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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Mohammed Garadi, individually and on behalf of all others similarly situated, Plaintiff, v. Mars Wrigley Confectionery US, LLC, Defendant.	1:19-cv-03209-RJD-ST

MARS WRIGLEY CONFECTIONARY US, LLC'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT

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INTRODUCTION

This is a strike suit.[1] Plaintiffs'[2] counsel, employing a raft of recycled complaints, has filed approximately 100 putative class actions just like this one against food manufactures. The complaints allege each manufacturer intentionally deceived consumers by failing to flavor their products with flavoring 100% derived from the "tropical orchid of the genus Vanilla (*V. planifolia*)." First Am. Compl. ("FAC") ¶ 24. The challenged products include yogurt, cookies, oatmeal, almond milk, soy milk, cream soda, ice cream, and now, in this case, milk and dark chocolate Dove Bars® ("Dove Bars®") manufactured by Defendant Mars Wrigley Confectionary US, LLC. ("Mars"). In addition to its copy-and-paste vanilla claims, Plaintiffs also allege that Mars deceived consumers by failing to label the milk chocolate in Dove Bars® as "milk chocolate and vegetable fat coating." *Id.* at ¶ 143.

Plaintiffs' claims are premised on their distorted view of flavor regulations implementing the Food, Drug & Cosmetic Act ("FDCA") coupled with the false notion that even the most technical alleged violation of these regulations is a deceptive practice under state consumer protection laws. They purport to bring claims for injunctive and monetary relief on behalf of "all consumers in all 50 states," FAC ¶ 168, (1) under New York General Business Law ("GBL") sections 349, 350 and "the Consumer Protection Statutes of Other States and Territories"; (2) for negligent misrepresentation; (3) for breach of express warranty, the Magnusson Moss Warranty Act, and implied warranty of merchantability; (4) for fraud; and (5) for unjust enrichment, FAC ¶¶ 177-205.[3]

Not only are Plaintiffs not authorized to enforce their view of FDCA regulations, but their consumer deception and common law claims are preempted, implausible, insufficiently pleaded, and

[1] A strike suit is a lawsuit intended to force a quick settlement, on the theory that defendants will make the rational decision to settle where the cost of settlement is less than the legal costs of a full defense.

[2] Plaintiffs improperly omitted Plaintiff Maria Engesser from the caption. *See* Fed. R. Civ. P. 10(a).

[3] Plaintiffs withdrew their negligent misrepresentation and implied warranty of merchantability claims at the pre-motion conference before the Court on January 14, 2020. ECF No. 23. Consequently, this motion does not address those claims.

cannot withstand a motion to dismiss, as recently confirmed by Judges Valarie E. Caproni and Louis L. Stanton. *See Pichardo v. Only What You Need, Inc.*, 2020 WL 6323775 (S.D.N.Y. Oct. 27, 2020) (granting motion to dismiss identical claims involving vanilla-flavored protein drink); *Steele v. Wegmans Food Mkts., Inc.*, --- F. Supp. 3d ----, 2020 WL 3975461 (S.D.N.Y. July 14, 2020) (granting motion to dismiss identical claims involving Wegmans Vanilla Ice Cream). The same result is required for Dove Bars® and Plaintiffs' claims should be dismissed.

BACKGROUND

Mars stands in a long line of manufacturers sued by Plaintiffs' counsel, who have filed approximately 100 copycat federal lawsuits.[4] The procedural history of these cases underscores their purpose: leverage the threat of putative class claims and force early settlements.[5] Now Plaintiffs' counsel have set their sights on Mars, which manufactures such iconic products as M&M's®,

[4] Plaintiffs' counsel relies on the same argument to bring these approximately 100 "vanilla" lawsuits. Here is a partial list: *Cartelli v. Danone USA, Inc.*, 19-cv-11354 (S.D.N.Y.) (Briccetti, J.); *Lytkine v. 7-Eleven, Inc.*, 19-cv-11352 (S.D.N.Y.) (Koeltl, J.); *Louis v. The Mochi Ice Cream Co.*, 19-cv-11242 (S.D.N.Y.) (Morrero, J.); *Clarke v. Tillamook Cnty. Creamery Ass'n*, 19-cv-08207 (S.D.N.Y.) (Nelson, J.); *Fore-Heron v. The Price Chopper, Inc.*, 19-cv-11224 (Roman, J.); *Cummings v. Topco Associates, LLC*, 19-cv-11104 (S.D.N.Y. (Abrams, J.); *Lioul v. Nestle Dreyer's Ice Cream Co.*, 19-cv-05762(S.D.N.Y) (Cote, J.); *Andriulli v. Danone N. Am., LLC*, 19-cv-05165 (S.D.N.Y.) (Briccetti, J.); *Charles v. Friendly's Mfg. & Retail, LLC*, 19-cv-06571 (Rakoff, J.); *Musikar v. Cumberland Farms, Inc.*, 19-cv-08410 (S.D.N.Y.) (Seibel, J.); *Tr. v. Silk Operating Co., LLC*, 19-cv-08442 (S.D.N.Y.) (Karas, J.); *Cicciarella v. Califia Farms, LLC*, 19-cv-08785 (S.D.N.Y.) (Seibel, J.); *Parham v. Aldi Inc.*, 19-cv-08975, (Gardephe J.); *Cosgrove v. Blue Diamond Growers*, 19-cv-08993 (Marrero, J.); *Steele v. Wegmans Food Mkts., Inc.*, 19-cv-09227 (S.D.N.Y.) (Stanton, J.); *Sharpe v. A & W Concentrate Co. et al.*, 19-cv-00768 (E.D.N.Y.) (Cogan, J.); *Derchin v. Unilever U.S., Inc.*, 19-cv-03543 (Garaufis, J.); *Haut v. Glanbia Performance Nutrition (Mfg.), Inc.*, 19-cv-04566 (E.D.N.Y.) (Glasser, J.).

[5] Plaintiffs' counsel has settled a number of vanilla lawsuits, including: (1) *Andriulli v. Danone N. Am., LLC*, 19-cv-05165 (S.D.N.Y. Jun. 6, 2019); (2) *Liou v. Nestle Dreyer's Ice Cream Co.*, 19-cv-05762 (S.D.N.Y. Jun. 20, 2019); (3) *Charles v. Friendly's Mfg. & Retail, LLC*, 19-cv-06571 (S.D.N.Y. Jul. 15, 2019); (4) *Kane v. Turkey Hill, L.P.*, 19-cv-04794 (E.D.N.Y. Aug. 20, 2019); (5) *Weber-Lugo v. Aldi Inc.*, 19-cv-04861 (E.D.N.Y. Aug. 24, 2019); (6) *Clarke v. Tillamook Cnty Creamery Ass'n*, 19-cv-08207 (S.D.N.Y. Sept. 9, 2019); (7) *Varelli v. Blue Diamond Growers*, 19-cv-05259 (E.D.N.Y. Sept. 14, 2019); (8) *Cicciarella v. Califia Farms, LLC*, 19-cv-08785 (S.D.N.Y. Sept. 9, 2019); (9) *Hyde v. WWF Operating Co.*, 19-cv-05566- (E.D.N.Y. Oct. 2, 2019); (10) *Smith v. Moran Foods, LLC*, 19-cv-09453 (S.D.N.Y. Oct. 12, 2019); (11) *Housell v. Annie's Homegrown, Inc.*, 19-cv-09670 (S.D.N.Y. Oct. 18, 2019); (12) *Rogers v. Casper's Ice Cream Inc.*, 19-cv-06064 (S.D.N.Y. Oct. 29, 2019); (13) *Legrier v. Walmart Inc.*, 19-cv-10433 (S.D.N.Y. Nov. 8, 2019); (14) *Vinales v. Kemps LLC*, 19-cv-10463 (S.D.N.Y. Nov. 11, 2019); (15) *Benites v. 7-Eleven*, 19-cv-06551 (E.D.N.Y. Nov. 20, 2019); (16) *Lyons v. Wells Enters.*, 19-cv-10916 (S.D.N.Y. Nov. 26, 2019); (17) *Newton v. Whitewave Servs.*, 19-cv-06743 (E.D.N.Y. Nov. 30, 2019); (18) *Nelles v. Pac. Foods of Ore.*, 1:19-cv-11025 (S.D.N.Y. Dec. 1, 2019); (19) *Louis v. The Mochi Ice Cream Co.*, 19-cv-11242 (S.D.N.Y. Dec. 8, 2019); (20) *Lytkine v. 7-Eleven*, 19-cv-11352 (S.D.N.Y. Dec. 11, 2019); (21) *Cartelli v. Danone US, Inc.*, 19-cv-11354 (S.D.N.Y. Dec. 12, 2019); (22) *Lamouth v. Horizon Organic Dairy, LLC*, 19-cv-11928 (S.D.N.Y. Dec. 31, 2019); (23) *Darby v. Prairie Farms Dairy*, 20-cv-00151 (S.D.N.Y. Jul. 7, 2020); (24) *Sanders v. Trader Joe's Co.*, 20-cv-00496 (S.D.N.Y. Jan. 19, 2020); (25) *Papoulis v. Pac. Foods of Ore.*, 20-cv-00432 (E.D.N.Y. Jan. 27, 2020); (26) *Angeles v. Tillamook Cnty. Creamery Ass'n*, 20-cv-01764 (S.D.N.Y. Feb. 28, 2020); (27) *Buonocore v. Aldi Inc.*, 20-cv-01699 (E.D.N.Y. Apr. 5, 2020); and (28) *Sajnani et al v. The Hain Celestial Grp.*, 20-cv-04281 (S.D.N.Y. Jun. 4, 2020).

SNICKERS®, MILKY WAY®, TWIX®, EXTRA® and Skittles®.

This lawsuit concerns Dove Bars®, which are advertised as sorbet or various ice cream flavors "dipped in silky smooth Dove®" chocolate—"An experience like no other®". *See, e.g.*, FAC ¶¶ 2, 3. The principal display panel (front) of the package depicts and describes Dove Bars® as follows:

Id. Plaintiffs do not question the tastiness of Dove Bars®, or dispute they are "[a]n experience like no other®." Instead, they decry Mars's use of the word "vanilla" to describe the flavor of the ice cream and "milk chocolate" to describe the chocolate used in the Bars' coating. Plaintiffs' reading of federal regulations for milk chocolate is flat wrong. Moreover, anyone who has visited the supermarket or a Baskin Robbins knows ice cream comes in a seemingly endless variety of flavors including chocolate, vanilla, mint, strawberry, coffee, birthday cake, caramel, red velvet, snickerdoodle, etc. Among such flavors, Plaintiffs allege "[v]anilla is the consistent number one flavor for ice cream for 28% of Americans." *Id.* ¶ 7. The main flavor component of vanilla is vanillin. *Id.* ¶ 32. Vanillin comes from vanilla beans and from other natural and artificial sources. *See id.* ¶¶ 32, 40. According to Plaintiffs, "only 1-2% of vanillin in commercial use is vanillin obtained from the vanilla plant, which means that almost all vanillin has no connection to the vanilla bean." *Id.* ¶ 35.

Here, Plaintiffs do not (and cannot) allege that the packaging for Dove Bars® affirmatively promises that the bars are made with a specific vanilla flavoring or vanilla flavoring from a single or

exclusive source. *See id.* ¶¶ 2-3. The packaging does not feature pictures or illustrations of vanilla beans or the "tropical orchid of the genus Vanilla (*V. planifolia*)." *Id.* ¶¶ 2-3, 24. It also does not contain the words vanilla extract, vanilla bean, or describe the constituents of the vanilla flavor. Nonetheless, Plaintiffs allege that the word "vanilla" implies an exceedingly specific representation: that the vanilla flavor in the ice cream portion of Dove Bars® is derived *exclusively* from the vanilla bean. *See id.* ¶ 73. Such representation, they allege, is based on the Food and Drug Administration's ("FDA") complex "flavor labeling regime for ice cream." *Id.* ¶ 123. That regime includes three FDA-created categories.

> Category I, codified at 21 C.F.R. § 135.110(f)(2)(i), provides:
>
> If the food *contains no artificial flavor*, the name on the principal display panel or panels of the label shall be accompanied by the common or usual name of the characterizing flavor, e.g., "vanilla", in letters not less than one-half the height of the letters used in the words "ice cream".

Id. (emphasis added); *Id.* ¶ 63; Category II, in contrast provides:

> If the food *contains both a natural characterizing flavor and an artificial flavor simulating it, and if the natural flavor predominates*, the name on the principal display panel or panels of the label shall be accompanied by the common name of the characterizing flavor, in letters not less than one-half the height of the letters used in the words "ice cream", followed by the word "flavored", in letters not less than one-half the height of the letters in the name of the characterizing flavor, e.g., "Vanilla flavored" . . . .

21 C.F.R. § 135.110(f)(2)(ii) (emphasis added); *Id.* ¶ 64. Finally, Category III provides:

> If the food *contains both a natural characterizing flavor and an artificial flavor simulating it, and if the artificial flavor predominates*, or if artificial flavor is used alone the name on the principal display panel or panels of the label shall be accompanied by the common name of the characterizing flavor in letters not less than one-half the height of the letters used in the words "ice cream", preceded by "artificial" or "artificially flavored", in letters not less than one-half the height of the letters in the name of the characterizing flavor, e.g., "artificial Vanilla" . . . .

21 C.F.R. § 135.110(f)(2)(iii) (emphasis added); *id.* ¶ 64.

These categories differentiate among the inclusion and prevalence of artificial and natural characterizing flavors. But Plaintiffs' claims are not premised on the standard FDA definition of

"artificial flavors."[6] *Id.* ¶ 70. Rather, they seek to hold Mars liable for using the term "vanilla" even if it includes vanilla flavor naturally derived and from natural sources. *See id.* ("[W]hether a flavor complies with the general definition of natural flavor . . . has no relevance."). Moreover, Plaintiffs do not (and cannot) claim consumers would not have purchased Dove Bars® made with artificial flavors. Mars expressly discloses the inclusion of both "ARTIFICIAL AND NATURAL FLAVORS" (in the chocolate coating) as follows:

Vanilla Ice Cream with Milk Chocolate

INGREDIENTS: ICE CREAM: SKIM MILK, CREAM, SUGAR, CORN SYRUP, MONO AND DIGLYCERIDES, CARRAGEENAN, CAROB BEAN GUM, GUAR GUM, NATURAL FLAVOR, BETA CAROTENE. **COATING:** MILK CHOCOLATE (SUGAR, COCOA BUTTER, SKIM MILK, CHOCOLATE, LACTOSE, MILKFAT, SOY LECITHIN, ARTIFICIAL FLAVOR), SEMISWEET CHOCOLATE (SUGAR, CHOCOLATE, CHOCOLATE PROCESSED WITH ALKALI, COCOA BUTTER, MILKFAT, SOY LECITHIN, ARTIFICIAL AND NATURAL FLAVORS), COCONUT OIL, PALM OIL. **ALLERGY INFORMATION: CONTAINS MILK AND SOY. MAY CONTAIN PEANUTS AND TREE NUTS.**

Vanilla Ice Cream with Dark Chocolate

INGREDIENTS: ICE CREAM: SKIM MILK, CREAM, SUGAR, CORN SYRUP, MONO AND DIGLYCERIDES, CARRAGEENAN, CAROB BEAN GUM, GUAR GUM, NATURAL FLAVOR, BETA CAROTENE. **COATING:** SEMISWEET CHOCOLATE (SUGAR, CHOCOLATE, CHOCOLATE PROCESSED WITH ALKALI, COCOA BUTTER, MILKFAT, SOY LECITHIN, ARTIFICIAL AND NATURAL FLAVORS), COCONUT OIL, PALM OIL. **ALLERGY INFORMATION: CONTAINS MILK AND SOY. MAY CONTAIN PEANUTS AND TREE NUTS.**

Id. ¶ 74 (depicting ingredient list for milk chocolate).

Plaintiffs thus rely on notion that, among all known ice cream flavors, "[v]anilla is the only flavor that has a standard of identity." FAC ¶ 37. Plaintiffs then cite FDA definitions for "vanilla extract," and "vanilla flavoring." *See* FAC ¶ 77 (citing 21 C.F.R. § 169.175; 21 C.F.R. § 169.177). The FDA defines "vanilla extract" as "the solution in aqueous ethyl alcohol of the sapid and odorous principles extractable from vanilla beans [wherein] the content of ethyl alcohol is not less than 35 percent by volume and the content of vanilla constituent, as defined in § 169.3(c), is not less than one unit per gallon." 21 C.F.R. § 169.175(a). The FDA, in turn, defines "vanilla flavoring" as satisfying the definition and standard of identity of vanilla extract, "except that its content of ethyl alcohol is less than 35 percent by volume." 21 C.F.R. § 169.177(a).

[6] The FDA defines the term artificial flavor as "any substance, the function of which is to impart flavor, which is not derived from a spice, fruit or fruit juice, vegetable or vegetable juice, edible yeast, herb, bark, bud, root, leaf or similar plant material, meat, fish, poultry, eggs, dairy products, or fermentation products thereof. Artificial flavor includes the substances listed in §§ 172.515(b) and 182.60 of this chapter except where these are derived from natural sources." 21 C.F.R. § 101.22(a)(1).

When these flavorings are sold separately, they must be named "vanilla extract" and "vanilla flavoring," respectively. *See* 21 C.F.R. § 169.175(b)(1) (The "name of the food is 'Vanilla extract' or 'Extract of vanilla.'"); 21 C.F.R. § 169.177(b) (The "name of the food is 'Vanilla flavoring.'"). Although vanilla extract is not mentioned in the ice cream rules, Plaintiffs nonetheless allege the ice cream regulations are meant to be read together with the vanilla standard of identity. *See* FAC ¶ 78. Plaintiffs conclude Dove Bars® are "subject to the category I ice cream requirements." FAC ¶ 124. They do not dispute Dove Bars® contain vanilla extract, but insist all of the vanilla flavor must come 100% or exclusively from vanilla beans—the sapid and odorous principles extractable from the fruit pods of the tropical orchid of the genus Vanilla (*V. planifolia*). *See* FAC ¶¶ 24, 73, 79. Plaintiffs do not allege that they or other consumers of Dove Bars® were aware of the FDA regulations they cite, yet they allege ice cream shoppers share this understanding. Plaintiffs allege consumers believe "vanilla ice cream," is a product "where (1) vanilla is the characterizing flavor, (2) vanilla is contained in sufficient amount to flavor the product; (3) no other flavors in the product simulate, resemble, reinforce, or enhance vanilla and (5) [sic] vanilla is the exclusive source of flavor." *Id.* ¶ 73.

Plaintiffs further challenge the "milk chocolate" labels on the milk chocolate variety of Dove Bars®. Plaintiffs assert that the presence of coconut oil and palm oil in the Bars' *coating* requires Mars to label the bars as containing "milk chocolate and vegetable fat coating." *Id.* ¶ 144-45.

Following that winding and technical set up, Plaintiffs claim the labels for Dove Bars® are misleading. They allege that the bars contain non-vanilla flavor because the "Product's ingredient list reveals the vanilla ice cream in the Product is flavored by the ingredient designated as 'Natural Flavors.'" *Id.* ¶ 74. They separately allege testing failed to detect certain marker compounds for vanilla and instead found the presence of other flavorings. *See id.* ¶¶ 93-118. And they insist that the milk-chocolate designation should read "milk chocolate and vegetable fat coating." *Id.* ¶ 144.

Based on these allegations, Plaintiffs bring nationwide putative class claims for violations of

New York GBL sections 349 and 350, negligent misrepresentation, breaches of express and implied warranty and violations of the Magnuson-Moss Warranty Act, fraud, and unjust enrichment. *Id.* ¶¶ 177-205. These claims are preempted, facially implausible, inadequately pleaded, do not support claims for injunctive or monetary relief, and should be dismissed.

STANDARD OF REVIEW

"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) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility 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.* The "pleading must contain something more . . . than . . . a statement of facts that merely creates a suspicion [of] a legally cognizable right of action." *Twombly*, 550 U.S. at 555. "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it stops short of the line between 'possibility and plausibility of entitlement to relief.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 556 U.S. at 679). "Determining whether a complaint states a plausible claim for relief . . . [is] a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 556 U.S. at 679.

ARGUMENT

I. PLAINTIFFS CANNOT ENFORCE FDCA REGULATIONS.

Plaintiffs' claims are unquestionably predicated upon their interpretation of FDA regulations regarding label designations for milk chocolate and the complex labeling regime for vanilla ice cream. The First Amended Complaint contains no less than 40 citations to Chapter 21 of the Code of Federal Regulations, which implements the FDCA, and five of the complaint's six exhibits are FDA correspondence from the late 1970s and early 1980s with unrelated parties. *See* FAC Exs. A, B, C, D, E. But, Plaintiffs are neither competent to interpret FDA regulations nor empowered to enforce them.

First, Plaintiffs cannot enforce the FDCA. The right to enforce and interpret the FDCA rests exclusively with the FDA. *See* 21 U.S.C. § 337(a); *PDK Labs, Inc. v. Friedlander*, 103 F.3d 1105, 1113 (2d Cir. 1997) (plaintiff may not "privately enforce alleged violations of the FDCA"); *Verzani v. Costco Wholesale Corp.*, 2010 WL 3911499, at *3 (S.D.N.Y. Sept. 28, 2010) ("The FDCA lacks a private right of action and therefore [a plaintiff] cannot rely on it for purposes of asserting a state-law consumer claim under G.B.L. § 349"), *aff'd*, 432 F. App'x. 29 (2d Cir. 2011).

Second, Plaintiffs may not indirectly enforce or interpret the FDCA through New York state law. *See, e.g.*, *Borchenko v. L'Oréal USA, Inc.*, 389 F. Supp. 3d 769, 773 (C.D. Cal. 2019) (state law claims preempted where the court "cannot grant any relief to plaintiff without referring to and applying provisions of the FDCA"); *Patane v. Nestlé Waters N. Am., Inc.*, 314 F. Supp. 3d 375, 387 (D. Conn. 2018) ("Where a state law claim would not exist but for a FDCA regulation, [21 U.S.C.] § 337(a) impliedly preempts the claim."). Here, Plaintiffs do not plead a violation of New York's Agriculture and Markets Law ("AML"). Nor can they, as the AML does not provide them with a private right of action. *See Steele,* 2020 WL 3975461 at *2 (AML does not provide a private right of action to enforce ice cream regulations). There is no private right of action where "the Legislature specifically considered and expressly provided for enforcement mechanisms in the statute itself." *Cruz v. TD Bank, N.A.*, 22 N.Y.3d 61, 71 (2013). For its part, the AML vests enforcement in a Commissioner, including rules for frozen desserts. *See* N.Y. Agric. & Mkts. Law §§ 5, 32, 35, 71-k; *Hammer v. Am. Kennel Club*, 1 N.Y.3d 294, 299 (2003) (Agriculture and Markets Law statute precluding animal cruelty did not create a private right of action). The "statute does not, either expressly or impliedly, incorporate a method for private citizens to obtain civil relief." *Hammer*, 1 N.Y.3d at 299.

II. PLAINTIFFS' INTERPRETATION OF FDCA ICE CREAM REGULATIONS IS BOTH FLAWED AND INSUFFICIENT TO STATE A CLAIM.

Plaintiffs' interpretation of the FDCA's flavoring and ice cream regulations is flawed. For example, they conflate regulations pertaining to the principal display panel (front) of the package with

regulations regarding the ingredient list on the back of the package. *Compare* 21 C.F.R. § 135.110(f)(2)(i-iii) (regulating "the principal display panel"); 21 C.F.R. § 101.1 (defining principal display panel); *with* 21 C.F.R. § 101.22; 21 C.F.R. § 101.2 (defining informational display panel). They allege that because the ingredient list on the back of Dove Bars® identifies "natural flavor" not vanilla extract, *see* FAC ¶ 74, that is *prima facie* evidence that the ice cream is flavored with non-vanilla flavors, *see id.* ¶ 75.

That exact argument was rejected by Judge Benitez in the Southern District of California as it "misstates the law with respect to the listing of 'natural flavors' on an ingredients list." *Zaback v. Kellogg Sales Co.*, 2020 WL 3414656, at *3 (S.D. Cal. June 22, 2020) (dismissing claims). Specifically, the claim contravenes federal labeling regulations that specify how to declare vanilla extract on the ingredients list. These regulations provide that "[e]ach of the ingredients used in the food shall be declared on the label as required by the applicable sections 101 and 130 of this chapter." 21 C.F.R. § 169.175(a)-(c). The referenced sections identify vanilla extract as a "natural flavor" and state that manufacturers *"shall declare the flavor in the statement of ingredients in the following way:* . . . natural flavor . . . may be declared as . . . '*natural flavor*.'" 21 C.F.R. § 101.22(h)(l) (emphasis added); *see also* 21 C.F.R. § 101.4(b)(1) ("[F]lavorings . . . shall be declared according to the provisions of § 101.22): 21 C.F.R. § 101.22(a)(3) (definition of natural flavoring); 21 C.F.R. § 182.10 (defining "vanilla" as a natural flavoring).[7]

That said, no matter how flawed they may be, Plaintiffs' interpretations and application of the unique and complex FDCA ice cream regulations ("which is left to the authorities to regulate") do not give rise to a claim. *Steele*, 2020 WL 3975461, at *2. "The point here is not conformity with this or that [vanilla] standard." *Id.* Instead, Plaintiffs must plausibly allege facts for each of their state law

[7] That is not the only flaw in Plaintiffs' interpretations. For example, a product labeled "vanilla" ice cream may also contain secondary, non-vanilla flavor notes. The ingredients that contribute such flavor notes are not relevant under the FDA regulations on which Plaintiffs rely because they do not "characterize[]" the flavor. *See* 21 C.F.R. § 135.110 (f)(2). Plaintiffs fail to understand this, as they decry the alleged discovery of maltol, which they concede merely "improves overall flavor, increases sweetness, and enhances the sensation of creaminess." FAC ¶ 110.

claims, including that "the marketing presentation was deceptive." *Id.*; *see also N. Am. Olive Oil Ass'n v. Kangadis Food Inc.,* 962 F. Supp. 2d 514, 519 (S.D.N.Y. 2013) (distinguishing between violations of FDA and New York state labeling standards and actionable claims under GBL sections 349 and 350). Plaintiffs have failed to plausibly allege such claims.

III. PLAINTIFFS' INTERPRETATION OF FDCA MILK CHOCOLATE REGULATIONS IS BOTH FLAWED AND PREEMPTED.

The FDCA contains an express provision providing that any state law requirement "not identical" to federal labeling requirements is preempted. *See* 21 U.S.C. § 343-1(a). Consequently, courts have recognized that "if a product's packaging does not run afoul of federal law governing food labeling, no state law claim for consumer deception will lie." *Casey v. Odwalla, Inc.*, 338 F. Supp. 3d 284, 296 (S.D.N.Y. 2018); *Daniel v. Tootsie Roll Indus., LLC,* No. 17-CV-7541 (NRB), 2018 WL 3650015, at *4 (S.D.N.Y. Aug. 1, 2018) (same). Here, Plaintiffs acknowledge Dove Bars® are made "with milk chocolate." FAC ¶ 147. Yet, they allege that reference to "milk chocolate" is misleading because Dove Bars® contain two separate ingredients "coconut oil and palm oil" in the Bars' coating. *Id.* ¶¶ 143-45.

Plaintiffs misread FDA regulations and conflate individual ingredients with a multi-ingredient coating. The FDA has enacted numerous regulations for different cocoa ingredients. *See, e.g.*, 21 C.F.R. § 163.110 (cocao nibs); *id.* § 163.111 (chocolate liquor); *id.* § 163.112 (breakfast cocoa); *id.* § 163.113 (cocoa); *id.* § 163.114 (lowfat cocoa); *id.* § 163.123 (sweet chocolate); *id.* § 163.124 (white chocolate); *id.* § 163.135 (buttermilk chocolate); *id.* § 163.140 (skim milk chocolate). Plaintiffs' challenge concerns two distinct cocoa ingredients: "milk chocolate" and "milk chocolate and vegetable coating."

Milk Chocolate: "Milk Chocolate" is "the solid or semiplastic food prepared by intimately mixing and grinding chocolate liquor with one or more of the optional dairy ingredients and one or more optional nutritive carbohydrate sweeteners, and may contain one or more of the other optional ingredients specified in paragraph (b) of this section." 21 C.F.R. § 163.130(a). The specified optional dairy and other ingredients include "cacao fat," "skim milk," "artificial flavorings," and "emulsifying

agents" such as soy lecithin. *Id.* at § 163.130(b). To qualify as milk chocolate, the ingredient must contain at least 10 percent chocolate liquor, at least 3.39 percent milkfat, and at least 12 percent milk solids. *See id.* § 163.130(a)(2). "The name of th[is ingredient] is 'milk chocolate' or 'milk chocolate coating.'" *See id.* § 163.130(c) and it must be declared on the label as "as required by the applicable sections of parts 101 and 130 of this chapter." *Id.* § 163.130(d); *see* 21 C.F.R. § 101.4(a)(1) (ingredients "shall be listed by common or usual name in descending order of predominance").

Milk Chocolate and Vegetable Coating: Milk Chocolate and Vegetable Coating is a different ingredient that otherwise "conforms to the standard of identity, and is subject to the requirements for label declaration of ingredients for milk chocolate . . . or skim milk chocolate . . ., *except* that one or more optional ingredients specified in paragraph (b) of this section are used." 21 C.F.R. § 163.155(a) (emphasis added). That is, unlike "milk chocolate," which can be made with milk, cocoa butter, cream, or skim milk, "Milk Chocolate and Vegetable Coating" is made with "vegetable derived oils, fats, and stearins other than cacao fat." *Id.* at § 163.155(b). "The name of th[is ingredient] is 'milk chocolate and vegetable fat coating.'" *Id.* at § 163.155(c).

Here, the chocolate ingredient in milk chocolate Dove Bars® is "MILK CHOCOLATE (SUGAR, COCOA BUTTER, SKIM MILK, CHOCOLATE, LACTOSE, MILKFAT, SOY LECHTIN, [and] ARTIFICIAL FLAVOR)." FAC ¶¶ 3, 74; 21 C.F.R. § 101.4(b)(2)(i) ("An ingredient which itself contains two or more ingredients . . . shall be designated in the statement of ingredients [using] a parenthetical listing of all ingredients contained therein in descending order of predominance."). Mars did not substitute cocoa butter, skim milk, or milkfat with lesser ingredients, namely "vegetable derived oils, fats, and stearins other than cacao fat," so as to turn its milk chocolate ingredient into something else. 21 C.F.R. § 163.155(b).

Unable to allege such substitution, Plaintiffs point to the inclusion of two additional ingredients in the coating (not the milk chocolate ingredient) for Dove Bars®. They argue that coconut

oil and palm oil in the coating requires Mars to describe its milk chocolate ingredient as "Milk Chocolate and Vegetable Coating." FAC ¶¶ 143-45. But, nothing in FDA regulations allow Plaintiffs to conflate individual ingredients with the multi-ingredient coating. Rather, the FDA simply requires manufactures to list each ingredient of a multi-ingredient product "in descending order of predominance." 21 C.F.R. § 101.4(a)(1). Here, Mars complied with that requirement by identifying milk chocolate—the predominant ingredient—along with coconut oil and palm oil. *See* FAC ¶¶ 3, 74.

IV. PLAINTIFFS FAIL TO PLEAD PLAUSIBLE CLAIMS FOR RELIEF.

A. Plaintiffs' General Business Law Claim Fails.

To plead violations of New York GBL §§ 349 and 350, Plaintiffs must plausibly allege "the defendant engaged in consumer oriented conduct that is materially misleading," *Bowring v. Sapporo U.S.A., Inc.*, 234 F. Supp. 3d 386, 390 (E.D.N.Y. 2017), and "on account of [that] materially misleading practice, [they] purchased a product and did not receive the full value of [their] purchase." *Orlander v. Staples, Inc.*, 802 F.3d 289, 302 (2d Cir. 2015).

Conduct is materially misleading only if it would mislead "a reasonable consumer acting reasonably under the circumstances." *Bowring,* 234 F. Supp. 3d at 390 (quoting *Orlander*, 802 F.3d at 300). "[I]n determining whether a reasonable consumer would have been misled by a particular advertisement, context is crucial." *Fink v. Time Warner Cable*, 714 F.3d 739, 742 (2d Cir. 2013) (per curiam). "If a plaintiff alleges that an element of a product's label is misleading, but another portion of the label would dispel the confusion, the court should ask whether the misleading element is ambiguous. If so, the clarification can defeat the claim." *Davis v. Hain Celestial Grp., Inc.*, 297 F. Supp. 3d 327, 334 (E.D.N.Y. 2018) (citation omitted). "This is because reasonable consumers understand that, with vague product descriptions, the devil is in the details." *Davis,* 297 F. Supp. 3d at 334.

"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*, 714 F.3d at 741; *see also, e.g., Steele*,

2020 WL 3975461 (dismissing case substantially identical to this one, alleging misleading "vanilla" flavor designator on ice cream); *Pichardo*, 2020 WL 6323775 (granting motion to dismiss substantially identical claims involving vanilla-flavored protein drink); *Sibrian v. Cento Fine Foods, Inc.*, 2020 WL 3618953 (E.D.N.Y. July 2, 2020) (dismissing a case alleging that "San Marzano" tomatoes did not comply with Italian designation-of-origin certifications because a reasonable consumer would not know the details of such certifications); *Sarr v. BEF Foods*, 2020 WL 729883 (E.D.N.Y. Feb. 13, 2020) (dismissing case against a food label because it would not communicate a misleading message to a reasonable consumer); *Campbell-Clark v. Blue Diamond Growers*, Case No. 1:18-cv-5577-WFK, ECF No. 24 (E.D.N.Y. Dec. 17, 2019) (dismissing allegations that packaging for "nut and rice" crackers implicitly overstated their nut content); *Reyes v. Crystal Farms Refrigerated Distrib.* 2019 WL 3409883, at *1-5 (E.D.N.Y. July 26, 2019) (dismissing implausible allegations that "made with real butter" on mashed potato product implied absence of margarine); *Solak v. Hain Celestial Grp., Inc.*, 2018 WL 1870474, at *1-11 (N.D.N.Y. Apr. 17, 2018) (name of "veggie straws" snacks and images of vegetables are truthful in that they imply the snacks are made from vegetables, and do not reasonably imply that the snacks contain fresh, whole, ripe vegetables); *Campbell v. Freshbev LLC*, 322 F. Supp. 3d 330, 341 (E.D.N.Y. 2018) (truthful claim that a juice is "cold-pressed" does not imply it is only cold-pressed).

1. Plaintiffs Fail To Plead A Plausible "Milk Chocolate" Claim.

Beyond being preempted, Plaintiffs fail to plausibly allege "a reasonable consumer acting reasonably under the circumstances" would be misled by the phrase "with milk chocolate" or "dipped in silky smooth Dove Milk Chocolate." FAC ¶¶ 141-42; *Bowring,* 234 F. Supp. 3d at 390 (quoting *Orlander*, 802 F.3d at 300). *First*, Dove Bars® unquestionably are dipped in, and made "with milk chocolate," the predominant ingredient in the coating. *See* 21 C.F.R. § 101.4(a)(1); FAC ¶¶ 3, 74; *see id.* ¶ 143 ("[T]he Products are dipped in a compound that *contains* milk chocolate."). That is fatal to Plaintiffs' claim, as it is not misleading to represent that Dove Bars® are made with, or dipped in, milk

chocolate when they in fact contain milk chocolate as the primary coating ingredient. *See Harris v. Mondelēz Global LLC*, No. 19-cv-2249, 2020 WL 4336390, at *3 (E.D.N.Y. July 28, 2020) ("[I]t is not misleading . . . to represent that its Oreos are made with 'real' cocoa when they in fact contain cocoa."); *Sarr*, 2020 WL 729883, at *3 (rejecting plaintiff's counsel's claim that "Real . . . Butter" can mislead consumers where the product contained real butter).

Second, Plaintiffs cannot plausibly claim consumers expect the coating for Dove Bars® to be made exclusively or "entirely [of] chocolate." *Id.* ¶ 148. "There is no 'only' or 'exclusively' modifier before" the words "milk chocolate." *Harris v. Mondelēz Global LLC*, 2020 WL 4336390, at *3 (E.D.N.Y. July 28, 2020) (quoting *Campbell v. Freshbev LLC*, 322 F. Supp. 3d 330, 341 (E.D.N.Y. 2018)). Nor does the term "with milk chocolate," or "dipped in silky smooth Dove Milk Chocolate" imply there are no other ingredients. FAC ¶¶ 141-42; s*ee Pichardo*, 2020 WL 6323775 at *5 ("Nor does the use of the term vanilla imply that there are no other flavoring ingredients."); *Harris*, 2020 WL 4336390, at *3 ("Reasonable consumers would not expect . . . that the [cocoa in Oreos] is present in a particular form or not mixed with other ingredients."); *Sarr*, 2020 WL 729883, at *4 (rejecting plaintiff's counsel's claim that reasonable consumer would interpret "real butter" to imply no additional fats); *Kennedy v. Mondelez Global LLC*, No. 19-CV-302, 2020 WL 4006197, at *13 (E.D.N.Y. 2020) (rejecting plaintiff's counsel's claim that "made with real honey" means honey was the exclusive sweetener). To be sure, it is implausible to believe Dove Bars® are born by simply dipping frozen ice cream into melted milk chocolate. A silky smooth coating must be stable, brittle when bitten, melt in the mouth, and resist viscosity changes, separation, and unintended cracking during production and shipping.

Finally, any potential confusion is easily dispelled by the ingredient list, which specifies each ingredient in the coating "in descending order of predominance." 21 C.F.R. § 101.4(a)(1). "[I]f a plaintiff alleges that an element of a product's label is misleading, but another portion of the label would dispel the confusion, . . . the clarification can defeat the claim." *Reyes*, 2019 WL 3409883, at *3

(quoting *Davis*, 297 F. Supp. 3d at 334); *see also Melendez v. ONE Brands, LLC*, 2020 WL 1283793, at *9 (E.D.N.Y. Mar. 16, 2020) (rejecting plaintiff's counsel's claims where "potential ambiguity created by the front label regarding the bars' carbohydrate and caloric contents is readily clarified by the back panel of the bars' packaging"); *Fink*, 714 F.3d at 741 ("The presence of a disclaimer or similar clarifying language may defeat a claim of deception.").

2. Plaintiffs Fail To Plead A Plausible "Vanilla" Claim.

Plaintiffs fail to plausibly allege that "a reasonable consumer acting reasonably under the circumstances" would be misled by the phrase "vanilla ice cream." *Bowring,* 234 F. Supp. 3d at 390 (quoting *Orlander*, 802 F.3d at 300). There are over 1,000 different flavors of ice cream. "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." *Steele*, 2020 WL 3975461, at *2. The flavor type, "vanilla," "is of immediate use." *Id.* To assist with that selection, the label for Dove Bars® uses the term "vanilla ice cream" FAC ¶ 2. The labels allow consumers to select a product made with the ice cream flavor of their choice. *See id.*; *see also Pichardo*, 2020 WL 6323775 at *5 ("[R]easonable consumers associate the word 'vanilla' with a flavor, not with an ingredient.").

Nowhere on Dove Bars®' packaging does Mars say the bars are made with, predominantly made with, or even partially made with vanilla beans, vanilla extract, or vanilla flavoring from a specific or exclusive source. *See* FAC ¶¶ 2-3; *Pichardo*, 2020 WL 6323775 at *5 (The term vanilla does not "imply that there are no other flavoring ingredients."); *see id.* (dismissing identical claims where label did not say anything to imply the vanilla came exclusively from vanilla extract). Further, the packaging does not feature images of vanilla beans, specs of vanilla beans, or the "tropical orchid of the genus Vanilla (*V. planifolia*)." FAC ¶¶ 2-3, 24. Nor do Plaintiffs allege Mars advertises Dove Bars® as having premium or super premium ice cream. Mars does not promise its Dove Bars® are made without

artificial flavors, or promise an "all-natural" frozen treat.[8]

If anything, Dove Bars®' messaging and imagery focus on "silky smooth Dove®" chocolate. *See* FAC ¶¶ 2-3. The packaging discloses that the bars contain "vanilla ice cream" and invites consumers to "[t]ake a moment to enjoy the rich flavor of vanilla ice cream dipped in silky smooth Dove®" chocolate. *Id.* ¶ 3. "An experience like no other.®" *Id.* "That is where the container's disclosures start, and where they stop. Where is the deception? What is misleading, or misrepresented?" *Steele*, 2020 WL 3975461, at *2.

Plaintiffs do not question the taste of the vanilla ice cream. *See Pichardo*, 2020 WL 6323775 at *5 ("When consumers read vanilla on a product label, they understand it to mean the product has a certain taste."). They do not dispute that it contains vanilla extract. They do not claim vanilla derived from vanilla extract is healthier or materially different from other vanilla flavorings. *See id.* at *5-6 ("Amount of Vanilla Extract is Not Material"). Plaintiffs further admit that "only 1-2% of vanillin [(vanilla flavor)] in commercial use is vanillin obtained from the vanilla plant, which means that almost all vanillin has no connection to the vanilla bean." FAC ¶ 35. "[T]he grocery store shelves are stocked with many vanilla-flavored beverages that sell just fine." *Pichardo*, 2020 WL 6323775 at *6. Yet, they implausibly claim that consumers take it for granted that vanilla ice cream is derived 100% or exclusively from vanilla beans—the sapid and odorous principles extractable from the fruit pods of the tropical orchid of the genus Vanilla (*V. planifolia*). *See* FAC ¶¶ 24, 73, 75. That claim has now been repeatedly rejected. *See Pichardo*, 2020 WL 6323775 at **3-6; *Steele*, 2020 WL 3975461, at *2-3.

The absurdity of Plaintiffs' assumptions about consumer behavior become even more evident

[8] Plaintiffs claim—without providing non-conclusory factual allegations—presupposes consumers' purchasing decisions are driven not by their desire for ice cream enrobed in a chocolate shell, but instead by their desire for vanilla ingredients sourced exclusively from the "tropical orchid of the genus Vanilla (*V. planifolia*)." FAC ¶ 24. That is absurd. Dove Bars® contain no less than 25 ingredients and two additional categories of ingredients. FAC ¶ 143. If one were to buy Plaintiffs' testing (which one cannot), the vanilla flavoring ingredients combine for a total of .0014% of just the ice cream component of Dove Bars®. FAC ¶¶ 105, 108, 113.

when placed in context. *See Fink*, 714 F.3d at 742 ("[C]ontext is crucial."). The FDA has approved and regulates a vast number of natural and artificial flavors. Natural flavors broadly include all "essential oil, oleoresin, essence or extractive, protein hydrolysate, distillate, or any product of roasting, heating or enzymolysis, which contains the flavoring constituents derived from a spice, fruit or fruit juice, vegetable or vegetable juice, edible yeast, herb, bark, bud, root, leaf or similar plant material, meat, seafood, poultry, eggs, dairy products, or fermentation products thereof." 21 C.F.R. § 101.22(a)(3). Artificial flavorings, in turn, include any substance—more than 730 of them—not so derived so long as they function to impart flavor. *See id.* §§ 101.22(a)(1), 172.515(b), 182.60.

Among the hundreds of FDA-approved flavors, Plaintiffs focus on vanilla extract and "vanilla flavoring." FAC ¶ 76. Plaintiffs allege that unlike all other flavors, "[v]anilla is the only flavor that has a standard of identity." *Id.* ¶ 37. Of course Mars does not sell bottles of vanilla extract or vanilla flavor. *See* 21 C.F.R. §§ 169.175(b)(1), 169.177(b). So, Plaintiffs resort to the complex labeling regime for vanilla ice cream. FAC ¶ 66. Plaintiffs devote over 50 paragraphs to describing the scheme (and end up getting it wrong). *See id.* ¶¶ 24-73, 75-91; *see also supra* Section II.

Plaintiffs allege that this labeling regime involves a unique distinction between natural and artificial flavors. FAC ¶¶ 70. They allege that ice cream regulations do not use the standard FDA definitions of "natural" and "artificial" flavors—the definitions applicable to every food sold in the United States that has added flavoring except ice cream. *See* 21 C.F.R. § 101.22(a)(3) (defining "natural flavor"); 21 C.F.R. § 101.22(a)(1) (defining "artificial flavor"). To the contrary, Plaintiffs concede their claims do not turn on whether vanilla flavoring are naturally derived and from natural sources, and thus satisfy the FDA definition of natural flavor. FAC ¶¶ 70-71; 21 C.F.R. § 101.22(a)(3). Nor can they plausibly claim consumers of Dove Bars® are averse to purchasing artificially flavored foods. Mars expressly discloses Dove Bars® include artificial flavors (in the chocolate coating). FAC ¶ 3.

Rather, Plaintiffs read FDCA ice cream regulations as requiring products labeled as "vanilla

ice cream" to be flavored exclusively from vanilla beans. FAC ¶¶ 73, 75, 79, 117, 200. They claim there are only two acceptable flavor ingredients for vanilla ice cream: (1) "vanilla extract"—"[T]he solution in aqueous ethyl alcohol of the sapid and odorous principles extractable from vanilla beans [so long as] the content of ethyl alcohol is not less than 35 percent by volume and the content of vanilla constituent . . . is not less than one unit per gallon;" or (2) "vanilla flavoring"—flavoring that "conforms to the definition and standard of identity . . . for vanilla extract . . ., except that its content of ethyl alcohol is less than 35 percent by volume." 21 C.F.R. §§ 169.175, 169.177(a); FAC ¶¶ 76-77.

Plaintiffs' theory of liability is absolute. It does not matter whether ingredients impart the same taste or have the same nutritive value. *See, e.g.,* FAC ¶ 50 (acknowledging vanilla flavors "match[] the taste of pure vanilla extracts."). They allege the term "vanilla ice cream" becomes misleading if *any* ingredient is added that "simulate[s], resemble[s], reinforce[s], extend[s] . . . enhance[s]" or imparts vanilla flavor, even if the ingredient serves another function such as adding sweetness or enhancing the sensation of creaminess. FAC ¶¶ 73. Their view is so extreme that the alleged presence of 0.0000092% Maltol—a "flavor enhancer" that does not contribute a flavor of its own but "increases sweetness and enhances the sensation of creaminess"—allegedly renders Dove Bars®' packaging deceptive in the eyes of consumers. FAC ¶ 110.

Plaintiffs' theory depends not only on such extreme views and the implausible allegation that reasonable consumers understand and have internalized the complex labeling regime for vanilla ice cream, but also that consumers distinguish, and find material the difference between products labeled as "vanilla ice cream," "vanilla flavored ice cream," and ice cream made with "vanilla flavoring." *See* Sibrian, 2020 WL 3618953, at *4 (rejecting as strained plaintiff's counsel's claim that consumers are familiar with certification standards for San Marzano tomatoes).

For example, Plaintiffs claim it is misleading for Mars to label its product as "vanilla ice cream." FAC ¶ 73, 75, 117. Yet, it is perfectly appropriate for Mars to use the terms "vanilla flavored" and

"vanilla flavored ice cream." FAC ¶ 52. It is also, according to Plaintiffs, perfectly appropriate for manufacturers to label their product as "vanilla ice cream" so long as it is made with "vanilla flavoring." FAC ¶ 76. They assume consumers not only can tell the difference among these descriptions, but rely on them when choosing their favorite frozen treats.

Beyond Plaintiffs' failure to plead plausible consumer deception, their claims independently fail because their assertion that Dove Bars® contain non-vanilla flavor is not supported by plausible allegations. In Plaintiffs' 36-page FAC, they make only two such allegations, both of which have been rejected by federal courts. *First*, Plaintiffs allege that because the ingredient list identifies "natural flavor" in the "ice cream," *see* FAC ¶ 74, it is *prima facie* evidence that the ice cream is flavored with non-vanilla flavors, *see* FAC ¶ 75. That claim misreads the ice cream regulations and "misstates the law with respect to the listing of 'natural flavors' on an ingredients list." *Zaback*, 2020 WL 3414656, at *3.

Second, Plaintiffs obtained a gas chromatography-mass spectrometry ("GC-MS") analysis on a finished M&M's® Bar. As Judge Stanton in the Southern District of New York explained when he considered and rejected identical GC-MS testing in vanilla case brought by Plaintiffs' attorneys: what the test results indicate with regard to the presence of vanilla extract is "left to speculation." *Steele,* 2020 WL 3975461, at *3. Judge Stanton found that the conclusions Plaintiffs attempt to draw from his testing is not "self-evident." *Id.* "The fact that the analysis disclosed only the vanillin may simply show that the test was not sensitive enough to detect the markers with smaller profiles in the bean." *Id.* "What is needed," he explained, "is to test, not for the universe of the ice cream's contents, but specifically for the presence of the particular chemical markers." *Id.* Judge Stanton thus concluded that "the test performed under plaintiffs' instructions . . . is inapplicable to this action" and dismissed the complaint. *Id.* This Court should do the same.

B. Plaintiffs' Express Warranty Claim Fails.

To plead a breach of express warranty, Plaintiffs "must within a reasonable time after [they]

discover[] or should have discovered any breach notify the seller of breach or be barred from any remedy." N.Y. U.C.C. Law § 2-607(3)(a); *In re Frito-Lay N. Am., Inc. All Nat. Litig.*, 2013 WL 4647512, at *27 (E.D.N.Y. Aug. 29, 2013) (express warranty claims "under New York law must be dismissed because the plaintiffs did not provide notice to the defendants prior to commencing the litigation.").

Plaintiffs allege they purchased Dove Bars® "[d]uring the discovery period." FAC ¶ 167. Yet Plaintiffs never notified Mars of their claim prior to filing this lawsuit. Instead, Plaintiffs offer a single, deficient allegation: "Plaintiffs' [sic] provided *or will provide notice* to defendant and/or its agents, representatives, retailers and their employees." FAC ¶ 195 (emphasis added). That conclusory statement does not suffice. *See Twombly*, 550 U.S. at 555; *see also Colella v. Atkins Nutritionals, Inc.*, 348 F. Supp. 3d 120, 144 (E.D.N.Y. 2018) ("The Amended Complaint makes no allegations and states no facts showing that notice was provided to defendant."); *Quinn v. Walgreen Co.*, 958 F. Supp. 2d 533, 544 (S.D.N.Y. 2013) (dismissing warranty claims for failure to allege notice).

C. Plaintiffs' MMWA Claim Fails.

Plaintiffs claim that Mars issued written warranties by virtue of the "vanilla ice cream" label on Dove Bars®' packaging,[9] FAC ¶ 192, and that Mars breached those warranties because the ice cream was not flavored exclusively with vanilla derived from vanilla beans, *see id.* ¶¶ 190-97. Plaintiffs thus bring claims under the Magnuson Moss Warranty Act ("MMWA"). These claims should be dismissed for two independent reasons.

First, the "vanilla ice cream" label to which Plaintiffs direct the Court do not comprise a written warranty covered by the MMWA. Section 2301(b) of the MMWA provides that written warranties falling within the scope of the Act come in two forms: (1) a written promise to "refund, repair, replace, or take other remedial action," or (2) a "written affirmation of fact." 15 U.S.C. § 2301(6). But, "[n]ot

[9] Though not expressly pled in their complaint, we assume that Plaintiffs' invocation of the MMWA suggests that they believe the "vanilla" and "milk chocolate" statements comprise written warranties under 15 U.S.C. § 2301(6).

every affirmation of fact made by a manufacturer creates a warranty." *Schechner v. Whirlpool Corp.*, 237 F. Supp. 3d 601, 615 (E.D. Mich. 2017). Two requirements must be met: (1) the statement must "relate[] to the nature of the material or workmanship" and (2) the statement must "affirm[] or promise[] that such material or workmanship is defect free; or will meet a specified level of performance over a specified period of time." 15 U.S.C. § 2301(6).

The MMWA therefore defines "written warranty" narrowly, and "[c]ourts have declined to extend the term . . . beyond its statutory definition." *In re ConAgra Foods*, 908 F. Supp. 2d 1090, 1102 (C.D. Cal. 2012). Notably, a "mere 'product description' . . . does not affirmatively promise defect-free performance and it therefore falls outside MMWA's definition." *Schechner*, 237 F. Supp. 3d at 615 (citing *Bowling v. Johnson & Johnson*, 65 F. Supp. 3d 371, 378 (S.D.N.Y. 2014)). Further, "Courts have consistently held that products must explicitly specify a period of time in order to fall under the MMWA's ambit." *Dayan v. Swiss-Am. Prod., Inc.*, 2017 WL 9485702, at *11 (E.D.N.Y. Jan. 3, 2017), *report and recommendation adopted*, 2017 WL 1214485 (E.D.N.Y. Mar. 31, 2017).

Here, Plaintiffs challenge the label "vanilla iced cream" on Dove Bars®' packaging because they alleges Mars "warranted to plaintiffs the Products contained only the characterizing ingredients to impart flavor to the ice cream and outer coating portion, and that they were present in amounts sufficient to independently characterize the food." FAC ¶ 192. But "vanilla" is merely a product description, and contains no temporal element. It is well settled law that such product descriptions, akin to "all natural," "do not constitute warranties" under the MMWA. *Jones v. ConAgra Foods, Inc.*, 912 F. Supp. 2d 889, 903-904 (N.D. Cal. 2012); *see also, e.g., Anderson v. Jamba Juice Co.*, 888 F. Supp. 2d 1000, 1004 (N.D. Cal. 2012) ("District Courts have held consistently that labeling a product "All Natural" is not a "written warranty" under the MMWA."); *Kao v. Abbott Labs. Inc.*, 2017 WL 5257041, at *10 (N.D. Cal. Nov. 13, 2017) ("Plaintiffs do not, and cannot, allege that the Non-GMO labeling is a warranty that the product is 'defect-free,'"); *Bowling*, 65 F. Supp. 3d at 378 (label stating that

toothpaste "Restores Enamel" not a warranty under the MMWA because it does not state that it works over specified period of time); *In re Frito-Lay*, 2013 WL 4647512, at *17 (no claim under the MMWA because "All Natural" does not "constitute a promise that the product 'will meet a specified level of performance'"). To accept any argument to the contrary "would be to transform most, if not all, product descriptions into warranties against a defect." *Littlehale v. Hain Celestial Grp., Inc.*, 2012 WL 5458400, at *1 (N.D. Cal. July 2, 2012).

Second, Plaintiffs' MMWA claims are barred by 15 U.S.C. § 2311(d). That section makes clear that the MMWA is "inapplicable to any written warranty the making or content of which is otherwise governed by Federal law." 15 U.S.C. § 2311(d). Courts considering § 2311(d) have agreed that an "MMWA claim founded on the labels of products governed by the FDCA" are "barred." *Dayan*, 2017 WL 9485702, at *12; *see also, e.g., Dopico v. IMS Trading Corp.*, 2018 WL 4489677, at *6 (D.N.J. Sept. 18, 2018) ("[T]he MMWA is inapplicable to any alleged express or implied warranty claims on the labeling of the dog treats."); *Jasper v. MusclePharm Corp.*, 2015 WL 2375945, at *5-6 (D. Colo. May 15, 2015) (MMWA claims barred where dietary supplement product labels containing allegedly misleading claims about the supplement's attributes or effects were governed by the FDCA); *Bates v. Gen. Nutrition Ctrs., Inc.*, 897 F. Supp. 2d 1000, 1002 (C.D. Cal. Oct. 12, 2012) ("Defendants are correct that the [MMWA] claim should be dismissed because the [FDCA] governs written warranties on the labeling of dietary supplements."). Here, the FDCA and associated FDA regulations govern the labelling of "vanilla ice cream" on Dove Bars®. Indeed, Plaintiffs concede as much: each of their allegations are predicated on alleged violations of FDA labeling regulations. *See* FAC. Plaintiffs' MMWA claim is therefore barred and must be dismissed.

D. Plaintiffs' Fraud Claim Fails.

Plaintiffs' fraud claims do not withstand scrutiny. "A practice may carry the capacity to mislead or deceive a reasonable person but not be fraudulent." *Gaidon v. Guardian Life Ins. Co. of Am.*, 725

N.E.2d 598, 606 (N.Y 1999). To state a fraud claim Plaintiffs "must allege facts that give rise to a strong inference of fraudulent intent." *Acito v. IMCERA Grp.*, 47 F.3d 47, 52 (2d Cir. 1995); *Wexner v. First Manhattan Co.*, 902 F.2d 169, 172 (2d Cir. 1990). "The requisite 'strong inference' of fraud may be established either (a) by alleging facts to show that defendants had both motive and opportunity to commit fraud, or (b) by alleging facts that constitute strong circumstantial evidence of conscious misbehavior or recklessness." *Lerner v. Fleet Bank, N.A.*, 459 F.3d 273, 290-91 (2d Cir. 2006) (quoting *Shields v. Citytrust Bancorp, Inc.*, 25 F.3d 1124, 1128 (2d Cir. 1994)).

Here, Plaintiffs do not ascribe to Mars any particular motive for fraud beyond a general profit motive common to all corporations. This does not suffice. Plaintiffs make the conclusory claim that Mars's "fraudulent intent is evinced by its failure to accurately identify the Product on the front labels, when it knew its statements were neither true nor accurate and could mislead consumers." FAC ¶ 201. But, as a matter of law, Plaintiffs' conclusory allegation of a "generalized motive to satisfy consumers' desires, [or to] increase sales and profits, 'does not support a strong inference of fraudulent intent.'" *In re Frito–Lay*, 2013 WL 4647512, at *25 (quoting *Chill v. GE*, 101 F.3d 263, 268 (2d Cir. 1996)); *see also Quiroz v. Beaverton Foods, Inc.*, 2019 WL 1473088, at *11 (E.D.N.Y. Mar. 31, 2019) ("simple knowledge that the Product's label is false and a generalized motive to increase sales of the Product" is insufficient); *In re Lyman Good Dietary Supplements Litig.*, 2018 WL 3733949, at *4 (S.D.N.Y. Aug. 6, 2018) (allegations relate only to generalized motives to earn profits and, therefore, are insufficient to state a claim for fraud); *Dash v. Seagate Tech. Holdings*, 2015 WL 1537543, at *2 (E.D.N.Y. Apr. 1, 2015) (dismissing fraud claim because "a generalized motive to . . . increase sales and profits, does not support a strong inference of fraudulent intent"); *Brookdale Univ. Hosp. v. Health Ins. Plan of Greater N.Y.*, 2009 WL 928718, at *6 (E.D.N.Y. Mar. 31, 2009) (collecting cases).

E. Plaintiffs' Unjust Enrichment Claim Fails.

"An unjust enrichment claim is not available where it simply duplicates, or replaces, a

conventional contract or tort claim." *Corsello v. Verizon N.Y., Inc.*, 967 N.E.2d 1177, 1185 (N.Y. 2012). Rather, "[i]t is available only in unusual situations when, though the defendant has not breached a contract nor committed a recognized tort, circumstances create an equitable obligation running from the defendant to the plaintiff." *Id.* "Typical cases are those in which the defendant, though guilty of no wrongdoing, has received money to which he or she is not entitled." *Eidelman v. Sun Prods. Corp.*, 2017 WL 4277187, at *6 (S.D.N.Y. Sept. 25, 2017).

Here, Plaintiffs allege Mars is guilty of wrongdoing—the same wrongdoing that underlies their other claims. "Although a plaintiff may plead unjust enrichment in the alternative to his other claims, the unjust enrichment claim will not survive a motion to dismiss where plaintiff fails to explain how it is not merely duplicative of his other causes of action." *Tyman v. Pfizer, Inc.*, 2017 WL 6988936, at *20 (S.D.N.Y. Dec. 27, 2017) (internal quotation marks and alterations omitted) (quoting *Cont'l Indus. Grp. v. Altunkilic*, 2017 WL 2895933, at *14 (S.D.N.Y. July 7, 2017)); *Alce v. Wise Foods, Inc.*, 2018 WL 1737750, at *11 (S.D.N.Y. Mar. 27, 2018); *Hughes v. Ester C Co.*, 330 F. Supp. 3d 862, 877 (E.D.N.Y. 2018); *Stoltz*, 2015 WL 5579872, at *27; *Cont'l Indus. Grp.*, 2017 WL 2895933, at *14; *Bautista v. CytoSport, Inc.*, 223 F. Supp. 3d 182, 194 (S.D.N.Y. 2016) ("Courts will routinely dismiss an unjust enrichment claim that simply duplicates, or replaces, a conventional contract or tort claim."). Because Plaintiffs fail to distinguish this claim from their other claims, it should be dismissed.

V. Plaintiffs Lacks Standing to Seek Injunctive Relief.

Plaintiffs lack standing to seek injunctive relief, both individually and on behalf of the putative class. "For each form of relief sought, a plaintiff 'must demonstrate standing separately.'" *Nicosia v. Amazon.com, Inc.*, 834 F.3d 220, 239 (2d Cir. 2016) (quoting *Friends of the Earth, Inc. v. Laidlaw Envt'l Servs.*, 528 U.S. 167, 185 (2000)). Plaintiffs must show a threat of future injury that is "actual or imminent, not 'conjectural' or 'hypothetical.'" *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)). In other words, the alleged injury "must be

'concrete and particularized.'" *Knife Rights, Inc. v. Vance*, 802 F.3d 377, 383 (2d Cir. 2015) (quoting *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014)). Moreover, plaintiffs "cannot rely on past injury to satisfy the injury requirement but must show a likelihood that [he] . . . will be injured in the future." *Shain v. Ellison*, 356 F.3d 211, 215 (2d Cir. 2004) (second alteration in original) (quoting *Deshawn E. ex rel. Charlotte E. v. Safir*, 156 F.3d 340, 344 (2d Cir. 1998)).

Plaintiffs cannot seek a preliminary or permanent injunction requiring Mars to modify the packaging or label of Dove Bars®, as they have not alleged a likelihood of future harm. Plaintiffs admit they are now aware of the alleged misrepresentations. FAC ¶¶ 153, 168. As the Second Circuit recently held: "past purchasers of a product . . . are not likely to encounter future harm of the kind that makes injunctive relief appropriate." *Berni v. Barilla S.p.A.*, 964 F.3d 141,147, at *5 (2d Cir. 2020). The Court reasoned that "they will not again be under the illusion" of the alleged deception. Rather, they will purchase the product "with exactly the level of information that they claim they were owed from the beginning." *Id.* at 148. Therefore, injunctive relief will not "improve their position as knowledgeable consumers." *Id.*

Likewise, courts in the Second Circuit have overwhelmingly found that plaintiffs lack standing for injunctive relief when they allege they would not have purchased the product but for the alleged deceptive practice, as Plaintiffs do here. *See* FAC ¶ 153; *see also Davis v. Hain Celestial Grp.*, 297 F. Supp. 3d 327, 339 (E.D.N.Y. 2018) ("To the extent that plaintiff was deceived by defendants' products, he is now aware of the truth and will not be harmed again in the same way."); *Casey v. Odwalla, Inc.*, 338 F. Supp. 3d 284, 291–92 (S.D.N.Y. 2018) (same); *Atik v. Welch Foods, Inc.,* 2016 WL 5678474, at *1, 4, 5, 6 (E.D.N.Y. Sep. 30, 2016) (plaintiffs did not have standing to seek injunctive relief, even though they would resume their purchases if they knew the advertising was truthful).

CONCLUSION

For the foregoing reasons, the Court should dismiss Plaintiffs' claims with prejudice.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I, John Turquet Bravard, hereby certify that a true and correct copy of this document was served via email to Counsel on the service list below, who agreed to accept service through electronic means, on November 13, 2020.

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