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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

LOIS BRYANT, individually, and on behalf of all others similarly situated in Missouri, Plaintiff, v. WHOLE FOODS MARKET GROUP, INC., Defendant.	Case No.: 4:15-cv-01001-NAB

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS PLAINTIFF'S COMPLAINT

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I. INTRODUCTION

This action is one of numerous similar lawsuits filed in the past several years in which a private plaintiff improperly attempts to enforce a non-binding FDA guidance document regarding use of the term evaporated cane juice ("ECJ") on food labels. Virtually all such actions have been rightly dismissed as implausible or dismissed or stayed in deference to the FDA's ongoing consideration of the draft administrative document plaintiffs attempt to enforce. Plaintiff's Complaint here is deficient by even the low bar set by pleadings in similar cases. Plaintiff does little more than couple a vague purchase allegation with an obscure non-binding FDA administrative document discussing ECJ. Thus, Plaintiff improperly seeks to appoint herself as a private attorney general and/or U.S. Food, Drug & Cosmetic Act ("FDCA") enforcement agent. The law does not grant Plaintiff such power. Enforcement of FDCA regulations are in the sole purview of the executive branch of the federal government. Simply put, Plaintiff's claims are preempted and invoke the primary jurisdiction doctrine. These doctrines alone bar Plaintiff's claims.

Plaintiff's case should also be dismissed because Plaintiff fails to allege facts sufficient to sustain her claims for relief. Plaintiff does not plausibly plead any unlawful conduct based on the challenged label, which prominently disclosed both the total amount of sugar and the existence of added sugar by separately identifying brown sugar as an ingredient in addition to ECJ. These disclosures alone destroy her claims as they flatly contradict her contentions that she was "misled into purchasing the Cookies believing the Cookies do not contain as much sugar as they in fact contain" and that the product contained "undisclosed sugar." Nor does Plaintiff plausibly allege that she suffered any ascertainable loss much less that any such loss was *caused* by the ECJ representation. Plaintiff received a quality private label product, which are typically priced at or below similar brand-name products, as advertised. She presumably consumed and enjoyed the Cookies. She may not get money back now under Missouri's consumer protection statute. For similar reasons, Plaintiff cannot plausibly allege Whole Foods has been "unjustly enriched." Moreover, even assuming Plaintiff's theory is plausible, the elements of her claims are not adequately supported by *factual* allegations. Though Plaintiff's entire pleading sounds in fraud and thus her claims are subject to Rule 9(b), Plaintiff does not

identify where Plaintiff purchased the Cookies, specifically when or how many times she purchased them, what specifically she relied on, any factual detail about what loss she purportedly suffered, or even how Plaintiff was deceived. And her unjust enrichment claim fails independently because she has an adequate remedy at law.

These are not the types of deficiencies that can be cured by amendment. As such, Whole Foods requests this Court to dismiss Plaintiff's Complaint in its entirety with prejudice.

II. FACTS[1]

Plaintiff alleges few relevant facts. Plaintiff alleges that she purchased a package of Whole Foods Market Gluten-Free Nutmeal Raisin Cookies ("Cookies"). Compl. ¶ 4. Beyond this purchase allegation, few facts about Plaintiff appear in the remainder of the Complaint. Instead, the Complaint is largely devoted to legal argument of counsel, selective reproduction of FDA administrative materials, deceptively cropped images of a Cookie label,[2] and vague and conclusory claims of deception and harm to "consumers."

Specifically, Plaintiff alleges that by disclosing ECJ as an ingredient on the label of the Cookies, "Defendant falsely and misleadingly lead Missouri consumers to believe the Cookies did not contain as much sugar as they in fact contain." Compl. ¶ 2. This allegation, however, is directly contradicted by the label, which prominently discloses both the total amount of sugar in the Cookies and the presence of added sugar by separately identifying brown sugar as an ingredient. Compl. ¶ 20; Exhibit A. Nevertheless, Plaintiff contends without support that evaporated cane juice is something other than what it plainly means--an added sweetener derived from sugar cane sugar. *Id.* And Plaintiff further asserts, again without support, that "Plaintiff and the Class Members paid more for the Cookies than they would have if they had known they contained undisclosed sugar." Compl. ¶ 33.

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[1] Whole Foods does not admit the truth of any of Plaintiff's factual allegations.

[2] A true and correct copy of the label Plaintiff partially included in the Complaint is attached as **Exhibit A**. The Court may take judicial notice of the label. Courts addressing motions to dismiss based on food product labeling routinely use the incorporation by reference doctrine to notice the labels relied on in complaints. *See, e.g.*, *Lam v. General Mills, Inc.*, 859 F. Supp. 2d 1097, 1100 (N.D. Cal. May 10, 2012); *Rooney v. Cumberland Packing Corp.*, 2012 WL 1512106, at *2 (S.D. Cal. Apr. 16, 2012); *McKinniss v. Sunny Delight Beverages Co.*, 2007 WL 4766525, at *4 n.1 (C.D. Cal. Sept. 4, 2007).

The Complaint contains no factual allegations regarding what Plaintiff (or any other consumer) thought ECJ to be if not a sweetener—how Plaintiff or any other consumers were deceived. Nor does the Complaint contain any factual allegations about any comparable product to support her counterintuitive assertion that the challenged private label product commanded a premium price, much less a premium specifically attributable to ECJ in the context of the purchase of: (1) a Cookie—an inherently sweetened product; (2) with added sugar separately disclosed on the label; and (3) total sugar separately disclosed on the label.

Instead, Plaintiff's claim is based entirely on an FDA guidance document regarding identification of ECJ as an ingredient. Compl. ¶¶ 19, 20. But the Court would not know from the excised portions in the Complaint that it is a "draft" document "distributed for comment purposes only" that is [n]onbinding" and "does not create or confer any rights for or on any person and does not operate to bind FDA or the public." FDA Draft Guidance for Industry: Ingredients Declared As Evaporated Cane Juice (Oct. 2009) at http://www.fda.gov/Food/GuidanceRegulation/GuidanceDocuments RegulatoryInformation/LabelingNutrition/ucm181491.htm ("Draft ECJ Guidance").

By way of background, this action is one of numerous other lawsuits filed in recent years in which plaintiffs attempt to enforce the Draft ECJ Guidance. *E.g.*, *Figy v. Amy's* Kitchen, 2014 WL 1379915 (N.D. Cal. Apr. 9, 2014); *Swearingen v. Attune Foods, Inc.*, 2014 WL 2094016 (N.D. Cal. May 15, 2014); *Figy v. Lifeway Foods, Inc.*, 2014 WL 1779251 (N.D. Cal. May 5, 2014). After many similar lawsuits were filed, the FDA re-opened the comment period on its Draft Guidance. 79 Fed. Reg. 12,507 (March 5, 2014). The FDA re-opened the comment period to "request further comments, data, and information about the basic nature and characterizing properties of the ingredient sometimes declared as 'evaporated cane juice,' how this ingredient is produced, and how it compares to other sweeteners." *Id.*; *see also* FDA Center for Food Safety and Applied Nutrition, Update for Industry on Certain Proposed Rules (Dec. 24, 2014), available at http://www.fda.gov/food/ingredientspackaginglabeling/labelingnutrition/ucm427968.htm ("ECJ Update").

In response to the FDA's request, the agency received submissions from multiple stakeholders identifying a host of complex issues that must be resolved, including the differences between ECJ and

other sweeteners in terms of manufacturing and composition, consumer perceptions of the term, and the legal and practical implications of a (currently non-existent) federal prohibition on ECJ labeling. *See* Regulatory Docket for Draft ECJ Guidance, Docket No. FDA-2009-D-0430 at http://www.regulations.gov/#!docketDetail;D=FDA-2009-D-0430. The FDA is still "evaluating the submitted comments and considering appropriate actions."

Despite the rightfully tepid response from courts to such claims and FDA's ongoing consideration of ECJ, Plaintiff filed her Complaint in Missouri in April 2015. Following a familiar script, Plaintiff claims entitlement to recover up to a refund of the purchase price of the Cookies and her attorneys' fees based on the Draft ECJ Guidance. Compl. ¶ 6, Prayer. Plaintiff claims entitlement to these remedies based on two claims: (1) alleged violation of the Missouri Merchandising Practices Act; and (2) unjust enrichment. Both claims should be dismissed for the reasons stated below.

III. PLAINTIFF'S CLAIMS FOR RELIEF SHOULD BE DISMISSED

A complaint must consist of a short and plain statement showing the plaintiff is entitled to relief. Fed. R. Civ. P. 8(a). A complaint must be dismissed under Rule 12(b)(6) unless it "contain[s] 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, 663 (2009) (quoting *Bell Ad. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Although the Court must accept factual allegations as true, this tenet is inapplicable to conclusory allegations, legal conclusions, unreasonable inferences, or unwarranted deductions of fact contained in the pleading. *Id.* After stripping the "conclusory statements" in the complaint, the remaining factual allegations must "raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555 (quotations omitted). For the reasons stated below, Plaintiff has not sufficiently plead a claim for relief, and her Complaint should be dismissed with prejudice.

A. Plaintiff's Claims Should Be Dismissed Because They Are Preempted

Preemption can be express or implied. *Stengel v. Medtronic Incorp.*, 704 F.3d 1224, 1230 (9th Cir. 2013). Only limited claims may survive the dual effects of express and implied preemption under the FDCA. Specifically, as noted in Plaintiff's Complaint, there is a "narrow gap through which a plaintiff's state-law claim must fit if it is to escape express or implied preemption. The plaintiff must be

suing for conduct that violates the FDCA (or else his claim is expressly preempted by [21 U.S.C.] § 360k(a)), but the plaintiff must not be suing because the conduct violates the FDCA (such a claim would be impliedly preempted under *Buckman* [*v. Plaintiffs' Legal Committee*, 531 U.S. 341, 350 (2001)]). *In re Medtronic, Inc., Sprint Fidelis Leads Products Liability Litigation*, 623 F.3d 1200, 1204 (8th Cir. 2010); *see also Perez v. Nidek*, 711 F.3d 1109, 1120 (9th Cir. 2013). Plaintiff's attempt to enforce the Draft ECJ Guidance is both impliedly and expressly preempted.

1. Plaintiff's Claims Are Impliedly Preempted (21 U.S.C. § 337)

A plaintiff asserts a claim *because* of conduct that violates the FDCA, and the claim is therefore impliedly preempted, where the claim "originates from, is governed by, and terminates according to federal law." *Stengel*, 704 F.3d at 1230. Implied preemption can only be avoided if the "claim is grounded in a traditional category of state law…that predated the federal enactments in question, and…the claim therefore does not exist solely by virtue of those enactments." *Id.* at 1235. This flows from the fact that private litigants are prohibited from suing to enforce compliance with the FDCA. With certain limited exceptions (not applicable here), only the federal government may enforce the FDCA. 21 U.S.C. § 337.

Congress and the FDA have created a detailed, rigorous, comprehensive, and uniform system for labeling food products through the FDCA and its implementing regulations. This federal statutory and regulatory scheme is designed to ensure that food is safe and is labeled in a consistent manner that does not mislead consumers. *See, e.g.*, 21 U.S.C. § 341. To allow a private person to prosecute a state law private right of action based on a violation of the FDCA (as Plaintiff attempts to do here) would directly interfere with the governmental prosecutorial discretion and federal government oversight that is built into the FDCA, and it would conflict with the clear congressional intent to provide for a comprehensive and exclusive governmental interpretive and enforcement scheme. *See Buckman Co. v. Plaintiffs' Legal Committee.* 531 U.S. 341, 350 (2001) (finding state tort claim based on fraudulent misrepresentations to the FDA during pre-market approval process impliedly preempted by FDCA); *Ethex Corp. v. First Horizon Pharrn. Corp.*, 228 F. Supp. 2d 1048, 1055 (E.D. Mo. 2002) (dismissing false advertising counterclaim despite defendant's insistence "that it is not attempting to privately

enforce the provisions of the FDCA," but where the "touchstone" of plaintiff's argument was an FDCA violation); *Kapps v. Biosense Webster, Inc.*, 813 F. Supp. 2d 1128, 1151 (D. Minn. 2011) ("even if [defendant] failed to comply with FDA regulations, [plaintiff] cannot recover from [defendant] for this failure alone"); *Braintree Labs. v. Nephro-Tech, Inc.*, 1997 WL 94237, at *7 (D. Kan. Feb. 26, 1997) (where the "crux" of plaintiff's unfair competition claim was an FDCA violation, claim was impliedly preempted); *Perez,* 711 F.3d at 1109 (finding common law fraud claim impliedly preempted by FDCA where alleged fraudulent act was the defendant's failure to inform the plaintiffs that a medical device used in their eye surgery was not approved by the FDA for the particular use).

Here, Plaintiff's claims are not grounded in a traditional category of state law and she does not allege violations of independent, preexisting state-law duties. Instead, Plaintiff's claims are based on alleged FDCA violations of the regulatory common or usual name requirement and the tentative interpretation of that regulatory requirement distributed for comment by the FDA in the Draft ECJ Guidance. Plaintiff alleges that Whole Foods improperly identified sugar as ECJ on labels of cookies. Compl. ¶ 22. Plaintiff alleges these names are not the required common or usual names of any ingredient, including any sugar-cane based sweetener in violation of 21 C.F. R. § 343. Compl. ¶¶ 14, 16-19. Plaintiff alleges that the proper identification of the ingredients should be their common or usual name, which Plaintiff contends is "sugar." *Id.* Plaintiff bases this allegation on a series of FDCA-implementing regulations–21 C.F.R. §§ 101.3-4, 102.5–that require ingredients to be identified by their common-and-usual name and a **draft** guidance document issued by the FDA that expresses disapproval of the term ECJ to describe sweeteners derived from sugar-cane syrup. Compl. ¶ 14, 16-19. Accordingly, because the common-or-usual name requirement and FDA guidance would not exist *but for* the FDCA, Plaintiff's evaporated-cane-juice claims likewise exist solely by virtue of the FDCA and therefore are impliedly preempted.

2. Plaintiff's Claims Are Expressly Preempted (21 U.S.C. § 343-1)

The NLEA contains an express preemption provision, which provides that no state "may directly or indirectly establish . . . any requirement for the labeling of food of the type" regulated by federal law "that is not identical to the [federal] requirement." 21 U.S.C. § 343-1 (emphasis added).

This express preemption provision covers federal statutes as well as labeling regulations. *Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982). The purpose of the express preemption provision was to create uniform national standards regarding the labeling of food. *See, e.g., Turek v. General Mills, Inc.*, 662 F.3d 423, 426 (7th Cir. 2011) ("It is easy to see why Congress would not want to allow states to impose disclosure requirements of their own on packaged food products, most of which are sold nationwide[,] [as] [m]anufacturers might have to print 50 different labels . . . ."). Thus, as noted above, a plaintiff must sue for conduct that violates the FDCA or face dismissal because of express preemption. A plaintiff is not suing for conduct that *violates* the FDCA, and therefore her claims are expressly preempted, where she seeks to impose a requirement that is "different from or in addition to" the federal requirement. *Stengel*, 704 F.3d at 1232.

The FDCA and its implementing regulations do not prohibit the use of ECJ on product labels. If it did, Plaintiff would not need to rely on draft guidance expressly made non-binding on the food-and-beverage industry. The draft guidance relied on by Plaintiff could not be clearer that it has no legal effect. It states: (1) "This draft guidance, when finalized, will represent the Food and Drug Administration's (FDA's) current thinking on this topic. It does not create or confer any rights for or on any person and does not operate to bind FDA or the public"; (2) "FDA's guidance documents, including this guidance, do not establish legally enforceable responsibilities"; (3) "Draft Guidance," "Contains Nonbinding Recommendations," "distributed for comment purposes only," and "Not for Implementation." Draft ECJ Guidance, p. 1. These statements are not mere boilerplate. They are based on a binding regulation. *See* 21 C.F.R. § 10.115(d) ("Are you or FDA required to follow a guidance document? No. Guidance documents do not establish legally enforceable rights or responsibilities. They do not legally bind the public or FDA."). Plaintiff's attempt to make enforceable that which the FDA expressly says is unenforceable on the document itself and in a binding federal regulation seeks to impose a requirement that is different from or in addition to the federal requirement.

Further, the regulations cited by Plaintiff simply require ingredients to be identified by their common or usual name. Compl. ¶ 17. A common or usual name may be established by regulation or common usage. 21 C.F.R. 102.5(d). Plaintiff fails to identify an applicable regulation and fails to

plead facts regarding common usage of the ingredient (such as how many products are marketed with the ingredient or how long the term has been used). Further, the FDA uses the term "cane juice" and variants thereof throughout the FDA implementing regulations. *See, e.g.*, 21 C.F.R. § 168.130(a) ("juice of sugarcane" and "such juice"); § 184.1854(a) ("Sucrose is obtained by crystallization from sugar cane…juice"); § 172.165 ("sugar cane juice" and "sugar juice").

Absent any alleged facts to the contrary, the requirements sought to be imposed by Plaintiff necessarily are in addition to or in conflict with the federal requirements.

B. The Primary Jurisdiction Doctrine Requires Dismissal of Plaintiff's Claims

Even if the Court is not inclined to find that Plaintiff's claims are preempted, the Court should dismiss the claims because they fall under the primary jurisdiction of the FDA. "Primary jurisdiction is a common-law doctrine that is utilized to coordinate judicial and administrative decision making." *See Red Lake Band of Chippewa Indians v. Barlow*, 846 F.2d 474, 476 (8th Cir. 1988). The primary jurisdiction doctrine allows courts to stay proceedings or to dismiss a complaint pending the resolution of an issue by an administrative agency. *Access Telecommunications v. Southwestern Bell Telephone Co.*, 137 F.3d 605, 609 (8th Cir. 1998); *see also Clark v. Time Warner Cable*, 523 F.3d 1110, 1114 (9th Cir. 2008). There exists no fixed formula for determining whether to apply the doctrine of primary jurisdiction. *Access Telecommunications*, 137 F.3d at 608 citing *United States v. Western Pac. R.R. Co.*, 352 U.S. 59, 64 (1956). Instead, in each case courts must consider whether one of the reasons for the doctrine are present and whether applying the doctrine will aid the purposes for which the doctrine was created. *See United States v. McDonnell Douglas Corp.*, 751 F.2d 220, 224 (8th Cir. 1984). One reason courts apply the doctrine of primary jurisdiction is to obtain the benefit of an agency's expertise and experience. *Access Telecommunications*, 137 F.3d at 608. The principle is firmly established that "in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over." *Id.* citing *Far East Conference v. United States*, 342 U.S. 570, 574 (1952). Another reason is to promote uniformity and consistency within the particular field of regulation. *Id.* citing *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 303–04 (1976); *see also Syntek Semiconductor*

Co. v. Microchip Tech., Inc., 307 F.3d 775, 781 (9th Cir. 2002) (amended); *Union Elec. Co. v. Cable One, Inc.*, 2013 WL 2286055, *1 (E.D. Mo. May 23, 2013) (citing *Syntek*). One reason for invoking the primary jurisdiction doctrine is sufficient; here, both reasons cited above exist—the exercise of administrative discretion and uniformity and consistency are required.

The FDA has regulatory authority over food labeling. *See* 21 U.S.C. § 341 *et seq.* The FDCA establishes a uniform federal scheme of food regulation to ensure that food is labeled in a manner that does not mislead consumers. *See* 21 U.S.C. § 341 *et seq.* Food labeling enforcement is a matter that Congress has indicated requires the FDA's expertise and uniformity in administration. Congress amended the FDCA through the passage of the NLEA to "clarify and to strengthen" the FDA's "legal authority to require nutrition labeling on foods, and to establish the circumstances under which claims may be made about nutrients in foods." H.R. Rep. No. 101-538, at 7, *reprinted in* 1990 U.S.C.C.A.N. 3336, 3337. No state may "directly or indirectly establish. . . any requirement for the labeling of food that is not identical to the [FDCA]." 21 U.S.C. § 343-1(a).

Indeed, as noted above, this action is virtually identical to numerous other actions challenging the use of ECJ based on the Draft ECJ Guidance. When the actions were initially filed, some but a likely minority of courts considering the issue stayed or dismissed ECJ claims based on the primary jurisdiction doctrine. *E.g.*, *Hood v. Wholesoy*, 2013 WL 3553979, *4-5 (N.D. Cal. July 12, 2013) (deciding before Notice that evaporated cane juice claims should be stayed under primary jurisdiction doctrine). After the March 5, 2014 Notice, courts in the vast majority of cases have stayed or dismissed evaporated cane juice claims based on the primary jurisdiction doctrine in deference to the FDA's ongoing consideration of the Draft ECJ Guidance. *E.g.*, *Leonhart v. Nature's Path Foods, Inc.*, 2014 WL 6657809, *6 (N.D. Cal. Nov. 21, 2014) (staying Plaintiff's evaporated cane juice claims based on primary jurisdiction doctrine "pending the FDA's issuance of final guidance."); *Thomas v. Costco Wholesale Corporation*, 2014 WL 5872808, *6 (N.D. Cal. Nov. 12, 2014) (staying Plaintiff's evaporated cane juice claims based on primary jurisdiction "until the FDA issues final guidance after the ECJ comment period ends."); *Saubers v. Kashi Co.*, 39 F.Supp.3d 1108, 1113 (S.D. Cal. 2014) (dismissing Plaintiffs' evaporated cane juice claims without prejudice to Plaintiffs filing an amended

pleading "after the FDA has released its final guidance regarding the common or usual name for the sweetener often referred to as 'evaporated cane juice.'").

While the reasons for invoking the primary jurisdiction in the ECJ context are particularly acute, numerous districts, including at least one in the 8th Circuit, have dismissed or stayed similar food-labeling claims outside the ECJ context as well. *See, e.g., Taradejna v. General Mills*, 909 F. Supp. 2d 1128, 1134 (D. Minn. 2012) (abstaining on primary jurisdiction grounds to adjudicate issue of standard of identity of Greek yogurt); *Astiana v. The Hain Celestial Group*, 905 F. Supp. 2d 1013, 1016-17 (N.D. Cal. 2011) (abstaining on primary jurisdiction grounds to adjudicate meaning of term "natural" in cosmetics); *Cox v. Gruma Corp.*, 2013 WL 3828800 (N. D. Cal. July 11, 2013) (referring to the FDA, under the primary jurisdiction doctrine, the issue of the meaning of "natural.").

Proceeding here while the Draft ECJ Guidance is being actively considered by the FDA would only further run afoul of concerns underlying the primary jurisdiction doctrine. At a minimum, this Court should dismiss this case pending FDA action.

C. Plaintiff Has Fashioned Wholly Implausible Claims

1. Plaintiff Fails to Plausibly Allege She Suffered An Ascertainable Loss As A Result Of Wrongful Conduct

Article III of the United States Constitution "confines the jurisdiction of federal courts to justiciable cases and controversies." *Meuir v. Greene County Jail Employees*, 487 F.3d 1115, 1119 (8th Cir. 2007), citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-560 (1992). To allege standing under Article III, Plaintiff must plausibly plead (1) injury in fact; (2) causation; and (3) redressability. *Lujan*, 504 U.S. at 560-61. A "quintessential injury-in-fact" occurs when the "plaintiffs spent money that, absent defendants' actions, they would not have spent." *Maya v. Centex Corp.*, 658 F.3d 1060, 1069 (9th Cir. 2011). In addition, to state a claim under the MMPA, Plaintiff must show that she: (1) purchased merchandise; (2) for personal, family, or household purposes; and (3) suffered an *ascertainable loss* of money or property; (4) *as a result of an act declared unlawful* by section 407.020." *Robbe v. Webster University*, 2015 WL 1412014, *3 (E.D. Mo. March 25, 2015) (emphasis added) citing *Chochorowski v. Home Depot U.S.A., Inc.*, 295 S.W.3d 194, 198 (Mo. Ct. App. 2009).

Plaintiff fails to plausibly allege these requirements.

First, Plaintiff fails to plausibly allege the use of ECJ on the Cookie label was unlawful. To be unlawful under the MMPA, there must be a use or employment of a deception, fraud, a false pretense, a false promise, a misrepresentation, an unfair practice, or a concealment. Mo. Rev. Stat. § 407.020. The use of the ECJ in the manner alleged does not fall within any of those categories. **First**, a "cookie" is by definition "a sweet baked food that is usually small, flat, and round and is made from flour and sugar." Merriam-Webster On-Line Dictionary, at http://www.merriam-webster.com/dictionary/cookie. **Second**, the label of the Cookies prominently discloses the sugar content in the Nutrition Facts, which is immediately adjacent to the ingredient list and in larger font. *Morgan v. Wallaby Yogurt Co., Inc.*, 2013 WL 5514563 (N.D. Cal. Oct. 4, 2013) (dismissing ECJ claim based on theory that plaintiff did not know added sugar in product because contradicted by the sugar amount disclosure in Nutrition Facts). **Third**, the ingredient list discloses brown sugar in the ingredient list (and thus the presence of added sugar). *Avoy v. Turtle Mountain, LLC*, 2014 WL 587173 (N.D. Cal. Feb. 14, 2014) (dismissing ECJ claims; finding claim of deception implausible and noting particularly strong case for dismissal because other types of sugar disclosed in ingredient list). **Fourth**, Plaintiff's citation to the Draft ECJ Guidance does not make her theory of deception any more plausible. *Kelly v. Cape Cod Potato Chip Company*, 2015 WL 363147 (W.D. Mo. Jan. 27, 2015) (dismissing MMPA challenge to use of "natural" on food label for failure to provide plausible understanding of the term; refusing to consider definition in FDA policy statement because non-binding). Moreover, the FDA's concern with use of ECJ was that a consumer may be confused into thinking the product contains juice (which the FDA contends can connote an unwarranted level of nutrition), not, as Plaintiff bases her theory of deception, that a consumer will not know ECJ is a sweetener. This is likely due to the intuitive notion that consumers associate "cane" with "sugar cane" and thus know it to be a sweetener. Accordingly, there is no plausible deception, fraud, false pretense, false promise, misrepresentation, unfair practice, or concealment and Plaintiff may not recover under the MMPA.

Similarly, Plaintiff's allegations fall far short of establishing a plausible claim of the required element of causation. As decisions in the Missouri Supreme Court and the Eighth Circuit confirm,

"more is required than a bare assertion of an unfair practice." Michael B. Barnett, Plaintiffs' Bar Cannot Enforce the Laws: Individual Reliance Issues Prevent Consumer Protection Classes in the Eighth Circuit, The, 75 Mo. L. Rev. (2010) available at: http://scholarship.law.missouri.edu/mlr/vol75/iss1/6. For example, in *Owen v. General Motors Corp.*, plaintiffs brought a putative class action under the MMPA contending that GM knew but failed to disclose that the wipers on plaintiffs' Tahoe had a propensity to fail. 533 F.3d 913, 922 (8th Cir. 2008). The wipers on the plaintiffs' vehicle failed outside the warranty period and thus plaintiffs had to pay to fix the wipers themselves. *Id.* The district court granted summary judgment for GM on an MMPA claim because the plaintiffs did not show the failure to disclose the defect was the proximate cause of their wiper failure or that they would not have purchased the Tahoe had they known about the defect. *Id.* The Eighth Circuit affirmed the district court's grant of summary judgment for GM, holding that "there is no denying that causation is a necessary element of an MMPA claim" and that "the MMPA [actually] demands that a causal connection"" be established from the unfair practice to an ascertainable loss. *Id.* Allegations of causation are particularly important in the class action context, where the Court will be required at the class certification stage to assess such things as ascertainability of class membership, commonality of issues among class members' claims, and predominance of common issues. *See, e.g., State ex rel. Coca-Cola Co. v. Nixon*, 249 S.W.3d 855, 858-59 (Mo. 2008) (en banc) (analyzing reasons why consumers would purchase challenged product and reversing the trial court's class certification order on ground that proposed class "undoubtedly includes an extremely large number of uninjured class members…who did not care if the Diet Coke they purchased contained saccharin."). Where there is no plausible false or misleading representation, the challenged representation could not in any legally recognizable way have *caused* any loss. Thus, for the reasons that Plaintiff fails to plausibly allege unlawful conduct, i.e., there was plausibly false or misleading representation, Plaintiff fails to plausibly allege that the representation *caused* her (or any other consumer's) alleged loss.

Moreover, Plaintiff fails to allege any facts to support her conclusory assertion that she paid a premium attributable to the ECJ representation and thus fails to plausibly allege an ascertainable loss. Instead, she relies solely on the unsupported assertion that "Plaintiff and the Class Members paid more

for the Cookies than they would have if they had known they contained undisclosed sugar." Compl. ¶ 33. Plaintiff never alleges what alternative product she would have purchased or how any such product was priced or any factual basis for her assertion whatsoever. Moreover, the limited *facts* Plaintiff does allege run counter to her asserted price premium theory. Plaintiff based her claim on the alleged purchase of a private label product, *not* a branded product that typically command premium prices over their non-branded competitors like the private label Cookies. Compl. ¶¶ 2, 20.

Simply put, Plaintiff's claims are precisely the type that have been rejected at the pleadings stage due to implausibility. *E.g.*, *Kane v. Chobani, Inc.*, 2013 WL 5289253 (N.D. Cal. Sept. 19, 2013) (dismissing ECJ claims; finding claim of deception implausible); *Pratt v. Whole Foods Market California, Inc.*, 2014 WL 1324288 (N.D. Cal. March 31, 2014) (same); *Wallaby Yogurt Co., Inc.*, 2013 WL 5514563 at *4 (same); *Turtle Mountain, LLC*, 2014 WL 587173 at *4 (same); *see also Cape Cod Potato Chip Company*, 2015 WL 363147 at * 3 (claim of deception based on "natural" representation on food label implausible); *Pelayo v. Nestle USA, Inc.*, 989 F.Supp.2d 973, 980 (C.D. Cal. 2013) (claim of deception based on "all natural" representation implausible; noting "all natural" representation "appears immediately above the list of ingredients and "[t]herefore, to the extent there is any ambiguity regarding the definition of "All Natural" with respect to each of the Buitoni Pastas, it is clarified by the detailed information contained in the ingredient list."); *Werbel ex rel. v. Pepsico, Inc.*, 2010 WL 2673860 (N.D. Cal. July 2, 2010), at *3 (holding that it is "[n]onsense" to think that "Cap'n Crunch Berries" cereal "derives nutrition from actual fruit by virtue of the references to 'Berries'"); *McKinnis v. Kellogg USA*, 2007 WL 4766060, at *5 (C.D. Cal. Sept. 19, 2007) (rejecting claim that "Froot Loops" name suggested that the product contained real fruit).

2. For Similar Reasons, Plaintiff Fails To Plausibly Allege Whole Foods Has Been Unjustly Enriched

The elements of a cause of action for unjust enrichment are that: (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 or unjust circumstances. *Hertz Corp. v. Raks Hospitality, Inc.*, 196 S.W.3d 536, 543 (Mo. Ct. App. 2006). Under Missouri law, this third element is "the most

significant and most difficult of the elements." *US Bank Nat'l Ass'n v. Cox*, 341 S.W.3d 846, 852 (Mo. Ct. App. 2011). To determine if a defendant accepted or retained a benefit unjustly, a court considers "whether any wrongful conduct by the defendant contributed to the plaintiff's disadvantage." *S & J, Inc. v. McLoud & Co., L.L.C.*, 108 S.W.3d 765, 768 (Mo. Ct. App. 2003); *see also Myers v. Sander*, 2014 WL 409081, *8 (E.D. Mo. Feb. 3, 2014). As set forth above, Plaintiff's claim is based entirely on deception, yet Plaintiff fails to plausibly allege any such conduct. Moreover, as further set forth above, for similar reasons Plaintiff failed to plausibly allege that the challenged representation *caused* her any loss. And Plaintiff failed to plausibly allege an actual loss in the form of the purported price premium. Absent plausible allegations of these essential elements, the Court cannot possibly conclude that Plaintiff plausibly alleged that Whole Foods accepted and retained a benefit (the purported price premium) under inequitable or unjust circumstances (obtained the purported price premium as a result of deceptive labeling). Put simply, Plaintiff received the product for which she paid and she has not alleged that those products were tainted or defective in any way. Thus, Plaintiff "ha[s] not identified a benefit unjustly conferred upon Defendants which would warrant Plaintiffs receiving redress." *Grp. Health Plan v. Philip Morris, Inc.*, 68 F. Supp. 2d 1064, 1071 (D. Minn. 1999). Plaintiff's unjust enrichment claim is equally implausible and should be dismissed on that basis as well.

D. Plaintiff Fails To Plead His Claims With The Required Particularity

Plaintiff is required to meet the heightened pleading standard of Federal Rule of Civil Procedure 9(b). *See Stephens v. Arctic Cat Inc.*, 2011 WL 890686, *7 (E.D. Mo. March 14, 2011) (Rule 9(b) applies to claims under the MMPA); *Accor Franchising North America, LLC, v. Gemini Hotels*, 2012 WL 5258834, at *4 (E.D. Mo. Oct. 23, 2012) (Rule 9(b) applies to all claims of fraud including false statement claims). To satisfy Rule 9(b), the complaint must contain allegations about the who, what, where, when, and how of the fraud. *Accor Franchising North America, LLC*, 2012 WL 528834 at *4 citing *Parnes v. Gateway 2000, Inc.*, 122 F.3d 539, 549–50 (8th Cir. 1997). "[C]onclusory allegations that a defendant's conduct was fraudulent and deceptive are not sufficient to satisfy the rule." *Id.* citing *Commercial Prop. v. Quality Inns Int'l*, 61 F.3d 639, 644 (8th Cir. 1995). Because, as demonstrated below, Plaintiff fails to meet the stringent requirements of Rule 9(b), his

fraud claims should be dismissed.

Specifically, Plaintiff never alleges ***what***, if anything, she actually reviewed on the label. Plaintiff also fails to allege with any specificity what was obtained as a result of the alleged fraud; instead, she alleges that the price premium was anywhere from 1 cent to the full price of the product (without any support for any amount at all). Compl. ¶ 6 ("the total value of her individual claim is, at most, equal to a refund of the purchase price she paid for the Cookies."). Plaintiff fails to allege ***when*** she purchased the Cookies or on how many occasions; instead, Plaintiff generally alleges that purchased the Cookies "[o]n at least one occasion during the Class Period…, including in April 2015. Compl. ¶ 4. Plaintiff fails to allege ***where*** she actually purchased the products—not even the store or state in which she allegedly made the purchases. Plaintiff fails to allege ***how*** the labels misled her (or anyone else) as she never alleges what she (or anyone else) believed the ECJ to be if not a cane-based form of sweetener. Plaintiff's claims fail to satisfy Rule 9(b) and should be dismissed on that basis.

E. Plaintiff's Unjust Enrichment Claim Also Fails Because She Has An Adequate Remedy At Law

Plaintiff's unjust enrichment claim fails for the additional independent reason that Plaintiff has an adequate remedy at law. Unjust enrichment is an "equitable remedy," *Reyner v. Crawford*, 334 S.W.3d 168, 174 (Mo. Ct. App. 2011), and Missouri law has long held that equitable remedies are not available when there is an adequate remedy at law. *See, e.g., Beery v. Shinkle*, 193 S.W.3d 435, 440 n.2 (Mo. Ct. App. 2006); *Walton v. City of Berkeley*, 118 S.W.3d 617, 620 (Mo. Ct. App. 2003). Plaintiff has an adequate legal remedy as evidenced by her MMPA claim and thus she is not entitled to bring a claim for unjust enrichment.

IV. CONCLUSION

For the foregoing reasons, Whole Foods requests the Court dismiss Plaintiff's Complaint. As shown above, the defects in Plaintiff's claim are not of the type that can be cured by amendment. Accordingly, the Court should dismiss the Complaint with prejudice. *Stricker v. Union Planters Bank, N.A.*, 436 F.3d 875, 878 (8th Cir. 2006) (affirming denial of leave to amend were amendment futile).

Dated: July 2, 2015

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CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of July, 2015, a copy of this document was filed through the ECF system and will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF).

/s/ Michael W. Kopp
Michael W. Kopp

EXHIBIT A

1/8" Radius

WEB DIRECTION 2

7 7/8"

3 1/4"

WHOLE FOODS MARKET

Gluten Free BAKEHOUSE

ALL-NATURAL

Nutmeal Raisin Cookies

NET WT 10 OZ (284g)

Best Enjoyed Warm!

Nutrition Facts

Serving Size 1 Cookie Approx. 1.25 oz.(35g)
Servings Per Container 8

Amount Per Serving	
Calories 180 Fat Calories	80
	% Daily Value*
Total Fat 9g	14%
Saturated Fat 3.5g	18%
Trans Fat 0.2g	
Cholesterol 30mg	10%
Sodium 135mg	6%
Total Carb. 24g	8%
Dietary Fiber 1g	6%
Sugars 10g	
Protein 2g	

Vitamin A 4% • Vitamin C **
Calcium 2% • Iron 6% • Folic Acid **
*Percent Daily Values are based on 2,000 calorie diet

MADE IN A DEDICATED GLUTEN-FREE FACILITY

INGREDIENTS: rBGH FREE BUTTER, RAISINS, EVAPORATED CANE JUICE, ALMONDS, RICE FLOUR, POTATO STARCH, BROWN SUGAR, CAGE-FREE EGGS, TAPIOCA STARCH, XANTHAN GUM, VANILLA EXTRACT, CINNAMON, BAKING SODA, SALT.

CONTAINS DAIRY, EGG AND ALMOND INGREDIENTS.

GOOD MANUFACTURING PRACTICES USED TO SEGREGATE INGREDIENTS IN A FACILITY THAT PROCESSES DAIRY, EGGS, SOY, PEANUTS AND TREE NUTS.

WHOLE FOODS MARKET™
GLUTEN-FREE BAKEHOUSE
2800-C PERIMETER PARK DR
MORRISVILLE, NC 27560

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www.facebook.com/glutenfreebakehouse

7 23055 03525 3

Colors:
(4) 384 Green + 371 Green + 153 Orange + 653 Blue

Size	Die	Line Screen
3 1/4 X 7 7/8"	10-212	100

STOCK Semi Gloss ☒ W/LAM **ADHESIVE** Permanent

WEB DIRECTION: 1 | 2 X | 3 | 4 | 5 | 6 | 7 | 8

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