UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BRANDY OLDREY, individually and on behalf of all others similarly situated,

Plaintiff,

v.

NESTLÉ WATERS NORTH AMERICA, INC.,

Defendant.

21 CV 03885 (NSR)
OPINION & ORDER

NELSON S. ROMÁN, United States District Judge:

Plaintiff Brandy Oldrey ("Plaintiff") brings this putative class action against Nestlé Waters North America, Inc.[1] ("Defendant"), alleging violation of New York's General Business Law §§ 349 and 350, breach of express warranty, breach of the implied warranty of merchantability, violation of the Magnuson Moss Warranty Act, 15 U.S.C. §§ 2301, *et seq*., negligent misrepresentation, fraud, and unjust enrichment. (ECF No. 1.) Presently before the Court is Defendant's motion to dismiss the Complaint. (ECF No. 16.) For the following reasons, the motion is GRANTED.

BACKGROUND

The following facts are taken from Plaintiff's Complaint (ECF No. 1) and are accepted as true and construed in the light most favorable to Plaintiff for purposes of this motion.

Defendant is a multinational bottler of water products, and it manufactures, markets, and sells a raspberry and lime-flavored sparkling water under its Poland Springs brand (the "Product"). (Compl. ¶¶ 1; 64.) Defendant markets the Product as a way to "ditch the sugary sodas." (*Id*. ¶ 3.)

[1] Nestlé Waters North America, Inc. is now known as BlueTriton Brands, Inc.

The Product has a label that states, "With a Twist of Raspberry Lime" and "Taste the Real" with pictures of raspberries and limes. (*Id.* ¶¶ 5; 7.)

Consumers seek sparkling waters with real fruit ingredients, and value raspberries and limes for their nutritive purposes. (*Id.* ¶¶ 5; 42.) However, most of the Product's flavoring is from non-raspberry and non-lime flavors. (*Id.* ¶ 22.) The ingredient list only includes "spring water, CO2, natural flavors." (*Id.* ¶ 23.) "Natural Flavors" is the term used where "a mix of extractives and essences from various fruits, along with additives and solvents, are combined in a laboratory." (*Id.* ¶ 24.) This fails to inform consumers that the Product's taste is mainly from fruits other than raspberries and limes. (*Id.* ¶ 25.) If the Product provided "all the flavor depth" of the named fruit ingredients, the label would state "raspberry oil, lime juice" instead of "Natural Flavors." (*Id.* ¶ 28.)

Plaintiff alleges that Defendant's labeling misleads consumers as to the relative amount and quantity of raspberry and lime ingredients. (*Id*. ¶ 9.) Consumers expect the presence of a non-*de minimis* amount of raspberry and lime ingredients based on the labeling, and consumers prefer foods which get their taste from food ingredients instead of added flavor as this is perceived as more natural, less processed and not exposed to additives or solvents. (*Id*. ¶¶ 10; 12.) The Product lacks "an authentic raspberry and lime taste" because it lacks sufficient amounts of the flavor compounds of these fruits. (*Id*. ¶ 40.)

The front label also includes a "disclaimer" which states "NATURALLY FLAVORED SPRING WATER WITH OTHER NATURAL FLAVORS AND CO2." (*Id*. ¶ 18.)

Plaintiff alleges that even if consumers examined this disclaimer after seeing the other representations, they would not know this meant the Product does not contain a "Twist of Raspberry Lime." (*Id*. ¶ 19.)

Plaintiff purchased the Product on at least one occasion. (*Id*. ¶ 67.) She bought the Product because she expected it would provide the non-negligible amounts of the named fruit ingredients. (*Id*. ¶ 68.) As a result of the representations, Defendant sold more of the Product and at higher prices, and Plaintiff bought the product and paid more than she would have absent the representations. (*Id*. ¶¶ 52-55; 69-70.)

Plaintiff initiated this action on May 2, 2021. (ECF No. 1.) On January 11, 2022, Defendant filed a motion to dismiss (ECF No. 16), and Plaintiff filed a brief in opposition (ECF No. 19.) Defendant also filed a notice of supplemental authority on April 7, 2022. (ECF No. 23.)

LEGAL STANDARD

Under Federal Rule of Civil Procedure 12(b)(6), dismissal is proper unless the complaint "contain[s] 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) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). When there are well-pled factual allegations in the complaint, "a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Id*. at 679.

While the Court must take all material factual allegations as true and draw reasonable inferences in the non-moving party's favor, the Court is "not bound to accept as true a legal conclusion couched as a factual allegation," or to credit "mere conclusory statements" or "[t]hreadbare recitals of the elements of a cause of action." *Iqbal*, 556 U.S. at 662, 678 (quoting *Twombly*, 550 U.S. at 555). The critical inquiry is whether the plaintiff has pled sufficient facts to nudge the claims "across the line from conceivable to plausible." *Twombly*, 550 U.S. at 570. A motion to dismiss will be denied where the allegations "allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678.

DISCUSSION

Plaintiff asserts claims against Defendant for (1) violations of §§ 349 and 350 of the New York General Business Law ("GBL"), (2) negligent misrepresentation, (3) breach of express warranty, (4) breach of implied warranty of merchantability, (5) violation of the Magnuson Moss

Warranty Act ("MMWA"), 15 U.S.C. §§ 2301, *et seq.*, (6) fraud, and (7) unjust enrichment. (Compl. ¶¶ 81-101.) The Court will examine each claim in turn.

I. New York General Business Law Sections 349 and 350

Section 349 of the GBL involves unlawful deceptive acts and practices, while section 350 involves unlawful false advertising. "The standard for recovery under [Section] 350, while specific to false advertising, is otherwise identical to Section 349." *Denenberg v. Rosen*, 897 N.Y.S.2d 391, 396 (2010) (quoting *Goshen v. Mutual Life Ins. Co. of N.Y.*, 98 N.Y.2d 314, 324 n.1 (2002)). The elements of a cause of action under both Sections 349 and 350 are that: "(1) the challenged transaction was 'consumer-oriented'; (2) defendant engaged in deceptive or materially misleading acts or practices; and (3) plaintiff was injured by reason of defendant's deceptive or misleading conduct." *Id.* (citing *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank*, 85 N.Y.2d 20, 25 (1995)).

The parties' main dispute in the instant motion involves the second element: whether Defendant engaged in deceptive or materially misleading acts or practices. To be actionable, the alleged deceptive act must be "likely to mislead a reasonable consumer acting reasonably under the circumstances." *Oswego*, 85 N.Y.2d at 26; *see also Orlander v. Staples, Inc.*, 802 F.3d 289, 300 (2d Cir. 2015) ("As for the 'materially misleading' prong, '[t]he New York Court of Appeals has adopted an objective definition of misleading, under which the alleged act must be likely to mislead a reasonable consumer acting reasonably under the circumstances.'"). In determining whether a reasonable consumer would be misled, "[c]ourts view each allegedly misleading statement in light of its context on the product label or advertisement as a whole." *Pichardo v. Only What You Need, Inc.*, No. 20-cv-493 (VEC), 2020 WL 6323775, at *2 (S.D.N.Y. Oct. 27, 2020) (citing *Wurtzburger v. Kentucky Fried Chicken*, No. 16-cv-08186, 2017 WL 6416296, at *3 (S.D.N.Y. Dec. 13, 2017)); *see also Fink v. Time Warner Cable*, 714 F.3d 739, 742 (2d Cir. 2013)

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