2016 WL 614570 (Mo.Cir.) (Trial Order)
Circuit Court of Missouri.
Twenty-Second Judicial Circuit
St. Louis City

Daniel MURPHY, individually and on behalf of all others similarly situated in Missouri, Plaintiff,
v.
STONEWALL KITCHEN, LLC, Defendant.

No. 1522-CC00481.
January 26, 2016.

Amended Order and Judgment Granting Motion to Dismiss

Joan L. Moriarty, Judge.

***1** This matter comes before the Court on "Defendant's Motion to Dismiss" in the above-styled cause. The Court now rules as follows.

I. Background

This case, which is filed as a putative class action, concerns Defendant Stonewall Kitchen LLC's "Vanilla Cupcake Mix" product. The Cupcake Mix contains an ingredient known as sodium acid pyrophosphate (hereinafter "SAPP"), a leavening agent which is a part of the baking powder that makes the cupcakes rise.

In essence, Plaintiff's Petition in this case alleges that the Cupcake Mix was deceptively marketed, in violation of the Missouri Merchandising Practices Act (MMPA), because the front label of the bag in which the product was sold states (inter alia) that the mix is "all natural" and, according to Plaintiff, SAPP therefore cannot legitimately be contained in the mix because SAPP is in fact not natural but rather an artificial and/or synthetic substance.

Plaintiff's MMPA claim is set forth in Count I of his Petition. Count II alleges the same basic facts as Count II but pleads in the alternative that Plaintiff is entitled to restitution and/or disgorgement of profits, under a theory of unjust enrichment.

Plaintiff's core factual allegations in relation to his MMPA claim are, in some respects, remarkably scant. He alleges, inter alia: that he purchased the Mix at a local Straub's store in the City of St. Louis for $9.95 for personal use (Petition paragraph 4); that Defendant makes the Mix (paragraph 5); that Defendant has sought to "take advantage of" a "growing market" for healthy foods by attaching the label "all natural" to the Mix and thereby "entice consumers like Plaintiff to pay a premium" for supposedly "all natural" products (paragraph 14); that the label "all natural" on the Mix is in fact deceptive and misleading because SAPP is contained in the Mix and SAPP is in fact not natural but rather is "a synthetic leavening chemical" (paragraphs 15 and 16); and that this alleged misrepresentation violates § 407.020 RSMo of the MMPA because it is a prohibited act involving the use or employment of "deception, fraud, 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 merchandise (paragraphs 18, 31 and 32). [1]

Plaintiff further alleges that he, along with each putative Class Member who purchased the Mix product [2], "thereby suffered an ascertainable loss [of money] as a result" of the alleged unlawful conduct; and that said alleged loss consists of "the difference between the actual value of the product and the value of the product if it had been as represented." (Petition, at paragraph 33.)

***2** Defendant now brings this motion to dismiss on grounds that Plaintiff has failed to state a claim on which relief can be granted. Defendant raises five distinct arguments in support of its motion.

First, Defendant contends, Plaintiff fails in Count I to allege an "unlawful act" within the meaning of the MMPA and hence fails to state a claim under the Act, because he does not plead—and cannot plead--that the Cupcake Mix's package labeling failed to specifically disclose that SAPP was an ingredient.

Second, Defendant argues, Plaintiff similarly has failed to state a viable claim of an unlawful act under the MMPA because his entire claim is based on the premise that SAPP is not a "natural" ingredient, yet Plaintiff's proposed definition of the word "natural" is one which is "fatally subjective and unworkable, [thereby] defeating his claim."

Third, Defendant urges, even assuming Plaintiff's pleaded definition of "natural" may be workable, Plaintiff's Petition never pleads that SAPP in fact fails to meet that definition.

Fourth, Defendant claims, even assuming that Plaintiff *has* pleaded what would (if true) amount to an unlawfully misleading or deceptive representation under the MMPA, Plaintiff still has failed to state a claim under the MMPA, "because he does not plead facts showing that his alleged loss was caused by ('as a result of') any alleged unlawful act."

Fifth and finally, Defendant asserts that if *any* of the above four arguments has merit, then Count II (Plaintiff's claim for unjust enrichment) must also be dismissed, because the latter claim "is wholly derivative of and cannot stand apart from Plaintiff's MMPA claim."

As reflected in his briefing, Plaintiff disputes all of these arguments, on a variety of grounds.

II. Discussion

A motion to dismiss for failure to state a claim is solely a test of the adequacy of the plaintiff's petition. *Nazeri v. Missouri Valley College*, 860 S.W.2d 303, 306 (Mo. banc 1993). The court assumes all well-pleaded factual allegations are true, and grants plaintiff all reasonable inferences therefrom. *Id.* The challenged claim is simply reviewed to see if the facts alleged meet "the elements of a recognized cause of action, or of a cause that might be adopted in that case." *Id.* By the same token, however, such a motion is well taken where "facts essential to recovery are not pleaded." *Berkowski v. St. Louis County*, 854 S.W.2d 819, 823 (Mo. App. E.D. 1993). "[M]ere conclusions of the pleader not supported by factual allegations are disregarded." *Id.*

The purpose of the Missouri Merchandising Practices Act "is to preserve fundamental honesty, fair play and right dealings in public transactions." *Hope v. Nissan North America, Inc.*, 353 S.W.3d 68, 81 (Mo. App. W.D. 2011). The MMPA thus prohibits "deception, fraud, false pretense, false promises, 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" by defining such activity as an unlawful practice. *Id.*, citing § 407.020.1 RSMo. Civil actions may be brought under the MMPA to recover actual damages by "[a]ny person who purchases or leases merchandise primarily for personal, family or household purposes and thereby suffers an ascertainable loss of money or property, real or personal, as a result of [an unlawful practice]." *Id.*, quoting § 407.025.1; see also *Chochorowski v. Home Depot U.S.A., Inc.*, 295 S.W.3d 194, 197-198 (Mo. App. E.D. 2009).

***3** Thus, in a private cause of action brought under the MMPA, a pleader must allege that he or she has met the following claim elements: (1) purchased or leased merchandise (which includes services) from the defendant; (2) for personal, family or household purposes; and (3) thereby suffered an ascertainable loss of money or property; (4) "as a result of" [an act declared unlawful under section 407.020]. *Chochorowski*, 295 S.W.3d at 198; see also *Edmonds v. Hough*, 344 S.W.3d 219, 223 (Mo. App. E.D. 2011).

Here, the Court finds the **second, third and fourth** asserted arguments for dismissal raised by Defendant, (summarized earlier herein), do not need to be substantively addressed by the Court because the **first and fifth** stated grounds are dispositive of the case. Hence, any discussion of the other three would be in the nature of mere *dicta.* Rather, the following two issues are pivotal.

A. Has Plaintiff Failed to Plead an Unlawful Act Within the Meaning of the MMPA Because he has not---and Cannot---Allege that the Cupcake Mix's packaging, Taken as a Whole, Failed to Disclose that SAPP was an Ingredient?

The Court concludes after careful analysis that the answer to the above question is "yes," and that accordingly, Plaintiff has failed to state a claim on which relief can be granted under the MMPA.

Defendant begins its argument on this point by asserting that when Plaintiff included a photograph of the Cupcake Mix box in his Petition, he did not include the FDA-mandated list of ingredients which appears on the back of the box, *and* that the list of ingredients clearly and unequivocally states that SAPP is one of the ingredients in the Mix. This is fatal to the Plaintiff's claim, Defendant says, arguing that "to establish a claim for deception or concealment under the MMPA" in a case like this one, Plaintiff "would have to allege at a minimum that SAPP was not included in the ingredients list on the box." Here, Defendant asserts, it is *undisputed* that SAPP clearly was included in the ingredients list, and Plaintiff's MMPA claim should therefore be dismissed. [3]

Moreover, Defendant urges, the federal district court for the Western District of Missouri has recently dismissed a quite similar putative MMPA class action, based in large part on just such grounds. The plaintiff there claimed that describing potato chips as "all natural" implied there were no synthetic ingredients; but the federal court dismissed the case at least in part because the alleged offending ingredient was clearly listed on the package:

> ***4** Because the labels clearly disclosed the presence of the [allegedly unnatural ingredients], it is not plausible that Plaintiffs believed, based on Defendants' [ ] 'all natural' representations, that the [product] did not contain the challenged ingredients]. **The Court agrees that the federally-compliant ingredient label on the back of the Chips defeats Plaintiff's claims that the Chips' labeling constitutes an unlawful practice under the MMPA.** Plaintiff's assertion that she was deceived by Defendants' labeling is contradicted by the full disclosure of the challenged ingredients by Defendants. Further, if Plaintiff wished to avoid products containing the challenged ingredients, Defendants provided her with all the information she needed to do so. Thus, the Court finds that Defendants' labeling of the Chips is not deceptive or misleading with regards to the ingredients contained therein. **Accordingly, Plaintiff has failed to state a claim that Defendants committed any unlawful act under the MMPA.**

Kelly v. Cape Cod Potato Chip Company, Inc., 81 F. Supp.3d 754, 762 (W.D. Mo. 2015). (Emphasis added)

The above-discussed basis for dismissal of such a claim, for want of a better term, might aptly be called the "ingredient list defense." And although *Kelly* remains the only case cited by either party that addresses this issue under Missouri law, nevertheless, as Defendant correctly notes there are a number of cases from other jurisdictions where "natural or "all natural" claims have been dismissed on essentially this same basis. See *Kane v. Chobani, Inc.*, No. 12-CV-02425 LHK, 2013 U.S. Dist. LEXIS 134385, at *36 (N.D. Cal., Sept. 19, 2013) (dismissal of "all natural" claims granted in key part

"[b]ecause the label clearly discloses the presence of [the allegedly unnatural ingredients]"); *Chin v. General Mills, Inc.*, No. 12-2150 (MJD/TNL), 2013 U.S. Dist. LEXIS 77345, at *18 (D. Minn., June 3, 2013) (food labeling claim dismissed; court stating that "the specific terms included in the ingredient list must inform the more general term '100% natural'"); *Hairston v. South Beach Beverage Co.*, No. CV12-1429-JFW (DTBx), 2012 U.S. Dist. LEXIS 74279, at *14-*15 (C.D. Cal. May 18, 2012) (product labeled "all natural" would not mislead a reasonable consumer because "to the extent there is any ambiguity, it is clarified by the detailed information contained in the ingredient list, which explains the exact contents of Lifewater").

Plaintiff counters by arguing that other courts have rejected the "ingredient list" rationale in declining to dismiss similar claims, and urges that this Court should do so too. Plaintiff cites, *inter alia*, to *Lam v. General Mills, Inc.*, 859 F. Supp.2d 1097, 1105 (N.D. Cal. 2012) (holding "an ingredients list cannot be used to correct the message that reasonable consumers may take from the rest of the packaging"); and *Bohlke v. Shearer's Foods, LLC*, No. 9:14-CV-80727, 2015 U.S. Dist. LEXIS 6054, at *25-*26 (S.D. Fla. January 20, 2015) (declining to dismiss, finding in part that "[a] consumer might be misled by the statements 'All Natural' and "No Artificial Ingredients,' regardless of additional disclosures on the back of a Product's packaging," and thus holding that "inclusion of the ingredient list" on back of the product's packaging does not necessarily preclude plaintiffs' state statutory consumer fraud claim.) See also *Williams v. Gerber Products Co.*, 552 F.3d 934, 939-940 (9th Cir. 2008) (opining that an ingredients list on back or side of package does not automatically shield a defendant from liability for false representation on front of package, at least in those cases where "the truth" as revealed by the ingredients list is clearly at odds with the false and misleading representation on front of box).

***5** As can be seen from the foregoing discussion, there is to some extent a split of authority among courts that have considered this issue, with some finding that specific inclusion of the allegedly unnatural ingredient on the package's ingredients list bars any deceptive labeling claim based on package labeling that asserts the words "Natural" or "All Natural," while others have held differently. After careful consideration, and as applied to the circumstances of the case at bar, the Court finds the former line of cases represents the better-reasoned and more persuasive view.

In this Court's view, the fundamental reason for this conclusion is--as many courts and commentators have recognized--the fact that to a *very* considerable degree the terms "natural" or "all natural," as used in the context of food and food labeling, are *inherently ambiguous* terms; they do not have any clearly settled and/or generally understood and accepted meaning in this context.

There is no doubt that the FDA itself has struggled with this issue, and has repeatedly declined to even attempt to adopt any formal definition of these terms, as it has concluded that the task would be unfeasible. See *Schwartz & Silverman, supra*, 80 Brooklyn L. Rev. at 655 and n.328; *id* at 665-666 and n. 393. See also *Kelly*, *supra*, 81 F. Supp. 3d at 760 (noting, *inter alia*, that a quite recent FDA informal advisory opinion states "that the FDA solicited comments on this issue, but the solicited comments failed to provide a 'specific direction to follow for developing a definition of the term 'natural,' ' (citing to 58 Fed. Reg. at 2407)).[4] Clearly, in the context of food labeling: "The term 'natural' is vague and ambiguous." *Kelly*, 81 F.3d at 760 (citing *Balser v. Hain Celestial Group*, No. 13-05604-R, 2013 U.S. Dist. LEXIS 180220 at *3 (C.D. Cal. Dec 18, 2013).

Indeed, this Court would add, even the informal definition of "natural" in this context which has been adopted and sometimes-but-rarely cited by the FDA ("nothing artificial or synthetic … has been included in, or has been added to, a food that would not normally be expected to be in the food"), (see 58 Fed. Reg. 2302 at 2407 (1993)), is ***itself*** considerably ambiguous, because it leaves open the possibility that at least in some instances a synthetic or artificial ingredient included in a particular food---for example, a leavening agent such as SAPP in a cake mix---might be so frequently found and commonly used in such a food that many people would **normally expect** it to be in such a product, and hence would regard it as a "natural" ingredient thereof.

Thus, because the terms "natural" and "all natural" are in fact, to a considerable degree, ambiguous in the food labeling context, the Court concludes that a reasonable consumer who had any concern or question at all as to whether a particular food product item with the phrase "all natural" on its labeling did in fact comport with the consumer's own subjective notion or definition of what that phrase meant, would presumably examine the ingredients list on the package labeling if the product contained such a list.

Here, the product in question did contain such a list; and it is undisputed that the ingredient list specifically listed SAPP as an ingredient. This Court thus finds that the rationale relied upon by the federal district court for the Western District of Missouri in *Kelly*, insofar as the ingredient list is concerned, is applicable here as well. The disclosure of SAPP on the Cupcake Mix box's ingredient list "defeats Plaintiff's claims that the ['all natural'] labeling constitutes an unlawful practice under the MMPA." *Kelly*, 81 F.3d at 762. Plaintiff's claim that he was misled by the "all natural" wording on the front of the package "is contradicted by the full disclosure" on the ingredient list of the challenged ingredients. *Id.* Thus, the Court finds that Defendant's labeling of its Cupcake Mix product, as a matter of law, could not be deemed deceptive or misleading with regard to the inclusion of SAPP as an ingredient of the product; the Court therefore finds that Plaintiff has failed to state a claim that Defendant committed an unlawful act under the MMPA. [5]

B. Count II is Wholly Derivative of Count I, and Thus Must Also Be Dismissed

***6** Finally, Defendant is correct that under Missouri law, a so-called "unjust enrichment" claim that is wholly derivative of other substantive claims cannot serve as an independent basis for relief in the case if those other claims fail. See *Binkley v. American Equity Mortgage, Inc.*, 447 S.W.3d 194, 199 (Mo. banc 2014). That is the case here. Since Plaintiff's Count I MMPA claim fails as a matter of law, Plaintiff's Count II "unjust enrichment" claim must also be dismissed.

III. Conclusion

WHEREFORE, for all of the foregoing reasons, it is hereby ordered, adjudged and decreed that Plaintiff's Petition in this matter, as to both Counts I and II thereof, is **dismissed for failure to state a claim on which relief can be granted.**

Dated: *January 26*, 2016

SO ORDERED:

<<signature>>

Joan L. Moriarty, Judge

Footnotes

1 The Court notes in passing, (even though it is not outcome-determinative here), that nowhere in Plaintiff's Petition does Plaintiff ever specifically allege that he was deceived by the words "all natural" which appeared on the Cupcake Mix package's front label, or that he relied on the "all natural" claim in his decision to purchase the product. Indeed, for all that is shown from the bare allegations of the Petition itself, it is not even 100% clear and certain that Plaintiff was not *already aware* that the Mix contained SAPP, *at the time he purchased the product*.

2 Plaintiff defines the class as Cupcake Mix consisting of: "All persons in Missouri who purchased Stonewall Kitchen's Vanilla Cupcake Mix in the five years preceding the filing of this Petition (the 'Class Period')."

3 Ordinarily, and especially if the Plaintiff had in any way whatsoever voiced a procedural objection to it, the Court would find that this sort of defense argument is more appropriate for a motion for summary judgment rather than a motion to dismiss, since it is not apparent solely from the face of the Petition whether SAPP was or was not included in the product package's

ingredients list. In this case, however, Plaintiff's written memorandum in opposition to the motion to dismiss openly concedes that SAPP ***was***, in fact, clearly included and indicated in the ingredients list on the package. Instead, Plaintiff's response on this point consists **entirely** of a legal argument that ***even though*** SAPP was explicitly included in the product's ingredient list, this fact "does not insulate" Defendant from still being liable under the MMPA for the "All Natural" wording on the front of the package. Under these circumstances, where it is **absolutely clear** that Plaintiff does not dispute that the Cupcake Mix's label disclosed that SAPP was an ingredient, the Court is not going to engage in the utterly pointless exercise of saying that the issue is one which must await summary judgment before it can be decided. It is ripe for decision now.

4 See also Nicloe E. Negowetti, *Defining "Natural" Foods: The Search for a Natural Law*, 26 Regent U. L. Rev. 329, 364 (2014) ("There is no indication that the FDA, courts, Congress, state legislatures, or the marketplace will create a comprehensive, uniform and enforceable definition of 'natural' anytime in the near future.")

5 In so ruling, the Court wishes to note and emphasize that it is ***not*** holding that a ***clearly*** false and misleading representation contained on a product package's labeling can never be actionable under the MMPA whenever contradictory-but-truthful information is contained in the package's more detailed ingredient list. On the contrary, in such cases, this Court fully agrees with the reasoning of those courts which have found that reasonable consumers should not "be expected to look beyond misleading representations on the front of the box to discover the truth from the ingredient list in small print on the side of the box;" and that the legitimate purpose of an ingredient list is not "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." *Williams v. Gerber Prods. Co. supra*, 552 F.3d at 939-940. Thus, for example, if a product package stated that the product was "organic" but the ingredients list on the back of the package plainly revealed such claim to be false, the Court would have little difficulty in finding that such deceptive labeling could be actionable under the MMPA, since "organic" in the context of foods has a fairly definite and settled meaning. The same would be true, for instance, of a beverage labeled as "completely non-alcoholic" on the front of the bottle but an ingredients list on the back side of the bottle revealed that it in fact contained a small amount of alcohol, since there is no ambiguity about the meaning of "non-alcoholic." But where, as here, a general term—(i.e., "natural" or "all natural")---***is*** largely ambiguous, the Court believes that such labeling cannot be deemed unlawfully deceptive if the product's detailed ingredient list truthfully explains the exact contents of the food product and clearly reveals the presence of the challenged ingredient, since such an explanation fully clarifies any and all ambiguity.

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