

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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QUINCY STEELE and JIMMY ARRIOLA, on
behalf of themselves and all others
others similarly situated,

Plaintiffs

19 Civ. 9227 (LLS)

- against -

OPINION & ORDER

WEGMANS FOOD MARKETS, INC.

Defendants

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In this putative class action, defendant Wegmans Food Markets, Inc. moves to dismiss plaintiffs Quincy Steele and Jimmy Arriola's first amended complaint ("FAC") (Dkt. No. 10) pursuant to Federal Rules of Civil Procedure 12(b)(6) and 9(b). For the following reasons, the motion (Dkt. No. 13) is granted.

BACKGROUND

Plaintiffs sue Wegmans, a grocery store chain and food manufacturer, for claimed deceptive acts or practices in violation of federal, New York, and Pennsylvania statutes and standards, false advertising, common-law negligent misrepresentation, fraud, breach of warranty and unjust enrichment.

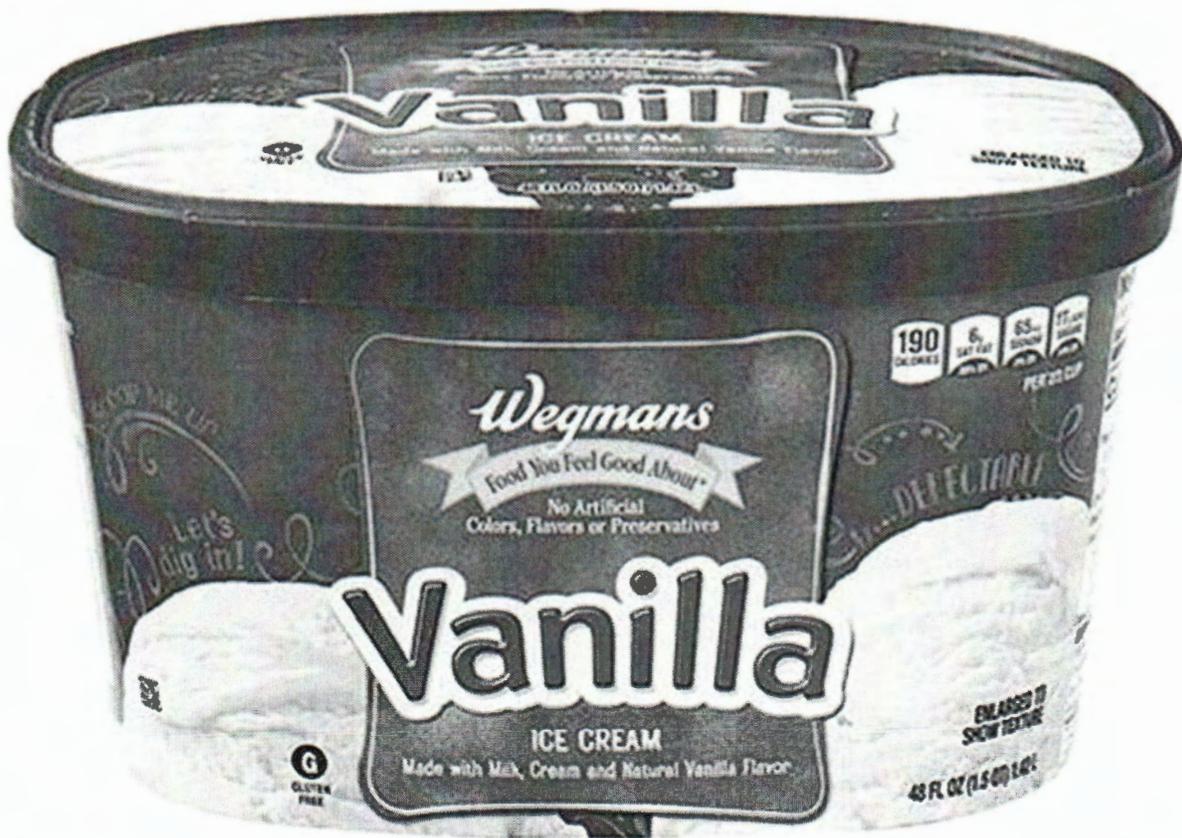
Nevertheless, the case comes down to two decisive questions: did the label on the ice cream container misrepresent the container's contents? and did the elaborate gas

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chromatography-mass spectrometry analysis plaintiffs' chemists performed show there was fraudulently little vanilla bean extract in the ice cream?

The answers to each of those questions being No, the complaint is dismissed.

A picture included in the FAC of the packaging of the product in question and its ingredient list is below.



Milk, Cream, Corn Syrup, Liquid Sugar, Skim Milk, Buttermilk, Milkfat, Whey, Natural Flavor, Mono- and Diglycerides, Guar Gum, Cellulose Gum, Carrageenan, Dextrose, Annatto (color).

Plaintiffs contend they were deceived by Wegmans to believe that ice cream they bought from Wegmans got its vanilla flavor from vanilla beans or vanilla bean extract, when in fact the ice

cream got most of its vanilla flavor from some non-vanilla source. FAC ¶¶ 5, 6 ("Defendant's Product contains non-vanilla flavor, a de minimis amount of vanilla and to the extent it tastes like vanilla, such flavor is contributed by vanillin from non-vanilla sources. The Product is not truthfully or lawfully identified as 'Vanilla Ice Cream' which misleads consumers.").

Plaintiffs' claim that Wegmans' ice cream is flavored by artificial flavors, not natural vanilla flavor, has no factual support, since the test performed does not show that.

Plaintiffs' claim that Wegmans' label is misleading under the law requires some explanation, but also fails.

DISCUSSION

The Federal and State Statutes

The food, and ice cream, business is closely regulated, in ways described for many pages in the complaint. The primary federal Food Drug and Cosmetic Act deals generally with food, not with flavoring, 21 U.S.C. § 343(g), and its enforcement is left to the federal and State (if the food is located within the State) authorities. There is no private civil right of action for breaches of its provisions. See 21 U.S.C. § 337. The New York Agriculture and Markets Law, which in its ice cream regulations, 1 NYCRR 17.19, adopted the federal ice cream regulations, is also administered by a Commissioner who investigates and may sue for penalties. N.Y. Agric. & Mkts. Law

§ 35. No private civil actions can be inferred; the legislature created such a right of action only when it wished to (N.Y. Agric. & Mkts. Law § 378(3), dealing with tampering with animal research).

Thus, in 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. PDK Labs Inc. v. Friedlander, 103 F.3d 1105, 1113 (2d Cir. 1997) (Plaintiff's "dogged insistence that PDK's products are sold without proper FDA approval suggests" his goal is "to privately enforce alleged violations of the FDCA. . . . However, no such private right of action exists.").

The point here is not conformity with this or that standard (which is left to the authorities to regulate) but whether the marketing presentation was deceptive.

The relevant portions of the Pennsylvania Unfair Trade Practices and Consumer Protection Law (73 Penn. Statutes §§ 201-1, 2, 3), like the provisions of New York's General Business Law Sections 349 and 350, are not product standards, but prohibitions of misrepresentations, deceptions and misleading conduct. They, like the common-law false advertising, and fraud issues, turn on the honesty and accuracy of the ice cream container's label, to which we now turn.

The Container Label: Deceptive?

Although they are processed almost simultaneously by the buyer, to analyze the total effect of the messages on the container it is useful to consider them in sequence. The buyer's first desire is for ice cream, and when he is in the frozen food area he must select, from many choices (chocolate, lemon, mint, lime, etc.) the one he wants. Thus the large-type "Vanilla" is of immediate use. Of course he is not looking for a bowl of vanilla, and the next largest words confirm that the container holds ice cream. Those who prefer natural ingredients will note that it has natural vanilla flavor, and no artificial flavors. Evidently there are various natural substances which have a vanilla flavor. Those interested in the actual ingredients can read the list, which mentions neither vanilla beans nor extracts, but they will not learn the components, amounts or proportions of the Natural Flavor¹.

That is where the container's disclosures start, and where they stop. Where is the deception? What is misleading, or misrepresented?

¹ In a highly competitive market for consumer taste, ice cream producers seek not just a vanilla ice cream, but a different and better tasting vanilla ice cream than their competitors. To this end, many manufacturers flavor their vanilla ice creams not just with vanilla extract, but with a package of flavorings of which vanilla extract is the predominant, but not the only, flavoring component. These flavoring packages often are carefully developed by specialized flavor suppliers, with their proprietary formulations kept as a trade secret. Defts' April 20, 2020 brief, p.4.

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