UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

SANDRA ADAMS,

Plaintiff,

v. Case No: 5:22-cv-290-GAP-PRL

THE KRAFT HEINZ COMPANY,

Defendant

ORDER

This cause came on for consideration without oral argument on Defendant's Motion to Dismiss (Doc. 14). The Court has also considered Plaintiff's Response in Opposition (Doc. 18), Defendant's Reply (Doc. 21), and Defendant's Notice of Supplemental Authority (Doc. 26).

I. Procedural History

Plaintiff, Sandra Adams ("Plaintiff"), brought suit against Defendant, the Kraft Heinz Company ("Defendant"), on June 24, 2022, on behalf of herself and others seeking to certify a consumer fraud multi-state class encompassing persons in Florida, Alabama, South Carolina, Tennessee, and Virginia. *See* Doc. 1, ¶¶ 94-99, 131. Her Complaint alleges that Defendant misleads consumers by representing that the flavoring in its MiO brand Tropical Cherry and Berry Pomegranate flavored

water enhancers (the "Products") comes only from natural sources when, in fact, an artificial form of malic acid plays a significant role in generating the flavor profile. *Id.*, ¶¶ 17-22, 49-57. Plaintiff filed claims under the Florida Deceptive and Unfair Trade Practices Act ("FDUPTA") [1] and the Magnuson-Moss Warranty Act ("MMWA") [2], in addition to common law claims for breach of express and implied warranty, negligent misrepresentation, fraud, and unjust enrichment. *See id*. at 19-24. Defendant filed the instant Motion to Dismiss on November 7, 2022. *see* Doc. 14.

II. Legal Standard

In ruling on a motion to dismiss, the Court must view the complaint in the light most favorable to the plaintiff, *see, e.g.*, *Jackson v. Okaloosa County*, 21 F.3d 1531, 1534 (11th Cir. 1994), and must limit its consideration to the pleadings and any exhibits attached thereto. *See* Fed. R. Civ. P. 10(c); *see also GSW, Inc. v. Long Cnty.*, 999 F.2d 1508, 1510 (11th Cir. 1993). The Court will liberally construe the complaint's allegations in the Plaintiff's favor. *See Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969). However, "conclusory allegations, unwarranted factual deductions or legal conclusions masquerading as facts will not prevent dismissal." *Davila v. Delta Air Lines, Inc.*, 326 F.3d 1183, 1185 (11th Cir. 2003).

---

[1] Plaintiff additionally filed claims under analogous consumer fraud acts in Alabama, South Carolina, Tennessee, and Virginia. *See* Doc. 1, ¶¶ 145-150.

[2] *See* 15 U.S.C. §§ 2301 *et seq.*

In reviewing a complaint on a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), "courts must be mindful that the Federal Rules require only that the complaint contain 'a short and plain statement of the claim showing that the pleader is entitled to relief.'" *United States v. Baxter Int'l, Inc.*, 345 F.3d 866, 880 (11th Cir. 2003) (citing Fed. R. Civ. P. 8(a)). This is a liberal pleading requirement, one that does not require a plaintiff to plead with particularity every element of a cause of action. *Roe v. Aware Woman Ctr. for Choice, Inc.*, 253 F.3d 678, 683 (11th Cir. 2001). However, a plaintiff's obligation to provide the grounds for his or her entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 554–55 (2007). The complaint's factual allegations "must be enough to raise a right to relief above the speculative level," *id.* at 555, and cross "the line from conceivable to plausible." *Ashcroft v. Iqbal*, 556 U.S. 662, 680 (2009).

III. Analysis

A. Background

1. *Malic Acid*

The legal issues in this case involve an acidic compound known as malic acid, the common name for 1-hydroxy-1, 2-ethanedicarboxylic acid. *See* 21 C.F.R. §

184.1069(a)[3]. Malic acid has two principal isomers: L-malic acid which occurs naturally in various foods, and DL-malic acid, which does not occur naturally. *Id.* DL-malic acid is produced through a chemical process[4]. *See id.* Federal regulations state that malic acid is used as a *flavor enhancer*[5], a *flavoring agent and adjuvant*[6], and as a *pH control agent*[7]. Malic acid and other acidulants (e.g., malic acid, citric acid, tartaric acid, etc.) in fruit-flavored beverages "can intensify fruit flavors, creating a smoother, more natural flavor profile and prolonged flavor release." *See* Doc. 1, ¶ 36; *see also* Y.H. HUI, ET AL., HANDBOOK OF FRUIT AND VEGETABLE FLAVORS 48-49

---

[3] Title 21, Chapter 184 includes direct human food ingredients that "have been reviewed by the Food and Drug Administration and affirmed to be generally recognized as safe (GRAS) for the purposes and under the conditions prescribed." 21 C.F.R. § 184.1(a).

[4] L-Malic acid is included in the USDA's list of "Nonagricultural (nonorganic) substances allowed as ingredients in or on processed products labelled as 'organic' or 'made with organic (specified ingredients or food group(s))." 7 C.F.R. § 205.605. DL-Malic acid is not on this list. *See id.*; *see also* National Organic Program (NOP): Proposed Amendments to the National List of Allowed and Prohibited Substances (Crops and Processing), 70 Fed. Reg. 54660-01 (proposed Sept. 16, 2005) (to be codified at 7 C.F.R. pt. 86) ("DL-Malic acid was originally petitioned for use as a synthetic processing aid in organic handling.…The NOSB evaluated DL-Malic acid in an open meeting, received public comment, and concluded that the substance was not consistent with the evaluation criteria of 7 U.S.C. 6517 and 6518 of the OFPA. This determination was made because of an identified available natural alternative, L-Malic acid.").

[5] A *flavor enhancer* is defined by regulation as a substance that "supplement[s], enhance[s], or modifi[ies]" the flavor "without imparting a characteristic taste or aroma of its own." 21 C.F.R. at § 170.3(o)(11).

[6] *Flavoring agents and adjuvants*, on the other hand, are defined as substances which are "added to impart or help impart a taste or aroma in food." 21 C.F.R. at § 170.3(o)(12).

[7] A *pH control agent* is used to "change or maintain active acidity or basicity." 21 C.F.R. at § 170.3(o)(23).

(2010) ("[T]otal sugars, sucrose, and malic acid have an important influence on taste.").

2. *Federal Regulation of Flavor Labeling*

Labeling of flavorings is regulated by the Food and Drug Administration ("FDA") under 21 C.F.R. § 101.22, which states that:

> The term *artificial flavor* or *artificial flavoring* means any substance, the function of which is to impart flavor, which is *not derived from* a spice, fruit or fruit juice, vegetable or vegetable juice, edible yeast, herb, bark, bud, root, leaf or similar plant material, meat, fish, poultry, eggs, dairy products, or fermentation products thereof.

id. at § 101.22(a)(1) (emphasis added). The provision cites to two, non-exhaustive lists of artificial flavor substances for guidance. *Id.*; *see also id.* at §§ 172.515(b), 182.60. The regulations state further that:

> The term *natural flavor* or *natural flavoring* means the essential oil, oleoresin, essence or extractive, protein hydrolysate, distillate, or any product of roasting, heating or enzymolysis, which contains the flavoring constituents *derived from* a spice, fruit or fruit juice, vegetable or vegetable juice, edible yeast, herb, bark, bud, root, leaf or similar plant material, meat, seafood, poultry, eggs, dairy products, or fermentation products thereof, whose significant function in food is flavoring rather than nutritional.

Id. at § 101.22(a)(3) (emphasis added). Similarly, the provision cites to lists which indicate substances generally considered natural flavors. *Id.*; *see also id.* at §§ 172.510, 182.10, 182.20, 182.40, 182.50, and part 184.

Where a product's label or marketing makes a representation with respect to the "primary recognizable flavor," (e.g. depiction of a fruit, like a strawberry) that

flavor is considered the "characterizing flavor." *Id.* at § 101.22(i). If the product contains no artificial flavor which "stimulates, resembles, or reinforces the characterizing flavor" the label may use the flavor's common name (e.g. strawberry). *Id.* at § 101.22(i)(1). The product may be labeled as "natural flavored" so long as the characterizing flavor is naturally derived from the ingredient, even if there is none of that ingredient itself in the product (e.g., even if there are no strawberries in the product, it may be labeled as "natural flavored" so long as the strawberry flavor is naturally derived from strawberries). *Id.* at § 101.22(i)(1)(i). If, in addition to "natural flavor" from the ingredient itself, there is "other natural flavor which simulates, resembles or reinforces the characterizing flavor" (e.g., natural flavor derived from strawberries, plus natural flavor derived from apples), the label must indicate "natural flavor…with other natural flavor." *Id.* at § 101.22(i)(1)(iii).

Notably, if *none* of the flavor used in the food is derived from the product whose flavor is simulated (ie. strawberry flavor, but not derived from strawberries), the product must be labelled with the source ingredient from which it is derived or as "artificially flavored." *Id.* at § 101.22(i)(1)(ii). The product must also be labelled as "artificial" or "artificially flavored" if the product contains any artificial flavor which "stimulates, resembles or reinforces the characterizing flavor." *Id.* at § 101.22(i)(2).

3. *Plaintiff's Allegations*[8]

In her complaint, Plaintiff alleges that Defendant misled her, and other consumers, by marketing and advertising certain water enhancers—its Berry Pomegranate and Tropical Cherry flavors—with the words "NATURAL FLAVOR WITH OTHER NATURAL FLAVOR." Doc. 1, ¶ 17. Plaintiff asserts that this marketing appealed to her (and appeals to consumers in the proposed class) because she was looking for only naturally flavored products. *Id.*, ¶ 18. However, in practice, Defendant uses the artificial DL-malic acid, produced synthetically from petroleum through a chemical process, *id.*, ¶ 55, to provide flavor to the Products[9]. *Id.*, ¶¶ 21-22, 53. Plaintiff avers that without "an advanced understanding of organic chemistry and without performing chemical analysis on the Products," she was unable to understand that the Products' flavor comes from an artificial form of malic acid. *Id.*, ¶ 84.

Plaintiff explains that "[f]ruit flavors are the sum of the interaction between sugars, acids, and volatile compounds." *Id.*, ¶ 31 (citing Y.H. HUI, ET AL., *supra*, at

---

[8] "[I]n reviewing motions to dismiss[,] we accept as true the facts stated in the complaint and all reasonable inferences therefrom." *Jackson v. Okaloosa Cnty.*, 21 F.3d 1531, 1534 (11th Cir. 1994).

[9] "Defendant adds artificial DL-Malic Acid to the Products to create, enhance, simulate, and/or reinforce the sweet, fruity, and tart like taste that consumers associate with the fruits featured on the Product labels." Doc. 1, ¶ 53.

693). She also provides a table showing which acidulants are present in particular fruits; malic acid is the predominant acid in cherries and pomegranates and is a secondary acid in blackberries. Doc. 1, ¶¶ 33-35. Malic acid "contributes and enhances the fruity, sweet and sour taste of these and other fruits." *Id.*, ¶ 36; *see also* HUI, ET AL., *supra*, at 47-49.

Plaintiff certifies that laboratory analysis has confirmed that artificial DL-Malic acid is present in Defendant's Products Doc. 1, ¶ 57. She contends that Defendant uses various mixtures of sugars, natural L-Malic acid, and artificial DL-Malic acid to "resemble the natural ratio of sugar and L-Malic acid" of the fruit flavors indicated on the Products. *Id.*, ¶ 63. The resulting mixture therefore cannot be a natural flavor because it is not derived from a fruit, vegetable, or other natural source. *Id.*, ¶¶ 61-63 (referring to the definition of "natural flavor" at 21 C.F.R. 101.22(a)(3)); *see infra* at III.A.ii..

Plaintiff states that artificial DL-Malic acid "fundamentally alters" the characterizing fruit flavors of the Products and, therefore, the law requires that they be labelled as "artificially flavored" in accordance with 21 C.F.R. 101.22(i)(2). Doc. 1, ¶¶ 70, 77. Because of Defendant's false and misleading representations, she claims she was "deceived into paying money for products she did not want…because the Products were labeled with 'Natural Flavor With Other Natural Flavor,' which she understood to mean their taste was provided only by natural,

and not artificial flavoring ingredients." *Id.*, ¶ 86. Plaintiff seeks and intends to purchase the Products in the future when she can rely on the Products' representations. *Id.*, ¶ 129.

B. FDUPTA Claim (and other state consumer fraud claims)

1. Preemption

Defendant argues that Plaintiff cannot state a claim premised on an alleged violation of 21 C.F.R. § 101.22. Doc. 14 at 16-17. While Defendant is correct that 21 U.S.C. § 337(a) does not provide a private enforcement mechanism for violations of Chapter 21, it does not preempt a FDUPTA claim based on deceptive labeling which may simultaneously violate federal regulations. *See, e.g.*, *Reynolds v. Wal-Mart Stores, Inc.*, 2015 WL 1876915, *15 (N.D. Fla. 2015)[10]. FDUPTA contains a safe-harbor provision that renders the statute inapplicable to "[a]n act or practice required or specifically permitted by federal or state law." § 501.212(1), Fla. Stat. (2022); *see also Brett v. Toyota Motor Sales, U.S.A., Inc*, 2008 WL 4329876, at *8 (M.D. Fla. 2008) (holding that acts or practices alleged to be misconduct that are permissible and required by federal law cannot, as a matter of law, be misconduct under FDUPTA).

[10] *Id.* at *10 ("The '[p]rivate remedies that enforce federal misbranding requirements would seem to aid, rather than hinder, the functioning of' the statute. *Id.* at 451. ... [The statute] does not preclude States from imposing different or additional *remedies*, but only different or additional requirements.' *Id.* at 447.") (quoting *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 447, 451 (2005)) (emphasis added).

But where Plaintiff's allegations constitute a *violation* of the federal regulations, "it is not preempted, FDUPTA might well apply, and…the claim goes forward." *Reynolds*, 2015 WL 1876915 at *15.

2. Sufficiency of Pleading

FDUTPA prohibits "[u]nfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce." § 501.204(1), Fla. Stat. (2022). Plaintiffs must show three elements: (1) a deceptive act or unfair practice; (2) causation; and (3) actual damages. *Carriuolo v. General Motors Co.*, 823 F.3d 977, 983-84 (11th Cir. 2016) (citing *City First Mortg. Corp. v.* Barton, 988 So.2d 82, 86 (Fla. 4th DCA 2008)). To prevail on the first element of a FDUPTA claim, Plaintiff must plausibly allege that the "practice was likely to deceive a consumer acting reasonably in the same circumstances." *Carriuolo*, 823 F.3d at 983-84 (quoting *State of Florida v. Commerce Comm. Leasing, LLC*, 946 So.2d 1253 (Fla. 1st DCA 2007).).

The operative question here is whether artificial DL-malic acid in Defendant's Products functions as flavoring, rendering its natural flavor labeling deceptive. Defendant makes two principal arguments in support of its motion to dismiss: Plaintiff has failed to plausibly allege that, first, the malic acid in its products acts as an artificial flavor and, second, that the omission of an "artificially flavored"

disclosure is likely to mislead a reasonable consumer. *See* Doc. 14 at 6-16. The Court addresses each in turn[11].

a. Whether malic acid in the Products acts as an artificial flavor

Defendant argues that Plaintiff has not plausibly alleged that the malic acid in its products is artificial or that it acts as a flavor. *See* Doc. 14 at 6. Though it is uncontested that the Products in this case contain malic acid, *see* Doc. 1, ¶ 20; Doc. 14 at 5, Defendant objects to Plaintiff's "bare-bones allegation" that a laboratory analysis confirmed the presence of DL-malic acid in the Products, citing to *Myers v. Wakerfern Food Corp.*, 2022 WL 603000, *4 (S.D.N.Y. 2022). In that case the Plaintiff "fail[ed] to substantiate how…the two alleged findings from the purported lab test helped her arrive at the conclusion that the Product is made of artificial flavors." *Id.* at *4. Here, however, Plaintiff has comprehensively described, in scientific detail, how DL-malic acid could function as an artificial flavor. *See* Doc. 1, ¶¶ 25-57. Therefore, Plaintiff's pleadings pass muster.

---

[11] Defendant also argues that federal law preempts Plaintiff's claim that it was required to use the specific term "DL-malic acid," as opposed to the generic "malic acid," to describe the ingredient on the Products' labels. Doc. 14 at 14-16; *see also* 21 C.F.R. § 101.4(a). Though Plaintiff's Complaint makes several references to such claims, the bulk of its papers are primarily focused on the deception occasioned by the "Natural Flavor With Other Natural Flavor" label on the Products. However, to the extent that Plaintiff does makes this claim, this Court agrees with the courts which have found that the FDCA and FDA requirement that a food label bear the "common or usual name of each…ingredient" is satisfied by the use of the term "malic acid." *Willard v. Tropicana Manufacturing Co.*, 557 F.Supp.3d 814, 829 (N.D. Ill. 2021) (collecting cases).

i. Whether malic acid is artificial

First, Defendant's only resistance to Plaintiff's characterization of the malic acid ingredient in its Products as "artificial DL-malic acid"—apart from objecting to Plaintiff's certification of laboratory confirmation—is relegated to a footnote where it places the descriptor "artificial" in quotation marks. *See id*. at n. 1. However, the regulatory language and other materials counsel that DL-malic acid "does not occur naturally," and is not considered a natural ingredient. 21 C.F.R. § 184.1069(a); *see also id.* at § 101.22(a)(3); *see also infra* at n. 3. Absent any persuasive argument to the contrary, Plaintiff has plausibly alleged that DL-malic acid is indeed artificial.

ii. Whether malic acid acts as a flavor

The second, and overarching, question is whether Plaintiff has sufficiently alleged that the malic acid in Defendant's products acts as a flavor. Defendant argues that by distinguishing between *flavors* and *flavor enhancers*, "the FDA has made clear that [*flavor enhancers* like malic acid] need not be disclosed on the front label," citing to a passage in the Federal Register from 1991. *See* Doc. 14 at 4, 8. The proposed rulemaking cited by Defendant, registered over thirty years ago, is neither binding authority nor does it support Defendant's contention; rather, it emphasizes the FDA's reliance on case-by-case review for determining appropriate labeling requirements for *flavor enhancers*. *See* FDA, *Food Labeling: Declaration of Ingredients*,

56 Fed. Reg. 28592, 28598 (June 21, 1991) ("Historically, FDA has addressed the relatively few labeling questions that have arisen concerning flavor enhancers on a case-by-case basis.…In other specific situations, the agency has simply rendered informal opinions in letters concerning the application of the act's labeling requirements to specific flavor enhancers.").

Defendant additionally cites to *Viggiano v. Hansen Natural Corp.*, 944 F.Supp.2d 877, 889 (C.D. Cal. 2013) for its contention that, to trigger front label flavor disclosure requirements, a flavor must impart an "original taste." However, in *Viggiano* the plaintiff never alleged that any of the product's *flavors* were artificial, rather that they used synthetic sweeteners or flavor enhancers. *Id.* at 881-82. The ingredients at issue in *Viggiano* were incapable of imparting the product's characterizing flavor, rendering that court's analysis inapplicable to the allegedly complex relationship between malic acid and fruit flavored beverages here. *See id.* at 889; *see also* Doc. 1, ¶¶25-57. Moreover, the *Viggiano* court relied significantly on the relevant ingredients' absence from the regulatory lists of artificial flavors, 944 F.Supp.2d at 889, but "the fact that malic acid does not appear on the FDA's list of artificial flavors is irrelevant since 21 C.F.R. § 101.22 states that the lists are not exhaustive." *Branca*, 2019 WL 1082562 at *4; *see also Willard v. Tropicana Mfg. Co.*, 577 F.Supp.3d 814, n. 5 (N.D. Ill. 2021) (…and other courts have held that, 'simply because malic acid is not on these lists does not mean that the FDA determined

malic acid is not an artificial flavor") (quoting *Allred v. Frito-Lay North America, Inc.*, 2018 WL 1185227, *4 (S.D. Cal. 2018)).

Defendant's reliance on *Ivie v. Kraft Foods Global, Inc.* does not bolster its argument that Plaintiff has failed to state a claim. 961 F.Supp.2d 1033 (N.D. Cal. 2013) (hereinafter "*Ivie I*"); *see* Doc. 14 at 8-10. In *Ivie* the court dismissed the plaintiff's claim that a product bearing a "natural flavors" label ran afoul of 21 C.F.R. § 101.22(i)(2)'s requirement to disclose artificial flavors. 961 F.Supp.2d at 1041. The court's decision turned on the lack of support in the FDA regulations for the contention that the sodium- and potassium-citrate at issue in *Ivie I* were flavors. 961 F.Supp.2d at 1041. Here, FDA regulations explicitly acknowledge that malic acid acts a flavor. *See* 21 C.F.R. § 184.1069(c) ("[malic acid] [is] used as a flavor enhancer…, flavoring agent and adjuvant…, and pH control agent"). Moreover, as the *Ivie* court itself acknowledged in its order on that defendant's first motion to dismiss, "the factual determinations of whether [the ingredients are used] as a sweetener and/or…as a flavoring agent in this particular product…[are] inappropriate for determination on a motion to dismiss." *Ivie v. Kraft Foods Global, Inc.*, 2013 WL 685372, *10 (N.D. Cal. 2013) (hereinafter "*Ivie II*").

Hu v. Herr Foods, Inc. is also inapposite. 251 F. Supp.3d 813 (E.D. Pa. 2017). *Hu* was about whether certain ingredients acted as preservatives and was dismissed

with leave to amend because the Plaintiff did not even directly allege that the relevant ingredient functioned as a preservative in the products. *Id.* at 822-23.

Here, Plaintiff has plainly alleged that malic-acid functions as a flavor in Defendant's Products. *See, e.g.,* Doc. 1, ¶ 49-57. She contests Defendant's characterization of the function of malic acid in the Products as a *flavor enhancer* or *pH balancer*, *id.*, ¶¶ 66-74, and has explained that the fundamental generator of a fruit's flavor is its unique makeup of sugars and acids (e.g., malic acid, citric acid, tartaric acid, etc.). *Id.*, ¶¶ 25-36. Where malic acid is listed as the Products' second- and third-most predominant ingredient by weight—whether it is classified as a *flavor enhancer* or otherwise—it is eminently plausible that it may "stimulate, resemble[] or reinforce[] the characterizing flavor." 21 C.F.R. § 101.22(i)(2) (if a product contains "*any*" such artificial flavor, it must be labelled as "artificial" or "artificially flavored"); *see also* Doc. 1, ¶¶ 20-21. Indeed, Plaintiff alleges that malic acid's presence, by necessity, makes it a flavor, irrespective of how Defendant chooses to classify it. *Id.*, ¶¶ 73-74.

This question is ultimately a factual determination ill-disposed to resolution at this early stage. *See, e.g.*, *Ivie II*, 2-13 WL 685372 at *10. Plaintiff's allegation that DL-malic acid is an artificial compound that Defendant uses to flavor its Products, supported by laboratory tests, crosses the line from "conceivable to plausible." *Iqbal*, 556 U.S. at 680; *see also Branca v. Bai Brands, LLC*, 2019 WL 1082562 *19-*20 (S.D. Cal.

2019) (finding plaintiff sufficiently alleged claims by asserting that laboratory tests showed the presence of DL-malic acid).

b. Omission of an "artificially flavored" disclosure could mislead a reasonable consumer

In the alternative, Defendant argues that, even if its products may derive some flavoring from artificial DL-malic acid, Plaintiff has failed to adequately allege that the omission of an "artificially flavored" disclosure would likely mislead a reasonable consumer. *See* Doc. 14 at 10-15. Florida[12] applies an objective test to determine whether the alleged practice was "likely to deceive a consumer acting reasonably." *Carriuolo*, 823 F.3d at 984. The standard requires a showing of " 'probable, not possible, deception' that is 'likely to cause injury to a reasonable relying consumer.' " *Zlotnick v. Premier Sales Group, Inc.*, 480 F.3d 1281, 1284 (11th Cir. 2007).

Defendant asserts that its labels make no affirmative representation that the Products are free of artificial ingredients and that no reasonable consumer would "assume that a shelf-stable, fruit flavored liquid beverage concentrate is free of

[12] Though Plaintiff alleges violations of consumer protection statutes in four additional states, "the parties agree that the critical issue for resolving this motion is whether a reasonable consumer would be misled…" *Harris v. Mondelez Global LLC*, 2020 WL 4336390, *2 (E.D.N.Y. 2020).

artificial ingredients." Doc. 14 at 11-12. Defendant, however, fails to consider that American consumers have relied on regulated, honest food labeling requirements "to buy food for what it really is" for over a century. *U.S. v. Ninety-Five Barrels (More or Less) Alleged Apple Cider Vinegar*, 265 U.S. 438, 443 (1924) (citations omitted). Applying Defendant's logic, the entire regulatory scheme underlying this litigation is superfluous because consumers assume product labels to be disingenuous in the first instance.

Defendant's position relies on the fact that, despite its Products' prominent disclosure located directly beneath the identified flavor of the beverage ("Natural Flavor with other Natural Flavor," Doc. 1, ¶ 17), its labels do not explicitly state that its products are "all natural" or free of artificial ingredients. *See, e.g.*, Doc. 14 at 13. As courts have long held, however, "[d]eception may result from the use of statements not technically false or which may be literally true. The aim of the [Food and Drugs Act] is to prevent that resulting from indirection and ambiguity, as well as from statements which are false." *Ninety-Five Barrels*, 265 U.S. at 443. Moreover, as Plaintiff correctly notes, "her allegations were limited to '[whether they] contained only natural *flavoring* ingredient.' " Doc. 18 at 4 (emphasis added). She

makes no allegation that she was misled by any "all natural" or comparable labels. *See id.*[13]

The cases Defendant cites in support of its arguments are unpersuasive. In *Willard*, the court found that reasonable consumers could expect a product with the statement "100% Juice" on its front label to contain only natural products. 577 F.Supp.3d at 832. Thus, where artificial DL-malic acid was present, the plaintiff had plausibly alleged the product's label was misleading. *Id*. *Akers v. Costco Wholesale Corp.* is also inapposite. 2022 WL 4585417 (S.D. Ill. 2022). There, the product at issue displayed no analogous "natural flavor" disclosure on its front label, with the court comparing the matter to an "apple juice" product (distinct from that discussed

---

[13] Defendant filed a Notice of Supplemental Authority (Doc. 26) to alert the court as to the recently published decision in *Gouwens v. Target Corp.*, 2022 WL 18027524 (N.D. Ill. 2022). In *Gouwens,* the court dismissed the plaintiff's case based on its finding that "a reasonable consumer would not believe that a shelf-stable, bright red fruit punch flavored liquid water enhancer was free of artificial ingredients absent an affirmative statement to the contrary." *Id.* at *3. Plaintiff here, however, only alleges that she expected natural *flavoring* ingredients—not a product free of *any* artificial ingredients. Moreover, the *Gouwens* court relied on Illinois state court precedent it interpreted to require a showing of an "affirmatively 'false impression' " to state a claim under the state consumer fraud statute. *Id.; compare Pappas v. Pella Corp.*, 844 N.E.2d 995, 998 (Ill. App. Ct. 2006) ("Concealment is actionable where it is employed as a device to mislead.") *with Spector v. Mondelez Int'l, Inc.*, 178 F.Supp.3d 657, ("[W]hile an omission of material fact can satisfy the requirements of pleading fraud under the ICFA, Illinois courts are 'always watchful that the Act not be used to transform nondeceptive and nonfraudulent omissions into actionable affirmations.' "). No analogous precedent in Florida has been raised in this matter and, even under that precedent, Plaintiff here may well have stated a claim. *See Pappas*, 844 N.E.2d at 803-05. Ultimately, *Gouwens* is not binding, and this Court rejects the proposition, without evidentiary support, that a reasonable consumer would assume that Defendant's products contained artificial flavoring ingredients.

above involving the "100% Juice" label) in the *Willard* case where the front label had "unambiguously notified the consumer that the product was *not* apple juice." *Id.* at *4 (emphasis added). Here, the Products feature prominent statements that they are flavored with "natural flavor with other natural flavor." Doc. 1, ¶ 17. A consumer acting reasonably could expect such a product to be free from artificial flavor.

If, as Plaintiff alleges, the Products contain artificial flavors, Defendant's contention that prominent labeling unequivocally stating the opposite could not mislead a consumer acting reasonably is unsustainable. Though Defendant's assertion that its labeling does not state that the Products contain *only* natural flavors "may be literally true," *Ninety-Five Barrels*, 265 U.S. at 443, without any further indicia of artificial flavorings, a consumer could reasonably rely on this disclosure as representing that the Products contain only natural flavor. Indeed, Plaintiff has pled as much in her Complaint. Doc. 1 at ¶¶ 18-19 ("The representations that the Products contain only 'Natural Flavor With Other Natural Flavors' appeals to more than seven out of ten consumers who seek to avoid artificial flavoring ingredients…").

The Court's conclusion is bolstered by the regulatory language. Though consumers may be unaware that Defendant is required by federal law to disclose on the principal display panel if any artificial flavor "simulates, resembles or reinforces the characterizing flavor," 21 C.F.R. § 101.22(i)(2), they expect food to be

labeled accurately. Doc. 1, ¶ 95. It is probable and likely that many, if not most, consumers reasonably relying on a prominent representation that a product contains "natural flavor with other natural flavor," would suffer injury upon the realization that, in fact, the product also contains artificial flavoring. *See, e.g.*, Doc. 1, ¶¶ 17-23, 83-89; *see also Zlotnik*, 480 F. 3d at 1284. No doubt, this is why the FDA chose to propagate 21 C.F.R. § 101.22(i)(2).

Therefore, if DL-malic acid is found to "stimulate[], resemble[] or reinforce[] the characterizing flavor," Plaintiff may have been misled through deceptive labeling practices. *See* § 501.204(1), Fla. Stat. (2022); *see also* 21 C.F.R. § 101.22(i)(2). If it does not, Plaintiff's claims may be preempted by federal law. *See* § 501.212(1), Fla. Stat. (2022). Central to any resolution of this case, however, is a factual determination that cannot be resolved by Defendant's Motion to Dismiss.

C. Common Law & Warranty Claims

As Defendant has acknowledged, Plaintiff's remaining claims likewise hinge on whether the Products' labeling misrepresents how they are flavored. *See* Doc. 14 at 16-19. Because the factual questions surrounding the role of malic acid in Defendant's Products and, subsequently, whether its advertising is likely to mislead a reasonable consumer, have not been answered at this stage of the litigation, it is premature to consider dismissal of Plaintiff's remaining claims. The pleadings are sufficient at this stage to state claims for Breach of Warranty

(Express/Implied/MMWA), Negligent Misrepresentation, Fraud, and Unjust Enrichment. *See, e.g.*, *Reynolds*, 2015 WL 1879615 at *15; *Branca*, 2019 WL 1082562 at *10-*12.

D. Standing for Injunctive Relief

Finally, Defendant argues that, should Plaintiff's claims avoid dismissal, she lacks standing to seek injunctive relief. *See* Doc. 14 at 19; Doc. 1, ¶ 184 (*sic*). Whether Plaintiff has standing to seek injunctive relief depends on the threat of future injury. *City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983). She must show that there is a sufficient likelihood that she will be affected—a real and immediate threat of injury—by the allegedly unlawful conduct in the future. *Houston v. Marod Supermarkets, Inc.*, 733 F.3d 1323, 1334 (11th Cir. 2013) (citations omitted). Past wrongs are insufficient to grant standing, but are "evidence bearing on whether there is a real and immediate threat of repeated injury." *Lyons*, 461 U.S. at 968.

Plaintiff has alleged that she "intends to, seeks to, and will purchase the Products again when she can do so with" assurance. Doc. 1, ¶ 129. As it stands, Plaintiff is "unable to rely on the labeling…not only of these Products, but for other similar water enhancers, because she is unsure whether those representations are truthful." *Id.*, ¶ 130. Plaintiff has sufficiently alleged, through her desire to continue purchasing these products, a "real and immediate threat of repeated injury"

because she cannot rely on Defendant's representations. *See id.*; *see also Branca*, 2019 WL 1082562 at *12-*13.

IV. Conclusion

Accordingly, it is **ORDERED** that Defendant's Motion to Dismiss (Doc. 14) is **DENIED.**

DONE and **ORDERED** in Orlando, Florida on January 9, 2022.

GREGORY A. PRESNELL
UNITED STATES DISTRICT JUDGE

Copies furnished to:

Counsel of Record
Unrepresented Parties