

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- x
MOHAMMED GARADI, *individually and
on behalf of all others similarly situated,*

Plaintiff,

- against -

1:19-cv-03209 (RJD)(ST)

MARS WRIGLEY CONFECTIONERY US, LLC,

Defendant.

----- x
MOLLY BROWN, *individually and on
behalf of all others similarly situated,*

Plaintiff,

- against -

1:21-cv-1996 (RJD)(ST)

MARS WRIGLEY CONFECTIONERY US, LLC,

MEMORANDUM & ORDER

Defendant.

----- x
DEARIE, District Judge

In this consolidated action,¹ plaintiffs Mohammed Garadi and Molly Brown seek injunctive relief and monetary damages against Mars Wrigley Confectionery US, LLC (“Mars”) on behalf of a putative class of consumers who purchased Mars’s Dove “Vanilla Ice Cream” bars. Plaintiffs contend that the products’ labels are misleading because the ice cream is not flavored exclusively from vanilla beans in violation of New York General Business Law (“NY GBL”) Sections 349 and 350 and several California consumer protection laws, in breach of

¹ On April 13, 2021, Judge Tigar granted Mars’s motion to transfer Ms. Brown’s Northern District of California case to the Eastern District of New York. Brown v. Mars Wrigley Confectionery US, LLC, 20-cv-8292 (JST) (N.D. Cal.), ECF No. 34. On June 1, 2021, I consolidated Ms. Brown’s case with Mr. Garadi’s for all purposes pursuant to Federal Rule of Civil Procedure 42(a) given that both plaintiffs allege the “vanilla” ice cream label on Mar’s Dove bar is deceiving.

express and implied warranty and the Magnuson-Moss Warranty Act, constituting fraud and resulting in defendant’s unjust enrichment.²

Defendant moves to dismiss plaintiffs’ claims for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6).³ For the reasons discussed herein, the motion is granted and the amended complaints are dismissed.

BACKGROUND

The following facts are derived from the amended complaints and assumed to be true for purposes of the instant motion. Mars “manufactures, distributes, markets, labels and sells” vanilla ice cream bars under the Dove brand. Garadi Am. Compl. ¶ 1; Brown Am. Compl. ¶ 1. The front labels on defendant’s Dove ice cream bars appear as follows:



Plaintiffs allege they were deceived by the word “vanilla” on Mars’s packaging because the ice cream is not flavored exclusively from vanilla beans or extract. Garadi Am. Compl. ¶¶

² On January 14, 2020, Mr. Garadi withdrew his negligent misrepresentation claim. See No. 1:19-cv-03209 (RJD)(ST), ECF No. 26, Pre-Motion Conference Tr., at 6:3-20. He later withdrew his claims relating to the products’ “chocolate” representations as well. *Id.* at ECF No. 34 at 1, n.1.

³ Defendant submits that the motion to dismiss filed in *Garadi* “would resolve most, if not all of the claims” in *Brown*. No. 1:21-cv-1996 (RJD)(ST), ECF No. 39 at 1. Counsel for Ms. Brown responded that she would “rely on the *Garadi* plaintiff’s opposition to that motion in opposing any similar request for dismissal in the present matter.” *Id.* at No. 41. As such, the Court deems the instant motion as one to dismiss both amended complaints.

24, 73-78, 118; Brown Am. Compl. ¶¶ 18-19; 82-84. According to the amended complaints, a label that says vanilla without qualification indicates to a consumer that vanilla is the “characterizing flavor”, that no other flavors in the product “simulate” or “reinforce” vanilla and that vanilla from beans or extract is the exclusive source of flavor. Garadi Am. Compl. ¶¶ 73, 75; see Brown Am. Compl. ¶¶ 101, 104. Plaintiffs assert that testing of the bars indicates they contain “a small amount of vanilla derived from vanilla beans” and also “high levels of ethyl vanillin,” which may be derived from tree bark and is distinct from vanilla flavor “obtained from the vanilla plant.” Garadi Am. Compl. ¶¶ 35, 92-127; see also Brown Am. Compl. ¶¶ 77, 92-93. Thus, plaintiffs insist that the “vanilla” label is misleading because it does not disclose that defendant used additional non-vanilla bean sources to achieve the ice cream’s flavor. According to plaintiffs, a reasonable consumer would expect either that the bars are flavored exclusively from vanilla beans or that the label would state the bars are flavored from both vanilla beans and other sources.

Plaintiffs claim that had they known that the source of the vanilla flavor did not come exclusively from “natural” vanilla (*i.e.*, vanilla beans) they would not have purchased the ice cream bars or would have paid less for them. Garadi Am. Compl. ¶¶ 151-55; Brown Am. Compl. ¶¶ 118-21.

DISCUSSION

Defendant argues the amended complaints should be dismissed because private parties do not have standing to enforce the Federal Food, Drug, and Cosmetic Act (“FDCA”) under the guise of bringing state law claims, ECF No. 33 at 7-8, and because plaintiffs fail to state a claim for which relief may be granted, ECF No. 33 at 12-23.

New York’s General Business Law, California’s Unfair Competition Law (“UCL”), California’s False and Misleading Advertising Law (“FAL”) and California’s Consumer Legal

Remedies Act (“CLRA”) make it unlawful for a business to engage in deceptive conduct. See, e.g., New York G.B.L. § 349 (prohibiting “[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service”); UCL, Cal. Bus. & Profs. Code §§ 17200 et seq. (prohibiting “unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising”); FAL, Cal. Bus. & Profs. Code §§ 17500 (prohibiting a business from making any statement concerning property or services that is “untrue or misleading”); CLRA, Cal. Civ. Code § 1770 (prohibiting “unfair methods of competition and unfair or deceptive acts or practices.”). To survive a motion to dismiss under Rule 12(b)(6), plaintiffs must assert sufficient factual allegations to suggest that defendant “is engaging in an act or practice that is deceptive or misleading in a material way.” Oswego Laborers’ Local 214 Pension Fund v. Marine Midland Bank, N.A., 647 N.E.2d 741, 744 (N.Y. 1995); see also Shroyer v. New Cingular Wireless Servs., 622 F.3d 1035, 1044 (9th Cir. 2010) (recognizing that plaintiff is required to show that members of the public are “likely to be deceived” in order to survive a motion to dismiss a claim brought under Section 17200). The “deceptive practice must be ‘likely to mislead a reasonable consumer acting reasonably under the circumstances.’” Stutman v. Chem. Bank, 731 N.E.2d 608, 611-12 (N.Y. 2000) (quoting Oswego, 647 N.E.2d at 744); see also Davis v. HSBC Bank, 691 F.3d 1152, 1161-62 (9th Cir. 2012) (same); In re Ferrero Litig., 794 F. Supp. 2d 1107, 1115 (S.D. Cal. 2011) (“Under California[’s FAL, UCL and CLRA], conduct is deceptive or misleading if it is likely to deceive an ordinary customer.”) (citing Williams v. Gerber Prods. Co., 552 F.3d 934, 938 (9th Cir. 2008)).

“It is well settled that a court may determine as a matter of law that an allegedly deceptive advertisement would not have misled a reasonable consumer.” Fink v. Time Warner

Cable, 714 F.3d 739, 741 (2d Cir. 2013) (per curiam). New York and California have adopted an objective definition of deception under which the alleged act must be “likely to mislead [or deceive] a reasonable consumer acting reasonably under the circumstances.” See Cohen v. JP Morgan Chase & Co., 498 F.3d 111, 126 (2d Cir. 2007) (quoting Oswego, 647 N.E.2d at 744); see In re Frito-Lay N. Am., Inc. All Nat. Litig., No. 12-md-2413 (RRM)(RLM), 2013 WL 4647512, at *16 (E.D.N.Y. Aug. 29, 2013) (“[I]n resolving the reasonable consumer inquiry, one must consider the entire context of the label.”); Ackerman v. Coca-Cola Co., No. 09-cv-0395 (JG)(RML), 2010 WL 2925955, at *15 (E.D.N.Y. July 21, 2010) (determining the likelihood that reasonable consumers would be misled entails “[v]iewing each allegedly misleading statement in light of its context on the label and in connection with the marketing of [the product] as a whole”); Holt v. Noble House Hotels & Resort, Ltd., 370 F. Supp. 3d 1158 (S.D. Cal. 2019) (citing Gerber, 552 F.3d 934, 938); Davis v. HSBC Bank, 691 F.3d 1152, 1161-62 (9th Cir. 2012).

To begin, the amended complaints’ references to U.S. Food and Drug Administration (“FDA”) regulations for vanilla flavor and ice cream are not relevant in determining whether plaintiffs have failed to state a claim. This case is about a reasonable consumer’s understanding of the labeling on Dove vanilla ice cream bars. It is not about the enforcement of FDA regulations, which lies solely within the purview of the agency. See, e.g., Steele v. Wegmans Food Markets, Inc., 472 F. Supp. 3d 47, 49-50 (S.D.N.Y. 2020) (“[I]n this private civil action, the extensive discussion and argument in the motion papers with respect to particular federal standards for ice cream flavor descriptions is without consequence” because enforcement of the FDCA “is left to the federal and State . . . authorities.”); Pichardo v. Only What You Need, Inc., No. 20-cv-493 (VEC), 2020 WL 6323775, at *3 n.6 (S.D.N.Y. Oct. 27, 2020) (“Plaintiffs’ claims

regarding FDA regulations are not relevant to determining whether a label is deceptive or misleading under GBL §§ 349-50.”).

The amended complaints fail to state a claim because plaintiffs have failed to plausibly allege that a reasonable consumer acting reasonably under the circumstances would be misled by the phrase “vanilla ice cream.” Mars’s label does not make any claims about where or in what quantity the vanilla taste comes from. It simply alerts a consumer faced with different flavors that this ice cream tastes like vanilla. Critically, plaintiffs do not allege that the ice cream does not taste like vanilla. Instead, the complaints hinge on the allegation that a reasonable consumer cares about the specific source of the vanilla flavoring. According to plaintiffs, a reasonable consumer expects vanilla flavor to indicate a product was flavored with vanilla derived from vanilla beans and vanilla beans only. And while plaintiffs concede Dove ice cream bars do contain vanilla from vanilla beans, they argue the label is still misleading because the products also contain vanilla derived from ethyl vanillin, maltol, benzaldehyde and other compounds not present in vanilla beans. In short, plaintiffs claim the “vanilla” descriptor on the label implies the ice cream is 100% flavored from vanilla beans.

Plaintiffs have failed to plausibly allege deception. Nowhere on the packaging does defendant promise that the ice cream bars are flavored with vanilla from an exclusive source. The front label merely indicates the ice cream is vanilla flavored and plaintiffs do not argue the ice cream does not taste like vanilla. See Wynn v. Topco Assocs., LLC, No. 19-cv-11104 (RA), 2021 WL 168541 (S.D.N.Y. Jan. 19, 2021) (vanilla almond milk); Barreto v. Westbrae Nat., Inc., No. 19-cv-9677 (PKC), 2021 WL 76331 (S.D.N.Y. Jan. 7, 2021) (vanilla soymilk); Twohig v. Shop-Rite Supermarkets, Inc., No. 20-cv-763 (CS), 2021 WL 518021 (S.D.N.Y. Feb. 11, 2021) (vanilla soymilk); Cosgrove v. Oregon Chai, Inc., No. 19-cv-10686 (KPF), 2021 WL

706227 (S.D.N.Y. Feb. 22, 2021) (vanilla chai tea); Steele v. Wegmans Food Markets, Inc., 472 F. Supp. 3d 47 (S.D.N.Y. 2020) (vanilla ice cream); Clark v. Westbrae Natural, Inc., 2020 WL 7043879, at *3 (N.D. Cal. Dec. 1, 2020) (vanilla soymilk); Pichardo, 2020 WL 6323775 (vanilla protein drink).

Plaintiffs' reliance on labeling cases premised on representations about ingredients is misplaced. For instance, the Second Circuit's decision in Mantikas v. Kellogg Co., 910 F.3d 633 (2d Cir. 2018), does not foreclose dismissal of the amended complaint in this case. Mantikas involved ingredients, not flavor. There, the Circuit reversed dismissal where a complaint alleged that packaging for "whole grain" Cheez-Its was misleading because the product primarily contains white flour as opposed to whole grain. District court decisions relying on Mantikas to allow claims to survive as to root beer "made with aged vanilla," "blueberry" bagels, "100% grated parmesan cheese," "natural vanilla" ice cream, "honey graham" crackers, "smokehouse" almonds are thus entirely distinguishable from the allegations in this case. In all of those cases, courts concluded that it is sufficient to allege deception by pointing to a product purporting to contain a particular ingredient that is not present. This case, like the litany of vanilla cases before it, is about flavor and there is no allegation that the ice cream bars do not taste like vanilla.⁴

Plaintiffs' remaining claims for fraud, breach of express and implied warranty and unjust enrichment are also dismissed because they are all premised on the groundless assertion that defendant's label is materially misleading.

⁴ Mr. Garadi suggested the products do not taste like vanilla in his opposition to defendant's motion to dismiss. See Pl's Opp. at 5-6, ECF No. 34. That allegation is not only missing from the amended complaint, but it is also contradicted by the pleading which asserts that the other sources of flavoring taste the same as vanilla flavored from vanilla beans. See, e.g., Garadi Am. Compl. ¶¶ 70, 93.

CONCLUSION

Defendant's Dove vanilla ice cream bars taste like vanilla. The amended complaints do not allege otherwise. Plaintiffs have failed to adequately allege that a reasonable consumer believes that vanilla ice cream means ice cream that is exclusively flavored from the vanilla plant without any such representation from the manufacturer other than the word "vanilla." The motion is granted and Mr. Garadi's and Ms. Brown's amended complaints are dismissed.

SO ORDERED.

Dated: July 6, 2021
Brooklyn, NY

/s/ Raymond J. Dearie
Raymond J. Dearie
United States District Judge