17-2011-cv

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

KRISTEN MANTIKAS, KRISTIN BURNS, and LINDA CASTLE, individually and on behalf of all others similarly situated,
Plaintiffs-Appellants,

v.

KELLOGG COMPANY,
Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of New York,
No. 2:16-CV-02552-SJF-AYS

BRIEF OF PLAINTIFFS-APPELLANTS KRISTEN MANTIKAS, KRISTIN BURNS, AND LINDA CASTLE

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JURISDICTIONAL STATEMENT

This appeal is from a final judgment that disposes of all of the claims of Plaintiffs Kristen Mantikas, Kristin Burns, and Linda Castle (collectively, "Plaintiffs") in this action against the sole defendant, Kellogg Company ("Kellogg" or "Defendant"). The District Court had subject matter jurisdiction over this case pursuant to the Class Action Fairness Act of 2005, which provides for the original jurisdiction of federal district courts over "any civil action in which the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs, and [that] is a class action in which . . . any member of a class of plaintiffs is a citizen of a State different from any defendant." 28 U.S.C. § 1332(d)(2)(A). Plaintiffs are citizens of New York and California; Defendant is a citizen of Delaware and Michigan. Plaintiffs further allege that the amount in controversy is in excess of $5 million in the aggregate, exclusive of interest and costs. Finally, Plaintiffs allege that "the number of members of all proposed plaintiff classes in the aggregate" is greater than 100. *See* 28 U.S.C. § 1332(d)(5)(B).

On May 31, 2017, the District Court entered an Opinion and Order granting Kellogg's motion to dismiss Plaintiffs' Class Action Complaint in its entirety, with leave to amend within 30 days. A007 (ECF No. 26); A043–60. Plaintiffs filed a timely Notice of Appeal on June 26, 2017, disclaiming any intent to file an amended pleading in response to the District Court's Opinion and Order. A008 (ECF No. 28);

A061–63. The Clerk of Court entered the Notice of Appeal as a Notice of Interlocutory Appeal on June 28, 2017. A008. On July 11, 2017, the District Court closed the case and directed the Clerk to enter Judgment, A008, and the Clerk did so on August 21, 2017, *id.* (ECF No. 30); A067–68. On September 9, 2017, the Clerk re-entered the Notice of Interlocutory Appeal as a Notice of Appeal. A008. This Court thus has jurisdiction pursuant to 28 U.S.C. § 1291.

ISSUE PRESENTED FOR REVIEW

Did the District Court err as a matter of law in granting a motion to dismiss where it did not accept the allegations of the Complaint as true and instead ruled as matter of law that no reasonable consumer would be misled by a product labeled "WHOLE GRAIN" or "MADE WITH WHOLE GRAIN" when, in fact, the grain in the product is not 100% whole grain, or even predominantly whole grain?

STATEMENT OF THE CASE

Plaintiffs appeal from a decision of the Honorable Sandra J. Feuerstein, U.S. District Judge, granting a motion by Kellogg to dismiss Plaintiffs' Class Action Complaint. *Mantikas v. Kellogg Co.*, No. 2:16 Civ. 2552 (SJF) (AYS), 2017 WL 2371183 (E.D.N.Y. May 31, 2017). Plaintiffs filed the Complaint on May 19, 2016, alleging Kellogg's "WHOLE GRAIN" and "MADE WITH WHOLE GRAIN" representations on the labeling of its "Cheez-It WHOLE GRAIN" baked snack crackers are false and misleading because the grains in the product are

predominantly composed of non-whole grains. Kellogg moved to dismiss on October 7, 2016, and the District Court granted the motion on May 31, 2017. Plaintiffs appealed on June 26, 2017. For the reasons set out below, the Court should reverse the District Court's order and remand the case for further proceedings.

American consumers have become increasingly health conscious. To foster good health through their diets, consumers are attempting to adhere to the recommendations of authorities on dietary health. The Scientific Report of the 2015 Dietary Guidelines Advisory Committee found "strong and consistent evidence" that higher consumption of whole grains and lower intake of refined grains is associated with decreased risk of cardiovascular disease,[1] and the Dietary Guidelines for Americans recommends that people dramatically increase their intake of whole grains.[2] In line with these recommendations and general health awareness, consumers frequently try to select whole grains instead of processed, nutrient-depleted alternatives, such as refined grains. Indeed, according to the Whole Grains

[1] A018 ¶ 46 (citing U.S. DEP'T OF AGRIC. AND U.S. DEP'T OF HEALTH & HUMAN SERVS., *Scientific Report of the 2015 Dietary Guidelines Advisory Committee: Advisory Report to the Secretary of Health and Human Services and the Secretary of Agriculture*, at Part D, Chapter 2, pp. 8–9 (Feb. 2015), *available at* http://goo.gl/YjXWlr).

[2] A011 ¶ 4 (citing U.S. DEP'T OF AGRIC. AND U.S. DEP'T OF HEALTH & HUMAN SERVS., *Dietary Guidelines for Americans 2015–2020* (8th ed. 2015), *available at* http://goo.gl/qnyfLi (click "A Closer Look Inside Healthy Eating Patterns" under "Chapter 1. Key Elements of Healthy Eating Patterns")).

Council, a 2015 survey found that 64% of Americans claimed to have increased their whole grain consumption in the preceding five years.[3] According to the same survey, the percentage of Americans who report that they now "nearly always" choose whole grains over non-whole grains increased over 700% in the last five years.[4]

Kellogg has endeavored to capitalize on these consumer trends by introducing into the American market "WHOLE GRAIN" and "MADE WITH WHOLE GRAIN" varieties of its "Cheez-It" brand baked crackers. To attract health-aware American consumers to the product, it emblazons the words "WHOLE GRAIN" or "MADE WITH WHOLE GRAIN" in large letters in a central location on the front of the box. A019 ¶ 50, Illustration 1. Indeed, the "WHOLE GRAIN" text is the second-largest set of words on the front label.

The Federal Trade Commission ("FTC") has found that reasonable consumers are likely to perceive "whole grain" claims to mean a product is 100% or nearly 100% whole grain.[5]

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[3] A018 ¶ 47 (citing Eric Schroeder, *Survey Shows Spike in Whole Grains Consumption*, FOOD BUS. NEWS, Aug. 31, 2015, *available at* http://goo.gl/BRupWU).

[4] *Id.* at ¶ 48.

[5] A019 ¶ 49 (citing Comments of the Staff of the Bureau of Consumer Protection, the Bureau of Economics, and the Office of Policy Planning of the Federal Trade Commission, *In the Matter of Draft Guidance for Industry and FDA Staff: Whole Grains Label Statements*, Docket No. 2006-0066, at 13 (Apr. 18, 2006) ("FTC Staff Comments")).

Unfortunately for American consumers, however, Kellogg has engaged in a bait and switch. Despite the product label's prominent, central "WHOLE GRAIN" representation, the grain in so-called "WHOLE GRAIN" or "MADE WITH WHOLE GRAIN" Cheez-It crackers is not whole-grain. Rather, the grain is primarily nutrient-depleted, highly processed refined grain. Indeed, despite the expectation Kellogg has created by naming the product variety "WHOLE GRAIN" or "MADE WITH WHOLE GRAIN" Cheez-It, whole grain actually makes up only a minor percentage of the product. And, nothing on the front label alerts consumers to this fact. This is a consumer deception that is significant to consumers and to public health. As such, Plaintiffs bring this action to stop Kellogg's deceptive practice and to seek monetary relief under the consumer protection laws of their respective states.

I. Factual Background

Kellogg manufactures, markets, and sells "WHOLE GRAIN" Cheez-It baked crackers through major retail stores nationwide. A011 ¶ 1. Kellogg conspicuously labels the product as "WHOLE GRAIN" or "MADE WITH WHOLE GRAIN" on the front of the box, as the following images show:

A011 ¶ 2; A019 ¶ 50, Illustration 1; A042; A045. Kellogg's "WHOLE GRAIN" and "MADE WITH WHOLE GRAIN" claims create the reasonable expectation that the grain in the product is predominantly or entirely whole grain. A012 ¶ 6; A019 ¶ 49. Indeed, other similar products that use the representation "whole grain" are predominantly or 100% whole grain, including Nabisco Wheat Thins Whole Grain, Nabisco Triscuit crackers, and Pepperidge Farm Goldfish "Baked With Whole Grain." A012 ¶ 7.

Consumers are increasingly seeking out whole grain products, A018 ¶¶ 47–48, for good reason. Whole grains are nutritionally superior to non-whole grains. A017–18 ¶¶ 43–46. Whole grains are grains that include the entire grain seed—its endosperm, bran, and germ. A017 ¶ 43. The bran and germ of a grain seed contain important nutrients, including dietary fiber, iron, zinc, folate, magnesium, thiamin,

niacin, selenium, riboflavin, manganese, copper, vitamin E, and vitamin B6. A017 ¶ 44. By contrast, non-whole grains or refined grains have been processed to remove the bran and germ, thereby removing the dietary fiber and most other nutrients. *Id.* Most refined grains are "enriched," a term that the Food and Drug Administration ("FDA") allows on labels if a manufacturer adds back iron and some of the previously removed B vitamins (thiamin, riboflavin, niacin, and folic acid). A017 ¶ 45. However, other nutrients, including zinc, magnesium, selenium, manganese, copper, vitamin E, and vitamin B6, are not added back in. Furthermore, the fiber removed is not replaced. A017–18 ¶ 45.

Kellogg's "WHOLE GRAIN" and "MADE WITH WHOLE GRAIN" claims are false and misleading because the primary ingredient in Cheez-It "WHOLE GRAIN" crackers is not whole grain, but rather refined grain (listed as enriched white flour on the ingredient panel). A011 ¶ 3. As with other refined grains, A017–18 ¶¶ 44–45, enriched white flour is white flour that has been stripped of the bran and germ (which are high in fiber, vitamins, minerals, antioxidants, and other plant constituents), so only the endosperm (which is mostly starch) remains, A011 ¶ 3. Despite Kellogg's "WHOLE GRAIN" and "MADE WITH WHOLE GRAIN" claims, whole grain is actually the third ingredient in the product, after enriched white flour and "soybean and palm oil with TBHQ for freshness." A020 ¶ 52.[6]

[6] In some more recent instances, whole grain is the second ingredient on the

In small print on the front of the box, Kellogg states that the Cheez-It "WHOLE GRAIN" and "MADE WITH WHOLE GRAIN" products contain five, or sometimes eight, grams of whole grain per serving. A020 ¶ 53. However, as Plaintiffs allege, "[n]othing else on the box provides any context for how much 5 or 8 grams of whole grain is, in relationship to the much larger amount of refined grain." *Id.* In other words, the disclosure of the amount of grams of whole grain does nothing to dispel a consumer's belief that the grains in the product are predominately, if not exclusively, whole grain.

Plaintiffs are residents of New York and California. A012 ¶ 10; A013 ¶ 18; A014 ¶ 28. Plaintiffs each read Kellogg's representation that the products were "WHOLE GRAIN" and, in reliance thereon, purchased the products at a premium price. A012–13 ¶¶ 11–16; A013–14 ¶¶ 19–26; A015 ¶¶ 29–34. Plaintiffs each would purchase the products again in the future if the labels were truthful and not misleading, but they currently cannot be confident that the labeling is, and will be, truthful and non-misleading. A013 ¶ 17; A014 ¶ 27; A015 ¶ 35.

Plaintiffs bring claims against Kellogg on behalf of the following proposed classes: a nationwide class seeking only injunctive relief, a nationwide class pursuing all remedies, a New York subclass, and a California subclass. A022–25 ¶¶

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ingredient list, after the non-whole grain. A020 ¶ 52.

66–81. Plaintiff Mantikas asserts claims on behalf of the New York subclass for violation of New York General Business Law sections 349 and 350, and Plaintiffs Burns and Castle assert claims on behalf of the California subclass for violation of the unlawful prong of California's Unfair Competition Law, CAL. BUS. & PROF. CODE § 17200 *et seq.* ("UCL"); the unfair and fraudulent conduct prongs of the UCL; California's False Advertising Law, CAL. BUS. & PROF. CODE § 17500 *et seq.* ("FAL"); and California's Consumers Legal Remedies Act, CAL. CIV. CODE § 1750 *et seq.* ("CLRA"). A027–35 ¶¶ 90–141.

II. Procedural History

A. Plaintiffs Filed Their Complaint and Kellogg Moved to Dismiss

Plaintiffs filed their Class Action Complaint against Kellogg in the U.S. District Court for the Eastern District of New York on May 19, 2016. A004 (ECF No. 1); A009–37. On June 6, 2016, Kellogg waived service of the summons. A005 (ECF No. 6).

On August 5, 2016, pursuant to Rule 4.B of Judge Feuerstein's Individual Rules, Kellogg served on Plaintiffs, but did not file, a motion to dismiss the Complaint. *See* A006 (ECF No. 11). On September 16, 2016, Plaintiffs served on Kellogg, but did not file, their opposition to the motion. *See* A006 (ECF No. 14). On October 7, 2016, Kellogg filed the fully briefed motion to dismiss, including its reply brief. A006 (ECF No. 17).

B. The District Court Granted Kellogg's Motion to Dismiss, and Plaintiffs Appealed

On May 31, 2017, the District Court entered an Opinion and Order granting Kellogg's motion to dismiss Plaintiffs' Complaint in its entirety, with leave to amend within 30 days. A007 (ECF No. 26); A043–60. Plaintiffs filed a Notice of Appeal on June 26, 2016, disclaiming any intent to file an amended pleading in response to the District Court's Opinion and Order. A008 (ECF No. 28); A061–63. The Clerk of Court entered the Notice of Appeal as a Notice of Interlocutory Appeal on June 28, 2017. A008. On July 11, 2017, the District Court closed the case and directed the Clerk to enter Judgment, *id.*, and the Clerk did so on August 21, 2017, *id.* (ECF No. 30); A067–68. On September 9, 2017, the Clerk re-entered the Notice of Interlocutory Appeal as a Notice of Appeal. A008.

In its Opinion and Order granting Kellogg's motion to dismiss, the District Court dismissed Plaintiffs' claims under New York and California consumer protection laws on the ground that "the phrases 'WHOLE GRAIN' and 'MADE WITH WHOLE GRAIN,' when considered in the entire context of the [Cheez-It] Crackers' packaging, would neither mislead nor deceive a reasonable consumer." A050; *see also* A054. The District Court held that "the Crackers' packaging in this action neither contained any affirmative misrepresentations nor incorrectly suggested that the Crackers contained certain ingredients." A053; *see also* A050–51.

According to the District Court, "the front of the [Cheez-It] Crackers' box contained factually truthful statements regarding the Crackers' ingredients and provided additional information regarding the exact amount of whole grain per serving," A053; specifically, "in addition to the factually accurate statement that the Crackers are 'MADE WITH WHOLE GRAIN,' the front of the packaging also states that the Crackers are either 'MADE WITH 5g OF WHOLE GRAIN PER SERVING' or 'MADE WITH 8g OF WHOLE GRAIN PER SERVING,'" A051. The District Court held that "no reasonable consumer would believe that the Crackers were *solely* composed of whole grain, as the front of the Product's box explicitly stated otherwise," A054; that the reasonable consumer need not refer to the ingredient list to learn the true content of the product because the front of the box only identified ingredients that were actually in the product and "provided an explicit, factually accurate statement regarding the amount of whole grain in each serving," *id.*; and that the Cheez-It product label does not suggest that the products "are predominantly whole grain," A051. Without addressing Plaintiffs' allegation that "[n]othing else on the box provides any context for how much 5 or 8 grams of whole grain is, in relationship to the much larger amount of refined grain," A020 ¶ 53, the District Court held that "a reasonable consumer would not be misled by a product's packaging that states the exact amount of the ingredient in question," A051.

The District Court also dismissed Plaintiffs' claim for injunctive relief for lack of standing. A060. The court held that "[a]s Plaintiffs have failed to demonstrate that the Crackers' packaging was deceptive, they are unable to demonstrate that they have suffered an injury in fact," one of the elements of standing. The District Court thus held that Plaintiffs are not entitled to injunctive relief solely because they failed to show deception. *Id.*[7]

SUMMARY OF ARGUMENT

The District Court's decision is the product of clear errors of law. The "reasonable consumer" test for misleading advertising is a highly fact and context dependent inquiry that is reserved for the factfinder in all but situations that are "rare," and, under the *Twombly*/*Iqbal* standard, where it would not be "plausible" to prove deception. Yet the District Court substituted itself for the factfinder and disregarded the alleged context of Defendant's "WHOLE GRAIN" and "MADE WITH WHOLE GRAIN" representations. Importantly, the federal agency charged with protecting American consumers from misleading advertising, the FTC, has ***expressly*** stated that consumers are ***likely*** to perceive such whole grain claims to mean that a product is 100% or nearly 100% whole grain. A019 ¶ 49. The FTC also found that disclosing the number of grams in a serving is not sufficient qualification to dispel

[7] The District Court did not address Kellogg's argument that federal law preempts Plaintiffs' claims. A054 n.2.

the misleading nature of the claim. At least at the motion to dismiss stage, in addition to accepting as true the plaintiffs' own allegations, courts should accord deference to the expertise of the FTC. Accordingly, the District Court erred in concluding as a matter of law that it is not plausible for consumers to expect that a product labeled "WHOLE GRAIN" or "MADE WITH WHOLE GRAIN" contains only or mostly whole grain.

ARGUMENT

I. Standard of Review

This Court reviews the granting of a motion to dismiss on the pleadings *de novo*, accepting the complaint's factual allegations as true, and drawing all inferences in favor of the plaintiff. *See Operating Local 649 Annuity Trust Fund v. Smith Barney Fund Mgmt. LLC*, 595 F.3d 86, 91 (2d Cir. 2010); *Karedes v. Ackerley Group, Inc.*, 423 F.3d 107, 113 (2d Cir. 2005). A motion to dismiss should be denied where the complaint contains "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)). A claim is considered plausible on its face "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* Moreover, plausibility does *not* require probability. "[A] well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof

of those facts is improbable, and that a recovery is very remote and unlikely." *Twombly*, 550 U.S. at 556.

Because the ultimate question of whether a retail product label is misleading to a reasonable consumer is one for the factfinder, courts are properly skeptical of motions to dismiss such cases on the pleadings. Dismissal is only appropriate where "the advertisement itself made it *impossible* for the plaintiff to prove that a reasonable consumer was likely to be deceived." *Williams v. Gerber Prods. Co.*, 552 F.3d 934, 939 (9th Cir. 2008) (emphasis added). Such situations are "rare," and, indeed, anomalous where the federal agency with relevant expertise has issued guidance supportive of the claim. *Id.*; *see also Segedie v. Hain Celestial Grp., Inc.*, No. 14 Civ. 5029 (NSR), 2015 WL 2168374, at *11 (S.D.N.Y. May 7, 2015) (only in "rare situations" may a court determine, as a matter of law, that the alleged violations of consumer protection laws are "simply not plausible").

II. The District Court Made an Error of Law by Misapplying the Reasonable Consumer Standard Used to Gauge Whether an Advertisement Is Likely to Deceive

False advertising claims are evaluated from the vantage point of a reasonable consumer in both California and New York. *Williams*, 552 F.3d at 938 (California claims); *Ackerman v. Coca-Cola Co.*, No. 09 Civ. 395 (JG) (RML), 2010 WL 2925955 (E.D.N.Y. July 21, 2010) (New York and California claims). Under the test, a plaintiff must show that acts are materially deceptive or misleading "to a

reasonable consumer acting reasonably under the circumstances." *Goldemberg v. Johnson & Johnson Consumer Cos.*, 8 F. Supp. 3d 467, 478 (S.D.N.Y. 2014) (quoting *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A.*, 647 N.E.2d 741, 745 (N.Y. 1995)). The issue is not what a consumer might ascertain by reading all the fine print on a label or investigating facts by other means, but "what a person of ordinary intelligence would imply." *Lavie v. Procter & Gamble Co.*, 105 Cal. App. 4th 496, 505 (2003) (internal quotation marks and brackets omitted) (quoting *California State Bd. of Funeral Directors & Embalmers v. Mortuary in Westminster Mem'l Park*, 271 Cal. App. 2d 638, 642 (1969)). Put another way, a consumer is not required to ferret out the truth within misleading claims. *Williams*, 552 F.3d at 939. Indeed, "a reasonable consumer may be unwary or trusting." *Lavie*, 105 Cal. App. 4th at 506.

Here, the District Court based its decision to grant the motion to dismiss on its *own* review of the two different versions of the Cheez-It Whole Grain packages at issue, one stating "WHOLE GRAIN" and the other stating "MADE WITH WHOLE GRAIN." A049–54. Based on its review, the District Court concluded that this case was the "rare" situation where "a court may determine, as a matter of law, that the alleged violations of the consumer protection laws are simply not plausible." A050 (brackets omitted) (quoting *Segedie*, 2015 WL 2168374, at *11). In so concluding, the District Court made several reversible errors.

A. The "WHOLE GRAIN" and "MADE WITH WHOLE GRAIN" Labels Are Actionable

As set forth in the Complaint, during the class period, Kellogg sold Cheez-It Whole Grain using two different boxes. Kellogg labels these products as either "WHOLE GRAIN" or "MADE WITH WHOLE GRAIN." *See* A011 ¶ 2; A045. These boxes also respectively state in small print, at the bottom margin of the package, "MADE WITH 5G OF WHOLE GRAIN PER SERVING" or "MADE WITH 8G OF WHOLE GRAIN PER SERVING" (together, "Grams of Whole Grain Claims"). *See* A045. In determining that, as a matter of law, a reasonable consumer could not be misled by either of the Cheez-It Whole Grain packages, the District Court put great stock in the fact that the labels make factually accurate statements in that the Cheez-It Whole Grain crackers contain some amount of whole grain and disclose on the front of the package the amount of whole grain in grams (in comparatively inconspicuous font). *See* A051–52 ("As the Product's packaging truthfully states that the Crackers are made with whole grain, and specifies the exact amount of whole grain per serving, the Crackers' packaging would neither deceive nor mislead a reasonable consumer."). The District Court distinguished this case from *Williams* and *Ackerman*, stating: "Unlike the products at issue in *Williams* and *Ackerman*, the Crackers' packaging in this action neither contained any affirmative misrepresentations nor incorrectly suggested that the Crackers contained certain ingredients." A053.

1. Plaintiffs Alleged Affirmative Misrepresentation in Kellogg's Use of the "WHOLE GRAIN" (with No "MADE WITH" Qualifier) Version of Its Label

As an initial matter, Plaintiffs alleged that the version of the packaging that makes unqualified use of the words "WHOLE GRAIN" (without the "MADE WITH" qualifier) makes an affirmative misrepresentation that the grain in Cheez-It Whole Grain is all or predominantly whole grain. A011 ¶ 3 ("Kellogg's 'WHOLE GRAIN' representation, however, is false and misleading, because the primary ingredient in Cheez-It Whole Grain crackers is enriched white flour."); A020 ¶ 52 ("Cheez-It Whole Grain crackers are not predominantly whole grain, as advertised."); A021 ¶ 57 ("Plaintiffs read and relied on Kellogg's false and misleading labeling in purchasing Cheez-It Whole Grain crackers, including the representation that the crackers were 'WHOLE GRAIN.'").

Tellingly, Defendant never addressed this unqualified "WHOLE GRAIN" label, without the words "MADE WITH," in arguing that no reasonable consumer could be misled (as Plaintiffs were) to think that the grain in the product is whole grain. Instead, Defendant limited its arguments to the "MADE WITH WHOLE GRAIN" version of the label. *See, e.g.*, Mem. Supp. Def.'s Mot. Dismiss Compl. 1, ECF No. 17-1 ("The 2016 version of the packaging for the whole grain variety of Cheez-It states 'MADE WITH WHOLE GRAIN' — a factually true statement saying that one of the ingredients is whole grain."); *id.* at 3 ("Plaintiffs take issue with the 2016

version of the Cheez-It packaging which stated in the front of the box 'MADE WITH WHOLE GRAINS' along with a prominent statement 'MADE WITH 8g OF WHOLE GRAINS PER SERVING' below it."); *id.* at 7–8 (citing cases primarily featuring a "made with" claim); *see also* A038–42 (image of 2016 version of Cheez-It Whole Grain).

The District Court glossed over the distinction between the two different labels, "WHOLE GRAIN" versus "MADE WITH WHOLE GRAIN," and concluded that "the Product's packaging truthfully states that the Crackers are ***made with whole grain*** . . . ." A051 (emphasis added). The District Court thus addressed the stand-alone "WHOLE GRAIN" label claim *sua sponte*. However, this Court has held that, "though [a] district court has the power to dismiss a complaint *sua sponte* for failure to state a claim on which relief can be granted, it may not properly do so without giving the plaintiff an opportunity to be heard." *Thomas v. Scully*, 943 F.2d 259, 260 (2d Cir. 1991); *see also Grant v. County of Erie*, 542 F. App'x 21, 24 (2d Cir. 2013).

Of course, plastering the stand-alone words "WHOLE GRAIN" in extra-large font at the focal point of the label when the product contains significantly more refined grain than whole grain cannot be characterized as a "truthful" statement, and Plaintiffs have alleged that this is, in fact, "false and misleading." A011 ¶ 3. Thus, the District Court's legal analysis requiring an affirmative misrepresentation, even if it were not flawed, was misapplied to Plaintiffs' claims with respect to the

unqualified "WHOLE GRAIN" label. However, as discussed below, the District Court erred in its application of the "reasonable consumer" standard by requiring a false—as opposed to a misleading—representation.

2. Even Technically Accurate Statements Are Actionable

Courts have repeatedly held that representations need not be false to mislead a reasonable consumer and that even technically accurate statements are actionable under the consumer protection laws of California and New York. *See, e.g.*, *Williams*, 552 F.3d at 938 (consumer protection laws prohibit "not only advertising which is false, but also advertising which, although true, is either actually misleading or which has a capacity, likelihood or tendency to deceive or confuse the public" (internal quotation marks and brackets omitted)); *Atik v. Welch Foods, Inc.*, No. 15 Civ. 5405 (MKB) (VMS), 2016 WL 5678474, at *10 (E.D.N.Y. Sept. 30, 2016) ("*Atik* Order") (the label "Made With REAL Fruit," while technically true, was still actionable because a "reasonable consumer could expect a fruit snack to contain a significant amount of fruit, especially where, as here, the packaging and labeling emphasize the presence of fruit in the Products"); *Ackerman*, 2010 WL 2925955, at *1 ("vitaminwater" product name actionable even if product contains vitamins and water).

Contrary to the District Court's conclusions, neither *Williams* nor *Ackerman* suggest, let alone hold, that affirmative misrepresentations are required to state a

claim. To the contrary, both cases focused on whether the labeling creates a ***false impression***, not whether the labeling itself is false. Thus, in *Williams*, the Ninth Circuit found that the statement "made with 'fruit juice and other all natural ingredients'"—while technically true—"could easily be interpreted by consumers as a claim that **all** the ingredients in the product were natural" when they were not. *Williams*, 552 F.3d at 939 (emphasis added); *see also Atik* Order, 2016 WL 5678474, at *9 n.10 ("[N]othing in *Williams* suggests that the court's decision hinged on the fact that the defendant made affirmative misrepresentations."). Similarly, *Ackerman* did not hinge on whether the name and labeling of "vitaminwater" products are true or accurate. Rather, the court concluded that even though the product, in fact, contains vitamins and water, the name itself could lead consumers to have the ***false impression*** that the product is **solely** composed of vitamins and water. As the court in *Ackerman* explained: "The labeling of a food which contains two or more ingredients may be misleading by reason (among other reasons) of the designation of such food in such labeling by a name which includes or suggests the name of one or more but not all such ingredients, even though the names of all such ingredients are stated elsewhere in the labeling." *Ackerman*, 2010 WL 2925955, at *13 (quoting FDA regulations).

Here, as in *Williams*, Plaintiffs claim that the use of either the "WHOLE GRAIN" or the "MADE WITH WHOLE GRAIN" label creates the ***false impression***

that the grain in Cheez-It Whole Grain crackers is comprised substantially or entirely of whole grain, when it is not. *See, e.g.*, A012 ¶ 8. And, just like in *Ackerman*, the emphasis on one ingredient, whole grain, but not other ingredients such as non-whole, refined wheat grain, can reasonably lead consumers to the ***false impression*** that the grain in the product is comprised substantially or entirely of whole grain. *See Albert v. Blue Diamond Growers*, 151 F. Supp. 3d 412, 418–19 (S.D.N.Y. 2015) (sustaining claims under New York and California consumer protection law where manufacturer conveyed impression that almond milk products contained a significant amount of almonds, with the health benefits ascribed to almonds, when in fact the products were mostly water and contained a small percentage of almonds); *Paulino v. Conopco, Inc.*, No. 14 Civ. 5145 (JG) (RML), 2015 WL 4895234, at *5 (E.D.N.Y. Aug. 17, 2015) ("That the label makes no explicit claim of being 'All Natural,' '100% natural,' or 'free from synthetics' is beside the point. A reasonable juror could reach the conclusion that the label 'Naturals' means that the product is at least mostly comprised of natural ingredients."); *Segedie*, 2015 WL 2168374, at *11 ("It is not unreasonable as a matter of law to expect that a product labeled 'natural' . . . contains *only* natural ingredients." (emphasis added)); *Goldemberg*, 8 F. Supp. 3d at 479 (holding that product labeled "Active Naturals" could mislead a reasonable consumer to believe that the product contained only natural ingredients); *Wilson v. Frito-Lay N. Am., Inc.*, No. 12 Civ. 1586 (SC), 2013 WL 1320468, at *12

(N.D. Cal. Apr. 1, 2013) (claim "Made with ALL NATURAL Ingredients" on the products' labels could mislead a reasonable consumer into thinking the products were entirely made of natural ingredients); *Lam v. Gen. Mills*, 859 F. Supp. 2d 1097, 1099–1100 (N.D. Cal. 2012) (fruit roll-up products' names, in combination with their "made with real fruit" claims, could mislead a reasonable consumer into thinking the product was made primarily of fruit).

More recently, two cases held that whether reasonable consumers could be misled by claims falsely suggesting higher content of whole grains could **not** be resolved on a motion to dismiss. In *National Consumers League v. Doctor's Associates*, the plaintiff brought a claim against the Subway sandwich franchisor under Washington, D.C.'s consumer protection statute, which is similar to the California and New York statutes at issue here. *Nat. Consumer's League v. Doctor's Assocs., Inc.*, No. 2013 CA 006549 B, 2014 WL 4589989, at *1 (D.C. Super. Sept. 12, 2014). The plaintiff alleged that Subway misrepresents the qualities of its "9-Grain Wheat" and "Honey Oat" breads with the name and fake color combination used to identify these particular breads in order to deceive whole-grain-conscious consumers into thinking that these breads are more healthful than the other breads offered by Subway, when in fact they are virtually identical. *Id.* The court noted that Subway's names for its breads are truthful in that the "9-Grain Wheat" bread in fact contains nine distinct grains and the "Honey Oat" bread in fact contains honey and

oats. *Id.* at *6. The court nonetheless denied the motion to dismiss and concluded that "[w]hether a reasonable consumer would in fact infer from [defendant's] practices that its 9-Grain Wheat and Honey Oat breads contain a substantially higher quantity of whole grains than they actually have is a question of fact that need not be resolved at this stage of the litigation." *Id.* at *7.

Similarly, the court in *National Consumers League v. Bimbo Bakeries USA* refused to dismiss a claim that the defendant misrepresents the whole grain content of its Thomas' Light Multi-Grain Hearty Muffins and Sara Lee Classic Honey Wheat bread through the product names and their packaging. *Nat. Consumers League v. Bimbo Bakeries USA*, No. 2013 CA 006548 B, 2015 WL 1504745, at *2–4 (D.C. Super. Apr. 2, 2015). The court found that whether a reasonable consumer could infer from the defendant's representations that the "products in dispute contain substantial amounts of whole grains or whole wheat when they actually do not, constitutes an issue of fact, which a jury should resolve at trial." *Id.* at *11.

In contrast to the numerous cases that decline to make a "reasonable consumer" determination as a matter of law, the primary authorities that the District Court relied upon in dismissing Plaintiffs' claims are *Red v. Kraft Foods, Inc.*, No. 10 Civ. 1028 (GW) (AGRx), 2012 WL 5504011 (C.D. Cal. Oct. 25, 2012), and *Workman v. Plum, Inc.*, 141 F. Supp. 3d 1032 (N.D. Cal. 2015). *See* A051; A054. Those cases, however, are readily distinguishable from the instant case.

Plaintiffs in *Red* alleged that Kraft cracker products carrying the claim "Made with Real Vegetables" were deceptively labeled because they did not contain significant amounts of vegetables. The court held that no reasonable consumer would look at box of crackers claiming that it was "made with real vegetables" and conclude that it contained significant amounts of vegetables. *Red*, 2012 WL 5504011, at *3 ("[T]he product is a box of crackers, and a reasonable consumer will be familiar with the fact of life that a cracker is not composed of primarily fresh vegetables."). It is a very different "fact of life" when the misrepresentation concerns the *primary* ingredient of the product: flour. As Magistrate Judge Vera M. Scanlon explained in her Report and Recommendation on the defendant's motion to dismiss in *Atik v. Welch Foods, Inc.* (which the district court subsequently adopted in its entirety, *Atik* Order, 2016 WL 5678474, at *1):

> *Red* dealt with a product that made clear it was one food item, crackers, while advertising that it included another type of food item, vegetables. The packaging at issue made it clear to the consumer that they were purchasing a box of crackers, which the ordinary person would know are not generally made of vegetables.

Atik v. Welch Foods, Inc., No. 15 Civ. 5405 (MKB) (VMS), 2016 U.S. Dist. LEXIS 106497, at *34 (E.D.N.Y. Aug. 5, 2016) ("*Atik* R&R"). In the *Atik* R&R, the court found that, in contrast to *Red*, a claim that fruit snacks were "made with real fruit" *was* potentially deceptive, because "Fruit Snacks are advertised as primarily fruit." *Id.* That is the case here: "WHOLE GRAIN" is represented not as a flavoring or a

supporting player in crackers, but as the main event. While a reasonable consumer may know that a cracker is not made mostly of vegetables, a reasonable consumer could—and according to the FTC generally would—have the false impression that a cracker labeled "WHOLE GRAIN" or "MADE WITH WHOLE GRAIN" is made mostly of whole grain.

Workman also is inapposite because that case involved no words and only pictures of featured ingredients contained in the puree pouch and fruit bars at issue. There, the court found, "No reasonable consumer would expect the size of the flavors pictured on the label to directly correlate with the predominance of the pictured ingredient in the puree blend." *Workman*, 141 F. Supp. 3d at 1036. Here, Plaintiffs have alleged affirmative misrepresentations—either express in the case of "WHOLE GRAIN" or implied in the case of "MADE WITH WHOLE GRAIN"—that the grain in Cheez-It Whole Grain crackers is "WHOLE GRAIN," when the crackers are made mostly with refined grain. Thus, Plaintiffs' allegations fit squarely with the holdings and reasoning of *Williams*, *Ackerman*, the *Atik* R&R, the *Atik* Order, and the numerous other cases denying motions to dismiss a claim that a "reasonable consumer" was likely to be deceived.

B. Disclosure of Grams of Whole Grain Claims, Even on Front of Box, Does Not Mitigate Consumer Deception or Confusion

In concluding as a matter of law that no reasonable consumer could be misled by the Cheez-It Whole Grain packaging, the District Court also relied on the fact

that the front of the packages displays the Grams of Whole Grain Claims. *See* A051 ("Furthermore, as the Crackers' packaging conspicuously states that the Crackers are made with either five (5) or eight (8) grams of whole grain per serving, Defendant neither misrepresents that its Crackers are one hundred percent (100%) whole grain nor suggests that they are predominantly whole grain."). Again, the District Court missed the mark in applying the reasonable consumer standard.

The Supreme Court's words in the seminal false advertising case of *Donaldson v. Read Magazine* bear recitation here. In *Donaldson*, the Court elucidated that:

> That exceptionally acute and sophisticated readers might have been able by penetrating analysis to have deciphered the true nature of the contest's terms is not sufficient to bar findings of fraud by a fact finding tribunal. Questions of fraud may be determined in the light of the effect advertisements would most probably produce on ordinary minds. People have a right to assume that fraudulent advertising traps will not be laid to ensnare them. Laws are made to protect the trusting as well as the suspicious.

Donaldson v. Read Magazine, 333 U.S. 178, 189 (1948) (internal quotation marks and citations omitted). These words still apply today, and consumer protection laws should not be, and have not been, interpreted so narrowly as to cover only those members of the public who have the sophisticated language skills or education to appreciate the particular representation or nuance at issue. *See, e.g.*, *Annunziato v. eMachines, Inc.*, 402 F. Supp. 2d 1133, 1138 (C.D. Cal. 2005) ("The goal of

consumer protection is not advanced by eliminating large segments of the public from coverage under [California's consumer protection laws] where they suffer actual harm merely because they were inattentive or for one reason or another lacked the language skills to appreciate the particular unfair or false representation in issue. A construction of these statutes that reduced them to common law fraud would not only be redundant, but would eviscerate any purpose that [California's consumer protection laws] have independent of common law fraud.").

The District Court's finding that reasonable consumers would even read, let alone understand, the Grams of Whole Grain Claims ignores the context in which the reasonable consumer evaluates a product. Consumers purchase products in crowded grocery store aisles. Unlike courtroom chambers, grocery store aisles are not places where any person can engage in contemplation of the veracity of any label claim—they are designed to get consumers to move quickly through them, picking boxes off the shelf based on the most prominent claims and images on the front of the package. Marketers are well aware of this, and they are skilled at making prominent those things that they want consumers to see and hiding the negatives. Without the assistance of consumer perception studies, expert opinion, or any other means of determining what reasonable consumers actually understood, judges are not well equipped at the motion to dismiss stage to determine whether a reasonable consumer would, in fact, be misled by labeling claims.

The Grams of Whole Grain Claims in this case are a perfect example of this. Unlike the "WHOLE GRAIN" or "MADE WITH WHOLE GRAIN" claims, which are in extra-large font, centered in the middle of the package, or the "made with 100% REAL CHEESE" claim, which is set off with a yellow box, the Grams of Whole Grain Claims are written in small font and placed in the bottom margin of the package. *See Stoltz v. Fage Dairy Processing Indus., S.A.*, No. 14 Civ. 3826 (MKB), 2015 WL 5579872, at *16 (E.D.N.Y. Sept. 22, 2015) ("[T]he significance of a disclaimer depends upon factors such as the font size and placement of the disclaimer as well as the relative emphasis placed on the disclaimer and the allegedly misleading statement."). In a context where consumers are governmentally advised to eat at least half of their grains as whole grains, those who purchase whole grain products reasonably seek foods that are more than 50% whole grain (rarely do they eat 100% whole grain products to compensate for 100% refined grain products). Nor, equally, do reasonable consumers understand that 5 grams of whole grain is overshadowed by perhaps 10 grams, or whatever the case might factually be, of nutritionally inferior refined grains. *See* FTC Staff Comments at 6 (citing the dietary guidelines recommending that Americans make at least half of the grains in their diet whole grains); A018–19 ¶¶ 46–49.

Simply put, the disclosure of the number of grams of whole grain per serving—even if consumers see it—provides little meaningful information. As the

FTC explained, information about the absolute quantity of whole grain in grams is of limited utility:

> The FTC staff believes that many consumers may find it difficult, if not impossible, to translate a quantitative statement such as "10 grams whole grain" into meaningful information about how much of their recommended daily amount of whole grain they will receive from a serving of a food.

FTC Staff Comments at 7; A019 ¶ 49.

Here, the number of grams of whole grain provides no information indicating that whole grains are a minority ingredient in Cheez-It Whole Grain crackers. While the Grams of Whole Grain Claims on the products, if read, may allow consumers to determine the quantity in grams of whole grain in the products, it ***does not*** inform consumers that there may be grain in the crackers that is not whole, let alone that the crackers are predominately not whole grain. Indeed, Plaintiffs have alleged that the Grams of Whole Grain Claims do not provide the quantity of refined grain or total grain in the products and that it is impossible to determine the amount of whole grain as a percentage of total grain in the product. *See* A020 ¶ 53 ("Nothing else on the box provides any context for how much 5 or 8 grams of whole grain is, in relationship to the much larger amount of refined grain."). Plaintiffs are ***still*** unaware of the amount of whole grain as a percentage of total grain in the product. Thus, the District Court's conclusion, as a matter of law, that "no reasonable consumer would believe that the Crackers were *solely* composed of whole grain, as the front of the

Product's box explicitly stated otherwise," A054, is erroneous both factually and legally.

Tellingly, Plaintiffs assert in their Complaint that they "would not have purchased or paid more for Cheez-It Whole Grain crackers had they known ***the product contains more refined grain than whole grain***." A012 ¶ 8 (emphasis added). By contrast, they did not claim that they would not have purchased the product if they knew that there was only five or eight grams of whole grain per serving. Indeed, the only clear indication that the product is not more whole grain than refined grain is the ingredients list. *See id.* ¶ 6. But the contention that a disclosure on the ingredients list should save an otherwise deceptive label has been resoundingly rejected by *Williams*, 552 F.3d at 939, and other courts. *See, e.g.*, *Ackerman*, 2010 WL 2925955, at *67 (concluding that consumers could reasonably be expected to rely on the label claims as accurate descriptions of the food; "[I]t seems clear that such an impression was precisely what defendant intended to convey. If that were not the case, it is difficult to understand what defendant had in mind." (quoting *Miller v. Am. Family Publishers*, 284 N.J. Super. 67, 80 (Ch. Div. 1995))). Thus, contrary to the District Court's conclusion, *see* A051; A054, specifying the exact amount of whole grain per serving, no less in small and inconspicuous font, does **not** render the packaging unable to mislead a reasonable

consumer into believing that Cheez-It Whole Grain crackers are all or predominantly whole grain as a matter of law.

C. The District Court Ignored Allegations that Experts Have Found that Reasonable Consumers May Be Misled by "Whole Grain" Labels

In lieu of a factual inquiry into whether a reasonable consumer would find the "WHOLE GRAIN" or "MADE WITH WHOLE GRAIN" labeling misleading, the District Court substituted its own judgment on this question. In doing so, the District Court ignored both Plaintiffs' allegations about their own understanding, as well as their allegations that federal agencies with expertise on the marketing and labeling of food products have determined that whole grain claims, like those at issue here, are likely to deceive reasonable consumers. *See* A019 ¶ 49 ("The Federal Trade Commission ('FTC') has stated that consumers are likely to perceive unqualified whole grain claims to mean that a product is 100% or nearly 100% whole grain) (citing FTC Staff Comments); A021 ¶ 55 ("FDA and the FTC have warned, consumers can be misled by statements about whole grain foods.").

The FTC, along with FDA, "has developed considerable expertise in food advertising and labeling issues . . . and has done substantial research on how consumers interpret nutrition and health claims in food advertising." FTC Staff Comments at 2. Armed with industry expertise, the FTC and FDA have found that whole grain claims, such as the "WHOLE GRAIN" or "MADE WITH WHOLE

GRAIN" statements at issue here, are misleading to consumers, as consumers are likely to perceive them to mean that a product is 100% or nearly 100% whole grain. *See id.* at 12 ("The FTC staff agrees with FDA's draft guidance position that in addition to the express '100% whole grain' statement, other variations of general, unqualified claims are also likely to convey that all or nearly all of the grain in the product is whole grain."). Indeed, addressing the exact wording of the "WHOLE GRAIN" label at issue, the FTC concluded:

> Many 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.

Id. at 13.

The FTC found "MADE WITH WHOLE GRAIN" similarly problematic as "WHOLE GRAIN":

> On some food labels, for instance, the words "whole grain" appear in large, banner type on the front label while the words "made with," presumably meant to qualify the "whole grain" banner, are in substantially smaller type. This may be a method that companies use to imply that their products are 100% whole grain, when they are not.

Id. at 11, n.20. This, of course, perfectly describes the Cheez-It Whole Grain cracker "MADE WITH WHOLE GRAIN" claim, where the words "MADE WITH" are approximately one half the size of the words "WHOLE GRAIN." *See* A042.[8]

In sum, the District Court erred in concluding as a matter of law that both versions of the packaging for Cheez-It Whole Grain crackers made it impossible for Plaintiffs to prove that a reasonable consumer was likely to be deceived when Plaintiffs made supported allegations that (1) FTC and FDA, experts in food advertising and consumer perceptions, concluded that consumers are likely to be misled by the very terms "WHOLE GRAIN" and "MADE WITH WHOLE GRAIN" used here; (2) that the display of the smaller Grams of Whole Grain Claims on the front of the box, which provide the number of grams of whole grain—even if seen by consumers—does not indicate clearly to a reasonable consumer that the grain in Cheez-It Whole Grain crackers is predominantly not whole grain; (3) the "WHOLE GRAIN" label is an affirmative misrepresentation; and (4) both the "WHOLE GRAIN" packaging and the "MADE WITH WHOLE GRAIN" packaging create a false

[8] *See also* FTC Staff Comments at 11 (citing U.S. DEPT. OF AGRIC., *Food Safety and Inspection Service (FSIS) Statement of Interim Policy Guidance: Use of the USDA MyPyramid Reference on Meat and Poultry Labeling and Whole Grain Claims*, at 3 (Oct. 14, 2005), *available at* https://goo.gl/XbEVXc ("[T]here should be . . . generally more whole grain than refined grains in the [whole grain pasta] to ensure that the statements are not misleading")); U.S. DEPT. OF AGRIC., *Guidance: Products in the "Made with Organic ***" Labeling Category*, at 3 (May 2, 2014), *available at* https://goo.gl/sh4LQz (determining that in a product labeled "'Made with organic flour[,]' all flour . . . must be certified organic.").

impression with reasonable consumers that the grain in the Cheez-It Whole Grain crackers is comprised substantially or entirely of whole grain. Accordingly, the District Court's dismissal of Plaintiffs' New York and California consumer protection claims must be reversed.

III. Plaintiffs Have Standing to Seek Injunctive Relief

The District Court ruled that Plaintiffs did not have standing to obtain injunctive relief based solely on its conclusion that Plaintiffs had not demonstrated the Cheez-It Whole Grain packaging was deceptive. A060. As discussed above, Plaintiffs have pled sufficient allegations to establish that Defendant's product label was deceptive. Accordingly, the District Court's ruling that Plaintiffs are not entitled to injunctive relief is reversible error.

CONCLUSION

For the reasons set forth above, the Judgment of the District Court should be reversed, and the case should be remanded for further proceedings.

Date: October 6, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(g)

I hereby certify pursuant to Federal Rule of Appellate Procedure 32(g) that the attached brief is proportionally spaced, has a typeface (Times New Roman) of 14 points, and contains 8,178 words (excluding, as permitted by Federal Rule of Appellate Procedure 32(f), the cover page, the table of contents, the table of authorities, the certificate of compliance, and the signature block), as counted by the Microsoft Word processing system used to produce this brief.

Date: October 6, 2017

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