UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CHANDRA CAMPBELL, individually and on behalf of all others similarly situated,

Plaintiffs,

-against-

WHOLE FOODS MARKET GROUP, INC.,

Defendant.

Case No.: 1:20-cv-01291-GHW-OTW

ORAL ARGUMENT REQUESTED

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT

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TABLE OF CONTENTS

Page

I. INTRODUCTION 1
II. PLAINTIFF'S ALLEGATIONS 2
III. ARGUMENT 3
A. Plaintiff's Claims for False and Misleading Advertising Fail as a Matter of Law. 4
1. The Statement "Honey Graham Crackers" Is Not Misleading to Reasonable Consumers. 5
a. The Phrase "Graham Crackers" Is Not Misleading 5
b. The "Honey" Representation Is Not Misleading 9
2. Plaintiff Has Not Alleged an Injury Under GBL Sections 349 and 350. 10
3. Plaintiff Cannot Privately Enforce Alleged Violations of the FDCA 11
B. Plaintiff Fails to State a Claim for Fraud. 13
C. Plaintiff's Negligent Misrepresentation Claim Fails. 14
1. Plaintiff Fails to Allege a "Special Relationship" 14
2. The Economic Loss Rule Bars Plaintiff's Negligent Misrepresentation Claim. 15
D. Plaintiff Fails to State a Plausible Breach-of-Warranty Claim. 16
1. Plaintiff's Claim for Breach of Express Warranty Fails 16
2. Plaintiff's Implied Warranty Claims Fail Because 365 Graham Crackers Are Fit for Consumption 17
3. Plaintiff's Magnuson-Moss Warranty Act Claim Should Be Dismissed 17
E. Plaintiff Fails to State a Claim for Unjust Enrichment. 18
F. Plaintiff Does Not Have Standing to Seek Injunctive Relief. 19
IV. CONCLUSION 20

TABLE OF AUTHORITIES

STATE CASES

Corsello v. Verizon N.Y., Inc.
967 N.E.2d 1177 (N.Y. 2012) 18

Kimmel v. Schaefer
675 N.E.2d 450 (N.Y. 1996) 14

Koch v. Acker, Merrall & Condit Co.
967 N.E.2d 675 (N.Y. 2012) 4

Morrow v. MetLife Inv'rs Ins. Co.
177 A.D.3d 1288 (4th Dept 2019) 5

Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A.
85 N.Y.2d 20 (N.Y. 1995) 4

Pesce Bros., Inc. v. Cover Me Ins. Agency of NJ, Inc.
144 A.D.3d 1120 (2d Dept 2016) 5

FEDERAL CASES

Ashcroft v. Iqbal
556 U.S. 662 (2009) 4

Becerra v Dr Pepper/Seven Up, Inc.
945 F3d 1225 (9th Cir 2019) 7, 13

Belfiore v Procter & Gamble Co.
311 F.R.D. 29 (E.D.N.Y. 2015) 8

Bell Atl. Corp. v. Twombly
550 U.S. 544 (2007) 3, 4

Berni v Barilla S.p.A.
964 F.3d 141 (2d Cir 2020) 19, 20

Bowling v Johnson & Johnson
65 F. Supp. 3d 371 (S.D.N.Y. 2014.) 17

Brazil v. Dole Food Co.
935 F. Supp.2d 947 (N.D. Cal. 2013) 18

Brown v Starbucks Corp.
No. 18-cv2286-JM-WVG, 2019 WL 996399 (S.D. Cal. Mar. 1, 2019) 8

Brumfield v. Trader Joe's Co.
No. 17-cv-3239-LGS, 2018 WL 4168956 (S.D.N.Y. Aug. 30, 2018) 14, 16, 17

Campbell v. Freshbev LLC
322 F. Supp. 3d. 330 (E.D.N.Y. 2018) 10

Carmania Corp., N.V. v. Hambrecht Terrell Int'l
705 F. Supp. 936 (S.D.N.Y. 1989) 15

Caronia v. Phillip Morris USA, Inc.
715 F.3d 417 (2d Cir. 2013) 17

Cohen v. JP Morgan Chase & Co.
498 F.3d 111 (2nd Cir. 2007)... 5

Colella v. Atkins Nutritional, Inc.
348 F. Supp. 3d 120 (E.D.N.Y 2018) 11, 16

Daniel v. Mondelez Int'l, Inc.
287 F. Supp. 3d 177 (E.D.N.Y. 2018) 12

Davis v. Hain Celestial Grp., Inc.
297 F. Supp. 3d 327 (E.D.N.Y. 2018) 4, 8, 13

EED Holdings v. Palmer Johnson Acquisition Corp.
387 F. Supp. 2d 265 (S.D.N.Y. 2004) 15

Elkind v. Revlon Consumer Prod. Corp.
No. 14-cv-2484-JS-AKT, 2015 WL 2344134 (E.D.N.Y. May 14, 2015) 15, 19

Fin. Guar. Ins. Co. v. Putnam Advisory Co., LLC
783 F.3d 395 (2d Cir. 2015)... 13

Fink v. Time Warner Cable
714 F.3d 739 (2d Cir. 2013)... 4

Goldemberg v Johnson & Johnson Consumer Companies, Inc.
8 F. Supp. 3d 467 (S.D.N.Y. 2014.) 16

Gordon v. Hain Celestial Grp., Inc.
No. 16-cv-6526-KBF, 2017 WL 213815 (S.D.N.Y. Jan. 18, 2017) 15

In re 100% Grated Parmesan Cheese Mktg. and Sales Practices Litig.
275 F. Supp. 3d 910 (N.D. Ill. 2017) 8, 9

In re Frito-Lay N. Am., Inc. All Nat. Litig.
No. 12-md-2413-RRM-RLM, 2013 WL 4647512 (E.D.N.Y. Aug. 29, 2013).................. 18

Izquierdo v. Mondelez Int'l, Inc.
No. 16-CV-4697, 2016 WL 6459832 (S.D.N.Y. Oct. 26, 2016)................. 5, 10, 11, 18, 19

Kennedy v Mondelez Glob. LLC
No. 19-cv-302-ENV-SJB, 2020 WL 4006197 (E.D.N.Y. Jul. 10, 2020) ... 7, 10, 14, 17, 18

Koenig v. Boulder Brands, Inc.
995 F.Supp.2d 274 (S.D.N.Y. 2014) 11

Kommer v Bayer Consumer Health, a division of Bayer AG
710 Fed. Appx. 43 (2d Cir 2018) 19

Lima v Post Consumer Brands, LLC
No. 18-cv-12100-ADB, 2019 WL 3802885 (D. Mass. Aug. 13, 2019) 9, 10

Mantikas v. Kellog Co.
910 F.3d 633 (2d Cir. 2018) 4, 7, 8

Melendez v. One Brands
No. 18-cv-06650-CBA-SJB, 2020 WL 1283793 (E.D.N.Y. Mar. 16, 2020) 5

Nashville Syrup Co. v. Coca Cola Co.
215 F. 527 (6th Cir 1914) 5

Nelson v. MillerCoors, LLC
246 F. Supp. 3d 666 (E.D.N.Y. 2017) 14

Olson v. Major League Baseball
No. 20-cv-632, 2020 WL 1644611 (S.D.N.Y. Apr. 3, 2020) 18

Orlander v. Staples, Inc.
802 F.3d 289 (2d Cir. 2015) 4, 11

PDK Labs, Inc. v. Friedlander
103 F.3d 1105 (2d Cir. 1997) 11

Quinn v. Walgreen Co.
958 F. Supp. 2d 533 (S.D.N.Y. 2013) 16

Reyes v. Crystal Farms Refrigerated Distribution Co.
No. 18-cv-2250-NGG-RML, 2019 WL 3409883 (E.D.N.Y. July 26, 2019) 12

Sarr v. BEF Foods, Inc.
No. 18-cv-6409-ARR-RLM, 2020 WL 729883 (E.D.N.Y. Feb. 13, 2020) 10, 12

Schwartzco Enters. LLC v. TMH Mgmt., LLC
60 F. Supp. 3d 331 (E.D.N.Y. 2014) 13

Segedie v Hain Celestial Group, Inc.
No. 14-cv-5029-NSR, 2015 WL 2168374 (S.D.N.Y. May 7, 2015) 15

Sharpe v A&W Concentrate Co.
No. 19-cv-768-BMC, 2020 WL 4931045 (E.D.N.Y. Aug. 24, 2020) 20

Solak v. Hain Celestial Grp., Inc.
No. 17-cv-0704-LEK-DEP, 2018 WL 1870474 (N.D.N.Y. Apr. 17, 2018) 16

Steele v. Wegmans Food Markets, Inc.
No. 19-cv-9227-LLS, 2020 WL 3975461 (S.D.N.Y. Jul. 14, 2020) 9, 10, 12

Stolz v. Fage Dairy Processing Indus.
2015 WL 5579872 (E.D.N.Y Sept. 22, 2015) 14, 15

Verzani v. Costco Wholesale Corp.
No. 09-cv-2117-CM, 2010 WL 3911499 (S.D.N.Y. Sept. 28, 2010) 11, 12

Werbel ex rel. v PepsiCo, Inc.
C 09-04456 SBA, 2010 WL 2673860 (ND Cal July 2, 2010) 7

STATUTES & REGULATIONS

15 U.S.C. § 2302(e) 18

15 U.S.C. § 2310(d)(3)(A) 18

21 C.F.R. § 101.3 13

21 C.F.R. § 101.3(b) 13

21 C.F.R. § 101.4 13

21 C.F.R. § 101.9 13

21 C.F.R. § 101.95(a) 12

21 C.F.R. § 102.5(a) 13

21 U.S.C. § 337(a) 11

Fed. R. Civ. P. 9(b) 2, 13

N.Y. Gen. Bus. Law § 349 .... 1, 4, 10, 11, 12, 16

N.Y. Gen. Bus. Law § 350 .... 1, 4, 10, 11, 12, 16

I. INTRODUCTION

Defendant Whole Foods Market Group, Inc. ("WFM Group") sells 365 Everyday Value Organic Honey Graham Crackers ("365 Graham Crackers"), at Whole Foods Market stores in New York state and other states across the country. The product's front label reads "Organic Honey Graham Crackers" with images of a honey dipper and a plate of the rectangular crackers. The back-label identifies the use of organic wheat flour, organic cane sugar, organic whole wheat flour, organic honey and organic molasses among its ingredients. Thus, the labeling and packaging of 365 Graham Crackers accurately disclose the product's ingredients and nutritional facts.

Plaintiff, however, alleges the front label is deceptive, and therefore violates New York General Business Law ("GBL") Sections 349 and 350, because the name "honey graham crackers" (coupled with a photograph of a honey dipper) implies to consumers that the product contains more whole-wheat flour than wheat flour and more honey than sugar. Plaintiff's claims are implausible and should be dismissed.

When evaluating if a complaint states a plausible claim for relief, a court must make a context-specific determination drawing on its judicial experience and common sense. Plaintiff's claims defy common sense. It is commonly understood that a "graham cracker" is a light brown-colored cookie with a slightly sweet taste, often in a perforated rectangular shape. Reasonable consumers do not assume that the term "graham cracker" refers to graham or whole-wheat flour and certainly do not assume that whole-wheat flour is the product's only or predominate ingredient. Similarly, reasonable consumers of graham crackers do not assume the term "honey" means the cracker is sweetened exclusively or predominately by honey without any added sugar.

The reasonable consumer test requires more than a mere possibility that 365 Graham Crackers' packaging might conceivably be misunderstood by a few consumers viewing it in an unreasonably literal manner. Moreover, any ambiguity created by the front label is resolved by consulting the product's ingredient list on the back of the box. Plaintiff's claims for deceptive

advertising also fail because her First Amended Complaint ("FAC") does not allege any facts to support her claim of injury.

Unable to demonstrate consumer deception from a plain reading of the product's label, Plaintiff turns to various food label regulations under the Food, Drug & Cosmetic Act ("FDCA") in an effort to manufacture a basis for her false advertising claims. But, New York courts have made clear there is no private right of action to enforce the Food and Drug Administration's ("FDA") regulations under the FDCA. Congress intended that the FDA, not Plaintiff, interpret and enforce its own regulations. More to the point, the packaging and labeling of 365 Graham Crackers does not violate FDA regulations. Thus, her false advertising claims fail as a matter of law.

The FAC includes several other claims that should all be dismissed for the same reasons as their core false advertising claims and, in the alternative, because Plaintiff has not and cannot plead the necessary elements for each of those claims. Plaintiff's fraud claim fails to comply with Rule 9(b)'s heightened pleading standards by, among other things, failing to plead the requisite fraudulent intent. Plaintiff's negligent misrepresentation claim fails to plead the requisite special relationship between WFM Group and Plaintiff, and is barred by the economic loss doctrine. Plaintiff's breach of warranty claims should be dismissed because Plaintiff did not provide WFM Group with the requisite pre-suit notice, fails to allege the 365 Graham Crackers were inedible or otherwise not merchantable and fail to identify a written warranty subject to the Magnuson-Moss Warranty Act ("MMWA"). Plaintiff's unjust enrichment claim should be dismissed because it is duplicative of her other claims. Finally, Plaintiff lacks standing to seek injunctive relief. Because she is now aware of the ingredients in 365 Graham Crackers, there is no further risk that the product's packaging and labeling will deceive her.

II. PLAINTIFF'S ALLEGATIONS

WFM Group owns and operates Whole Foods Market stores in New York and several other states. (Dkt. No. 16 ("FAC") at ¶¶1-2, 86-8.) WFM Group sells a variety of food and beverage products under the private label brand "365 Everyday Value," including a graham

cracker snack labeled "Organic Honey Graham Crackers" above images of a honey dipper and plate of crackers. (*Id.* at ¶¶1-3.) As a retailer, WFM Group does not manufacture the private label graham crackers, but obtains them from a supplier.

Plaintiff alleges she purchased 365 Graham Crackers from a Whole Food Market store in New York throughout 2019. (FAC ¶88.) Plaintiff claims that the labeling of the 365 Graham Crackers misleads consumers into believing that the product contains more whole grain flour than non-whole grain flour and more honey than sugar. (FAC ¶4.) Plaintiff alleges the 365 Graham Crackers packaging represents "that honey is the exclusive, primary and/or most significant sweetener" in the crackers. (FAC ¶9.) She also alleges that the name "Honey Graham Crackers" gives consumers the impression that whole grain graham flour is the primary flour ingredient used. (FAC ¶39.)

The labeling for 365 Graham Crackers does not state that the crackers are sweetened primarily by honey. The ingredient list clearly identifies three sweeteners in descending order of predominance: organic cane sugar, organic honey and organic molasses. (FAC ¶30.) In addition, the ingredient list for 365 Graham Crackers does not state that more whole grain flour is used than non-whole grain flour. (*Id.*) Thus, the basis for Plaintiff's claims boils down to the contention that the name "Honey Graham Crackers" is itself deceptive. Specifically, she contends this product name misrepresents the "substantive, quality, compositional, organoleptic and/or nutritional attributes of the Products." (FAC ¶¶107, 111, 119.)

Based on these allegations, Plaintiff asserts the following claims on behalf of herself and a class of New York consumers: (1) violation of New York consumer product law; (2) negligent misrepresentation; (3) breach of express warranty, breach of implied warranty and breach of the Magnuson-Moss Warranty Act; (4) fraud; and (5) unjust enrichment. (FAC ¶¶17-20.) Plaintiff seeks injunctive relief, restitution, damages, and punitive damages. (FAC ¶¶20-21.)

III. ARGUMENT

A court should grant a motion to dismiss when a plaintiff fails to allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570

(2007). When ruling on a motion to dismiss, a court must accept factual allegations pleaded in the complaint as true, but it need not accept unreasonable inferences or legal conclusions cast in the form of factual allegations. *Ashcroft v. Iqbal,* 556 U.S. 662, 681(2009) ("bare assertions . . . amount[ing] to nothing more than a 'formulaic recitation of the elements' of a . . . claim are not entitled to an assumption of truth"), quoting *Twombly*, 550 U.S. at 555. "Nor does a complaint suffice if it 'tenders naked assertion[s]' devoid of 'further factual enhancement.'" *Id*. at 678 (quoting *Twombly*,550 U.S. at 557).

"Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it stops short of the line between 'possibility and entitlement to relief.'" *Id*., quoting *Twombly*, 550 U.S. at 557. In making this "context-specific" determination, the Court must draw on its judicial experience and *common sense*." *Iqbal*, 556 U.S. at 679. (emphasis added).

A. Plaintiff's Claims for False and Misleading Advertising Fail as a Matter of Law.

Plaintiff claims that the front label of 365 Honey Graham Crackers is misleading in violation of New York's consumer protection laws. GBL section 349 and 350 require Plaintiff "allege that [WFM Group] has engaged in (1) consumer-oriented conduct that is (2) materially misleading and that (3) plaintiff suffered injury as a result of the allegedly deceptive act or practice.'" *Orlander v. Staples, Inc.*, 802 F.3d 289, 300 (2d Cir. 2015) (quoting *Koch v. Acker, Merrall & Condit Co.*, 967 N.E.2d 675 (N.Y. 2012)). As to the second element, Plaintiff must show that "a reasonable consumer acting reasonably under the circumstances" would be misled. *Mantikas v. Kellog Co.*, 910 F.3d 633, 636 (2d Cir. 2018). A court may determine, as a matter of law, that an allegedly deceptive practice does not mislead a reasonable consumer. *See Fink v. Time Warner Cable*, 714 F.3d 739, 741 (2d Cir. 2013).

"To survive a motion to dismiss, plaintiff must allege statements that were 'likely to mislead a reasonable consumer acting reasonably under the circumstances.'" *Davis v. Hain Celestial Grp., Inc.,* 297 F. Supp. 3d 327, 334 (E.D.N.Y. 2018) (quoting *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A.,* 85 N.Y.2d 20, 26 (N.Y. 1995)). Courts

use "an objective inquiry" to determine if a statement would be likely to mislead reasonable consumers. *Melendez v. One Brands*, No. 18-cv-06650-CBA-SJB, 2020 WL 1283793, *6 (E.D.N.Y. Mar. 16, 2020) (citing *Cohen v. JP Morgan Chase & Co.*, 498 F.3d 111, 126 (2nd Cir. 2007)).

In addition, Plaintiff must plead an actual injury as a result of the alleged deception. Plaintiff's damages may be overpayment or payment of a price premium, but the alleged deception itself is not a cognizable injury. *See Izquierdo v. Mondelez Int'l, Inc.*, No. 16-cv-4697, 2016 WL 6459832, at *7 (S.D.N.Y. Oct. 26, 2016).

Plaintiffs' claims for false and misleading advertising fail for several reasons. First, the use of "Honey Graham Crackers" on the snack's front label is not misleading to a reasonable consumer. Second, Plaintiff has not alleged an injury sufficient to establish her false advertising claims. Finally, Plaintiff cannot privately enforce alleged violations of federal regulations under the FDCA.

1. The Statement "Honey Graham Crackers" Is Not Misleading to Reasonable Consumers.

A false or misleading statement or conduct is the threshold requirement of an action for false advertising, misrepresentation and fraud. *See Morrow v. MetLife Inv'rs Ins. Co.*, 177 A.D.3d 1288, 1289 (4th Dept 2019); *Pesce Bros., Inc. v. Cover Me Ins. Agency of NJ, Inc.*, 144 A.D.3d 1120, 1122 (2d Dept 2016.) Here, Plaintiff breaks the name of the product ("Honey Graham Crackers") in two, contending the statement "Honey" is a misleading ingredient claim (i.e., no added sugar) and the statement "Graham Crackers" is a separately misleading ingredient claim (i.e., only whole wheat flour). Leaving aside that fact that reasonable consumers would review these terms together to describe the honey flavored rectangular snack treat classically used in s'mores, Plaintiff's allegations fail to establish the statements are materially misleading.

a. The Phrase "Graham Crackers" Is Not Misleading

Plaintiff asserts that the phrase "Graham Crackers" is materially misleading because it suggests that the product is made predominately with whole-wheat flour. The phrase "graham

cracker," however, is not an ingredient statement and does not suggest that 365 Graham Crackers are made with a specific type of flour or a particular proportion of whole grain flour as compared to other ingredients. Rather, those terms signal that the product *is* a graham cracker—a light brown-colored cracker with a characteristic sweet taste, often in a perforated rectangular shape.

Reasonable consumers would not assume that "graham flour" or whole-wheat flour is the only or predominant ingredient. Indeed, the dictionary definitions cited by Plaintiff do not define a "graham cracker" as a cracker *made predominately* with whole-wheat flour. Instead they define a "graham cracker" as "a slightly sweet cracker made of whole wheat flour" and "a semisweet cracker, usually rectangular in shape, made chiefly with whole-wheat flour." The terms "made" and "made chiefly"[1] do not describe a quantum or percentage of whole-wheat flour required to make a cracker a graham cracker. As Plaintiff's own evidence shows there is no consensus that a "graham cracker" must be made predominately with whole-wheat flour. And, as Plaintiff does not dispute, 365 Graham Crackers do, in fact, contain whole-wheat flour.

Courts have long rejected similar hyper-literal interpretations of compound words. In *Nashville Syrup Co. v. Coca Cola Co.,* the court rejected a claim that the term 'Coca-Cola" suggested that the beverage "is composed mainly or in essential part of the coca leaves and the cola nut." *Nashville Syrup Co. v. Coca Cola Co.,* 215 F. 527, 531 (6th Cir 1914.) The court explained:

> The use of a compound name does not necessarily indicate that the article to which the name is applied contains the substances whose names make up the compound. Thus, soda water contains no soda; the butternut contains no butter; cream of tartar contains no cream; nor milk of lime any milk. Grape fruit is not the fruit of the grape; nor is bread fruit the fruit of bread; the pineapple is foreign to both the pine and the apple; and the manufactured food known as Grape Nuts contains neither grapes nor nuts.

Nashville Syrup Co. v Coca Cola Co., 215 F at 532.

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[1] "Chiefly" is defined as "most importantly" or "mainly." (https://www.merriam webster.com/dictionary/chiefly.)

More recently, in *Werbel ex rel. v. PepsiCo, Inc*., the court rejected plaintiff's claims that the name "Crunch Berries" implies the product is made from crunchy berries.

> [T]he FAC alleges that members of the public are likely to be deceived into believing that Cap'n Crunch derives nutrition from actual fruit by virtue of the reference to 'Berries' and because the Crunch Berries allegedly are 'shaped to resemble berries.' Nonsense. It is obvious from the product packaging that no reasonable consumer would believe that Cap'n Crunch derives any nutritional value from berries." (Citations omitted.) *Werbel ex rel. v PepsiCo, Inc*., C 09-04456 SBA, 2010 WL 2673860, at *3 (ND Cal July 2, 2010.)

See Becerra v Dr Pepper/Seven Up, Inc., 945 F3d 1225, 1229 (9th Cir 2019) (rejecting claim that, when read in its proper context, the term "diet" promises weight loss or management).

In *Kennedy v. Mondelez Global, LLC,* a similar case brought by Plaintiff's attorney challenging the packaging and labeling of Nabisco's Honey Maid graham crackers, the court rejected plaintiff's claims of false advertising. The court explained:

> The word "graham" when included in the term "grahams" or the phrase "graham crackers" does not connote graham flour. A reasonable consumer hearing the term "graham," even without the word "cracker," thinks first and foremost of a slightly sweet, darker-colored, rectangular, and perforated cracker. It is a type of cracker that is used in desserts like s'mores. The Court also does not believe a reasonable consumer would associate "graham" as meaning "graham flour," and as a result assume that graham flour is either the predominant ingredient in the product or that graham flour predominates over other types of flour.

Kennedy v Mondelez Glob. LLC, No. 19-cv-302-ENV-SJB, 2020 WL 4006197, at *9 (E.D.N.Y. Jul. 10, 2020.)

The label "graham cracker" is distinguishable from the labeling challenge addressed in *Mantikas v Kellogg Co*., 910 F.3d 633 (2d Cir. 2018). In that case, plaintiff claimed that CheezIt crackers labeled "whole grain" and "made with whole grain" were deceptively labeled because the crackers were made predominately with white flour. The court held that "[t]he representation that a cracker is 'made with whole grain' would thus plausibly lead a reasonable consumer to

conclude that the grain ingredient was entirely, or at least predominately, whole grain." *Mantikas v Kellogg Co.*, 910 F.3d at 638. Here, in contrast, the packaging and labeling of 365 Graham Cracker do not state the crackers are "made with whole grain" or "made with graham flour." Instead the label simply refers to the common name for the product: a "graham cracker."

Moreover, even if the term "graham cracker" is ambiguous, the allegedly misleading statement must be read in context. *See Belfiore v Procter & Gamble Co*., 311 F.R.D. 29, 53 (E.D.N.Y. 2015) ("Courts view each allegedly misleading statement in light of its context on the product label or advertisement as a whole. The entire mosaic is viewed rather than each tile separately.") (citations omitted.) "If a plaintiff alleges that an element of a product's label is misleading, but another portion of the label would dispel the confusion, the court should ask whether the misleading element is ambiguous. If so, the clarification can defeat the claim." *Davis v. Hain Celestial Grp.*, *supra,* 297 F. Supp.3d at 334. Here, the ingredient list accurately reflects that 365 Graham Crackers are made with organic whole-wheat flour and that it contains more organic wheat flour than organic whole-wheat flour. Thus, the product's packaging accurately communicates its content and ingredients, and reasonable consumer are not misled into believing that 365 Graham Crackers contain more whole-wheat flour than other flours or ingredients.

In *In re 100% Grated Parmesan,* the plaintiff made a similarly implausible argument claiming that "100% Grated Parmesan Cheese" was misleading because it falsely implied that the product *only* contained grated parmesan cheese, even though it also contained cellulose and potassium sorbate. *In re 100% Grated Parmesan Cheese Mktg. and Sales Practices Litig*., 275 F. Supp. 3d 910, 917 (N.D. Ill. 2017). The court rejected plaintiff's claim:

> Plaintiffs' claims are doomed by the readily accessible ingredient panels on the products that disclose the presence of non-cheese ingredients. Although "100% Grated Parmesan Cheese" might be interpreted as saying that the product is 100% cheese and nothing else, it also might be an assertion that 100% of the cheese is parmesan cheese, or that the parmesan cheese is 100% grated. Reasonable consumers would thus need more information before

> concluding that the labels promised only cheese and nothing more, and they would know exactly where to look to investigate—the ingredient list. Doing so would inform them that the product contained non-cheese ingredients.

Id. at 923.; *Brown v Starbucks Corp*., No. 18-cv2286-JM-WVG, 2019 WL 996399, at *3 (S.D. Cal. Mar. 1, 2019) (reasonable consumer not misled by packaging that lists "apple, watermelon, tangerine and lemon flavored candies" on front of product into believing sour gummies were flavored *only* with fruit.) Because Plaintiff has not, and cannot plausibly allege that a reasonable consumer would be deceived by 365 Graham Crackers' product name, her claim that the label's use of the phrase "Graham Crackers" is deceptive because the product contains more wheat flour than whole-wheat flour fails as a matter of law.

b. The "Honey" Representation Is Not Misleading

Plaintiff next asserts that because the product name uses the term "Honey," alongside an image of a honey dipper and in a bowl of honey, the product's packaging is misleading because it leads consumers to believe the product contains more honey than sugar. (FAC ¶¶3, 4.) This claim fails for three reasons: 1) the packaging does not represent that honey is used as a sweetener as opposed to a flavoring; 2) even if the packaging represents that honey is used as a sweetener, it certainly does not suggest that it is the predominate sweetener; and 3) to the extent there is any ambiguity, the ingredient label makes clear that cane sugar and molasses are also used to sweeten the product.

First, the term "honey" in the product's name and the image of a honey dipper is not an ingredient statement. The packaging does not say "made only with honey" or "sweetened with honey." Instead the term and image refer to the characteristic flavor of the product. Indeed, Plaintiff admits that honey is used in the product as a flavoring. (FAC ¶64.) "[W]here honey is a flavor as well as a sweetener, Plaintiffs have not plausibly alleged that [defendant's] use of the word 'honey' and the images of a sun, bee, and honey dipper is 'false or misleading….'" *Lima v Post Consumer Brands, LLC*, No. 18-cv-12100-ADB, 2019 WL 3802885, at *6 (D. Mass. Aug. 13, 2019), *reconsideration denied*, 2019 WL 4889599 (D. Mass. Oct. 2, 2019); *see also Steele v*

Wegmans Food Markets, Inc., No. 19-cv-9227-LLS, 2020 WL 3975461, at *2 (S.D.N.Y. Jul. 14, 2020) (ice cream labeled "vanilla" is not deceptive even if there is only *de minimis* amount of vanilla in product; nothing in packaging suggested product *only* flavored with natural vanilla.)

Second, nothing in the term "honey" or image of a honey dipper suggests that the product is sweetened primarily with honey. The labeling and packaging do not claim that the product is "only" or "exclusively" sweetened by honey. And, as Plaintiff acknowledges, the product *is* in fact sweetened with honey. (FAC ¶30.) *Kennedy v Mondelez Glob. LLC, supra,* 2020 WL 4006197, at *12 ("Sweetening grahams with honey does not foreclose the use of other sweeteners or make the representation deceptive."); *see also Sarr v. BEF Foods, Inc.*, No. 18-cv-6409, 2020 WL 729883, at *4, *5 (E.D.N.Y. Feb. 13, 2020) (use of phrase "Made with Real … Butter" is not likely to mislead reasonable consumers despite product's use of margarine as ingredient); *Campbell v. Freshbev LLC,* 322 F. Supp. 3d. 330, 341 (E.D.N.Y. 2018) (rejecting, as implausible, claim that label statement "cold-pressed" misleading because "[t]here is no 'only' or 'exclusively' modifier before 'cold-pressed' to indicate that the juice has been subjected to no other process.").

Third, even if the term "honey" and image of a honey dipper are ambiguous, the ingredient label makes clear that cane sugar and molasses are also used to sweeten the product. *Lima v Post Consumer Brands, LLC*, *supra,* 2019 WL 3802885, at *7 (holding "'Honey Bunches of Oats' with honey dipper was not deceptive because [t]he packaging . . . makes no objective representation about the amount of honey, leaving the cereal's accurate list of ingredients as the only unambiguous representation of the amount of honey relative to other sweeteners.") Because the name "honey graham crackers" and the image of honey in a honey dipper would not mislead a reasonable consumer into believing that the product is primarily sweetened with honey, Plaintiff's "honey" claim fails as a matter of law.

2. Plaintiff Has Not Alleged an Injury Under GBL Sections 349 and 350.

To sufficiently plead an injury under GBL Sections 349 and 350, Plaintiff must allege that, "on account of a materially misleading practice, [she] purchased a product and did not

receive the full value of [her] purchase*." Izquierdo v. Mondelez Int'l, Inc., supra,* 2016 WL 6459832, at *7, citing *Orlander v. Staples*, Inc., 802 F.3d 289, 302 (2d Cir. 2015)). Injury can be "overpayment or [payment of a] price premium, whereby a plaintiff pays more than [ ]he would have but for the deceptive practice." *Id*., citing *Koenig v. Boulder Brands, Inc*., 995 F. Supp. 2d 274, 288-289 (S.D.N.Y. 2014). "Simply ... recit[ing] the word 'premium' multiple times in the[ ] Complaint does not make Plaintiffs' injury any more cognizable." *Id*.

Here, Plaintiff's price premium allegations do not constitute an injury. While she does allege that she paid "approximately no less than $3.99 per box," she does not allege the price of any comparable products. (FAC ¶76.) Without any facts to support her conclusory price premium claim, Plaintiff fails to allege an actual injury. *Colella v. Atkins Nutritional, Inc*., 348 F. Supp. 3d 120, 143 (E.D.N.Y 2018) (plaintiff "provided no facts regarding what the premium was, what price he paid for the products, or the price of non-premium products."). Thus, Plaintiff fails to allege an injury in the FAC, and her GBL Sections 349 and 350 claims should be dismissed with prejudice.

3. Plaintiff Cannot Privately Enforce Alleged Violations of the FDCA.

While Plaintiff purports to base her deceptive labeling claim on New York's consumer protection laws, her FAC also alleges that the labeling and packaging of 365 Graham Crackers is "inconsistent" with FDCA regulations. (FAC ¶¶65-69.) Any claim based on alleged FDCA violations must fail because: (i) there is no private right of action under the FDCA, (ii) any technical violation of an FDA regulation is not a *pre se* material misrepresentation, and (iii) the labeling and packaging of 365 Graham Crackers complies with FDA regulations.

There is no private right of action under the FDCA: "[A]ll such proceedings for the enforcement, or to restrain violations, of this chapter shall be by and in the name of the United States." 21 U.S.C. § 337(a); *see also PDK Labs, Inc. v. Friedlander*, 103 F.3d 1105, 1113 (2d Cir. 1997) (there can be no private cause of action if plaintiff's "true goal is to privately enforce alleged violations of the FDCA"); *Verzani v. Costco Wholesale Corp.,* No. 09-cv-2117-CM, 2010 WL 3911499, at *3 (S.D.N.Y. Sept. 28, 2010) ("The FDCA lacks a private right of action

and therefore [a plaintiff] cannot rely on it for purposes of asserting a state-law consumer claim under G.B.L. § 349"), aff'd, 432 Fed. Appx. 29 (2d Cir. 2011).

Even if Plaintiff could privately enforce FDCA regulations, the 365 Graham Crackers label does not merely violate the GBL because of some alleged technical violation of the FDCA's regulations. Rather, Plaintiff still must show an objectively material misrepresentation on the 365 Graham Crackers' packaging. *See e.g., Daniel v. Mondelez Int'l, Inc.*, 287 F. Supp. 3d 177, 190 (E.D.N.Y. 2018) ("Plaintiff's statutory claims fail because non-functional slack-fill as defined by the FDCA and parallel state statutes, even assuming its existence, are not per se material misrepresentations under sections 349 and 350 … New York courts [] have adopted an objective definition of what constitutes a 'material misrepresentation' under section 349 and 350, which, unlike federal law, takes context into account.") Plaintiff has not done that because she has not shown that the perceptions of ordinary consumers align with their interpretation of the FDCA's labeling regulations.[2] Her contention that consumer expectations are set by a convoluted web of labeling regulations strains credulity. (FAC ¶¶65-69.) Plaintiff fails to allege facts showing that consumers have any understanding of these regulations. What consumers expect is a graham cracker that tastes of honey, which is exactly what they get.

Finally, despite Plaintiff's suggestions otherwise, 365 Graham Crackers do comply with the relevant FDA regulations. FDCA and FDA regulations require that a food products' "statement of identity" can consist of either "[t]he common or usual name of the food" or,

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[2] As here, plaintiffs in *Steele*, *Sarr*, and *Reyes* (all brought by the same plaintiff's attorney in this action) premised some of their false advertising claims on alleged violations of FDCA labeling regulations. *Steele v. Wegmans Food Markets, Inc., supra,* 2020 WL 3975461, at *1 (alleging violations of FDCA vanilla and ice cream flavor regulations); *Sarr v. BEF Foods, Inc., supra*, 2020 WL 729883, at *5 (alleging statement "Made with Fresh Whole Potatoes" is false with regards to Defendants' mashed potatoes because FDA regulations define "fresh" as food "in its raw state and has not been frozen or subjected to any form of thermal processing or any other form of preservation."), citing 21 C.F.R. 101.95(a); *Reyes v. Crystal Farms Refrigerated Distribution Co.,* No. 18-cv-2250-NGG-RML, 2019 WL 3409883, at *4 (E.D.N.Y. July 26, 2019) (same). In each case, the court held that such technical violations of FDCA regulations were meaningless in proving plaintiff's GBL claims because they were not tethered to consumer expectations. *Steele,* 2020 WL 3975461, at *2 ("the extensive discussion and argument in the motion papers with respect to particular federal standards for ice cream flavor descriptions is without consequence."); *Sarr*, 2020 WL 729883, at *5 (reasonable consumer understand that mashed potatoes are not fresh potatoes); *Reyes*, 2019 WL 3409883, at *4 (same).

alternatively, "[a]n appropriately descriptive term, or when the nature of the food is obvious, a fanciful name commonly used by the public for such a food." 21 C.F.R. § 101.3(b). The regulations make clear that the name of the food product itself does not need to refer to its ingredients and certainly not all of its ingredients. The name "Honey Graham Crackers" accurately identifies in simple and direct terms the basic nature of the food—a honey flavored graham cracker—and identifies the product by its common or usual name. 21 C.F.R. §§102.5(a) and 101.3.

FDCA and FDA regulations further provide that the food product's labeling must include a nutritional label and an ingredient list. 21 C.F.R. §§ 101.4 and 101.9. Plaintiff concedes that the packaging of 365 Graham Crackers includes the required ingredient list and nutritional label. (FAC ¶¶44, 49.)

B. Plaintiff Fails to State a Claim for Fraud

To state a claim for fraud under New York law, a plaintiff must allege (1) a material misrepresentation or omission of fact; (2) which the defendant knew to be false; (3) which the defendant made with the intent to defraud; (4) upon which the plaintiff reasonably relied; and (5) which caused injury to the plaintiff." *Fin. Guar. Ins. Co. v. Putnam Advisory Co., LLC*, 783 F.3d 395, 402 (2d Cir. 2015). Moreover, "[c]laims sounding in fraud or mistake are subject to the heightened pleading standard of Federal Rule of Civil Procedure 9(b), which requires that such claims "state with particularity the circumstances constituting fraud or mistake." *Becerra*, 945 F3d at 1228. Rule 9(b) is satisfied when the complaint specifies 'the time, place, speaker, and content of the alleged misrepresentations;' [and] how the misrepresentations were fraudulent." *Schwartzco Enters. LLC v. TMH Mgmt., LLC*, 60 F. Supp. 3d 331, 344 (E.D.N.Y. 2014) (internal citation omitted).

Plaintiff alleges that WFM Group's "fraudulent intent is evinced by its failure to accurately identify the Products [sic] on the front label when it knew this was not true." (FAC ¶128.) But "[t]he simple knowledge that a statement is false is not sufficient to establish fraudulent intent." *Davis v. Hain Celestial Grp.*, 297 F. Supp.3d 327, 337 (E.D.N.Y. 2018.)

Additionally, as discussed in Section A, above, no misrepresentation has been identified. "Where a consumer protection claim fails [because no misrepresentation has been found], so must a fraud claim." *Kennedy v. Mondelez Glob. LLC, supra*, 2020 WL 4006197, at *14; *Brumfield v. Trader Joe's Co*., No. 17-cv-3239-LGS, 2018 WL 4168956, at *5 (S.D.N.Y. Aug. 30, 2018) (dismissing fraud claim after finding that label "black truffle flavored" was not deceptive.) Accordingly, Plaintiff's claim for fraud must be dismissed.

C. Plaintiff's Negligent Misrepresentation Claim Fails

Plaintiff fails to state a claim for negligent misrepresentation because she fails to plead that a special relationship existed between herself and WFM Group, and the claim is barred by the economic loss doctrine.

1. Plaintiff Fails to Allege a "Special Relationship"

To plead a claim for negligent misrepresentation, Plaintiff must allege that WFM Group owed her "a duty of care due to a special relationship." *Nelson v. MillerCoors, LLC*, 246 F. Supp. 3d 666, 677 (E.D.N.Y. 2017). In a commercial transaction, such a duty "has been imposed only on those persons who possess unique or specialized expertise, or who are in a special position of confidence and trust with the injured party such that reliance on the negligent misrepresentation is justified." *Kimmel v. Schaefer*, 675 N.E.2d 450, 545 (N.Y. 1996).

Plaintiff's conclusory allegation that WFM Group owed her a duty because it holds "itself out as having special knowledge and experience in the production, service and/or sale of the product" is insufficient. (FAC ¶114.) "[I]f this alone were sufficient, a special relationship would necessarily always exist for purposes of misbranded food claims, which is not the case." *Stolz v. Fage Dairy Processing Indus.*, 2015 WL 5579872 at *25 (E.D.N.Y Sept. 22, 2015).

In *Stoltz*, the court rejected the claim that the maker of yogurt held itself out as having special knowledge in the making of yogurt: "[t]he requisite special relationship may not, however, be based solely on Defendants' status as the manufacturer of the Total 0% Products because, if this alone were sufficient, a special relationship would necessarily always exist for purposes of misbranded food claims, which is not the case." *Stolz v. Fage Dairy Processing*

Indus., 2015 WL 5579872, at *25; *see also Segedie v Hain Celestial Group, Inc*., 14-cv-5029-NSR, 2015 WL 2168374, at *14 (S.D.N.Y. May 7, 2015) ("Defendant's obligation to label products truthfully does not arise from any special relationship. There is nothing approximating privity between the parties.") Plaintiff fails to allege any facts demonstrating that her purchase of 365 Graham Crackers was anything more than an ordinary commercial transaction.

2. The Economic Loss Rule Bars Plaintiff's Negligent Misrepresentation Claim

Plaintiff's negligent misrepresentation claim should also be dismissed because it is barred by the economic loss doctrine. "The economic loss doctrine restricts the remedy of plaintiffs who have suffered economic loss, but not personal or property injury, to an action in contract." *Elkind v. Revlon Consumer Prod. Corp*., No. 14-cv-2484-JS-AKT, 2015 WL 2344134, at *12 (E.D.N.Y. May 14, 2015), citing *EED Holdings v. Palmer Johnson Acquisition Corp*., 387 F. Supp. 2d 265, 277 (S.D.N.Y. 2004). "If the damages suffered are of the type remediable by contract, a plaintiff may not recover in tort." *Carmania Corp., N.V. v. Hambrecht Terrell Int'l*, 705 F. Supp. 936, 937 (S.D.N.Y. 1989) (collecting cases). The economic loss rule "applies to claims for negligent misrepresentation." *Elkind*, 2015 WL 2344134, at *12 (dismissing negligent misrepresentation claim with prejudice). Allegations that "plaintiff and the putative class members purchased products they would have otherwise purchased at a lesser price or not at all" are subject to the economic loss doctrine. *Gordon v. Hain Celestial Grp., Inc.*, No. 16-cv-6526-KBF, 2017 WL 213815, at *6 (S.D.N.Y. Jan. 18, 2017) (dismissing negligent misrepresentation claim with prejudice).

Here, Plaintiff fails to allege that she suffered personal or property injury. Instead, she alleges: "Plaintiffs and class members would not have purchased the Products [sic] or paid as much if the true facts had been known, suffering damages." (FAC ¶¶109, 117.) As *Gordon* makes clear, such damage allegations do not provide grounds for tort recovery, and this Court should dismiss Plaintiffs' negligent misrepresentation claim with prejudice.

D. Plaintiff Fails to State a Plausible Breach-of-Warranty Claim

1. Plaintiff's Claim for Breach of Express Warranty Fails

To state a claim for breach of express warranty under New York law, a buyer must provide a seller with timely notice of an alleged breach of warranty. *Colella,* 348 F. Supp. 3d at 143. Plaintiff alleges that she "provided or will *provide* notice to defendant…" (Emphasis added.) (FAC ¶122.) But New York law requires that a plaintiff affirmatively allege she has provided notice, not simply that she may or may not have done so. *Quinn v Walgreen Co*., 958 F. Supp. 2d 533, 544 (S.D.N.Y. 2013.)

Additionally, "a plaintiff must allege (1) the existence of a material statement amounting to a warranty, (2) the buyer's reliance on this warranty as a basis for the contract with the immediate seller, (3) breach of the warranty, and (4) injury to the buyer caused by the breach." *Goldemberg v Johnson & Johnson Consumer Companies, Inc*., 8 F. Supp. 3d 467, 482 (S.D.N.Y. 2014.) Plaintiff's breach of warranty claims are based on the same assertions she made regarding labeling and packaging (that is, the labeling and packaging of 365 Graham Cracker imply that cracker contains more whole-wheat flour than wheat flour and more honey than sugar), which Plaintiff claims violate GBL sections 349 and 350. (FAC ¶119.) As with her deceptive advertising claims, Plaintiff cannot prevail on her breach of warranty claim because the labeling and packaging of 365 Graham Crackers are not likely to mislead a reasonable consumer. *Solak v Hain Celestial Group, Inc.,* No. 17-cv-0704-LEK-DEP, 2018 WL 1870474, at *11 (N.D.N.Y. Apr. 17, 2018) ("[B]ecause those three representations . . . are insufficient as a matter of law to mislead a reasonable consumer, they cannot be relied upon by Plaintiffs as grounds for asserting a breach of express warranty . . .)

Moreover, the packaging and labeling of 365 Graham Crackers does not make any actionable warranty. The labeling and packaging do not warrant that the crackers contain predominately whole-wheat flour or honey. In *Brumfield*, the court dismissed plaintiff's claim that Trader Joe's Truffle Oil breached an express warranty when it did not in fact contain actual truffles:

> The Complaint identifies only one express warranty: Trader Joe's "expressly warranted that Trader Joe's Truffle Oil was, in fact, flavored by black truffle." However, that is not what the Product label warrants; it states that the olive oil is "Black Truffle Flavored." That is what Plaintiffs received when they purchased the Product—olive oil that tasted like black truffle. As a result, the fact that the Product did not contain actual black truffle did not constitute a breach of express warranty, and that claim is dismissed.

Brumfield v Trader Joe's Co., *supra,* 2018 WL 4168956, at *3.

Similarly, in *Kennedy* the court rejected plaintiffs' breach of warranty claims based on the packaging and labeling of Nabisco and Honey Maid graham crackers. *See, Kennedy v. Mondelez Glob. LLC, supra*, 2020 WL 4006197, at *15 ("[T]he graham and whole grain statements do not warrant that more whole grains than white flour are in the crackers. And the honey statements do not warrant that more honey than sugar is used or that honey is the predominant sweetener. Thus, there is no basis to claim a breach of any express warranty. . .") Accordingly, Plaintiff's claim for breach of express warranty should be dismissed with prejudice.

2. Plaintiff's Implied Warranty Claims Fail Because 365 Graham Crackers Are Fit for Consumption.

Under New York law, the implied warranty of merchantability "requires only that the good sold be of a minimal level of quality." *Caronia v. Phillip Morris USA, Inc.*, 715 F.3d 417, 433 (2d Cir. 2013). If Plaintiff challenges the merchantability of a food product, she must allege the food was "unfit to be consumed." *Brumfield,* 2018 WL 811530, at *4. Here, because Plaintiff does not allege that 365 Graham Crackers were unfit for consumption, her breach of implied warranty claims must be dismissed.

3. Plaintiff's Magnuson-Moss Warranty Act Claim Should Be Dismissed.

The Magnuson-Moss Warranty Act ("MMWA") "defines a 'warranty' as a 'written affirmation' that a consumer product will be 'defect free or will meet a specified level of performance over a specified period of time.'" *Bowling v Johnson & Johnson*, 65 F. Supp. 3d 371, 377-78 (S.D.N.Y. 2014.) The packaging and labeling of 365 Graham Crackers and the product name "Organic Honey Graham Crackers" does not meet the requirements of the MMWA. It does not warrant that the product is defect free or that it will meet a specified level

of performance. *In re Frito-Lay N. Am., Inc. All Nat. Litig.,* 12-md-2413-RRM-RLM, 2013 WL 4647512, at *17 (E.D.N.Y. Aug. 29, 2013) (dismissing MMWA claims because "[a]n 'All Natural' label does not warrant a product free from defect.")

Additionally, the MMWA precludes claims where "amount in controversy of any individual claim is less than the sum or value of $25" and where the product costs less than $5. 15 U.S.C. §2310(d)(3)(A) and §2302(e). Here Plaintiff alleges that she bought a box of the product for $3.99. (FAC ¶¶76, 88.) These allegations preclude a claim under the MMWA. *Brazil v. Dole Food Co.,* 935 F. Supp.2d 947, 965-66 (N.D. Cal. 2013).

E. Plaintiff Fails to State a Claim for Unjust Enrichment

Plaintiff's claim for unjust enrichment fails because she does not allege any theory on which to recover, and has thus failed to show "that the defendant has at the plaintiff's expense been enriched and unjustly so." *Olson v. Major League Baseball*, No. 20-cv-632, 2020 WL 1644611, at *10 (S.D.N.Y. Apr. 3, 2020), *reconsideration denied,* -- F.Supp.3d --, 2020 WL 3025280 (June 5, 2020); see also *Kennedy v Mondelez Glob. LLC, supra*, 2020 WL 4006197, at *15 (dismissing plaintiffs' unjust enrichment claims because they failed to allege deceptive trade practices or any other claim.)

In addition, Plaintiff's unjust enrichment claim should be dismissed because it is duplicative of her other claims and she already has an adequate remedy at law. "[U]njust enrichment is not a catchall cause of action to be used when others fail. . . . An unjust enrichment claim is not available where it simply duplicates, or replaces, a conventional contract or tort claim." *Corsello v. Verizon N.Y., Inc.*, 967 N.E.2d 1177, 1185 (N.Y. 2012); see also *Izquierdo,* 2016 WL 6459832, at *9-10 (dismissing unjust enrichment claims as duplicative of plaintiffs' other claims).

Plaintiff's unjust enrichment cause of action relies entirely upon the same facts as Plaintiff's other causes of actions and thus must be dismissed. (FAC ¶¶130-131.) Further, as Plaintiff's other alleged causes of action make clear, Plaintiff already has a number of other adequate remedies at law. While Plaintiff's remedies at law fail for the reasons stated above,

Plaintiff cannot cure those deficiencies with an unjust enrichment claim. *See Izquierdo*, 2016 WL 6459832, at *10 ("Here, all of Plaintiffs' causes of action have been dismissed. Their unjust enrichment claim cannot cure the failings of their other causes of action.").

F. Plaintiff Does Not Have Standing to Seek Injunctive Relief

Plaintiff seeks an injunction directing WFM Group to correct its practices and refrain from using certain representations in 365 Graham Crackers. (FAC at p. 20 [Prayer] ¶¶2, 3.) "[W]hen seeking prospective injunctive relief, the plaintiff must prove the likelihood of future or continuing harm." (citations omitted.) *Elkind*, 2015 WL 2344134, at *3. "A plaintiff 'lack[s] standing to pursue injunctive relief [if he is] unable to establish a 'real or immediate threat' of injury.' '[P]ast injuries ... [therefore] do not confer standing to seek injunctive relief unless the plaintiff can demonstrate that [ ]he is likely to be harmed again in the future in a similar way.'" (Citations omitted.) *Kommer v Bayer Consumer Health, a division of Bayer AG*, 710 Fed. Appx. 43, 44 (2d Cir 2018.) Past purchasers of allegedly deceptive products are not likely to suffer future harm. As the court in *Berni v Barilla S.p.A* explained:

> For several reasons, past purchasers of a product, like the Barilla purchasers, are not likely to encounter future harm of the kind that makes injunctive relief appropriate. In the first place, past purchasers are not bound to purchase a product again—meaning that once they become aware they have been deceived, that will often be the last time they will buy that item. Past purchasers do not have the sort of perpetual relationship with the producer of a consumer good that is typical of plaintiffs and defendants in Rule 23(b)(2) class actions. No matter how ubiquitous Barilla pasta may be, there is no reason to believe that all, or even most, of the class members—having suffered the harm alleged—will choose to buy it in the future.
>
> But even if they do purchase it again, there is no reason to believe that all, or even most, of the class members will incur a harm anew. Supposing that they have been deceived by the product's packaging once, they will not again be under the illusion that the boxes of the newer pastas are filled in the same way as the boxes of the older pastas. Instead, next time they buy one of the newer pastas, they will be doing so with exactly the level of information that they claim they were owed from the beginning. A "fill-line"

> or some disclaimer language will not materially improve their position as knowledgeable consumers.

Berni v Barilla S.p.A., 964 F.3d 141, 147-48 (2d Cir 2020).

Plaintiff alleges that she "would not have purchased the product in the absence of Defendant's misrepresentations and omissions." (FAC ¶91.) And, that she will only purchase the product again when "with the assurance that [sic] Product's label is lawful and consistent with the Product's ingredients." (FAC ¶ 95.) Because Plaintiff admits that she is unlikely to purchase the product again, unless the product is changed, she lacks standing to seek injunctive relief. *See Sharpe v A&W Concentrate Co*., No. 19-cv-768-BMC, 2020 WL 4931045, at *4 (E.D.N.Y. Aug. 24, 2020).

IV. CONCLUSION

For the reasons stated herein, WFM GROUP asks that this Court dismiss Plaintiff's entire FAC with prejudice.

Dated: September 8, 2020 Respectfully submitted,

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1:20-cv-01291-GHW-OTW

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- against -

Whole Foods Market Group, Inc.,

Defendant

Plaintiff's Memorandum of Law in Opposition
to Defendant's Motion to Dismiss the First Amended Complaint

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Table of Contents

TABLE OF AUTHORITIES iv

INTRODUCTION 1

FACTUAL BACKGROUND 1

LEGAL STANDARDS 3

ARGUMENT 4

I. PLAINTIFF HAS PLAUSIBLY ALLEGED DECEPTION 4

A. Defendant's "Compound Name" Argument is Illogical and Misapplied 5

B. Identifying an Entire Product With Another Word for Whole Grain Exceeds *Mantikas* "Made With Whole Grain" 6

C. The Honey Representation Is Misleading 9

D. Ingredient List Fails to Cure Deceptive Front Label Claims 10

II. PLAINTIFF ESTABLISHED SUFFICIENT INJURY TO PURSUE HER GBL CLAIMS FOR DAMAGES 12

III. PLAINTIFF'S GBL CLAIMS ARE BASED ON CONDUCT THAT IS DECEPTIVE INDEPENDENT OF FEDERAL REGULATIONS 13

A. Plaintiff Does Not Rely on Violations of FDA Regulations for their GBL Claims 14

B. Defendant's Assertion that the Regulations Have No Weight is Without Merit 15

C. Defendant's Authorities Address "Technical Violations" 17

IV. PLAINTIFF PROPERLY ALLEGED COMMON LAW CLAIMS 18

A. Plaintiff Properly Pled Negligent Representation Claims 18

B. Plaintiff Properly Alleged Express Warranty Claims 19

C. Plaintiff Properly Pled Breach of Implied Warranty Claim 20

D. Plaintiff Properly Pled Fraud Claims 21

E. Plaintiff's Claims of Unjust Enrichment are Not Duplicative 22

V. PLAINTIFF HAS STANDING TO SEEK INJUNCTIVE RELIEF 22

Conclusion 24

TABLE OF AUTHORITIES

Cases

Ackerman v. Coca-Cola Co.,
No. 09-cv-00395, 2013 WL 7044866 (E.D.N.Y. July 18, 2013)... 28

Aetna Cas. And Sur. V. Aniero Concrete Co., Inc.,
404 F.3d 566 (2d Cir. 2005).. 22

Am. Home Prods. Corp. v. Fed. Trade Comm'n,
695 F.2d 681 (3d Cir.1982).. 19

Ashcroft v. Iqbal,
556 U.S. 662 (2009).. 4

Avola v. La.-Pac. Corp.,
No. 11-cv-4053, 2013 WL 4647535 (E.D.N.Y. Aug. 28, 2013) 23, 24

Bell Atl. Corp. v. Twombly,
550 U.S. 544 (2007)... 4, 19

Berger v. MFI Holding Corporation,
No. 17-cv-06728 (E.D.N.Y. Apr. 3, 2019) 13

Berni v. Barilla S.p.A., *et al. v. Schulman*,
No. 19-cv-1921, 2020 U.S. App. LEXIS 21167 (2d Cir. July 8, 2020) 29

Buckman Co. v. Plaintiffs' Legal Comm.,
531 U.S. 341, 121 S.Ct. 1012, 148 L.Ed.2d 854 (2001).. 16, 17

Buonasera v. Honest Co., Inc.,
208 F. Supp 3d 555 (S.D.N.Y. 2016)... 23

Burton v. Iyogi, Inc.,
No. 13-cv-6926, 2015 WL 4385665 (S.D.N.Y. Mar. 16, 2015).. 27

Cummings v. FCA US LLC,
401 F. Supp. 3d 288 (N.D.N.Y. 2019)... 27

Daniel v. Mondelez Int'l, Inc.,
287 F. Supp. 3d 177 (E.D.N.Y. 2018)... 21

Davis v. Hain Celestial Grp. Inc.,
297 F. Supp. 3d 327 (E.D.N.Y. 2018) 13

Dumont v. Reilly Food Co., 934 F.3d 35 (1st Cir. 2019)... 19

Duran v. Henkel of America, Inc.,
__ F.Supp.3d __, 2020 WL 1503456 (S.D.N.Y. March 30, 2020) 6, 14, 15

Eternity Glob. Master Fund. Ltd. v. Morgan Guar. Trust Co. of N.Y.,
375 F.3d 168 (2d Cir. 2004) 22, 23

Famous Horse Inc. v. 5th Ave. Photo Inc.,
624 F.3d 106 (2d Cir. 2010) 5

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.,
528 U.S. 167 (2000) 28

Galper v. JP Morgan Chase Bank, N.A.,
802 F.3d 437 (2d Cir. 2015) 4

Gant v. Wallingford Bd. of Educ.,
69 F.3d 669 (2d Cir. 1995) 5

Goldemberg v. Johnson & Johnson Consumer Companies, Inc.,
8 F. Supp. 3d 467 (S.D.N.Y. 2014) 15

Goldemberg v. Johnson & Johnson Consumer Cos.,
317 F.R.D. 374 (S.D.N.Y. 2016) 28

Greene v. Gerber Products Co.,
262 F. Supp 3d 38 (E.D.N.Y. 2017) 22

Hanley v. Chicago Title Ins. Co.,
No. 12-cv-4418, 2013 WL 3192174 (S.D.N.Y. June 24, 2013) 4

Henry v. Daytop Vill., Inc.,
42 F.3d 89 (2d Cir.1994) 26

Huang v. iTV Media, Inc.,
13 F. Supp. 3d 246 (E.D.N.Y. 2014) 27

In re Bayer Corp. Combination Aspirin Prods. Mktg. and Sales Practices Litig.,
701 F. Supp. 2d 356 (E.D.N.Y. 2010) 17

In re Scotts EZ Seed Litig.,
304 F.R.D. 397 (S.D.N.Y. 2015) 14

J.A.O.Acquisition Corp. v. Stavitsky,
8 NY3d 144 (2007) 21

Jackson v. Eddy's LI RV Ctr., Inc.,
845 F. Supp. 2d 523 (E.D.N.Y. 2012) 24

Jackson-Mau v. Walgreen Co.,
No. 18-cv-04868, 2019 WL 5653757 (E.D.N.Y. Oct. 31, 2019) 28

Kacocha v. Nestle Purina Petcare Co.,
No. 15-cv-5489 (KMK) (S.D.N.Y. 2016).. 15

Karlin v. IVF Am., Inc.,
93 N.Y.2d 282 (1999) 5

Koenig v. Boulder Brands, Inc.,
995 F. Supp. 2d 274 (S.D.N.Y. 2014).. 15

Loreley Fin. (Jersey) No. 3 Ltd. v. Wells Fargo Sec., LLC,
797 F.3d 160 (2d Cir. 2015).. 26

Mandarin v. Wildenstein,
16 N.Y.3d 181 (2011) 21

Mantikas v. Kellogg Co.,
910 F.3d 633 (2d Cir. 2018)... 6, 7, 8, 12

Nashville Syrup Co. v. Coca Cola Co.,
215 F. 527 (6th Cir. 1914) 7

Orlander v. Staples, Inc.,
802 F.3d 289 (2d. Cir. 2015)... 6

Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A.,
85 N.Y.2d 20 (1995) 5, 14

Patane v. Nestlé Waters North America, Inc.,
369 F. Supp. 3d 382 (D. Conn. 2019)... 18

Pelman ex rel. Pelman v. McDonald's Corp.,
396 F.3d 508 (2d Cir. 2005).. 14

Quiroz v. Beaverton Foods, Inc.,
No. 17-cv-7348, 2019 WL 1473088 (E.D.N.Y. Mar. 31, 2019)... 18

Reyes v. Crystal Farms Refrigerated Distrib. Co.,
No. 18-cv-2250, 2019 U.S. Dist. LEXIS 125971 (E.D.N.Y. July 26, 2019).......................... 13

Rivera v. Navient Solutions, LLC,
2020 WL 4895698 (S.D.N.Y. August 19, 2020) 6

Ross v. Bolton,
904 F.2d 819 (2d Cir.1990).. 26

Sarr v. BEF Foods,
No. 18-cv-6409, 2020 U.S. Dist. LEXIS 25594 (E.D.N.Y. Feb. 13, 2020) 13

Sci. Components Corp. v. Sirenza Microdevices, Inc.,
2006 WL 2524187 (E.D.N.Y. Aug. 30, 2006).. 25

Sharpe v. A & W Concentrate Company and Keurig Dr. Pepper Inc.,
__ F. Supp.3d __, No. 1:19-cv-00768 (BMC), 2020 WL 4931045
(E.D.N.Y. August 24, 2020) 9, 10

Small v. Lorillard Tobacco Co.,
94 N.Y.2d 43 (2013) 14

Solak v. Hain Celestial Grp., Inc.,
No. 3:17-cv-0704, 2018 U.S. Dist. LEXIS 64270 (N.D.N.Y. Apr. 17, 2018)....................... 21

Tucker v. Post Consumer Brands LLC,
No. 4:19-cv-03993-YGR (N.D. Cal. Apr. 21, 2020) 11

Watson v. Kellogg Sales Company,
No. 19-cv-01356-DLC (S.D.N.Y. Oct. 29, 2019)... 9

Weisman v. LeLandais,
532 F.2d 308 (2d Cir. 1976)... 5

Wyeth v. Levine,
555 U.S. 555, 129 S.Ct. 1187, 173 L.Ed.2d 51 (2009)... 18

Statutes

21 U.S.C. § 337(a) 16

N.Y. Gen. Bus. Law § 349... 1, 3, 5, 21

N.Y. Gen. Bus. Law § 350... 1, 3, 5

Rules

Fed. R. Civ. P. 8(e)(2).. 26

Fed. R. Civ. P. 9(b) 25

Fed. R. Civ. P. 12(b)(6).. 3, 4

Plaintiff Chandra Campbell ("Plaintiff") respectfully submits this memorandum of law in opposition to the motion by Defendant Whole Foods Market Group, Inc. ("Defendant" or "Whole Foods") to dismiss her First Amended Class Action Complaint, ECF No. 17 ("Amended Complaint or "Am. Comp.").

For the reasons given below, the Court should deny Defendant's motion.

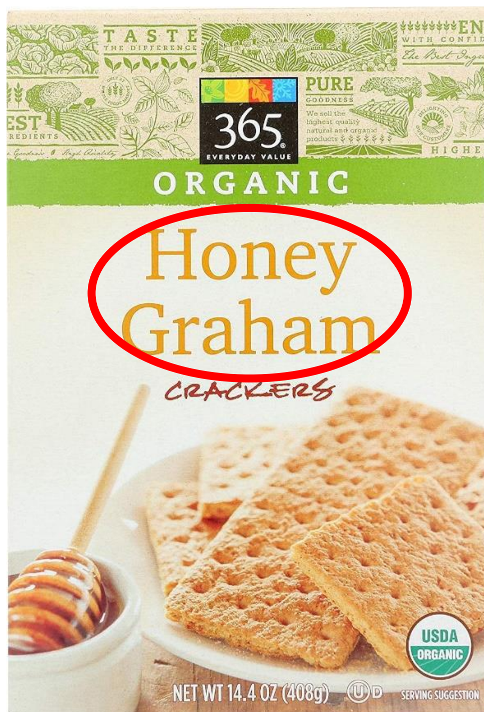
INTRODUCTION

Plaintiff brings claims for damages for violations of New York General Business Law ("GBL") §§ 349 and 350 and common law claims on behalf of herself and a New York class.

Defendant argues that the claims in Plaintiff's Amended Complaint should be dismissed with prejudice because (1) Plaintiff fails to state a plausible claim of deception; (2) Plaintiff lacks injury in fact to pursue her GBL claims for damages; and (3) Plaintiff improperly seeks to privately enforce federal and state regulations. *See* Defendant Whole Food's Memorandum in Support of Its Motion to Dismiss Plaintiff's First Amended Class Action Complaint ("Def. Mem."). None of these arguments can be the basis for dismissal of Plaintiff's GBL claims or common law claims for damages, and Defendant's motion should be denied.

FACTUAL BACKGROUND

As seen below, Defendant prominently states, "Honey Graham Crackers" on the front of its Organic 365 crackers (the "Product"). *See* Image 1 ("Honey" and "Graham" representations circled). See Am. Compl. at ¶¶ 1, 3.



The Product is misleading for two reasons: (1) the Product represents that it is exclusively or predominantly sweetened with honey when, in fact, it is predominantly sweetened with sugar and (2) the Product represents that it contains more whole grain or graham flour than wheat flour when this is not true. *Id*. at ¶¶ 9-10, 44. These front label representations cause consumers, like Plaintiff, to believe that the product has more nutritive qualities than are present. *Id*. at ¶ 107. Consumers are accustomed to looking to the front label to discern the primary ingredients of a product. Unfortunately for consumers, they would need to take recourse to the back panel ingredient list to discern the truth about this Product. *Id*. at ¶ 30.

Given consumer preference for non-sugar sweeteners and whole grain flour, Defendant is reaping the benefit of consumers' tastes without following through and providing a truthfully advertised Product. Sugar has become disfavored as a sweetener in recent years. *Id*. at ¶ 15-16. Consumers describe honey as more healthful than sugar. Id. at ¶ 21. Defendant clearly knows this to be true and is seeking to appeal to this burgeoning market of consumers seeking sugar

substitutes.

Additionally, the Product is misleading because of its flour content. *Id*. at ¶ 39. The Product's name gives reasonable consumers the impression that whole grain graham flour is the primary flour ingredient used. *Id*. Consumers are once again misled, however, as the predominate flour ingredient is "Organic Wheat Flour." *Id*. at ¶ 44. Consumers seek out products made with whole grains because of their health benefits, including containing more fiber than refined white flour. *Id*. at ¶ 50. Again, Defendant knows this and appeals to health-conscious consumers by highlighting the premium or more healthful ingredients on the front label while misleading consumers as to the real content of the Product.

Plaintiff Campbell purchased the Product bearing the "Honey Graham" statement on the front labeling. *Id.* at ¶¶ 89-90. She relied upon the front label representations in making her purchase. *Id*. As a result of the misleading labeling at issue, the Product is sold at a premium price, as compared to similar competing products represented in a non-misleading way. *Id.* at ¶ 76. The value of the Product purchased by Plaintiff was materially less than its value as represented by Defendant. *Id.* at ¶ 93.

Plaintiff Campbell asserts claims for violation of GBL §§ 349 and 350 *id.* at ¶¶ 104-109, and common law claims. *Id.* at ¶¶ 110-131, on behalf of a proposed class of similarly situated consumers who purchased the Product and who reside in New York. *Id.* at ¶ 96. Plaintiff seeks monetary and injunctive relief as well as expenses and reasonable attorneys' fees. *Id.* at 20-21 (Prayer for Relief, ¶¶ 3-5).

LEGAL STANDARDS

To survive a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)("*Iqbal*").

"Rule 12(b)(6) does not countenance…dismissals based on a judge's disbelief of a complaint's factual allegations." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007) (*Twombly*). "[A] well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and 'that a recovery is very remote and unlikely.'" *Id*. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678.

"A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 663. The court "is required to accept as true the facts alleged in the complaint, consider those facts in the light most favorable to the plaintiff, and determine whether the complaint sets forth a plausible basis for relief." *Galper v. JP Morgan Chase Bank, N.A.*, 802 F.3d 437, 443 (2d Cir. 2015). A court "must accept all factual allegations in the complaint as true and draw all reasonable inferences in the plaintiff's favor." *Hanley v. Chicago Title Ins. Co.*, No. 12-cv-4418, 2013 WL 3192174, at *2 (S.D.N.Y. June 24, 2013) (citing *Famous Horse Inc. v. 5th Ave. Photo Inc.*, 624 F.3d 106, 108 (2d Cir. 2010).

The "issue is not whether a plaintiff is likely to prevail ultimately, 'but whether the claimant is entitled to offer evidence to support the claims. Indeed, it may appear on the face of the pleading that a recovery is very remote and unlikely but that is not the test.'" *Gant v. Wallingford Bd. of Educ.*, 69 F.3d 669, 673 (2d Cir. 1995) (quoting *Weisman v. LeLandais*, 532 F.2d 308, 311 (2d Cir. 1976)).

ARGUMENT

I. PLAINTIFF HAS PLAUSIBLY ALLEGED DECEPTION

Plaintiff brings claims under GBL §§ 349 and 350, which New York's highest court has recognized are founded on the overarching belief that "[c]onsumers have the right to an honest

market place where trust prevails between buyer and seller." *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A.*, 85 N.Y.2d 20, 25 (1995). "These statutes on their face apply to virtually all economic activity, and their application has been correspondingly broad." *Karlin v. IVF Am., Inc.*, 93 N.Y.2d 282, 290 (1999). "The reach of these statutes 'provide[s] needed authority to cope with the numerous, ever-changing types of false and deceptive business practices which plague consumers in our State.'" *Id.*

"To successfully assert a claim under either section, a plaintiff must allege that a defendant has engaged in (1) consumer-oriented conduct that is (2) materially misleading and that (3) plaintiff suffered injury as a result of the allegedly deceptive act or practice." *Orlander v. Staples, Inc.*, 802 F.3d 289, 300 (2d. Cir. 2015).

To state a claim for false advertising or deceptive business practices under New York law, "a plaintiff must plausibly allege that the deceptive conduct was likely to mislead a reasonable consumer acting reasonably under the circumstances." *Mantikas v. Kellogg Co.*, 910 F.3d 633, 636 (2d Cir. 2018). Whether a representation is likely to mislead a reasonable consumer "is generally a question of fact not suited for resolution at the motion to dismiss state." *Duran v. Henkel of America, Inc.*, __ F.Supp.3d __, 2020 WL 1503456, at *4 (S.D.N.Y. March 30, 2020) (listing cases in which motion to dismiss was denied); *see also Rivera v. Navient Solutions, LLC*, 2020 WL 4895698, at *7 (S.D.N.Y. August 19, 2020) ("a determination of whether a particular act or practice is misleading is not ordinarily appropriate for decision on a motion to dismiss") (listing cases in which motion to dismiss was denied).

A. Defendant's "Compound Name" Argument is Illogical and Misapplied

The Amended Complaint alleges the Product is misleading because graham "refers to whole grain flour." Am. Compl. at ¶ 43. According to defendant, expecting a product identified as a "graham cracker" to contain more whole grain than white flour is akin to expecting Coca Cola

to contain a "kola nut," "Froot Loops" to contain real fruit and to expect a "crunch berry" to refer to a novel berry instead of puffed corn. *Nashville Syrup Co. v. Coca Cola Co.*, 215 F. 527, 532 (6th Cir. 1914) (declining to find that the trademarked name, Coca Cola, was misleading as to the amount of coca leaves or cola nuts because this question "must be decided as of the time of adoption.");

Defendant's comparison of a product containing the name of an actual, established food – "graham crackers" – with "FROOT" and "Crunch Berries" fails because the latter are obvious fanciful names, which by definition are "overimaginative and unrealistic" – such as "moon pie" or "Hershey's Kisses."

Defendant claims it is "hyper-literal" for consumers to place reliance on the dictionary definition of graham cracker to suggest a specific amount of graham flour. Def. Mem. at 12. However, Plaintiff does not seek something unrealistic, as graham flour is a specific standardized ingredient which has had a common consumer understanding for over 50 years. Am. Compl. at ¶ 52 ("Graham flour is an alternative name for whole wheat flour"). There are no similar standardized foods such as "Froot" nor any record of "Crunch Berry" farming.

B. <u>Identifying an Entire Product With Another Word for Whole Grain Exceeds *Mantikas* "Made With Whole Grain"</u>

Defendant asks the Court to invert the Second Circuit's decision in *Mantikas v. Kellogg Co.*, which is directly on point and governs here. In *Mantikas*, the district court dismissed a complaint that alleged false advertising and deceptive business practices under the GBL. *Mantikas*, 910 F.3d at 634, 635 n.1. The subject of the case was a cracker sold in boxes that bore on their front labels the words "WHOLE GRAIN" or "MADE WITH WHOLE GRAIN" in large letters, as well as the statement "Made with 5g [or 8g] of WHOLE GRAIN per serving." *Id.* at 634–36. The plaintiffs alleged the "WHOLE GRAIN" representations led them to believe the product was

made predominantly of whole grain, when in fact the grain content was predominantly enriched white flour. *Id.* at 634–35, 637. The defendant moved to dismiss, and the district court granted the motion. *Id.* at 636.

On appeal, the Second Circuit vacated the district court's order for reversible error and remanded. It held that the plaintiffs had plausibly alleged deception and the fact that the product was made with some whole grain and the ingredient list on the side of the box listed "enriched white flour" before "whole wheat flour" were insufficient to dispel the plaintiffs' claim that the "WHOLE GRAIN" claims were deceptive. *Id.* at 637.

Here, as in *Mantikas*, the fact that the "graham (whole grain)" statement may technically be accurate because the Product contains *some* graham flour does not make the statement unactionable as a matter of law. Plaintiff has plausibly alleged that the Product contains more refined, white flour than whole grain graham flour in a way that is deceptive and contrary to consumer expectations.

The representation here is more egregious than in *Mantikas*, because identifying the entire Product as "Graham (Whole Grain) Crackers" goes beyond the "Made With Whole Grain" claim that the Second Circuit found was plausibly misleading. Def. Mem. at 14 citing *Kennedy v Mondelez Glob. LLC*, No. 19-cv-302, 2020 WL 4006197, at *9 (E.D.N.Y. Jul. 10, 2020) ("The word 'graham' when included in the term 'grahams' or the phrase 'graham crackers' does not connote graham flour.").

Defendant fails to bring to this Court's attention a similar case where District Judge Cote reached the opposite conclusion of Magistrate Judge Bulsara about similarly labeled graham cracker products. *Watson v. Kellogg Sales Company*, No. 19-cv-01356-DLC (S.D.N.Y. Oct. 29, 2019) Doc. 33 (relying on *Mantikas* and stating "I'm going to allow this litigation to proceed on

two claims, the GBL claim under the New York General Business Law -- this is the plaintiff's principal claim -- as well as the express warranty claim").

Defendant essentially asks this Court to rule contrary to the *Mantikas* decision by allowing Defendant to make a conspicuous, misleading front-label statement regarding an ingredient that Defendant chooses to highlight so long as the ingredient is in the Product in some minute amount or because the front label representations don't truly make ingredient claims. The Second Circuit warned that such a rule would open the door to "highly deceptive" practices:

> The rule . . . that, as a matter of law, it is not misleading to state that a product is made with a specified ingredient if that ingredient is in fact present – would validate highly deceptive advertising and labeling [and] would validate highly deceptive marketing.

Mantikas, 910 F. 3d at 638.

The recent case, *Sharpe v. A & W Concentrate Company and Keurig Dr. Pepper Inc.*, __ F. Supp.3d __, No. 1:19-cv-00768 (BMC), 2020 WL 4931045 (E.D.N.Y. August 24, 2020), affirmed the relevance of *Mantikas* in the consumer advertising area.

At issue was the representation "Made with Aged Vanilla" made by the defendants on the front label of its root beer and cream sodas. The plaintiffs in that case claimed that "consumers interpret the defendants' representation to mean that the characterizing flavoring derives from the vanilla plant, not a cheap inferior substitute for the natural substance." *Id.*, 2020 WL 4931045 at *1. The defendants argued that a reasonable consumer cannot be misled because the products contain some real vanilla and are conspicuously labeled as being "Naturally and Artificially Flavored." *Id.*

The court rejected both arguments.

> [Plaintiffs] have adequately alleged that the "MADE WITH AGED VANILLA" representation on the front of defendants' packaging communicates to the reasonable consumer the false message that the vanilla

> flavoring comes from real vanilla, when in reality, the product contains no "aged vanilla" whatsoever. The complaint reiterates that, even if the products contain any aged vanilla, "it is in trace or de minimis amounts not detectable by advanced scientific means." Therefore, defendants' misleading message that the drink contains "aged vanilla" is not dispelled by the information that the beverages are "Naturally and Artificially Flavored," which fails to communicate that the quantity of the artificial flavoring far exceeds the quantity of natural vanilla.

Id.

Just as in *Sharpe*, Plaintiff has alleged that the "graham [flour]" representation on the front of Defendant's packaging communicates to the reasonable consumer the false message that the Product contains more graham or whole-wheat flour than it does enriched flour when the opposite is true.

C. <u>The Honey Representation Is Misleading</u>

In a similar vein to its arguments regarding the "graham cracker" representation, Defendant claims that its representation of the Product as "honey" is not misleading because (1) the honey representation is a flavor claim and not an ingredient claim and (2) honey is not represented to be the predominate sweetener. Def. Mem. at 9. Both these arguments fail.

By choosing to highlight the ingredient honey – which does appear on the ingredient list and therefore is not solely a flavor – Defendant is making an ingredient claim. Def. Mem. at 23. Again, the decision in *Sharpe* is directly on point. In *Sharpe*, the defendant attempted to argue that since vanilla was not the predominant ingredient, *Mantikas* did not control and the "Made With Aged Vanilla" representation was not misleading. *Sharpe*, 2020 WL 4931045 at *5. That argument was unavailing.

Here, Defendant makes an analogous argument. Defendant claims the honey representation is not misleading because "nothing in the term 'honey' or image of a honey dipper suggests that the product is sweetened primarily with honey." Def. Mem. at 10.

Again, Defendant provides the Court only authority which supports its position. Def. Mem. at 15 citing *Lima v Post Consumer Brands, LLC*, No. 18-cv-12100, 2019 WL 3802885, at *6 (D. Mass. Aug. 13, 2019), reconsideration denied, 2019 WL 4889599 (D. Mass. Oct. 2, 2019) (dismissing claims based on expectation of more honey than sugar because "honey is a flavor as well as a sweetener.") *but see Tucker v. Post Consumer Brands LLC*, No. 4:19-cv-03993-YGR (N.D. Cal. Apr. 21, 2020), Doc. 42 (finding plausible claim of deception regarding "the use of honey as a sweetener" and *not* as a "flavoring agent").

Regardless of which, if any, decision is more relevant, Defendant chose to highlight the honey ingredients in the Product, thereby attempting to reap the benefits of consumer experience and expectation. However, Defendant had a responsibility to ensure that honey was a predominate or significant sweetening ingredient in the Product, when it was not.

D. Ingredient List Fails to Cure Deceptive Front Label Claims

Defendant cannot defeat Plaintiff's claims with a defense that the Product's ingredient list somehow dispels any ambiguity whether the Product is predominantly sweetened with honey or made with graham (whole-wheat) flour. Def. Mem. at 8, 10. The Second Circuit's decision in *Mantikas* is controlling and forecloses this argument. The Court of Appeals specifically rejected the argument that disclosures on the ingredient list rendered the allegations of deception implausible. *Id.* at 637. The Second Circuit could not be clearer in its decision:

> We conclude that a reasonable consumer should not be expected to consult the Nutrition Facts panel on the side of the box to correct misleading information set forth in large bold type on the front of the box.

Id.

The *Sharpe* decision again is on fours. The court rejected a similar argument made by the defendant in that case:

> [T]o adequately review [the "Naturally and Artificially Flavored"]

> disclosure on some of the products, one must maneuver and rotate the bottle. If the Court in *Mantikas* emphasized that a consumer should not be expected to turn and consult the side of a box to correct misleading information set forth in large bold type on the front of the box, I see no reason why a consumer purchasing a bottle of soda should be expected to do the same.

Sharpe, 2020 WL 4931045, at *5.

Here, the consumer inspecting the front label of the Product is confronted only with "Organic Honey Graham Crackers." Thus, before "maneuver[ing]" the Product to inspect the ingredient list, the reasonable consumer is left to take away two misleading conclusions: (1) the Product is sweetened predominantly with honey and (2) the Product is made predominantly with whole-wheat or graham flour. Neither one is true and only an inspection of the ingredient list dispels these assumptions. The Second Circuit has been clear that Defendant cannot rely upon the technical accuracy of its ingredient list to solve the problem of its deceptive front label.

Defendant's citation of a trio of cases dealing with front label claims actually supports Plaintiff's position. Def. Mem. at 16 citing *Sarr v. BEF Foods*, No. 18-cv-6409, 2020 U.S. Dist. LEXIS 25594 (E.D.N.Y. Feb. 13, 2020); *Reyes v. Crystal Farms Refrigerated Distrib. Co.*, No. 18-cv-2250, 2019 U.S. Dist. LEXIS 125971, at *8-16 (E.D.N.Y. July 26, 2019); *see also Davis v. Hain Celestial Grp. Inc.*, 297 F. Supp. 3d 327 (E.D.N.Y. 2018) (decided prior to *Mantikas* and dismissing claims based on ingredient list disclosure).

In *Sarr* and *Reyes*, the plaintiffs alleged it was misleading to promote the presence of butter given those mashed potatoes contained non-butter vegetable oil ingredients. The courts dismissed the claims because both items contained *more* butter than vegetable oils.

This case is more similar to *Berger v. MFI Holding Corporation*, No. 17-cv-06728 (E.D.N.Y. Apr. 3, 2019), where District (now Appellate) Judge Bianco concluded that plaintiff's claim of "made with real butter" was plausibly deceptive because there was *less* butter than

margarine in the mashed potatoes. Here, promoting whole grain graham flour is likewise misleading because it is present in an amount *less* than white flour.

II. PLAINTIFF ESTABLISHED SUFFICIENT INJURY TO PURSUE HER GBL CLAIMS FOR DAMAGES

A GBL action "is not subject to the pleading-with-particularity requirements of Rule 9(b), but need only meet the bare-bones pleading requirements of Rule 8(a)." *Pelman ex rel. Pelman v. McDonald's Corp.*, 396 F.3d 508, 511 (2d Cir. 2005) (internal citations omitted). Moreover, a plaintiff need not plead or allege reliance. *See In re Scotts EZ Seed Litig.*, 304 F.R.D. 397, 409 (S.D.N.Y. 2015).

A plaintiff needs to show only that the material deceptive act caused the injury. *See Small v. Lorillard Tobacco Co.*, 94 N.Y.2d 43, 56 (2013); *Oswego*, 85 N.Y.2d at 26. As explained in a recent decision in this District, *Duran v. Henkel of America, Inc.*:

> To allege injury under a price premium theory, a plaintiff must allege not only that defendants charged a price premium, but also that there is a connection between the misrepresentation and any harm from, or failure of, the product. This connection often takes the following form: A plaintiff alleges that a company marketed a product as having a unique quality, that the marketing allowed the company to charge a price premium for the product, and that the plaintiff paid the premium and later learned that the product did not, in fact, have the marketed quality.

Duran, __ F.Supp.3d __, 2020 WL 1503456 (S.D.N.Y. March 30, 2020), at *8 (internal quotations and citation omitted).

Here, Plaintiff has done just that. She alleged that Defendant's representations as to the flour content and honey content had a "material bearing on price and consumer acceptance of the Products." Am. Compl. at ¶ 73. Plaintiff alleged that "[t]he value of the Product that plaintiff purchased and consumed was materially less than its value as represented by defendant." *Id.* at ¶¶ 73, 76 ("As a result of the false and misleading labeling, the Product is sold at a premium price,

approximately no less than $3.99 per box, excluding tax, compared to other similar products represented in a non-misleading way.").

Finally, Plaintiff alleged, "Had plaintiff and class members known the truth, they would not have bought the Product or would have paid less for them." *Id.* at ¶ 74.

Plaintiff has unquestionably alleged injury sufficient to maintain his GBL claims. *See, e.g., Duran*, 2020 WL 1503456, at *8 (finding allegations sufficient for price premium theory of injury); *Goldemberg v. Johnson & Johnson Consumer Companies, Inc.*, 8 F. Supp. 3d 467, 480–82 (S.D.N.Y. 2014) (the plaintiff merely alleging he paid a premium price without making any other factual allegations was sufficient to properly allege injury); *Kacocha v. Nestle Purina Petcare Co.*, No. 15-cv-5489, 2016 WL 4367991, at *7 (S.D.N.Y. 2016) ("the law is clear that economic injury – including that caused by paying a premium – is sufficient to establish injury for standing purposes."); *Koenig v. Boulder Brands, Inc.*, 995 F. Supp. 2d 274, 288 (S.D.N.Y. 2014) ("A plaintiff adequately alleges injury under GBL § 349 by claiming that he paid a premium for a product based on the allegedly misleading representations.").

III. PLAINTIFF'S GBL CLAIMS ARE BASED ON CONDUCT THAT IS DECEPTIVE INDEPENDENT OF FEDERAL REGULATIONS

Defendant's argument, that Plaintiff asserts an improper private right of action for violations of FDA regulations, can be dispensed with easily. Def. Mem. at 17-18.

Plaintiff alleges that Defendant's labeling constitutes deceptive business practices under GBL § 349 and false advertising under GBL § 350 because the Product's front label representations deceptively imply that the Product is sweetened with more honey than sugar and that it contains more whole grain graham flour vis-à-vis enriched flour than the case. *See* Am. Compl. at ¶¶ 104-109. These are "'free-standing claim[s] of deceptiveness under GBL § 349 that happens to overlap with a possible claim' under another statute that is not independently

actionable." *Broder v. Cablevision Sys. Corp.*, 418 F.3d 187, 200 (2d Cir. 2005).

A. Plaintiff Does Not Rely on Violations of FDA Regulations for their GBL Claims

Defendant characterizes the Amended Complaint as "based on alleged FDCA violations," Def. Mem. at 17 quoting 21 U.S.C. § 337(a) ("[A]ll such proceedings for the enforcement, or to restrain violations, of this chapter shall be by and in the name of the United States.").

However, Plaintiff is not seeking to "enforce" any FDA violations made upon the FDA, but alleges Defendant made misrepresentations to *her* and similarly situated consumers. *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 121 S.Ct. 1012, 148 L.Ed.2d 854 (2001) (upholding principle that private plaintiff cannot assert "fraud-on-the-FDA claim"); *In re Bayer Corp. Combination Aspirin Prods. Mktg. and Sales Practices Litig.*, 701 F. Supp. 2d 356, 369 (E.D.N.Y. 2010) ("The plaintiff must be suing for conduct that violates the FDCA…but the plaintiff must not be suing because the conduct violates the FDCA (such a claim would be impliedly preempted under *Buckman*)."); *PDK Labs, Inc. v. Friedlander*, 103 F.3d 1105, 1113 (2d Cir. 1997) (dismissing claims where it was alleged that "PDK's products are sold without proper FDA approval").

Though Defendant asserts that "[A]ny claim based on alleged FDCA violations must fail," this sweeping principle would only apply if Plaintiff's claims "exist[ed] solely by virtue of the FDCA disclosure requirement." *Bayer Corp.*, 701 F. Supp. 2d at 369 quoting *Buckman Co.*, 531 U.S. at 353.

The Amended Complaint is replete with allegations that the Product's representations are actionable under GBL §§ 349-350 because they mislead consumers, based upon an independent state duty to refrain from misleading consumers. Am. Compl. At ¶ 72 ("The amount and proportion of the characterizing components, honey and whole grain graham flour, have a material bearing on price and consumer acceptance").

Plaintiff has "threaded the needle and alleged conduct that violates the FDCA but sounds in traditional principles of state [consumer protection] law and would give rise to recovery even had the FDCA never been enacted." *Bayer Corp.*, 701 F. Supp. 2d at 375; *In re DDAVP Indirect Purchaser Antitrust Lit.* (claims based on separate consumer protection grounds not subject to implied preemption); *Quiroz v. Beaverton Foods, Inc.*, No. 17-cv-7348, 2019 WL 1473088, at *6 (E.D.N.Y. Mar. 31, 2019) (no preemption where plaintiff relied on "statutory definition [of preservative] to support her contention that citric acid is a preservative, but her claim is not premised on a violation of federal labeling requirements.").

Merely because "any particular state law standard is not independently actionable or directly enforceable is neither grounds to reach a *non sequitur* conclusion that the standard must be preempted by federal law, nor to conclude that the standard has no legal weight as a state law duty that is independent of federal law." *Patane v. Nestlé Waters North America, Inc.*, 369 F. Supp. 3d 382, 394 (D. Conn. 2019) ("*Patane II*") (denying motion to dismiss where Court acknowledged the relevance of plaintiffs' citations to regulatory authority which sets standards for various types of conduct).

The regulations cited by Plaintiff are "a floor upon which States can build additional protections," which encompass those asserted by Plaintiff under the GBL. *Wyeth v. Levine*, 555 U.S. 555, 129 S.Ct. 1187, 1202, 173 L.Ed.2d 51 (2009); Am. Compl. at ¶ 67 ("FDA regulations require that a food product's name disclose the percentage of honey and whole grain, graham flour, when these are "characterizing ingredient[s]").

B. Defendant's Assertion that the Regulations Have No Weight is Without Merit

Defendant is incredulous that Plaintiff can ground her claims on a "convoluted web of labeling regulations." Def. Mem. at 18. This is false, as Plaintiff has not alleged she was aware of the regulations in the Amended Complaint at the point of purchase.

Plaintiff merely read and relied upon the front label statements of "Honey Graham Crackers" and the honey dipper to expect that whole grain flour and honey were present in greater amounts than they were. Am. Compl. at ¶ 90.

The relevance of the regulations in the Amended Complaint is because they establish boundaries for permissible conduct, within which consumers make their choices. *See, e.g., Dumont v. Reilly Food Co.,* 934 F.3d 35, 42 (1st Cir. 2019) (reversing district court and holding that in case involving a hazelnut creamer that "FDCA requirements effectively established custom and practice in the industry. Accordingly, it may be that a consumer's experience with that custom and practice primes her to infer from the absence of a flavoring disclosure that the product gets its characterizing nutty flavor from the real nut."); *Am. Home Prods. Corp. v. Fed. Trade Comm'n*, 695 F.2d 681, 697-98 (3d Cir.1982) (recognizing "[p]ervasive government regulation [of drugs], and consumer expectations about such regulation, lend [drug] claims all the more power to mislead").

Plaintiff should be permitted to proceed past the pleading stage because she has "set forth facts that permit the inference that discovery will bear out [her] allegations." *Bayer Corp.* citing *Twombly*, 550 U.S. at 570.

Plaintiff alleged Defendant's standalone "honey" and "graham" representations are misleading. Am. Compl. at ¶ 43 ("Because the 'Graham' in 'Honey Graham Crackers' refers to whole grain flour, reasonable consumers expect a food identified in this way to have more whole grains than if the main ingredient was enriched flour"); *Id.* at ¶ 62 ("A product branded 'Honey Graham Crackers' that contains a honey dipper in a bowl of honey conveys to a reasonable

consumer it is mostly sweetened with honey as opposed to sugar and is predominantly made with whole grain graham flours.").

Plaintiff's GBL claims do not hinge or rely on her allegations that Defendant's labeling violates FDA regulations. Rather, the FDA regulations regarding vanilla give context and further support Plaintiff's allegations of deception. Plaintiff cites to the federal regulations because they offer a touchstone as to what is deceptive behavior. *See, e.g.,* Am. Comp. at ¶¶ 65-69.

C. Defendant's Authorities Address "Technical Violations"

Defendant's likens the allegations of the Amended Complaint to a "technical violation of the FDCA's regulations." Def. Mem. at 18. However, the amount of the two promoted ingredients is material. Am. Comp. at ¶¶ 21, 28 ("[c]onsumers rated honey at 73% 'better for you than sugar," "consumers place a greater value on products that are sweetened with honey") at ¶¶ 43, 53 ("The FDA has warned companies against making misleading whole grain representations in a product name…where the products were predominantly white flour.").

Defendant's authorities are distinguishable, because plaintiffs there alleged misleading representations of product quantity despite the legally required "net weight" disclosure. After finding the claims did not mislead reasonable consumers, the courts concluded that *even if* the defendants failed to comply with a technical labeling requirement, this was not independently actionable as a basis for a GBL claim. Def. Mem. at 11-12 citing *Verzani v. Costco Wholesale Corp.*, No. 09-cv-2117, 2010 WL 3911499 (S.D.N.Y. Sept. 28, 2010) (dismissal of GBL § 349 claim because it was not plausible that the product's net weight would only refer to the shrimp in shrimp cocktail); *Daniel v. Mondelez Int'l, Inc.*, 287 F. Supp. 3d 177, 190 (E.D.N.Y. 2018) (dismissing GBL claims based exclusively on the presence of non-functional slack-fill because the products "clearly disclosed accurate net weight and/or the total product count."); *see also Solak v. Hain Celestial Grp., Inc.*, No. 3:17-cv-0704, 2018 U.S. Dist. LEXIS 64270, at *31 (N.D.N.Y. Apr.

17, 2018) (dismissing complaint because no reasonable consumer could expect "veggie sticks" to have similar health and nutritional value to the "garden grown potatoes" and "ripe vegetables" depicted on the front label).

IV. PLAINTIFF PROPERLY ALLEGED COMMON LAW CLAIMS

A. Plaintiff Properly Pled Negligent Representation Claims

In New York, "It is well settled that a claim for negligent misrepresentation requires the plaintiff to demonstrate (1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information. *Mandarin v. Wildenstein*, 16 N.Y.3d 181, 173 (2011) (citing *J.A.O.Acquisition Corp. v. Stavitsky*, 8 NY3d 144, 148 (2007) (internal quotations omitted).

Defendant claims Plaintiff cannot plead negligent misrepresentation because there existed no special relationship. These assertions disregard facts asserted in the Amended Complaint as well as established law in New York State.

A special relationship sufficient to establish a claim of negligent representation existed between Plaintiff and Defendant. A relationship is considered to approach that of privity if: "(1) the defendant makes a statement with the awareness that the statement was to be used for a particular purpose; (2) a known party or parties rely on this statement in furtherance of that purpose; and (3) there is some conduct by the defendant linking it to the party or parties and evincing [the] defendant's understanding of their reliance." *Greene v. Gerber Products Co.*, 262 F. Supp 3d 38, 75 (E.D.N.Y. 2017) (citing *Aetna Cas. And Sur. V. Aniero Concrete Co., Inc.*, 404 F.3d 566, 584 (2d Cir. 2005)).

Since "casual statements and contacts are prevalent in business, liability in the commercial context is imposed only on those persons who possess unique or specialized expertise, or who are in a special position of confidence and trust with the injured party such that reliance on the negligent misrepresentation is justified." *Greene* F.Supp 3d at 75 (citing *Eternity Glob. Master Fund. Ltd. v. Morgan Guar. Trust Co. of N.Y.*, 375 F.3d 168, 188 (2d Cir. 2004).

Where a plaintiff fails to allege the existence of a special relationship, negligent misrepresentation is still properly pled where the plaintiff "emphatically" alleges (1) the person making the representation held or appeared to hold unique or special expertise and (2) the speaker was aware of the use to which the information would be put and supplied it for that purpose. *Id*. at 75 (citing *Eternity Glob.*, 375 F.3d at 188).

Plaintiff adequately alleged that Defendant held a unique or special expertise. Am. Comp. ¶ 114. Second, it is implausible that Defendant was not aware that consumers would rely upon the of its Product's front label representations.

B. Plaintiff Properly Alleged Express Warranty Claims

To state a claim for breach of an express warranty, a plaintiff must allege (1) the existence of a material statement amounting to a warranty, (2) a buyer's reliance on this warranty as a basis for the contract with the immediate seller, (3) breach of the warranty, and (4) injury to the buyer caused by the breach. *Goldemberg*, 8 F.Supp 3d at 482 (citing *Avola v. La.-Pac.* Corp., No. 11-cv-4053, 2013 WL 4647535, at *6 (E.D.N.Y. Aug. 28, 2013); *Buonasera v. Honest Co., Inc.*, 208 F. Supp 3d 555, 567 (S.D.N.Y. 2016).

Plaintiff alleged that (1) Defendant expressly warranted that their Product's contained more graham or whole wheat flour than wheat flour; (2) Defendant expressly warranted that the Product was predominantly sweetened by honey; (3) Defendant breached the express warranty because the Product had more wheat flour than whole wheat flour or graham flour and was predominantly

sweetened with sugar; (4) Defendant made such an express warranty knowing the purpose for which its representations were to be used – to consumers seeking a product with certain nutritive qualities; (5) Plaintiff purchased the Product based upon these representations. Am. Compl. at ¶¶ 118-125.

In *Goldemberg*, the court denied defendant's motion to dismiss breach of express warranty claims because their labels and marketing materials advertised their products as "Active Naturals" when they contained mostly synthetic ingredients. *Id.* at 482-83 citing *Avola v. La.-Pac. Corp.*, No. 11-cv-4053, 2013 WL 4647535, at *6 (E.D.N.Y. Aug. 28, 2013).

Here, Defendant represents that the Product contains more honey and whole grain flour than sugar and non-whole grain flour Am. Compl. at ¶ 4

C. Plaintiff Properly Pled Breach of Implied Warranty Claim

In New York, an implied warranty of merchantability is governed by §2-314 of the New York Uniform Commercial Code. That section provides, in part, that a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Further, the UCC provides that to be merchantable, the goods must be: (1) fit for the ordinary purpose for which they are used; (2) capable of passing without objection in the trade under the contract description; and (3) of fair and average quality of such goods. *Jackson v. Eddy's LI RV Ctr., Inc.*, 845 F. Supp. 2d 523, 527 (E.D.N.Y. 2012). "Liability for breach of warranty of merchantability depends on the expectations for the performance of the product when used in the customary, usual and reasonably foreseeable manners." *Sci. Components Corp. v. Sirenza Microdevices, Inc.*, 2006 WL 2524187 at *7 (E.D.N.Y. Aug. 30, 2006).

Defendant asserts that Plaintiff "must allege the food was 'unfit to be consumed.'" Def. Mem. at 22. However, Defendant does not tackle the issue that for the Product not to breach its implied warranty of merchantability, it must be "capable of passing without objection in the trade

under the contract description." Here, because the Product is described as "Honey Graham Crackers," the Product created an implied warranty, through a contractual description, that it was primarily sweetened by honey and made from whole grain flour. Am. Compl. at ¶¶ 9-10, 44. Because neither of those descriptions was true or accurate, the Product breached its implied warranty of merchantability.

D. Plaintiff Properly Pled Fraud Claims

Defendant argues that Plaintiff's fraud allegations fail to be pled with the required specificity pursuant to Fed. R. Civ. P. 9(b) and that the fraud claims fail because there was no misrepresentation. Def. Mem. at 13. To satisfy Rule 9(b), "the complaint must: (1) detail the statements (or omissions) that the plaintiff contends are fraudulent, (2) identify the speaker, (3) state where and when the statements (or omissions) were made, and (4) explain why the statements (or omissions) are fraudulent." *Loreley Fin. (Jersey) No. 3 Ltd. v. Wells Fargo Sec.*, LLC, 797 F.3d 160, 171 (2d Cir. 2015). "Rule 9(b) requires only that Plaintiffs plead, with particularity, facts from which it is plausible to infer fraud; it does not require Plaintiffs to plead facts that make fraud more probable than other explanations." *Id.* at 175.

Plaintiff has identified Defendant as the speaker of the representations and made numerous fraudulent statements and omissions with respect to the amount and proportion of the Product's taste from real vanilla. Am. Compl. at ¶¶ 1-3, 126-129.

Finally, Plaintiff explains why the statements are fraudulent – "Defendant's conduct was misleading deceptive, unlawful, fraudulent, and unfair because it gives the impression to consumers the Products were primarily if not exclusively sweetened with honey instead of sugar and that whole grain graham flour instead of white enriched flour was the exclusive or at least predominate flour ingredient.'" Am. Compl. ¶ 127. These allegations meet the "primary purpose

of Rule 9(b)" which "is to afford defendant fair notice of the plaintiff's claim and the factual ground upon which it is based." *Ross v. Bolton,* 904 F.2d 819, 823 (2d Cir.1990).

E. Plaintiff's Claims of Unjust Enrichment are Not Duplicative

Defendant argues that the Court should dismiss Plaintiff's unjust enrichment claim because it is duplicative. Def. Mem. at 18. However, "[u]nder Rule 8(e)(2) of the Federal Rules of Civil Procedure, a plaintiff may plead two or more statements of a claim, even within the same count, regardless of consistency." *Henry v. Daytop Vill., Inc.,* 42 F.3d 89, 95 (2d Cir.1994); *Burton v. Iyogi, Inc.*, No. 13-cv-6926, 2015 WL 4385665, at *11 (S.D.N.Y. Mar. 16, 2015) (denying dismissal of unjust enrichment because "it is well-settled that parties may plead in the alternative").

To the extent that this Court finds that Plaintiff does not state claims pursuant to the GBL or common law claims, the Court may hold that Plaintiff's unjust enrichment claims are viable. *Cummings v. FCA US LLC*, 401 F. Supp. 3d 288, 316-17 (N.D.N.Y. 2019) ("Plaintiff's claim for unjust enrichment arises outside of the scope of the Limited Warranty and is consequently not barred.").

Thus, because questions of fact remain as to all of Plaintiff's claims, dismissal of the unjust enrichment claim at is premature. *Huang v. iTV Media, Inc.*, 13 F. Supp. 3d 246, 261 (E.D.N.Y. 2014) (declining to dismiss unjust enrichment claim as duplicative at motion to dismiss stage).

V. PLAINTIFF HAS STANDING TO SEEK INJUNCTIVE RELIEF

Plaintiff has standing to pursue injunctive relief because she is unable to rely on the Product's labels in the future, which causes her to avoid purchasing the Product even though she would like to. This constitutes an imminent threat of future harm sufficient to satisfy Article III's injury in fact requirement. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181–85 (2000).

Numerous courts have concluded that the inability to rely on the labels in the future, as alleged in the Amended Complaint, constitutes a threat of harm and that to hold otherwise would eviscerate the New York consumer protection statute. *See, e.g.*, *Belfiore v. Procter & Gamble Co.*, 94 F. Supp. 3d 440, 445 (E.D.N.Y. 2015) ("plaintiffs have standing to seek injunctive relief based on the allegation that a product's labeling or marketing is misleading to a reasonable consumer,' because to 'hold otherwise would effectively bar any consumer who avoids the offending product from seeking injunctive relief'") *quoting Ackerman v. Coca-Cola Co.*, No. 09-cv-00395, 2013 WL 7044866, at *2–3, *14–15, n.23 (E.D.N.Y. July 18, 2013); *Jackson-Mau v. Walgreen Co.*, No. 18-cv-04868, 2019 WL 5653757, at *3 (E.D.N.Y. Oct. 31, 2019) (finding plaintiff could seek injunctive relief because her complaint stated she would purchase the product "again if she could be sure that the bottle actually contains what it is supposed to contain."); *Goldemberg v. Johnson & Johnson Consumer Cos.*, 317 F.R.D. 374 at 397 (S.D.N.Y. 2016) (holding that the fact that "Plaintiff would continue to purchase the Products in the future if the misleading labeling is corrected is sufficient to demonstrate an intent to purchase products in the future that subjects them to future harm").

Defendant incorrectly claims that a recent Second Circuit opinion stymies Plaintiffs' request for injunctive relief. *Berni v. Barilla S.p.A.*, *et al. v. Schulman*, No. 19-cv-1921, 2020 U.S. App. LEXIS 21167 (2d Cir. July 8, 2020). The court in *Berni* correctly recognized that for purposes of class certification, injunctive relief addressed to past conduct is insufficient to meet the requirements of Rule 23(b)(2). Plaintiff here, as proposed class representatives, seek monetary damages *in addition to* injunctive relief. The procedural posture of this action – at the pleading stage – requires this Court to only focus on the well-pleaded allegations of Plaintiff, and not, like in *Berni*, the millions of other class members who would have their rights extinguished in support

of a settlement which granted them fictitious relief in the form of a "fill-line." Such a conclusion is logical and reasonable, as applied to a large group of unnamed individuals.

CONCLUSION

For the foregoing reasons, the Court should deny Defendant's Motion to Dismiss.

Date: September 29, 2020

Respectfully submitted,

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1:20-cv-01291-GHW-OTW
United States District Court
Southern District of New York

Chandra Campbell, individually and on behalf of all others similarly situated,

Plaintiff,

-against-

Whole Foods Market Group, Inc.,

Defendant

Plaintiff's Memorandum of Law in Opposition
to Defendant's Motion to Dismiss the First Amended Complaint

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Pursuant to 22 NYCRR 130-1.1, the undersigned, an attorney admitted to practice in the courts of New York State, certifies that, upon information, and belief, formed after an inquiry reasonable under the circumstances, the contentions contained in the annexed documents are not frivolous.

Date: September 29, 2020

/s/Spencer Sheehan
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Certificate of Service

I certify that on September 29, 2020, I served and/or transmitted the foregoing by the method below to the persons or entities indicated, at their last known address of record (blank where not applicable).

	CM/ECF	First-Class Mail	Email	Fax
Defendant's Counsel	☒	☐	☐	☐
Plaintiffs' Counsel	☒	☐	☐	☐
Courtesy Copy to Court	☐	☐	☐	☐

/s/ Spencer Sheehan

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CHANDRA CAMPBELL, individually and on behalf of all others similarly situated, Plaintiffs, -against- WHOLE FOODS MARKET GROUP, INC., Defendant.	Case No.: 1:20-cv-01291-GHW-OTW ORAL ARGUMENT REQUESTED

REPLY MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT

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TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. ARGUMENT 2

A. Plaintiff Has Not Plausibly Alleged Consumer Deception. 2

1. Plaintiff Has Not Plausibly Alleged WFM Group's Use of "Graham Crackers" Is False of Misleading. 3

a. "Graham" and "Graham Crackers" Are Not *Per Se* Ingredient nor Quantity Claims 3

b. Reasonable Consumers Do Not Construe "Graham Crackers" to Mean "Made with Whole Grain." 5

2. Plaintiff Has Not Plausibly Alleged WFM Group's Use of "Honey" Is Materially Misleading. 7

3. The 365 Graham Cracker Ingredient List Cures Any Ambiguity 8

4. Plaintiff Has Not Alleged Sufficient Injury to Pursue Her Consumer Deception Claims. 9

5. Plaintiff Admits Her FDCA Allegations Are Irrelevant. 10

B. Plaintiff's Negligent Misrepresentation Claim Fails as a Matter of Law. 11

C. Plaintiff Fails to State a Plausible Breach of Warranty Claim. 12

D. Plaintiff's Fraud Claim Also Fails. 13

E. Plaintiff's Unjust Enrichment Claim Should Be Dismissed. 14

F. Plaintiff Lacks Standing to Seek Injunctive Relief. 14

III. CONCLUSION 15

TABLE OF AUTHORITIES

STATE CASES

Kimmel v. Schaefer
675 N.E.2d 450 (N.Y. 1996).. 11

FEDERAL CASES

Ashcroft v. Iqbal
556 U.S. 662 (2009)... 2

Belfiore v Procter & Gamble Co.
311 F.R.D. 29 (E.D.N.Y. 2015) 15

Cohen v. JP Morgan Chase & Co.
498 F.3d 111 (2nd Cir. 2007)... 2

Dallas Aerospace, Inc. v. CIS Air Corp.
352 F.3d 775 (2d Cir. 2003) 11, 12

Daniel v. Mondelez Int'l, Inc.
287 F. Supp. 3d 177 (E.D.N.Y. 2018) 2

Davis v. Hain Celestial Grp., Inc.
297 F. Supp. 3d 327 (E.D.N.Y. 2018) 9, 14

Eternity Glob. Master Fund Ltd. v. Morgan Guar. Tr. Co. of N.Y.
375 F.3d 168 (2d Cir. 2004) 11

Fink v. Time Warner Cable
714 F.3d 739 (2d Cir. 2013)... 9

Green v. Gerber Products Co.
262 F. Supp. 3d 38 (E.D.N.Y. 2017) 11, 12

Gordon v. Hain Celestial Grp., Inc.
No. 16-cv-6526-KBF, 2017 WL 213815 (S.D.N.Y. Jan. 18, 2017)................................. 11

In re 100% Grated Parmesan Cheese Mktg. and Sales Practices Litig.
275 F. Supp. 3d 910 (N.D. Ill. 2017) 9

Jackson v. Eddy's LI RV Ctr., Inc.
845 F. Supp. 2d 523 (E.D.N.Y. 2012) 13

Kennedy v Mondelez Glob. LLC
No. 19-cv-302-ENV-SJB, 2020 WL 4006197 (E.D.N.Y. Jul. 10, 2020) 2- 8, 12-15

Kommer v Bayer Consumer Health, a division of Bayer AG
710 Fed. Appx. 43 (2d Cir 2018) 15

Lima v Post Consumer Brands, LLC
No. 18-cv-12100-ADB, 2019 WL 3802885 (D. Mass. Aug. 13, 2019) 7, 8

Mantikas v. Kellog Co.
910 F.3d 633 (2d Cir. 2018).. 2, 5, 6, 7, 8

Melendez v. One Brands
No. 18-cv-06650-CBA-SJB, 2020 WL 1283793 (E.D.N.Y. Mar. 16, 2020) 2

Nashville Syrup Co. v. Coca Cola Co.
215 F. 527 (6th Cir 1914) 4

Nelson v. MillerCoors, LLC
246 F. Supp. 3d 666 (E.D.N.Y. 2017) 14

Nicosia v. Amazon.com, Inc.
834 F.3d 220 (2d Cir. 2016).. 14

Sharpe v A&W Concentrate Co.
No. 19-cv-768-BMC, 2020 WL 4931045 (E.D.N.Y. Aug. 24, 2020) 6, 7, 8, 9, 15

Silva v. Smucker Nat. Foods, Inc.
No. 14-cv-6154, 2015 WL 5360022 (E.D.N.Y. Sept. 14, 2015) 13

Steele v. Wegmans Food Markets, Inc.
No. 19-cv-9227-LLS, 2020 WL 3975461 (S.D.N.Y. Jul. 14, 2020) 5, 7, 10

Suez Equity Inv'rs, L.P. v. Toronto-Dominion Bank
250 F.3d 87 (2d Cir. 2001).. 11

Watson v. Kellogg Sales Co.
No. 19-cv-1356, 2019 WL 10734829 (S.D.N.Y. Oct. 29, 2019) 6, 7

Werbel v PepsiCo, Inc.
No. 09-04456 SBA, 2010 WL 2673860 (ND Cal July 2, 2010) 4

Wright v. Publishers Clearing House, Inc.
439 F. Supp. 3d 102 (E.D.N.Y. 2020) 10

STATUTES & REGULATIONS

15 U.S.C. § 2301(6) 13

Fed. R. Civ. P. 8 .... 10, 14

Fed. R. Civ. P. 9(b) 13

I. INTRODUCTION

Plaintiff's lawsuit, as confirmed in her opposition brief, is premised on the theory that the terms "honey" and "graham" or "graham crackers" lead reasonable consumers to conclude that the 365 Graham Crackers sold at WFM's retail stores are made exclusively or predominately from whole grain and are predominately sweetened by honey.[1] This liability theory lies at the heart of all of Plaintiff's claims, including her consumer deception claims and her tag-along fraud, misrepresentation and breach of warranty claims.

Plaintiff's opposition brief (ECF No. 24), however, does not come close to establishing that reasonable consumers necessarily construe the name "honey graham crackers" in the manner Plaintiff suggests. Despite Plaintiff's efforts to associate the terms "graham" or "graham cracker" with the presence of whole grain flour, the link is tenuous at best. This is also true of Plaintiff's attempt to spin the use of the term "honey" into a claim that the product is sweetened or predominately sweetened by honey instead of sugar. Consumers have for decades associated the name "honey graham crackers" or "graham crackers" with a specific type of snack product – a distinctively sweet tasting, rectangular shaped, honey flavored, brownish toned and crisp textured cracker. Common sense, which the Supreme Court directs district courts to apply in assessing the plausibility of a complaint, dictates that these attributes – and not the presence of whole grain or sweetener – define what it means to be a "honey graham cracker."

Moreover, even assuming for argument's sake that the terms "honey" or "graham" might be susceptible to Plaintiff's subjective interpretation (which they are not), Plaintiff does not and cannot dispute that "honey" and "graham" have multiple plausible meanings. Thus, at most, the terms would be ambiguous. Second Circuit case law establishes that ambiguous label statements are not deceptive if the remainder of the label, viewed as a whole, would resolve the ambiguity (i.e., by disclosing the presence of non-whole grain and sugar). The 365 Graham Crackers' ingredient list dispels any supposed ambiguity, as it unquestionably discloses the presence of

[1] WFM Group uses the same short hand references in this reply brief for the terms defined in its Memorandum of Law (ECF No. 23).

both whole wheat and wheat flour, as well as the presence of both honey and sugar. These arguments are fatal to all of Plaintiff's claims. Thus, the Court should grant WFM Group's motion to dismiss with prejudice.

II. ARGUMENT

A. Plaintiff Has Not Plausibly Alleged Consumer Deception.

Plaintiff admits her consumer deception claims require she establish the allegedly misleading statements "were likely to mislead a reasonable consumer acting reasonably under the circumstances." *Mantikas v. Kellogg Co.*, 910 F.3d 633, 636 (2d Cir. 2018). Plaintiff also does not dispute that courts use "an objective inquiry" to resolve this issue that is not defined by the Plaintiff's subjective views. *Melendez v. One Brands*, No. 18-cv-06650, 2020 WL 1283793, *6 (E.D.N.Y. Mar. 16, 2020) (citing *Cohen v. JP Morgan Chase & Co.*, 498 F.3d 111, 126 (2nd Cir. 2007)). Plaintiff further concedes courts apply their "common sense" in assessing whether Plaintiff's claims of consumer deception are plausible. *Daniel v. Mondelez Int'l, Inc.*, 287 F. Supp. 3d 177 (E.D.N.Y 2018); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) (directing courts to draw on their "judicial experience and common sense").

Plaintiff's opposition, however, urges that the Court check its common sense at the door when determining how a reasonable person would interpret the 365 Graham Cracker's label, and instead credit Plaintiff's subjective interpretation which is based on a strained and nonsensical reading of the 365 Graham Crackers name. Reasonable consumers do not presume whole grain to be the snack's predominant flour, nor honey to be its predominant sweetener based on an objective reading of the product's packaging. In fact, using the principles outlined above, at least one court has already dismissed (at the pleading stage) identical consumer deception claims brought by the same plaintiff's counsel, concluding reasonable consumers do not interpret either "honey" or "graham cracker" as the type of ingredients claims espoused by the plaintiff. *See Kennedy v. Mondelez Glob. LLC,* No. 19-cv-302-ENV-SJB, 2020 WL 4006197, at *9 (E.D.N.Y. Jul. 10, 2020.) Here too, Plaintiff failed to allege plausible claims for consumer deception based on the 365 Graham Crackers packaging.

1. Plaintiff Has Not Plausibly Alleged WFM Group's Use of "Graham Crackers" Is False or Misleading.

Plaintiff contends the phrase "Graham Crackers" on the 365 Graham Crackers' front label is materially misleading because reasonable consumers understand this use of "graham" to be an ingredient claim and therefore expect the snack product to be made predominately from whole grain flour. ECF No. 24 (Opposition) at pp. 5-6; ECF No. 17 (First Amended Complaint) ¶43. Nothing in Plaintiff's opposition brief or amended complaint, however, establishes that reasonable consumers view the terms "graham" or "graham crackers" as an ingredient claim or to mean the product contains more whole grain flour than white flour. *Id.* Rather, consumers readily understand the phrase "graham crackers" to refer to the name of a favored snack product with a particular shape, texture, color and taste.

Plaintiff makes two arguments in an effort to establish that the use of "graham" is a materially misleading statement: (1) consumers understand "graham" to refer to whole grain flour, and (2) the use of "graham" in the product name is the same as saying "made with whole grain." Neither of these arguments, however, demonstrate that the use of "graham" in the name "graham crackers" is a materially misleading ingredient claim.

a. "Graham" and "Graham Crackers" Are Not *Per Se* Ingredient nor Quantity Claims.

One premise of Plaintiff's consumer deception claims is that the terms "graham" and/or "graham crackers" intrinsically mean the product is predominately made from whole grain flour. ECF No. 17 at ¶52. Plaintiff points to dictionary definitions of "graham crackers" as the foundation for this liability theory. The fact that some definitions reference graham flour, however, does not necessarily suggest how reasonable consumers interpret the terms graham or graham crackers.[2] *See Kennedy v. Mondelez Glob. LLC*, 2020 WL 4006197, at *10 (varying

[2] Even if a dictionary definition of "graham cracker" did establish the reasonable consumers understanding of that term, the 365 Graham Crackers' label would not be misleading because the product contains whole grain flour. *See Kennedy v. Mondelez Glob. LLC*, 2020 WL 4006197, at *10 (product complies with Merriam-Webster definition because it contains graham flour).

definitions of "graham cracker" suggest no common understanding of term). Indeed, the fact Plaintiff felt the need to repeatedly use the phrase "graham flour" throughout her Amended Complaint and the parenthetical "whole grain" or "flour" when discussing the term "graham" in her opposition confirms that the average consumer does not naturally associate the use of "graham" with whole grain flour – let alone a specific amount of whole grain. *See gen.*, ECF No. 17 at ¶¶1, 39, 44-45, 47-48, 59, 61-62, 66-69, 72, 108, 112 & 127; *see also* ECF No. 24 at pp. 7, 9 and 10.

This premise of Plaintiff's deception theory is tenuous because it is based on the product's name rather than any specific representation about whole grain content. As detailed in WFM Group's moving papers, the fact a product's name may reference an ingredient (even one, unlike graham flour, that is recognizable to most consumers) does not mean the product contains a specific amount of that ingredient. *See* ECF No. 23 at pp. 6-7 (citing *Nashville Syrup Co. v. Coca Cola Co.,* 215 F. 527, 531 (6th Cir. 1914); *Werbel v. Pepsico, Inc.*, No. 09-4456, 2010 WL 2673860, at *3 (N.D. Cal. Jul. 2, 2010).) Plaintiff attempts to distinguish these cases on the grounds that they involved trademarked, fanciful product names. ECF No. 24 at pp. 5-6. Plaintiff's argument, however, misses the mark.

The rulings in *Nashville Syrup* and *Werbel* were actually based on the fact that reasonable consumers do not view the terms "coca cola" or "crunch berries" as ingredient claims. *Nashville Syrup*, 215 F. at 531; *Werbel,* 2010 WL 2673860, at *3. The same is true of "graham crackers." *Kennedy v. Mondelez Glob. LLC*, 19-cv-0302, 2020 WL 4006197, at *9 (E.D.N.Y. Jul. 10, 2020) (reasonable consumers do not associate "graham" with graham flour or assume graham flour is the predominant ingredient). Thus, given the absence of an explicit statement about the presence of graham or whole grain flour, i.e., "made with graham flour" or "made with whole grain," it is implausible that reasonable consumers would construe the product name "graham crackers" as a claim about whole grain flour or its predominance over other ingredients.

b. Reasonable Consumers Do Not Construe "Graham Crackers" to Mean "Made with Whole Grain."

Plaintiff contends that the Second Circuit's decision in *Mantikas v. Kellogg Co.*, 910 F.3d 633 (2d Cir. 2018), is on point and controls the outcome of WFM Group's motion to dismiss. WFM Group, however, addressed this decision in its moving papers and explained why the *Mantikas* ruling is inapposite to the present matter. *See* ECF No. 23 at pp. 7-8. In short, *Mantikas* is not controlling because neither the name "graham crackers" nor the 365 Graham Crackers' packaging purport to be "Made with Whole Grain" or "Made with Graham Flour." The explicit ingredient claim (i.e., "made with whole grain") on Kellogg's packaging was the focus and basis for the Second Circuit's ruling in *Mantikas*. *Id.* at 638. In fact, subsequent district court decisions have distinguished *Mantikas* on this precise issue.

In *Steele v. Wegmans Food Markets, Inc.*, No. 19-cv-9227, 2020 WL 3975461 (S.D.N.Y. July 14, 2020), Judge Louis Stanton rejected a similar ingredient claim theory raised against defendant Wegman's "vanilla" ice cream. The court distinguished *Mantikas* stating:

> The plaintiffs assume that buyers take it for granted that natural vanilla flavor is wholly or largely derived from vanilla beans, and argue that if the predominant component of the flavoring is not from beans or vanilla extract, the customer is misled. They point to *Mantikas v. Kellogg Co.*, 910 F.3d 633 (2d Cir. 2018) where the Cheez-It crackers box proclaimed WHOLE GRAIN in large type; there was in fact a small amount of whole grain in the crackers, but they were mainly made of less nutritious enriched white flour. This case is different. The Wegmans container does not mention vanilla beans, or bean extract, and even if vanilla or bean extract is not the predominant factor, if the sources of the flavor are natural, not artificial, it is hard to see where there is deception. What is misrepresented? The ice cream is vanilla flavored. The sources of the flavor are natural, not artificial

Id. at *2. Similarly, in *Kennedy v. Mondelez Glob. LLC*, *supra*, the Eastern District of New York held that use of "graham" in the product's name was not an ingredient claim, but instead a descriptor of the type and taste of the product. The court distinguished *Mantikas* on these grounds:

> Plaintiffs' "whole grain" allegations in this case are distinguishable from the products in *Mantikas*. The products here are not labelled

> or represented as "crackers made with graham flour" or "crackers made with graham"—they are instead referred to as "grahams" or "graham crackers." And as noted above, saying "graham" or "graham cracker" does not necessarily constitute a representation about the quantum of graham flour in the product. Use of the label "graham" does not implicate the same concern about a particular ingredient being highlighted and presented to consumers to deceive them into thinking such an ingredient is the primary or predominant ingredient.

Kennedy v. Mondelez Glob., LLC, 2020 WL 4006197, at *11.

These same distinctions apply to the present matter. Neither 365 Graham Crackers' label nor its packaging state "made with graham flour," "made with whole grain" or "100% whole grain." ECF No. 17 at ¶3. Instead, the label simply informs consumers that they are purchasing graham crackers – a light brown-colored cracker with a characteristic sweet taste, often in a perforated rectangular shape. There is no explicit ingredient claim that must be bolstered by a greater amount of whole grain flour than white flour.

Plaintiff also points to the Eastern District's decision in *Sharpe v. A&W Concentrate Co.,* No. 19-CV-768 (BMC), 2020 WL 4931045, at *1 (E.D.N.Y. Aug. 24, 2020), as support for her ingredient claim liability theory. However, as with *Mantikas*, *Sharpe* involved an express ingredient claim on the products' label – i.e., "MADE WITH AGED VANILLA." *Id.* at *1. The court relied on this fact in concluding that "[b]y holding out their products as containing "aged vanilla," defendants' representation is the equivalent to stating the beverages are "Made With Natural Vanilla."" *Id.* at *5. Thus, *Sharpe*, is inapposite for the same reasons as *Mantikas*. There is no "made with" claim on the 365 Graham Crackers' packaging.

Lastly, Plaintiff points to Judge Cote's decision in *Watson v. Kellogg Sales Co*., a similar case brought by plaintiff's counsel that challenged labeling of Keebler "Grahams," as support for her claim that the term "graham" in "graham crackers" is an explicit ingredient claim. *See* ECF No. 24 at pp. 7-8 (citing *Watson v. Kellogg Sales Co.,* No. 19-cv-1356, 2019 WL 10734829 (S.D.N.Y. Oct. 29, 2019).) Judge Cote, however, did not issue a written order reflecting her decision or her reasoning, but did note in her oral order that the *Mantikas* decision prevented dismissal of plaintiff's consumer deception claims at the pleading stage. *Watson*, 2019 WL

10734829, at *1. The more recent district court decisions in *Steele* and *Mondelez*, as detailed above, however, demonstrate why the *Mantikas* decision is distinguishable and not controlling under the present facts. Thus, WFM Group respectfully submits that the *Watson* decision is neither correct nor binding on this Court.[3]

2. Plaintiff Has Not Plausibly Alleged WFM Group's Use of "Honey" Is Materially Misleading.

Plaintiff contends that the use of "honey" on the 365 Graham Crackers label is materially misleading in the same manner as the use of "graham," i.e., it is a highlighted ingredient claim that consumers understand to mean the product is primarily or exclusively sweetened by honey. Plaintiff again relies on the *Mantikas* and *Sharpe* decisions to support this deception theory and avoid dismissal.[4] *See* ECF No. 24 at p. 9. As detailed above, however, these decisions are distinguishable from the facts of the present case because the 365 Graham Crackers label does not make the express claim espoused by Plaintiff. Nowhere on the 365 Graham Cracker front label or packaging does it explicitly state that honey is used as a sweetener (let alone as the primary or predominant sweetener), as opposed to a flavoring. The 365 Graham Cracker label "makes no objective representation about the amount of honey, leaving the [product's] accurate list of ingredients as the only unambiguous representation of the amount of honey relative to other sweeteners." *Lima v. Post Consumer Brands, LLC*, No. 18-12100, 2019 WL 3802885, at

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[3] To the extent the Court is inclined to rely on the *Watson* decision, it should be noted that Judge Cote dismissed plaintiff's claim that "honey" is an ingredient claim, as well as plaintiff's claims for fraud, negligent misrepresentation, implied warranty, unjust enrichment, injunctive relief and the MMWA claim.

[4] Plaintiff also cites to the Northern District of California's decision in *Tucker v. Post Consumer Brands, LLC*, 19-cv-03993, 2020 WL 1929368 (N.D. Cal. Apr. 21, 2020), as support for her contention that she has alleged a plausible claim of deception regarding the use of honey as a sweetener and not as a flavoring agent. *See* ECF No. 24 at p. 10. The District Courts of this Circuit (and the First Circuit), who have considered a similar issue, however, have ruled the opposite and dismissed the claims at the pleading stage. *See Kennedy v. Mondelez Glob. LLC, supra,* 2020 WL 4006197*,* at *12 (consumer deception claim based on front label honey statement dismissed); *Watson v. Kellogg Sales Co., supra*, 2019 WL 10734829, at *1 (same); *Lima v. Post Consumer Brands, LLC*, *supra*, 2019 WL 3802885, at *7 (same).

*7 (D. Mass. Aug. 13, 2019). Thus, the courts' reasoning in *Mantikas* and *Sharpe* are inapplicable to the present facts.

Moreover, even if a consumer presumed honey to be a sweetener rather than a flavor, the 365 Graham Cracker's packaging would not deceive a reasonable consumer because it does not make any objective representation about the amount of honey or about the proportion of honey to other ingredients. Plaintiff contends that by highlighting the use of honey, WFM Group was obligated "to ensure that honey was a predominate or significant sweetening ingredient." ECF No. 24 at p. 10. This is essentially the same argument the *Kennedy* court rejected in finding defendant's "made with honey" representations and related imagery (bee and honey dipper) were not misleading or deceptive and did not convey to consumer that honey is the predominant sweetening ingredient. *Kennedy v. Mondelez Glob. LLC*, *supra*, 2020 WL 4006197, at **11-13 ("reasonable consumer could not be misled into thinking that 'made with honey' means the grahams contain more honey than sugar, because honey is not the primary ingredient in grahams). Regardless, Plaintiff's argument does not establish deception because the point remains that the 365 Graham Cracker label makes no objective representation that the product is exclusively or primarily sweetened by honey. Thus, "[e]ven a reasonable consumer who presumed honey to be a sweetener rather than a flavor … would have recognized that [the product] might be sweetened with some honey, but also with other sweeteners." *Lima*, 2019 WL 3802885, at *7.

3. The 365 Graham Cracker Ingredient List Cures Any Ambiguity.

Plaintiff's argument that the product's name – Honey Graham Crackers – is deceptive because it highlights certain ingredients and conveys to consumers those ingredients predominate over others not only lacks merit, but also ignores the information in the ingredient list on the product's back label. Plaintiff contends that under *Mantikas* and *Sharpe* the Court cannot look to or rely upon the product's back label ingredient list to find her deception theories implausible because consumers are not expected to consult the back panel of products to correct misleading information highlighted on the front label. ECF No. 24 at pp. 10-11 (citing *Mantikas*, 910 F.3d

at 637; *Sharpe*, 2020 WL 4931045, at *5). Unfortunately for Plaintiff, she has not shown, nor can she, that there is anything false or misleading on the product's front label.

Moreover, if the statement is merely ambiguous, then a back-label clarification may defeat the claim. *See Davis v. Hain Celestial Grp.*, 297 F. Supp. 3d 327, 334 (E.D.N.Y. 2018). "In determining whether a reasonable consumer would have been misled by a particular advertisement," the "presence of a disclaimer or similar clarifying language may defeat a claim of deception." *Fink v. Time Warner Cable*, 714 F.3d 739, 742 (2d Cir. 2013). Thus, "[w]here a plaintiff contends that certain aspects of a product's packaging are misleading in isolation, but an ingredient label or other disclaimer would dispel any confusion, the crucial issue is whether the misleading content is ambiguous; if so, context can cure and defeat the claim." *In re 100% Grated Parmesan Cheese Mktg. and Sales Practices Litig.*, 275 F. Supp. 3d 910, 922 (N.D. Ill. 2017).

Even, assuming for the sake of argument, that some consumers might interpret the terms "honey" and "graham" to mean whole grain and honey are the predominant sources of grain and sweetener in the product, a consumer could just as easily conclude these terms mean simply the product contains or contains some amount of the ingredients or even just a taste profile. Thus, given the varying possibilities of interpretation, these terms are *at most* ambiguous and consumers looking for more information could consult the ingredient list to confirm or clarify their understanding. Plaintiff does not dispute that the ingredient list accurately identifies the product's ingredients and in their order of predominance. Accordingly, any perceived confusion over the levels of whole grain flour and honey would be dispelled by the ingredient list, which unquestionably establishes that whole grain flour is not the predominant grain source nor honey the primary sweetener. *See* ECF No. 17 at ¶44.

4. Plaintiff Has Not Alleged Sufficient Injury to Pursue Her Consumer Deception Claims.

Plaintiff contends she has alleged sufficient injury to support her consumer deception claims by including three conclusory allegations in her Amended Complaint: (1) highlighting

the flour and honey content has a material bearing on price and consumer acceptance; (2) the product she purchased and consumed was worth less than represented; and (3) she would not have bought or paid as much for the product if she had known the alleged truth. ECF No. 24 at p. 12 (citing ECF No. 17 at ¶¶73, 74, 76). These, however, are bald allegations of an alleged price premium. Courts have held that mere "boilerplate recitations of the formula for calculating a price premium" are insufficient to establish injury and have required plaintiffs to allege "non-conclusory allegations actually demonstrating that the Plaintiffs paid a price premium for any of the products." *Wright v. Publishers Clearing House, Inc.*, 439 F. Supp. 3d 102, 114 (E.D.N.Y. 2020). As detailed in WFM Group's moving papers (ECF No.23 at pp. 10-11), Plaintiff's Amended Complaint does not allege the facts that would support her conclusion that she paid a price premium.

5. Plaintiff Admits Her FDCA Allegations Are Irrelevant.

Plaintiff contends her consumer deception claims do not rely on federal regulations to establish consumer deception nor do they seek to enforce alleged violations of the FDCA. *See* ECF No. 23 at pp. 13-184. As such, Plaintiff admits that her allegations that the labeling and packaging of 365 Graham Crackers is "inconsistent" with FDCA regulation (ECF No. 17 at ¶¶65-69) are immaterial to her consumer deception claims and inconsistent with Federal Rule of Civil Procedure, Rule 8's requirement of a "short and plain statement of the claim."

While Plaintiff contends these allegations provide "context and further support [her] allegations of deception," (ECF No. 23 at p. 17), she does not allege any facts that tend to establish that the perceptions of ordinary consumers align with her interpretation of the FDCA's labeling regulations. In fact, she admits that she was not aware of and "has not alleged that she was aware of the [FDCA] regulations in the Amended Complaint at the point of purchase." ECF No. 24 at p. 16. Courts have correctly held that allegations of alleged FDCA violations or irregularities are meaningless when they are not tethered to consumer expectations. *See Steele v. Wegmans Food Markets, supra,* 2020 WL 3975461, at *2 ("the extensive discussion and argument in the motion papers with respect to particular federal standards for ice cream flavor

descriptions is without consequence."). Accordingly, any claim based on these FDCA allegations should be dismissed.

B. Plaintiff's Negligent Misrepresentation Claim Fails as a Matter of Law.

At the threshold, Plaintiff's opposition does not address WFM Group's arguments that the economic loss rule precludes her claim for negligent misrepresentation as a matter of law. *See* ECF No. 24 at pp. 18-19. Because Plaintiff has not and cannot contest the application of the economic loss rule, the Court should dismiss her claim for negligent misrepresentation with prejudice. *Gordon v. Hain Celestial Grp.*, No. 16-cv-6526, 2017 WL 213815, at *6 (S.D.N.Y. Jan. 18, 2017).

Plaintiff's negligent misrepresentation claim also fails because she has not alleged the required special relationship. *See* ECF No. 23 at pp. 14-15. Plaintiff responds by arguing that she does not need to allege a special relation so long as she "emphatically" alleges WFM Group held unique or special expertise in the manufacture and labeling of graham crackers. *Id.* Plaintiff cites to the Eastern District of New York's decision in *Green v. Gerber Products Co.,* 262 F. Supp. 3d 38 (E.D.N.Y. 2017), as her only support for this argument. ECF No. 24 at p. 18. Leaving aside whether *Greene* actually does away with the need to allege a special relationship, which it does not, Plaintiff's argument fails because she has not alleged facts that tend to establish WFM Group had the requisite unique or special expertise.[5]

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[5] *Greene* relies on *Suez Equity Inv'rs, L.P. v. Toronto-Dominion Bank*, 250 F.3d 87 (2d Cir. 2001), and *Eternity Glob. Master Fund Ltd. v. Morgan Guar. Tr. Co. of N.Y.*, 375 F.3d 168 (2d Cir. 2004), for the proposition that a plaintiff need not plead a special relationship so long as they emphatically plead defendant's special expertise and intent. Neither the *Suez* nor *Eternity Glob.* decisions, however, dispensed with the special relationship requirement as *Greene* suggests. *See Suez*, 250 F.3d at 103 ("plaintiff's complaint implies a relationship between the parties that extended beyond the typical arm's length business transaction: defendants initiated contact with plaintiffs, induced them to forebear from performing their own due diligence, and repeatedly vouched for the veracity of the allegedly deceptive information."); *Eternity Glob. Master Fund Ltd.*, 375 F.3d at 188-89 (holding that *Suez* does not dispense with special relationship requirement). Indeed, completely eradicating the special relationship requirement directly contradicts the New York Court of Appeals seminal holding in *Kimmell v. Schaefer*, 89 N.Y.2d 257, 652 N.Y.S.2d 715, 675 N.E.2d 450, 454 (1996), which "does nothing to undermine the

Plaintiff points to paragraph 114 of her Amended Complaint in an attempt to show she sufficiently alleged WFM Group's special expertise. ECF No. 24 at p. 19. This paragraph, however, only states in conclusory fashion that WFM Group "held itself out as having special knowledge and expertise in the production, service and/or sale of the product or service type." ECF No. 17 at ¶ 114. This boilerplate allegation is a far cry from the detailed allegations of specialized knowledge that the court considered "emphatic" in *Greene. See Greene,* 262 F. Supp. 3d at 76 (plaintiff alleged specialized knowledge by showing defendant conducted study undermining label claims and knew FDA rejected label claims). Indeed, the Amended Complaint is devoid of any allegations that WFM Group possessed similar product testing or made any communication whatsoever to Plaintiff assuring her of its expertise, as the defendant had in *Greene*. *Id.* Instead, Plaintiff's allegations rest on the simple particulars of WFM Group's business and are not actionable. Thus, even under her own theory, Plaintiff failed to adequately allege WFM Group's special expertise or intent, and her negligent misrepresentation claim should be dismissed.

C. Plaintiff Fails to State a Plausible Breach of Warranty Claim

Because Plaintiff has not alleged, nor shown in her opposition, that the 365 Graham Crackers labeling is likely to deceive a reasonable consumer, her breach of express warranty claim necessarily fails. ECF No. 23 at pp. 16-17. Plaintiff halfheartedly responds by reciting the elements for an express warranty claim and arguing she has sufficiently alleged these elements because the 365 Graham Crackers' label represents that the product contains more honey and whole grain than sugar and non-whole grain. ECF No. 24 at pp. 20-21. As established in Section II.A above, however, the product's label does not warrant that whole grain is the predominant grain ingredient nor that honey is the predominant sweetener. *Kennedy v. Mondelez Glob. LLC*, *supra*, 2020 WL 4006197, at *15 (the graham and honey statements do not warrant more whole grain and honey than non-whole grain and sugar). Moreover, Plaintiff admits – through her

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basic requirement of a 'special relationship' for a negligent misrepresentation tort action." *Dallas Aerospace, Inc. v. CIS Air Corp.*, 352 F.3d 775, 788–89 (2d Cir. 2003).

silence on the issue – that she did not provide WFM Group with the requisite pre-suit notice. As such, her express warranty claim should be dismissed.

Further, as to the implied warranty claim, Plaintiff fails to respond to WFM Group's authority showing that, "[w]here the sale of a food or beverage is concerned, courts have ruled that the product need only be fit for human consumption to be of merchantable quality." *Silva v. Smucker Nat. Foods, Inc.*, No. 14-cv-6154, 2015 WL 5360022, at *11 (E.D.N.Y. Sept. 14, 2015) (dismissing implied warranty claim). Instead, Plaintiff cites to *Jackson v. Eddy's LI RV Ctr., Inc.*, 845 F. Supp. 2d 523, 530–31 (E.D.N.Y. 2012), which deals with the merchantability of motorhomes, not snack or food products. Plaintiff failed to allege her 365 Graham Crackers were inedible. In fact, to the contrary, she alleges she consumed the product. *See* ECF No. 17 at ¶ 73. As such, her claim for breach of an implied warranty claim fails.

Finally, although Plaintiff alleges a claim for breach of the MMWA, she fails to address it in her opposition. Plaintiff's MMWA claim fails because she has not established that the terms "honey," "graham" or "graham crackers" constitute a written warranty as defined by 15 U.S.C. §2301(6). ECF No. 23 at pp. 17-18. Thus, Plaintiff's MMWA claim should be dismissed.

D. Plaintiff's Fraud Claim Also Fails.

Similar to Plaintiff's defense of her warranty claims, Plaintiff's opposition merely recites the elements of fraud without responding to any of WFM Group's arguments.[6] Plaintiff does not dispute that her fraud claim requires she "plead scienter, or fraudulent intent," nor that she must plead each element of her common-law fraud claim – including scienter – with sufficient detail to satisfy the heightened pleading standards of Rule 9(b). Yet, she does not attempt to explain how her allegations are sufficient to demonstrate fraudulent intent beyond the alleged mistaken beliefs of consumers that the 365 Graham Crackers label promised more whole grain and honey than non-

[6] Again, as established in Section II.A above, Plaintiff's fraud claim fails for the simple reason that she has not shown the 365 Graham Crackers' label promised that whole grain is the predominate grain ingredient nor that honey is the predominate sweetener. *Kennedy v. Mondelez Glob. LLC, supra*, 2020 WL 4006197, at *14 ("Where a consumer protection claim fails [because no misrepresentation has been found], so must a fraud claim.").

whole grain and sugar. ECF No. 24 at pp. 21-22. But as New York courts have made clear, "[t]he simple knowledge that a statement is false is not sufficient to establish fraudulent intent, nor is a defendant's 'generalized motive to satisfy consumers' desires [or] increase sales and profits.'" *Davis v. Hain Celestial Grp., supra,* 297 F. Supp. 3d at 337. Plaintiff does not point to any allegations that would establish – let alone show with particularity – that WFM Group (a retailer) intentionally used the terms "honey," "graham" or "graham crackers" to deceive consumers or that it adopted these terms with reckless disregard to their truth or falsity.

E. Plaintiff's Unjust Enrichment Claim Should Be Dismissed

Plaintiff argues that Rule 8 permits her to plead her unjust enrichment claim in the alternative to her other claims. ECF No. 24 at pp. 22. But "even pleaded in the alternative, claims for unjust enrichment will not survive a motion to dismiss where plaintiffs fail to explain how their unjust enrichment claim is not merely duplicative of their other causes of action. *Nelson v. MillerCoors, LLC*, 246 F. Supp. 3d 666, 679 (E.D.N.Y. 2017); *see also Kennedy v Mondelez Glob. LLC, supra*, 2020 WL 4006197, at *15 (dismissing plaintiffs' unjust enrichment claims because they failed to allege deceptive trade practices or any other claim.). Plaintiff does not explain how her unjust enrichment claim is not entirely derivative of her other claims. As such, it should be dismissed.

F. Plaintiff Lacks Standing to Seek Injunctive Relief

"Although past injuries may provide a basis for standing to seek money damages, they do not confer standing to seek injunctive relief unless the plaintiff can demonstrate that she is likely to be harmed again in the future in a similar way." *Nicosia v. Amazon.com, Inc.*, 834 F.3d 220, 239 (2d Cir. 2016) (citations omitted). Following *Nicosia*, federal courts in New York have repeatedly applied this principle to conclude that a consumer cannot seek injunctive relief once she has learned of a manufacturer's allegedly "deceptive" advertising, as there is no likelihood that she will be similarly deceived in the future. *See e.g., Davis v. Hain Celestial Grp*., *supra*, 297 F. Supp. 3d at 339 ("To the extent that plaintiff was deceived by defendants' products, he is now aware of the truth and will not be harmed again in the same way."); *see also Kennedy v.*

Mondelez Glob. LLC, supra, 2020 WL 4006197, at **4-5 (dismissing injunctive relief claim based on allegation plaintiff "would consider purchasing the Products again if there were assurances that the Products' representations were no longer misleading.")

Plaintiff relies on *Belfiore v. Procter & Gamble Co.,* 94 F. Supp. 3d 440, 445 (E.D.N.Y. 2015), and its progeny to argue that the inability to rely on labels in the future constitutes an injury conferring standing to pursue injunctive relief. This line of cases, however, conflict with the Second Circuit's decision in *Kommer v. Bayer Consumer Health, a division of Bayer AG*, 710 F. App'x 43, 44 (2d Cir. 2018), which held that absent an actual intent to purchase the product in the future there is no standing to obtain injunctive relief. *See Sharpe v. A&W Concentrate Co*., *supra*, 2020 WL 4931045, at **3-4 (E.D.N.Y. Aug. 24, 2020) (distinguishing *Belfiore* line of cases as mostly predating *Kommer*, and holding that "[b]ecause plaintiffs admit that they are unlikely to purchase the products at issue, unless the products are changed, they lack standing to seek injunctive relief."). Here, as in *Sharpe,* Plaintiff alleges she will purchase the product again only if it is changed, and thus fails to allege standing to obtain injunctive relief.

III. CONCLUSION

For the reasons stated herein, WFM Group requests the Court dismiss Plaintiff's entire Amended Complaint with prejudice.

Dated: October 6, 2020

Respectfully submitted,

/s/ Brian R. Blackman

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