THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

TINAMARIE BARRALES and MICHAEL WILIAMS, *individually and on behalf of all those similarly situated*, Plaintiffs, v. GHOST BEVERAGES LLC, and MONDELEZ INTERNATIONAL, INC., Defendants.	Case No.: 1:24-cv-1185

DEFENDANT GHOST BEVERAGES LLC'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

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I. INTRODUCTION

In this proposed class action, Plaintiffs claim that Defendant Ghost Beverages LLC ("Ghost") falsely labels its energy drinks as "appropriate for consumption by children", apparently because certain energy drinks are flavored like candy produced by Defendant Mondelēz International, Inc. ("Mondelēz"). (Doc. 1, Compl., ¶ 5.) But Plaintiffs do not allege a single instance in which Ghost states the drinks are appropriate for children. To the contrary, the relevant label states not only that the product is an "ENERGY DRINK" containing 200mg of caffeine but also provides the following warning: "CAUTION: THIS PRODUCT IS ONLY INTENDED FOR HEALTHY ADULTS, 18 YEARS OF AGE OR OLDER."

The sole labeling statement on which Plaintiffs rely is the "Sour Patch Kids" branding on one of Ghost's energy drinks. But the "Kids" in "Sour Patch Kids" is part of the name of the food, a well-known candy. Using the "Sour Patch Kids" name is hardly an assertion that the associated product is suitable for "kids" or children. Just as a "Sugar Babies" energy drink would not be targeted at newborns, and a "Sugar Daddy" energy drink would not be intended only for their fathers, Plaintiffs fail to plausibly allege that reasonable consumers would be deceived.

The Complaint also suffers from other defects. Plaintiffs fail to plead their claims with particularity, as required by Fed. R. Civ. P. 9(b). They also lack Article III standing to bring claims as to any products they did not purchase or to pursue injunctive relief. Meanwhile, their negligent misrepresentation and express warranty claims fail for a variety of reasons under both Illinois and California law. As set forth below, the Court should dismiss the Complaint in its entirety.

II. PLAINTIFFS' ALLEGATIONS

Plaintiffs Tinamarie Barrales and Michael Williams allege that Ghost markets energy drinks in various flavors, including Sour Patch Kids, Bubblicious, and Swedish Fish. (Doc. 1, ¶ 1.)

Mondelēz licenses its candy and gum trademarks to Ghost for use on the products. (*Id.* ¶ 2.)

The Complaint is vague as to which specific Ghost products are allegedly at issue: Plaintiffs sometimes refer to "Ghost energy drinks" generally and at other times refer to the Sour Patch Kids, Bubblicious, and Swedish Fish products. In any event, the only product that Plaintiffs allegedly purchased themselves is the Sour Patch Kids flavor. (*Id.* ¶¶ 5, 20.)

Plaintiffs allege that they "read and relied on the images of the Sour Patch Kids, and word '**Kids**' prominently displayed in the Sour Patch Kids logo in buying" the product. (*Id.* ¶ 20 [emphasis in original].) The word "kids" is not alleged to appear anywhere other than in the Sour Patch Kids logo. Plaintiffs allege that, based on that logo, they "believed and expected that the Ghost drinks were suitable for children and teens" (*id.* ¶ 21), and they "would not have purchased Ghost drinks if they had known they were not safe for consumption by children." (*id.* ¶ 23.)

Plaintiffs do not allege—nor could they allege—that adults do not enjoy Sour Patch Kids (or any other candy or flavors described in Ghost's labels). Plaintiffs also do not and cannot identify any statement on the labeling that the product is appropriate for, or recommended for, children. To the contrary, in a warning panel running the length of the can, the label states in capital letters:

> CAUTION: THIS PRODUCT IS ONLY INTENDED FOR HEALTHY ADULTS, 18 YEARS OF AGE OR OLDER. DO NOT CONSUME IF YOU ARE SENSITIVE TO CAFFEINE, OR IN COMBINATION WITH CAFFEINE OR STIMULANTS FROM OTHER SOURCES. TOO MUCH CAFFEINE MAY CAUSE NERVOUSNESS, IRRITABILITY, SLEEPLESSNESS, AND OCCASSIONALLY, RAPID HEART RATE. NOT FOR USE BY WOMEN WHO ARE PREGNANT, NURSING, OR TRYING TO BECOME PREGNANT. CONSULT A LICENSED, QUALIFIED HEALTHCARE PROFESSIONAL BEFORE CONSUMING THIS PRODUCT. DO NOT USE IF YOU ARE TAKING ANY PRESCRIPTION DRUG AND/OR HAVE ANY MEDICAL CONDITION.

(Decl. of Michael Wilke ("Wilke Decl."), Ex. 1 (emphasis in original).)[1]

Williams alleges he is a citizen of Illinois. (*Id.* ¶ 8.) Barrales alleges she is a citizen of California. (Doc. 1, ¶ 7.) They do not allege when or where they made their purported purchases, other than the vague, non-particularized allegation that the purchases were "within the statutes of limitations for each cause of action alleged at stores in Illinois and California." (*Id.* ¶ 22.)[2]

Plaintiffs assert the following claims on behalf of proposed classes: (1) violation of the Illinois Consumer Fraud and Deceptive Trade Practices Act ("ICFA"), 815 ILCS §§ 505/1, et seq.; (2) violation of the Illinois Uniform Deceptive Trade Practices Act ("IUDTPA"), 815 ILCS 505/1, et seq.; (3) violation of the Consumers Legal Remedies Act ("CLRA"), Cal. Civ. Code §§ 1750, et seq.; (4) violation of California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code § 17200; (5) unjust enrichment; (6) negligent misrepresentation; and (7) breach of express warranty.

III. PLEADING STANDARDS

The court must dismiss a claim if it fails to state a claim upon which relief can be granted. Fed. R. Civ. P. 8. Rule 8 demands "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal citation omitted). The complaint must state sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its face. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

The court does not accept as true "legal conclusions," "labels and conclusions" or a "formulaic recitation of the elements of a cause of action[.]" *Iqbal*, 556 U.S. at 678. A "naked

[1] As explained in Section III, below, the Court may consider the entire label under the doctrine of incorporation by reference.

[2] Throughout the Complaint, Plaintiffs make vague references to online advertising or social media marketing, but they do not allege that they ever viewed or relied on any such online marketing in making their purchases. Instead, as noted, they allege they made their purchases "at stores" based on the product's labeling. (Doc. 1, ¶¶ 20, 22.)

assertion" devoid of "further factual enhancement" does not suffice. *Id.* (citation omitted). "Additionally, evaluating whether a plaintiff's claim is sufficiently plausible to survive a motion to dismiss is 'a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.'" *BCBSM, Inc. v. Walgreen Co.*, 512 F.Supp.3d 837, 849-850 (N.D. Ill. 2021) (citation omitted).

The court considers the pleadings, documents incorporated by reference in the complaint, and matters subject to judicial notice. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007); *Milwaukee Police Ass'n v. Flynn*, 863 F.3d 636, 640 (7th Cir. 2017). Plaintiffs include partial images of the product label in the Complaint and they refer to the labeling throughout the Complaint. (Doc. 1, ¶ 27.) The full label is properly considered by the Court under the doctrine of incorporation by reference. *See, e.g., Stuve v. Kraft Heinz Company*, No. 21-CV-1845, 2023 WL 184235, at *1 n.2 (N.D. Ill. Jan. 12, 2023); *Randolph v. Mondelez Global LLC*, No. 21-cv-10858 (JSR), 2022 WL 953301, at *1 n.1 (S.D.N.Y. Mar. 29, 2022); *Jones v. ConAgra Foods, Inc.*, 912 F.Supp.2d 889, 903 n.7 (N.D. Cal. 2012).

IV. ARGUMENT

A. The ICFA, IUDTPA, CLRA, and UCL Claims Fail Because Plaintiffs Do Not Plausibly Allege Reasonable Consumers Would Be Deceived.

Legal standards. To state an ICFA claim, a plaintiff must allege facts plausibly showing (among other things) that there is a deceptive act or practice by the defendant. *De Bouse v. Bayer AG*, 235 Ill.2d 544, 550, 922 N.E.2d 309 (2009); *Zahora v. Orgain LLC,* No. 21 C 705, 2021 WL 5140504, at *3 (N.D. Ill. Nov. 4, 2021). Under the IUDTPA, "a misleading statement also is required." *Robinson v. Walgreen Co.*, 2022 WL 204360, at *7 (N.D. Ill. Jan. 24, 2022).

A statement is deceptive if it is likely to deceive "reasonable consumers." *Barbara's Sales,*

Inc. v. Intel Corp., 227 Ill.2d 45, 76, 879 N.E.2d 910 (2007); *Geske v. PNY Technologies, Inc.*, 503 F. Supp. 3d 687, 705 (N.D. Ill. 2020). This requires more than a possibility that a label might be misunderstood by some few consumers viewing it in an unreasonable manner; the reasonable consumer standard requires a *probability* that a significant portion of the general consuming public, acting reasonably in the circumstances, could be misled. *Geske*, 503 F. Supp. 3d at 705; *Kampmann v. Procter & Gamble Company*, --- F. Supp. ---, 2023 WL 7042531, at *6 (N.D. Ill. Oct. 24, 2023) (complaint must allege facts showing that fraud is a "*necessary or probable inference*") (citations and quotation omitted, emphasis in original).

"[T]he allegedly deceptive [statement] must be looked upon in light of the totality of the information made available to the plaintiff." *Benson v. Fannie May Confections Brands, Inc.*, 944 F.3d 639, 646 (7th Cir. 2019); *accord Davis v. G.N. Mortgage Corp.*, 396 F.3d 869, 884 (7th Cir. 2005). "Allegedly deceptive labels must be viewed in context, as while a statement might be deceptive in isolation, it may be permissible in conjunction with clarifying language." *Kampmann*, 2023 WL 7042531, at *5.

CLRA and UCL claims are also governed by the "reasonable consumer" standard. *Chapman v. Skype*, 220 Cal. App. 4th 217, 230 (2013); *Freeman v. Time, Inc.*, 68 F.3d 285, 289 (9th Cir. 1995). A plaintiff's "selective interpretation of individual words or phrases from a product's labeling cannot support a CLRA . . . or UCL claim." *Hairston v. S. Beach Beverage Co.*, No. CV 12-1429, 2012 WL 1893818, at *4 (C.D. Cal. May 18, 2012). The court considers "the promotion as a whole." *Freeman*, 68 F.3d at 290.

On motions to dismiss, the court analyzes whether the plaintiff has plausibly alleged reasonable consumers would be misled. *See, e.g., Kampmann*, 2023 WL 7042531, at *5 ("[i]t is clear that to defeat a motion to dismiss, the Plaintiff must clearly identify a communication which

contained a misrepresentation or material omission"); *Zarinebaf v. Champion Petfoods USA Inc.*, No. 18 C 6951, 2019 WL 3555383, at *6 (N.D. Ill. July 30, 2019) ("courts routinely analyze whether statements like these are deceptive as a matter of law under the ICFA"). Furthermore, a plaintiff's allegation that a product label is "deceptive" is "plainly . . . a legal conclusion that is not deemed true even on a motion to dismiss." *Harris v. McDonald's Corp.*, No. 20-cv-06533-RS, 2021 WL 217833, at *2 (N.D. Cal. Mar. 24, 2021); *accord Wach v. Prairie Farms Dairy, Inc.*, No. 21 C 2191, 2022 WL 1591715, at *3 (N.D. Ill. May 19, 20220).

Application. Plaintiffs' ICFA, IUDTPA, CLRA, and UCL claims fail as a matter of law because Plaintiffs do not allege facts plausibly establishing that reasonable consumers would be deceived by any product, including the Sour Patch Kids drink.

First, as noted, the Court must consider the promotion as a whole. Here, the product is expressly identified as an "ENERGY DRINK" containing 200mg caffeine per serving. (Wilke Decl., Ex. 1.) Plaintiffs allege the caffeine content makes the drink inappropriate for children, but the label includes clear disclosures of the caffeine content, not only in the Nutrition Facts/ingredients panel—"exactly the spot consumers are trained to look," *Davis v. Hain Celestial Group, Inc.*, 297 F. Supp. 3d 327, 331 (E.D.N.Y. 2018)—but on the other side as well:

(Wilke Decl., Ex. 1.).

Second, the label does not state the product is appropriate for children. Quite the opposite. In bold font, the label states: "**CAUTION: THIS PRODUCT IS ONLY INTENDED FOR HEALTHY ADULTS, 18 YEARS OF AGE OR OLDER.**" (*Id.*) Nor does the use of a "Sour Patch Kids" logo—a well-known *candy* brand—imply otherwise. In context, reasonable consumers would obviously understand that "Sour Patch Kids" is the *flavor*, not a statement that the caffeinated energy drink is appropriate for children. Plaintiffs' argument is akin to a claim that reasonable consumers would think a package of "Dutch Babies" is marketed to infants, or that a "lady finger" cookie was intended solely for grown women. Such overliteral assertions willfully ignore normal usage and custom and need not be credited at the pleading stage. *See, e.g., McKinnis v. Kellogg USA*, 2007 WL 4766060, at *4 (C.D. Cal. Sept. 19, 2007) (rejecting claim that use of "FROOT LOOPS" suggested that cereal was made with real fruit, observing that "while [F-R-O-O-T] might be a fanciful take on the word F-R-U-I-T, it appears in the trademarked name of the cereal, not on its own or as a description of the actual ingredients of the cereal itself").

Furthermore, under the CLRA and UCL, "the promotion as a whole" makes clear the product is a caffeinated energy drink intended for adults only. *Freeman*, 68 F.3d at 290. Even assuming for argument's sake that the front label's mere reference to Sour Patch Kids flavoring could create any ambiguity as to whether the product is "appropriate" for children (and it does not), the rest of the labeling expressly dispels any ambiguity. Under the UCL and CLRA, "the front label must be unambiguously deceptive for a defendant to be precluded from insisting that the back label be considered together with the front label." *McGinity v. Proctor & Gamble Company*, 69 F.4th 1093, 1098 (9th Cir. 2023) (affirming dismissal). If a "front label is ambiguous, the ambiguity can be resolved by reference to the back label." *Id.* at 1099; *see also Kampmann*, 2023 WL 7042531, at *8 ("P&G did not omit a material fact where there was a clear disclaimer

on the Super C back label."). The label states the product is intended only for healthy adults.

Plaintiffs fail to plausibly allege any ICFA, IUDTPA, CLRA, or UCL claim.

B. The ICFA, IUDTPA, CLRA, UCL, and Unjust Enrichment Claims Fail as a Matter of Law Because They Are Not Pled with Particularity Under Rule 9(b).

Plaintiffs' ICFA, IUDTPA, CLRA, UCL, and unjust enrichments claims—which are all based on the same theory of allegedly deceptive advertising—also fail Rule 9(b)'s heightened pleading standard. *See Gardner v. Ferrara Candy Co.*, No. 22-cv-1272, 2023 WL 4535906, at *3 (N.D. Ill. Mar. 22, 2023) (ICFA); *Medscript Pharmacy, LLC v. My Script, LLC*, 77 F. Supp. 3d 788, 793 (N.D. Ill. 2015) (IUDTPA); *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125 (9th Cir. 2009) (CLRA/UCL claims); *O'Connor v. Ford Motor Company*, 477 F. Supp. 3d 705, 720 (N.D. Ill. 2020) (unjust enrichment sounding in fraud). Plaintiffs are required to plead with particularity the who, what, when, where, and how of the alleged deception. *United States ex. rel. Presser v. Acacia Mental Health Clinic, LLC*, 836 F.3d 779, 776 (7th Cir. 2016). They fail to do so.

First, Plaintiffs do not allege with particularity *which* products they supposedly purchased. While they allege they purchased the Sour Patch Kids variety (Doc. 1, ¶ 5), they subsequently make the vague allegation that they purchased "*one or more varieties* of Ghost drinks, *including* drinks bearing one of the trademarks belonging to Mondelez[.]" (*Id.* ¶ 22 [emphasis added].) This makes it impossible for Ghost even to know which particular products are at issue, let alone what specific label statements (if any) the Plaintiffs supposedly relied upon *if* they purchased any Ghost energy drink other than the Sour Patch Kids flavor. The Complaint does not contain images of any Ghost products other than the partial images of the Sour Patch Kid variety (Doc. 1, ¶ 27), and Plaintiffs do not allege that they relied on something particular on any other product's label. This does not meet Rule 9(b) requirements. *See Willard v. Tropicana Manufacturing Company, Inc.*,

577 F. Supp. 3d 814, 835 (N.D. Ill. 2021) ("Plaintiffs fail to allege which Products they actually purchased" and "the Complaint contains no details about the alleged misrepresentations contained on the Remaining Products' labels"); *Ibarolla v. Nutrex Research, Inc.*, 2012 WL 5381236, at *2 (N.D. Ill. 2012) ("Plaintiff claims to have purchased 'one or more' of six named Nutrex products. [Citation.] Without specifying which product she actually purchased, we cannot determine what particular misrepresentations Plaintiff relied on.").

Second, Plaintiffs fail to plead "when" with particularity. They plead that they "purchased one or more varieties of Ghost drinks, including drinks bearing one of the trademarks belonging to Mondelez, on one or more occasions within the statute of limitations for each cause of action alleged[.]" (Doc. 1, ¶¶ 20, 22 [emphasis in original].) "Within the statute of limitations" is not a particularized allegation of time. "Providing broad time ranges when misrepresentations were made is not sufficient to satisfy Rule 9(b)." *Cook v. Exelon Corp.*, No. 01 C 7406, 2002 WL 31133274, at *5 (N.D. Ill. Sept. 26, 2002); *see also Baldwin v. Star Scientific, Inc.*, 78 F. Supp. 3d 724, 738 (N.D. Ill. Jan. 13, 2015) (the "allegation fails to state with particularity when and where Plaintiff even purchased the product"); *Willard*, 577 F. Supp. 3d at 835; *Clark v. Robert W. Baird Co., Inc.*, 142 F. Supp. 2d 1065, 1072 (N.D. Ill. 2001) ("it is not enough to merely allege a period of months or years").

Third, Plaintiffs do not allege with particularity *where* they made their purchases. They just allege they purchased "at stores in Illinois and California." (Doc. 1, ¶ 22.) This is not sufficient. *See, e.g., Willard*, 577 F. Supp. 3d at 835; *Rosenberg v. SC Johnson & Son, Inc.*, No. 20-cv-869, 2021 WL 3291687, at *4 (E.D. Wis. Aug. 2, 2021) ("Which plaintiff purchased which product? When? Where? How much did they pay?"); *Forsher v. J.M. Smucker Co.*, 612 F. Supp. 3d 714,

720-21 (N.D. Ohio 2020) ("Plaintiff here fails to identify where he was shopping at the time of the alleged fraud."); *Pattie v. Coach, Inc.*, 29 F. Supp. 3d 1051, 1059 (N.D. Ohio 2014) (same).

For all these reasons, the ICFA, IUDTPA, CLRA, UCL, and unjust enrichment claims fail as a matter of law.

C. Plaintiffs Lack Standing to Assert Claims as to Products They Did Not Purchase.

As noted, the Complaint does not clearly identify *which* products it targets. But it is clear Plaintiffs never allege to have actually purchased any Ghost product other than the Sour Patch Kids flavored energy drink. Thus, they do not have standing to bring claims as to any other product, whether that be the Warheads Sour Watermelon, Bubblicious Strawberry Splash, "generic flavors Citrus, Tropical Mango, and Orange Cream" or any other unpurchased product. (Doc. 1, ¶ 25.)

Under Article III, a federal court can resolve only "a real controversy with a real impact on real persons." *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2103 (2019) (Gorsuch, J., concurring). The plaintiff must have a "personal" stake in the case. *TransUnion LLC v. Ramirez*, 594 U.S. 413, 423 (2021). "Plaintiffs cannot be injured by products they did not buy." *Bohen v. Conagra Brands, Inc.*, No. 23 C 1298, 2024 WL 1254128, at *3 (N.D. Ill. Mar. 25, 2024); *accord Weaver v. Champion Petfoods USA Inc.*, 3 F.4th 927, 936 (7th Cir. 2021) (noting the plaintiff lacked standing for a product he did not purchase); *Bakopoulos v. Mars Petcare US, Inc.*, No. 20 CV 6841, 2021 WL 2915215, at *3 (N.D. Ill. July 12, 2021) ("Plaintiffs have no injury-in-fact caused by products they did not buy, and therefore lack standing with respect to those products."). The Court should dismiss any claims asserted as to any unpurchased products.

Ghost recognizes that some district courts have permitted consumer fraud claims based on "substantially similar" products to survive to the class certification stage. *See Bakopolous*, 2021 WL 2915215, at *3 (citing cases). But "whether these plaintiffs may be adequate class

representatives for absent class members injured by similar products is a different question" than Article III standing. *See id.* "At this stage of the case, there is no class and plaintiffs cannot bypass the 'irreducible constitutional minimum' of Article III standing for their individual claims." *Id.* (citation omitted). In short, the "substantial similarity" theory is "inconsistent with the basic concept of standing" as "[t]he similarity of a product, by itself, says nothing about whether a party suffered an injury traceable to the allegedly wrongful conduct of another." *Lorentzen v. Kroger Co.*, 532 F. Supp. 3d 901, 908, 909 (C.D. Cal. 2021).

And even under the "substantial similarity" notion of standing, Plaintiffs do not have standing for unpurchased products because they do not allege any of the unpurchased products' labels include "Sour Patch Kids"—the only phrasing they allegedly "read and relied on" in determining the purchased product was appropriate for children (Doc. 1, ¶ 20)—or any other textual reference to "kids" or "children." The other energy drinks' labels are thus simply not "similar" in any relevant sense to the "Sour Patch Kids" label, much less "substantially" so, and the Court should dismiss all claims as to any unpurchased products for lack of standing.

D. Plaintiffs Lack Standing to Pursue Any Claims for Injunctive Relief.

Plaintiffs do not have Article III standing to pursue injunctive relief. A plaintiff must demonstrate standing separately for each form of relief sought. *Friends of the Earth, Inc. v. Laidlaw Evntl. Servs. (TOC), Inc.*, 528 U.S. 167, 185 (2000). To seek injunctive relief, the plaintiff must show she is likely to suffer future injury from the defendant's conduct. *City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983). "Past exposure" to allegedly "illegal conduct" is not enough. *Camasta v. Jos. A. Bank Clothiers, Inc.*, 761 F.3d 732, 740 (7th Cir. 2014).

"[P]ast purchasers of a consumer product who claim to be deceived by that product's packaging . . . have, at most, alleged a past harm." *Berni v. Barilla S.p.A.*, 964 F.3d 141, 147 (2d

Cir. 2020). Since Plaintiffs "are now aware of [Ghost's] sales practices," they are "not likely to be harmed by the practices in the future." *Camasta*, 761 F.3d at 741; *accord Garland v. The Children's Place, Inc.*, No. 23 C 4899, 2024 WL 1376353, at *5 (N.D. Ill. Apr. 1, 2024); *Biczo v. Ferrara Candy Company*, No. 22-cv-01967, 2023 WL 2572384, at *4 (N.D. Ill. Mar. 20, 2023). Plaintiffs do not allege any facts establishing they are likely to be harmed in the future. To the contrary, the Complaint shows that Plaintiffs are aware of the caffeine content of these products and the purported health risks associated with consuming caffeine, and would not suffer any harm in the future. The Court must dismiss any claims for injunctive relief.

E. The Negligent Misrepresentation Claims Fail for Several Reasons.

Plaintiffs assert negligent misrepresentation claims. In cases involving alleged false advertising, courts have held that, under Illinois choice-of-law principles, the claim is governed by the laws of the state in which the consumer viewed the advertisement and made the purchase. *See, e.g., Clay v. American Tobacco Co.*, 188 F.R.D. 483, 497, 498 (S.D. Ill. 1999); *Kubilius v. Barilla America, Inc.*, No. 18 C 6656, 2019 WL 2861886, at *1-2 (N.D. Ill. July 2, 2019).

Illinois law (Williams). For two reasons, Plaintiff Williams does not state any negligent misrepresentation claim under Illinois law. First, "without a false or deceptive statement," Williams cannot satisfy the first element of a negligent misrepresentation claim. *Gardner*, 2023 WL 4535906, at *7. As explained, Williams has failed to plausibly allege any false statement. The Ghost labeling does not state that the energy drinks are "appropriate" or "suitable" for children.

Second, the negligent misrepresentation claim is barred regardless by the economic loss doctrine, which bars tort damages claims for purely monetary losses. *See, e.g., Manley v. Hain Celestial Group, Inc.*, 417 F.Supp.3d 1114, 1120 (N.D. Ill. 2019). While Illinois recognizes an exception to the economic loss doctrine for negligent misrepresentation by one who is in the

business of supplying information for the guidance of others in their business transactions, "[a]n allegation that a supplier of tangible goods provided information ancillary to the sale of a product would not suffice." *Manley*, 417 F.Supp.3d at 1121; *accord First Midwest Bank, N.A. v. Stewart Title Guar. Co.*, 218 Ill.2d 326, 339, 300 Ill.Dec.69, 77, 843 N.E.2d 327, 335 (2006); *Chiappetta v. Kellogg Sales Co.*, No. 21-CV-3545, 2022 WL 602505, at *7 (N.D. Ill. Mar. 1, 2022). As Williams alleges only economic loss, he fails to state a claim.[3]

California law (Barrales). In addition to having failed to plausibly allege any misrepresentation, under California law a negligent misrepresentation claim requires a positive assertion of fact; "[a]n implied assertion of fact is not enough to support liability." *SI 59 LLC v. Variel Warner Ventures, LLC*, 29 Cal.App.5th 146, 154 (2018) (quotation omitted). Here, the product labeling does not include any positive assertion that the energy drink is "suitable" or "appropriate" for children; instead, the label expressly states it is not. To the extent Barrales alleges the mere use of the Sour Patch Kids flavor or logo supposedly *implies* the product is appropriate for children, implied representations cannot support a negligent misrepresentation claim. (And if Illinois law applied to Barrales claim, it would fail for the all the same reasons as Williams' claim.)

F. The Breach of Express Warranty Claims Fail for Multiple Reasons.

Plaintiffs express warranty claims (Count VII) is also governed by the laws of the state in which the purchases were made. *See Clay*, 188 F.R.D. at 497.

Illinois law. Under Illinois law, Williams's breach of express warranty claim fails for several reasons. First, he does not allege privity. *See Manley*, 417 F. Supp. 3d at 1125 (a claim for

[3] The Complaint states in a single instance—without elaboration—that "Plaintiffs' children suffered adverse health effects" (Doc. 1, ¶ 5), but Plaintiffs do not seek any money damages tied to those purported effects. (*Id.* ¶¶ 92, 99, 128, 132) (referencing only the cost of the products purchased and allegedly discarded).

breach of express warranty requires privity of contract); *Baldwin v. Star Scientific, Inc.*, 78 F.Supp.3d 724, 739 (N.D. Ill. 2015) (same). He alleges he purchased "at stores"; he does not allege that he purchased the product directly from Ghost. (Doc. 1, ¶ 22.)

Second, to state a claim, the buyer must allege he gave pre-suit notice to the seller. 810 ILCS 5/2-607(3)(a); *Connick v. Suzuki Motor Co., Ltd.*, 174 Ill.2d 482, 494-95, 675 N.E.2d 584 (1996); *Gardner*, 2023 WL 4535906, at *8. Williams has not alleged pre-suit notice.

Third, because Williams fails to plausibly allege that reasonable consumers would be deceived (see Section IV.A, *supra*), the express warranty claim also fails. *See, e.g., Gardner*, 2023 WL 4535906, at *7 ("The Court's holding that no reasonable consumer would be misled under the ICFA applies to Gardner's warranty claims, too."); *Zahora v. Orgain LLC*, No. 21 C 705, 2021 WL 5140504, at *5 (N.D. Ill. Nov. 4, 2021) (same).

California law. If Illinois law applied to Barrales's express warranty claim, it would fail for the same reasons that Williams' claim fails, including lack of privity and no pre-suit notice. But assuming California law applies to Barrales, the express warranty claim still fails.

First, because Barrales fails to plausibly allege that reasonable consumers would be deceived, the express warranty claim fails as a matter of law. *See, e.g., Weiss v. Trade Joe's Co.*, 838 F. App'x 302, 303 (9th Cir. 2021) (affirming dismissal of breach-of-warranty claims premised on the "exact same representations as her consumer protection claim").

Second, an express warranty claim requires an express affirmation of fact; the plaintiff "must allege the exact terms of the warranty." *Williams v. Beechnut Nutrition Corp.*, 185 Cal. App. 3d 135, 142 (1986); *Baird v. Samsung Electronics America, Inc.*, 522 F. Supp. 3d 679, 685 (N.D. Cal. 2021). A statement does not constitute an express warranty unless it is "specific and unequivocal." *Baird*, 522 F.Supp.3d at 142. Here, the product label does not include any specific,

unequivocal statement that the product is "suitable" or "appropriate" for children. It expressly states it is not.

G. The Unjust Enrichment Claims Fails as Matter of Law.

Where an unjust enrichment claim rests on the same improper conduct alleged in another claim, it will fall with the related claim. *See, e.g., Berryman v. Merit Prop. Mgmt.*, 152 Cal. App. 4th 1544, 62 Cal.Rptr.3d 177, 188 (2007) (finding unjust enrichments claims based on the same facts failing to state UCL claim must fail); *O'Connor v. Ford Motor Company*, 477 F. Supp. 3d 705, 720 (N.D. Ill. Aug. 7, 2020) (dismissing unjust enrichment claim where "it is premised on the same conduct underlying Plaintiff's legally deficient ICFA claim); *Gardner*, 2023 WL 4535906, at *8 (similar). As Plaintiffs have failed to plausibly allege that reasonable consumers would be deceived, the unjust enrichment claim (Count V) necessarily fails.

V. CONCLUSION

For the foregoing reasons, Ghost requests that the Court grant its motion to dismiss in its entirety and without leave to amend.

Dated: May 13, 2024

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CERTIFICATE OF SERVICE

I hereby certify that, on May 13, 2024, a copy of the foregoing Memorandum in Support was filed electronically via the Court's CM/ECF system. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt.

/s/ William P. Cole
William P. Cole