

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

NOT FOR PUBLICATION

CHARLES HARRIS, *et al.*, individually and on
behalf of all others similarly situated,

MEMORANDUM AND ORDER

Plaintiffs,
– against –

19-cv-2249 (ERK) (RER)

MONDELÉZ GLOBAL LLC,

Defendant.

KORMAN, *J.*:

Purchasers of Oreo cookies allege that the manufacturer has misleadingly stated on the front packaging label that the cookies are “Always Made With Real Cocoa,” even though the cocoa has been refined through an alkalizing process. Second Am. Compl. (“SAC”) ¶¶ 88–89, ECF No. 18. Plaintiffs claim that the addition of alkali diminishes the quality and taste of the cocoa and that a reasonable consumer would understand “real cocoa” to refer to cocoa in an “unadulterated, non-artificially processed form.” *Id.* ¶¶ 48, 64, 89. Plaintiffs further allege that Oreos are sold at a price premium as a result of this misleading representation. *Id.* ¶ 90.

BACKGROUND

Plaintiffs are consumers from twelve states who purchased Defendant’s well-known Oreo cookies.¹ SAC ¶¶ 96–109. Plaintiffs allege that they were misled by

¹ Plaintiffs are citizens of California, Colorado, Connecticut, Florida, Idaho, Illinois, Massachusetts, New Jersey, New York, Texas, Virginia, and Washington State.

the representation on the Oreos' front label that the cookies are "Always Made With Real Cocoa." *Id.* ¶¶ 4–5. Specifically, they claim that this text is misleading because the cocoa used in the cookies is "highly processed and modified" with alkali. *Id.* ¶ 6. In Plaintiffs' view, Defendant's failure to caveat that the cocoa is processed with alkali is misleading to a reasonable consumer. Rather, they allege that reasonable consumers "expect 'real cocoa' to be a quality of cocoa that is not processed with alkali." *Id.* ¶ 88.

As Plaintiffs explain, cocoa powder can be mixed with alkali ingredients to make the cocoa less acidic, which makes the taste of the cocoa milder. *Id.* ¶¶ 43, 47–49. Plaintiffs claim that "[t]he representation 'real cocoa' is false, deceptive and misleading because consumers expect 'real cocoa' to indicate a higher quality cocoa than had the ingredient merely been accurately identified as 'cocoa,' (minus the descriptor 'real')." *Id.* ¶ 12. Additionally, they allege that unalkalized cocoa is commercially available and has certain health benefits. *Id.* ¶¶ 50–74.

Plaintiffs assert claims under statutes from forty states and the District of Columbia prohibiting deceptive or misleading business practices, as well as a claim for unjust enrichment.² Plaintiffs have withdrawn their claims for fraud, negligent

² Plaintiffs do not allege claims under the consumer protection statutes of Arizona, Indiana, Iowa, Maryland, North Carolina, Pennsylvania, Texas, Utah, Virginia, or Wyoming. SAC ¶ 122.

misrepresentation, and breach of warranty. Pls.’ Br. 15, ECF No. 25-3. They seek damages and injunctive relief on behalf of a putative nationwide class and on behalf of subclasses for the states of each named plaintiff. I have jurisdiction over this putative class action under 28 U.S.C. § 1332(d) because there is minimal diversity among the parties and the amount in controversy exceeds \$5 million.³

STANDARD OF REVIEW

In deciding a motion to dismiss under Rule 12(b)(6), I “constru[e] the complaint liberally, accept[] all factual allegations in the complaint as true, and draw[] all reasonable inferences in the plaintiff’s favor.” *Elias v. Rolling Stone LLC*, 872 F.3d 97, 104 (2d Cir. 2017) (quoting *Chase Grp. All. LLC v. City of N.Y. Dep’t of Fin.*, 620 F.3d 146, 150 (2d Cir. 2010)). “To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). In addition to the facts alleged in the SAC, I may also consider documents that Plaintiffs have incorporated by reference. *Chamberlain v. City of White Plains*, 960 F.3d 100, 105 (2d Cir. 2020).

³ Plaintiffs allege that Defendant is a Delaware limited liability company with co-principal places of business in Illinois and New Jersey. SAC ¶ 110. Because this is a putative class action, Defendant is considered a citizen only of Delaware, Illinois, and New Jersey. *Claridge v. N. Am. Power & Gas, LLC*, 2015 WL 5155934, at *1–2 (S.D.N.Y. Sept. 2, 2015) (citing 28 U.S.C. § 1332(d)(10)).

DISCUSSION

I. The Challenged Statement Is Not Misleading

Although Plaintiffs allege violations of consumer protection statutes from forty states and the District of Columbia, the parties agree that the critical issue for resolving this motion is whether a reasonable consumer would be misled by Defendant's statement that its Oreos are "Always Made With Real Cocoa." See Def.'s Br. 11, ECF No. 25-1; Pls.' Br. 12–13; see also *Fink v. Time Warner Cable*, 714 F.3d 739, 741 (2d Cir. 2013) (applying New York and California law); *In re 100% Grated Parmesan Cheese Mktg. & Sales Practices Litig.*, 275 F. Supp. 3d 910, 920 (N.D. Ill. 2017) (noting that, while states' consumer protection laws "differ in certain particulars, all share a common requirement: to state a claim, a plaintiff must allege conduct that plausibly could deceive a reasonable consumer").⁴ "It is well settled that a court may determine as a matter of law that an allegedly deceptive

⁴ *In re 100% Grated Parmesan Cheese* analyzed the consumer protection statutes of most of the states in which the named Plaintiffs bring claims here. The reasonable consumer standard also applies to the remaining statutes under which the named plaintiffs bring claims. See *Anderson v. State Farm Mut. Auto. Ins. Co.*, 416 F.3d 1143, 1148–49 (10th Cir. 2005) (Colorado law); *Tomasella v. Nestlé USA, Inc.*, 962 F.3d 60, 71 (1st Cir. 2020) (Massachusetts law); *Panag v. Farmers Ins. Co. of Washington*, 204 P.3d 885, 895 (Wash. 2009) (Washington law); see also IDAHO ADMIN. CODE r. 04.02.01.030 (2019) ("It is an unfair and deceptive act or practice for a seller to make any claim or representation concerning goods or services which directly, or by implication, has the capacity, tendency, or effect of deceiving or misleading a consumer acting reasonably under the circumstances.").

advertisement would not have misled a reasonable consumer.” *Fink*, 714 F.3d at 741.

Plaintiffs do not dispute that the challenged products are in fact made with cocoa, which is fatal to their case. SAC ¶¶ 43–49 (describing the alkalization process applied to cocoa powder). Instead, they argue that reasonable consumers are misled by the claim that the cookies are made with “real” cocoa and therefore would not expect that the cocoa has been “adulterated, processed with alkali, or modified from its real nature.” *Id.* ¶ 87; Pls.’ Br. 15. Plaintiffs rely on *Mantikas v. Kellogg Co.*, but that case does not resolve this one. 910 F.3d 633 (2d Cir. 2018). *Mantikas* held that purchasers of Cheez-Its had adequately alleged that the phrase “Made With Whole Grain” was misleading, because it falsely implied that there was more whole grain than white flour in the crackers. *Id.* at 638. Indeed, *Mantikas* distinguished cases in which consumers could not reasonably have believed that the advertised ingredient was the primary one, such as that cookies were made with “real fruit.” *Id.* (citing *Manchouk v. Mondelez Int’l, Inc.*, 2013 WL 5400285, at *2 (N.D. Cal. Sept. 26, 2013)).

Courts following *Mantikas* have reaffirmed that a representation that a food is “made with” a “real” ingredient does not necessarily mislead from the truth that the advertised ingredient may have been combined with another. As Judge Ross and Judge Garaufis have explained in cases involving mashed potatoes packaged with

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