

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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DENNIS PIERRE BOULET, Individually and  
On Behalf of All Others Similarly Situated,

Plaintiff,

v.

NATIONAL PRESTO INDUSTRIES, INC.,  
a Wisconsin Corporation,

Defendant.

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OPINION AND ORDER

11-cv-840-slc

In this proposed class action brought under the Class Action Fairness Act, 28 U.S.C. § 1332(d)(2), plaintiff Dennis Boulet alleges that defendant National Presto Industries, Inc. engaged in false advertising, fraud, misrepresentation, breach of contract, breach of warranty and other state law violations by falsely representing that its CoolDaddy® Cool Touch Electric Deep Fryer remains cool to the touch when used as directed. Boulet purports to bring his claims on behalf of himself and a class comprised of anyone in the United States of America who purchased a CoolDaddy® fryer from November 2007 to the present.

Before the court is Presto's motion to dismiss the complaint for failure to state a claim under Fed. R. Civ. P. 12(b)(6). Additionally, Presto questions whether this court even has jurisdiction to entertain the complaint given the unlikelihood of class certification and Boulet's skimpy allegations of economic injury.

As discussed below, I conclude that jurisdiction is present, even if this court ultimately denies Boulet's motion for class certification. Further, although I agree with Presto that Boulet's allegations of economic injury are minimal, they suffice to confer standing.

As for the motion to dismiss, I am granting it in part and denying it in part. Boulet has alleged sufficient facts to support his various misrepresentation claims and his breach of express

warranty claim, but his remaining claims are either inartfully pled or rest on specious legal theories.

#### ALLEGATIONS OF FACT

For the purposes of this order, I accept as true the well-pleaded allegations of Boulet's complaint (dkt. 1):

Denis Pierre Boulet is a citizen of Florida. On or about July 20, 2011, Boulet purchased a CoolDaddy® deep fryer through Amazon.com. National Presto Industries, Inc. (Presto), a company incorporated and headquartered in Eau Claire, Wisconsin, manufactures the CoolDaddy®.

Presto markets, labels, warrants and generally represents that the CoolDaddy® is an electric deep fryer whose exterior remains cool to the touch when frying foods. Indeed, Presto represents to consumers that they can use their bare hands on the handle of the exterior basket to lower and raise food in and out of the hot cooking oil. Boulet relied on these representations in deciding to purchase a CoolDaddy®. Upon using it, however, he discovered that the exterior of the fryer does not remain cool to the touch when foods are cooking in the fryer. To the contrary, the aluminum portion of the exterior bail handle—which Presto explicitly instructs to use for removing food from the fryer—heats to excessive and dangerous temperatures. This occurs during proper use of the fryer when steam escapes and heats the underside of the handle. On one occasion, Boulet was burned when he touched the fryer's handle. Had Boulet known that the CoolDaddy® did not remain cool to the touch, he would not have bought one or paid as much as he did for it.

The instruction manual accompanying the CoolDaddy® contains a Limited Warranty provision which states, in relevant part:

Presto pledges to the original owner that should there be any defects in material or workmanship during the first year after purchase, we will repair or replace it at our option . . . To obtain service under the warranty, return this PRESTO® appliance, shipping prepaid, to the Presto Factory Service Department or to the nearest Presto Authorized Service Station. This warranty gives you specific legal rights, and you may also have other rights which vary from state to state. This is Presto's personal pledge to you and is being made in place of all other express warranties.

Compl., dkt. 1, exh. A, p.10.

#### OPINION

Boulet asserts nine causes of action: (1) common law fraud; (2) negligent misrepresentation; (3) breach of contract; (4) breach of the covenant of good faith and fair dealing; (5) breach of express warranty under Wis. Stat. § 402.313; (6) breach of the express manufacturer's warranty; (7) deceptive trade practices in violation of Wis. Stat. § 100.18(1); (8) unjust enrichment; and (9) punitive damages under Wis. Stat. § 895.043.<sup>1</sup> All of these theories are based, more or less, on the same set of facts: Presto represented that its product had certain features that it did not actually have, and Boulet relied on these representations to his detriment.

Presto has moved to dismiss all claims on their merits, and has raised threshold concerns whether this court has subject-matter jurisdiction, and whether Boulet has sufficiently alleged injury-in-fact to establish that he has standing to maintain this suit. I will address these threshold concerns first:

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<sup>1</sup>Boulet also asserted a claim under Wis. Stat. § 100.20, which he has withdrawn. *See* Plt.'s Br. in Opp. to Mot. to Dismiss, dkt. 11, at n.1.

## I. Jurisdiction and Standing

### A. Jurisdiction

Boulet's sole basis for claiming federal jurisdiction is the Class Action Fairness Act of 2005 ("CAFA"). 28 U.S.C. § 1332(d). CAFA confers federal jurisdiction over qualifying class actions, namely those "in which at least one member of the class is a citizen of a different state from any Defendant (that is, in which diversity may not be complete)," *Cunningham Charter Corp. v. Learjet, Inc.*, 592 F.3d 805, 806 (7<sup>th</sup> Cir. 2010), and in which the matter in controversy exceeds the sum or value of \$5 million. 28 U.S.C. § 1332(d)(2). "Class action" is defined as "any civil action filed under Rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action." 28 U.S.C. § 1332(d)(1)(B).

Citing Judge Barbara B. Crabb's opinion in *Porcell v. Lincoln Wood Products, Inc.*, 2008 WL 4534022 (W.D. Wis. April 23, 2008), Presto argues that this court's jurisdiction under CAFA is called into question by the unlikelihood that Boulet will obtain class certification. Like this case, *Porcell* was a defective-consumer-products case brought on behalf of a putative nationwide class of similarly-situated purchasers in which the existence of a class with damages of more than \$5,000,000, 28 U.S.C. § 1332(d), was asserted as the sole basis for subject matter jurisdiction. Although the Defendant filed a motion seeking dismissal of the claims on their merits, Judge Crabb ruled that it was not appropriate to decide the merits until the plaintiff had demonstrated the appropriateness of a class action, a demonstration that was virtually certain to fail in light of Seventh Circuit precedent disapproving nationwide class actions in consumer products misrepresentation and breach of warranty actions. *Porcell*, 2008 WL 4534022 at \*2 (citing *In*

*re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1015 (7<sup>th</sup> Cir. 2002)). In Judge Crabb’s view, deciding the class certification issue before the merits was appropriate because “[d]enial of a motion to certify the class could compel dismissal of the action for lack of subject matter jurisdiction.” *Id.* (citing cases). Judge Crabb never reached the question of class certification because the plaintiff dismissed his suit voluntarily.

At the time Judge Crabb decided *Porcell*, CAFA was relatively new and there was no consensus whether denial of class certification divested the court of jurisdiction under CAFA . *See Avritt v. Reliastar Life Ins. Co.*, 2009 WL 1703224 (D. Minn. June 18, 2009) (collecting conflicting case law). In the nearly four years since then, however, a consensus *has* emerged, with most courts of appeals, including the Seventh Circuit, holding that federal jurisdiction under CAFA does *not* depend on class certification. *Greenberger v. GEICO General Ins. Co.*, 631F.3d 392, 396 (7<sup>th</sup> Cir. 2011) (citing *Cunningham*, 592 F.3d at 806); *Metz v. Unizan Bank*, 649 F.3d 492, 501 (6<sup>th</sup> Cir. 2011); *United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int’l Union v. Shell Oil Co.*, 602 F.3d 1087, 1091 (9<sup>th</sup> Cir. 2010); *Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1268 n. 12 (11<sup>th</sup> Cir. 2009).<sup>2</sup> These courts have reasoned that the “filed under” language of § 1332(d)(1)(B) shows that “Congress did not base CAFA jurisdiction on a civil action being ‘certified’ as a class action, but instead on an action being ‘filed under’ the rule governing class actions.” *Metz*, 649 F.3d at 500; *see also Cunningham*, 592 F.3d at 806 (“[R]emember that jurisdiction attaches when a suit is *filed* as a class action, and that invariably precedes certification.”)(emphasis in original); *United Steel*, 602 F.3d at 1091-92 (agreeing with

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<sup>2</sup> Presto’s failure to cite these easily discoverable contrary cases—which include binding circuit authority—is unacceptable. If it happens again, there will be consequences..

*Cunningham*). In other words, it is the time of filing that matters for determining jurisdiction under CAFA; a later denial of class certification does not divest the court of jurisdiction. *Id.* In light of these authorities, Presto's reliance on *Porcell* is misplaced.

Even so, jurisdiction can be found lacking if the jurisdictional allegations are frivolous or defective from the outset; a party cannot fool his way into federal court. *Cunningham*, 592 F.3d at 806–07; *Metz*, 649 F.3d at 501; *College Of Dental Surgeons Of Puerto Rico v. Connecticut General Life Ins. Co.*, 585 F.3d 33, 42 (1<sup>st</sup> Cir. 2009). In this case, however, I cannot conclude that it is obvious from the allegations in the complaint that there could be no class that would warrant certification. True, the Court of Appeals for the Seventh Circuit generally disapproves of nationwide class actions on the ground that it undermines federalism to apply one state's laws to sales in different states with different rules, *Bridgestone*, 288 F.3d at 1018, but the court has not yet gone so far as to say that such actions simply cannot be brought. Accordingly, I am satisfied that subject matter jurisdiction exists in this lawsuit, even if certification of a nationwide class of CoolDaddy® purchasers seems unlikely. That decision will have to wait until Boulet actually moves for class certification. *See College Of Dental Surgeons*, 585 F.3d at 42 (“In all but the clearest of cases, the existence vel non of a sufficiently defined class is appropriately addressed after some development of the facts and under Rule 23's established protocol for weighing the propriety of class certification.”); *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 316 n. 15 (3d Cir. 2008).

## B. Standing

Article III of the Constitution confines the federal courts to adjudicating actual “Cases” or “Controversies.” U.S. Const. art. III, § 2, cl. 1. “[T]he requirements of Article III case-or-controversy standing are threefold: (1) an injury in-fact; (2) fairly traceable to the Defendant's action; and (3) capable of being redressed by a favorable decision from the court.” *Booker-El v. Superintendent, Indiana State Prison*, 668 F.3d 896, 899 (7<sup>th</sup> Cir. 2012) (quoting *Parvati Corp. v. City of Oak Forest, Ill.*, 630 F.3d 512, 516 (7<sup>th</sup> Cir. 2010), in turn citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)).

The standing requirements “are rather undemanding.” *Family & Children's Center, Inc. v. School City of Mishawaka*, 13 F.3d 1052, 1058 (7<sup>th</sup> Cir. 1994) (internal quotation omitted). As long as the plaintiff has shown that he has “an actual stake in the outcome that goes beyond intellectual or academic curiosity . . . even a minor or non-economic injury will satisfy the strictures of Article III.” *Id.*

Presto argues that Boulet has not sufficiently alleged that he suffered an injury-in-fact. As it points out, Boulet does not seek recovery for physical injury, only economic, and then only in the vaguest of terms. In Presto’s view, Boulet’s allegation that he would not have bought a CoolDaddy® or paid as much as he did had he known it did not stay cool is simply too sketchy to establish standing.

The Court of Appeals for the Seventh Circuit recently rejected a similar argument in *In re Aqua Dots Products Liability Litigation*, 654 F.3d 748 (7<sup>th</sup> Cir. 2011). The plaintiffs in that case were purchasers of Aqua Dots, a toy that was recalled after children mistook its small beads for candy and swallowed them. Although the plaintiffs had purchased Aqua Dots, their children

were not harmed by them, nor had the plaintiffs asked for a refund of their money or challenged the adequacy of the recall program. Nonetheless, found the court, the plaintiffs had standing because their loss was financial: “[T]hey paid more for the toys than they would have, had they known of the risks the beads posed to children. A financial injury creates standing.” *Id.* at 750-751. *See also Askin v. Quaker Oats Co.*, 818 F. Supp. 2d 1081, 1086 (N.D. Ill. 2011) (“Regardless of whether Askin was physically harmed by the products he consumed, he alleges that he would not have purchased them absent the allegedly misleading statements. That allegation states the kind of economic injury that is redressable through this suit.”).

Like the plaintiffs in *Aqua Dots* and *Askin*, in this case Boulet alleges that he would not have purchased Presto’s deep fryer or paid as much as he did absent Presto’s misleading statements about its qualities. These allegations are entitled to a presumption of truth and are sufficient to establish standing.

## **II. Motion to Dismiss**

### **A. Pleading Standards**

Motions to dismiss require the court to accept as true all well-pleaded factual allegations and draw all reasonable inferences in favor of the plaintiff, but this presumption of truth does not extend to legal conclusions or conclusory allegations merely reciting the elements of the claim. *McCauley v. City of Chicago*, 671 F.3d 611, 616 (7<sup>th</sup> Cir. 2011). Thus, deciding a motion to dismiss is a two-part exercise: first, the court excises the allegations not entitled to the presumption; second, it considers whether the remaining allegations are sufficient to “raise a right to relief above the speculative level.” *Id.* (quoting *Twombly*, 550 U.S. at 555). To meet

this standard, the complaint must contain “allegations plausibly suggesting (not merely consistent with)” an entitlement to relief. *Twombly*, 550 U.S. at 557. Making the plausibility determination is “a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.” *McCauley*, 671 F.3d at 616 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 1950 (2009)).

Rule 9(b) of the Federal Rules of Civil Procedure imposes an additional requirement in cases alleging fraud. Under that rule, “[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.” Thus, when alleging fraud, a plaintiff is required to provide “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.” *Bankers Trust Co. v. Old Republic Ins. Co.*, 959 F.2d 677, 683 (7th Cir. 1992) (citations omitted); *see also Uni\*Quality, Inc. v. Infotronx, Inc.*, 974 F.2d 918, 923 (7th Cir. 1992). Put more colloquially, a plaintiff must plead the “who, what, when, and where” of the alleged fraud. *Reger Development, LLC v. National City Bank*, 592 F.3d 759, 764 (7<sup>th</sup> Cir. 2010).

The parties assume that Wisconsin law applies to the state law claims, so I have done the same. *RLI Insurance Company v. Conseco, Inc.*, 543 F.3d 384, 390 (7<sup>th</sup> Cir. 2008) (“When neither party raises a conflict of law issue in a diversity case, the applicable law is that of the state in which the federal court sits.”)

## B. Misrepresentation Claims (Claims I, II and VII)

Boulet asserts three types of misrepresentation: 1) intentional (a.k.a. fraud); 2) negligent; and 3) violation of Wis. Stat. § 100.18(1), which really is a misrepresentation claim dressed up in statutory clothing.<sup>3</sup> See *Weather Shield Mfg., Inc. v. PPG Industries, Inc.*, 1998 WL 469913, \*5 (W.D. Wis. 1998) (as policy matter there was little reason to distinguish § 100.18(1) claim from a common law misrepresentation claim.); *Gorton v. American Cyanamid Co.*, 194 Wis.2d 203, 232, 533 N.W.2d 746 (1995) (upholding award of attorney's fees under §§ 100.18(1) and (11) six months after jury verdict on negligent misrepresentation claim, holding that the “negligent misrepresentation claim, as presented by the evidence at trial, entailed all of the elements of a claim brought pursuant to sec. 100.18(1), Stats.”). For the most part, Presto’s challenges to each of these misrepresentation claims would apply equally to the other. Accordingly, given the similarities of these claims, I address them together.

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<sup>3</sup>Wisconsin Stat. § 100.18(1) reads:

No person, firm, corporation or association, or agent or employee thereof, with intent to sell, distribute, increase the consumption of or in any wise dispose of any real estate, merchandise, securities, employment, service, or anything offered by such person, firm, corporation or association, or agent or employee thereof, directly or indirectly, to the public for sale, hire, use or other distribution, or with intent to induce the public in any manner to enter into any contract or obligation relating to the purchase, sale, hire, use or lease of any real estate, merchandise, securities, employment or service, shall make, publish, disseminate, circulate, or place before the public, or cause, directly or indirectly, to be made, published, disseminated, circulated, or placed before the public, in this state, in a newspaper, magazine or other publication, or in the form of a book, notice, handbill, poster, bill, circular, pamphlet, letter, sign, placard, card, label, or over any radio or television station, or in any other way similar or dissimilar to the foregoing, an advertisement, announcement, statement or representation of any kind to the public relating to such purchase, sale, hire, use or lease of such real estate, merchandise, securities, service or employment or to the terms or conditions thereof, which advertisement, announcement, statement or representation contains any assertion, representation or statement of fact which is untrue, deceptive or misleading.

The common elements of intentional and negligent misrepresentation are: 1) the representation must be one of fact and made by the Defendant; 2) the representation of fact must be untrue; and 3) the plaintiff must believe such representation to be true and rely on it to his damage. *Ollerman v. O'Rourke Co., Inc.*, 94 Wis. 2d 17, 25, 288 N.W. 2d 95, 99 (1980). “The gravamen of the wrong is the nature of the false words used and the reliance which they may reasonably induce.” *Id.* at 26, 288 N.W.2d at 99 (noting difference between “false words” and failure to disclose, which is not intentional misrepresentation unless seller has duty to disclose). Whereas “proof of intent or knowledge of falsity is not required in . . . negligent misrepresentation claims,” *Stuart v. Weisflogs Showroom Gallery, Inc.*, 2008 WI 86, ¶ 34, 311 Wis. 2d 492, 753 N.W.2d 448, it is a required element of an intentional misrepresentation claim. See WI-Jury Instructions-Civil 2401.

Though not identical, the elements of a claim under the Wisconsin Deceptive Trade Practices Act, Wis. Stat. § 100.18(1), are somewhat similar to a negligent representation claim in that they require plaintiff to prove: (1) the defendant made a representation to “the public” with the intent to induce an obligation, (2) the representation was “untrue, deceptive or misleading,” and (3) the representation materially caused a pecuniary loss to the plaintiff. *Novell v. Migliaccio*, 2008 WI 44, ¶ 49, 309 Wis.2d 132, 749 N.W.2d 544. A nondisclosure is not an “assertion, representation or statement of fact” under Wis. Stat. § 100.18(1) and, thus, is not actionable under the statute, see *Tietsworth v. Harley-Davidson, Inc.*, 2004 WI 32, ¶ 40, 270 Wis. 2d 146, 677 N.W.2d 233.

Presto begins its attack with a global challenge, arguing that the complaint consists mostly of conclusory, naked assertions that merely parrot the various causes of action and fails

to show any plausible claim of relief as required under *Iqbal*, much less meet Rule 9(b)'s heightened pleading requirements. I disagree.

Boulet's complaint contains factual allegations identifying: 1) the representations Presto made about its product (its representation that the CoolDaddy® had a "cool touch exterior" and its advertisements and instruction manual depicting a person lifting the basket bare-handed out of the fryer after cooking); 2) where those representations were made (in Presto's advertisements, labeling and instruction manual); 3) why those representations were false (during proper use of the fryer, steam escapes and heats the basket handle to temperatures capable of burning); and 4) detrimental reliance on the part of Boulet on those representations (Boulet would not have bought the CoolDaddy® or paid as much as he did for it had he known of the alleged defect). This pattern of facts is not complex or unique, nor is Boulet alleging the sort of wide-ranging conspiracy for which the courts demand more specificity after *Twombly* and *Iqbal*. Essentially, this is a deceptive advertising case. Given its simplicity, I am satisfied that Boulet has provided enough details not only to satisfy Rule 8's requirement that a plaintiff "present a story that holds together," *McCauley*, 671 F.3d at 616 (quoting *Swanson v. Citibank, N.A.*, 614 F.3d 400, 404 (7th Cir. 2010)), but also to satisfy the heightened pleading standard of Fed. R. Civ. P. 9(b).<sup>4</sup>

Further, contrary to Presto's suggestion, this is not a "failure to disclose" case. *See John Doe I v. Archdiocese of Milwaukee*, 2007 WI 95, ¶48, 303 Wis. 2d 34, 67, 734 N.W. 2d 827, 842 ("In general, silence or a failure to disclose a fact is not an intentional misrepresentation unless

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<sup>4</sup> Because I find that Boulet's allegations pass muster even under Fed. R. Civ. P. 9(b), it is unnecessary to decide whether that rule applies to claims brought under Wis. Stat. § 100.18(1). *Compare* Def.'s Br., dkt. 8, at 26 (arguing Rule 9(b) applies to claims under § 100.18(1), *with* Plt.'s Br., dkt. 11, at 26 (arguing to the contrary)).

the person has a duty to disclose.”) (citations omitted). From the complaint, it is clear that Boulet’s misrepresentation claims are based upon affirmative statements by Presto about how its CoolDaddy® worked, namely, that during use, the exterior, including the bail handle, remained cool to the touch. Boulet refers in his complaint to Presto’s website and instruction manual, which depict a person using his bare hands to lift the fryer basket. Presto virtually ignores these representations and focuses its arguments solely on its use of the words “cool touch exterior,” but a misrepresentation claim need not be based solely on statements. *See id.*, 2007 WI 97, ¶¶ 42-44; *Scandrett v. Greenhouse*, 244 Wis. 108, 113, 11 N.W. 2d 510 (1943) (“Any conduct capable of being turned into a statement of fact is a representation.”). The pictures to which Boulet refers in his complaint are capable of being construed as an affirmative representation that the CoolDaddy®’s handle was safe to touch with bare hands even while the fryer was in use. Thus, they suffice to support a claim of fraud.

Also unpersuasive is Presto’s contention that its representations about its product amount to mere sales puffery. “Puffery” is defined as “the exaggerations reasonably to be expected of a seller as to the degree of quality of his product, the truth or falsity of which cannot be precisely determined.” *Tietsworth v. Harley-Davidson, Inc.*, 2004 WI 32, ¶41, 270 Wis.2d 146, 677 N.W.2d 233 (citations omitted). Examples of such statements include statements that a motorcycle was a “masterpiece” and of “premium quality,” *id.*, that a product would have a “long equipment life,” *Consolidated Papers, Inc. v. Dorr-Oliver, Inc.*, 153 Wis. 2d 589, 594, 451 N.W. 2d 456 (Ct. App. 1989), that “Players Win!” and that “complete, 100% satisfaction” was ensured at a casino, *Williams v. Aztar Indiana Gaming Corp.*, 351 F.3d 294, 299 (7<sup>th</sup> Cir. 2003), that “quality satisfaction” was “guaranteed” by a job search firm, *Ubelacker v. Allen Holdings, Inc.*,

464 F. Supp. 2d 791, 806 (W.D. Wis. 2006), and that the seller's washing machines were the "best" or the "finest," *State v. American TV & Appliance of Madison, Inc.*, 146 Wis. 2d 292, 301-02, 430 N.W.2d 709 (1988). Such statements are found to be not actionable because they represent the speaker's opinion and are incapable of being substantiated or refuted. *Tietsworth*, 270 Wis.2d 146, ¶ 44, 677 N.W.2d 233.

Contrary to these statements, Presto's representation that the CoolDaddy®'s exterior remained cool to the touch while cooking foods in hot oil can in fact be substantiated or refuted. Although it is true that different individuals may have different heat tolerances and thus may vary to some degree in their perception of what something "cool" feels like, it defies common sense for Presto to suggest that this term, when used to describe the outside of a deep fryer, is so subjective that no person of ordinary prudence and comprehension would rely on it. No one would understand the term "cool" to encompass an exterior that became hot enough to burn flesh. *Accord Radford v. J.J.B. Enterprises, Ltd.*, 163 Wis. 2d 534, 544-45, 472 N.W.2d 790 (Ct. App.1991) (statements that a boat had a "sound hull" exceeded puffery when hull leaked); *Drayton v. Jiffie Chemical Corp.*, 591 F.2d 352, 358-59 (6<sup>th</sup> Cir. 1978) (manufacturer's advertisements describing its drain cleaner as "safe" and "fast working" and television commercials showing human hand swishing water around in kitchen sink constituted actionable express warranties about product's safety for human contact). *See also Richardson v. Davis*, 2008 WL 961140, \*2 (Wis. App. 2008) (upholding circuit court's determination that statements by home seller in MLS report that their house had been "overimproved," "kept in immaculate condition" by "fastidious" owners and that "all the work [was] done" were not puffery) (unpublished disposition).

Also, I am not persuaded by Presto’s argument that Boulet’s misrepresentation claims are contradicted by the CoolDaddy®’s instruction manual, which contains the following statements: “CAUTION: . . . any water droplets in the oil super-heat, becoming a volatile steam that can cause hot oil to spatter, boil over, or even erupt out of the deep fryer” and “CAUTION: **It is normal for steam to escape from the cover vents during frying. To prevent steam burns, keep hands and face away from the vents.**” Boulet does not allege that he did not know that he could not place his hands or face near the vents or that he would need to use caution when cooking foods in the CoolDaddy®. He alleges that he did not know that the exterior of the unit, namely, the bail handle, would heat up during cooking to the point that he would burn his hand if he touched the handle, and that he did not know this because Presto’s statements and depictions of a person using the product led him to believe otherwise. Presto has not pointed to any statement in its instruction manual in which it affirmatively cautioned users that the bail handle got hot during use or (for example) illustrations showing users employing a hotpad when touching the handle.

In sum, Boulet has adequately pleaded his various theories of misrepresentation.<sup>5</sup>

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<sup>5</sup> Presto has not argued for dismissal of the tort claims on the basis of Wisconsin’s economic loss doctrine, which might apply directly to bar the fraud and negligent misrepresentation claims that Boulet asserts here. *See State Farm Mutual Auto. Ins. Co. v. Ford Motor Co.*, 225 Wis. 2d 305, 592 N.W. 2d 201 (Wis. 1999) (economic loss doctrine operates generally to preclude contracting parties from pursuing tort recovery for purely economic or commercial losses associated with the contract relationship, to consumer transactions); *Kaloti Enterprises, Inc. v. Kellogg Sales Co.*, 2005 WI 111, ¶ 28, 283 Wis. 2d 555, 580, 699 N.W.2d 205, 216 (“Recovery for ‘economic loss’ refers to recovery as a result of a product failing in its intended use, . . . or failing to live up to a contracting party’s expectations”) (citations omitted)). *But see Below v. Norton*, 2008 WI 77, ¶ 16, 310 Wis. 2d 713, 723, 751 N.W.2d 351, 356 (economic loss doctrine does not apply to claims under Wis. Stat. § 100.18). Therefore, this issue is not before the court.

### C. Breach of Express Warranty (Count V)

In Count V, Boulet alleges that Presto's representations that the CoolDaddy® would remain cool to the touch even during use amount to express warranties that the product was of a certain quality and standard, and that Presto breached this warranty when it sold Boulet a deep fryer that did not meet these standards. *See* Wis. Stat. § 402.313(1)(a) ("Any affirmation of fact or promise made by the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise."). Presto argues that this claim must be dismissed because it is barred by the disclaimer of warranties set forth in the Limited Warranty provision.

It is true that under the Uniform Commercial Code (UCC), a seller of goods may limit his contractual liability through a disclaimer of warranties or a limitation of remedies. *Murray v. Holiday Rambler, Inc.*, 83 Wis.2d 406, 414, 265 N.W.2d 513, 517 (1978). A disclaimer of warranties reduces the number of circumstances in which the seller will be in breach of the contract, thereby limiting the seller's liability. *Id.* at 414, 265 N.W.2d at 517-18. As Boulet points out, however, the UCC also provides that when the express warranty conflicts with the disclaimer of all warranties, the language of the express warranty must control. *See* Wis. Stat. § 402.316(1) ("Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to s. 402.202 on parol or extrinsic evidence, negation or limitation is inoperative to the extent that such construction is unreasonable."). *See also Murray*, 83 Wis.2d at 417, 265 N.W.2d at 519. In other words, a seller cannot "give an express warranty with one

hand and take it away with the other.” B. Clark and C. Smith, *The Law of Product Warranties*, (2<sup>nd</sup> ed. 2010), § 8:2.

Here, Presto’s alleged express warranty that the CoolDaddy® would remain cool enough during normal use that a user could safely touch the handle bare-handed is arguably inconsistent with its negation of “all other express warranties” in the Limited Warranty provision. Accordingly, I am unable to conclude at this early stage of the case that Boulet’s breach of express warranty claim is barred by the disclaimer provision.

Presto also argues that the Limited Warranty provision also includes a limitation of remedies provision providing for repair or replacement of the defective product. Such limitations are authorized by Wis. Stat. § 402.719(1)(a).<sup>6</sup> Although a limitation on remedies is “closely related” to a disclaimer of warranties, it is “conceptually different.” *Id.*, § 8:1. (In its brief, Presto tends to blur the distinction between the warranty disclaimer and the remedy limitation, arguing as if the two provisions are one and the same.) While a *disclaimer* of warranties seeks to eliminate warranty liability altogether or narrow the circumstances in which a warranty will operate, a *limitation* on remedies “seeks to force the buyer to pursue certain remedies while denying him access to others.” *Id.* The former is covered by Wis. Stat. § 402.316(1); the latter by § 402.719. Nothing in § 402.719 requires that the *remedies* available to a buyer for breach of warranties must be construed as consistent with each other.

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<sup>6</sup> The statute states that an agreement

“ . . . may provide for remedies in addition to or in substitution for those provided in this chapter and may limit or alter the measure of damages recoverable under this chapter, as by limiting the buyer’s remedies to return of the goods and repayment of the price or to repair and replacement of nonconforming goods or parts.”

Even so, an argument can be made that the remedy of repair or replacement is not the sole remedy permitted under the sales contract. Wis. Stat. § 402.719(1)(b) provides that “[r]esort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy.” Presto’s Limited Warranty provision does not expressly indicate that the repair or replacement is the “exclusive” remedy permitted for product defects. To the contrary, the warranty provision appears to contemplate other remedies, insofar as it informed Boulet that he “may also have other rights which vary from state to state.”

Neither Presto nor Boulet has addressed the matter of exclusivity. Because it is Presto who raises the Limited Warranty as a bar to Boulet’s breach of express warranty claim, Presto bears the burden on this argument. Absent any contention that the limitation on remedies to repair or replacement of defective parts was meant to be the exclusive remedy, I must deny Presto’s motion on this claim.

#### **D. Breach of Limited Warranty (Count VI)**

In Count VI of his complaint, Boulet alleges that Presto breached the terms of the Limited Warranty provision. It is not entirely clear how this claim differs from Count V. Further, Boulet does not allege that he invoked his remedies under the Limited Warranty. So how could Presto have breached it?

Boulet appears to suggest that returning his CoolDaddy® to Presto for repair or replacement would be futile because, in its memorandum in support of the motion to dismiss, “Presto refuses to accept that the CoolDaddy is defective” and “has made no effort to correct the defect,” insofar as it is continuing to sell the CoolDaddy under the same name and depict

it on its website and instruction manual as being safe to touch during use. Plt.'s Br., dkt. 11, at 32. Boulet, however, fails to cite any authority for the proposition that a buyer may hold a seller to its warranty obligations while at the same time completely avoiding his own obligations under that warranty on the ground that the seller continues to offer the product for sale.

Although limited remedies provisions are not enforceable if they fail of their “essential purpose” of providing the buyer with goods that conform to the contract, *Murray*, 83 Wis. 2d at 414, 265 N.W.2d at 518, the case law suggests that such failure must be actual, not hypothetical. *BOC Group, Inc. v. Chevron Chemical Co., LLC*, 819 A.2d 431, 438 (N.J. Super. A.D. 2003) (finding that plaintiff's failure to give the exclusive remedy an opportunity to work before terminating the contract precluded his claim that the remedy failed of its essential purpose); *Midwest Printing, Inc. v. AM Int'l, Inc.*, 108 F.3d 168, 171-72 (8th Cir.1997) (finding that buyer's refusal to accept seller's offer to replace the allegedly defective printing press under the warranty precludes buyer from recovering under the failure of its essential purpose theory); *Malkamaki v. Sea Ray Boats, Inc.*, 411 F. Supp.2d 737, 745 (N.D. Ohio 2005) (“If, after repeated repairs, a vehicle fails ‘to operate as should a new vehicle,’ the repair remedy fails of its essential purpose.”). In this case, insofar as Boulet may be suggesting a failure of the Limited Warranty’s essential purpose, He is hypothesizing. If this count of his complaint is based upon some other conduct, I am unable to discern from the complaint what that conduct is. Accordingly, Count VI shall be dismissed.

### **E. Breach of Contract (Count III)**

The elements of a breach of contract claim are the existence of a valid contract that the Defendant breached and damages flowing from that breach. *Matthews v. Wisconsin Energy Corp.*, 534 F.3d 547, 553 (7<sup>th</sup> Cir. 2008) (citation omitted). Presto argues that Boulet has failed to state a claim for breach of contract because he paid for a deep fryer and that's what he got. But Boulet's claim is that he didn't get the deep fryer that Presto led him to believe he was getting, namely, one whose handle was safe to touch during and after use. This is sufficient to state a claim for breach of contract. That said, there is no apparent distinction between the allegations this generic breach of contract claim and the allegations in Boulet's breach of express warranty claim. If this case proceeds to trial, then Boulet likely will have to elect which theory he would like to pursue.

### **F. Breach of Covenant of Good Faith and Fair Dealing (Count IV)**

In Count IV, Boulet alleges that Presto breached the covenant of good faith and fair dealing when it sold Boulet a deep fryer that did not stay safe and cool to the touch when used as directed. Wisconsin law recognizes that every contract imposes an obligation of good faith in its performance. *Estate of Chayka*, 47 Wis.2d 102, 107, 176 N.W.2d 561, 564 (1970). Although "good faith" is difficult to define, Wisconsin courts have relied on the Restatement's definition of "bad faith":

A complete catalogue of types of bad faith is impossible, but the following types are among those which have been recognized in judicial decisions: evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party's performance.

*Foseid v. State Bank of Cross Plains*, 197 Wis. 2d 772, 541 N.W.2d 203, 213 (Ct. App. 1995) (quoting Restatement (Second) of Contracts § 205 cmt. d). A party may be liable for breach of the implied duty of good faith even though all the terms of the contract have been fulfilled. *Id.*, 197 Wis.2d at 796, 541 N.W.2d at 212. Under Wisconsin law, to state a claim for breach of duty of good faith, a plaintiff must allege facts “that can support a conclusion that the party accused of bad faith has actually denied the benefit of the bargain originally intended by the parties.” *Zenith Insurance Co. v. Employers Insurance*, 141 F.3d 300, 308 (7th Cir. 1998).

As an initial matter, I question whether this common law duty even applies to this case, which involves the sale of goods and therefore is governed by the Uniform Commercial Code, which has its own definition of good faith. Wis. Stat. § 401.304 (“Every contract or duty within [the code] imposes an obligation of good faith in its performance and enforcement.”). A breach of the duty of good faith under the UCC cannot be brought as a separate claim. *Hauer v. Union State Bank of Wautoma*, 192 Wis.2d 576, 597, 532 N.W.2d 456, 464 (Ct. App. 1995). Presto, however, does not argue for dismissal on this basis. Instead, it argues that Boulet has simply failed to allege facts that would plausibly support his bad faith theory.

As Presto points out in its reply, implicit in the notion of good faith is the existence of an ongoing contractual relationship between the parties after the contract has been formed. *Market Street Associates Ltd. Partnership v. Frey*, 941 F.2d 588, 594 (7<sup>th</sup> Cir. 1991) (“The office of the doctrine of good faith is to forbid the kinds of opportunistic behavior that a mutually dependent, cooperative relationship might enable in the absence of rule.”); *Metropolitan Ventures, LLC v. GEA Associates*, 2006 WI 71, ¶ 26, 291 Wis.2d 393, 415, 717 N.W.2d 58, 69 (“The duty of good faith arises because parties to a contract, once executed, have entered into a *cooperative*

*relationship* and have abandoned the wariness that accompanied their contract negotiations, adopting some measure of trust of the other party.”)(citation omitted, emphasis in original). In a run-of-the-mill, arm’s-length, consumer sales transaction, however, the contract is formed and performed essentially simultaneously. The purchase is made and the relationship between buyer and seller is all but over. There is no ongoing, cooperative relationship, which means that the doctrine of good faith simply does not apply.

Here, the only contractual obligation to which the duty of good faith might arguably apply would be to Presto’s promise to repair or replace any defective product within one year of purchase. As previously discussed, however, Boulet does not allege that he invoked his rights under the warranty provision. Absent such allegations, I conclude that the breach of good faith claim must be dismissed.

#### **G. Unjust Enrichment (Count IX)**

The parties agree that the doctrine of unjust enrichment is a quasi contractual theory that applies only in the absence of a contract. *Continental Cas. Co. v. Wisconsin Patients Compensation Fund*, 164 Wis. 2d 110, 118, 473 N.W.2d 584 (Ct. App. 1991). The parties also agree that a plaintiff may plead breach of contract and unjust enrichment as alternative theories of relief. Fed. R. Civ. P. 8(d). Presto insists, however, that Boulet has failed to allege any facts that would plausibly support a finding that the sales contract between Boulet and Presto for the purchase of the CoolDaddy® might be found invalid. Absent such facts, says Presto, there is no basis for Boulet to assert an equitable claim for unjust enrichment.

I agree. In his brief, Boulet argues that if it is determined that Presto sold him a product that was not as it was represented to be, then the contract may be found invalid for lack of consideration. Plt.'s Br., dkt. 11, at 35. As Presto points out, however, Boulet never uses the term "consideration" in his complaint. Boulet is not arguing that the parties did not enter into a valid sales contract; rather, the gist his complaint is that Presto did not hold up its end of the bargain because it sold Boulet a deep fryer that did not perform as advertised. The complaint alleges nothing to suggest that the contract may be found invalid. Further, I am not aware of—and Boulet has not cited—any authority for the proposition "defective product = inadequate consideration."

Facing a similar situation in *Harley Marine Services, Inc. v. Manitowoc Marine Group, LLC*, 759 F. Supp. 2d 1059 (E.D. Wis. 2010), the court determined that "where a plaintiff asserts a breach of contract claim and fails to allege any facts from which it could at least be inferred that the contract on which that claim is based might be invalid, the plaintiff is precluded from pleading in the alternative claims that are legally incompatible with the contract claim." *Id.* at 1062-63. As the court explained, this conclusion is nothing more than an application of the rule that a plaintiff may plead himself out of court. Therefore, the court dismissed plaintiff's claim for unjust enrichment because plaintiff's own complaint alleged that a valid contract existed and defendant had not denied the existence or validity of the contract. *Id.* at 1063. *See also American Casual Dining, L.P. v. Moe's Southwest Grill, L.L.C.*, 426 F. Supp. 2d 1356, 1371-72 (N.D. Ga. 2006) ("When neither side disputes the existence of a valid contract, the doctrine of promissory estoppel does not apply, even when it is asserted in the alternative."); *Decatur Ventures, LLC v. Stapleton Ventures, Inc.*, 373 F. Supp. 2d 829, 849 (S.D. Ind. 2005) ("Plaintiffs' unjust

enrichment claim becomes superfluous when neither side disputes the existence of a valid contract, even if it is being alleged in the alternative.”); *Ball v. Sony Electronics, Inc.*, 2005 WL 2406145, \*6 (W.D. Wis. Sept. 8, 2005) (“There is no question that plaintiffs entered into contracts for the purchase of their camcorders. Plaintiffs believe that they paid more than the camcorders were worth because they were defective. However, under such circumstances any remedy must be based on the law of contract and warranty, not unjust enrichment. Unjust enrichment is not a mechanism for supplementing that which a purchaser perceives as inadequate contractual remedies.”)

As in these cases, here it is plain from the facts alleged in the complaint that Boulet entered into a contract for the purchase of his CoolDaddy®. Even if pleaded in the alternative, Boulet’s unjust enrichment claim must be dismissed because there are no facts alleged to plausibly support it.

#### **H. Punitive Damages (Count X)**

Finally, I agree with Presto that “a claim for punitive damages is in the nature of a remedy and should not be confused with the concept of a cause of action.” *Becker v. Automatic Garage Door Co.*, 156 Wis. 2d 409, 415 456 N.W. 2d 888 (Wis. App. 1990) (citation omitted). As Presto acknowledges, however, in spite of mislabeling this claim for relief as a cause of action, Boulet is entitled to *seek* punitive damages. Accordingly, at this early stage it is unnecessary to dismiss or strike the punitive damages allegations in the complaint.

ORDER

IT IS ORDERED that:

I. Presto's motion to dismiss the complaint is GRANTED IN PART and DENIED IN PART, as follows:

A. The motion is GRANTED as to Counts IV, VI, VIII and IX, which are DISMISSED WITHOUT PREJUDICE.

B. The motion is DENIED with respect to Counts I, II, III, V and VII.

Entered this 7<sup>th</sup> day of May, 2012.

BY THE COURT:

/s/

STEPHEN L. CROCKER  
Magistrate Judge