UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
NORTHERN DIVISION

TINAMARIE BARRALES and MICHAEL WILLIAMS, individually and on behalf of all those similarly situated, Plaintiffs, v. GHOST BEVERAGES LLC, and MONDELĒZ INTERNATIONAL, INC., Defendants.	)	No.: 1:24-cv-1185 Class Action Jury Trial Demand

MONDELĒZ INTERNATIONAL, INC.'S SUPPLEMENTAL MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS CLASS ACTION COMPLAINT

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Rule

In support of its motion to dismiss the Class Action Complaint ("Complaint"), Defendant Mondelēz International, Inc. ("Mondelēz") joins in the memorandum of law (the "Ghost Memorandum") submitted by defendant Ghost Beverages LLC ("Ghost"), and adopts the arguments in support of dismissal set out in the Ghost Memorandum. Mondelēz also respectfully submits this supplemental memorandum of law to address issues specific to Mondelēz.

INTRODUCTION

Mondelēz is a manufacturer of snack products that prioritizes meeting the evolving needs of its consumers. As one of the world's largest snack companies, it strives to provide consumers with high-quality products in accordance with its mantra "Snacking Made Right"—the right snack, for the right moment, made the right way. In their Complaint, Plaintiffs Tinamarie Barrales and Michael Williams attempt to disparage Mondelēz's longstanding commitment to Snacking Made Right via claims that Ghost—a separate entity—sold beverages that are flavored like particular brands of candy owned by Mondelēz.

Plaintiffs' claims about alleged misrepresentations in the labeling of Ghost beverages fail as to all Defendants for the reasons explained in the Ghost Memorandum. But Plaintiffs' claims as against Mondelēz fail for the separate and additional reason that Ghost, and *not Mondelēz*, allegedly sells and undertakes all relevant marketing activity for the beverages at issue. As alleged, Mondelēz is a mere licensor that did not engage in any consumer-facing activity or representations related to Plaintiffs' claims. Decisions from this district and around the country make clear that such a theory of liability in a mislabeling case is untenable as a matter of law. For that reason, and those set forth in the Ghost Memorandum, the Court should dismiss the Complaint as against Mondelēz pursuant to Federal Rule of Civil Procedure 12(b)(6).

FACTUAL BACKGROUND[1]

Mondelēz. Mondelēz is one of the largest snack companies in the world, operating in more than 80 countries across the globe. Mondelēz brands include Sour Patch Kids, Swedish Fish, and Bubblicious. Compl. ¶ 30.

Ghost. Ghost is an energy drink manufacturer. *Id.* ¶¶ 14-15. Ghost specializes in creating energy drinks in a variety of flavors that contain no sugar or artificial ingredients, including a line of energy drinks based on Mondelēz's Sour Patch Kids, Bubblicious, and Swedish Fish products (the "Energy Drinks"). The Energy Drinks are sold by retailers across the United States. *Id.* ¶ 13.

Plaintiffs acknowledge that Mondelēz's sole role with regard to the Energy Drinks was to license its "Sour Patch Kids, Bubblicious, and Swedish Fish trademarks to Ghost for use on" the Energy Drinks. *Id.* ¶ 2. Specifically, the Energy Drinks smell and taste like each respective candy, and the packaging includes the images and names of each respective candy. *Id.* ¶ 25. In exchange for the right to use Mondelēz products in its branding, Ghost allegedly provides Mondelēz with a percentage of its revenue from the sale of the Energy Drinks. *Id.* ¶¶ 30-31.

Plaintiffs. Barrales and Williams bring this putative class action against both Ghost and Mondelēz, alleging that they purchased the Energy Drinks because they "believed and expected that the Ghost drinks were suitable for children and teens" based on their "associat[ion] [of] candy brands . . . with products suitable for children and teens." *Id.* ¶¶ 19-22. They further allege that had they "been aware of the true characteristics of Ghost's products, . . . they would not have

[1] Mondelēz acknowledges that on this motion the Court must accept "as true all of the well-pleaded facts in the complaint and draw[s] all reasonable inferences in favor of the plaintiff." *Platt v. Brown*, 872 F.3d 848, 851 (7th Cir. 2017). A plaintiff, however, cannot carry this burden with "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *see also Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (stating that "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do").

purchased them." *Id.* ¶ *89.*

Plaintiffs allege that the Energy Drinks did not appropriately disclose that they are not suitable for children, but acknowledge that each Energy Drink can contains a warning that the products are intended only for adults. *Id.* ¶ 27. Specifically, the label warning states in **capital and bold letters**: "**CAUTION: THIS PRODUCT IS ONLY INTENDED FOR HEALTHY ADULTS, 18 YEARS OF AGE OR OLDER**," *id.* ¶¶ 25, 34. Depending on the flavor of the Energy Drinks, the labels are "brightly colored" in "bright red and yellow" (Sour Patch Kids Redberry), "bright blue and yellow" (Sour Patch Kids Blue Raspberry), "bright pink" (Bubbilicious), or "bright yellow, blue, and red" with "fish scales on the can" (Swedish Fish) and the Energy Drinks flavored like Swedish Fish and Sour Patch Kids each contain an image of the respective candy on the front on the can. *Id.* ¶¶ 27, 34.

Plaintiffs do not allege that Mondelēz made any representations to them, or that they have any other relationship to Mondelēz.

ARGUMENT

Plaintiffs' Complaint is subject to dismissal with prejudice for all the reasons set forth in the Ghost Memorandum, which Mondelēz adopts and expressly incorporates herein by reference. The Complaint also fails to state a plausible claim for relief against Mondelēz for two independent reasons. First, Plaintiffs' allegations relating solely to Mondelēz's role as a mere licensor of its trademark on Ghost's Energy Drinks are too speculative to state a claim for relief. Second, Mondelēz cannot be held liable under either California or Illinois law for breaching an express warranty because it is not a *seller* of Ghost's Energy Drinks.

I. Mondelēz Cannot Be Not Liable For The Energy Drinks' Labeling As A Mere Licensor

Plaintiffs' causes of action against Mondelēz are deficient because a mere licensor of a

trademark cannot be held responsible for another entity's advertising and marketing of products containing that trademark.

Plaintiffs' claims against Mondelēz relate solely to Mondelēz's role as a licensor of the candy trademarks displayed on the Energy Drinks. *See id.* ¶¶ 22, 30, 63. Indeed, not a single allegation in the Complaint identifies any participation by Mondelēz in the creation of the Energy Drinks' labels or other marketing-related activity as to the Energy Drinks. Instead, the Complaint alleges that the Energy Drinks are sold by Ghost and that Ghost undertakes all relevant marketing activity. *See, e.g.*, Compl. ¶¶ 27 ("**Ghost's** energy drinks do not disclose in a meaningful manner that they are not suitable for children.") (emphasis added), 48 ("Although **Ghost** markets its energy drinks as healthy and providing "epic focus, 'consumption of energy drinks has been linked to a number of negative health consequences for minors . . . .'") (emphasis added); 51 ("Moreover, the serious and potentially dangerous issues associated with **Ghost's** branding and advertising tactics are exacerbated because **Ghost** fails to clearly and conspicuously disclose in any of the company's marketing materials or on its products that these products are only intended for healthy adults after they have consulted a healthcare professional.") (all emphasis added).[2]

Plaintiffs' theory of liability as against Mondelēz—that a trademark licensor can be sued in connection with alleged mislabeling or false advertising claims—has been rejected in numerous decisions, including one from this district.

Start with *Joseph v. TGI Friday's, Inc.*, No. 21-cv-1340, 2022 WL 17251277 (N.D. Ill.

[2] *See also id.* ¶¶ 14 ("**Ghost** sold nearly $188 million dollars in energy drink products . . . ."); 23 ("Plaintiffs would not have purchased **Ghost** drinks if they had known they were not safe . . . .") 29 ("**Ghost** hides the nature of the ingredients in its drink by providing meaningless trademarked terms instead of actual compounds"); 37 ("**Ghost's** marketing targets minors, video gamers, and fitness enthusiasts . . . ."); 45 ("[T]he caffeine content of **Ghost** might be different from the labels . . . ."); 53 ("**Ghost** also uses social media 'influencers' to illegally promote their energy drinks.") (all emphasis added).

Nov. 28, 2022). There, a consumer sued the eatery TGI Friday's ("TGIF"), alleging that he/she was misled by the label on "mozzarella sticks snacks" from manufacturer Inventure Foods, Inc. ("Inventure") because the label contained the language "TGI Friday's Mozzarella Sticks Snacks, Original" but contained no actual mozzarella cheese. *Id.* at *5. Judge Dow rejected the plaintiff's claims in their entirety against TGIF, finding that "an allegation that a party has licensed its trademark to appear on a product is not, by itself, sufficient to state a claim for liability for misleading representations that appear on the product." *Id.*

In so holding, Judge Dow followed decisions from other circuits coming to the same conclusion—namely, that absent plausible allegations of making or participating in the making of the alleged labeling statements at issue, a trademark licensor cannot be haled into court on a false advertising or similar theory. *See, e.g.*, *Troncoso v. TGI Friday's Inc.*, No. 19 Civ. 2735 (KPF), 2020 WL 3051020, at *11 (S.D.N.Y. June 8, 2020) ("[T]he fact that TGIF has licensed its trademark to Inventure does not suggest that TGIF was involved in any aspects of the labeling beyond its own trademark, which Plaintiff does not allege is misleading. And Plaintiff's allegation that TGIF had control over the marketing of the chips — and thus, presumably, the snack chips' misleading labeling — is wholly conclusory."); *Hilsley v. General Mills, Inc.*, 376 F. Supp. 3d 1043, 1051 (S.D. Cal. 2019) (dismissing claims against media companies who licensed children's cartoon characters to General Mills because allegations that they were responsible for General Mills' purportedly misleading advertising were "too bare and conclusory to be 'entitled to the assumption of truth'" and did "not provide the facts necessary to raise her right to relief above the speculative level") (internal quotation marks and citations omitted); *Parent v. Millercoors LLC*, No. 3:15-cv-1204-GPC-WVG, 2016 WL 3348818, at *8 (S.D. Cal. June 16, 2016) ("[A] third party's use of a trademark does not constitute an endorsement by the trademark owner.").

Mondelēz is not aware of any contrary authority.[3] Because Plaintiffs do not assert that Mondelēz had a hand in actually creating the Energy Drinks' labels, or played any role other than as licensor of the trademarks for the brands reflected on the Energy Drinks' labels, Plaintiffs' claims against Mondelēz fail on their face.

To the extent the Complaint says anything at all about Mondelēz's alleged activities, those allegations are conclusory and unavailing. Paragraph 25, a bare allegation that "Ghost and Mondelēz are involved in deceptive, unfair and misleading advertising," is wholly conclusory. Paragraph 40, which alleges without elaboration that "[b]oth Ghost and Mondelēz" allegedly "create[ed] and distribut[ed] energy drinks designed to appeal specifically to children and teens," fails to allege a single respect in which Mondelēz might have engaged in the creation or distribution of the Energy Drinks. This tactic fails. *See Joseph*, 2022 WL 17251277, at *5 (even where a plaintiff alleges that a licensor played "various roles" in creating an allegedly misleading product, the plaintiff must still plead more than just "wide-ranging" or "wholly conclusory" allegations to support this claim); *see also, e.g.*, *Dachev v. Rich Am., Inc*., No. 17-cv-5729, 2019 WL 423192, at *13 (N.D. Ill. Feb. 4, 2019) ("Although Plaintiff also alleges misconduct by Defendants generally, a complaint cannot lump multiple defendants together" and should instead "inform each defendant of the specific fraudulent acts that constitute the basis of the action against the particular defendant.") (internal quotation marks and citations omitted); *Swiss Reinsurance Am. Corp. v. Access Gen. Agency, Inc.*, 571 F. Supp. 2d 882, 884-86 (N.D. Ill. 2008) (same).

[3] *Accord Winston v. Hershey Co.*, No. 19-CV-3735 (ENV) (JO), 2020 WL 8025385, at *5 (E.D.N.Y. Oct. 26, 2020) ("[W]ith respect to the mislabeling of the product as white chocolate by third parties, plaintiff has not plausibly alleged that defendant was actually involved in that mislabeling.") (citing *Troncoso*, 2020 WL 3051020, at *12); *Appel v. Bos. Nat'l Title Agency, LLC*, No. 18-cv-873-BAS-MDD, 2020 WL 3078534, at *5 (S.D. Cal. June 10, 2020) ("The fact that Concierge may have advertised Boston National in a certain way, without Boston National's contribution, is not a claim against Boston National.") (citing *Parent*, 2016 WL 3348818, at *7).

II. Plaintiffs Fail To Plausibly Allege A Breach of Express Warranty Claim Against Mondelēz

Moreover, the fact that Mondelēz is a *licensor* and not a *seller* is fatal to Plaintiffs' claim for breach of express warranty under California and Illinois law. Both California and Illinois require that a plaintiff bringing a claim for breach of express warranty allege an underlying "affirmation of fact or promise" by a seller to a buyer, and the seller's failure to meet that promise. *See Gubala v. CVS Pharmacy, Inc.*, No. 14 C 9039, 2015 WL 3777627, at *7 (N.D. Ill. June 16, 2015); *Shu v. Toyota Motor Sales USA, Inc.*, 669 F. Supp. 3d 888, 902 (N.D. Cal. 2023). While breach of express warranty claims have been brought against manufacturers or distributors under Illinois or California law, there is no precedent for holding a licensor like Mondelēz liable under the theory that it qualifies as a "seller" who made an express warranty to a "buyer." *See, e.g., Corwin v. Conn. Valley Arms, Inc.*, 74 F. Supp. 3d 883, 892 (N.D. Ill. 2014) (dismissing breach of an express warranty claim against bullet *manufacturer* because manufacturer's packaging expressed mere opinions, not affirmations of fact) (emphasis added); *Quatela v. Stryker Corp.*, 820 F. Supp. 2d 1045, 1048 (N.D. Cal. 2010) (finding that under California law plaintiff was required to demonstrate reliance on *manufacturer's* representations for an express warranty claim) (emphasis added). Plaintiffs point to no authority holding licensors like Mondelēz—who do not actually sell the relevant products to consumers—liable for a seller's purported breach of express warranty.

CONCLUSION

For the reasons set forth above, along with the reasons set forth in the Ghost Memorandum, Mondelēz respectfully requests that the Court dismiss the Complaint with prejudice pursuant to Federal Rule of Civil Procedure 12(b)(6).

Dated: May 13, 2024

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was filed on May 13, 2024, with the Court and served electronically through the CM/ECF system to all counsel of record registered to receive a Notice of Electronic Filing for this case.

/s/ Paul Olszowka