UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

---------- x

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

Plaintiff,

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

MARS WRIGLEY CONFECTIONERY US, LLC,

Defendant.

---------- x

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

Plaintiff,

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

MARS WRIGLEY CONFECTIONERY US, LLC,

MEMORANDUM & ORDER

Defendant.

---------- x

DEARIE, District Judge

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

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

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

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

BACKGROUND

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

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

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

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

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

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

DISCUSSION

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

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

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

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

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

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

DOCKET ALARM

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts

Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research

With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips

Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS
Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS
Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS
Sync your system to PACER to automate legal marketing.