



17-2011

*Mantikas, et al. v. Kellogg Company*

1 dismissed Plaintiffs' complaint for failure to state a claim. Held, the district  
2 court erred in dismissing Plaintiffs' complaint because, under the proper  
3 standards for reviewing a motion to dismiss pursuant to Rule 12(b)(6),  
4 Plaintiffs plausibly alleged that the whole grain labels would lead a  
5 reasonable consumer to believe, incorrectly, that the grain in whole grain  
6 Cheez-Its was wholly or predominantly whole grain. VACATED and  
7 REMANDED.

8  
9 MICHAEL R. REESE, George V. Granade,  
10 Reese LLP, New York, N.Y., *for*  
11 *Plaintiffs-Appellants.*

12  
13 KENNETH K. LEE, Christina A. Aryafar,  
14 Jenner & Block LLP, Los Angeles, CA,  
15 Dean N. Panos, Jenner & Block LLP,  
16 Chicago, IL, Kelly M. Morrison, Jenner  
17 & Block LLP, Washington D.C. *for*  
18 *Defendant-Appellee*

19  
20 LEVAL, *Circuit Judge:*

21 Plaintiffs Kristen Mantikas, Kristin Burns, and Linda Castle  
22 ("Plaintiffs") appeal from a judgment entered on August 21, 2017 in the  
23 United States District Court for the Eastern District of New York (Sandra J.  
24 Feuerstein, J.), granting Defendant Kellogg Company's motion to dismiss  
25 Plaintiffs' complaint for failure to state a claim, as provided in Fed. R. Civ. P.  
26 12(b)(6). Plaintiffs are residents of New York and California who purchased  
27 Defendant's Cheez-It crackers that were labeled "whole grain" or "made with  
28 whole grain." They filed a class action complaint (the "Complaint") against

17-2011

*Mantikas, et al. v. Kellogg Company*

1 Defendant alleging that the whole grain labels were false and misleading in  
2 violation of New York and California consumer protection laws. They alleged  
3 that such labeling would cause a reasonable consumer to believe that the  
4 grain in whole grain Cheez-Its was predominantly whole grain, when, in fact,  
5 it was not. The primary grain content was enriched white flour. The district  
6 court dismissed the Complaint pursuant to Rule 12(b)(6). It held that the  
7 whole grain labels would not mislead a reasonable consumer, and that  
8 Plaintiffs therefore failed to state a claim.

9 We conclude that the district court erred in dismissing Plaintiffs'  
10 complaint. Reviewed under the proper standards for a Rule 12(b)(6) motion,  
11 the Complaint plausibly alleged that a reasonable consumer would be misled  
12 by Defendant's whole grain labels to believe that the grain in whole grain  
13 Cheez-Its was predominantly whole grain. Accordingly, we vacate the  
14 judgment of the district court and remand for further proceedings.

15 **BACKGROUND**

16 The Complaint alleges as follows. Defendant produces Cheez-It  
17 crackers and sells the brand in a variety of flavors, including "original" and  
18 "whole grain." During the relevant time period, Defendant packaged and

17-2011

*Mantikas, et al. v. Kellogg Company*

1 sold the “whole grain” variety in two boxes, each with slightly different  
2 labeling. One version contained the words “WHOLE GRAIN” in large print  
3 in the center of the front panel of the box, and “MADE WITH 5G OF WHOLE  
4 GRAIN PER SERVING” in small print on the bottom. The other version  
5 contained the words “MADE WITH WHOLE GRAIN” in large print in the  
6 center of the box, with “MADE WITH 8G OF WHOLE GRAIN PER SERVING” in  
7 small print on the bottom. Both versions also contained a “Nutrition Facts”  
8 panel on the side of the box, which revealed in much smaller print that a  
9 serving size of the snack was 29 grams and that the first ingredient on the  
10 ingredients list was “enriched white flour.” “Whole wheat flour” was listed  
11 on the ingredients list as either the second or third ingredient. As required by  
12 federal regulation, the ingredients were listed in order of their predominance,  
13 with the primary ingredient listed first. *See* 21 C.F.R § 101.4 (generally  
14 requiring ingredients to be listed “in descending order of predominance by  
15 weight”).

17-2011

*Mantikas, et al. v. Kellogg Company*



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Plaintiffs purchased one or both versions of the Cheez-Its labeled “WHOLE GRAIN,” believing on the basis of that label that the grain content was predominantly whole grain. Contrary to their belief, however, the grain content was not predominantly whole grain, but rather enriched white flour. Plaintiffs assert that they would not have purchased the crackers had they known that the grain content was not predominantly whole grain. Plaintiffs filed the Complaint in the United States District Court for the Eastern District of New York, asserting claims for false advertising and deceptive business practices in violation of New York and California consumer protection laws,<sup>1</sup>

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<sup>1</sup> In particular, Plaintiffs asserted claims for “deceptive acts or business practices in the conduct of any business” in violation of N.Y. Gen. Bus. Law § 349(a), “[f]alse advertising in the conduct of any business” in violation of N.Y. Gen. Bus. Law § 350, “unlawful, unfair or fraudulent business act or practice”

17-2011

*Mantikas, et al. v. Kellogg Company*

1 as well as for unjust enrichment under Michigan law. They sought  
2 declaratory and injunctive relief, as well as monetary damages, on behalf of a  
3 putative class of all persons residing in the United States and its territories  
4 who purchased whole grain Cheez-Its since May 19, 2010.

5 Defendant moved to dismiss the Complaint pursuant to Rule 12(b)(6).  
6 It argued that the “MADE WITH WHOLE GRAIN” version of the Cheez-Its  
7 packaging was not false and misleading, because that statement was factually  
8 accurate and, in addition, was qualified by the more detailed “MADE WITH 8G  
9 OF WHOLE GRAIN PER SERVING” label. Defendant did not specifically  
10 address whether the “WHOLE GRAIN” version of the packaging was false  
11 and misleading. Defendant also argued that Plaintiffs’ claims were preempted  
12 by federal law, that Plaintiffs failed to state a claim for unjust enrichment  
13 under Michigan law, and that Plaintiffs lacked standing to pursue injunctive  
14 relief because they failed to allege any likelihood of continuing or future  
15 harm.

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in violation of Cal. Bus. & Prof. Code § 17200, “false or misleading advertising” in violation of Cal. Bus. & Prof. Code § 17500, and a claim for injunctive relief under Cal. Civ. Code § 1750. [A27-35]



17-2011

*Mantikas, et al. v. Kellogg Company*

1 *Cable*, 714 F.3d 739, 740-41 (2d Cir. 2013). “To survive a motion to dismiss, a  
2 complaint must contain sufficient factual matter, accepted as true, to state a  
3 claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678  
4 (2009) (internal quotation marks omitted).

5 To state a claim for false advertising or deceptive business practices  
6 under New York or California law, a plaintiff must plausibly allege that the  
7 deceptive conduct was “likely to mislead a reasonable consumer acting  
8 reasonably under the circumstances.” *Fink*, 714 F.3d at 741 (citing *Freeman v.*  
9 *Time, Inc.*, 68 F.3d 285, 289 (9th Cir. 1995); *Oswego Laborers’ Local 214 Pension*  
10 *Fund v. Marine Midland Bank, N.A.*, 85 N.Y.2d 20, 26 (1995). “[I]n determining  
11 whether a reasonable consumer would have been misled by a particular  
12 advertisement, context is crucial.” *Id.* at 742. We therefore consider the  
13 challenged advertisement as a whole, including disclaimers and qualifying  
14 language. *See Fink*, 714 F.3d at 742 (“[U]nder certain circumstances, the  
15 presence of a disclaimer or similar clarifying language may defeat a claim of  
16 deception.”); *Freeman*, 68 F.3d at 289–90.

17 The district court held that Plaintiffs failed to state a claim for relief  
18 because, in the context of the entire Cheez-Its packaging, a reasonable

17-2011

*Mantikas, et al. v. Kellogg Company*

1 consumer would not be misled by the whole grain representations. The court  
2 relied on the fact that although the Cheez-Its boxes were conspicuously  
3 labeled “WHOLE GRAIN” and “MADE WITH WHOLE GRAIN,” the boxes  
4 accurately displayed, on the front panel, the precise number of grams of  
5 whole grain per serving (“MADE WITH 5G [OR 8G] OF WHOLE GRAIN PER  
6 SERVING”). The court reasoned that because the crackers in fact contained  
7 whole grain, and because the front of each box clarified exactly *how much*  
8 whole grain was in the product, a reasonable consumer was not likely to  
9 believe that the crackers were made of predominantly whole grain. *Mantikas*  
10 *v. Kellogg*, No. 16-cv-2552, 2017 WL 2371183, at \*4-5 (E.D.N.Y. May 31, 2017).  
11 After all, the court emphasized, “a reasonable consumer would not be misled  
12 by a product’s packaging that states the exact amount of the ingredient in  
13 question.” *Id.* at 4.

14 Although the district court is correct that an allegedly misleading  
15 statement must be viewed “in light of its context on the product label or  
16 advertisement as a whole,” *id.* at 3 (quoting *Belfiore v. Proctor & Gamble Co.*,  
17 311 F.R.D. 29, 53 (E.D.N.Y. 2015)), the court misapplied that principle to  
18 Plaintiffs’ claims in this case. Plaintiffs’ core allegation is that the statements

17-2011

*Mantikas, et al. v. Kellogg Company*

1 “WHOLE GRAIN” and “MADE WITH WHOLE GRAIN” are misleading  
2 because they communicate to the reasonable consumer that the grain in the  
3 product is predominantly, if not entirely, *whole* grain. Contrary to the  
4 reasonable expectations communicated by the large, bold-faced claims of  
5 “WHOLE GRAIN,” however, the grain in the product is predominantly  
6 enriched white flour. While the disclosures on the front of the box relied on  
7 by the district court (“MADE WITH 5G [OR 8G] OF WHOLE GRAIN PER  
8 SERVING”) do set forth accurately the *amount* of whole grain in the crackers  
9 per serving, they are nonetheless misleading because they falsely imply that  
10 the grain content is entirely or at least predominantly whole grain, whereas in  
11 fact, the grain component consisting of enriched white flour substantially  
12 exceeds the whole grain portion.

13 Defendant contends that a reasonable consumer still would not be  
14 deceived by the “WHOLE GRAIN” claims, because the side panel of the  
15 packaging discloses further detail about the product’s ingredients.  
16 Specifically, the Nutrition Facts panel reveals that a serving size of Cheez-Its  
17 is 29 grams and the list of ingredients names “enriched white flour” as the  
18 first (and thus predominant) ingredient. Neither of these disclosures cures the

17-2011

*Mantikas, et al. v. Kellogg Company*

1 deceptive quality of the “WHOLE GRAIN” claims as alleged by Plaintiffs.  
2 First, the specification that 29 grams is the total weight of a serving does not  
3 adequately dispel the inference communicated by the front of the package  
4 that the grain in “whole grain” crackers is predominantly whole grain  
5 because it does not tell what part of the 29-gram total weight is grain of any  
6 kind. Such serving size information clarifies the amount of whole grain as a  
7 proportion of a total serving, but it does not indicate the ratio of whole grain  
8 to white flour.

9       Moreover, we cannot conclude that these disclosures on the side of the  
10 box render Plaintiffs’ allegations of deception implausible. “[R]easonable  
11 consumers should [not] be expected to look beyond misleading  
12 representations on the front of the box to discover the truth from the  
13 ingredient list in small print on the side of the box.” *Williams v. Gerber Prods.*  
14 *Co.*, 552 F.3d 934, 939 (9th Cir. 2008). “Instead, reasonable consumers expect  
15 that the ingredient list contains more detailed information about the product  
16 that *confirms* other representations on the packaging.” *Id.* at 939-40 (emphasis  
17 added). We conclude that a reasonable consumer should not be expected to  
18 consult the Nutrition Facts panel on the side of the box to correct misleading

17-2011

*Mantikas, et al. v. Kellogg Company*

1 information set forth in large bold type on the front of the box. Plaintiffs  
2 plausibly allege that the Nutrition Facts panel and ingredients list on whole  
3 grain Cheez-Its—which reveals that enriched white flour is the predominant  
4 ingredient—contradict, rather than confirm, Defendant’s “whole grain”  
5 representations on the front of the box.

6 Defendant points us to several district court decisions, each dismissing  
7 a case on the pleadings, in which consumers alleged that food product labels  
8 asserting that the food was “made with” various ingredients misled them to  
9 believe that the stated ingredient was the dominant, or at least a major,  
10 ingredient. Those cases differ materially from ours because of the form of  
11 deception alleged. In most of those cases, plaintiffs claimed that a product  
12 label was deceptive because it led consumers to believe, incorrectly, the  
13 product contained a significant quantity of a particular ingredient. *See, e.g.,*  
14 *Chuang v. Dr. Pepper Snapple Grp., Inc.*, No. CV 17-01875, 2017 WL 4286577, at  
15 \*2 (C.D. Cal. Sept. 20, 2017) (allegation that the packaging misled consumers  
16 to believe that the products “contain more fruit and vegetable content than  
17 they really do”); *Workman v. Plum, Inc.*, 141 F. Supp. 3d 1032, 1034 (N.D. Cal.  
18 2015) (allegation that the packaging was misleading for implying that the

17-2011

*Mantikas, et al. v. Kellogg Company*

1 pictured ingredients were the most prominent); *McKinniss v. Sunny Delight*  
2 *Beverages Co.*, No. CV 07-02034, 2007 WL 4766525, at \*3 (C.D. Cal. Sept. 4,  
3 2007) (allegation that a product label misleadingly communicated that a  
4 beverage contained “substantial amounts of fruit”). In contrast, our Plaintiffs  
5 allege that the labelling of whole grain Cheez-Its is deceptive because it  
6 implies that, of the grain content in the product, most or all of it is whole  
7 grain, as opposed to less nutritious white flour.

8 In addition, in most of the cases Defendant cites, plaintiffs alleged they  
9 were misled about the quantity of an ingredient that obviously was not the  
10 products’ primary ingredient. For example, in *Red v. Kraft Foods, Inc.*, plaintiffs  
11 claimed they were misled by the label “made with real vegetables” to believe  
12 that the crackers contained a larger amount of vegetables than they in fact  
13 did. No. CV 10-1028, 2012 WL 5504011, at \*2 (C.D. Cal. Oct. 25, 2012). The  
14 court observed that a reasonable consumer would not be misled by the  
15 representation, because such a consumer would “be familiar with the fact of  
16 life that a cracker is not composed of primarily fresh vegetables.” *Id.* at \*2-3;  
17 see also *Manchouck v. Mondelez Int’l Inc.*, No. CV 13-02148, 2013 WL 5400285, at  
18 \*2 (N.D. Cal. Sept. 26, 2013) (dealing with a similar claim involving labeling of

17-2011

*Mantikas, et al. v. Kellogg Company*

1 cookies asserting that they were made with “real fruit”); *Henderson v. Gruma*  
2 *Corp.*, No. CV 10-04173, 2011 WL 1362188, at \*12 (C.D. Cal. Apr. 11, 2011)  
3 (involving a packaging claim that a vegetable dip was made “With Garden  
4 Vegetables”).

5         In our case of Cheez-Its crackers, in contrast, reasonable consumers are  
6 likely to understand that crackers are typically made predominantly of grain.  
7 They look to the bold assertions on the packaging to discern what *type* of  
8 grain. The representation that a cracker is “made with whole grain” would  
9 thus plausibly lead a reasonable consumer to conclude that the grain  
10 ingredient was entirely, or at least predominately, whole grain. That same  
11 consumer, confronted with the claim that a cracker is “made with real  
12 vegetables,” likely would not likely conclude that the cracker was made  
13 predominantly of vegetables.

14         Moreover, the rule that Defendant contends emerges from these district  
15 court decisions—that, as a matter of law, it is not misleading to state that a  
16 product is made with a specified ingredient if that ingredient is in fact  
17 present—would validate highly deceptive advertising and labeling. Such a  
18 rule would permit Defendant to lead consumers to believe its Cheez-Its were

17-2011

*Mantikas, et al. v. Kellogg Company*

1 made of whole grain so long as the crackers contained an iota of whole grain,  
2 along with 99.999% white flour. Such a rule would validate highly deceptive  
3 marketing.

4 We conclude that Plaintiffs, as required to survive a Rule 12(b)(6)  
5 motion to dismiss, “state a claim to relief that is plausible on its face.” *Iqbal*,  
6 556 U.S. at 678. “A claim has facial plausibility when the plaintiff pleads  
7 factual content that allows the court to draw the reasonable inference that the  
8 defendant is liable for the misconduct alleged.” *Id.* Plaintiffs have adequately  
9 alleged such factual content. They allege that the conspicuous “WHOLE  
10 GRAIN” and “MADE WITH WHOLE GRAIN” claims on the front and center of  
11 the Defendant’s packaging communicates to the reasonable consumer the  
12 false message that the grain content of the crackers is exclusively, or at least  
13 predominately whole grain; that this false message is not dispelled by the  
14 information that each cracker is “MADE WITH 8G [OR 5G] G OF WHOLE GRAIN  
15 PER SERVING,” which fails to communicate that the quantity of enriched white  
16 flour exceeds the quantity of whole grain; and that the misleading quality of  
17 the message is not effectively cured by implicitly disclosing the predominance  
18 of enriched white flour in small print on an ingredients list on the side of the

17-2011

*Mantikas, et al. v. Kellogg Company*

1 package. These are sufficient factual allegations to state a claim that  
2 Defendant's conduct was, plausibly, deceptive. A reasonable consumer  
3 would likely be deceived by the labeling alleged in the complaint. The district  
4 court's conclusion to the contrary was error.<sup>2</sup>

5 **CONCLUSION**

6 The judgment of the district court in favor of Defendant is VACATED,  
7 and the case is REMANDED for further proceedings.

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<sup>2</sup> Because the district court's holding that Plaintiffs were not entitled to injunctive relief was premised entirely on its conclusion that Plaintiffs had failed to state a claim that the packaging was deceptive, we vacate that holding. *Mantikas*, 2017 WL 2371183, at \*7 ("As Plaintiffs have failed to demonstrate that the Crackers' packaging was deceptive, they are unable to demonstrate that they have suffered an injury in fact."). The district court did not discuss Defendant's argument that Plaintiffs lacked standing to pursue injunctive relief because they failed to allege a likelihood of continuing or future harm, and we decline to address it in the first instance on appeal. For the same reason, we do not address Defendant's argument that Plaintiffs' claims are preempted by federal law.

**United States Court of Appeals for the Second Circuit  
Thurgood Marshall U.S. Courthouse  
40 Foley Square  
New York, NY 10007**

**ROBERT A. KATZMANN**  
CHIEF JUDGE

Date: December 11, 2018  
Docket #: 17-2011cv  
Short Title: Mantikas v. Kellogg Company

**CATHERINE O'HAGAN WOLFE**  
CLERK OF COURT

DC Docket #: 16-cv-2552  
DC Court: EDNY (CENTRAL  
ISLIP)  
DC Judge: Feuerstein  
DC Judge: Shields

**BILL OF COSTS INSTRUCTIONS**

The requirements for filing a bill of costs are set forth in FRAP 39. A form for filing a bill of costs is on the Court's website.

The bill of costs must:

- \* be filed within 14 days after the entry of judgment;
- \* be verified;
- \* be served on all adversaries;
- \* not include charges for postage, delivery, service, overtime and the filers edits;
- \* identify the number of copies which comprise the printer's unit;
- \* include the printer's bills, which must state the minimum charge per printer's unit for a page, a cover, foot lines by the line, and an index and table of cases by the page;
- \* state only the number of necessary copies inserted in enclosed form;
- \* state actual costs at rates not higher than those generally charged for printing services in New York, New York; excessive charges are subject to reduction;
- \* be filed via CM/ECF or if counsel is exempted with the original and two copies.

**United States Court of Appeals for the Second Circuit  
Thurgood Marshall U.S. Courthouse  
40 Foley Square  
New York, NY 10007**

**ROBERT A. KATZMANN**  
CHIEF JUDGE

Date: December 11, 2018  
Docket #: 17-2011cv  
Short Title: Mantikas v. Kellogg Company

**CATHERINE O'HAGAN WOLFE**  
CLERK OF COURT

DC Docket #: 16-cv-2552  
DC Court: EDNY (CENTRAL  
ISLIP)  
DC Judge: Feuerstein  
DC Judge: Shields

**VERIFIED ITEMIZED BILL OF COSTS**

Counsel for

\_\_\_\_\_

respectfully submits, pursuant to FRAP 39 (c) the within bill of costs and requests the Clerk to prepare an itemized statement of costs taxed against the

\_\_\_\_\_

and in favor of

\_\_\_\_\_

for insertion in the mandate.

Docketing Fee \_\_\_\_\_

Costs of printing appendix (necessary copies \_\_\_\_\_ ) \_\_\_\_\_

Costs of printing brief (necessary copies \_\_\_\_\_ ) \_\_\_\_\_

Costs of printing reply brief (necessary copies \_\_\_\_\_ ) \_\_\_\_\_

**(VERIFICATION HERE)**

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Signature