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### Net Weight/Serving Size Disclosures Helpful in Slack-Fill Case

Accurate net weight and serving size disclosures on packaging can be a helpful defense to slack-fill claims, as one Southern District of New York court recently held. On January 24, 2022, the court in [Klausner v. Annie's](#) granted Annie's motion to dismiss—with prejudice—in a case alleging the presence of non-functional slack-fill in the defendant's fruit snacks. In coming to its conclusions, the court stated that it "does not write on a blank slate when it comes to so-called 'slack-fill' cases," citing at least eight other in-district cases as "instructive." Order at 6. The court first granted Defendant's Rule 12(b)(1) motion because Plaintiff failed to plausibly allege a threat of future injury. This is because Plaintiff alleged that she purchased the fruit snacks "multiple times a year for the past three years" and was presumably "aware by now of the amount of slack-fill contained in a box of Fruit Snacks." *Id.* at 7. Further, the court rejected Plaintiff's assertion that she will purchase in the future only with the "assurance" of less slack-fill. *Id.* This is a "conditional" statement that depends on the defendant changing the packaging: if Annie's doesn't, then Plaintiff won't purchase; if Annie's does, then Plaintiff is not deceived by future packaging. *Id.* "In either scenario, Plaintiff goes unharmed." *Id.* at 8. Turning to the Rule 12(b)(6) motion, the court held that a reasonable consumer would not be misled by the packaging because "the front label of the Fruit Snacks box 'discloses, in large, color-differentiated font, the actual amount of' Fruit Snacks in each box" and Plaintiff didn't allege that any of this information was inaccurate. *Id.* at 9. The court dismissed Plaintiff's GBL claims on this ground. The court also dismissed Plaintiff's remaining common law claims on the same grounds, for lack of a material misrepresentation, as well as for independent pleading failures. *Id.*

- Plaintiff's negligent misrepresentation claim failed for lack of a "special relationship" between the parties. "Indeed, the relationship between Plaintiff and Defendant 'appears to be even more attenuated than a run-of-the-mill, arms-length commercial transaction because' Plaintiff did not purchase the Fruit Snacks directly from Defendant—she purchased them from 'stores including ShopRite.'" *Id.* at 12.
- Plaintiff's claim for breaches of express warranty, the implied warranty of merchantability, and the Magnuson Moss Warranty Act also failed for lack of privity. *Id.* at 13. Plaintiff did not allege that she purchased directly from Annie's or that she incurred a personal injury—only an economic one. *Id.*
- Plaintiff's fraud claim failed because "Plaintiff has not alleged facts sufficient to support plausibly an inference that the [Fruit Snacks] packaging was materially misleading as to the quantity of [Fruit Snacks] in the box she purchased and, given the content disclosures on the box, she cannot establish that she reasonably relied on any quantity impression derived solely from the size of the box." *Id.* at 14–15.
- Plaintiff's unjust enrichment claim failed as duplicative. *Id.* at 15.

Lastly, the Court declined to grant leave to amend, noting that Plaintiff has already had an opportunity to amend and she failed to attach a proposed amended pleading or otherwise advise in her briefing how the defects could be cured by amendment. *Id.* at 16.

## Authors

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