UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 15-CIV-60973-BLOOM/Valle

AMY STEINBERG,

Plaintiff,

v.

ATEECO, INC.,

Defendant.
_____/

ORDER ON MOTION TO DISMISS

THIS CAUSE is before the Court upon Defendant Ateeco, Inc.'s Motion to Dismiss, ECF No. [20] ("Motion"). The Court has reviewed the Motion, all supporting and opposing filings, the record in this case, and is otherwise fully advised. For the reasons that follow, the Motion is denied.

I. FACTS

On May 11, 2015, Plaintiff Amy Steinberg ("Plaintiff") commenced this class-action consumer fraud litigation asserting claims under the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA"), Fla. Stat. § 501.201, *et seq.* (Count I), and common-law unjust enrichment (Count II), against Defendant Ateeco, Inc. ("Defendant"), a purveyor of various types of pierogis. *See* Complaint, ECF No. [1].

According to Plaintiff, Defendant has engaged in a pervasive pattern of deception, misrepresenting the nutritional information of its products by: (1) "using serving sizes that are not in accordance with the serving sizes mandated by law for pierogies [sic] and, as a result, understating the actual amount of calories, fat, and sodium contained in the Products; and (2) concealing or failing to provide a disclosure statement, which is mandated by law, regarding the

high sodium content of its Products." *Id.* at ¶ 3. Under Plaintiff's first theory, Defendant flagrantly disregards the Food and Drug Administration's ("FDA") regulations regarding serving sizes, deliberately understating the serving size of its products in order to deceive consumers into believing that its products are substantially healthier than they actually are. *Id.* at ¶¶ 16-17. Specifically, the FDA regulations provide that the "serving size declared on a product label shall be determined from the 'Reference Amounts Customarily Consumed Per Eating Occasion * * * *' (reference amounts) that appear in § 101.12(b) . . . ." *Id.* at ¶ 18 (quoting 21 C.F.R. § 101.9(2)(b)). Utilizing the "Reference Amounts Customarily Consumed Per Eating Occasion" ("RACC"), Plaintiff calculates that the appropriate RACC or serving size for pierogis is 140 grams, not the 114 grams Defendant uses on its product labels.[1] *See id.* at ¶¶ 19-21. In contravention of this regulation, Defendant understated the serving size of its product in order to "understate the calories, fat, and sodium content" of its products. *Id.* at ¶ 20. Had Defendant employed the appropriate serving size mandated by the FDA, the calories, fat, and sodium content of its product would be 1.3 times higher for standard pierogis and 1.6 times higher for mini-size pierogis. *Id.* at ¶¶ 21-22.

Plaintiff's second theory also requires consideration of FDA regulations. Under relevant FDA regulations, if a food contains more than 480 milligrams of sodium per RACC, the manufacturer is required to include a statement "disclosing that the nutrient exceeding the specified level is present in the food as follows: 'See nutrition information for [nutrient] content' with the blank filled in with the identity of the nutrient exceeding the specified level." *See id.* at ¶ 28 (quoting 21 C.F.R. § 101.13(h)(1)). When correcting for the appropriate serving size,

[1] As further evidence of Defendant's improper labeling, Plaintiff includes reference to an FDA warning letter sent to Defendant's peer food manufacturer regarding the appropriate serving size for pierogis under the RACC. *See id.* at ¶ 26.

Defendant's products also exceed the prescribed level of sodium but fail to include the requisite statement pursuant to 21 C.F.R. § 101.13(h)(1). *See id.* at ¶¶ 28-36.

Based on this dual labeling failure and allegedly deceptive marketing scheme, Defendant has coerced Plaintiff and the class members into purchasing Defendant's products. *See id.* at ¶¶ 38-39. Plaintiff contends that Defendant knew or should have known that its failure to comply with the FDA-mandated labeling procedures was likely to mislead a consumer into believing that Defendant's products were substantially healthier. *Id.* at ¶¶ 40-41, 44-47, 63. Had Plaintiff known that Defendant's products had more calories and higher levels of fat and sodium than represented, they would not have purchased the products. *Id.* at ¶ 42.

Defendant now moves to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), asserting Plaintiff's Complaint is simply a series of conclusory allegations lacking support in the law.

II. LEGAL STANDARD

Under Federal Rule of Civil Procedure 12(b)(6), a motion to dismiss lies for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). A pleading in a civil action must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). To satisfy the Rule 8 pleading requirements, a complaint must provide the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002). While the complaint "does not need detailed factual allegations," Rule 8 requires "more than labels and conclusions" and "a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *see Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (explaining that the Rule 8(a)(2) pleading standard "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation"). Nor can a complaint rest on "naked assertion[s] devoid of

'further factual enhancement.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557 (alteration in original)). The Supreme Court has emphasized that "[t]o survive a motion to dismiss a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id.* (quoting *Twombly*, 550 U.S. at 570); *see also Am. Dental Assoc. v. Cigna Corp.*, 605 F.3d 1283, 1288-90 (11th Cir. 2010).

When reviewing a motion to dismiss, a court, as a general rule, must accept the plaintiff's allegations as true and evaluate all plausible inferences derived from those facts in favor of the plaintiff. *See Chaparro v. Carnival Corp.*, 693 F.3d 1333, 1337 (11th Cir. 2012); *Iqbal*, 556 U.S. at 678. "At a minimum, notice pleading requires that a complaint contain inferential allegations from which [the court] can identify each of the material elements necessary to sustain a recovery under some viable legal theory." *Wilchombe v. TeeVee Toons*, Inc., 555 F.3d 949, 960 (11th Cir. 2009) (quoting *Snow v. DirecTV, Inc.*, 450 F.3d 1314, 1320 (11th Cir. 2006)).

III. DISCUSSION

Defendant first moves for dismissal of Plaintiff's FDUTPA claim (Count I), asserting that Plaintiff's RACC classification and sodium content claim are unsubstantiated and otherwise conclusory in nature. Motion, ECF No. [20] at 6-9. Further, Defendant challenges the elements of causation and damages, contending that Plaintiff merely parrots the legal standard required to establish these elements. *Id.* at 10-11. Finally, Defendant moves to dismiss Plaintiff's unjust enrichment claim for failure to plead facts supporting the basic elements of such a claim. *Id.* at 11-12. The Court addresses these issues in turn and finds that dismissal is not warranted.

A. FDUTPA (Count I)

FDUTPA was enacted "[t]o protect the consuming public and legitimate business enterprises from those who engage in unfair methods of competition, or unconscionable,

deceptive, or unfair acts or practices in the conduct of any trade or commerce." Fla. Stat. § 501.202(2). "In order to succeed in a claim under the FDUTPA, a plaintiff must prove: '(1) a deceptive act or unfair practice; (2) causation; and (3) actual damages.'" *Double AA Int'l Inv. Grp., Inc. v. Swire Pac. Holdings, Inc.*, 674 F. Supp. 2d 1344, 1353 (S.D. Fla. 2009) (quoting *Rollins, Inc. v. Butland*, 951 So. 2d 860, 869 (Fla. 2d DCA 2006)). Although FDUTPA does not explicitly define the term "deception," the provisions of the Act are to be "construed liberally." Fla. Stat. § 501.202. Nevertheless, courts have determined that a deceptive practice occurs when there is "a representation, omission, or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer's detriment." *Zlotnick v. Premier Sales Group*, 480 F.3d 1281, 1284 (11th Cir. 2007) (citation and quotation omitted); *see also Rollins*, 951 So. 2d at 869 ("A deceptive practice is one that is 'likely to mislead' consumers."). "This standard requires a showing of 'probable, not possible, deception' that is 'likely to cause injury to a reasonable relying consumer.'" *Zlotnick*, 480 F.3d at 1284 (quoting *Millennium Commc'ns & Fulfillment, Inc. v. Office of the Att'y Gen.*, 761 So. 2d 1256, 1263 (Fla. 3d DCA 2000)).

Plaintiff's dispute and the allegedly "deceptive" practice she now alleges centers on the proper serving size for Defendant's products. Plaintiff contends that 140 grams is the proper RACC serving under 21 C.F.R. § 101.12(b). Defendant, on the other hand, provides no alternative, merely stating that Plaintiff has failed to identify the product category and corresponding reference amount. A quick perusal of the FDA's RACC reveals that 140 grams is the reference amount for grains, pastas, "[e]ntrees with sauce, e.g., fish with cream sauce, shrimp with lobster sauce," assorted fruits, as well as "[m]ixed dishes . . . not measurable with cup, e.g. burritos, egg rolls, enchiladas, pizza, pizza rolls, quiche, all types of sandwiches." 21 C.F.R. § 101.12(b). It appears that Plaintiff intends to hold Defendant's products subject to the "mixed

dishes" standard; however, this fact is not identified in the Complaint. Thus, the question becomes whether Plaintiff's failure to identify the proper classification is fatal to her FDUTPA claim. The Court finds that it is not.

The critical element of a FDUTPA claim is deception, which is "a representation, omission, or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer's detriment." *Zlotnick*, 480 F.3d at 1284 (citation and quotation omitted); *see also Rollins*, 951 So. 2d at 869 ("A deceptive practice is one that is 'likely to mislead' consumers."). Probable deception is all that is required, that is "deception that is likely to cause injury to a reasonable relying consumer." *Zlotnick* at 1284 (quotation and citation omitted). Assuming that Plaintiff's classification is accurate, which the Court is required to do at this juncture, a reasonable consumer could be misled into purchasing Defendant's products based on the caloric content and nutritional information of the serving size as presented on Defendant's packaging. Indeed, Plaintiff clearly alleges this when she states that a reasonable consumer may be allured into purchasing Defendant's product based on the erroneous belief that Defendant's products are "healthier" when in fact, they are not. *See* Compl. at ¶¶ 40-41, 44-47, 63. Defendant introduces no authority to support the proposition that a Plaintiff must demonstrate the category under which the food must fall and, as noted, simply asserts that Plaintiff's classification is incorrect without any factual support or alternative. To the contrary, Plaintiff clearly alleges that Defendant's labeling fails to conform to applicable FDA regulations, identifies the specific regulation, and indicates how this failure is likely to mislead consumers.[2]

[2] Despite Plaintiff's repeated assertions in this respect, Defendant contends that "there are absolutely no allegations that Defendant's labels contain any misrepresentations, omissions, or *any other practice that would mislead a consumer*." Reply, ECF No. [31] at 5. As indicated, this assertion lacks merit. Plaintiff straightforwardly alleges the practice which she contends is likely to mislead a consumer acting reasonably under the circumstances.

Thus, the allegations in Plaintiff's Complaint clearly set forth the practice which Plaintiff believes is deceptive, thereby satisfying the first element of her FDUTPA claim.

With respect to Plaintiff's allegations as to Defendant's improper labeling regarding sodium content, Defendant altogether misinterprets the argument. Making much ado about "expressed nutrient content claims," Defendant states that it has never made a nutrient content claim regarding the sodium content of its pierogis. *See* Mot. at 9. Defendant is correct but fails to recognize the true nature of Plaintiff's assertion. Where a product makes a claim, either expressly or implicitly, regarding the level of a nutrient, under certain circumstances, that claim must be made in accord with the applicable FDA regulations. *See* 21 C.F.R. § 101.13(b).[3] However, this is not the requirement upon which Plaintiff bases its theory of deception. Under § 101.13(h)(1), any food, subject to certain exceptions, which contains more than 480 milligrams of sodium per labeled serving must bear a statement identifying the nutrient that exceeds the specified level. In this case, that statement would be "See nutrition information for sodium content," as the proper serving size for Defendant's products exceeds the set level of 480 mg of sodium. *See id.* Thus, Defendant misjudges Plaintiff's assertion. It is not that Defendant makes express or implied nutrient content claims but, rather, that when accounting for the proper serving size, Defendant's products are required to bear the aforementioned statement.[4]

[3] "A claim that expressly or implicitly characterizes the level of a nutrient of the type required to be in nutrition labeling under § 101.9 or under § 101.36 (that is, a nutrient content claim) may not be made on the label or in labeling of foods unless the claim is made in accordance with this regulation and with the applicable regulations in subpart D of this part or in part 105 or part 107 of this chapter." 21 C.F.R. § 101.13(b).

[4] It is worth noting that Plaintiff, in responding to Defendant's misconstruction, appears to modify its assertions, stating that Defendant has repeatedly made "low fat" express nutrient content claims on its packaging. *See* Response, ECF No. [25] at 10-11. At no point in the Complaint does Plaintiff allege that Defendant is noncompliant with FDA regulations in this

Accordingly, Plaintiff's assertion that Defendant's product fails to include the requisite sodium warning is merely further evidence of deceptive practices.

Next, Plaintiff appropriately pleads the elements of causation and damages. While some courts have hinted that the causation requirement requires a plaintiff to prove that the consumer actually relied on the deceptive practice, see, e.g., *Kais v. Mansiana Ocean Residences, LLC*, 08–CV–21492–FAM, 2009 WL 825763, at *2 (S.D. Fla. Mar. 25, 2009) (dismissing claim because Plaintiff failed to state that the alleged deceptive act "caused him to enter into the contract . . . or caused him to act differently in any way"), the Eleventh Circuit has plainly resolved this issue, stating that "FDUTPA does not require a plaintiff to prove actual reliance on the alleged conduct." *Cold Stone Creamery, Inc. v. Lenora Foods I, LLC*, 332 F. App'x 565, 567 (11th Cir. 2009) (quotation omitted); *see also Davis v. Powertel, Inc.*, 776 So. 2d 971, 973 (Fla. 1st DCA 2000) ("A party asserting a deceptive trade practice claim need not show actual reliance on the representation or omission at issue."); *State, Office of Attorney Gen., Dep't of Legal Affairs v. Commerce Commercial Leasing, LLC*, 946 So. 2d 1253, 1258 (Fla. 1st DCA 2007) ("A deceptive or unfair trade practice constitutes a somewhat unique tortious act because, although it is similar to a claim of fraud, it is different in that, unlike fraud, a party asserting a deceptive trade practice claim need not show actual reliance on the representation or omission at issue." (internal quotation omitted)). Instead of actual reliance, a plaintiff must simply prove that "the alleged practice was likely to deceive a consumer acting reasonably in the same circumstances." *Cold Stone*, 332 F. App'x at 567.

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respect. Plaintiff may not amend via responsive motion and, accordingly, the Court disregards any arguments and assertions related thereto.

Plaintiff repeatedly states that the allegedly deceptive practice was likely to mislead consumers. Going even further, Plaintiff asserts that she was *actually* misled into purchasing Defendant's products: "Reasonably relying on the labels of the Products and representations therein, Plaintiff purchased the Products." *See* Compl. at ¶¶ 43-47, 65. Defendant's argument as to Plaintiff's purportedly conclusory assertions misses the point. Defendant portrays Plaintiff's claim as one which requires a consumer to possess an intricate knowledge of the myriad FDA regulations and relevant RACC numbers. *See* Mot. at 10-11. This is not the case. In reality, it is quite the opposite; it is the consumer who is uneducated as to the proper serving size that suffers as a result of the incorrect labeling. The deception Plaintiff alleges occurs not solely as a result of Defendant's purported failure to comply with FDA regulations but also the consequence, which is lower calorie counts and lower values for nutrients which a health conscious individual may deem unsavory per serving size. Plaintiff sufficiently pleads that this misrepresentation of serving size is "likely to deceive a consumer acting reasonably in the same circumstances," *Cold Stone* at 567, and otherwise satisfies the causation element.

As far as damages, FDUTPA permits recovery for "actual damages." *Rollins*, 951 So. 2d at 869. "Actual damages" does not include consequential damages. *Id.*; *Eclipse Med., Inc. v. Am. Hydro-Surgical Instruments, Inc.*, 262 F. Supp. 2d 1334, 1357 (S.D. Fla. 1999) *aff'd sub nom. Eclipse Med., Inc. v. Am. Hydro-Surgical*, 235 F.3d 1344 (11th Cir. 2000); *Dorestin v. Hollywood Imports, Inc.*, 45 So. 3d 819, 824-25 (Fla. 4th DCA 2010); *Rodriguez v. Recovery Performance & Marine, LLC*, 38 So. 3d 178, 180 (Fla. 3d DCA 2010). Generally, the standard measurement for actual damages "is the difference in the market value of the product or service in the condition in which it was delivered and its market value in the condition in which it should have been delivered according to the contract of the parties." *Rollins*, 951 So. 2d at 869 (quoting

Rollins, Inc. v. Heller, 454 So. 2d 580, 585 (Fla. 3d DCA 1984)) (describing this measurement as being "well-defined in the case law"). This element is also satisfied. While Defendant protests that Plaintiff has "failed to allege precisely how she was aggrieved," Mot. at 11, Plaintiff clearly indicates that based on the statements on the label, she "purchased Pierogies [sic] over other similar products because the labels indicated that they were substantially healthier." Compl. at ¶¶ 47-48.

Based on the foregoing, Plaintiff's Complaint adequately addresses the three elements of a FDUTPA claim: (1) a deceptive act or unfair practice; (2) causation; and (3) actual damages. The Court finds that the Complaint is not devoid of factual enhancement to an extent that negates Defendant's ability to formulate a proper response.

B. Unjust Enrichment (Count II)

Plaintiff's unjust enrichment claim also passes muster. "A claim for unjust enrichment has three elements: (1) the plaintiff has conferred a benefit on the defendant; (2) the defendant voluntarily accepted and retained that benefit; and (3) the circumstances are such that it would be inequitable for the defendants to retain it without paying the value thereof." *Virgilio v. Ryland Grp., Inc.*, 680 F.3d 1329, 1337 (11th Cir. 2012) (citing *Fla. Power Corp. v. City of Winter Park*, 887 So. 2d 1237, 1241 n.4 (Fla. 2004)). "Unjust enrichment is an old equitable remedy permitting the court in equity and good conscience to disallow one to be unjustly enriched at the expense of another." *Koch Foods of Alabama, LLC v. Gen. Elec. Capital Corp.*, 303 F. App'x 841, 846 (11th Cir. 2008) (citation and quotation omitted). Generally, in Florida, equitable remedies are unavailable where an adequate legal remedy exists. *See Mobil Oil Corp. v. Dade Cnty. Esoil Mgmt. Co.*, 982 F. Supp. 873, 880 (S.D. Fla. 1997) (citing *H.L. McNorton v. Pan American Bank of Orlando*, 387 So. 2d 393, 399 (Fla. 5th DCA 1980)). This broad proposition,

however, does not apply to unjust enrichment claims. *Karhu v. Vital Pharm., Inc.*, No. 13-60768-CIV, 2013 WL 4047016, at *8 (S.D. Fla. Aug. 9, 2013) (quoting *Williams v. Bear Stearns & Co.*, 725 So. 2d 397, 400 (Fla. 5th DCA 1998)); *see also State Farm Mut. Auto. Ins. Co. v. Physicians Injury Care Ctr., Inc.*, 427 F. App'x 714, 722 (11th Cir. 2011) *rev'd in part sub nom. State Farm Mut. Auto. Ins. Co. v. Williams*, 563 F. App'x 665 (11th Cir. 2014) (quoting same). It is only where an express contract is proven that dismissal of an unjust enrichment claim is warranted. *See Williams*, 725 So. 2d at 400 ("Until an express contract is proven, a motion to dismiss a claim for . . . unjust enrichment . . . is premature." (citation omitted)).

Plaintiff's allegations include sufficient factual support for its unjust enrichment claim. Notably, Plaintiff alleges that she conferred a benefit in the form of money paid for Defendant's products, Defendant retained that benefit, and, based on Defendant's deceptive practice iit would inequitable for Defendant to retain the benefit. Further, the Court will not dismiss the claim based on the assertion that Plaintiff has an adequate remedy at law, that is, her FDUTPA claim. Plaintiff's unjust enrichment claim is brought in the alternative, as a plaintiff may do, see Fed. R. Civ. P. 8(d), and no express contract precludes such a claim. Accordingly, Count II of the Complaint stands. *See Mazzeo v. Nature's Bounty, Inc.*, No. 14-60580-CIV, 2015 WL 1268271, at *5 (S.D. Fla. Mar. 19, 2015) (declining to dismiss unjust enrichment claim based on availability of FDUTPA claim).

IV. CONCLUSION

For the above reasons, it is hereby **ORDERED AND ADJUDGED**, that Defendant Ateeco, Inc.'s Motion to Dismiss, **ECF No. [20]**, is **DENIED**. Defendant Ateeco, Inc. shall respond to Plaintiff's Complaint **on or before August 26, 2015**.

DONE AND ORDERED in Fort Lauderdale, Florida, this 11th day of August, 2015.

BETH BLOOM
UNITED STATES DISTRICT JUDGE

Copies to:
Counsel of Record