UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Brent Charette,

Plaintiff,

v.

Civil Action No. 23-10114
Honorable Jonathan J.C. Grey

adidas America, Inc.,

Defendant.
_____/

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS (ECF No. 5)

On January 14, 2023, Brent Charette brought this complaint against adidas[1] America, Inc. (ECF No. 1.) Charette claims that adidas misled consumers and thus violated state consumer protection acts, including the Michigan Consumer Protection Act (MCPA); the implied warrant of merchantability or fitness; and the Magnuson Moss Warranty Act (MMWA). Charette also alleges that, through the same conduct, adidas committed common law fraud, negligent misrepresentation, and was unjustly enriched.

[1] The case caption lists the defendant as "Adidas America, Inc." However, in its filings, adidas refers to itself in the lowercase. The Court will use the company's preferred uncapitalized name in this opinion.

On May 16, 2023, adidas filed a motion to dismiss under Federal Rules of Civil Procedure 12(b)(1)[2] and (6) for lack of subject matter jurisdiction and failure to state a claim. (ECF No. 5.) For the following reasons, the Court **GRANTS** the motion to dismiss under Rule 12(b)(6) and **DISMISSES** Charette's cause of action.

I. Background

Charette claims to have purchased a Detroit Red Wings hockey jersey manufactured by adidas within the last two years from a shop in the Little Caesars Arena, the Red Wings home site.[3] He further alleges that the jersey was marked as "authentic." Charette states that the authentic label is promoted by retailers as indicating that the jersey uses the same construction and material as the in-game jerseys worn by the Red Wings professional hockey players. Further, he claims that historical usage and understanding support that belief. These authentic jerseys are distinguished from so-called "replica jerseys" that use the same style and

[2] adidas makes conclusory claims that the Court lacks subject matter jurisdiction; however, it never fully explains its position. Since the Court rules on other grounds, it will withhold judgment on that issue.

[3] It is unclear from the pleading whether Charette purchased more than one jersey from different locations. Given the vague allegations and given that it is not relevant to the analysis, the Court assumes he only purchased one jersey.

design as the in-game jerseys but do not profess to be the same construction and material.

Charette claims that adidas promoted its authentic-labeled jerseys as having the same construction and material as the in-game hockey jerseys used by the professional athletes. However, he claims that the authentic jerseys are in fact different from the in-game jerseys in quality and materials. In the complaint, he includes many side-by-side photo comparisons of authentic labeled jerseys and real in-game jerseys.

adidas argues that Charette has failed to meet his pleading burden under Federal Rules of Civil Procedure 8(a) and 9(b). The Court agrees.

II. Legal Standards

Federal Rule of Civil Procedure 8(a) requires that a complaint include a short and plain statement of a claim showing that the plaintiff is entitled to relief. The Court may grant a motion to dismiss under Rule 12(b)(6) if the complaint fails to allege facts sufficient to "state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 570 (2007)). The Court must be able to draw a reasonable inference from its face that the defendant is liable for the misconduct alleged. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). When assessing a

motion to dismiss under Rule 12(b)(6), the Court must give the plaintiff the benefit of the doubt and must accept all the complaint's factual allegations as true. *Keys v. Humana, Inc.*, 684 F.3d 605, 608 (6th Cir. 2012).

Fraud claims are governed by Rule 9(b), which places a heightened pleading standard on the plaintiff. That rule requires that a plaintiff (1) specify the fraudulent statements, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain their fraudulent nature. *New London Tobacco Market, Inc. v. Kentucky Fuel Corp.*, 44 F.4th 393, 411 (6th Cir. 2022). That is, the plaintiff must state the "who, what, when, where, and how" of the alleged fraud. *Id.* at 411 (citations omitted).

III. Discussion

A. MCPA claim

Charette failed to state which provision of the MCPA adidas purportedly violated. The MCPA contains many sections and provisions. Without an indication of what the elements of Charette's claim are or what provisions adidas purportedly violated, the Court cannot draw any reasonable inferences from the face of the complaint about adidas'

liability. *Home Owners Ins. Co. v. ADT LLC*, 109 F. Supp. 3d 1000, 1008 (E.D. Mich. 2015) (dismissing a MCPA claim in part for failure to specify what provision was violated); *see also Iqbal*, 556 U.S. at 678. Thus, Charettes claim under the MCPA is **DISMISSED WITHOUT PREJUDICE**.[4]

B. Fraud and negligent representation

Next, Charette's claims of fraud and negligent misrepresentation must be dismissed for failure to meet the Rule 9(b) pleading requirements. Nowhere in the complaint does Charette state that adidas ever represented to him that the authentic jerseys were the same as the in-game jerseys. Charette shows an adidas webpage that labels its jerseys as authentic. Charette also includes a "description" purportedly made by adidas that the jersey features the same details as the in-game jerseys, including sewn-on team graphics, a tie-down fight strap (a unique feature to hockey jerseys), and a moisture absorbing fabric. Even assuming that the statement was made, and that the website was published by adidas, as the Court must do on a motion to dismiss,

[4] This analysis applies to an even greater extent for the other unnamed state consumer protection laws that Charette claims apply. If there are any such claims, those claims are likewise dismissed.

Charette has failed to state a claim.

Charette has not provided any statements by adidas that define the term authentic. Nor has he provided any statements by adidas that the two types of jerseys are the same construction and material.[5] The statement provided says that the authentic jerseys have the same details as the in-game jersey. Charette included pictures of authentic jerseys that do in fact have the same details as the in-game jersey. Charette never alleged, however, that adidas claimed the quality and robustness of the materials is the same. Thus, Charette has failed to plead that the statements were fraudulent.

Even assuming, without holding, that historical usage and understanding can define the term and supersede adidas' own statements, Charette has still failed to carry his burden. Rule 9(b) does not create a high bar, but it does require more than the short and plain statement required by Rule 8(a). As adidas correctly points out in its brief, Charette never stated when he was lied to, where the lie occurred, or who lied to him. All of these are required for a claim based on fraud.

[5] Charette did include allegations that certain parties did make these statements. One of the statements was attributed to the retailer Dick's sporting goods and the other is unattributed. While the Court must read the complaint in the light most favorable to plaintiff, it cannot attribute those statements to adidas.

Kentucky Fuel Corp., 44 F.4th at 411 (fraud); *Teal v. Argon Medical Devices, Inc.*, 533 F. Supp. 3d 535, 554 (E.D. Mich. 2021) (negligent misrepresentation). Accordingly, Charette's claims for fraud and negligent misrepresentation are **DISMISSED WITHOUT PREJUDICE**.

C. Warranty claims and the MMWA

Under Michigan law, warranty claims require a plaintiff to provide reasonable pre-suit notice to the manufacturer upon discovery of a breach. *Gregorio v. Ford Motor Company*, 522 F. Supp. 3d 264, 284 (E.D. Mich. 2021) (citations omitted). This notice requirement is interpreted strictly by Michigan courts. *Id.* (citations omitted); *Gorman v. Am. Honda Motor Co.*, 302 Mich. App. 113, 127 (2013). The communication must give the defendant notice about the plaintiff's specific claims. *Chapman v. General Motors LLC,* 531 F. Supp. 3d 1257, 1281 (E.D. Mich. 2021).

Charette does not allege that he provided adidas with any notice. In his response, he merely claims that filing the suit provided adequate notice. That is not correct. Charette was required to give adidas *pre-suit* notice. Further, Charette's policy argument that his failure to provide notice did not frustrate extra-judicial resolution is unpersuasive given

the strict requirement imposed by Michigan law. Therefore, Charette's claims based on breach of warranty are **DISMISSED WITH PREJUDICE**.

Further, to sustain a claim under the MMWA, the plaintiff must state a viable claim for a state warranty claim. *In re General Motors Air Conditioning Marketing and Sales Practice Litigation*, 406 F. Supp. 3d 618, 634 (E.D. Mich. 2019). Since the Court dismissed Charette's state warranty claims, it must dismiss the MMWA claims. *Id.* Charette's MMWA claim is **DISMISSED WITH PREJUDICE**.

D. Unjust enrichment

Under Michigan law, generally, a plaintiff must allege that the defendant received some benefit directly from the plaintiff. *Smith v. Glenmark Generics, Inc.*, 2014 WL 4987968, at *1 (Mich. Ct. App. Aug. 19, 2014) (citing *Kammer Asphalt Paving Co. v. East China Township Schools*, 443 Mich. 176, 185 (1993)).

In its motion, adidas challenges Charette's unjust enrichment claim because it never received a direct benefit from Charette. However, this is not the law of this district. A consumer purchasing a good from a retailer can maintain a claim against the manufacturer under an unjust

enrichment claim. *See In re FCA US LLC v. Monostable Electronic Gearshift Litigation*, 280 F. Supp. 3d 975, 1009 (E.D. Mich. 2017). This is a reasonable understanding since the manufacturer ultimately will receive part of the proceeds of consumer purchases. As such, the Court finds that Charette could maintain a suit for unjust enrichment against adidas even if he purchased the jersey from a third-party retailer if he satisfied the elements of an unjust enrichment claim.

However, to maintain an unjust enrichment claim, the plaintiff must show that the benefit was unjustly received and kept. *Id.* Based on the allegations in the complaint, read in the light most favorable to the plaintiff, adidas did not keep the benefit in an unjust manner. Charette claims that certain parties, none identified as adidas, made statements that led him to that belief. He also claims that common usage and understanding supported that belief. At most, Charette's allegations establish that, based on the statement of others, he purchased the authentic labeled jersey believing it was the same jersey as the ones used in-game. However, given that he has failed to show that adidas is responsible for that mistaken belief, there is no injustice in adidas keeping the proceeds from the sale.

Charette received something of value in the exchange, however, whether he paid more than he believes he received is not a matter to be determined by an unjust enrichment claim absent a showing of wrongdoing. *See Morris Pumps v. Centerline Piping, Inc.*, 792 N.W.2d 898, 904 (Mich. Ct. App. 2006) (holding that not all enrichment is unjust in nature and that only when there has been a showing of some misleading act is an enrichment unjust). Therefore, Charette's claims for unjust enrichment are **DISMISSED WITHOUT PREJUDICE.**

VI. Conclusion

Accordingly, **IT IS ORDERED** that adidas' motion to dismiss (ECF No. 5) is **GRANTED** and that Charette's cause of action is **DISMISSED.**

SO ORDERED.

s/Jonathan J.C. Grey
Jonathan J.C. Grey
United States District Judge

Date: March 27, 2024

Certificate of Service

The undersigned certifies that the foregoing document was served upon counsel of record and any unrepresented parties via the Court's ECF System to their respective email or First-Class U.S. mail addresses disclosed on the Notice of Electronic Filing on March 27, 2024.

s/ S. Osorio
Sandra Osorio
Case Manager