UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

ROBERT BRATTON, individually and on behalf of all others similarly situated, Plaintiff, **v.** **THE HERSHEY COMPANY,** Defendant.	No. 16-cv-4322-NKL **Oral Argument Requested**

SUGGESTIONS IN SUPPORT OF HERSHEY'S MOTION TO DISMISS THE SECOND AMENDED COMPLAINT

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SERVED: March 8, 2017

TABLE OF CONTENTS

PAGE

PRELIMINARY STATEMENT 1

BACKGROUND 3

A. Hershey's Products Clearly Disclose the Contents of Each Package 3

B. Federal Law Permits Functional Slack-Fill in Packaged Foods 3

C. Bratton's Allegations 4

ARGUMENT 5

I. THE SECOND AMENDED COMPLAINT DOES NOT PLAUSIBLY ALLEGE THAT HERSHEY ENGAGED IN A DECEPTIVE ACT OR PRACTICE 6

II. THE COMPLAINT DOES NOT ALLEGE AN ASCERTAINABLE LOSS 11

III. THE UNJUST ENRICHMENT CLAIM FAILS AS A MATTER OF LAW 12

IV. PLAINTIFF LACKS STANDING TO SEEK INJUNCTIVE RELIEF 14

CONCLUSION 15

TABLE OF AUTHORITIES

Page(s)

Cases

Ashcroft v. Iqbal,
556 U.S. 662 (2009).....5

Bell Atl. Corp. v. Twombly,
550 U.S. 544 (2007).....5

Binkley v. Am. Equity Mortg., Inc.,
447 S.W.3d 194 (Mo. 2014) (en banc).....13

BJC Health Sys. v. Columbia Cas. Co.,
478 F.3d 908 (8th Cir. 2007).....6

Bush v. Mondelez Int'l, Inc.,
No. 16-cv-2460 (RS), 2016 U.S. Dist. LEXIS 140013 (N.D. Cal. Oct. 7, 2016), *appeal docketed*, No. 17-15126 (9th Cir. Jan. 19, 2017).....5, 7, 9

Bush v. Mondelez Int'l, Inc.,
No. 16-cv-2460 (RS), 2016 U.S. Dist. LEXIS 174391 (N.D. Cal. Dec. 16, 2016), *appeal docketed*, No. 17-15126 (9th Cir. Jan. 19, 2017).....9, 10

Carter v. Alcon Labs., Inc.,
No. 13-cv-977 (AGF), 2014 U.S. Dist. LEXIS 32381 (E.D. Mo. Mar. 13, 2014).....12, 13

City of Los Angeles v. Lyons,
461 U.S. 95 (1983).....14

Ebner v. Fresh, Inc.,
No. 13-cv-477 (JVS), 2013 U.S. Dist. LEXIS 188889 (C.D. Cal. Sept. 11, 2013), *aff'd*, 838 F.3d 958 (9th Cir. 2016).....8

Fermin v. Pfizer Inc.,
No. 15-cv-2133 (SJ) (ST), 2016 U.S. Dist. LEXIS 144851 (E.D.N.Y. Oct. 14, 2016).....9

Gorog v. Best Buy Co.,
760 F.3d 787 (8th Cir. 2014).....5

Hager v. Arkansas Dept. of Health,
735 F.3d 1009 (8th Cir. 2013).....5

Ham v. Hain Celestial Grp., Inc.,
70 F. Supp. 3d 1188 (N.D. Cal. 2014).....15

TABLE OF AUTHORITIES
(CONTINUED)

Page(s)

Hines v. Overstock.com, Inc.,
No. 09-cv-991 (SJ), 2013 U.S. Dist. LEXIS 117141 (E.D.N.Y. Aug. 19, 2013) 12

Hurst v. Nissan N. Am., Inc.,
No. WD 78665, 2016 Mo. App. LEXIS 263 (Mo. Ct. App. Mar. 22, 2016), *transferred*, 2016 Mo. LEXIS 235 (Mo. June 28, 2016) 7

Insulate SB, Inc. v. Advanced Finishing Sys.,
No. 13-cv-2664 (ADM), 2014 U.S. Dist. LEXIS 31188 (D. Minn. Mar. 11, 2014), *aff'd*, 797 F.3d 538 (8th Cir. 2015).....13

Ivie v. Kraft Foods Global,
No. 12-cv-2554 (RMW), 2013 U.S. Dist. LEXIS 25615 (N.D. Cal. Feb. 25, 2013) 14

Izquierdo v. Mondelez Int'l, Inc.,
No. 16-cv-4697 (CM), 2016 U.S. Dist. LEXIS 149795 (S.D.N.Y. Oct. 26, 2016) 15

In re Magnesium Oxide Antitrust Litig.,
No. 10-cv-5943 (DRD), 2011 U.S. Dist. LEXIS 121373 (D. N.J. Oct. 20, 2011) 13

In re Wellbutrin XL Antitrust Litig.,
260 F.R.D. 143 (E.D. Pa. 2009).....12, 13

Kelly v. Cape Cod Potato Chip Co.,
81 F. Supp. 3d 754, 761 (W.D. Mo. 2015) ..... *passim*

McKinniss v. Gen. Mills, Inc.,
No. 07-cv-2521 (GAF), 2007 U.S. Dist. LEXIS 96107 (C.D. Cal. Sept. 18, 2007) 5, 10

Miller v. City of St. Paul,
823 F.3d 503 (8th Cir. 2016) 14

Owen v. Gen. Motors Corp.,
No. 06-cv-4067 (NKL), 2006 U.S. Dist. LEXIS 70466 (W.D. Mo. Sept. 28, 2006) 6

Polk v. KV Pharm. Co.,
No. 09-cv-588 (SNLJ), 2011 U.S. Dist. LEXIS 144313 (E.D. Mo. Dec. 15, 2011) 11

TABLE OF AUTHORITIES
(CONTINUED)

Page(s)

Red v. Kraft Foods, Inc.,
No. 10-cv-1028 (GW), 2012 U.S. Dist. LEXIS 164461 (C.D. Cal. Oct. 25, 2012) 8, 9

Ritchie v. St. Louis Jewish Light,
630 F.3d 713 (8th Cir. 2011) 5

Smithrud v. City of St. Paul,
746 F.3d 391 (8th Cir. 2014) 5

Tellabs, Inc. v. Makor Issues & Rights, Ltd.,
551 U.S. 308 (2007).....5

Thompson v. Allergan USA, Inc.,
993 F. Supp. 2d 1007 (E.D. Mo. 2014).....11, 12

Thornton v. Pinnacle Foods Grp., LLC,
No. 16-cv-158 (JAR), 2016 U.S. Dist. LEXIS 99975 (E.D. Mo. Aug 1, 2016).....7

Toben v. Bridgestone Retail Operations, LLC,
No. 11-cv-1834 (CEJ), 2013 U.S. Dist. LEXIS 137317 (E.D. Mo. Sept. 25, 2013), *aff'd*, 751 F.3d 888 (8th Cir. 2014).....6, 7

United States v. 116 Boxes,
80 F. Supp. 911 (D. Mass 1948) 9

Williams v. First Nat'l Bank of St. Louis,
No. 14-cv-1458 (ERW), 2014 U.S. Dist. LEXIS 157519 (E.D. Mo. Nov. 7, 2014) 8, 10, 12

Young v. Wells Fargo & Co.,
671 F. Supp. 2d 1006 (S.D. Iowa 2009) 13

Statutes

Federal Food, Drug, and Cosmetic Act, Pub. L. 75-717, 52 Stat. 1040, codified at 21 U.S.C. § 301 *et seq.*.....3

Missouri Merchandising Practices Act, Mo. Rev. Stat. § 407.010 *et seq.*..... *passim*

Mo. Rev. Stat. § 196.075(4).....3

Other Authorities

15 Missouri Code of State Regulations 60-8.020 11

TABLE OF AUTHORITIES
(CONTINUED)

Page(s)

15 Missouri Code of State Regulations 60-9.010 7

15 Missouri Code of State Regulations 60-9.020 6

21 C.F.R. § 100.100(a).....3, 4

Fed. R. Civ. P. 8 .....10, 12

Fed. R. Civ. P. 9(b) 6, 10

Fed. R. Civ. P. 12(b)(6).....1, 5

Defendant The Hershey Company ("Hershey") respectfully submits this memorandum of law in support of its motion to dismiss the Second Amended Complaint ("SAC") pursuant to Fed. R. Civ. P. 12(b)(6).

PRELIMINARY STATEMENT

Hershey manufactures and sells Reese's® Pieces® and Whoppers® candies. The front of every Reese's Pieces box prominently states that it contains "4 OZ (113 g)" of candy and that there are 51 pieces per serving. The Nutrition Facts panel states there are "about 3" servings in every container. The Reese's Pieces box thus informs consumers that there are roughly 153 pieces of candy in each box. *See* Zalesin Decl., Exhibit A. The front of every Whoppers box similarly contains a prominent disclosure that it contains "5 OZ (141 g)" of candy. The Nutrition Facts panel states that there are a total of 3.5 servings and 18 pieces per serving for a total of approximately 63 pieces of candy per box. *See id.*

Notwithstanding these explicit disclosures as to weight and quantity, Plaintiff Robert Bratton alleges that he "attached importance" to the size of the boxes and was misled to believe he was getting more candy than he actually received. SAC ¶ 56. Specifically, Bratton claims that boxes of Reese's Pieces and Whoppers are "uniformly under-filled" and "slack-filled" and that consumers would not have purchased the Products if they had known that the containers were "substantially empty." SAC ¶¶ 3-4. As a matter of law, Bratton's allegations are implausible and legally deficient, and his claims must be dismissed.

Bratton's lead claim is for violation of the Missouri Merchandising Practices Act ("MMPA"), Mo. Rev. Stat. § 407.010 *et seq.* To state a claim under the MMPA, a plaintiff must allege facts that plausibly show that the defendant has engaged in a practice that is likely to

mislead a reasonable consumer acting reasonably under the circumstances. For a number of reasons, such a showing is impossible here:

- The packaging of both Reese's Pieces and Whoppers clearly discloses the net weight and quantity of candy inside, negating any potential confusion that may result from the size or dimensions of the box. It is not possible to view the product packaging without also seeing the net weight and quantity disclosures.
- Consumers are well aware of the fact that substantially all commercial packaging contains *some* empty space.
- Any consumer would recognize immediately upon picking up a box of Reese's Pieces or Whoppers that its contents rattle noticeably and audibly with every movement. As a matter of common sense, such a container *cannot* be filled to the brim.

In short, no *reasonable* consumer would form the misimpression that Bratton alleges. His MMPA claim must be dismissed for this reason alone. In addition, the MMPA claim fails because the complaint fails to allege an ascertainable loss, as the statute requires.

Bratton's alternative cause of action, for unjust enrichment, is the only claim that Bratton asserts on behalf of a nationwide class of consumers. As pled, the claim is conclusory and vague as to the state law under which it arises. The claim is also based on the same implausible allegations as the MMPA claim and should similarly be dismissed.

Finally, at minimum, Bratton's demand for an injunction must be dismissed because he lacks standing to seek such relief.

BACKGROUND

A. Hershey's Products Clearly Disclose the Contents of Each Package

Reese's Pieces are "'peanut butter candy in a crunchy shell,'" and Whoppers are "'malted milk balls.'" SAC ¶¶ 20, 23. Both candies are uniformly packaged and sold in malleable, non-transparent cardboard boxes; Reese's Pieces are packaged in a 4-ounce box and Whoppers in a 5-ounce box (collectively, the "Products"). *Id.* ¶¶ 3, 22, 25. The front of every box of Reese's Pieces states that the net weight of the product is "4 OZ (113 g)" and that there are 51 pieces per serving. *Id.* ¶¶ 23-25. The Nutrition Facts panel states that there are "about 3" servings per box. Similarly, the front of every box of Whoppers states that the net weight of the product is "5 OZ (141 g)," and the Nutrition Facts panel states there are 18 pieces in each serving and 3.5 servings in each box. *Id.* ¶ 22. The Products are sold throughout the United State and are "regularly sold at grocery stores, convenience stores, and other food retail outlets." *Id.* ¶ 19.

B. Federal Law Permits Functional Slack-Fill in Packaged Foods

The U.S. Food and Drug Administration has published detailed slack-fill regulations for foods. Pursuant to Section 403(d) of the Federal Food, Drug, and Cosmetic Act, Pub. L. 75-717, 52 Stat. 1040, codified in 21 U.S.C. § 301 *et seq.*, and its implementing regulations at 21 C.F.R. § 100.100(a), a food is misbranded "[i]f its container is so made, formed, or filled as to be misleading." 21 U.S.C. § 343(d). Missouri law incorporates the federal prohibition against containers that are "so made, formed, or filled as to be misleading." Mo. Rev. Stat. § 196.075(4). A container that does not allow a consumer to fully view its contents is misleading if it contains "nonfunctional slack-fill." 21 C.F.R. § 100.100(a). "Slack-fill is the difference between the actual capacity of a container and the volume of product contained therein." *Id.* However, federal regulations expressly *permit* slack-fill that is *functional—i.e.*, when the empty space in the container, among other things, serves to protect of the contents of the package, is

required by the machines used to enclose the package, or results from unavoidable product settling during shipping and handling. *Id.* § 100.100(a)(1)-(6).

C. Bratton's Allegations

Bratton, a resident of Columbia, Missouri, alleges that on or around September 22, 2016, he purchased a Reese's Pieces 4 oz. cardboard box and a Whoppers 5 oz. cardboard box for approximately $1.00 each from a retailer in Columbia, MO. SAC ¶ 6. The boxes he purchased disclosed the net weight of the contents, the number of pieces in each serving, and the number of servings per box. *Id.* ¶¶ 20-26. However, based on the *size* of the boxes alone, Bratton claims he "believed that [he was] purchasing more Product than was actually received." *Id.* ¶ 56. Specifically, he alleges that 41% of the Whoppers box was empty and 29% of the Reese's Pieces box was empty. *Id.* ¶ 3. Had he known the boxes were "substantially slack-filled," Bratton alleges, he "would not have purchased the Products, or would have purchased them on different terms." *Id.* ¶ 56. Bratton does not allege how much additional candy he expected to receive.

Bratton seeks to represent two classes: (i) "all Missouri citizens who, within the five years preceding the filing of this Complaint, purchased the Whoppers Products and/or the Reese's Pieces Products . . . ('Missouri Consumer Subclass')"; and (ii) "all persons in the United States who, within the relevant statute-of-limitations periods, purchased the Whoppers Products and/or the Reese's Pieces Products ('Nationwide Class')." *Id.* ¶¶ 60-61. On behalf of the Missouri Consumer Subclass, Bratton asserts that Hershey engaged in a deceptive practice in violation of the Missouri Merchandising Practices Act ("MMPA"), Mo. Rev. Stat. § 407.010 *et seq.* *Id.* ¶¶ 70-77. On behalf of the Nationwide Class, Bratton asserts an unjust enrichment claim. *Id.* ¶¶ 78-83. Bratton seeks certification of the Missouri Consumer Subclass and the Nationwide Class, injunctive relief, compensatory damages, pre-judgment interest, and reasonable attorneys' fees and costs. *Id.*, Prayer for Relief ¶¶ a-j.

ARGUMENT

Dismissal is proper where a complaint "fail[s] to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). To 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.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). This plausibility standard "asks for more than a sheer possibility that a defendant has acted unlawfully." *Ritchie v. St. Louis Jewish Light*, 630 F.3d 713, 717 (8th Cir. 2011) (internal quotation marks and citation omitted). "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not shown—that the pleader is entitled to relief." *Iqbal* 556 U.S. at 679. (internal quotation marks and citation omitted). "[T]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Smithrud v. City of St. Paul*, 746 F.3d 391, 397 (8th Cir. 2014) (quoting *Iqbal*, 556 U.S. at 678). Indeed, this Court "must not presume the truth of legal conclusions couched as factual allegations." *Hager v. Arkansas Dept. of Health*, 735 F.3d 1009, 1013 (8th Cir. 2013).[1]

[1] A court deciding a motion to dismiss may consider matters of which it may take judicial notice. *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 321 (2007); *see also McKinniss v. Gen. Mills, Inc.*, No. 07-cv-2521 (GAF), 2007 U.S. Dist. LEXIS 96107, at *10-11 n.1 (C.D. Cal. Sept. 18, 2007) (taking judicial notice of actual package referenced by the complaint in deciding a motion to dismiss). This includes the serving size and number of servings information on the boxes of Reese's Pieces and Whoppers because the packaging is "embraced" by Plaintiff's complaint. *See Gorog v. Best Buy Co.*, 760 F.3d 787, 791 (8th Cir. 2014) ("Though matters outside the pleading may not be considered in deciding a Rule 12 motion to dismiss, documents necessarily embraced by the complaint are not matters outside the pleading." (internal quotation marks and citation omitted)); *see also Kelly v. Cape Cod Potato Chip Co.*, 81 F. Supp. 3d 754, 761 (W.D. Mo. 2015) (considering product labels attached to the complaint); *Bush v. Mondelez Int'l, Inc.*, No. 16-cv-2460 (RS), 2016 U.S. Dist. LEXIS 140013, at *2 n.1 (N.D. Cal. Oct. 7, 2016) (considering the full product label, over plaintiff's objections, because the label was central to the plaintiff's claim and a plaintiff cannot survive a motion to dismiss by deliberately omitting references to the labels upon which the claims are based).

Moreover, as this Court has noted, because an MMPA claim is grounded in fraud, it is subject to the heightened pleading requirement of Fed. R. Civ. P. 9(b). *See Owen v. Gen. Motors Corp.*, No. 06-cv-4067 (NKL), 2006 U.S. Dist. LEXIS 70466, at *21-22 (W.D. Mo. Sept. 28, 2006) (citing Mo. Rev. Stat. § 407.020.1). The complaint must therefore "state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). To satisfy this requirement, the pleader must generally set forth the "who, what, where, when, and how of the alleged fraud." *BJC Health Sys. v. Columbia Cas. Co.*, 478 F.3d 908 , 917 (8th Cir. 2007) (internal quotation marks and citation omitted).

I. THE SECOND AMENDED COMPLAINT DOES NOT PLAUSIBLY ALLEGE THAT HERSHEY ENGAGED IN A DECEPTIVE ACT OR PRACTICE

To state a claim under the MMPA, a plaintiff must allege that (1) he purchased merchandise from the defendant; (2) the purchase was for personal or household purposes; and (3) he suffered an ascertainable loss of money or property (4) as a result of the defendant's use of acts, methods or practices that are unlawful under the act. *Kelly v. Cape Cod Potato Chip Co.*, 81 F. Supp. 3d 754, 757 (W.D. Mo. 2015) (citing Mo. Rev. Stat. § 407.025.1). Unlawful methods under the MMPA include deception, fraud, concealment, omission of any material fact, and unfair practices. *See id.*

The MMPA itself does not define "deception," but its implementing regulations do. *See* Mo. Rev. Stat. § 407.145; *Toben v. Bridgestone Retail Operations, LLC*, No. 11-cv-1834 (CEJ), 2013 U.S. Dist. LEXIS 137317, at *5 (E.D. Mo. Sept. 25, 2013), *aff'd*, 751 F.3d 888 (8th Cir. 2014). Deception is "any method, act, use, practice, advertisement or solicitation that has the tendency or capacity to mislead, deceive, or cheat, or that tends to create a false impression." 15 CSR 60-9.020(1). "Ultimately, the MMPA requires courts to make case-by-case determinations of whether a defendant's conduct violates principles of fair dealing." *Toben*, 2013 U.S. Dist.

LEXIS 137317, at *5 (citation omitted). Whether a reasonable consumer would be misled by a challenged practice is a central inquiry in an MMPA case. *See Hurst v. Nissan N. Am., Inc.*, No. WD 78665, 2016 Mo. App. LEXIS 263, at *23-24 (Mo. Ct. App. Mar. 22, 2016) ("Under the MMPA, plaintiffs . . . cannot base their claims on alleged misrepresentations upon which no reasonable consumer would rely."), *transferred*, 2016 Mo. LEXIS 235 (Mo. June 28, 2016)[2]; *Kelly*, 81 F. Supp. 3d at 760 (concluding no reasonable consumer purchasing potato chips would be confused by the term "natural" on the packaging); *see also* 15 CSR 60-9.010(1)(C) (defining "material fact" as "any fact which a *reasonable consumer* would likely consider to be important in making a purchasing decision" (emphasis added)).

To be sure, whether reasonable consumers are likely to be misled is often a question of fact that cannot be resolved on a motion to dismiss. *See Thornton v. Pinnacle Foods Grp., LLC*, No. 16-cv-158 (JAR), 2016 U.S. Dist. LEXIS 99975, at *5 (E.D. Mo. Aug 1, 2016) (declining to decide on a motion to dismiss whether a reasonable consumer would be deceived by a product label stating there was "nothing artificial" in muffin mix); *but see Kelly*, 81 F. Supp. 3d at 759-61 (concluding that an MMPA claim that "natural" was deceptive failed to state a claim). However, when a plaintiff's theory of deception assumes that consumers suspend common sense or ignore information plainly stated on a package, courts do not hesitate to find, as a matter of law, that the plaintiff has failed to show the defendant engaged in a deceptive act or practice. *See, e.g., Bush v. Mondelez Int'l, Inc.*, No. 16-cv-2460 (RS), 2016 U.S. Dist. LEXIS 140013, at *10 (N.D. Cal. Oct. 7, 2016) ("*Bush I*") (concluding that without "other indications of snack quantity" it is not plausible the consuming public could believe a container will be packed to the brim with snack),

[2] This appeal concerns the applicability of the puffery doctrine to the MMPA, which in turn may bear on the reasonable consumer standard.

appeal docketed, No. 17-15126 (9th Cir. Jan. 19, 2017); *Red v. Kraft Foods, Inc.*, No. 10-cv-1028 (GW), 2012 U.S. Dist. LEXIS 164461, at *8-12 (C.D. Cal. Oct. 25, 2012) (noting courts dismiss claims "as a matter of law" that assert that consumers will "disregard well-known facts of life" or "assume things about the products *other than* what the [package] actually says" (internal quotation marks and citations omitted)). Judged by these standards, Bratton fails to state a plausible claim for relief.

Bratton alleges in conclusory fashion that he "attached importance" to the "size" of the Reese's Pieces and Whoppers boxes and was thereby misled to believe he was "purchasing more Product than was actually received." SAC ¶ 56. For at least three reasons, these bald assertions defy common sense and fall short of a plausible showing that the packaging is likely to mislead a reasonable consumer.

First, the Products' labels prominently display the net weight, the number of candies in a serving, and the number of servings in the box. Consumers are thus expressly informed that they are getting 4 ounces, or roughly 153 pieces, of Reese's Pieces in each box, and 5 ounces, or roughly 63 pieces, of Whoppers. *See Kelly*, 81 F. Supp. 3d at 762 ("Plaintiff's assertion that she was deceived by the Defendants' labeling is contradicted by the full disclosure of the challenged ingredients by Defendants.").

Courts have recognized that where, as here, a package clearly and accurately discloses the quantity of its contents, it "is not reasonable to infer" that the package "would mislead reasonable consumers as to the quantity that they are receiving." *Ebner v. Fresh, Inc.*, No. 13-cv-477 (JVS), 2013 U.S. Dist. LEXIS 188889, at *19-20 (C.D. Cal. Sept. 11, 2013) (holding, on a motion to dismiss, that an allegedly slack-filled package could not deceive consumers "given that [it bears] an accurate label stating the net quantity"), *aff'd*, 838 F.3d 958 (9th Cir. 2016).

Indeed, within the past few months, several courts have recognized that net weight and quantity disclosures render slack-fill claims such as Bratton's implausible as a matter of law. *See Fermin v. Pfizer Inc.*, No. 15-cv-2133 (SJ) (ST), 2016 U.S. Dist. LEXIS 144851, at *5-6 (E.D.N.Y. Oct. 14, 2016) (dismissing consumer fraud claims under New York and California law because each of the packages clearly displayed the total pill-count of the label); *Bush v. Mondelez Int'l, Inc.*, No. 16-cv-2460 (RS), 2016 U.S. Dist. LEXIS 174391, at *4-5 (N.D. Cal. Dec. 16, 2016) ("*Bush II*") (concluding that a California consumer fraud claim was "implausible because [the] product labels disclose the net weight and number of cookies per container"), *appeal docketed*, No. 17-15126 (9th Cir. Jan. 19, 2017). Bratton's assertion that he relied on the size of the box alone and ignored the net weight and quantity disclosures renders his MMPA claim implausible. *See Fermin*, 2016 U.S. Dist. LEXIS 144851, at *5-6 ("This Court finds, as a matter of law, that it is not probable or even possible that Pfizer's packaging could have misled a reasonable consumer. Plaintiffs see[k] to be protected under packaging laws but to dispense with reading the package.").

Second, it is common knowledge that, in "our industrial civilization," substantially all packaged goods include some amount of empty or "head" space, which is necessary for efficient manufacturing and distribution. *United States v. 116 Boxes*, 80 F. Supp. 911, 913 (D. Mass 1948). The typical consumer "has been led to expect and desire machine-packing" and "recognizes that tight packing would often solidify into a mass [of] pieces which he prefers to have separate." *Id.* Consumers therefore "expect some slack or air space," *id*., and "[n]o reasonable consumer expects the overall size of the packaging to reflect precisely the quantity of the product contained therein." *Bush I*, 2016 U.S. Dist. LEXIS 140013, at *8; *see also Red*, 2012 U.S. Dist. LEXIS 164461, at *8-12 (noting courts should "dismiss[]"claims "as a matter of law"

that assert that consumers will "disregard well-known facts of life"). Bratton alleges that the Products' containers constitute "misrepresentations" because the containers are not filled to 100% capacity. *See* SAC ¶¶ 26-28. These assertions defy general knowledge and common sense, and fail to plausibly allege that Hershey engaged in a deceptive act or practice.

Third, a reasonable consumer, upon picking up the Reese's Pieces or Whoppers container, would instantly realize that it is not filled to the brim: with each movement of the package, its contents noticeably and audibly rattle—a fact of which this Court can take judicial notice. *See McKinniss*, 2007 U.S. Dist. LEXIS 96107, at *10-11. The noise that emanates from the container necessarily alerts consumers that the package includes some amount of empty space. A reasonable consumer could not believe otherwise. Indeed, Bratton himself notes that "[t]he more empty space there is in the Products' packaging, the more movement the Products will likely experience within the packaging." SAC ¶ 32.

In sum, no reasonable consumer could be deceived into believing that the Reese's Pieces and Whoppers packages are completely full or contain more than the amount of candy disclosed on their respective boxes. Bratton's allegations assume that consumers lack common sense and ignore readily-available information. Such claims deserve no credence. *See Williams v. First Nat'l Bank of St. Louis*, No. 14-cv-1458 (ERW), 2014 U.S. Dist. LEXIS 157519 at *10 (E.D. Mo. Nov. 7, 2014) ("Courts need not accept as true factual assertions that are contradicted by the complaint itself, by documents upon which the pleadings rely, or by facts of which the court may take judicial notice." (internal quotation marks and citation omitted)).

Even if it could satisfy Rule 8's basic plausibility standard, Bratton's complaint falls well short of pleading fraud with particularity, as required by Fed. R. Civ. P. 9(b). *See Bush II*, 2016 U.S. Dist. LEXIS 174391, at *7 (dismissing a consumer deception claim for failure to plead

fraud with particularity). To the contrary, Bratton implicitly concedes the accuracy of Hershey's net weight and quantity disclosures, and has not set forth facts sufficient to establish that a reasonable consumer could be deceived by the products' packaging. His MMPA claim should thus be dismissed.

II. THE COMPLAINT DOES NOT ALLEGE AN ASCERTAINABLE LOSS

Bratton's MMPA claim also fails because he received exactly what was advertised: 4 ounces of Reese's Pieces and 5 ounces of Whoppers. To state a deception or unfair practices claim under the MMPA, a plaintiff must allege that he suffered an ascertainable loss of money or property. *Kelly*, 81 F. Supp. 3d at 757; *see* 15 CSR 60-8.020(1). Determining whether a plaintiff has alleged an ascertainable loss requires application of the "benefit-of-the-bargain" rule, under which a prevailing party is awarded "the difference between the value of the product as represented and the actual value of the product as received." *Polk v. KV Pharm. Co.*, No. 09-cv-588 (SNLJ), 2011 U.S. Dist. LEXIS 144313, at *13 (E.D. Mo. Dec. 15, 2011).

The SAC alleges in conclusory fashion that "consumers were denied the benefit of the bargain between what was represented, and what was received" and that "Plaintiff and the Missouri Consumer Subclass members suffered an ascertainable loss as a result of Defendant's unlawful conduct because the actual value of the Products as purchased was less than the value of the Products as represented." SAC ¶¶ 4, 76. As illustrated by the pictures in the SAC, the Reese's Pieces and Whoppers labels prominently disclosed that the packages contained 4 ounces and 5 ounces of candy, respectively. SAC ¶¶ 20, 23. Bratton does not allege that he received less than those disclosed amounts. He therefore received exactly what he bargained for. *See Thompson v. Allergan USA, Inc.*, 993 F. Supp. 2d 1007, 1012-13 (E.D. Mo. 2014) (dismissing a MMPA claim because plaintiff received the quantity of eye drops exactly as advertised).

Bratton's claim is not saved by his boilerplate allegation that the "actual value of the

Products as purchased was less than the value of the Products as represented." SAC ¶ 57. He provides no basis for and pleads no facts supporting his allegation that the quantity of Reese's Pieces and Whoppers he bought had a lower "actual value" than what he paid for them. *See Thompson*, 993 F. Supp. 2d at 1012 (rejecting plaintiff's claim that smaller quantities of medication would be less expensive because "[e]ven assuming that less medication would produce a less expensive product for the consumer, the courts are not regulators of the fair market price of products"); *Carter v. Alcon Labs., Inc.*, No. 13-cv-977 (AGF), 2014 U.S. Dist. LEXIS 32381, at *12 (E.D. Mo. Mar. 13, 2014) (rejecting plaintiff's theory of loss based on what defendants charged for the medication and what they *could have* charged for a smaller bottle and concluding that without a showing of duress or price gouging, a plaintiff cannot complain that a manufacturer's choice of volume fill is an unfair practice under the MMPA). Bratton's MMPA should be dismissed on this ground as well.

III. THE UNJUST ENRICHMENT CLAIM FAILS AS A MATTER OF LAW

Bratton's nationwide claim for unjust enrichment should be dismissed for three independent reasons. *First*, Bratton's allegations are too vague to give Hershey notice of the legal basis for the claim. Unjust enrichment is a common law claim, the elements of which vary widely from state to state, yet Bratton fails to specify which state law applies to his claim on behalf of a nationwide claim. Such allegations fail to meet the basic pleading requirements of Fed. R. Civ. P. 8. *See Hines v. Overstock.com, Inc.*, No. 09-cv-991 (SJ), 2013 U.S. Dist. LEXIS 117141, at *33-34 (E.D.N.Y. Aug. 19, 2013) (dismissing unjust enrichment claim brought under undefined laws as conclusory where plaintiff "simply delineate[d]" the elements of the cause of action). Courts routinely dismiss complaints such as Bratton's that plead the elements of unjust enrichment without specifying under which state law relief is sought. *See id.*; *In re Wellbutrin XL Antitrust Litig.*, 260 F.R.D. 143, 167 (E.D. Pa. 2009) (dismissing plaintiffs' unjust enrichment

claims for failing to provide "any basis in law" or "link their claim to the law of any particular state"); *Young v. Wells Fargo & Co.*, 671 F. Supp. 2d 1006, 1016-17 (S.D. Iowa 2009) (finding that "[w]ithout reference to the law of any particular state," common law claims including an unjust enrichment claim were "so vague that [defendant] cannot reasonably prepare a response").

Second, to the extent Bratton seeks to assert violations of the laws of a state other than Missouri, he lacks standing to do so because he does not reside in, nor has he suffered any injury in, those states. *See Insulate SB, Inc. v. Advanced Finishing Sys.*, No. 13-cv-2664 (ADM), 2014 U.S. Dist. LEXIS 31188, at *30-35 (D. Minn. Mar. 11, 2014) (dismissing class claims for alleged violations of state laws because plaintiff did not reside in those states or allege injury in those states), *aff'd*, 797 F.3d 538 (8th Cir. 2015); *In re Magnesium Oxide Antitrust Litig.*, No. 10-cv-5943 (DRD), 2011 U.S. Dist. LEXIS 121373, at *37-38 (D. N.J. Oct. 20, 2011) (dismissing class claims because "[o]therwise a plaintiff would be able to bring a class action complaint under the laws of nearly every state in the Union without having to allege concrete, particularized injuries relating to those states, thereby dragging defendants into expensive nationwide class discovery, potentially without a good-faith basis"); *In re Wellbutrin*, 260 F.R.D. at 155 (dismissing class claims because "[t]he alternative . . . would allow named plaintiffs . . . with no injuries in relation to the laws of certain states referenced in their complaint, to embark on lengthy class discovery with respect to injuries in potentially every state").

Third, Bratton's unjust enrichment claim is premised on the same facts and circumstances as his MMPA claim. Because it merely repeats the same deficient allegations as his claim under the MMPA, the unjust enrichment claim should be dismissed as well. *See Carter*, 2014 U.S. Dist. LEXIS 32381, at *13; *Binkley v. Am. Equity Mortg., Inc.*, 447 S.W.3d 194, 196 (Mo. 2014) (en banc) (affirming trial court's dismissal of an unjust enrichment claim because it was based on

the same underlying conduct as an unsuccessful MMPA claim); *Ivie v. Kraft Foods Global*, No. 12-cv-2554 (RMW), 2013 U.S. Dist. LEXIS 25615, at *40-41 (N.D. Cal. Feb. 25, 2013) (dismissing an unjust enrichment claim as merely duplicative of an unsuccessful consumer fraud claim). The unjust enrichment claim should be dismissed in its entirety.[3]

IV. PLAINTIFF LACKS STANDING TO SEEK INJUNCTIVE RELIEF

Whatever comes of his monetary claims, Bratton's claim for prospective injunctive relief must be dismissed for lack of Article III standing. It is well established that a plaintiff who seeks a prospective injunction must face a future or continuing harm. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983) (finding no standing to seek an injunction "where there is no showing of any real or immediate threat that the plaintiff will be wronged again"); *Miller v. City of St. Paul*, 823 F.3d 503, 508 (8th Cir. 2016) ("Our court has recognized that a threatened injury must be certainly impending to constitute injury in fact, and that allegations of future injury must be particular and concrete." (internal quotation marks and citation omitted)). The named plaintiff must allege that he intends to purchase the product at issue in the future to establish standing to bring a consumer protection claim. *See Kelly*, 81 F. Supp. 3d at 762-63 (concluding plaintiff lacked standing to seek injunctive relief under the MMPA because the complaint "contains no allegations that Plaintiff intends to purchase [the product] from Defendants in the future").

Now that Bratton is aware of the presence of alleged slack-fill in the Reese's Pieces and Whoppers boxes, he cannot allege he will be subject to continuing injury. *See id.* ("Because Plaintiff is now aware of Defendants' alleged deception and knows the Chips are 'an inferior product that is unnatural and contains preservatives,' she is not likely to purchase the Chips as

[3] Bratton has twice amended his complaint, including once in response to Hershey's first motion to dismiss. Accordingly, Hershey respectfully requests that the SAC be dismissed in its entirety, with prejudice.

they exist at present."); *Ham v. Hain Celestial Grp., Inc.*, 70 F. Supp. 3d 1188, 1196 (N.D. Cal. 2014) ("Because [plaintiff] is now aware that [defendant's] products [contain slack-fill], she cannot allege that she would be fraudulently induced to purchase the products in the future."). Bratton alleges that he "would, however, likely purchase the Products in the future if the Products complied with the applicable laws." SAC ¶ 58. Bratton's conditional statement is insufficient to establish the threat of injury. *See Izquierdo v. Mondelez Int'l, Inc.*, No. 16-cv-4697 (CM), 2016 U.S. Dist. LEXIS 149795, at *13 (S.D.N.Y. Oct. 26, 2016) ("The Court interprets conditional statement to mean that [plaintiff] will not purchase the Candy unless Mondelez changes the Candy packaging. If the condition goes unfulfilled—that is, if Mondelez does not change the Candy packaging—[plaintiff] will not purchase the Candy again. Therefore, he will not be injured."). Bratton's claim for injunctive relief must therefore be dismissed.

CONCLUSION

For the reasons stated above, the Court should dismiss the SAC, in its entirety, with prejudice. Hershey respectfully requests oral argument on this Motion.

March 8, 2017

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CERTIFICATE OF SERVICE

The undersigned certifies that on this 8th day of March, 2017, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent notification of such filing to all counsel of record.

/s/ *Sonette T. Magnus*
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