23-1236-cv

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.

Appeal from the United States District Court
for the Southern District of New York,
No. 1:23-cv-07497-VEC

REPLY BRIEF OF PLAINTIFF-APPELLANT GRACEMARIE VENTICINQUE

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INTRODUCTION

The federal agencies with unparalleled expertise on deceptive food marketing and this Court, in *Mantikas v. Kellogg Co.*, 910 F.3d 633 (2d Cir. 2018), explicitly warned the food industry that reasonable consumers are likely to perceive statements such as "whole wheat" and "made with whole wheat" on a product to mean that the grain in the product is entirely or predominantly whole grain. Despite these warnings, Defendant marketed its product—Back to Nature "Stoneground Wheat Crackers" (the "Product")—with the claim "ORGANIC WHOLE WHEAT FLOUR" on the front of the package, even though the Product's grain content is predominantly refined flour.

This case, which is materially indistinguishable from *Mantikas*, should have sailed past Defendant's motion to dismiss. But, instead, the District Court substituted itself for the factfinder, reviewed the label under a microscope (instead of how a busy consumer would view the label at the grocery store), and seized on irrelevant differences between the Product and the product at issue in *Mantikas*. It used those irrelevant differences, and legal reasoning foreclosed by this Court, to rule that deception is not plausible here as a matter of law. That is reversible error.

Defendant urges this Court to adopt a rule that ambiguous statements on a product are not actionable if that ambiguity can be resolved by reference to the product's ingredient list (the "Ambiguity Exception"). That argument runs into a wall, both factually and legally.

The Ambiguity Exception was considered and rejected by this Court in *Mantikas*. Additionally, even if the Exception has a limited future viability in this Circuit (which it should not), it has no applicability here. Even under Defendant's interpretation, to trigger the Ambiguity Exception the claim on the front of the package must be at least ambiguous. But, here the claim is clearly deceptive, as *Mantikas* and relevant federal agencies have concluded.

Defendant's standing and preemption arguments, the first of which is relegated to a footnote, likewise fail. A sufficient injury to establish standing was adequately pled because Plaintiff alleged she paid a price premium due to the Product's deceptive labeling. Defendant's preemption argument also fails because Plaintiff's cause of action seeks to enforce state law requirements that mirror the standards of the Federal Food, Drug, and Cosmetic Act ("FDCA").

The District Court erred in holding that Plaintiff's allegations of deception were implausible as a matter of law. This Court should reverse the judgment of the District Court and remand the case for further proceedings. Even if this Court disagrees, it should reverse the District Court's decision denying leave to amend.

ARGUMENT

I. Under Any Standard, Plaintiff Has Stated a Claim for Consumer Deception.

A. The Whole Grain Claim Is Clearly Deceptive.

Defendant devotes a significant portion of its Brief to arguing that this Court should adopt the Ambiguity Exception. Defendant's Answering Brief ("DAB") at 9–27. Plaintiff argued in its Opening Brief and argues below, *see infra* Parts II & III, that this Court should reject the Ambiguity Exception or, at least, narrowly cabin it. However, Defendant's Brief reveals that Plaintiff has stated a claim under either standard.

Defendant's argument is premised on the notion that the Product's ingredients list cures any deception created by the front label. *See, e.g.*, DAB at 29. Thus, for Defendant to prevail, this Court must hold that the Ambiguity Exception applies here. But, even if one accepts Defendant's erroneous legal position, the Ambiguity Exception is inapplicable where the front label is clearly deceptive, *i.e.*, is not ambiguous. *See, e.g.*, DAB at 13.

It is axiomatic that for a claim to be ambiguous, it must have at least two plausible interpretations. Plaintiff has set forth her commonsense interpretation: the Product's whole wheat claim falsely conveys that the Product has at least more whole grain than refined grain. Defendant, however, never clearly provides a contrary interpretation, plausible or otherwise, and the reason is apparent: there is

none. Indeed, the only alternative interpretation of the claim is that the Product contains *some* whole wheat flour, an interpretation this Court has already rejected. *Mantikas*, 910 F.3d at 638. As held by this Court in rejecting this argument:

> Moreover, the rule that Defendant contends emerges from these district court decisions—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.

Id. Accordingly, Defendant's position is fatally flawed and must be rejected.

B. Plaintiff's Interpretation of the Whole Wheat Claim Is Supported by *Mantikas* and the Expert Opinions of Relevant Federal Agencies.

Not only has Plaintiff offered *the only* rational interpretation of the Product's whole grain claim, but her interpretation of such claim has been endorsed by this Court, the Food and Drug Administration ("FDA"), the Federal Trade Commission ("FTC") Staff, and the United States Department of Agriculture ("USDA"). *See* Plaintiff's Opening Brief ("POB") at 13–16, 34–36.

In *Mantikas*, this Court held that "[the] representation that a cracker is 'made with whole grain' would . . . ***plausibly lead a reasonable consumer to conclude that the grain ingredient was entirely, or at least predominately, whole grain***." 910 F.3d at 638 (emphasis added); *see also Wargo v. Hillshire Brands Co.*, 599 F. Supp. 3d 164 (S.D.N.Y. 2022) (reaching the same conclusion with respect to an egg sandwich product that claimed to be "made with whole grain").

The FDA, FTC Staff, and USDA agree. For example, the FTC Staff stated, based on its "considerable expertise in food advertising and labeling issues," that "[m]any reasonable consumers will likely understand 'whole grain' to mean that all, or virtually all, of the food product is whole grain, or that all of the grain ingredients in the product are whole grains." FTC Staff, In the Matter of Draft Guidance for Industry and FDA Staff: Whole Grains Label Statements, Docket No. 2006-0066 at 2, 13 (Apr. 18, 2006), https://bit.ly/3uCuWyo ("FTC Staff Comments"); *see also* FDA, Draft Guidance for Industry and FDA Staff: Whole Grains Label Statements at 6 (Feb. 2006), https://bit.ly/3Rkys9q (recommending, as an example, that "bagels, labeled as 'whole grain' or 'whole wheat' only be labeled as such when bagels are made entirely from whole grain flours or whole wheat flour, respectively."); Food Safety and Inspection Service, Guideline on Whole Grain Statements on the Labeling of Meat and Poultry Products at 6 (Oct. 2017), https://bit.ly/3R2dtHj (determining that claims like, "'whole wheat pizza crust,'" imply "that whole grains make up at least 51% of the total dry grain" of that component).[1]

[1] Copies of the federal agency documents cited above were attached to Plaintiff's Motion for Judicial Notice (filed Jan. 26, 2024).

In order to avoid the clear import of these expert pronouncements, Defendant makes two unpersuasive arguments. First, Defendant contends that they are not entitled to *Chevron* deference. DAB at 27, n.5. Plaintiff never contended they are. The statements are the considered opinions by relevant experts presented for their *persuasive value* on the very issue at the heart of this case.

Second, Defendant argues that nothing in these statements suggests that this Court should reject the Ambiguity Exception. DAB at 27–28. Defendant, again, misses the mark because the statements support Plaintiff's argument that the whole grain claim on the Product is clearly misleading. Indeed, even Defendant concedes that the Ambiguity Exception is inapplicable where the front label is clearly deceptive. *See, e.g.*, DAB at 13. Moreover, these statements make clear that the agencies do not believe an ingredient list cures deceptive whole grain claims, because they all concern products with ingredients lists. That certain whole grain claims are misleading despite the presence of information on the ingredient list is the *raison d'être* for the agencies' opinions and recommendations.[2]

[2] Defendant also contends there is a lack of alignment between Plaintiff's cause of action and the agency documents. *See* DAB at 27. Even a cursory read of the documents disproves this. *Compare* JA008 ("Defendant's labeling conveys to reasonable consumers that the Product's main flour is organic whole wheat flour."), *with* FTC Staff Comments at 13 ("[R]easonable consumers will likely understand 'whole grain' to mean that all, or virtually all, of the food product is whole grain.").

C. Several Aspects of the Product at Issue Here Are More Deceptive Than the Product at Issue in *Mantikas*.

Plaintiff, of course, need not establish that the Product is more deceptive than the Cheez-It crackers at issue in *Mantikas*. Rather, it is Defendant that needs to show the Product is materially less deceptive. Nonetheless, the following three aspects of the Product exacerbate what is an already deceptive whole grain claim: (1) the claim does not include a "made with" qualifier; (2) the claim is presented in a list of the Product's key ingredients; and (3) the Product is named "*Stoneground* Wheat Crackers." Thus, Defendant cannot prevail.

1. The Whole Wheat Claim Does Not Include a "Made With" Qualifier.

Unlike here, one version of the "whole grain" claim on the Cheez-It crackers in *Mantikas* included a "made with" qualifier. This provided the *Mantikas* manufacturer with the argument that the claim was literally true: the product was "made with" *some* whole grain. *Mantikas*, 910 F.3d at 638.

Defendant says *Mantikas* determined 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*." DAB at 33 (emphasis in original). Defendant has it backwards. Far from concluding the "made with" qualifier contributed to the deception, the *Mantikas* Court spent nearly two pages explaining why the claim was still deceptive despite several district court cases holding that

"made with" ingredient claims are not deceptive so long as the product contains some of the listed ingredient. *See Mantikas*, 910 F.3d at 637–38. Furthermore, *Mantikas* concluded that ***both the unqualified and qualified versions*** of the whole grain claims (*i.e.,* the "made with" whole grain claim and the whole grain claim without the "made with" qualifier) were deceptive, *id.* at 639–40, so even if Defendant was correct about the decision (which it is not), the absence of the "made with" qualifier obviously does not "show[] that this case is nothing like *Mantikas*" as Defendant wrongly contends.

2. The Whole Wheat Claim Appears in a List of the Product's Key Ingredients.

Unlike the product in *Mantikas*, the whole wheat claim is presented here in a list of two other ingredients, exacerbating the deception. As explained in Plaintiff's Opening Brief, consumers would likely interpret this list as identifying the Product's characterizing or key ingredients. POB at 17–18. To make an analogy, the front-of-package list is to the ingredients list as the summary of argument is to a legal brief. One might expect that certain minor details will be missing, but all reasonably expect that the primary ingredients (or primary arguments) will be provided. But, despite listing one type of flour in the key ingredient list, missing from the list is the Product's *main flour ingredient*—refined flour. Moreover, such a list discourages consumers from looking to the ingredients list for more information because consumers believe such a front-of-package list contains all the

information they need to know about the key ingredients in the Product.

Defendant nowhere addresses this argument. Defendant merely states this case is distinguishable from *Mantikas* because the whole grain claim is presented in a list of ingredients, without explaining why or how this matters. DAB at 31, 34. Plaintiff agrees this is a difference between the two cases, but it is a difference that renders Defendant's whole-grain claim more deceptive.[3]

3. The Name "Stoneground Wheat Crackers" Also Contributes to the Deception.

Unlike the Cheez-It crackers at issue in *Mantikas*, which were called "Baked Snack Crackers," the name of the Product here—"Stoneground Wheat Crackers"—contributes to the deception caused by Defendant's whole wheat claim. As Plaintiff noted in her Opening Brief, at a minimum the word "Stoneground" conveys that the Product's flour is minimally processed, which further suggests it is whole grain. *See* POB at 18–19.

Defendant contends that this argument "assumes away the most material aspect of the label in *Mantikas*," the whole grain claim. DAB at 33–34. But, it does no such thing. Plaintiff's position, at its core, is that the Product and the Cheez-It crackers in *Mantikas* make nearly identical whole grain claims.

[3] Defendant also says it is "implausible" Plaintiff believed the list was a "complete list of ingredients." DAB at 28–29. Plaintiff never contended it was.

Defendant also contends that the name "Stoneground Wheat Crackers" does not specify the Product is whole wheat. DAB at 34, n.6. Plaintiff has not argued to the contrary and does not need to because it is *Defendant's* whole wheat claim that conveys the grain in the Product is predominantly whole wheat. The "Stoneground Wheat Crackers" name contributes to, rather than mitigates, that misleading message, which Defendant does not refute.

D. The Relative Prominence of the Whole Grain Claims Is Not a Basis to Distinguish *Mantikas*.

Stripped of various irrelevant arguments,[4] Defendant's sole ground for distinguishing this case from *Mantikas* comes down to this: the whole grain claims in *Mantikas* were bigger. DAB at 31–32, 34–35.

As Plaintiff explained in her Opening Brief, the relative size of the whole grain claim is not a basis for concluding as a matter of law that the Product is not plausibly deceptive to reasonable consumers. The size of a labeling claim has nothing to do with whether it is deceptive, and a deceptive claim can influence consumer decision-making so long as it is seen and comprehended. The Product's "whole wheat" claim is in large font on the front of the package. It is easily visible

[4] For example, Defendant argues that *Plaintiff* could not be deceived by the Product. Such arguments, if anything, go to standing. Plaintiff, therefore, addresses them below. *See infra* Part IV.A. They have no relevance here. Whether the product is plausibly deceptive as a matter of law is judged from the objective vantage point of the reasonable consumer. *See Mantikas*, 910 F.3d at 636.

to any consumer making a purchase and, in fact, is designed by Defendant to influence consumer decision-making. That the claim on Cheez-It crackers was larger is insignificant.

Defendant seems to concede as much, stating that it is not arguing that the "size of a statement on a product label alone can render the label non-misleading." DAB at 34. Instead, it argues that when the size of the statement is combined with other elements distinguishing the Product from the Cheez-It crackers in *Mantikas*, the Product label taken as a whole is not misleading. However, outside of size, Defendant nowhere explains why the other distinguishing elements of the Product support its argument. *See* DAB at 34 (stating that the whole wheat claim appears in an "incomplete ingredient list" but not explaining how this supports a finding that as a matter of law it cannot be deceptive). As explained above, these distinguishable aspects, in fact, lend further support to Plaintiff's position.

E. The Ingredient List Does Not Dispel the Whole Wheat Claim's Deceptive Message.

To the extent there is any ambiguity in the whole wheat claim (and there is none) and that the Ambiguity Exception applies (which it should not), the ingredient list does not dispel the claim's misleading message. As detailed in Plaintiff's Opening Brief, POB at 31–33, for this Court to conclude that any ambiguity in the whole wheat claim is resolved by the ingredient list it would need to assume *both* that reasonable consumers understand that ingredients are listed in

order of predominance and that "organic unbleached enriched wheat flour" is a not whole grain, Joint Appendix ("JA") at 009, ¶ 10. However, there is no evidence to support either assumption. Defendant failed to address this argument.

II. This Court Should Reject the Ambiguity Exception.

As the above makes clear, the District Court's decision should be overturned under any standard. However, should this Court address the Ambiguity Exception, it should reject it.

A. Rejecting the Ambiguity Exception Is Consistent with this Court's Binding Precedents.

Defendant contends that Plaintiff's legal position is "contrary" to *Fink v. Time Warner Cable*, 714 F.3d 739 (2d Cir. 2013) and *Mantikas*. DAB at 11–14. Defendant is plainly mistaken.

Fink stands for the unremarkable proposition that, "*under certain circumstances*, the presence of a disclaimer or similar clarifying language may defeat a claim of deception." 714 F.3d at 742 (emphasis added). Thus, for example, if Defendant also stated on the front of the package that its flour is "20% Whole Wheat Flour," the "Organic Whole Wheat Flour" claim would not be misleading. Such a disclaimer would unequivocally explain the meaning of the claim and would be clearly seen by consumers. But, *Fink* does not stand for the broad proposition that small disclaimers on the back of the package that consumers are

unlikely to see render misleading claims on the front of a package non-deceptive *as a matter of law*.

Defendant argues incorrectly that Plaintiff's position is "contrary" to *Mantikas* because that opinion cites the general rule that courts should consider qualifying language. However, the core holding of *Mantikas* is that this general rule is inapplicable where a product makes a misleading claim on the front label and the qualifying information is in small print on the side label. *Mantikas*, 910 F.3d 637. Put another way, in nearly identical circumstances, this Court considered and rejected the exact argument Defendant now makes.

B. The Ambiguity Exception Ignores the Realities of Consumer Behavior and Is Contrary to the Rule 12(b)(6) Standard.

This Court rejected the Ambiguity Exception in *Mantikas* for good reason. The Ambiguity Exception departs from the Fed. R. Civ. Proc. 12(b)(6) standard by making false assumptions about consumer behavior that should be left to the fact finder.

The Ambiguity Exception, according to Defendant, rests on two premises: (1) that consumers who desire particular attributes in products will closely review the entire package to confirm the product has those attributes; and (2) that when consumers review an ambiguous claim, they will recognize it is ambiguous.

As to first premise, Defendant says, "any consumer who actually cared about the whole wheat content would look at the side label before making their

purchase." *See* DAB at 32. Lived experience and common sense suggests otherwise. A consumer who prefers whole grain foods is not like a consumer with a peanut allergy, where the consequences of a wrong decision can be life or death. A consumer who prefers whole grain may desire more nutritious foods and may be willing to pay more for them, but the selection of a relatively inexpensive cracker product from perhaps a dozen or more other cracker products on display during a shopping trip is hardly a monumental decision. Rather, instead of Defendant's self-serving proposition on how the reasonable consumers shops for groceries, it is perfectly reasonable that such a consumer would walk down the store aisle with shelves of crackers, review the front panel of the products (the only panel visible on the shelf), and identify a "whole grain" cracker without checking the fine print to ensure the manufacturer was not pulling a bait-and-switch. *See, e.g.*, *Bell v. Publix Super Mkts., Inc.*, 982 F.3d 468, 481 (7th Cir. 2020) ("We doubt it would surprise retailers and marketers if evidence showed that many grocery shoppers make quick decisions that do not involve careful consideration of all information available to them.").

Defendant concedes as much when the front label of a product is clearly deceptive. According to Defendant, however, when a consumer is presented with an ambiguous claim, they should recognize that the claim is ambiguous and do a more thorough review to understand the claim's meaning. DAB at 11. This also

rests on a flawed assumption: that when consumers view an ambiguous claim, they will recognize the ambiguity.

There is, of course, no evidence from which the Court can determine this is actually how consumers behave, but again common sense suggests otherwise. When reading an ambiguous claim in a few moments at a grocery store, consumers are likely to *definitively* interpret the claim one way or the other. That is, when a claim is subject to a plausibly misleading interpretation, consumers will simply interpret the claim in that misleading way. Having never recognized the claim is ambiguous, they would have no reason to do a more searching review. Such consumers are in the *exact same position* as consumers confronted with a false or clearly deceptive claim. To conclude otherwise is to "attribut[e] to ordinary supermarket shoppers a mode of interpretation more familiar to judges trying to interpret statutes in the quiet of their chambers." *See Bell*, 982 F.3d at 476.

Not only are the premises undergirding the Ambiguity Exception wrong, but they are also questions of fact. As such, it is improper for a court to dismiss a claim based on them. *Bell*, 982 F.3d at 481 ("What matters here is how consumers actually behave . . . . ***These are matters of fact*** . . . .") (emphasis added); *Dumont v. Reily Foods Co.*, 934 F.3d 35, 41 (1st Cir. 2019) (these are questions "that six jurors, rather than three judges [should] decide on a full record."); *Anderson News, L.L.C. v. American Media, Inc.*, 680 F.3d 162, 184–85 (2d Cir. 2012)) ("The

choice between and among plausible inferences or scenarios is one for the factfinder . . . not a choice to be made by the court on a Rule 12(b)(6) motion.").

C. Defendant's Policy Arguments for Adopting the Ambiguity Exception Are Unpersuasive.

Defendant puts forward two policy arguments for why this Court should adopt the Ambiguity Exception: (1) the Ambiguity Exception protects manufacturers from frivolous litigation; and (2) rejecting the Ambiguity Exception would lead to substantially more deceptive food labeling cases in this Circuit. Defendant is wrong on both counts.

Defendant first argues that, if the Ambiguity Exception is not adopted, courts will be unable to dismiss meritless false advertising lawsuits "caus[ing] havoc to businesses" by subjecting them to litigation for merely listing some, but not all, ingredients on the front of a product. DAB at 4, 14.

This is simply a speculative, unfounded, fear-mongering argument. Moreover, the manufacturers themselves have the means to avoid any increase in litigation simply by not engaging in deceptive labeling practices in order to increase sales. Plaintiff is only asking this Court to hold, as it did in *Mantikas*, that where a Plaintiff states a plausible claim for consumer deception based on front-of-package statements, courts should not dismiss such cases *as a matter of law* based on fine print disclosures on the side of the package.

As the Seventh Circuit explained in *Bell*, rejecting the Ambiguity Exception does not (1) preclude courts from dismissing cases "where plaintiffs base deceptive advertising claims on unreasonable or fanciful interpretations of labels"; (2) "foreclose defendants from offering evidence [at later stages in the proceeding] to show that consumers are not actually misled by their . . . labels"; or (3) undermine the "general principle" that, under certain circumstances, an effective disclaimer can defeat a claim of deception. 982 F.3d at 477–78.

Rejecting the Ambiguity Exception clearly would not preclude a court from dismissing a claim based solely on a theory that a product listed some, but not all, ingredients on the front label. For example, it would be "unreasonable" to interpret the "milk chocolate" claim on the Reese's "Peanut Butter Cups" label reproduced in Defendant's Brief as meaning the Product only contained milk chocolate and not also, for example, peanut butter. DAB at 14.

This is not Plaintiff's claim. Plaintiff contends the Product is deceptive because the front of the package lists a preferred type of an ingredient (whole wheat), but instead mainly contains the non-preferred variety (refined wheat). A similar deception would be if the primary chocolate in a "dark chocolate" Reese's candy was in fact milk chocolate.

Finally, Defendant's contention, DAB at 26–27, that this Court should raise the bar to bringing a deceptive advertising case to reduce district courts' caseloads

should be rejected out of hand. It goes without saying that the burden on district courts is an illegitimate consideration when determining the correct legal standard to apply.

III. If this Court Adopts the Ambiguity Exception, It Should Be Narrowly Cabined.

This Court's only binding decision addressing the Ambiguity Exception is *Mantikas*.[5] As set forth above and in Plaintiff's Opening Brief, this Court should reinforce that core holding in *Mantikas* by rejecting the Ambiguity Exception. This would not only be consistent with *Mantikas,* but also with the Rule 12(b)(6) standard and the majority of circuits to address this issue.[6] It would also eliminate any confusion arising from certain of this Court's non-binding, post-*Mantikas* cases.[7]

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[5] This Court, in *Montgomery v. Stanley Black & Decker, Inc.*, 2024 U.S. App. LEXIS 5245, at *3 (2d Cir. Mar. 5, 2024), recently held that a claim on the front panel of a product was not deceptive when read in the context of a disclaimer. *Montgomery* does not address the Ambiguity Exception because the disclaimer at issue was on the *front of the package* and was connected to the challenged claim by a "dagger symbol." *See Montgomery*, 857 F. App'x 46, 47 (2d Cir. 2021). As Plaintiff noted above, *see supra* Part II.A., rejecting the Ambiguity Exception does not require this Court to ignore front-of-package disclaimers.

[6] *See Bell*, 982 F.3d at 476–82; *Dumont*, 934 F.3d at 40–41.

[7] *Compare Richardson v. Edgewell Pers. Care, LLC*, 2023 U.S. App. LEXIS 28725 (2d Cir. Oct. 30, 2023) (unpublished), *with Hardy v. Olé Mexican Foods, Inc.*, 2023 U.S. App. LEXIS 12466 (2d Cir. May 22, 2023) (unpublished); *Foster v. Whole Foods Mkt. Grp.*, 2023 U.S. App. LEXIS 32491 (2d Cir. Dec. 8, 2023) (unpublished); and *Baines v. Nature's Bounty (NY), Inc.*, 2023 U.S. App. LEXIS 32630 (2d Cir. Dec. 11, 2023) (unpublished).

Given the myriad reasons for rejecting the Ambiguity Exception, if this Court is inclined to harmonize these post-*Mantikas* cases and allow the Exception to be used in some circumstances, it should make clear that those circumstances are exceptionally limited and certainly do not exist here.

As Plaintiff explained in her Opening Brief, POB at 29–30, the *Hardy*, *Foster*, and *Baines* Courts only referenced the back label of the products after the Courts made clear they were convinced that the front-of-package labeling claims were not deceptive as a matter of law, *see, e.g.*, *Foster*, 2023 U.S. App. LEXIS 32491, at *5 ("[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). At most these decisions 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 or unreasonable. If the Ambiguity Exception is to be applied at all (and Plaintiff urges that it should not), this Court should limit its applicability to those circumstances.

IV. Defendant's Arguments that Were Not Addressed Below Do Not Provide a Basis for Affirmance.

A. Plaintiff Has Pled an Injury Sufficient for Article III Standing.

Plaintiff was injured by paying a price premium for a product that did not contain the desired material quality advertised on the front of its package. JA010–12, ¶¶ 12–18, 20–21. Plaintiff even provided evidence that comparable products with less whole grain are less expensive. JA010, ¶ 13. Defendant all but admitted that the comparable product was less expensive because it did not contain whole grain. JA031. That is all, and indeed more, than what is required to plausibly allege an injury-in-fact based on deceptive labeling. *See, e.g.*, *Mason v. Reed's Inc.*, 515 F. Supp. 3d 135, 144 (S.D.N.Y. 2021) (alleging injury due to price premium is sufficient for standing).

Defendant's response is that Plaintiff "enjoy[ed]" the Product, as evidenced by her repeated purchase of it. DAB at 40–41, n.8. That is, of course, irrelevant. A consumer may enjoy the taste of a product yet be financially harmed because it does not contain the principal advertised ingredient that is desired for reasons *other than taste or other perceptible attributes*. Indeed, it is eminently plausible that Plaintiff prefers whole grains for reasons other than taste, such as their nutritional benefits. JA009 ¶ 10 (noting that whole wheat flour contains the "full wheat kernel, consisting of the bran, endosperm, and germ."); *SM Kids, LLC v. Google LLC*, 963 F.3d 206, 210 (2d Cir. 2020) (When a motion under Rule 12(b)(1) is based solely

on the pleadings, "the plaintiff bears no evidentiary burden, and the district court must evaluate whether [the pleadings] allege facts that *plausibly suggest* that the plaintiff has standing to sue.") (emphasis added).

Defendant also argues that Plaintiff, in her opposition brief at the District Court, admits she was not "misled about the Product's nutritional or health qualities." DAB at 35 (quoting JA064).[8] Defendant takes the cited statement completely out of context. Plaintiff was arguing, in response to Defendant's preemption defense, that she was not misled to believe the Product had a certain amount of fiber or that the Product, as a whole, was healthy (*i.e.*, she did not interpret the whole wheat claim as an implied nutrient content claim). Rather, Plaintiff explained that her allegation is she was misled to believe the Product's flour was predominantly whole wheat. JA064.

Although it is more than plausible that Plaintiff prefers whole grain products for their nutritional benefits, these two positions are not inconsistent. The nutritional benefits of whole grains, for example, are not limited to their fiber

[8] As noted above, *supra* note 4, arguments that Plaintiff was not deceived by the Product, if anything, relate to standing and are addressed in this Part. *But see Passman v. Peloton Interactive, Inc.*, 2023 U.S. Dist. LEXIS 76417, at *67-68 (S.D.N.Y. May 2, 2023) ("If . . . a price premium existed, then whether or not any individual class member saw and relied on the Challenged Statement in purchasing [the] products becomes irrelevant. Each putative class member would suffer an injury by virtue of purchasing at a price that was artificially inflated by the market-wide impact of the Challenged Statement.").

content. As the 2005 Dietary Guidelines for Americans explained, in addition to more fiber, whole wheat flour has "much higher concentrations" of calcium, magnesium, and potassium than enriched flour. *See* U.S. Department of Health and Human Services & U.S. Department of Agriculture, Dietary Guidelines for Americans 2005 at 27, https://bit.ly/3v8Wf3P.[9]

B. Plaintiff's Claims Are Not Preempted.

Under the FDCA's preemption provisions, state law claims are preempted *only* to the extent they impose labeling requirements that differ from the FDCA's. *See, e.g.*, *Gallagher v. Bayer AG*, 2015 U.S. Dist. LEXIS 29326, at *11 (N.D. Cal. Mar. 10, 2015). Plaintiff's New York GBL claims mirror the FDCA and, therefore, are not preempted.

1. Defendant's Whole Wheat Claim Could Only Be a Preferred Ingredient or Implied Good Source of Fiber Claim.

In Plaintiff's Opening Brief, she explained that the FDCA, properly understood, requires this Court to categorize Defendant's whole wheat claim one of two ways—it is either a preferred ingredient claim or an implied nutrient claim.

[9] Plaintiff has filed, concurrently with this Reply Brief, her Second Motion for Judicial Notice concerning an excerpt of the 2005 Dietary Guidelines for Americans.

If it is a ***preferred ingredient claim,*** the claim is neither expressly permitted nor expressly prohibited by the FDCA. POB at 49–51. Instead, it would be evaluated under the general false and misleading claims standard, which New York's GBL mirrors. *Compare* 21 U.S.C. § 343(a), *with* GBL §§ 350, 350-a(1). So, Plaintiff's claims are not preempted. POB at 51.

However, if it is an ***implied nutrient claim****,* that is, the Product is a "good source of fiber" (in that it contains at least 10 percent daily value of fiber), 21 C.F.R. §§ 101.54(c), 101.65(c)(3), the Product violates the FDCA because it is both false and misleading and contains only 4 percent daily value of fiber, POB at 46–49, 51–52.

Defendant incorrectly seems to suggest there is some amorphous middle ground. DAB at 38–39. Defendant cites as support, 21 C.F.R. § 101.13(b)(2)(i), which identifies "high in oat bran" as an example of an implied nutrient content claim. As detailed in Plaintiff's Opening Brief, nutrient content claims are rigidly categorized by FDA, and claims that do not fit into those categories *and* meet the definition of those categories, are strictly prohibited. *See* POB at 46–47. The example Defendant provides proves the point. FDA has stated explicitly that "high in oat bran" is an implied nutrient content claim with a *specific definition*. It means the product has equal or greater than 20 percent daily value of fiber. 21 C.F.R. §§ 101.65(c)(3), 101.54(b).

The only nutrient content claim that Defendant could even argue fits its whole wheat claim is an implied nutrient content claim that the Product is a good source of fiber. *See* POB at 46–47 & n.11 (setting forth the various categories of nutrient content claims and explaining why the only potentially applicable category is an implied good source of fiber claim); 21 C.F.R. § 101.65(c)(3) ("Claims may be made that a food contains or is made with an ingredient that is known to contain a particular nutrient . . . , [but only] if the finished food is . . . a 'good source' of the nutrient that is associated with the ingredient."). Defendant finds no help there because the Product does not meet the definition of a good source of fiber and because the whole wheat claim is misleading for the reasons set forth above.

2. Defendant's Whole Wheat Claim Is a Preferred Ingredient Claim.

Among the only two available regulatory categories for Defendant's whole wheat claim, the claim is best categorized as a preferred ingredient claim.

The FDA explained how it distinguishes between preferred ingredient claims and implied nutrient content claims: it "evaluate[s] these claims on a case-by-case basis, taking into account the entire label and the labeling, including the placement and prominence of the claim as well as the text of label statements." 58 Fed. Reg. 2,302, 2,372 (Jan. 6, 1993). "[T]he agency's primary focus will be whether the statement identifies the nutrient explicitly or by implication, and whether it states or implies absence of that nutrient or its presence in a certain amount." *Id.* at 2,371.

Using those guideposts,[10] it is clear the Product's whole wheat claim is a preferred ingredient claim for several reasons. First, the whole wheat claim is presented alongside two other ingredients. To read the list as a coherent whole, either the entire list is a series of nutrient content claims or it is a list of preferred ingredients. Because the list contains "sea salt," and Defendant clearly is not claiming the Product is a "good source" of sodium (a nutrient health-conscious consumers generally seek to avoid), the only natural reading of the list is that it refers to three preferred ingredients.

Second, the claim refers to the specific whole grain ingredient in the Product (*i.e.*, "ORGANIC WHOLE WHEAT FLOUR"), not to whole grain generically. Third, unlike the examples of implied nutrient content claims in FDA's regulation, the whole wheat claim does not use one of the defined terms for an express nutrient content claim (*e.g.*, "contains" or "high in"). *See* 21 C.F.R. § 101.65(c)(1), (3) (providing "*contains* oat bran" and "*high* in [oat bran]" as examples of implied nutrient content claims) (emphasis added).[11] Lastly, fiber is not the only factor that distinguishes whole wheat flour from other kinds of wheat flour. The choice of

[10] Defendant argues that Plaintiff relies on a comment to FDA that the agency rejected. DAB at 38. That is incorrect. Plaintiff's Opening Brief did not cite to the comment quoted in Defendant's Brief.

[11] "High" is an approved synonym for "excellent source," and "contains" is an approved synonym for "good source." 21 C.F.R. § 101.54(b), (c).

flour may impact a food's taste and appearance and, as noted above, *see supra* Part IV.A., whole wheat flour contains, among other things, more calcium, magnesium, and potassium than enriched flour.

Under this interpretation, as noted above, the whole wheat claim is only subject to the FDCA's catchall standard prohibiting false and misleading labeling and, therefore, Plaintiff's claim is not preempted.[12]

3. Defendant's Argument that Plaintiff Is Making an Implied Nutrient Content Claim Is Illogical.

Although its position is hard to discern, Defendant agrees it is not making an implied nutrient content claim. *See* DAB at 40 ("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' . . . with any particular fiber content."). That should be the end of the discussion. But, Defendant suggests that, even though it did not make an implied nutrient content claim on the Product, "Plaintiff . . . is . . . making an implied nutrient content claim." PAB at 37, 40.

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[12] Defendant argues that it is insufficient that the New York GBL standard mirrors this catchall FDCA standard because Plaintiff's lawsuit "would be barred if the challenged aspects of the label complied with a specific federal regulation." *See* DAB at 39 (quoting *Coe v. General Mills, Inc.*, 2016 U.S. Dist. LEXIS 105769, at *10 (N.D. Cal. Aug. 10, 2016)). Even assuming *arguendo* this is correct, it is irrelevant. As Plaintiff has explained in detail, there is no "specific federal regulation" with which the "challenged aspect of the label complie[s]."

This is nonsensical. Consumers do not make nutrient content claims. Manufacturers do. If the regulatory status of a claim shifted depending on the viewpoint of individual consumers, it would be impossible for FDA to enforce the FDCA. That is why, as noted above, FDA uses objective factors to determine whether a particular ingredient claim is a preferred ingredient claim or an implied nutrient content claim. 58 Fed. Reg. at 2,371 ("The definition [of implied nutrient content claims is] not intended to be a quantitative standard to determine the number of consumers who have a particular conception about an individual claim but is intended to focus on what the claim is saying."). As Plaintiff has explained, when those objective factors are applied, the whole wheat claim at issue is a preferred ingredient claim, as Defendant seems to concede.

V. The District Court Erred by Failing to Provide Leave to Amend.

Plaintiff believes her Amended Complaint sets forth plausible claims for relief and that she has alleged sufficient standing. If this Court disagrees, it should permit Plaintiff to file a Second Amended Complaint to allow her to provide more detailed evidence of consumer deception (from at least a consumer survey Plaintiff intends to conduct) and/or to explain why she prefers whole grain flour to refined flour.

Concerning the survey evidence, Defendant argues, relying on *Pernod Ricard USA, LLC v. Bacardi U.S.A., Inc.*, 653 F.3d 241 (3d Cir. 2011), that such evidence is irrelevant when a Court concludes that a label is not misleading as a matter of law. DAB at 41. Defendant neglects to mention that *Pernod* was an appeal from a judgment reached by the district court *after a three-day bench trial*. *Id.* at 247. And, even though the Third Circuit held that the district court did not err in failing to consider survey evidence in those very distinguishable circumstances, it "caution[ed]" that, in a less clear-cut case, the "wisest course [is] to consider survey evidence." *Id.* at 254–55. As the court explained, district courts may erroneously conclude that their interpretation of a claim is the only reasonable interpretation, but "survey evidence" may help the court "[t]houghtful[ly] reflect[] on potential ambiguities in an advertisement." *Id.*

Defendant also argues that, because Plaintiff has not conducted the survey, any potential amendments are "speculative." DAB at 41–42. First, Plaintiff has a reasonable basis for her belief that a survey will demonstrate consumer deception—after all, she was deceived by the Product and has pointed to objectively misleading aspects of the Product's label. Second, where, as here, the basis for denying leave to amend is futility, Plaintiff need only show that it is "possible" that amendment can cure a deficiency in the Amended Complaint. *Panther Partners Inc. v. Ikanos Communs., Inc.*, 347 F. App'x 617, 622 (2d Cir.

2009). To conclude otherwise would force Plaintiff to conduct an expensive consumer survey prior to this Court even determining that the Amended Complaint fails to state a claim.

The two cases Defendant cites in which courts have denied leave to amend are inapposite. In *Foster*, this Court denied leave to amend where, unlike here, the Plaintiff only belatedly proposed amendments in its reply brief and did not propose conducting a consumer survey. *Foster*, 2023 U.S. App. LEXIS 32491, at *6. In *Boswell v. Bimbo Bakeries USA, Inc.*, also unlike here, leave to amend was only denied after it was previously granted and plaintiff was warned no further amendments would be permitted. *Boswell v. Bimbo Bakeries USA, Inc.*, 570 F. Supp. 3d 89, 98 (S.D.N.Y. 2021).

CONCLUSION

For the reasons set forth above and in Plaintiff's Opening Brief, the District Court's Order should be reversed and the judgment should be vacated. Even if this Court disagrees, it should reverse the District Court's decision denying leave to amend.

Date: March 15, 2024

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to Fed. R. App. Proc. 32(g) that the Reply Brief of Plaintiff-Appellant Gracemarie Venticinque complies with Fed. R. App. Proc. 32(a)(5), (6) and Local Rule 32.1(a)(4)(B). The brief uses a proportionally spaced, serifs typeface (Times New Roman) of 14 points and contains 6,987 words (excluding, as permitted by Fed. Rule of App. Proc. 32(f), the cover page, table of contents, table of authorities, signature block, and certificate of compliance), as counted by the Microsoft Word processing system used to produce this brief.

Date: March 15, 2024

By: */s/Michael R. Reese*
Michael Reese