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

JOHN DALY, individually and on behalf of all others similarly situated, Plaintiff, v. THE WONDERFUL COMPANY, LLC. Defendant.	Case No. 1:24-cv-01267 **PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT**

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PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS

Now comes the Plaintiff, John Daly ("Plaintiff"), individually and on behalf of all others similarly situated, by and through his attorneys, and for his response to Defendant, The Wonderful Company, LLC ("Defendant"), Motion to Dismiss Plaintiff's Complaint, Plaintiff hereby states as follows:

I. INTRODUCTION

This is a "Natural" mislabeling case. Defendant intentionally labels its products with objectively false claims that the products are "Natural" when in fact the products contain synthetic microplastics. These false claims are on the products' packaging, offered to entice consumers to purchase Defendant's products. Plaintiff in his Complaint, (the "Complaint"), alleged that the products he purchased contained microplastics. Compl. ¶25. Plaintiff alleged that reasonable consumers expect that products labeled as "Natural" will not contain synthetic microplastics. Compl. ¶ 21. Defendant's conduct amounts to fraud. Yet, Defendant asks this Court to rule that Plaintiff cannot state a claim upon which relief can be granted. Defendant is wrong.

Defendant argues in its Motion to Dismiss that Plaintiff's Complaint should be dismissed because (1) Plaintiff's claims are preempted; (2) Plaintiffs failed to state a claim upon which relief may be granted. As Plaintiff will demonstrate, Defendant's arguments fail, and they should all be denied with prejudice.

II. FACTUAL BACKGROUND

This case is brought on behalf of all purchasers of Defendant's Products who purchased the products in the United States between January 18, 2019, and the present. Compl. ¶ 39. This case is also brought on behalf of a subclass of all purchasers of Defendant's Products who purchased the products in Illinois between January 18, 2019 and the present. Compl. ¶ 41. Plaintiff

alleged that the Products are mislabeled because Defendant labels the Products as "Natural Artesian Water" when the products contain microplastics. *Id.* at ¶ 6. Plaintiff alleged that the microplastics in Defendant's Products are synthetic. *Id* at ¶8. Plaintiff alleged that Defendant knew that the Product's "Natural" labeling was deceptive yet knowingly mislabeled the Products. *Id*. at ¶ 35-37. Plaintiffs were unaware that the products contained microplastics when they purchased it. *Id*. at ¶33. Furthermore, due to Defendant's intentional, deceitful practice of falsely labeling the Products as "Natural Artesian Water", Plaintiff could not have known that the Products contain microplastics. *Id*. at ¶ 32. Plaintiff and the Class and Sub-Class members were misled into purchasing products that did not provide them with the benefit of the bargain they paid money for, namely that Defendant's Products would be Natural. *Id*. at ¶ 29-30. Plaintiff alleges that the false labeling that the Products are Natural is present on the products they purchased and is substantively identical to the standardized packaging of Products sold by Defendant to thousands of other class members in Illinois and throughout the United States. *Id.* at ¶¶ 6. The allegations in this case do not arise from any oral or individualized interactions between class members and Defendant, but rather rely wholly on false affirmative misrepresentations made by Defendant on its standardized packaging. *Id*. Plaintiff alleges that Defendant's mislabeling constitutes violations of the Illinois Consumer Fraud and Deceptive Businesses Practices Act ("ILCFA"), 815 ILCS 505/1 et seq., common law fraud, and unjust enrichment. *Id*. at ¶¶ 1, 44-63. Plaintiff alleges that the claims at issue in this case will meet all elements required under Rule 23 for class certification. *Id*. at ¶¶ 41.

III. LEGAL STANDARD

"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 (2009), quoting *Bell Atlantic v. Twombly*, 550 U.S. 544, 570 (2007). If a complaint

contains well-pleaded factual allegations, then a court should assume that the allegations are true when determining if they are plausible enough to entitle the plaintiff to relief. *Id*. A court's evaluation of a motion to dismiss requires it to accept the complaint's well-pleaded factual allegations as true and to draw all reasonable inferences in the plaintiff's favor. *Bell Atlantic*, 550 U.S. at 555–56. "Twombly [i.e. Bell Atlantic] does not require a court at the motion-to-dismiss stage to consider whether the factual allegations are probably true. We made it clear, on the contrary, that a court must take the allegations as true, no matter how skeptical the court may be." *Ashcroft*, 556 U.S. at 696.

"A complaint need not 'allege all, or any, of the facts logically entailed by the claim,' and it certainly need not include evidence." *Tamayo v. Blagojevich*, 526 F.3d 1074, 1081 (7th Cir. 2008), citing *Bennett v. Schmidt*, 153 F.3d 516, 518 (7th Cir. 1998). "Litigants are entitled to discovery before being put to their proof, and treating the allegations of the complaint as a statement of the party's proof leads to windy complaints and defeats the function of Rule 8." *Bennett*, 153 F.3d at 519 (citations omitted). "A plaintiff's complaint need only provide a 'short and plain statement of the claim showing that the pleader is entitled to relief,' sufficient to provide the defendant with 'fair notice' of the claim and its basis. *Tamayo*, 526 F.3d at 1081, citing Fed. R. Civ. P. 8(a)(2) and *Bell Atlantic*, 550 U.S. at 555. "[A] complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations…" *Id*. (citations omitted).

IV. ARGUMENT

A. PLAINTIFF'S CLAIMS ARE NOT PREEMPTED

Defendant's erroneous claim that 21 U.S. C. § 343-1 preempts Plaintiff's claims regarding its "Natural" labeling should be denied with prejudice. The Supremacy Clause of the Constitution provides that the Constitution and federal laws constitute "the supreme Law of the Land . . . Laws of any State to the Contrary notwithstanding." U.S. Const., art. VI, cl. 2. Accordingly, the

Supremacy Clause "invalidates state laws that 'interfere with, or are contrary to,' federal law." *Dolin v. GlaxoSmithKline LLC*, 901 F.3d 803, 811 (7th Cir. 2018) (quoting *Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 712 (1985)), *cert.denied*, 139 S. Ct. 2636 (2019).

Defendant argued Plaintiff's claims are expressly and impliedly preempted because their claims are different from the requirements of 21 CFR 165.110 (a)(2)(i-iv). Defendant's Mot. to Dismiss, at p. 8. Defendant is wrong. Conflict preemption arises when state law conflicts with federal law to the extent that "compliance with both federal and state regulations is a physical impossibility," or the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Patriotic Veterans, Inc. v. Indiana*, 736 F.3d 1041, 1049 (7th Cir. 2013). In the case at bar, the federal and state misbranding laws include identical language characterizing when a food is misbranded. *See* 21 U.S.C. § 343(a)(1); 410 ILCS 620/11(a). Therefore, compliance with both the federal and state misbranding laws cannot be impossible, and the state law cannot be an obstacle to the purposes and objectives of congress. *See Patriotic Veterans, Inc. v. Indiana*, 736 F.3d 1041, 1049 (7th Cir. 2013). 21 CFR 165.110 (a)(2)(i) explicitly states "[t]he name of water from a well tapping a confined aquifer in which the water level stands at some height above the top of the aquifer is "artesian water" or "artesian well water." 21 CFR 165.110 (a)(2)(i) does not address use of the term "Natural". The Food and Drug Administration ("FDA") does not have a binding policy on the term "natural." Therefore, "Natural" is a voluntary label and is not required by 21 CFR 165.110 (a)(2)(i). The Baker case is instructive on this issue. *Baker v. Nestle S.A.,* No. 218CV03097VAPPJWX, 2019 WL 960204, at *2 (C.D. Cal. Jan. 3, 2019). In *Baker,* the plaintiffs brought a putative class action against the defendant for misrepresenting that bottled water was "pure" when it contained microplastics. *Baker* No. 218CV03097VAPPJWX, at 1. The *Baker* Court held that the Food and Drug Administration

("FDA") explicitly regulates the term "purified water", and as a result claims based on the term "purified water" are preempted. *Id* at 2. To comply with the *Baker* plaintiffs' demands the defendant would need to stop using the term "pure" or "purified water" in conflict with 21 C.F.R. § 165.110(a)(2)(iv). However, in this case, complying with Plaintiff's demands would not require Defendant to change the "artesian water" labeling, instead Defendant would have to stop voluntarily labeling the product as "Natural" and would not conflict with 21 CFR 165.110 (a)(2)(i). There is no conflict between Defendant's compliance with 21 CFR 165.110 (a)(2)(i) and compliance with 410 ILCS 620/11(a) and the ICFA. To the contrary, the FDCA prohibits misbranding of food, which occurs if the food's label is "false or misleading in any particular," and Plaintiff's state-law claims would also require Defendant to refrain from falsely or misleadingly label their products. See 21 U.S.C. § 343(a)(1); 410 ILCS 620/11(a). Plaintiff is attempting to enforce state law claims regarding Defendant's use of "Natural" labeling, which is misleading to reasonable consumers. Plaintiff's claims are not preempted. See *Lockwood v. Conagra Foods, Inc.,* 597 F. Supp. 2d 1028, 1034 (N.D. Cal. 2009) (holding that "natural" labeling claims are not subject to by field or conflict preemption, or primary jurisdiction). For these same reasons Plaintiff's claims are not subject to the ICFA safe harbor provisions because Defendant's use of "natural" labeling is not specifically authorized by laws administered by any regulatory body or officer acting under statutory authority of this State or the United States. *See* 815 Ill. Comp. Stat. Ann. 505/10b; *Bell v. Publix Super Markets, Inc.*, 982 F.3d 468, 486 (7th Cir. 2020) (holding that the safe harbor provision of the ICFA did not apply to mislabeling claims because the FDA did not authorize the defendants' "100% Grated Parmesan Cheese" label as nondeceptive); *Vanzant v. Hill's Pet Nutrition, Inc.*, 934 F.3d 730, 738 (7th Cir. 2019) (holding safe harbor provision did

not apply where an FDA policy guide did not "specifically authorize" the defendant's prescription labeling on its pet food).

B. DEFENDANT'S ARGUMENTS ARE INAPPROPRIATE FOR A MOTION TO DISMISS.

Plaintiff plausibly alleged factual content that allows the Court to draw the reasonable inference that Defendant is liable for the misconduct alleged. *See Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009). First, Plaintiff identified the specific Products Plaintiffs allege were deceptively sold. Compl. ¶ 6. Second, Plaintiff plausibly alleged that he was drawn to purchase the Products because of their "Natural" labels. Compl. ¶ 31. Plaintiff explained how he, and any reasonable consumer, interprets the statement "Natural" to mean the products they purchase will not contain synthetic materials. Compl. ¶¶ 21. Plaintiff alleged that the microplastics in Defendant's Products are synthetic and the inclusion of microplastics in bottled water is a material concern to consumers. Compl. ¶8-16. Plaintiff alleged that he was unaware of the Product's inclusion of microplastics at the time he purchased the Products and could not have known because of Defendant's misrepresentation. Compl. ¶ 30-38. Plaintiff alleged that the Products he purchased contained microplastics despite being labeled as natural. Compl ¶ 25. Plaintiff alleged that he and the class have been deprived of the benefit of the bargain of their purchase because the Products contain microplastics when Defendant advertised the Products as Natural. Compl. ¶ 29-30. Plaintiff alleged that Defendant knew that the Products "natural" labeling was deceptive. Compl. ¶ 35-38. Finally, Plaintiffs alleged that he suffered an injury in fact as a result of Defendant's conduct. Compl. ¶ 38.

Defendant's arguments ignore the well pled facts of the Complaint and assert issues of fact. First, Defendant claims Plaintiff failed to allege a material misrepresentation. Defendant's Mot. to Dismiss, at p. 3. That is false. To be material under Illinois law, the misrepresented fact must be essential to the transaction between the parties. *Ryan v. Wersi Elec. GmbH & Co.*, 59 F.3d 52, 54

(7th Cir. 1995) (citing *Mack v. Plaza Dewitt Ltd. Partnership,* 137 484 N.E.2d 900, 906 (1985). A misrepresentation is "material" and therefore actionable if it is such that ***had the other party been aware of it, he would have acted differently***. *Mack v. Plaza Dewitt Ltd. P'ship*, 484 N.E.2d 900, 906 (1985) (internal citations omitted) (emphasis added). Plaintiff explained did not expect a "natural" product to contain microplastics. Compl. ¶ 21. Plaintiffs further explained that Defendant's Products contain synthetic microplastics. Compl. ¶ 8-16, 25.. Plaintiffs explained that microplastics are deleterious to health, and that avoiding microplastics is a material concern to consumers and Plaintiff. Compl. ¶8-16. Plaintiff alleged that he does not want the Products because they do not contain all the benefits of the bargain Plaintiffs paid money for, namely that the Product would be Natural. Compl. ¶29-30. Had Plaintiff and the class members been aware of Defendant's misrepresentations they would have acted differently by not purchasing the Products or by paying less in exchange for the Products. See Comp. ¶ 8-16, 29-30.

Richburg v. Conagra Brands, Inc. is distinguishable from the case at bar. No. 22 CV 2420, 2023 WL 1818561, at *7 (N.D. Ill. Feb. 8, 2023). The *Richburg*, plaintiffs challenged the labels "only real ingredients" and "100% ingredients from natural sources" on the basis that the products contained PFAS. *Id.* at 7. The *Richburg* court held that the labels were correct as a matter of law, because the FDA, exempts "[s]ubstances migrating to food from equipment or packaging" from compliance with this regulation, meaning that they do not need to be included in the ingredient list. *Id.* (internal citation omitted). The court concluded that reasonable consumers would not consider PFAS to be an "ingredient" in the challenged food products based on the packages' representation that the products contain "only real ingredients" and "100% ingredients from natural sources." *Id.* (Emphasis in original). Here, the challenged label does not refer to ingredients, rather the statement is a broad claim that the Product is "natural". The FDA does not

have a binding policy on the term "natural", so the challenged "Natural" label on the Products cannot be correct as a matter of law. Furthermore, there is no FDA exemption or approved levels of microplastics for human consumption. Microplastics are polypropylene, polyethylene, polyacetal, polystyrene, and other synthetic polymers. Compl. ¶ 7-8. Microplastic are small solid plastic particles with different structures, shapes, sizes, and polymers. *Id.* They do not fit the description of substances allowed to be in bottled water. *See* 21 C.F.R. § 165.110(b)(4). Reasonable consumers cannot be expected to believe bottled water contains substances not approved for human consumption by the FDA. See 21 C.F.R. § 165.110(b)(4).

Ibarrola is equally misapplied to the case at bar. *Ibarrola v. Kind, LLC*, 83 F. Supp. 3d 751, 757 (N.D. Ill. 2015). The plaintiff's in *Ibarrola* challenged the defendant's "no refined sugar" labeling when the Product contained evaporated cane juice. *Id.* The court dismissed the plaintiff's claims because "no reasonable consumer Reasonable consumers do not believe that they are eating straight sugar cane…because sugar cane in its natural, unprocessed state is ***indigestible.*** *Ibarrola v. Kind, LLC,* 83 F. Supp. 3d 751, 758 (N.D. Ill. 2015) (emphasis added). Reasonable consumers cannot be expected to believe bottled water contains substances not approved for human consumption by the FDA. See 21 C.F.R. § 165.110(b)(4). Excluding microplastics from Defendant's Products, or removing the natural labeling, would not result in an indigestible product.

The pesticide labeling cases are not applicable to the case at bar because the challenged labeling was all distinguishable from Defendant's natural labeling, the glyphosate was added extremely early in the upstream of processing, and FDA has approved levels of glyphosate in food products. The Axion plaintiffs challenged the defendant's brand name "Florida's Natural" rather than a label. *Id.* at 183. Whereas here, Defendant's label is an affirmative statement that the Product is natural. Compl. ¶ 6. Next, the Axion court noted that "natural" labeling is more misleading when

the defendant intentionally includes an unnatural ingredient; however, the court's basis for dismissing the plaintiffs was that reasonable consumers would not find "Florida's Natural" brand labeling misleading because the defendant did not introduce the glyphosate rather it was trace amounts early in the production process. *Id.* at 183. *Axon v. Citrus World, Inc.,* 354 F. Supp. 3d 170, 183–84 (E.D.N.Y. 2018*), aff'd sub nom. Axon v. Florida's Nat. Growers, Inc.,* 813 F. App'x 701 (2d Cir. 2020); See also *Podpeskar v. Dannon Co., Inc.,* No. 16-CV-8478 (KBF), 2017 WL 6001845, at *1 (S.D.N.Y. Dec. 3, 2017) (dismissing plaintiff's claims that she was deceived by yogurt labels containing the word "natural" because rather than alleging that an ingredient used in the products was unnatural, plaintiff contended that "several steps back in the food chain, there may have been something unnatural ingested by a cow"). Importantly, the *Axion* court did not hold that a "natural" labeling required a defendant to include an unnatural ingredient to be a material misrepresentation. *Id.* Here, Plaintiff has alleged that microplastics were introduced by Defendant, through its bottling process and by the bottles discharging microplastics into the water themselves. Compl. ¶ 11-12. In other words, Defendant's conduct, rather than conduct upstream in the manufacturing process, resulted in the microplastic contamination that renders Defendant's label misleading. *Id.*

The *Parks* plaintiffs challenged the defendant's "natural" labeling, but failed set forth whether that amount of glyphosate in the product was harmful or innocuous. *Parks v. Ainsworth Pet Nutrition, LLC, 377* F. Supp. 3d 241, 248 (S.D.N.Y. 2019). The *Parks* Court also noted that the inclusion of an unnatural ingredient in a "natural" labeled product was more misleading, however court also did not hold that was the only way "natural" labeling could be a material misrepresentation. *Id.* The *Parks* court held that plaintiffs failed to establish a material misrepresentation because in the absence of "the presence of *negligible amounts* of glyphosate in

a *dog food product* that do not have harmful, 'toxic,' or 'carcinogenic' effects is not likely to affect consumers' decisions in purchasing the product and is thus not material." *Id.* (Emphasis added). Here Plaintiff explicitly alleged that exposure to microplastics through ingestion can lead to gastrointestinal problems such as irritable bowel syndrome; endocrine disruption such as adverse effects on hormonal balance and reproductive function; and cardiovascular problems such as increase of oxidative stress and impaired regular heart function. Compl. ¶ 14.

The *In re Gen. Mills Glyphosate Litig.,* plaintiffs challenged the label "Made with 100% Natural Whole Grain Oats". No. CV 16-2869 (MJD/BRT), 2017 WL 2983877, at *6 (D. Minn. July 12, 2017). The *General Mills* court concluded that "'Made with 100% Natural Whole Grain Oats' cannot plausibly be interpreted to be more restrictive with regard to synthetic residue than the standard for labelling a product as 'organic' under federal law." *Id.* The court based its reasoning on federal regulations allowing foods bearing the "organic" label to contain chemical pesticide residue, so long as it is less than 5 percent of EPA tolerance for the detected residue, which the challenged products satisfied. *Id.*; *See* 65 Fed. Reg. 80548-01, 80629 (Dec. 21, 2000); See Also *Hawyuan Yu v. Dr Pepper Snapple Grp., Inc.,* No. 18-CV-06664-BLF, 2020 WL 5910071, (N.D. Cal. Oct. 6, 2020) (Joining *Axon, Parks,* and *General Mills* and holding that reasonable consumers would not interpret "natural" and "All Natural Ingredients", as containing no trace pesticides because the FDA does not require trace glyphosate to be disclosed on food labels and glyphosate is allowed to be present in foods in under a specified tolerance, which the challenged products satisfied). There is no such regulation for microplastics. The regulations allowing for trace chemicals in bottled water allow for the inclusion of ***chemical concentrations of chloride, iron, manganese, phenols, total desolved solids, and zinc.*** 21 C.F.R. § 165.110(b)(4), (emphasis added). Microplastics are not chloride, iron, manganese, phenols, dissolved solids, or

zinc, but instead are ***polypropylene, polyethylene, polyacetal, polystyrene, and other synthetic polymers***. Compl. ¶ 7-8 (emphasis added). Microplastic are small solid plastic particles with different structures, shapes, sizes, and polymers. *Id*. They do not fit the description of allowed substances in 21 C.F.R. § 165.110(b)(4). There are no FDA approved levels of microplastics for human consumption. Reasonable consumers cannot be expected to believe bottled water contains substances not approved for human consumption by the FDA. See 21 C.F.R. § 165.110(b)(4).

Defendant is wrong. The analysis applied to PFAS and glyphosate cases does not defeat Plaintiff's claims. Furthermore, the reasoning of the PFAS and glyphosate cases establishes that the FDCA expressly allows threshold concentrations of specific chemicals in bottled water, not just any 'inorganic substances", "organic chemicals", or "pesticides and other synthetic organic chemicals". See 21 C.F.R. § 165.110(b)(4).

Second, Defendant argued Plaintiff failed to allege intent to deceive because Plaintiff failed to allege that Defendant was aware of testing revealing the presence of microplastics in water. Defendant's Mot. to Dismiss p. 5. To sufficiently plead a cause of action based on the ICFA a plaintiff must allege the defendant's intent that the plaintiff rely on the deception, not intent to deceive on the part of the defendant. *McIntosh v. Walgreens Boots All., Inc.,* 2019 IL 123626, ¶ 21, 135 N.E.3d 73, 80; See *De Bouse v. Bayer AG*, 235 Ill. 2d 544, 550, 337 Ill.Dec. 186, 922 N.E.2d 309 (2009); *Oliveira v. Amoco Oil Co.*, 201 Ill. 2d 134, 149, 267 Ill.Dec. 14, 776 N.E.2d 151 (2002); *Cripe v. Leiter*, 184 Ill. 2d 185, 191, 234 Ill.Dec. 488, 703 N.E.2d 100 (1998). To sufficiently plead a cause of action for common law fraud, Plaintiff is required to allege sufficient facts to show Defendant's intent to deceive, which be shown by circumstantial evidence *Washington Courte Condo. Ass'n-Four v. Washington-Golf Corp.*, 267 Ill. App. 3d 790, 815, 643 N.E.2d 199, 216 (1994); *Vitale v. Illinois Department of Revenue* (1983), 118 Ill.App.3d 210, 73

Ill.Dec. 702, 705, 454 N.E.2d 799, 802; *Mother Earth, Ltd. v. Strawberry Camel, Ltd.* (1979), 72 Ill.App.3d 37, 50, 28 Ill.Dec. 226, 390 N.E.2d 393; See also *Warren v. Le May* (1986), 142 Ill.App.3d 550, 573, 96 Ill.Dec. 418, 491 N.E.2d 464 (intent to deceive shown by "the proof of certain facts and circumstances from which the jury may infer other connected facts which usually and reasonably follow according to the common experience of mankind").

Regarding the ICFA, Plaintiff alleged sufficient allegations that Defendant intended for consumers to rely upon the "Natural" labeling when purchasing the Product, which is all that is required for ICFA claims, not intent to deceive. Compl. 6, 35-38, 48; *McIntosh,* 2019 IL 123626, ¶ 21. Regarding common law fraud, Plaintiff sufficiently alleged that Defendant intended to deceive consumers because Plaintiff alleged that copious research has shown the deleterious effects of plastic bottles on both the environment and human health, yet Defendant continues to bottle its water in plastic and continues to label the Products as Natural. Compl. ¶ 37. Defendant is a large corporation with professional staff and employees, it is reasonable to infer that Defendant is aware of the negative impacts of using plastic bottles and the contamination of microplastics in the Products. See *Warren v. Le May* (1986), 142 Ill.App.3d 550, 573, 96 Ill. Dec. 418, 491 N.E.2d 464 (intent to deceive shown by "the proof of certain facts and circumstances from which the jury may infer other connected facts which usually and reasonably follow according to the common experience of mankind").

Third, Defendant argued that Plaintiff failed to allege an injury and damages. Defendant asserted that Plaintiff failed to plausibly allege that the Products he purchased contained microplastics. Defendant's Mot. to Dismiss, at p. 6. That is false. Plaintiff explicitly alleged that their Products contained microplastics. Compl. ¶ 25. Defendant baselessly asserted that paragraph 25 of the complaint is a conclusion drawn from studies cited in the complaint, but that is a false

assumption. Plaintiff's allegations that his Products contain microplastics is a standalone factual allegation. "A complaint need not 'allege all, or any, of the facts logically entailed by the claim,' and it certainly need not include evidence." *Tamayo v. Blagojevich*, 526 F.3d 1074, 1081 (7th Cir. 2008), citing *Bennett v. Schmidt*, 153 F.3d 516, 518 (7th Cir. 1998). Paragraph 25 of the Complaint does not reference any studies, but instead factually asserts that Plaintiff's Products actually contain microplastics. See Compl. ¶ 29. Fed. R. Civ. P. 9(b) "does not require a plaintiff to plead facts that if true would show that the defendant's alleged misrepresentations were indeed false, it does require the plaintiff to state 'the identity of the person making the misrepresentation, the time, place, and content of the misrepresentation, and the method by which the misrepresentation was communicated to the plaintiff.'" *Uni*Quality, Inc. v. Infotronx, Inc*., 974 F.2d 918, 923 (7th Cir. 1992), citing *Bankers Trust Co. v. Old Republic Ins. Co.,* 959 F.2d 677, 683 (7th Cir.1992). Plaintiff's allegations show Defendant made misrepresentations to Plaintiff, on December 17, 2022, at a Meijer in the Northern District of Illinois, by claiming the Products were "Natural Artesian Water" when they contained microplastics, and this was communicated to Plaintiff through Defendant's label. See Compl. ¶ 22-24. Yet, Defendant asserts Plaintiff's allegations must be conclusory for a lack of information about testing performed on Plaintiff's products. The investigation performed on Plaintiff's allegations is attorney work product. See *Hickman v. Taylor*, 329 U.S. 495, 511, 67 S. Ct. 385, 393, 91 L. Ed. 451 (1947). Plaintiff is not required to include attorney work product in the pleadings. The test data of Plaintiff's Products is evidence. See Fed. R. Evid. 702(b). In other words, Defendant's entire argument on this issue is a demand for evidence in the pleadings. Defendant's argument is therefore inappropriate for a motion to dismiss.[1] Next,

[1] Defendant's argument is a disingenuous attempt to seek attorney work product. Either Plaintiff includes attorney work product, breaching that protection and entitling Defendant to discover preliminary testing, consultation experts, and mental impressions, or, as Defendant has argued, his

Defendant argued that plaintiff failed to adequately allege a price premium. Defendant's Mot. to Dismiss, at p. 6. That is false. The actual damage element of a private ICFA action requires that the plaintiff suffer "actual pecuniary loss." *Kim v. Carter's Inc.,* 598 F.3d 362, 365 (7th Cir. 2010) (citing *Mulligan v. QVC*, Inc., 888 N.E.2d 1190, 1197 (2008)). In the case of a private ICFA action brought by an individual consumer, "actual loss may occur if the seller's deception deprives the plaintiff of 'the benefit of her bargain' by causing her to pay 'more than the actual value of the property.' *Kim*, 598 F.3d at 365 (citing *Mulligan*, 888 N.E.2d at 1197–98). "The rule is based on the theory that a defrauded party is entitled to the benefit of his bargain in a transaction and should be placed in the same position that he would have occupied had the false representations on which he acted been true." *Mulligan*, 888 N.E.2d at 1196–97 (internal citations omitted). Plaintiff explicitly pled that he was misled into purchasing products that did not provide him with the benefit of the bargain he paid money for, namely that Defendant's Products would be Natural. Compl. ¶ 33. Plaintiff paid for **all** the advertised features of the Products. The Products do not have **all** the advertised features. Compl. ¶¶ 7. Therefore, Plaintiff has paid money to Defendant for a product feature he did not receive. *Id*. Furthermore, Plaintiffs alleged that microplastics are deleterious to health and microplastic contamination is a material concern to consumers. Compl. ¶¶ 10-14. Finally, Plaintiff explicitly plead they suffered concrete and particularized injuries including ***lost money***, wasted time, stress, aggravation, frustration, loss of trust, loss of serenity, and loss of confidence in product labeling. Compl. ¶ 41. (emphasis added). Defendant failed to address the

allegations must be conclusions. Plaintiff is entitled, through the discovery process, to hire an independent expert to independently confirm the investigation performed by Plaintiff's Counsel, and to present a report of the independent results without breaching attorney work product protections.

ways in which the contamination resulted in a loss of value in the Products. Defendant's MTD at p. 7.

Finally, Defendant argued that Plaintiff's unjust enrichment claims also fail. That is not accurate. When "an unjust enrichment claim rests on the same improper conduct alleged in another claim, then the unjust enrichment claim will be tied to this related claim – and, of course, unjust enrichment will stand or fall with the related claim." *DeMaso v. Walmart Inc.,* No. 21-CV-06334, 2023 WL 1800208, at *6 (N.D. Ill. Feb. 7, 2023), quoting *Cleary v. Philip Morris Inc.*, 656 F.3d 511, 517 (7th Cir. 2011). As a result, Plaintiff's unjust enrichment claims are directly tied to, and depend upon, Plaintiff's ILCFA claims. Because Plaintiff's ICFA claims do not fail, Plaintiff's unjust enrichment claims also do not fail. *Cleary v. Phillip Morris Inc., 6*56 F.3d 511, 517 (7th Cir. 2011).

V. CONCLUSION

Plaintiff respectfully requests the Court deny Defendant's Motion to Dismiss Plaintiff's Complaint with prejudice, order Defendant to file an Answer to Plaintiff's Complaint, and award such other relief as the Court deems appropriate under the circumstances. Should the Court feel that certain necessary allegations are lacking from Plaintiff's Complaint and therefore grant Defendant's MTD justice would require, (as stated in Fed. R. Civ. P. 15(a)(2), that Plaintiff be granted leave to file a First Amended Complaint so that Defendant's alleged fraudulent conduct in the labeling of the Products not be allowed to go unchecked. *See McDaniel v. Loyola Univ. Med. Ctr.*, 317 F.R.D. 72, 76 (N.D. Ill. 2016).

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I hereby certify that, on April 26, 2024 a copy of the foregoing Response to Defendant's Motion to Dismiss Plaintiffs' Complaint was filed electronically. 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/ Steven G. Perry
Attorney for Plaintiff