23-1236-cv

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

GRACEMARIE VENTICINQUE, individually and on behalf of a class of similarly situated persons,

Plaintiff-Appellant,

---v.---

BACK TO NATURE FOODS COMPANY, LLC,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

ANSWERING BRIEF FOR DEFENDANT-APPELLEE

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Did the District Court correctly decide that a plaintiff cannot create a false advertising claim by selectively reading ambiguous portions of a food label while ignoring other parts of the label?

2. Should this Court's opinion in *Mantikas* be extended to preclude a food manufacturer from truthfully disclosing some, but not all. of all the ingredients on the front of a product, even if the product complies with federal labeling laws.

3. Did the District Court correctly decide that Plaintiff failed to state a claim that she was misled about the amount of whole wheat flour in Back to Nature's crackers, where she claims that she selectively read the language "organic whole wheat flour, organic brown flax seed, salt" in a small-print list near the net weight, while ignoring the Nutrition Facts, which accurately specify the organic whole wheat flour content?

4. If Plaintiffs' claims were found to be plausible, are they preempted by the Nutrition Labeling and Education Act as implied nutrient content claims?

Defendant-Appellee B&G Foods, Inc. respectfully submits this Answering Brief.

INTRODUCTION

Plaintiff-Appellant Gracemarie Venticinque claims that she repeatedly purchased Back to Nature's Organic Stoneground Wheat Crackers over many years because of the statement "organic whole wheat flour, organic whole brown flax seed & sea salt," which appears in small print at the bottom of the box, near the net weight. While the crackers contain all those ingredients, Plaintiff argues that she thought they contained a higher percentage of whole wheat flour than is in the product. At the same time, Plaintiff claims that she did not read the Ingredients Panel on the side of the box, which is where a purchaser would look if she were buying crackers because of the percentage of whole wheat flour. Plaintiff's theory—that Back to Nature secretly used a more expensive ingredient (organic enriched flour processed from whole wheat flour, instead of just whole wheat flour) to deceive her—makes no sense, especially when she claims not to care about the healthiness of whole versus refined flour. The District Court correctly found that this claim was implausible and dismissed it.

Plaintiff urges this Court to distend the holding of *Mantikas v. Kellogg Co.*, 910 F.3d 633 (2d Cir. 2018), to require that a plaintiff bears no responsibility for reading any of the information on a product label and can sue regardless of

whether their claims make any sense. Her proposed rule would mean that a food manufacturer could never truthfully disclose some, but not all, of the ingredients in its product on the front of the label—as many companies do—without risking federal litigation. But *Mantikas* did not hold that purchasers can simply ignore the label of a product. It reiterated this Court's baseline rule that false advertising claims must be evaluated by reading the whole label, and held that where the name of the product and the front of the package were deliberately misleading, the plaintiff was not required to read the back of the package.

As this Court has recognized following *Mantikas*, if a label contains any ambiguity, a court should examine the totality of the label in assessing whether the plaintiff was misled. *Foster v. Whole Foods Market Group, Inc.*, No. 23-285-CV, 2023 WL 8520270, at *1 (2d Cir. Dec. 8, 2023) (fish oil labels were not misleading when front of label stated "1000 mg" and "Omega-3s" and back of label explained the capsules contained 1000 mg of fish oil, which included 300 mg of Omega-3s); *Hardy v. Ole Mexican Foods, Inc.*, No. 22-1805, 2023 WL 3577867 (2d Cir. May 22, 2023) (tortilla labels that included a depiction of the flag of Mexico on the front were not misleading when back of label stated product was made in Georgia); *Baines v. Nature's Bounty (NY), Inc.*, No. 23-710-CV, 2023 WL 8538172, at *2 (2d Cir. Dec. 11, 2023) (fish oil capsules containing esterized oil were not misleadingly labeled where front label just claimed products contained fish oil and

back label explained the fish oil had been esterized). These holdings are predicated on *Mantikas*, which reaffirmed the rule that "an allegedly misleading statement must be viewed in light of its context on the product label or advertisement as a whole." 910 F.3d at 636 (citation omitted).

Similarly, the Ninth Circuit, which decided the case upon which *Mantikas* is based (*Williams v. Gerber Prod. Co*., 552 F.3d 934, 939 (9th Cir. 2008)), likewise requires that plaintiffs cannot sue over ambiguous statements that are clarified elsewhere on a label. *See McGinity v. Procter & Gamble*, 69 F.4th 1093, 1099 (9th Cir. 2023) ("We hold that when, as here, a front label is ambiguous, the ambiguity can be resolved by reference to the back label.").

Foster, *Hardy*, *Baines,* and *McGinity* all turn on the difference between a falsehood that tricks people into not reading other parts of a label, and an ambiguity, which should provoke further review by people who care. The new rule Plaintiff proposes is inconsistent with *Twombly/Iqbal*, conflicts with this Court's cases pre- and post-dating *Mantikas*, would subvert the principles animating *Mantikas* by forcing courts to ignore the entirety and context of a label, would cause havoc to businesses that carefully follow the FDA's labeling rules as Back to Nature did here, and would convert commonplace ambiguities into protracted federal litigation.

Rejecting Plaintiff's new rule will protect reasonable consumers, reduce confusion below, and curb the deluge of claims that have resulted from lawyers trying to stretch *Mantikas* beyond the bounds of reason and turn the federal courts into the food labeling police. This has caused the federal courts of New York to surpass the Northern District of California as the nation's capital of food labeling litigation and has imposed substantial expense on food companies—which then gets passed along to the public. *See, e.g.*, Cary Silverman, James Muehlberger, and Adriana Paris, *The Food Court: Developments in Litigation Targeting Food and Beverage Marketing* (Aug. 2021), available at https://instituteforlegalreform.com/wp-content/uploads/2021/07/Food-Litigation-Update_web.pdf.

STATEMENT OF THE CASE

A. Factual Background

Back to Nature has created plant-based products since 1960 and has partnered with The Nature Conservancy to support initiatives focused on conservation for more than a decade. (JA023.) The company offers a range of granolas and snack foods, including several lines of cookies, crackers, and trail mixes. (*Id.*)

Plaintiff alleges that she repeatedly purchased crackers made by Back to Nature. (*Id.*) The box containing the crackers Plaintiff purchased is shown in Figure 1. (JA025.)

Figure 1

The statement of identity for the crackers pursuant to 21 C.F.R. § 101.3(b) identifies them as "stoneground wheat crackers"—a name which makes no reference to the whole wheat content of the crackers. (*Id.*) The most prominent features on the product label are the brand name "Back to Nature" and a picture of the crackers. (*Id.*) The picture shows that crackers are white and golden colored, not the darker brown associated with whole wheat flour. (*Id.*)

Plaintiff purported to assert claims under GBL §§ 349 and 350. (JA010-011 ¶¶ 13-18.) Plaintiff's entire argument focused on the incomplete list of ingredients that appears in small letters at the bottom of the front of the label, just above the net weight of the product: "organic whole wheat flour, organic whole brown flax seed & sea salt." (JA026.) As seen in Figure 1, "[t]he ingredients (along with the Nutrition Facts) are listed on the side of the box in the Ingredients Panel." (JA025.) Anyone who picked up the box would see that the full list of ingredients appears on the side, unless they purposely held the box in such a way that they completely avoided looking at anything apart from the front face.

According to Plaintiff, the statement "organic whole wheat flour, organic whole brown flax seed & sea salt" caused her to believe "that organic whole wheat flour is the main type of flour in the Product." (JA008-009 ¶¶ 8-9.) Plaintiff proposed to represent a purported class of individuals who "paid for a Product whose main flour they reasonably believed to be whole wheat flour, but they did not receive what they paid for." (JA011 ¶ 16.) Plaintiff did not allege anywhere in her Complaint why she purportedly prefers crackers with whole wheat flour.

B. The District Court's Opinion

Plaintiff brought this action on September 1, 2022. (JA002.) Defendant moved to dismiss pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. (JA0023.) The Honorable Valerie E. Caproni granted Defendants'

motion and dismissed Plaintiffs' complaint with prejudice pursuant to Rule 12(b)(6) on August 8, 2023. (JA085.)

In its opinion, the District Court found that the product's packaging was not misleading, because "it does not contain 'a prominent label that is unambiguous or misleading,'" and that, "at best, the label 'is ambiguous.'" (JA088 (cleaned up).) Judge Caproni contrasted Back to Nature's labels with the labels in *Mantikas*, noting that in this case, the phrase "'WHOLE WHEAT FLOUR' is not so 'conspicuous,' nor is it 'front and center' on the Product package. It is listed in much smaller print at the very bottom of the package, along with two other ingredients, 'ORGANIC WHOLE BROWN FLAX SEED & SEA SALT,' which arguably injects even more uncertainty into the meaning behind the label . . ." (JA0089.)

For these reasons, Judge Caproni found "Plaintiff's argument that *Mantikas* involved 'substantially similar facts'" to be "wholly mistaken." (*Id.*) This is because any consumer, including the Plaintiff, "would be able to interpret the label in context: the crackers are called "Stoneground Wheat Crackers," a name which does not specify whole wheat; and at the bottom of the box three distinct ingredients appear in smaller print — including "organic whole wheat flour" — in what is clearly a non-exhaustive list of ingredients. … A simple tilt of the package would reveal the full list of ingredients and dispel the confusion." (JA089-090.)

For the same reasons, Judge Caproni denied Plaintiff's request for leave to amend: "Although the allegations may change, the Product's label remains the same as it was when Plaintiff allegedly purchased it: ambiguous, at best, as to the Product's primary source of flour." (JA090.) Plaintiff appeals from the District Court's dismissal order.

ARGUMENT

The District Court properly dismissed Plaintiff's complaint as implausible. The District Court applied the correct legal standard, holding that if a claim on the front of a label is ambiguous, a court must examine the entire label, and properly concluded that the label is not misleading. To the extent the label is even arguably ambiguous, that ambiguity is resolved by the list of ingredients on the side panel, which anyone who actually cared about how much whole wheat flour was in the product would consult before their purchase. If Plaintiff's claims were found to be plausible, they would separately be preempted by federal law.

I. THE DISTRICT COURT APPLIED THE CORRECT LEGAL STANDARD

The District Court correctly followed *Mantikas* and other "courts in this Circuit [that] have reasoned that '[i]f 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 inquire as to whether the allegedly misleading element is instead merely ambiguous." (JA087.)

In *Mantikas*, this Court explained that because "context is crucial," a court must "consider the challenged advertisement as a whole, including disclaimers and qualifying language." 910 F.3d at 636 (citing *Fink v. Time Warner Cable*, 714 F.3d 739, 742 (2d Cir. 2013) ("[U]nder certain circumstances, the presence of a disclaimer or similar clarifying language may defeat a claim of deception."); *Freeman v. Time, Inc*., 68 F.3d 285, 289-90 (9th Cir. 1995)). *Mantikas* also added an exception/refinement to this Court's rule in *Fink*: in the context where the name of a product and front-of-pack representations are false, the presence of disclaimers or clarification elsewhere on the packaging does not defeat the claim. 910 F.3d at 637. It derived this exception from the Ninth Circuit's decision in *Williams v. Gerber Products Co*., 552 F.3d 934, 939 (9th Cir. 2008). *See Mantikas*, 910 F.3d at 637.

In *Williams*, Defendant's "product [wa]s called 'fruit juice snacks' and the packaging picture[d] a number of different fruits." 522 F.3d at 939. The product, however, "contained no fruit juice from any of the fruits pictured on the packaging" and "the two most prominent ingredients were corn syrup and sugar." *Id.* at 936. The court held that consumers would not necessarily read the ingredients to understand these facts in light of the false name, the prominent bogus images on the front-of-pack, and other misleading language on the product. *Id.* at 939.

As the District Court correctly recognized, absent a boldly misleading statement on the front of pack, the reasoning of *Mantikas* and *Williams* does not compel departing from the baseline rule of *Fink* that the full context of the label must be examined. (JA087.) As many courts have recognized, the reason for the *Mantikas* exception to the rule requiring examination of the whole label derives from the fact that "while a reasonable consumer, lulled into a false sense of security by an unavoidable interpretation of an allegedly deceptive statement, may rely upon it without further investigation, consumers who interpret ambiguous statements in an unnatural or debatable manner do so unreasonably if an ingredient label would set them straight." *Boswell v. Bimbo Bakeries USA, Inc.*, 570 F. Supp. 3d 89, 94 (S.D.N.Y. 2021) (quotation omitted).

Plaintiff's arguments to the contrary are: (1) inconsistent with this Court's pre-*Mantikas* decisions, (2) inconsistent with *Mantikas*, (3) inconsistent with this Court's post-*Mantikas* decisions, (4) inconsistent with the weight of authority from other courts addressing this issue, and (5) ultimately inconsistent with *Twombly*, *Iqbal*, and the policies undergirding those decisions.

A. Plaintiff's Proposed New Rule Is Contrary to this Court's Baseline Rule in *Fink*

Before *Mantikas*, this Court's rule was that in evaluating a false labeling claim, the Court would consider the entire label and context in deciding whether it

was misleading. Rather than overruling this commonsense principle, *Mantikas* expressly reaffirmed it:

> "[I]n determining whether a reasonable consumer would have been misled by a particular advertisement, context is crucial." *Fink*, 714 F.3d at 742. We therefore consider the challenged advertisement as a whole, including disclaimers and qualifying language. *See Fink*, 714 F.3d at 742 ("[U]nder certain circumstances, the presence of a disclaimer or similar clarifying language may defeat a claim of deception."); *Freeman*, 68 F.3d at 289–90.

Mantikas, 910 F.3d at 636.

Fink has been repeatedly cited by this Court and by lower courts for this basic principle, before and after *Mantikas* was decided in 2018. *See*, *e.g.*, *Geffner v. Coca Cola Co*., 928 F.3d 198, 200 & n.12 (2d Cir. 2019) (citing *Fink* to uphold dismissal of claim that Diet Coke misled plaintiff into believing that it would cause her to lose weight); *Chufen Chen v. Duncan' Brands*, *Inc.,* 954 F.3d 492, 500-501 (2d Cir. 2020) (citing *Fink* in dismissal of claims that plaintiff was misled into believing that Dunkin' Donuts' inexpensive Angus sandwich did not contain steak).[1]

Likewise, in *Freeman*, the Ninth Circuit case cited by *Mantikas* and *Fink*, the court upheld dismissal of plaintiff's claim that a "Million Dollar Dream Sweepstakes" ad was misleading because he failed to read the small print

[1] Per Westlaw, *Fink* has been cited 219 times regarding the standard applied to evaluating such claims.

explaining that he had not automatically won. The court explained that "any ambiguity" in the defendant's promotion that the plaintiff "would read into any particular statement is dispelled by the promotion as a whole." 68 F.3d at 290.

Plaintiff's proposed rule that the Court must ignore the entirety of a label when there is an ambiguity on the front-of-pack is contrary to all this longstanding precedent, which has continued after *Mantikas*, and which *Mantikas* upheld, rather than purported to overrule.

B. Plaintiff's Proposed Rule Is Contrary to *Mantikas*

Plaintiff's proposed rule that the District Court should have ignored the context of the statements at issue is contrary to *Mantikas*, itself. As discussed above, *Mantikas* embraced the rule that courts must review advertisements "as a whole, including disclaimers and qualifying language." 910 F. 3d at 636. *Mantikas* held that the district court had "misapplied that principle to Plaintiffs' claims in this case" because in certain contexts, a misrepresentation on a label may be so compelling that a plaintiff should not be expected to look elsewhere to clarify it. *Id*. at 637 (plaintiff not expected to fact check "misleading information set forth in large bold type on the front of the box"). Plaintiff's rule contradicts *Mantikas* because it would preclude courts from examining the advertisement as a whole—as *Mantikas* requires.

Nor does Plaintiff's proposed rule comport with the reasoning of *Mantikas*. The reason that *Mantikas* created an exception to the general rule of *Fink* is that once a plaintiff has been misled, they have no reason to read anything else. That is not the case in the context of an ambiguous statement. Just the opposite is true.

Nothing in *Mantikas* purported to subject such manufacturers to potential federal litigation for the way that products are commonly labeled, in which some, but not all, of the ingredients are disclosed on the front of the label.

Ingredients: Tomato Concentrate, Distilled Vinegar, High Fructose Corn Syrup, Corn Syrup, Salt, Spice, Onion Powder, Natural Flavoring.

INGREDIENTS: MILK CHOCOLATE [SUGAR; COCOA BUTTER; CHOCOLATE; NONFAT MILK; MILK FAT; LACTOSE; LECITHIN (SOY); PGPR, EMULSIFIER]; PEANUTS; SUGAR; DEXTROSE; SALT; TBHQ AND CITRIC ACID, TO MAINTAIN FRESHNESS. Ⓤ D

Partially produced with genetic engineering.

GLUTEN FREE

C. Plaintiff's Proposed Rule Is Contrary to This Court's Decisions after *Mantikas*

As noted in Section I.A above, following *Mantikas*, this Court has repeatedly applied *Fink*. Further, after *Mantikas*, three panels of this Court have held that when a label is ambiguous on its front, a plaintiff cannot create a claim by ignoring other language on the label. In each case, the plaintiffs made the exact same claim Plaintiff makes here: that a plaintiff can state a claim by ignoring the context and entirety of a label, if they see an arguably ambiguous representation on the front label. In each of these cases, this Court rejected the plaintiffs' claims in part because other representations on the products' packaging dispelled any arguable ambiguity in the products' labeling. Plaintiff argues that the Court should disregard these three decisions, but there is no reason for the Court to reach a different result here.

1. This Court Has Interpreted *Mantikas* to Mean that Courts Should Look at the Entire Context and Label in Cases of Ambiguity

First, in *Foster*, the Court affirmed a dismissal of a claim that a fish oil product sold by Whole Foods "misleadingly indicated that the product contains 1000mg of Omega-3s EPA and DHA per serving (one capsule), whereas each capsule actually contains only 300mg of Omega-3s." 2023 WL 8520270, at *1. The Court described the accused product as follows:

> "On the front label of the bottle, directly in the middle, 'Fish Oil' is listed, in large white typeface. Immediately above, in slightly smaller but prominent typeface, is the description "100% Wild-Caught." And, immediately below, the front label contains, on separate lines, the following four representations listed consecutively, one under the other, in small grey typeface: (1) "Omega-3s EPA & DHA"; (2) "1000mg Per Serving"; (3) "From Small Cold-Water Fish"; and (4) "Molecularly Distilled."

Id. at *2. The Court concluded that no reasonable consumer would read the first two of the "small lines" in the ingredient list on the face of the package together. *Id.* The Court further explained that "when ambiguity might exist related to certain representations on a product's label, context can be crucial in determining whether a reasonable consumer would have been misled or deceived as 'under certain circumstances, the presence of a disclaimer or similar clarifying language may defeat a claim of deception.'" *Id.* (quoting *Fink*, 714 F.3d at 742.) Here, that meant looking to "the back labeling" of the fish oil, which "clearly and accurately states to consumers the supplement facts per serving." *Id.*

Finally, the Court explained that *Mantikas* does not disturb the baseline rule that courts must examine the entire context of a label where the statement that the plaintiff claims to rely on is ambiguous. The Court reasoned that "[i]n *Mantikas*, we determined that contextual information on the reverse of the product's packaging could not overcome clearly inaccurate factual representations on the front labeling. But the case before us does not involve an affirmatively inaccurate

statement." *Id.* (citing *Mantikas*, 910 F.3d at 638-39). In contrast, the Court found that the list of fish oil ingredients at issue "does not involve an affirmatively inaccurate statement," and that "[e]ven assuming that the representation on the front label might be considered ambiguous, the additional information on the Fish Oil Product's back label provides clarifying language that definitively dispels any arguable ambiguity on the front." *Id.*

Second, in *Hardy*, the Court addressed a claim that tortilla products were marketed deceptively because their labels purportedly implied they originated from Mexico when they were in fact manufactured in the United States. 2023 WL 3577867, at *1. The Court described the accused products' packaging as follows:

> On the La Banderita Products, a graphic resembling the Mexican flag (but with corn stalks instead of the coat of arms of Mexico) figures prominently in the center of the packaging and sets the green-white-red color scheme of the packaging. The "La Banderita" brand is printed in a circle surrounding the flag, along with a descriptor of the tortilla product (*e.g.*, "Flour Tortillas," "Burrito Grande," "Sabrosísimas," or "Fajita"). Depending on the product, these words may be repeated at the edges of the packaging, which may also display a smaller version of the flag graphic – this time with a white bull replacing the white segment of the flag – and the phrase "A Taste of Mexico!" . . . Notably, in the bottom-left corner [of the back of the packaging], the packaging includes graphics stating that the products are "MANUFACTURED BY: OLÉ MEXICAN FOODS, INC. NORCROSS, GA 30071" and "MADE IN U.S.A."

Id. at *2. As in *Foster*, the Court found that no reasonable consumer would be deceived by this packaging. *Hardy*, 2023 WL 3577867, at *2. The Mexico-themed packaging drew "associations" with Mexico that did not amount to "an affirmative representation" that the products were made in Mexico. *Id.* That was "especially true given that the back of the packaging conspicuously states that the products are 'MADE IN U.S.A.' and 'MANUFACTURED [IN] NORCROSS, GA.'" *Id.* (citation omitted).

In rejecting the plaintiff's claim, the Court explicitly rejected the plaintiff's arguments that "*Mantikas* established a rule that information on the back of a product's packaging is always irrelevant to a deceptive marketing claim" and that "a front label representation about *any* aspect of a product can never be clarified by a representation made elsewhere on a product's packaging." *Id.* at *3. Instead, the Court held that "*Mantikas* reaffirmed that we will 'consider the challenged advertisement as a whole, including disclaimers and qualifying language' and that 'context is crucial' in evaluating deceptive-marketing claims." *Id.* (quoting *Mantikas*, 910 F.3d at 636).

Third, in *Baines*, the Court addressed a claim that a fish oil supplement was not actually fish oil because "it has undergone a transformation at a molecular level" such that the fish oil no longer was present in its natural omega-3 triglyceride form. 2023 WL 8538172, at *2 . The Court found that no reasonable

consumer "would be misled into thinking the supplement only contains omega-3s in triglyceride form" or that consumers "are actually thinking about the molecular form of their fish-oil-derived omega-3s at all." *Id.* This was especially true because, "to the extent that this molecular distinction does matter to any consumer, that consumer can look to the back label and read that the product's omega-3s are present 'as Ethyl Esters.'" *Id.* at *3 The Court found that "[t]his additional information cures any potential ambiguity from the front label as to the form of the omega-3s in the supplement." *Id.* The Court, as in *Foster* and *Hardy*, applied *Mantikas* and found that the information provided on the back label of the fish oil did not contradict the information provided on the front of the packaging, noting that, "[t]o the extent the front label leaves any ambiguity about the contents of Defendants' product, the back label provides sufficient clarification." *Id.* (citing *Mantikas*, 910 F.3d at 637).[2]

[2] The unpublished decision Plaintiff cites is inapposite, unlike *Foster*, *Hardy* and *Baines*, because it addressed a clear-cut case of consumer deception. *See Richardson v. Edgewell Pers. Care, LLC*, No. 23-128, 2023 WL 7130940, at *2 (2d Cir. Oct. 30, 2023) (finding representation that sunscreen was "reef friendly" "could plausibly mislead a reasonable consumer into thinking the products contain no reef-harming ingredients" and that statements regarding absence of certain reef-harming chemicals were plausibly misleading where the sunscreen contained additional, unlisted reef-harming chemicals).

2. Plaintiff's Attacks on this Court's Decisions in *Foster*, *Hardy* and *Baines* Should Be Rejected

Plaintiff makes no effort to address the numerous cases applying *Fink*. While Plaintiff argues that the Court should disregard *Foster*, *Hardy* and *Baines*, none of Plaintiff's arguments has merit.

First, Plaintiff argues that *Foster*, *Hardy* and *Baines* contradict *Mantikas*. (AOB at 26.) To the contrary, the three panels deciding the cases cited and applied *Mantikas*, which held that courts must look at the entirety of the label and context. The decisions above just clarify the extent of the exception that *Mantikas* created to the longstanding rule articulated in *Fink* and its progeny.

Second, Plaintiff argues that *Foster*, *Hardy* and *Baines* "depart[] from the [Rule] 12(b)(6) standard" because they purportedly require a plaintiff to allege more factual matter than is necessary for a claim to be "plausible on its face" within the meaning of *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). (AOB at 27.) Plaintiff further argues that, if a court finds a representation on the front of a product's packaging to be arguably ambiguous, the court is required to deny a motion to dismiss. (*Id.*) The standard, however, is not whether language on the front of a package is plausibly ambiguous or subject to multiple interpretations—it is whether the plaintiff plausibly was misled. *See Fink*, 714 F.3d at 741 ("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." (quoting *Iqbal*, 556 U.S. at 678)). The answer to that question turns on the totality of the label. Were Plaintiff correct, a court would be unable to "determine as a matter of law that an allegedly deceptive advertisement would not have misled a reasonable consumer," which it indisputably can. *Id.*

Third, Plaintiff attempts to distinguish this Court's decisions in *Foster*, *Hardy* and *Baines* by arguing that "the panels were convinced in each case that the front-of-package labeling claims were not just ambiguous, but were also not deceptive as a matter of law" such that the decisions "at most stand for the proposition that a court may look to the ingredients list . . . where the plaintiff's interpretation of the front-of-package claim is quasi-fanciful." (AOB at 29-30.) Again, however, that is not what *Foster*, *Hardy* and *Baines* held. Each case (1) found the front label not misleading and (2) in the alternative, found that the label was ambiguous at best and that other portions of the packaging cleared up the potential ambiguity. *Foster*, 2023 WL 8520270, at *2 ("[T]he complaint fails to plausibly allege that the Fish Oil Product's front label, viewed as a whole, was likely to mislead a reasonable consumer. Further, the back labeling clearly and accurately states to consumers the supplement facts per serving."); *Hardy*, 2023 WL 3577867, at *3 ("[N]o reasonable consumer would construe these elements to be an affirmative representation that the La Banderita Products were in fact manufactured in Mexico. This is especially true given that the back of the

packaging conspicuously states that the products are 'MADE IN U.S.A.'"); *Baines*, 2023 WL 8538172, at *3 ("This additional information [on the back label] cures any potential ambiguity from the front label as to the form of the omega-3s in the supplement."). That is exactly the situation here. As the District Court found, the language Plaintiff contends was misleading is not misleading as a matter of law because it appears "at the bottom of the box," where "three distinct ingredients appear in small print – including "organic whole wheat flour" – in what is clearly a non-exhaustive list of ingredients." (JA089-090.) The District Court then found that the label is, "at best," ambiguous as to the wheat content of the crackers. (*Id.*)

D. Plaintiff's Proposed Rule Is Contrary to the Weight of Authority from Other Courts

The Ninth Circuit, which generated the rule that the Court adopted in *Mantikas*, recently held that "when … a front label is ambiguous, the ambiguity can be resolved by reference to the back label." *McGinity v. Procter & Gamble Co.*, 69 F.4th 1093, 1099 (9th Cir. 2023). It drew the distinction between misleading and ambiguous statements by reasoning that the FDA did not require companies to list their ingredients to enable them to avoid liability for deception, but rather to provide "more detailed information about the product that *confirms* other representations on the packaging." *Id*. at 1098 (emphasis in original).

Likewise, a multitude of District and Circuit Courts addressing this issue have found that a plaintiff cannot state a consumer deception claim where an

ambiguous statement on a label's front packaging can be explained elsewhere on the packaging. *See, e.g.*, *Boswell v. Bimbo Bakeries USA, Inc.*, 570 F. Supp. 3d 89, 94 (S.D.N.Y. 2021) ("[W]hile a reasonable consumer, lulled into a false sense of security by an unavoidable interpretation of an allegedly deceptive statement, may rely upon it without further investigation, consumer who interpret ambiguous statements in an unnatural or debatable manner do so unreasonably if an ingredient label would set them straight."); *Warren v. Whole Foods Mkt. Grp., Inc.*, 574 F. Supp. 3d 102, 117 (E.D.N.Y. 2021) (same); *Reyes v. Crystal Farms Refrigerated Distrib. Co.*, No. 18CV2250NGGRML, 2019 WL 3409883, at *3 (E.D.N.Y. July 26, 2019) (finding that statement on front of mashed potatoes that product was "made with real butter" was ambiguous, and any "confusion [was] sufficiently dispelled by the ingredients label on the back of the package," which showed that the product was made with both real butter and butter-substitute fats); *Sarr v. BEF Foods, Inc.*, No. 18CV6409ARRRLM, 2020 WL 729883, at *5 (E.D.N.Y. Feb. 13, 2020) (same); *Bynum v. Fam. Dollar Stores, Inc.*, 592 F. Supp. 3d 304, 310-11 (S.D.N.Y. 2022) (collecting cases for the proposition that courts facing deceptive marketing claims "should inquire as to whether the allegedly misleading element is instead merely ambiguous"); *see also Pernod Ricard USA, LLC v. Bacardi U.S.A., Inc.*, 653 F.3d 241, 252-53 (3d Cir. 2011) (false advertising claim does not deal with "words in isolation" but rather the "entire accused advertisement," which in

the case of a consumer product is the whole "label", and concluding that rum sold under the brand name "Havana Club" did not mislead consumers into believing product came from Cuba when label said rum was made in Puerto Rico); *Am. Italian Pasta Co. v. New World Pasta Co.*, 371 F.3d 387, 392-93 (8th Cir. 2004) (holding the phrase "America's Favorite pasta," in the context of the product's whole packaging, was not misleading).

The two out-of-Circuit cases Plaintiff cites are factually inapposite and articulate a rule that is contrary to this Court's precedent and *Twombly* and *Iqbal*. First, both cases involved clear-cut instances of deception. In *Dumont v. Reily Foods Co.*, 934 F.3d 35, 37 (1st Cir. 2019), the court found that a coffee labeled "Hazelnut Crème" that in fact contained no hazelnut was misleading. In *Bell v. Publix Super Markets, Inc.*, 982 F.3d 468, 473 (7th Cir. 2020), the court likewise found a product labeled "100% Grated Parmesan Cheese" misleading because the product was not, in fact, 100% grated parmesan cheese. In both cases, the misleading statement was in the name of the product itself, and the product was labeled demonstrably incorrectly—which is not the case here, where the accused crackers (a) are not labeled "whole wheat crackers" or "100% whole wheat crackers" and (b) do actually contain whole wheat, along with the other ingredients listed on the front of the packaging. Second, both *Dumont* and *Bell* articulate a rule that, taken to its logical conclusion, would mean that consumers cannot be

expected to read statements on a product's label in context to clear up ambiguous statements. That rule is contrary to this Court's longstanding rule articulated in *Fink* and *Mantikas*, as discussed above. It likewise is contrary to *Twombly* and *Iqbal* because it would tie courts' hands in assessing a complaint's objective plausibility, which *Twombly* and *Iqbal* require them to do.[3]

E. Plaintiff's Proposed Rule Is Contrary to *Twombly/Iqbal*

Plaintiff's proposed rule also contradicts *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). As the Court recognized in *Fink*, the standard articulated in those cases "demands 'more than a sheer possibility that a defendant has acted unlawfully,'" but rather "depends on a host of considerations: the full factual picture presented by the complaint, the particular cause of action and its elements, and the existence of alternative explanations so obvious that they render plaintiff's inferences unreasonable." 714 F.3d at 741 (citation omitted). Where a plaintiff alleges that she intentionally refuses to review any portion of a product's packaging apart from one ambiguous statement on the front-of-pack, the claim is inherently implausible. At minimum,

[3] The district court cases plaintiff cites are similarly inapposite. *See Danone, US, LLC v. Chobani, LLC*, 362 F. Supp. 3d 109, 120 (S.D.N.Y. 2019) (denying preliminary injunction in Lanham Act case concerning labeling claims and relying on factual record and expert testimony); *Valcarcel v. Ahold U.S.A., Inc.*, 577 F. Supp. 3d 268, 278 (S.D.N.Y. 2021) (finding that calling crackers "Graham Crackers" was plausibly deceptive where crackers did not contain predominantly graham flour).

Plaintiff's rule would preclude courts from considering numerous facts that at least could be relevant to whether the claim is plausible, in contravention of *Twombly* and *Iqbal*.

F. Plaintiff's Theory Would Proliferate Unsound Litigation

The new rule Plaintiff asks the Court to adopt also runs contrary to the policy behind *Twombly* and *Iqbal* in that it would lower the threshold for plaintiffs to bring frivolous class actions. That would result in even more explosive growth in food labeling class actions in the most popular jurisdiction for filing such claims. Although plaintiffs once preferred to file food labeling class actions in the Northern District of California—which became known as the "food court"—New York's federal courts overtook the Northern District of California as the most popular venue for such claims in 2019.[4] One recent analysis found that consumer class actions targeting food and beverage products in New York had risen from 25 in 2017 to 106 in 2020, with 154 projected in 2021. *The Food Court*, *supra* n.3 at 4. This growth cannot be attributable to any corresponding increase in consumers being deceived by product labels. Rejecting Plaintiff's proposed rule

[4] *See* Cary Silverman, James Muehlberger, and Adriana Paris, *The Food Court: Developments in Litigation Targeting Food and Beverage Marketing* at 3-4 (Aug. 2021), *available at* https://instituteforlegalreform.com/wp-content/uploads/2021/07/Food-Litigation-Update_web.pdf; Perkins Coie LLP, *Food & Consumer Packaged Goods Litigation, 2020 Year in Review* at 4, *available at* https://www.perkinscoie.com/images/content/2/4/241153/2021-Food-CPG-Litigation-YIR-Report-v4.pdf.

and reiterating the Court's longstanding rule in *Fink* would ensure that only *plausible* cases of consumer deception are permitted to proceed past the pleading stage and inflict millions of dollars of harm upon innocent businesses. *See* Cary Silverman and James Muehlberger, *The Food Court: Trends in Food and Beverage Class Action Litigation* at 1, 5 (Feb. 2017) (more than five years ago, "the cost of defending against a 'routine' class action typically costs a company between $1 million and $17.5 million dollars, and can run far higher").

G. The Agency Comments Plaintiff Cites Are Irrelevant

In an argument she did not raise below, Plaintiff asks the Court to take judicial notice of FTC, FDA and USDA comments regarding products' whole grain content as purported support for her arguments. (AOB at 34-36.)[5] These comments are irrelevant to Plaintiff's theory because as she explained to the District Court: "Plaintiff is complaining only that Defendant represented—falsely—that whole wheat flour is the Product's predominant flour and that this was a material misrepresentation; not that she was misled about the Product's nutritional or health qualities." (JA063-064.) Moreover, none of the guidance

[5] While the existence of these comments is a matter of public record and thus noticeable, it would not be appropriate for the court to accept the various assertions in the comments as truthful. *See, e.g., Estate of Landers v. Leavitt*, 545 F.3d. 98, 106. (2d Cir. 2008) (clarifying that "interpretations contained in policy statements, agency manuals and enforcement guidelines do not warrant *Chevron* style deference (cleaned up)).

Plaintiff cites requires the Court to depart from its longstanding rule that a product's label must be considered in its entirety to determine whether it is misleading.

The guidance Plaintiff cites states that "[d]epending on the context in which a 'whole grain' statement appears on the label, it could be construed as meaning that the product is '100 percent whole grain.'" (AOB at 34.) But the rule that a court must examine the full context of a label is entirely consistent with Back to Nature's argument that statements on the label of a package need to be viewed in context with the rest of the package, so this guidance also supports affirmance. Likewise, Plaintiff cites instances where products are named "whole wheat pizza crust" or "whole wheat tortillas," but those examples are irrelevant because the accused crackers are not named "whole wheat crackers." (*Id*. at 35)

II. PLAINTIFF'S CLAIMS ARE IMPLAUSIBLE

Back to Nature's labels are truthful and follow all FDA regulations. The District Court applied the legal standard above to find that Plaintiff's claims were implausible. The District Court was correct for at least five reasons. ***First,*** it is implausible Plaintiff repeatedly purchased crackers because of their whole wheat content, and not their flavor, crispiness, or any of the real reasons people buy crackers. ***Second,*** the crackers are not branded as "whole wheat," but rather "wheat crackers." ***Third,*** it is implausible that Plaintiff believed the language "organic

whole wheat flour, organic whole brown flax seed & sea salt" constituted a complete list of the ingredients, when crackers need leavening and oil so that the flour rises and the product binds together. ***Fourth***, a person who wants to buy the crackers because of their whole wheat content knows where to find the ingredient list and would look there and find that organic unbleached enriched wheat flour is the first ingredient listed. To avoid knowing that there are more than three ingredients over many years and purchases, Plaintiff would have to have held the box unnaturally so that she could only see the front face while picking it up, putting it in her shopping cart, and at all other times. ***Fifth***, it is separately implausible that Plaintiff bought the crackers because of her supposed perception of the whole wheat content when she claims that she did not care if whole wheat flour was healthier than refined flour and liked the taste of the product because she repeatedly purchased and enjoyed it.

The District Court correctly found that the accused crackers' label is, at best, ambiguous as to wheat content, citing the following factors: (1) the whole wheat language is inconspicuous and appears at the bottom of the front of the package; (2) "organic whole wheat flour" appears in a non-exhaustive list along with two other ingredients, and (3) the crackers are called "Stoneground Wheat Crackers". JA089-090. As the District Court noted, "[a]t best, a reasonable consumer would find the label ambiguous as to whether the Product's primary source of flour was

whole wheat rather than enriched wheat flour" and that "[a] simple tilt of the package would reveal the full list of ingredients and dispel the confusion." (JA090.) This analysis is correct and consistent with *Mantikas*.

In *Mantikas*, the defendant produced two versions of Cheez It crackers that it marketed as "Whole Grain," as opposed to "Original" Cheez Its. 910 F.3d at 634. The first version was named "'WHOLE GRAIN' in large print in the center of the front panel of the box, and 'MADE WITH 5G OF WHOLE GRAIN PER SERVING' in small print on the bottom." *Id.* The second version "contained the words 'MADE WITH WHOLE GRAIN' in large print in the center of the box, with 'MADE WITH 8G OF WHOLE GRAIN PER SERVING' in small print on the bottom." *Id.* The Court found that plaintiff had stated a potential claim because, "[c]ontrary to the reasonable expectations communicated by the large, bold-faced claims of 'WHOLE GRAIN,' . . . the grain in the product is predominantly enriched white flour." *Id.* at 637. The Court noted that although the disclosures concerning whole grain content on the front of the box accurately set forth "the amount of whole grain in the crackers per serving, they are nonetheless misleading because they falsely imply that the grain content is entirely or at least predominantly whole grain, whereas in fact, the grain component consisting of enriched white flour substantially exceeds the whole grain portion." *Id.* (emphasis omitted). In light of the misleading label on the front of the box, the Court

concluded 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 Court need only compare the labels of the WHOLE GRAIN Cheez-Its in *Mantikas* to the accused crackers here—as the District Court did—to conclude that this case is not *Mantikas*. Here, the Complaint pertains to only one type of wheat cracker. It is not named "whole grain" or contrasted with an "original" or non-whole-grain product. "Whole wheat flour" is not advertised in large, bold, block letters in the statement of identity of the product, nor is the whole grain content identified on the front of the box. Unlike *Mantikas*, which only touted "whole grain," the term "whole wheat" appears in a list of three ingredients at the bottom of the label, near the net weight. The print is so small that Plaintiff had to excerpt and enlarge it in her pleadings below. (JA084.) The list is obviously incomplete because it contains no leavening agent or ingredient capable of binding the three dry ingredients listed. As seen in the image to the left in Figure 2 below (reproduced from *Mantikas*), the Whole Grain Cheez-It label in *Mantikas* bears no resemblance to the label of the accused crackers.

Figure 2

Mantikas

The Accused Crackers

Accordingly, as the District Court concluded, this case is materially different from *Mantikas*, and any consumer who actually cared about the whole wheat content would look at the side label before making their purchase.

Plaintiff's arguments that the accused crackers' label is actually *more* misleading than the Cheez-It box in *Mantikas* are implausible, illogical and should be summarily rejected.

First, Plaintiff notes that one version of the *Mantikas* Cheez-It box stated the amount of whole grain per serving. (AOB p. 15.) But this Court in *Mantikas* explicitly rejected the argument that setting forth the amount of whole grain cured the misleading nature of the prominent "WHOLE GRAIN" label, so this detail is irrelevant. 910 F.3d at 637.

Second, Plaintiff argues that "one version of the 'WHOLE GRAIN' claim on the Cheez-It crackers included the 'MADE WITH' qualifier" such that the label's claim "was literally true," and that Back to Nature cannot make the same argument. (AOB at 16.) This argument is illogical because the accused crackers indisputably contain the list of ingredients that appears in small print on the bottom of the label. Moreover, the Court actually found that the "MADE WITH" qualifier *contributed* to the misleading nature of the Cheez-It label, so if anything this fact further shows that this case is nothing like *Mantikas*. 910 F.3d at 638.

~~Third, Plaintiff argues that presenting the phrase "whole wheat" in an incomplete list of ingredients is indistinguishable from the *Mantikas* Cheez-It box because the "WHOLE GRAIN" label in that case "can also be described as an incomplete ingredient list." (AOB p. 17.) Needless to say, that is not how lists work: one ingredient does not constitute a list. *See List,* Merriam-Webster Dictionary, *https://www.merriam-webster.com/dictionary/list?utm_campaign=sd&utm_medium=serp&utm_source=jsonld* (last visited Feb. 29, 2024) (defining list as a "series of words or numerals").~~

Fourth, Plaintiff argues that "the District Court did not identify a meaningful difference between the name" of the accused crackers "and the Cheez-It crackers at issue in *Mantikas*." (AOB at 18-19.) However, as seen on the label in *Mantikas*, the product was called "WHOLE GRAIN" Cheez-Its, embedding the

misrepresentation at issue in the very identity of the product. 910 F.3d at 634-35. In contrast, Back to Nature's product is simply and truthfully called a wheat cracker. Plaintiff argues that there is no difference between the names of the two products because, "if the whole grain language is removed from the front of Cheez-It crackers, consumers would be left with a name, 'Baked Snack Crackers,'" that 'does not specify whole wheat.'" (AOB at 19.) But that argument simply assumes away the most material aspect of the label in *Mantikas*. One only needs to look at the labels of the products to show that the product statement of identity in *Mantikas* contains the allegedly misleading language, whereas the statement of identity of Back to Nature's crackers does not.[6]

Plaintiff argues that the size of the incomplete ingredient list that appears on the label of the accused crackers should not distinguish the label from *Mantikas* (AOB at 20-21), but that misstates Back to Nature's argument and the District Court's opinion. The District Court did not hold that the size of a statement on a product label alone can render the label non-misleading—rather, it found that the incomplete ingredient list at the bottom of the label must be read in context with the rest of the label and, with the rest of the label, is distinguishable from the

[6] Plaintiffs' argument that the word "stoneground" suggests whole wheat (AOB p. 18-19) likewise fails based on a plain reading of the product statement of identity. As the District Court noted, this name "does not specify whole wheat," in contrast to the Cheez-It label in Mantikas, which specified "Whole Grain." (JA089-90.)

prominent "WHOLE GRAIN" claim on the *Mantikas* Cheez It box. *See Foster*, 2023 WL 8520270, at *2 ("[T]he complaint fails to plausibly allege that the Fish Oil Product's front label, *viewed as a whole*, was likely to mislead a reasonable consumer." (emphasis added)).

Finally, Plaintiff's claims are separately implausible because she admittedly was not "misled about the Product's nutritional or health qualities." (JA0064.) Moreover, her Complaint alleges that she repeatedly bought the crackers-in-suit for many years, demonstrating that she enjoyed them. (JA011 ¶¶ 19-20.) Plaintiff concedes on appeal that she "does not allege specifically why she prefers whole grains to refined grains" and is only able to offer several speculative reasons why this may be the case. (AOB 40-41.) As such, her claim that she bought the crackers because she was deceived about the whole wheat content is implausible.

III. IF PLAINTIFFS' CLAIMS WERE NOT DISMISSED AS IMPLAUSIBLE, THEY WOULD BE PREEMPTED

As noted above, Plaintiff disclaims caring about the nutritional value of whole wheat, which is one of the many reasons that her claims are implausible. But to the extent that her claims do rely on the nutritional value of whole wheat, either expressly or impliedly, they are preempted by federal law, which governs "nutrient

content claims," and displaces any inconsistent efforts to regulate such claims via state law.[7]

The Nutrition Labeling and Education Act (NLEA) establishes uniform national standards for labeling the nutritional value of food products and prohibits states from "directly or indirectly establish[ing] . . . as to any food in interstate commerce . . . any requirement respecting any claim of the type described in section 343(r)(1) . . . that is not identical to the requirement of section 343(r)[.]" 21 U.S.C. § 343-1(a)(5). The NLEA therefore prevents states from mandating any requirements different from the FDCA's with respect to express or implied claims "characteriz[ing] the level of any nutrient" in a food product (known as "nutrient content claims"). *Id.* § 343(r)(1)(A); *Chacanaca v. Quaker Oats Co.*, 752 F.Supp.2d 1111, 1118 (N.D. Cal. 2010).

To the extent that it is based on the perceived health benefits of whole wheat flour, Plaintiff's claim that the phrase "whole wheat flour" was misleading is an implied nutrient content claim. Since Plaintiff cannot point to any federal rule that relates to nutrient content claims and with which Back to Nature has not complied, Plaintiff's claims are preempted. *See Red v. Kraft Foods, Inc.*, 754 F.Supp.2d

[7] The Court "may affirm on any grounds for which there is a record sufficient to permit conclusions of law, including grounds not relied upon by the district court." *In re Arab Bank, PLC Alien Tort Statute Litig.*, 808 F.3d 144, 157 (2d Cir. 2015), *as amended* (Dec. 17, 2015) (subsequent history and citations omitted).

1137, 1139 (C.D. Cal. 2010) (finding "'whole grain' per serving [claims] were not actionable on the ground that they are preempted by federal law"); *Chacanaca*, 752 F.Supp.2d at 1121-22 (finding "Made With Whole Grain Oats" claim was implied nutrient content claim and therefore preempted).

Additionally, the FDCA itself recognizes that claims about fiber content may give rise to preempted nutrient content claims. 21 U.S.C. §§ 343(r)(1)(A), 343-1(a)(5); *see* 21 U.S.C. § 343(q). Plaintiff alleges that the "stark contrast" between whole wheat flour and enriched wheat flour giving rise to whole wheat flour's "premium" value is the inclusion in whole wheat flour of "the full wheat kernel, consisting of the bran, endosperm, and germ." (JA032 ¶ 10 (citing 21 C.F.R. §§ 137.165, 137.105(a)).) This is an implied fiber claim. *See Ackerman v. Coca-Cola Co.*, No. CV-09-0395 (JG)(RML), 2010 WL 2925955, *3 (E.D.N.Y. July 21, 2010) (identifying the statement "high in oat bran" as "suggesting a high dietary fiber content"); *see also* 21 C.F.R. § 101.13(b)(2)(i). The decision below therefore also should be affirmed on the grounds that Plaintiff's claim is preempted by the NLEA.

Plaintiff argues that she is not making an implied nutrient content claim because the statement about the wheat content of the accused crackers is simply "[a] claim about the presence of an ingredient that is perceived to add value to the product, *e.g.*, 'made with real butter,' 'made with whole fruit,' or 'contains

honey.'" (AOB at 49 (quoting 21 C.F.R. § 101.65(b)(3)).) Plaintiff also cites FDA guidance identifying comments that "suggested that claims such as . . . 'made with whole wheat flour' . . . would be [an] example[] of added value claims." Food Labeling: Nutrient Content Claims, General Principles, Petitions, Definition of Terms, 58 Fed. Reg. 2302, 2369 (Jan. 6, 1993). These arguments are unavailing for several reasons.

First, the comments cited by Plaintiff (AOB at 48-49) were not incorporated by the FDA into the final regulation. *See* 21 C.F.R. §§ 101.54-101.69. The FDA explained its rejection of the comments in the guidance: "there would be cases, such as 'made with whole wheat flour,' where the added value statement is made in such a context that it could imply not only that a preferred ingredient was used, but also that the product contained a certain level of a nutrient (e.g., fiber). Such statements would be subject to section 403(r) of the act." 58 Fed. Reg. at 2369.

Second, Plaintiff argues throughout her Brief that the statement regarding whole wheat on the accused crackers' packaging would deceive consumers into believing that whole wheat is the predominant ingredient in the accused crackers. That is a statement regarding the amount of a nutrient contained in a food. *See Predominant*, Black's Law Dictionary (11th ed. 2019) ("[m]ore powerful, more common, or more noticeable than others; having superior strength, influence, and pervasiveness"). The regulations also make clear that an implied nutrient content

claim need not make a statement about an ingredient's weight. 21 C.F.R. § 101.13(b)(2)(i) (identifying "high in oat bran" as an example of a nutrient content claim).

Third, Plaintiff cannot bring a state-law claim "mirror[ing]" the "FDCA's catchall standard prohibiting false and misleading labeling" (AOB at 51) because her claims are preempted. The authority she cites, *Coe v. General Mills, Inc.*, does not support her argument. In *Coe*, the defendant argued the plaintiff's claims were preempted. No. 15-cv-05112-TEH, 2016 WL 4208287, at *4 (N.D. Cal. Aug. 10, 2016). The court's discussion directly contradicts Plaintiff's position: "'[t]he ability to bring such a claim [mirroring § 343(a)(1)] is not unlimited,' and Defendant correctly argues that a claim under § 343(a)(1) would be barred if the challenged aspects of the label complied with a specific federal regulation. '[I]f there is compliance with a specific requirement, then that aspect is not false or misleading under the catch-all provision, § 343(a)(1).'" *Id.* (quoting *Reynolds v. Wal-Mart Stores, Inc.*, No. 4:14CV381-MW/CAS, 2015 WL 1879615, at *12 (N.D. Fla. Apr. 23, 2015)) (internal citations omitted).

Fourth, Plaintiff cites *Gallagher v. Bayer AG*, No. 14-CV-04601-WHO, 2015 WL 1056480, at *4 (N.D. Cal. Mar. 10, 2015) for the proposition that state law claims are preempted by the FDCA only "where application of state laws would impose more or inconsistent burdens on manufacturers than the burdens

imposed by the FDCA." (AOB at 45.) That argument, however, proves too much: if New York law actually were to require a court to ignore the entirety of the label, then it would impose burdens on manufacturers that go beyond anything required by the FDCA and therefore be preempted. *Id.*

Finally, Plaintiff argues that the "whole wheat" language on the accused crackers' packaging is misleading because it purportedly "is an implied claim that the Product is a 'good source of fiber,'" and, according to Plaintiff, that means Back to Nature's crackers are "misbranded under the FDCA." (AOB at 51-52 (citing 58 Fed. Reg. at 2374).) That willfully misreads Back to Nature's preemption argument. Back to Nature is not arguing that it in fact made any claim that the accused crackers were "a good source of fiber" because nothing in the FDCA equates the presence of the term "whole wheat" on the front of the accused crackers' packaging with any particular fiber content. The point is that *Plaintiff* is making a claim about the fiber content of the accused crackers, and that Plaintiff's state law claims are therefore preempted as implied nutrient content claims—even though those implied nutrient content claims would also fail.[8]

[8] Back to Nature also argued below that Plaintiff lacks Article III standing because she has not plausibly alleged that she paid any price premium for the crackers she purchased. Although the District Court did not address this argument, under Plaintiff's theory, her alleged injury consists of repeatedly buying and enjoying crackers while being oblivious to their whole wheat content, which she did not believe to be more nutritious. That is not a "concrete, particularized, and actual or

IV. THE DISTRICT COURT CORRECTLY DENIED PLAINTIFF LEAVE TO AMEND

The District Court properly found that amendment would be futile because, "[a]lthough the allegations may change, the Product's label remains the same as it was when Plaintiff allegedly purchased it: ambiguous, at best, as to the Products' primary source of flour." (JA090.) Courts dismissing similar marketing claims have likewise found amendment to be futile because the plaintiff cannot allege new facts about the packaging of the accused product. *See, e.g.*, *Foster*, 2023 WL 8520270, at *2 (affirming denial of leave to amend where plaintiff "did not submit a proposed amended complaint at all, never mind one containing allegations that would remedy the insufficiency of the original complaint" and where proposed allegations referenced in reply brief would not suffice); *Boswell*, 570 F.Supp.3d at 97 (denying leave to amend where plaintiff did "not suggest that she is in possession of facts that would cure the problems with her claims").

Plaintiff's argument that she should be permitted to conduct a consumer survey to justify her allegations (AOB at 37) is no grounds to grant leave to amend. *See Pernod*, 653 F.3d 241, 254-55 (holding survey could be disregarded as immaterial when label was not misleading as a matter of law). Moreover, Plaintiff is not claiming to have *already* conducted any such survey, so the results are

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imminent" injury that confers standing under Article III within the meaning of *TransUnion LLC v. Ramirez*, 594 U.S. 413, 423 (2021).

entirely speculative and Plaintiff supplied no new facts about her proposed amendment. Accordingly, any amendment would be futile, and the Court should affirm the District Court's denial of leave to amend. *In re Whole Foods Mkt. Grp., Inc. Overcharging Litig.*, 167 F. Supp. 3d 524, 539 (S.D.N.Y. 2016) (subsequent history omitted) ("Amendment is futile if an amended complaint would fail to state a claim on which relief could be granted.").

CONCLUSION

For the foregoing reasons, Back to Nature respectfully submits that the District Court's Order should be affirmed in its entirety and that this case should be dismissed with prejudice.

Dated: March 1, 2024

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

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Dated: March 1, 2024

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