United States District Court
for the
Southern District of Florida

Mounira Doss, individually and on behalf of all other similarly situated, Plaintiffs,	)	
v.	)	Civil Action No. 18-61924-Civ-Scola
General Mills, Inc., Defendant.	)	

Order Granting Motion to Dismiss

Plaintiff Mounira Doss, individually and on behalf of a putative class, complains that Defendant General Mills, Inc., does not tell consumers that its Cheerios contain glyphosate and that, had she been aware of the glyphosate content, she never would have purchased them. (ECF No. 1.) Based on her allegations, she has lodged four claims against General Mills: a violation of Florida's Deceptive and Unfair Trade Practices Act; breach of warranty; breach of implied warranty of merchantability; and unjust enrichment. (*Id.*) In response, General Mills has filed a motion to dismiss. (ECF No. 21.) General Mills argues that Doss's complaint should be dismissed on several grounds: lack of Article III standing; preemption; the matters raised in the complaint are committed exclusively to the jurisdiction of the Environmental Protection Agency; and each cause of action fails to state a claim under Federal Rule of Civil Procedure 12(b)(6). (*Id.*) Because the Court finds Doss has failed to establish standing, it **grants** General Mills' motion (**ECF No. 21**) and dismisses the complaint.

1. Background[1]

Glyphosate, an herbicide, is often sprayed on oats just before they are harvested. (Compl. at ¶¶ 7, 9.) General Mills uses oats in manufacturing the cereals Doss complains about: Original and Honey Nut Cheerios. (*Id.* at ¶¶ 3, 17.) Testing has revealed trace amounts of glyphosate in samples of these cereals: the measured levels in the Cheerios tested range between 470 and 1,125 parts per billion. (*Id.* at ¶¶ 14 – 16.) According to Doss, "even ultra-low levels of glyphosate may be harmful to human health." (*Id.* at ¶ 10.) And, in fact, a nonprofit entity, the Environmental Working Group, has determined that the "health benchmark" for glyphosate is 160 parts per billion. (*Id.* at ¶ 16.)

[1] The Court accepts the complaint's allegations, as set forth below, as true for the purposes of evaluating the motion to dismiss. *Brooks v. Blue Cross & Blue Shield of Fla., Inc.*, 116 F.3d 1364, 1369 (11th Cir. 1997).

Doss's claims against General Mills stem from General Mills' failure to disclose to consumers that its Original and Honey Nut Cheerios contain glyphosate. She seeks to represent a nationwide class defined as "[a]ll persons who purchased Cheerios and Honey Nut Cheerios in the United States" and a Florida class defined as "all persons in the State of Florida who purchased Cheerios and Honey Nut Cheerios." (*Id.* at ¶ 21.) Doss maintains that she, and the class members, have been harmed by General Mills' lack of disclosure because, if they had known the cereal contained glyphosate, they would never have purchased it. (*Id.* at ¶¶ 1, 2, 26, 40, 46, 52.) Accordingly, Doss seeks relief, on behalf of the Florida class, for General Mills' violation of FDUTPA, and, on behalf of the nationwide class, for common law claims of breach of warranty, breach of implied warranty of merchantability, and unjust enrichment.

2. Legal Standard

Because the question of Article III standing implicates subject matter jurisdiction, it must be addressed as a threshold matter prior to the merits of any underlying claims. *Palm Beach Golf Ctr.-Boca, Inc. v. John G. Sarris, D.D.S., P.A.*, 781 F.3d 1245, 1250 (11th Cir. 2015). Article III of the Constitution grants federal courts judicial power to decide only actual "Cases" and "Controversies." U.S. Const. Art. III § 2. The doctrine of standing is a "core component" of this fundamental limitation that "determin[es] the power of the court to entertain the suit." *Hollywood Mobile Estates Ltd. v. Seminole Tribe of Fla.*, 641 F.3d 1259, 1264–65 (11th Cir. 2011) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *Warth v. Seldin*, 422 U.S. 490, 498 (1975)). "In the absence of standing, a court is not free to opine in an advisory capacity about the merits of a plaintiff's claims, and the court is powerless to continue." *Id.* (citing *CAMP Legal Def. Fund, Inc. v. City of Atlanta*, 451 F.3d 1257, 1269 (11th Cir. 2006)).

Standing under Article III consists of three elements: the plaintiff must have "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). To establish the first element, "a plaintiff must show that he or she suffered an invasion of a legally protected interest that is concrete and particularized and actual or imminent, not conjectural or hypothetical." *Id.* at 1548.

Because the Court finds Doss lacks standing, it declines to address General Mills' additional arguments regarding, among others things, preemption; the jurisdiction of the Environmental Protection Agency over this action; and Doss's failure to state a claim for each cause of action.

3. Analysis

In count one, Doss submits General Mills violated FDUTPA by engaging in deceptive trade practices by failing to disclose the presence of glyphosate in Cheerios. (Compl. at ¶ 35.) In count two, Doss alleges General Mills breached its warranty by warranting Cheerios as "wholesome goodness for toddlers and adults" when in reality, and unbeknownst to Doss, the cereal contains glyphosate. (*Id.* at ¶¶ 43–44.) Count three sets forth a claim for breach of implied warranty of merchantability. Doss maintains General Mills warranted that its Cheerios were reasonably fit for the intended use of food consumption when, in fact, they are not because they contain glyphosate. (*Id.* at ¶¶ 49–50). Lastly, count four alleges a claim for unjust enrichment based on the unlawful conduct described in counts one through three. (*Id.* at ¶ 54.)

As a threshold matter, General Mills moves to dismiss Doss's complaint in its entirety because she has not alleged any injury sufficient to confer Article III standing. (Def.'s Mot. at 19–21.) In response, Doss argues, without any meaningful analysis, that she has sufficiently alleged an "economic injury" because she would not have bought Cheerios if she had known they contained glyphosate. (Pl.'s Resp., ECF No. 30, 12.) After careful review, the Court finds General Mills' argument persuasive and finds Doss's position to the contrary unavailing.

Significantly, Doss does not allege her health has suffered as a result of eating Cheerios. Instead, she says her harm is "economic loss" resulting from buying a product under allegedly false pretenses. Doss does not, however, even allege that the Cheerios she herself bought actually contain any glyphosate—just that some Cheerios that have been tested do. In fact, Doss even hedges her bets, saying that the Cheerios she herself purchased either "contained or *could contain* glyphosate." (Compl. at ¶ 2.) There is thus no allegation that the cereal she purchased even contains glyphosate, never mind harmful levels of it. Moreover, Doss does not allege she even consumed the Cheerios she purchased—it would thus, based on her allegations, certainly be impossible for her to have suffered any negative health consequences as a result her purchase. Where a plaintiff "concede[s] . . . not [being] among the injured[,]" her claimed "wrong[] cannot constitute an injury in fact." *Rivera v. Wyeth-Ayerst Labs.*, 283 F.3d 315, 320 (5th Cir. 2002) ("The 'injury in fact' test requires . . . that the party seeking review be himself among the injured.") (quoting *Sierra Club v. Morton,* 405 U.S. 727, 734–35 (1972)).

Here, Doss paid for and purchased Cheerios and Honey Nut Cheerios. And even if the cereal she herself bought contained a significant amount of glyphosate, which she does not allege, or even any glyphosate, which she also

does not allege, there is no allegation that she did not receive, at a minimum, the product General Mills said it was offering: a "gluten free" cereal "packed with nutrients," made of oats which are "proven to help lower cholesterol," containing only one gram of sugar, and the ingredients of which also include "corn starch, . . . salt, tripotassium phosphate, and [v]itamin E." (Compl. at ¶¶ 17–19.) To the extent Doss means to argue she did not receive the benefit of the bargain, her claim fails. *See In re Fruit Juice Products Mktg. & Sales Practices Litig.*, 831 F. Supp. 2d 507, 512 (D. Mass. 2011) (finding no injury in fact where the "[p]laintiffs paid for fruit juice, . . . received fruit juice, which they consumed without suffering harm," and the juice has "not been recalled, ha[s] not caused any reported injuries, . . . do[es] not fail to comply with any federal standards, [and had] no diminished value due to the presence of the lead"); *c.f. Askin v. Quaker Oats Co.*, 818 F. Supp. 2d 1081, 1083 (N.D. Ill. 2011) (finding standing where, unlike here, Quaker Oats affirmatively stated on its package that its product contained "0 grams trans fat," when, in fact, it allegedly contained up to five grams of trans fat per box); *c.f. Guerrero v. Target Corp.*, 889 F. Supp. 2d 1348, 1353 (S.D. Fla. 2012) (Cohn, J.) (finding standing where the product purchased was labeled "honey" when it, allegedly, was not, in fact, honey). Furthermore, Doss has not set forth any allegations suggesting General Mills was under a legal obligation—for example by a federal regulation—to disclose the presence of glyphosate or its potential harm. *See Estrada v. Johnson & Johnson*, CV 16-7492 (FLW), 2017 WL 2999026, at *6 (D.N.J. July 14, 2017), *aff'd sub nom. In re Johnson & Johnson Talcum Powder Products Mktg., Sales Practices & Liab. Litig.*, 903 F.3d 278 (3d Cir. 2018) (noting that a "[p]laintiff cannot assert a benefit-of-the-bargain theory of economic harm based on an omission, where [the p]laintiff has failed to allege that [the d]efendants are under a legal duty to disclose the omitted fact").

Doss does not in any significant way elaborate on what she means when she summarily says she satisfies the injury-in-fact requirement because she "alleges an economic injury." In failing to develop her argument, she highlights the fact that she has, indeed, asserted no concrete injury. Instead she merely points to various paragraphs in her complaint in which she maintains "she would not have purchased Cheerios and Honey Nut Cheerios had she known the true nature of those products." (Pl.'s Resp. at 12 (citing Compl. at ¶¶ 2, 40–41, 45–47, 51–53).) In doing so, Doss seems to intermingle theories of liability premised on product liability principles and contract damages. "Such artful pleading, however, is not enough to create an injury in fact." *Rivera*, 283 F.3d at 320–21.

Furthermore, the danger Doss alleges is posed by the glyphosate, that is in, or *could* be in, the Cheerios she purchased is purely speculative. For

example, Doss alleges only that "ultra-low levels of glyphosate *may* be harmful to human health" (Compl. at ¶ 10 (emphasis added)) and that the World Health Organization classifies glyphosate as a "*probable* human carcinogen" (*id.* at ¶ 1 (emphasis added)). (*See also* Compl. at ¶ 44 (referring to glyphosate as "a known or *probabl[e]* carcinogen") (emphasis added).) Mere conjecture that something has the potential to be harmful is not enough. Doss also does not define "ultra-low levels." Is this more than or less than the levels she alleges were measured in some samples (though not the Cheerios she purchased) by various testing entities? At what level, exactly, does glyphosate, in oats, cause harm? Doss also briefly mentions the Environmental Working Group's glyphosate "health benchmark" of 160 parts per billion. (Id. at ¶ 16.) What is the significance of this "health benchmark"? What does it have to do with the potential harms Doss refers to? Her complaint offers no answers. Any hypothetical health risks Doss alludes too are far too speculative to manufacture standing in this case. *See Koronthaly v. L'Oreal USA, Inc.*, 374 Fed. App'x 257, 259 (3d Cir. 2010) (finding that a "subjective allegation that . . . trace amounts of lead . . . are unacceptable" does not amount to "an injury-in-fact sufficient to confer Article II standing").

Put simply, the Plaintiff has failed to allege an injury in fact based on her purchase of Cheerios and she therefore lacks standing.

4. Conclusion

Because the Court finds General Mills' analysis persuasive, and because Doss has thoroughly failed to controvert or rebut General Mills' arguments regarding standing, the Court **grants** General Mills' motion (**ECF No. 21**).

All pending motions, if any, are **denied as moot.** The Clerk is directed to **close** this case.

Done and ordered, at Miami, Florida, on June 14, 2019.

Robert N. Scola, Jr.
United States District Judge