturned *Keene* and the Court finds this Missouri Supreme Court decision remains binding. AB further claims more recent cases have found the notice requirement applies to manufacturers. However, none of these cases are binding, and cases continue to cite *Keene* favorably. *See, e.g., Budach v. NIBCO, Inc.*, No. 14-cv-04324-NKL, 2015 WL 6870145, at *4 (W.D. Mo. Nov. 6, 2015) ("the buyer is [ ] under a duty to notify the immediate seller") (citing *Keene*, 855 S.W.2d at 369). The Court thus finds Plaintiffs state a claim for breach of express warranty.

D. Count III – Breach of Implied Warranty of Merchantability

[19] To state a claim for breach of implied warranty of merchantability under Missouri law, a plaintiff must adequately allege:

> (1) that a merchant sold goods, (2) which were not "merchantable" at the time of the sale, (3) injury and damages to the plaintiff or his property (4) which were caused proximately or in fact by the defective nature of the goods, and (5) notice to the seller of the injury.

Hope v. Nissan N.A., Inc., 353 S.W.3d 68, 90 (Mo. App. W.D. 2011).

[20] AB argues Plaintiffs fail to allege the Products were not merchantable, that the claim fails to the extent it is a reiteration of the breach of express warranty claim, and Plaintiffs failed to provide notice. To the extent AB repeats its express warranty arguments, including the notice requirement, the Court finds those arguments unpersuasive for reasons previously stated.

***6** AB argues "merchantable" means "fit for the ordinary purpose for which such goods are used." Mo. Rev. Stat. 400.2-314(2)(c). AB contends Plaintiffs do not allege the Products were unfit for their ordinary purpose, that is, human consumption, and therefore the implied warranty claim fails. In response, Plaintiffs argue the breach of implied warranty is predicated on the definition of "merchantable" found in Mo. Rev. Stat. § 400.2-314(2)(f).

In addition to AB's proffered definition, Missouri statute defines "merchantable" to mean "conform to the promises or affirmations of fact made on the container or label[.]" Mo. Rev. Stat. § 400.2-314(2)(f). Courts, including the Western District of Missouri, have used the latter definition in the context of a breach of implied warranty of merchantability claim. *See, e.g., Grantham v. Wal-Mart Stores, Inc.*, No. 08-3466-CV-S-GAF, 2012 WL 12898186, at *3 (W.D. Mo. Feb. 28, 2012) ("Plaintiff can prove [the defendant] breached the implied warranty of merchantability by showing the [product] ... did not conform to the promises or affirmations of fact made on the container or label.") (citing, Mo. Rev. Stat § 400.2-314(2)(f)). The Court finds the alleged packaging and advertisements plausibly constitute a promise or affirmation of fact that the Products contains liquor or wine, which they do not. In turn, Plaintiffs have adequately stated a claim for breach of implied warranty.

E. Count V – Unjust Enrichment/Quasi-Contract

[21] Under Missouri law, a claim for unjust enrichment requires "(1) [the plaintiff] conferred a benefit on the defendant; (2) the defendant appreciated the benefit; and (3) the defendant accepted and retained the benefit under inequitable and/or unjust circumstances." *Hargis v. JLB Corp.*, 357 S.W.3d 574, 586 (Mo. banc 2011) (citation and quotation marks omitted). AB argues Plaintiffs' unjust enrichment claim fails because Plaintiffs have an adequate remedy at law and Plaintiffs do not allege they conferred a benefit on AB.[3] Plaintiffs argue they can plead the unjust enrichment claim in the alternative and contend that they conferred a benefit on AB.

1. Adequate Remedy at Law

[22] AB argues that because Plaintiffs have a remedy at law, they cannot pursue an unjust enrichment claim. "A party may state as many separate claims or defenses as it has, regardless of consistency." Fed. R. Civ. P. 8(d)(3). AB contends that because the unjust enrichment is based on the violation of a warranty, it must be dismissed. In *Budach v. NIBCO, Inc.*, cited by AB in support, the court dismissed an unjust enrichment claim because the plaintiff "explicitly premised his unjust enrichment claim on defendant's violation of the express warranty." 2015 WL 6870145, at *8. In contrast to *Budach*, Plaintiffs do not explicitly premise their unjust enrichment claim on the violation of a warranty, but instead on AB's alleged deception. At this early stage, Plaintiffs may plead their unjust enrichment claim in the alternative until it is determined whether they have an adequate remedy at law.

2. Conferred a Benefit

[23] AB contends Plaintiffs have not alleged that they have conferred AB a benefit because they purchased the Products from a third-party. Plaintiffs argue they are not required to confer a direct benefit on AB. "[T]here does not appear to be any bright line rule regarding how directly the defendant must have received a benefit at the plaintiff's expense." *Webb v. Dr Pepper Snapple Group, Inc.*, 2018 WL 1955422, at *6 (W.D. Mo. Apr. 25, 2018) (collecting cases). In each case cited by AB, the court dismissed the action because the benefit conferred on the defendant was not at the plaintiff's expense. Here, Plaintiffs allege "AB retained

the revenues derived from purchases of the Products by Plaintiff[.]" (Doc. #1, ¶ 122.) At this stage, the Court finds Plaintiffs adequately allege they conferred a benefit on AB and state an unjust enrichment claim.

F. Article III Standing

***7** AB argues Plaintiffs lack standing both to pursue injunctive relief and to assert claims for unpurchased Products, namely the Mojito Products and certain Margarita Products. Plaintiffs disagree. The Court addresses the parties' arguments below.

1. Injunctive Relief

[24] **[25]** [T]o seek injunctive relief, a plaintiff must show that he is under threat of suffering 'injury in fact' that is concrete and particularized; the threat must be actual and imminent, not conjectural or hypothetical; it must be fairly traceable to the challenged action of the defendant; and it must be likely that a favorable judicial decision will prevent or redress the injury. *Missourians for Fiscal Accountability v. Klahr*, 830 F.3d 789, 794 (8th Cir. 2016) (quoting *Summers v. Earth Island Inst.*, 555 U.S. 488, 493, 129 S.Ct. 1142, 173 L.Ed.2d 1 (2009)). "The fact of past damages, 'while presumably affording [the plaintiff] standing to claim damages ... does nothing to establish a real, immediate threat that he would again' suffer similar injury in the future." *Harmon v. City of Kansas City*, 197 F.3d 321, 327 (8th Cir. 1999) (quoting *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 210–11, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995)). "[S]ome day intentions – without any description of concrete plans, or indeed any specification of when the some day will be – do not support a finding of the 'actual or imminent' injury that our cases require." *Frost v. Sioux City*, 920 F.3d 1158, 1161 (8th Cir. 2019) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)).

[26] In their Complaint, Plaintiffs allege:

> Despite being misled by Defendant, Plaintiffs wish to and are likely to continue purchasing the Products in the future ... absent an injunction prohibiting the deceptive packaging and advertising described herein, they will be unable to rely with confidence on Defendant's packaging of the Products in the future and will therefore abstain from purchasing the Products, even though they would like to purchase them ... while Plaintiffs currently believe the Products do not contain distilled liquors or wine, they lack personal knowledge as to Defendant's specific business practices, leaving doubt in their minds as to the possibility that at some point in the future the Products could contain distilled liquors or wine. This uncertainty, coupled with their desire to purchase the Products, is an ongoing injury[.]

(Doc. #1, ¶ 14.)

AB contends this allegation is a hypothetical future injury insufficient to confer standing. Plaintiffs disagree, and so does the Court. Plaintiffs allege the ongoing injury they experience is the continual threat of AB's deceptive business practices. Absent knowing for certain that AB will not one day include liquor or wine in the Products, Plaintiffs allege they are continually at risk of being deceived.

AB, relying in party on *Penrose v. Buffalo Trace Distillery, Inc.*, argues that Plaintiffs have not shown a threat of future injury because "if one took [the plaintiffs] at their word, there are numerous indications in the Complaint that they will *not* purchase Defendants' product in the future." No. 17CV294 HEA, 2018 WL 705054, at *7 (E.D. Mo. Feb. 5, 2018). However, unlike the plaintiffs in *Penrose*, whose complaint "provides no indication of future intention to purchase the product," *id.*, Plaintiffs here allege that, while currently restraining from purchasing the Products, they have both the intention and desire to purchase the Product if they were confident in AB's packaging. These allegations, taken as true, are enough to confer standing to pursue injunctive relief.

2. Unpurchased Products

***8** AB additionally argues Plaintiffs do not have standing to assert claims regarding Products they did not purchase, specifically the Mojito Products and certain Margarita Products. Plaintiffs disagree, stating the Products are substantially similar enough to confer standing.

The Court observes that district courts are split on whether named plaintiffs may assert claims related to products they did not purchase, and neither the Missouri Supreme Court nor the Eighth Circuit have addressed this exact issue. *See Goldman v. Tapestry, Inc.*, 501 F.Supp.3d 662, 667 (E.D. Mo. 2020) ("[c]ourts have taken three broad positions on how related the product purchased by the named plaintiff and putative class members must be") (quoting *In re Vizio, Inc. Consumer Privacy Litig.*, 238 F. Supp. 3d 1204, 1218 (C.D. Cal. 2017)). "Some courts find that the named plaintiff can represent only those who purchased the exact same product," which AB contends is appropriate. *Vizio*, 238 F. Supp. 3d at 1218. However, this approach "is irreconcilable with the Supreme Court's decision in *Gratz v. Bollinger*, 539 U.S. 244 [123 S.Ct. 2411, 156 L.Ed.2d 257] (2003) ... [which held] the class representative could represent the freshman applicants because the freshman admissions process '[did] not implicate a significantly different set of concerns.' " *Id.* (quoting *Gratz*, 539 U.S. at 265, 123 S.Ct. 2411). "The second approach, which characterizes the question as one solely of adequacy and typicality under Rule 23(a), is also difficult to square with Supreme Court precedent." *Id.* (citing Supreme Court cases which dismissed class allegations on a standing, rather than a class certification, basis). The *Vizio* court concluded the " 'substantially similar' standard most closely accords" with U.S. Supreme Court precedent. *Id.* at 1219

[27] "[T]he overarching question is whether the plaintiff's averred injury is substantially similar to the claims of those she seeks to represent." *Id.* "At the motion to dismiss stage, however, the Court's review of the scope of a named plaintiff's Article III standing is necessarily limited. ... 'factual allegations' that raise a reasonable inference that the products are substantially similar 'may suffice.' " *Id.* (quoting *Lujan*, 504 U.S. at 561, 112 S.Ct. 2130). "[B]y the class certification stage, this standing question becomes effectively subsumed into Rule 23(a)'s 'rigorous' typicality and adequacy requirements." *Id.* (citing *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350–51, 131 S.Ct. 2541, 180 L.Ed.2d 374 (2011)). Finding the "substantially similar" approach most persuasive, the Court turns to the facts alleged by Plaintiffs to consider if their averred injury from the Products which they purchased is substantially similar to the claims of those they seek to represent in this suit.

[28] While AB contends each of the Products involves different words and imagery, Plaintiffs argue the only difference in the Margarita Products is the flavor (e.g., pomegranate versus lime), and contend the same theory of harm applies to the Mojito Products. "While the similarity of the products at issue is one important factor to consider, the similarity of the operative facts that give rise to the putative class representative and putative class's claims is equally important." *Id.* at 1219 n. 3 (citations omitted). The class claims assert the same causes of action as Plaintiffs' claims and are predicated on substantially similar facts, mainly how these malt beverages were packaged, including AB's use of cocktail names and associated imagery. In turn, the Court find at this early stage, Plaintiffs have adequately alleged facts showing that the Products are substantially similar. If warranted, AB may reassert this argument at a later stage of the proceeding, after the parties and the Court have the benefit of discovery.

IV. CONCLUSION

***9** Accordingly, it is **ORDERED** that AB's Motion to Dismiss (Doc. #10) is GRANTED IN PART and DENIED IN PART. The motion is GRANTED insofar as Plaintiffs will withdraw their MMPA claims on behalf of non-Missouri consumers, and DENIED in all other respects.

IT IS SO ORDERED.

All Citations

--- F.Supp.3d ----, 2021 WL 1940645, 104 UCC Rep.Serv.2d 1118

Footnotes

1 AB also argues that Non-Missouri consumers cannot assert claims under the MMPA and therefore the "nationwide" putative class allegations fail as a matter of law. Plaintiffs concede this point and state they will withdraw this class allegation. Accordingly, AB's motion on this point is granted. AB also argues Plaintiffs cannot state an MMPA claim based on the theory that AB omitted a disclaimer that the Products do not contain liquor or wine. Plaintiffs do not respond to this argument. However, because Plaintiffs otherwise allege AB deployed deceptive practices, the Court finds Plaintiff need not rely on an omission-theory to survive the motion to dismiss.

2 Page numbers reference pagination automatically generated by ECF.

3 AB also argues because Plaintiffs' MMPA claim must be dismissed, so should the unjust enrichment claim. Because the Court finds Plaintiffs adequately stated an MMPA claim, this argument fails.