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.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF OF DEFENDANT-APPELLEE THE KELLOGG COMPANY

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned counsel of record for Defendant-Appellee The Kellogg Company hereby certifies that there is no parent corporation for The Kellogg Company and no publicly-held corporation owns 10% or more of its stock.

Dated: December 20, 2017

By: */s/ Dean N. Panos*

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1. Did the District Court properly dismiss Plaintiffs-Appellants' lawsuit alleging they were misled about the amount of whole grain contained in Cheez-It crackers, where the front of the packaging as well as the Nutrition Facts panel disclosed the precise amount of whole grain per serving?

INTRODUCTION

The Kellogg Company makes the well-known brand of Cheez-It crackers that are sold in a wide variety of flavors and ingredients, including one that contains whole wheat flour. That particular version includes the statement "MADE WITH WHOLE GRAIN" or "WHOLE GRAIN" on the front panel of the packaging. Below that, in bold, high-contrast font, is the statement "MADE WITH 8g OF WHOLE GRAIN PER SERVING" or "MADE WITH 5g OF WHOLE GRAIN PER SERVING," depending on the time period during which the product was sold. Further, the Nutrition Facts panel states that a serving size is 29 grams (or 26 crackers), and the ingredient list discloses that these Cheez-It crackers contain other ingredients, including enriched flour.

Despite these prominent and accurate disclosures on the packaging that comply with FDA regulations, Plaintiffs-Appellants filed this putative class action lawsuit alleging that they were duped into believing that Cheez-It crackers were "predominantly whole grain." In advancing this theory of deception under New York and California consumer protection statutes, they myopically fixated on a single phrase ("Made with Whole Grain" or "Whole Grain") to jump to that conclusion, and ignored the rest of the statements on the packaging that would have dispelled such an erroneous assumption.

The District Court correctly dismissed the complaint, ruling that a reasonable consumer would not be misled by the Cheez-It packaging. It relied on well-established Second Circuit (and Ninth Circuit) precedent that directs courts to review the entire packaging or advertisement "as a whole" and the challenged language in

"context" with other statements in determining whether it is false or misleading. In light of the multiple disclosures about the precise amount of whole grain per serving on the front of the packaging as well as on the Nutrition Facts panel and ingredient list, the District Court ruled that a reasonable consumer would understand that Cheez-It crackers are made with whole grains but also include other ingredients, too. As the District Court put it, the front of the box "truthfully states that the Crackers are made with whole grain, and specifies the exact amount of whole grain per serving." A051-52.

The District Court's ruling follows a long line of analogous decisions in which federal courts have repeatedly dismissed similar "Made with . . ." claims on the ground that they merely indicate that the product contains a particular ingredient or nutrient. This Court should affirm the District Court's well-reasoned opinion.

STATEMENT OF THE CASE

I. The Packaging of Cheez-It Crackers Accurately States That They Contain Whole Grains and Specifies the Amount of Grains Per Serving.

In their putative class action complaint, Plaintiffs-Appellants allege that they bought Cheez-It crackers that included either the phrase "MADE WITH WHOLE GRAIN" or "WHOLE GRAIN." A019 at ¶ 50; A042; A045 (showing images of different Cheez-It packaging used during the putative class period). Below that is a banner stating "MADE WITH 8g OF WHOLE GRAIN PER SERVING" (or, for packaging sold before 2016, "MADE WITH 5g OF WHOLE GRAIN PER SERVING"). *Id.*

A042; *see also* A045, A019.

The Nutrition Facts panel reiterates that a serving size is 29 grams (or 26 crackers) and underscores that the crackers contain ingredients other than just whole grain, including enriched flour, which is the predominant ingredient by weight. *Id.*

II. Plaintiffs-Appellants Challenge the "Made with Whole Grain" or "Whole Grain" Label Because the Crackers Also Contain Enriched Flour.

Notwithstanding the multiple, prominent disclosures on the Cheez-It box, Plaintiffs-Appellants allege that the product packaging deceived them into believing the crackers were "predominantly whole grain." *See* A021 at ¶¶ 56-61. They filed this putative class action lawsuit against Kellogg on May 19, 2016, asserting claims for unjust enrichment / breach of quasi-contract under Michigan law; violations of New York's Consumer Protection from Deceptive Acts and Practices Act (N.Y. GEN. BUS. LAW §§ 349, 350); and violations of California's Unfair Competition Law (CAL. BUS. & PROF. CODE § 17200), False Advertising Law (CAL. BUS. & PROF. CODE § 17500), and Consumer Legal Remedies Act (CAL. CIV. CODE § 1750). A025-26 at ¶¶ 82-140. Plaintiffs-Appellants seek statutory, compensatory, and punitive damages on behalf of themselves and the putative class members. A035-36 (Prayer for Relief).

III. The District Court Granted Kellogg's Motion to Dismiss.

On May 31, 2017, the District Court dismissed Plaintiffs-Appellants' Complaint in its entirety. A044. Specifically, the District Court held that Plaintiffs-Appellants "fail[ed] to state a claim arising under either New York's or California's consumer protection laws" because "the phrases 'WHOLE GRAIN' and 'MADE WITH WHOLE GRAIN,' when considered in the entire context of the Crackers' packaging, would neither mislead nor deceive a reasonable consumer." A050.

As the District Court explained, this is not a situation in which the product packaging contains "affirmative misrepresentations [or] incorrectly suggest[s] that

the Crackers contain[] certain ingredients." A053. To the contrary, the Cheez-It box bears "factually accurate statements" regarding the product's ingredients and "conspicuously state[s] that the Crackers are made with either five (5) or eight (8) grams of whole grain per serving." A051. The District Court concluded that "a reasonable consumer would not be misled" because the box "truthfully states that the Crackers are made with whole grain, and specifies the exact amount of whole grain per serving." A051-52.

Having determined that the packaging of Cheez-It crackers is not deceptive as a matter of law, the District Court further held that Plaintiffs-Appellants were "unable to demonstrate that they have suffered an injury in fact" and thus lacked standing for injunctive relief. A060.[1]

Although the District Court granted Plaintiffs-Appellants leave to file an amended complaint, they declined to do so. A062. The District Court thus entered judgment for Kellogg on August 21, 2017. A068. This appeal followed. *See* A008 (Sept. 8, 2017) (Clerk of the District Court modifying interlocutory notice of appeal to notice of appeal).

SUMMARY OF THE ARGUMENT

This Court should affirm the District Court's opinion, which relies on well-settled Second Circuit precedent on false advertising claims.

[1] The District Court also dismissed Plaintiffs-Appellants' claim for unjust enrichment under Michigan law for lack of standing. *See* A054-59. Plaintiffs-Appellants abandoned the unjust enrichment claim by failing to raise it in their opening brief. *See generally* Pls' Op. Br.; *LoSacco v. City of Middletown*, 71 F.3d 88, 92 (2d Cir. 1995).

First, the District Court correctly ruled that the Cheez-It packaging would not likely deceive a reasonable consumer when the packaging is viewed "as a whole" and the challenged language in "context" with other statements, as required by case law in the Second Circuit and elsewhere. As the District Court explained, the front of the packaging discloses that the product has whole grains ("Made with Whole Grains" or "Whole Grains), and then further states in bold font the precise amount of whole grains per serving ("Made with 8g [or 5g] of Whole Grain"). Moreover, the Nutrition Facts panel and ingredient list further confirm that whole grain is one of the ingredients in Cheez-It crackers, but that there are other ingredients as well. There is nothing deceptive about these true statements that simply indicate what is in the crackers and in what quantity.

Second, even if this Court assumed for argument's sake that the meaning of the statement "Made with Whole Grains" or "Whole Grains" — when read in isolation — may be ambiguous, Plaintiffs-Appellants' claims would still fail. Federal courts have repeatedly held that an ambiguous statement is not actionable if other statements on the packaging clarify the ambiguity and dispel any such confusion. That is exactly the case here.

Third, the District Court correctly held that Plaintiffs-Appellants lack Article III standing to seek injunctive relief because they were not deceived and therefore did not suffer an injury in fact. It also cited cases stating that there is no standing for injunctive relief where there is no threat of future injury. As numerous federal courts in the Second Circuit have held, a plaintiff does not face any imminent future harm to warrant Article III standing for injunctive relief if he or she is not likely to

purchase the challenged product in the future. Plaintiffs-Appellants have made clear that they are unlikely to buy Cheez-It crackers in the future again, and therefore face no likelihood of future harm.

Finally, while the District Court did not address the issue in its order, this Court has the option of affirming dismissal of Plaintiffs-Appellants' complaint on preemption grounds. The whole grain statements on the front of the Cheez-It packaging are nutrient content claims that are permitted under the Nutrition Labeling and Education Act and its implementing regulations. A state law claim that tries to challenge statements expressly permitted by FDA regulations cannot stand under well-established preemption principles.

STANDARD OF REVIEW

This Court reviews *de novo* a district court's dismissal for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). *Pac. Inv. Mgmt. Co. LLC v. Mayer Brown LLP*, 603 F.3d 144, 150 (2d Cir. 2010). The *de novo* standard also applies to a dismissal for lack of standing pursuant to Federal Rule of Civil Procedure 12(b)(1) where, as here, "the district court based its decision solely on the allegations of the complaint and the undisputed facts evidenced in the record." *Doyle v. Mastercard Int'l Inc.*, 700 F. App'x 22, 24 (2d Cir. 2017) (citation omitted). Further, this Court "may affirm on any ground which finds support in the record, regardless of the ground upon which the trial court relied." *United States v. Watts*, 786 F.3d 152, 161 (2d Cir. 2015) (citation omitted).

ARGUMENT

I. The District Court Properly Held That Plaintiffs-Appellants Failed to State a Claim Under New York And California Law.

A. A district court properly dismisses a false advertising claim where it is unlikely that a significant portion of consumers would be misled by the challenged advertisement.

"To prevail on their consumer fraud claims under New York and California law, Plaintiffs must establish that [Kellogg's] allegedly deceptive advertisements were likely to mislead a reasonable consumer acting reasonably under the circumstances." *Fink v. Time Warner Co.*, 714 F.3d 739, 741 (2d Cir. 2013) (citing *Freeman v. Time, Inc.*, 68 F.3d 285, 289 (9th Cir. 1995) and *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A.*, 85 N.Y.2d 20, 26 (1995)).

The "reasonable consumer" test "requires more than a mere possibility that [the] label 'might conceivably be misunderstood by some few consumers viewing it in an unreasonable manner.'" *Ebner v. Fresh, Inc.*, 838 F.3d 958, 965 (9th Cir. 2016) (quoting *Lavie v. Procter & Gamble Co.*, 105 Cal. App. 4th 496, 508 (2003)). "Rather, the reasonable consumer standard requires a ***probability*** 'that a ***significant portion*** of the general consuming public or of targeted consumers, ***acting reasonably*** in the circumstances, could be misled.'" *Id.* (emphases added); *see also Zlotnick v. Premier Sales Grp., Inc.*, 480 F.3d 1281, 1284 (11th Cir. 2007) ("This [reasonable consumer] standard requires a showing of probable, not possible, deception.") (internal quotation marks and citation omitted); *Fermin v. Pfizer Inc.*, 215 F. Supp. 3d 209, 211 (E.D.N.Y. 2016) (same). Under this standard, a district court properly dismisses a false advertising claim at the pleading stage where it concludes that the

challenged advertisement would not mislead "a reasonable consumer acting reasonably under the circumstances." *Heskiaoff v. Sling Media, Inc.*, --- F. App'x ----, 2017 WL 5632078, at *2 (2d Cir. 2017).[2]

Plaintiffs-Appellants assert that the District Court erred here by conducting "its *own* review" of the challenged packaging and exercising its own "judgment" to conclude that, as a matter of law, a reasonable consumer would not be misled by the Cheez-It packaging at issue. Pls' Op. Br. at 15, 31 (emphasis in original). In essence, Plaintiffs-Appellants advance a sweeping rule that the "reasonable consumer" standard cannot be properly applied in "courtroom chambers" because, according to Plaintiffs-Appellants, "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." *Id.* at 27; *see also id.* at 12 (complaining that "the District Court substituted itself for the factfinder").

Plaintiffs-Appellants' far-reaching characterization of the law is simply wrong. District courts are routinely called upon to make similar determinations. For example, the U.S. Supreme Court has directed lower courts to apply the familiar *Iqbal/Twombly* plausibility test — "a context-specific task that requires the

[2] Plaintiffs mischaracterize *Williams v. Gerber Products Co.*, 552 F.3d 934 (9th Cir. 2008) in misstating the standard for dismissal of a false advertising claim. *See* Pls' Op. Br. at 14 (quoting *Williams*, 552 F.3d at 939). The *Williams* court merely stated that a motion to dismiss was properly granted in *Freeman v. Time* because, ***in that case***, "the advertisement itself made it impossible for the plaintiff to prove that a reasonable consumer was likely to be deceived." *Id.* It did not modify the reasonable consumer test by shifting the burden from the plaintiff (to show a likelihood of deception) to the defendant (to show impossibility of deception).

reviewing court to draw on its judicial experience and common sense" — to smoke out implausible cases at the pleading stage. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). Similarly, "the reasonable person standard is well ensconced in the law in a variety of legal contexts," *Freeman*, 68 F.3d at 289 (quoting *Haskell v. Time, Inc.*, 857 F. Supp. 1392, 1398 (E.D. Cal. 1994)), and "every day courts decide whether conduct is misleading," *Stiles v. Trader Joe's Co.*, No. 16-4318, 2017 WL 3084267, at *5 (C.D. Cal. Apr. 4, 2017) (quoting *Rojas v. Gen. Mills, Inc.*, No. 12-5099, 2013 WL 5568389, at *4 (N.D. Cal. Oct. 9, 2013)).

Indeed, the Second Circuit and the Ninth Circuit routinely affirm the dismissal of false advertising cases on the ground that a claim challenging an advertisement is not plausible or that the challenged advertisement is not likely to deceive a reasonable consumer. As this Court held in *Fink v. Time Warner*, 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." 714 F.3d at 741 (citing *Freeman*, 68 F.3d at 289 and *Oswego*, 85 N.Y.2d at 26). This makes sense: the "reasonable consumer" test is an objective standard, *Heskiaoff*, 2017 WL 5632078, at *2, and the "primary evidence in a consumer-fraud case arising out of allegedly false advertising is, of course, the advertising itself." *Fink*, 714 F.3d at 742; *accord Brockey v. Moore*, 107 Cal. App. 4th 86, 100 (2003).[3]

[3] Consistent with this Court's holding in *Fink*, the Ninth Circuit regularly affirms dismissals of false advertising claims at the pleading stage on the ground that the challenged advertisement is not likely to deceive a reasonable consumer. *See, e.g.*, *Davis v. HSBC Bank Nevada, N.A.*, 691 F.3d 1152, 1162 (9th Cir. 2012) (concluding that "the district court's dismissal of the false advertising claim was proper" because

B. The District Court properly concluded that the Cheez-it packaging would not mislead a reasonable consumer.

Plaintiffs-Appellants lodge several criticisms of the District Court's ruling that that the Cheez-It packaging would not mislead a reasonable consumer. All of them lack merit.

1. The District Court properly evaluated the packaging "as a whole."

Plaintiffs-Appellants pluck an isolated phrase — "MADE WITH WHOLE GRAIN" or "WHOLE GRAIN" — from the Cheez-It crackers packaging, and contend that the District Court "erred in concluding as a matter of law that it is not plausible for consumers" to be misled by these statements into believing that Cheez-It crackers "contain[] only or mostly whole grain." Pls' Op. Br. at 6, 13; *see also id.* at 25-26 (arguing the District Court erred by considering other statements on the packaging in concluding that a reasonable consumer would not be misled).

But Plaintiffs-Appellants' argument conflicts with Second Circuit and Ninth Circuit precedent that the reasonable consumer standard requires consideration of the challenged packaging "as a whole" and the challenged language in "context" with other statements. *See Freeman*, 68 F.3d at 290; *Fink*, 714 F.3d at 742; *see also Stewart v. Riviana Foods Inc.*, No. 16-6157, 2017 WL 4045952, at *9 (S.D.N.Y.

"Best Buy's advertising was not likely to deceive a reasonable consumer"); *Stuart v. Cadbury Adams USA, LLC*, 458 F. App'x 689, 691 (9th Cir. 2011) (affirming dismissal where "[o]nly an unreasonable consumer would be confused or deceived" by chewing gum label); *Girard v. Toyota Motor Sales, U.S.A., Inc.*, 316 F. App'x 561, 563 (9th Cir. 2008) ("The district court correctly determined that Girard's allegations failed to state [a UCL or CLRA] claim because a reasonable consumer would not be misled by Toyota's statements.").

Sept. 11, 2017) ("'The entire mosaic' is 'viewed rather than each tile separately.'") (quoting *Time Warner Cable, Inc. v. DIRECTV, Inc.*, No. 06-14245, 2007 WL 1138879, at *4 (S.D.N.Y. Apr. 16, 2007)).

As this Court has held, "in determining whether a reasonable consumer would have been misled by a particular advertisement, ***context is crucial***." *Fink*, 714 F.3d at 742 (emphasis added). "For example, under certain circumstances, the presence of a disclaimer or similar clarifying language may defeat a claim of deception." *Id.* (citing *Freeman*, 68 F.3d at 289-90). In other words, a party cannot fixate on a single word or phrase to claim deception, when the full context of the packaging or advertisement would clarify the meaning of that challenged word or phrase.

The *Freeman v. Time* decision is instructive. There, the plaintiff received a sweepstakes mailer that stated in large font that he had won a substantial monetary prize, but qualifying text in much smaller font said he would receive that prize only if his entry ended up being chosen. 68 F.3d at 287. The plaintiff argued that members of the public would be deceived by the mailer "since it is likely that the reader will review the large print and ignore the qualifying language in small print." *Id.* at 289. The Ninth Circuit found this argument unpersuasive, explaining that "any ambiguity" that a recipient "would read into any particular statement is dispelled by the promotion as a whole." *Id.* at 290. In short, "when read reasonably and in context, the promotion makes no such false representation." *Id.*

This Court engaged in a similar analysis in *Milich v. State Farm Fire & Casualty Co.*, 513 F. App'x 97 (2d Cir. 2013), where it affirmed the dismissal of a claim alleging that an insurance endorsement was misleading under General

Business Law § 349. *Id.* at *97-98. In concluding that the endorsement was not "'likely to mislead a reasonable consumer acting reasonably under the circumstances,'" the Court explained that a "policyholder who declines to read the readily accessible provisions referred to [in an endorsement] cannot claim to have been misled." *Id.* at *98-99 (quoting *Spagnola v. Chubb Corp.*, 574 F.3d 64, 74 (2d Cir. 2009)).[4]

Applying the guidance in *Fink* and *Freeman*, district courts in New York and California have dismissed false advertising lawsuits where the entire packaging or advertisement "as a whole" provided proper context to the challenged term. Two cases issued this year — *Bowring v. Sapporo U.S.A., Inc.* and *Goldman v. Bayer AG* — illustrate the contextual analysis that courts conduct in examining consumer product labels under the reasonable consumer test.

In *Bowring*, the plaintiff alleged that the label and advertising for Sapporo beer "created a misleading impression" that the beer "is a Japanese import, when in fact, it is produced in the United States and Canada." 234 F. Supp. 3d 386, 388

[4] *Accord Davis*, 691 F.3d at 1162 ("Given the advertisement's legible disclaimer that '[o]ther restrictions may apply,' no reasonable consumer could have believed that if an annual fee was not mentioned, it must not exist."); *Whiting v. AARP*, 637 F.3d 355, 364 (D.C. Cir. 2011) (affirming dismissal of plaintiff's claim because "the context refutes her proposed interpretation" of the challenged materials); *Girard*, 316 F. App'x at 563 ("Each of the two-page documents at issue includes numerous eligibility disclaimers and recommendations to seek professional tax advice, which put readers on notice of hybrid tax credit restrictions."); *Bober v. Glaxo Wellcome PLC*, 246 F.3d 934, 938, 940 (7th Cir. 2001) ("[T]o the extent that anyone could imply from the statements at issue that the drugs contain different medicine, information available to Zantac users, and in [plaintiff's] possession, would dispel any such implication.").

(E.D.N.Y. 2017). The plaintiff pointed to, *inter alia*, the slogans "Sapporo—the Original Japanese Beer" and "Japan's Oldest Brand," the image of the North Star on the beer label, and, for those beers produced in Canada and sold in the United States, the word "Imported" on the front label. *Id.* at 388-89. The court dismissed the complaint for failure to state a claim on the ground that, "[c]onsidering each allegedly misleading statement and Sapporo's marketing as a whole . . . the [d]efendant's conduct would not mislead a reasonable consumer." *Id.* at 391. Specifically, each can or bottle labeled "Imported" also included the language, "Imported by Sapporo U.S.A. Inc., New York, NY" followed by "Brewed and canned [or bottled] by Sapporo Brewing Company, Guelph, Ontario, Canada." *Id.* at 388-89; *see also id.* at 391 (rejecting plaintiff's arguments that the statements of origin should not be considered because "disclosure statements on the backs or sides of labels 'can[not] disclaim misrepresentations on the front'" and the text was in "very small font").[5]

In *Goldman*, the plaintiff alleged that the labeling of One A Day® VitaCraves® multivitamins was misleading because a consumer reviewing the "front" portion of the label would assume from the brand name ("One A Day") and the notation "70 Gummies" that the bottle contains 70 days' worth of vitamins when, in reality, it contains only 35 days' worth because a serving size is two "gummies"

[5] *See also Dumas v. Diageo PLC*, No. 15-1681, 2016 WL 1367511, at *2-3 (S.D. Cal. Apr. 6, 2016) (no reasonable consumer would be misled by the statements "Jamaican Style Lager" and "The Taste of Jamaica" into believing Red Stripe Beer was brewed in Jamaica where the bottom of the packaging states, "Brewed and bottled by Red Stripe Beer Company Latrobe, PA.").

No. 17-647, 2017 WL 3168525, at *1 (N.D. Cal. July 26, 2017). The court rejected the plaintiff's theory as implausible, pointing out that other portions of the label clearly disclosed that a "serving size" was "2 gummies" and that there were "35 servings" in the bottle, and included "directions" providing, "Fully chew two gummies daily." *Id.* at *4, 6, 7. As in *Bowring*, because this language was "not hidden," "not in 'tiny print,'" and did not "contradict" the language on the "front" portion of the label, it was properly considered in evaluating the label from the vantage of a reasonable consumer. *See id.* at *7 (dismissing claims asserted under California and New York consumer protection statutes).

The facts in this case are even more compelling than in *Bowring* or *Goldman* because the contextual disclosure ("Made with 8g of Whole Grain") is placed in bold font on the ***front*** of the Cheez-It box. As the District Court concluded, "the phrases 'WHOLE GRAIN' and 'MADE WITH WHOLE GRAIN,' when considered in the entire context of the Crackers' packaging, would neither mislead nor deceive a reasonable consumer." A050. As the Court emphasized, in addition to the challenged language, "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,'" providing "further context" for the statements on which Plaintiffs-Appellants focus. A051 (emphasis added). The District Court accordingly concluded that because "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." A051-52. The District Court's approach

complies with this Court's guidance that, in evaluating a labeling claim from the perspective of a reasonable consumer, "context is crucial." *Fink*, 714 F.3d at 742.

Plaintiffs-Appellants try to evade this overwhelming case law by invoking *Donaldson v. Read Magazine*, 333 U.S. 178 (1948) to argue that the reasonable consumer standard is one of "ordinary minds," not "exceptionally acute and sophisticated readers" or individuals with "sophisticated language skills or education." Pls' Op. Br. at 26. But Plaintiffs-Appellants' contention misses the mark. The District Court here did not rely on "small and inconspicuous" disclaimers buried in "long . . . form letters" that were a "model of obscurity" and understandable only through "'intensive and concentrated reading' and . . . close analysis." *Donaldson*, 333 U.S. at 186-88. Rather, the Court pointed to a simple and straightforward statement on the ***front*** of a cracker box declaring, "MADE WITH 8g OF WHOLE GRAIN PER SERVING." A051. As reflected above (*supra* p. 4), the statement is not "hidden or unreadably small," and there is no basis to assume that a reasonable consumer interested in whole grain content "[w]ould ignore it." *See Freeman*, 68 F.3d at 289-90.[6] Not only is the disclosure in a prominent place on

[6] *See also Nelson v. MillerCoors, LLC*, 246 F. Supp. 3d 666, 675 (E.D.N.Y. 2017) (holding that an "explicit disclaimer as to the [beer's] place of production" was sufficient to refute plaintiff's claim of deception because it was visible on the exterior packaging and not buried in "a long list of items"); *Gubula v. CVS Pharmacy, Inc.*, No. 14-9036, 2015 WL 3777627, at *6 (N.D. Ill. June 16, 2015) (rejecting Plaintiffs' contention that clarifying language should be disregarded because the allegedly misleading statement was "in larger text than the other words on the front label" when the other relevant language was "still clearly visible and prominently placed").

the front of the packaging, the language is sufficiently simple and clear that a reasonable consumer would obviously understand it.

Moreover, additional details about the whole grain content of the crackers are disclosed in the packaging's Nutrition Facts panel and ingredient list, which are "familiar and ubiquitous" features "found on most food packages." *Walker v. ConAgra Foods, Inc.*, No. 15-2424, 2016 WL 9087336, at *2 (N.D. Cal. Mar. 23, 2016) (quoting *Reid v. Johnson & Johnson*, 780 F.3d 952, 959 (9th Cir. 2015)); *see also Am. Meat Inst. v. U. S. Dep't of Agric.*, 760 F.3d 18, 31 (D.C. Cir. 2014) (noting that "nutrition labels" are "common and familiar to American consumers"). Reasonable consumers are well aware of the FDA-mandated Nutrition Facts panel and ingredient list included on every packaged food, and they understand that it provides information about the quantity of specific nutrients in the product and discloses the ingredients in a descending order of the amount of each ingredient contained in the product. *See id.*; *Workman v. Plum Inc.*, 141 F. Supp. 3d 1032, 1034 (N.D. Cal. 2015), *appeal dismissed* (Mar. 14, 2016) (explaining that the FDA requires products to "contain[] a 'Nutrition Facts' panel, listing all ingredients in descending order of predominance"); *Pillsbury Co. v. Upper Crust Production Co., Inc.*, No. 98-6114, 2004 WL 63980, at *1 n.1 (W.D.N.Y. Jan. 6, 2004) (same).

Contrary to Plaintiffs-Appellants' contention, *Williams v. Gerber* and *Ackerman v. Coca-Cola* do not undermine the District Court's analysis or preclude the consideration of contextual disclosures on product packaging. As the District Court explained, those cases involved ***affirmative misrepresentations*** on the front of the packaging, and the deciding courts merely made the unremarkable observation

that a company cannot rely on the "truth" found on the back or side panel of a package to correct false statements on the front panel. For example, in *Williams*, the plaintiffs alleged that the packaging of Gerber's Fruit Juice Snacks, a product for toddlers, was deceptive. 552 F.3d at 936. It was undisputed that the front of the package bore images of oranges, peaches, strawberries, and cherries, even though those fruits were ***not*** included in the product. *Id.* at 939. Gerber tried to defend itself by arguing that the ingredient list on the back of the packaging made clear that there were no oranges, peaches, strawberries, or cherries in the Fruit Juice Snacks. *See id.*

The *Williams* court held that the product's ingredient list could not be used as a "shield for liability" because a reasonable consumer is not "expected to look beyond misleading representations on the front of the box to discover the truth from the ingredient list in small print on the side of the box." *Id.* As the Ninth Circuit in a later decision explained, "*Williams* stands for the proposition that *if* the defendant commits an act of deception, the presence of fine print revealing the truth is insufficient to dispel that deception." *Ebner*, 838 F.3d at 966. In other words, "the [*Williams*] case 'merely bars a defendant from correcting an affirmative misrepresentation on the front packaging through a back of the box ingredient list.'" *Red v. Kraft Foods, Inc.*, No. 10-1028, 2012 WL 5504011, at *3 (C.D. Cal. Oct. 25, 2012); *see also Workman*, 141 F. Supp. 3d at 1036-37 (explaining that "*Williams*' applicability [i]s limited to affirmative misrepresentations").[7]

[7] Similarly, in *Ackerman v. Coca-Cola*, the court found that the statements on the front of the packaging of vitaminwater ("vitamins + water = all you need," "vitamins + water = what's in your hand," and "nutrient enhanced water beverage") were arguably affirmative misrepresentations because they suggested that vitaminwater

Here, however, as the District Court noted, "[u]nlike the products at issue in *Williams* and *Ackerman*, the Crackers' packaging . . . neither contained any affirmative misrepresentations nor incorrectly suggested that the Crackers contained certain ingredients." A053. Nor does the Cheez-It packaging require consumers to turn the box and review the back or side panel to learn that the crackers contain exactly "8g [or 5g] OF WHOLE GRAIN PER SERVING." *Supra* p. 4; *cf. In re Clorox Consumer Litig.*, 301 F.R.D. 436, 444 & n.4 (N.D. Cal. 2014) (discussing evidence reflecting that "the percentage of customers who read the back panel [of cat litter] is very low"). "To the contrary . . . the ***front*** of the Crackers' box contained factually truthful statements regarding the Crackers' ingredients ***and*** provided additional information regarding the exact amount of whole grain per serving." A053 (emphases added). In short, "unlike both *Williams* and *Ackerman*, . . . the front of the Crackers' box in this action only identified ingredients that were actually in the Crackers and provided an explicit, factually accurate statement regarding the amount of whole grain in each serving of the Crackers." A054.[8]

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was "composed solely of vitamins and water." No. 09-9385, 2010 WL 2925955, at *15 (E.D.N.Y. July 21, 2010); *see also Bowring*, 234 F.3d at 391 (distinguishing *Ackerman*). In reaching its conclusion, the district court also gave "substantial weight" to the FDA's issuance of "binding regulations" directing that "fortification of a food in a manner that is not consistent with FDA's fortification policy may be misleading because it may lead consumers to consume foods that contain sugar or other sources of calories, but lack any inherent nutrients other than those that have been added through fortification" — a factor that is absent here. *See Ackerman*, 2010 WL 2925955, at *15; *compare infra* pp. 34-35.

[8] Plaintiffs-Appellants also complain that the District Court erred by "requiring an affirmative misrepresentation" to state a claim. Pls' Op. Br. at 18-20. Plaintiffs are wrong. Contrary to Plaintiffs' mischaracterization, the District Court explicitly

2. In reviewing the packaging "as a whole," the District Court properly ruled it would not mislead a reasonable consumer.

a. Numerous courts have dismissed similar "made with . . ." claims, ruling that such statements are factually true.

Plaintiffs-Appellants contend that the Cheez-It packaging is misleading because its "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." Pls' Op. Br. at 21 (emphasis omitted).

But, as noted above, Plaintiffs-Appellants ignore Second and Ninth Circuit case law that requires courts to review the packaging "as a whole" and not fixate on a few words in isolation. *Supra* pp. 12-16. When viewed as a whole, the Cheez-It packaging — with its front-of-package disclosure about the precise amount of whole grain in each serving, Nutrition Facts panel, and ingredient list — makes clear that whole grains are not the only grain ingredient (or the predominant grain ingredient) in the product.

Taken to its logical conclusion, Plaintiffs-Appellants' argument would effectively bar a company from making a truthful statement about a specific ingredient or nutrient if that product also contains other ingredients because some

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recognized that "a representation need not be false to mislead a reasonable consumer." A051. The Court simply found that, notwithstanding that a technically true statement ***can*** mislead a reasonable consumer under certain circumstances, that is not the case here. Specifically, because "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." A051-52 (emphasis added).

consumer may subjectively misconstrue that true statement. That is why so many federal courts have rejected as implausible Plaintiffs-Appellants' argument that a reasonable consumer will see that a product is "made with" a particular ingredient, and then leap to the conclusion that the product contains a substantial quantity of that ingredient (or does not contain other ingredients). These courts have rejected that argument even where — unlike here — the front label does not disclose the specific amount of the ingredient the product is "made with."

For example, in *Romero v. Flowers Bakeries, LLC*, the plaintiff alleged that the labels for "Honey Wheat" and "Whitewheat" breads misleadingly suggested that "they contain a significant amount of whole wheat." No. 14-5189, 2016 WL 469370, at *6 (N.D. Cal. Feb. 8, 2016). The Court disagreed that the terms "wheat," "wholesome wheat," and "healthy grains," alongside "images of wheat stalks" would "lead a reasonable consumer to conclude that the breads 'contain a *significant amount* of whole wheat." *Id.* at *7 (emphasis in original). Rather, "it is more plausible that the packaging would lead a reasonable consumer to believe that the bread contains wheat and is enriched with added vitamins and minerals—all of which is true and uncontested." *Id.*

Numerous other courts have dismissed complaints at the pleading stage when confronted with similar "Made with . . ." allegations:

- In *Henderson v. Gruma Corp.*, the plaintiff alleged that a dip labeled "With Garden Vegetables" was misleading because it suggested there were more vegetables in the dip than there actually were. No. 10-4173, 2011 WL 1362188, at *12 (C.D. Cal. Apr. 11, 2011). The court dismissed the claim, explaining that the "labeling statement does not claim a specific amount of

vegetables in the product, but rather speaks to their presence in the product, which is not misleading." *Id.*

- Similarly, in *Red v. Kraft*, the plaintiffs claimed that the statement "Made with Real Vegetables" on the packaging of Vegetable Thins crackers was misleading because the crackers contained only small amounts of vegetables. *See* 2012 WL 5504011, at *3. The court dismissed the claim, stating it "strains credulity to imagine that a reasonable consumer will be deceived into thinking a box of crackers . . . contains huge amounts of vegetables simply because there are pictures of vegetables and the true phrase 'Made with Real Vegetables' on the box." *Id.* at *4.

- In *Manchouck v. Mondelez International Inc.*, the plaintiff challenged the term "made with Real Fruit" on Newtons cookies, complaining they contained only a "small amount of processed fruit puree." No. 13-2148, 2013 WL 5400285, at *2 (N.D. Cal. Sept. 26, 2013), *aff'd* 603 F. App'x 632 (9th Cir. 2015). The court dismissed the case because the "complaint does not dispute that the cookies contain real fruits." *Id.* at *3.

- In *Chuang v. Dr. Pepper Snapple Group, Inc.*, the plaintiff alleged that "images of certain fruits and vegetables on the packaging" and statements such as "made with real fruit and vegetable juice" and "100% of your daily value of Vitamin C" on the packaging of fruity snacks would mislead consumers "into thinking that the fruit snacks contain more fruit and vegetable content than they really do," when in reality they "contain[] far more sugar than fruit ingredients." No. 17-1875, 2017 WL 4286577, at *1-2, 4 (C.D. Cal. Sept. 20, 2017). The court dismissed the complaint because "the products do contain the fruits and vegetables depicted, are made with fruit and vegetable juice, and contain 100% of the daily value of Vitamin C." *Id.* at *4

- The plaintiff in *Workman v. Plum* alleged that images of healthy and expensive fruits (*e.g.*, pomegranate) on the packaging of baby food were misleading because they were not the most prominent ingredients in the

products but, rather, the products contained primarily inexpensive and less healthy ingredients (*e.g.*, banana puree). 141 F. Supp. 3d at 1034. The court dismissed the complaint, ruling there was no affirmative misrepresentation because the product in fact contained the pictured ingredients, and that "any potential ambiguity" regarding the quantity of specific ingredients "could be resolved by the back panel of the products, which listed all ingredients in order of predominance, as required by the FDA." *Id.* at 1035.

- In another case, a plaintiff challenged the name of a product, "apple Straws," on the ground that it was made primarily of potatoes. *Sensible Foods, LLC v. World Gourmet, Inc.*, No. 11-2819, 2012 WL 566304, at *6 (N.D. Cal. Feb. 21, 2012). The court dismissed the claim, holding that the product name was not deceptive because it did contain apples. *Id.*

- And in *McKinniss v. Sunny Delight Beverages Co.*, the plaintiff alleged that the label of Sunny Delight drinks misleadingly suggested they contained substantial amounts of fruit in light of their fruit names and images of fruits. No. 07-2034, 2007 WL 4766525, at *3 (C.D. Cal. Sept. 4, 2007). The court dismissed the complaint, ruling that "no reasonable consumer, upon review of the label as a whole . . . would conclude that Defendant's products contain significant quantities of fruit or fruit juice." *Id.* at *4. As the court explained, "[w]here a consumer can readily and accurately determine the composition and nutritional value of a product (here, by reading the front and back of the label), no reasonable consumer would be misled or deceived by depictions of fruit on the label." *Id.*

In short, it is not false or misleading to indicate by words or images that a product is made with a particular ingredient — such as fruit, vegetables, or whole grain — when the product does, in fact, contain that ingredient.

This conclusion is particularly true here, where the front of the packaging ***also*** indicates the precise ***amount*** of whole grain in the crackers. Even assuming a reasonable consumer reviewing the "MADE WITH WHOLE GRAIN" or "WHOLE GRAIN" language might interpret it as suggesting the crackers are made with predominantly or entirely whole grain, as Plaintiffs-Appellants contend, that assumption would be quickly dispelled by the announcement — on the ***same*** front panel containing the challenged language — that the crackers contain exactly "8g [or 5g] OF WHOLE GRAIN PER SERVING." A042; A045; *see also Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; Experimental Study on Consumer Responses to Whole Grain Labeling Statements on Food Packages*, 77 Fed. Reg. 11547-02, 11549 (Feb. 27, 2012) (FDA indicating that consumers are familiar "with measurements expressed in servings or grams"). None of Plaintiffs-Appellants' cited cases address a similar situation.[9]

[9] *Compare, e.g.*, *Atik v. Welch Foods, Inc.*, No. 15-5405, 2016 WL 5678474, at *2 (E.D.N.Y. Sept. 30, 2016) (Fruit Snacks packaging stated "Made with REAL Fruit," "100% Vitamin C," "25% Vitamins A & E," "[t]he Welch's name has been built on the highest quality fruit proudly grown on family farms," and "[i]n this tradition of wholesome goodness come Welch's Fruit Snacks, made with real fruit and fruit juices," but contained "only minimal amounts" of the fruits depicted on the label; no indication on front of package as to how much fruit they contained); *Albert v. Blue Diamond Growers*, 151 F. Supp. 3d 412, 415, 419 (S.D.N.Y. 2015) (stating without analysis that "Plaintiffs have sufficiently alleged causes of action" where plaintiffs alleged almond milk packaging "purposefully misrepresented" that the products "contain a significant amount of almonds, when they actually contain only two percent of almonds"; no indication on front of package as to amount of almonds contained in product); *Paulino v. Conpco, Inc.*, No. 14-5145, 2015 WL 4895234, at *5 (E.D.N.Y. Aug. 17, 2015) (disclosure of ingredients on the back of the packaging

Faced with this reality, Plaintiffs-Appellants argue it is not enough to identify on the front of the packaging the precise ***amount*** of whole grain in the crackers because, according to them, consumers may want even more information, such as knowing whether "whole grains are a minority ingredient" or that "there may be grain in the crackers that is not whole." Pls' Op. Br. at 28-29. Contrary to Plaintiffs-Appellants' insinuation, Kellogg is not required "to ascertain consumers' individual needs and guarantee that each consumer has all relevant information specific to its situation." *Milich*, 513 F. App'x at 99 (quoting *Oswego*, 85 N.Y.2d at 26). But even if it were, the detailed information Plaintiffs-Appellants describe is available in the FDA-mandated Nutrition Facts panel and ingredient list, which "reasonable consumers expect . . . [to] contain[] more detailed information about the product" that is consistent with other statements on the package. *Viggiano v. Hansen Natural Corp.*, 944 F. Supp. 2d 877, 892 (C.D. Cal. 2013) (quoting *Williams*, 552 F.3d at 939-40); *see also Stiles*, 2017 WL 3084267, at *4 (explaining that a reasonable consumer "seeking to purchase items containing maple syrup or maple sugar" would review the ingredient list).

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was found insufficient); *Segedie v. Hain Celestial Grp., Inc.*, No. 14-5029, 2015 WL 2168374, at *11 (S.D.N.Y. May 7, 2015) (same); *Wilson v. Frito-Lay N. Am., Inc.*, No. 12-1586, 2013 WL 1320468, at *13 (N.D. Cal. Apr. 1, 2013) (same); *Nat'l Consumers League v. Doctor's Assocs., Inc.*, No. 2013 CA 006549 B, 2014 WL 4589989 (D.C. Super. Ct. Sept. 12, 2014) (no indication that Subway disclosed the quantity of whole grain in its 9-Grain Wheat and Honey Oat breads); *Nat'l Consumers League v. Bimbo Bakeries USA*, No. 2013 CA 006548 B, 2015 WL 1504745 (D.C. Super. Ct. Apr. 2, 2015) (no indication that front of packaging of Multi-Grain Hearty Muffins and Classic Honey Wheat Bread stated amount of whole grain contained in the products).

b. Any mistaken belief about the meaning of "Made with Whole Grains" would be dispelled by the rest of the packaging.

There is another (alternative) basis for affirming the dismissal of this lawsuit: even if this Court assumes for argument's sake that the meaning of the phrase "MADE WITH WHOLE GRAINS" may be ambiguous in isolation, Plaintiffs-Appellants' claims still fails. Numerous federal courts have held that where a product's front label does not contain any affirmative misrepresentations and instead appears arguably ambiguous, a reasonable consumer has a duty to review the entire package. And if "any potential ambiguity [about the ingredients] could be resolved by the back panel of the products," then the complaint must be dismissed. *Workman*, 141 F. Supp. 3d at 1035-37.

Workman v. Plum is a highly analogous case. The plaintiff there alleged that Plum's Organics puree pouches and fruit bars were deceptive because they prominently depicted high-quality ingredients, such as pumpkin, pomegranate, quinoa, and yogurt, but were made predominantly of lower-cost ingredients like apple, pear, or banana puree. *Id.* at 1034. After reviewing the labels at issue, the court concluded that "any potential ambiguity" could "be resolved by the back panel of the products, which listed all ingredients in order of predominance, as required by the FDA." *Id.* at 1035. As the court explained, "One can hardly walk down the aisles of a supermarket without viewing large pictures depicting vegetable or fruit flavors, when the products themselves are largely made up of a different base ingredient. Every reasonable shopper knows that the devil is in the details." *Id.*

The facts in this case are even more compelling than in *Workman* because "any potential ambiguity" about the meaning of the phrase "Made with Whole Grains" could be "resolved" not only by looking at the "back panel" but also by the ***front*** of the packaging. *Id.*; *see also Goldman*, 2017 WL 3168525, at *7 (the name "One A Day" vitamins is not misleading, when viewed in full context, because the bottle discloses that a serving size is two gummies).

The recent decision in the *In re 100% Grated Parmesan Cheese* multidistrict litigation is also highly instructive because the court conducted a deep dive into false advertising case law from New York, California, and elsewhere. *See In re 100% Grated Parmesan Cheese Marketing & Sales Practices Litig.*, MDL No. 2705, No. 16-5802, 2017 WL 3642076 (N.D. Ill. Aug. 24, 2017). The plaintiffs in that case alleged that they were misled by the "100% Grated Parmesan Cheese" label on parmesan cheese products because the products contained cellulose powder and potassium sorbate and, therefore, cheese was not "100%" of the ingredients. *Id.* at *2, 6-8. In contrast, the defendants said that the term was accurate because it signified that the product contained only parmesan cheese (and not other types of cheese, such as processed American cheese). *See id.*

After surveying the applicable law in New York and California, the court found that the "principles [espoused by the courts] yield this rule: where a plaintiff contends that certain aspects of a product's packaging are misleading in isolation, but an ingredient label or other disclaimer would dispel any confusion, the crucial issue is whether the misleading content is ambiguous; if so, context can cure the ambiguity and defeat the claim." *Id.* at *5. Following the guidance set forth in this

Court's *Fink* decision ("context is crucial") and the Ninth Circuit's *Freeman* decision (review packaging "as a whole"), the court explained that "[t]his distinction rests on the principle that, when product descriptions are merely vague or suggestive, '[e]very reasonable shopper knows the devil is in the details.'" *Id.* at *6 (quoting *Workman*, 141 F. Supp. 3d at 1035).

Applying this well-established case law to the plaintiffs' claims, the court found that the "100% Grated Parmesan Cheese" label was ambiguous because, although it "*might* be interpreted as saying that the product is 100% cheese and nothing else, it also might be an assertion that 100% of the cheese is parmesan cheese, or that the parmesan cheese is 100% grated." *Id.* Given the ambiguity of the allegedly misleading label, the court held that the plaintiffs' claims were "doomed by the readily accessible ingredient panels on the products that disclose the presence of non-cheese ingredients." *Id.*

Likewise here, even assuming that the phrase "Made with Whole Grain" or "Whole Grain" in isolation is deemed ambiguous by a reasonable consumer, it would not be deceptive because the full packaging as a whole would dispel any ambiguity and "disclose" the fact that Cheez-It crackers also contain ingredients other than whole grains. *Id.*

First, as the District Court noted, the front of the Cheez-It packaging discloses prominently the precise amount of whole grains in each serving. *See* A045; A042.

Second, the Cheez-It ingredient list discloses that the top ingredient in the crackers by weight is enriched flour, followed by whole wheat flour. A042.

Third, the Nutrition Facts panel provides that a serving is 29 grams (26 crackers), reflecting that about 27.5% of a serving of the crackers is whole grains. *Id.*

Any consumer interested in learning more about the contents of Cheez-It crackers, such as whether "there may be grain in the crackers that is not whole" or if the crackers are "predominantly not whole grain" (Pls' Op. Br. at 29), would know exactly where to find this information. *Cf. In re Quaker Oats Maple & Brown Sugar Instant Oatmeal Litig.*, No. 16-1442, 2017 WL 4676585, at *5 (C.D. Cal. Oct. 10, 2017) ("The FDA encouraged consumers that, 'if you want a maple food that is made with maple syrup, look for the words 'maple syrup' in the ingredient list'"); *Bush v. Mondelez Int'l, Inc.*, No. 16-2460, 2016 WL 5886886, at *3 (N.D. Cal. Oct. 7, 2016) ("any potential ambiguity could be resolved by the back panel of the products") (quoting *Workman*, 141 F. Supp. 3d at 1035).[10] A consumer "who declines to read the readily accessible [information] . . . cannot claim to have been misled." *Milich*, 513 F. App'x at 99; *cf. also Ebner*, 838 F.3d at 965-66 (affirming dismissal of complaint where plaintiff claimed the lip balm's large tube obscured the amount of lip balm present because "[a]lthough the consumer may not know precisely how much product remains [in the container], the consumer's knowledge that *some*

[10] Plaintiffs-Appellants incorrectly allege there is no way to determine "how much 5 or 8 grams of whole grain is, in relationship to the much larger amount of refined grain." Pls' Op. Br. at 29. It is evident from the ingredient list (as Plaintiffs-Appellants' contention itself reflects), that whole grains comprise less than half of the grains in the crackers. Tellingly, the only reason that Plaintiffs-Appellants know about the relative quantity of enriched flour and whole grains in Cheez-It crackers is from reviewing the crackers' packaging.

additional product lies below the tube's opening is sufficient to dispel any deception") (emphasis in original).

In short, because "any potential ambiguity could be resolved by the back panel of the product[]" as well as the front panel disclosure statement about whole grain content, Plaintiffs-Appellants cannot plausibly allege that the phrase "Made with Whole Grain" or "Whole Grain," as used on Cheez-It crackers, is likely to mislead a reasonable consumer. *Workman*, 141 F. Supp. 3d at 1035; *see also Bober*, 246 F.3d at 938 (affirming dismissal of claim under analogous Illinois consumer fraud statute where "information available to" the plaintiff would "dispel" any allegedly misleading implication from the product label).

3. The District Court did not err in dismissing Plaintiffs-Appellants' claims challenging the pre-2016 Cheez-It packaging.

In an attempt to salvage at least a portion of their complaint, Plaintiffs-Appellants argue that the District Court erred in deciding that the pre-2016 package (which has the term "Whole Grain" as opposed to "Made with Whole Grain") contained no "affirmative misrepresentation." *See* Pls' Op. Br. at 17-18. Plaintiffs-Appellants make two arguments challenging the District Court's authority to make this finding, both of which are undermined by the relevant legal authority.

They first contend that the District Court erred in concluding there is no "affirmative misrepresentation" on the Cheez-It packaging because "Plaintiffs alleged" that the packaging "makes an affirmative misrepresentation." *Id.* at 17; *see also id.* at 18 (arguing District Court erred in dismissing complaint because "Plaintiffs have alleged" that "WHOLE GRAIN" is "false and misleading").

Plaintiffs-Appellants' argument ignores the distinction between alleging facts and alleging legal conclusions. While a court evaluating a motion to dismiss "must accept as true all the ***factual*** allegations in the complaint, that requirement is 'inapplicable to legal conclusions.'" *Heskiaoff*, 2017 WL 5632078, at *2 (quoting *Iqbal*, 556 U.S. at 678) (emphasis added). Plaintiffs-Appellants' conclusory assertion that the phrase "WHOLE GRAIN" is "an affirmative misrepresentation" is a textbook legal conclusion that is not entitled to deference.

Plaintiffs-Appellants next contend that the District Court erred in conducting a "*sua sponte*" analysis of the pre-2016 Cheez-It packaging, which bore the statements "WHOLE GRAIN" and "MADE WITH 5g OF WHOLE GRAIN PER SERVING." Pls' Op. Br. at 18; A045. Their argument fails both as a matter of fact and as a matter of law. As a preliminary matter, the Court's dismissal was not done on its own initiative. Kellogg did not limit its motion to dismiss to a subset of Plaintiffs-Appellants' claims but, rather, moved to dismiss the complaint in its entirety. *See* Notice of Motion and Motion to Dismiss Class Action Complaint Pursuant to Rule 12(b)(6), *Mantikas v. Kellogg Co.*, No. 16-2552, Dkt. No. 17 at 1 (E.D.N.Y. Oct. 7, 2016) (Kellogg moving "for an Order dismissing the Class Action Complaint of Plaintiffs . . . on the ground that the Complaint fails to state a claim upon which relief can be granted"); Memorandum of Law in Support of Defendant's Motion to Dismiss Class Action Complaint, *Mantikas v. Kellogg Co.*, No. 16-2552, Dkt. No. 17-1 at 18 (E.D.N.Y. Oct. 7, 2016) ("For the foregoing reasons, the Complaint must be dismissed."). Nor was there any obligation for Kellogg to address the two packaging versions separately. For the reasons made clear in the

District Court's opinion, the analysis is the same for both packages, each of which includes a statement on the front of the box identifying the specific amount of whole grains contained in the crackers: "MADE WITH 5g OF WHOLE GRAIN PER SERVING" (pre-2016) or "MADE WITH 8g OF WHOLE GRAIN PER SERVING" (2016). A045, A050-54.

But even if the District Court ***did*** dismiss Plaintiffs-Appellants' claims challenging the pre-2016 packaging *sua sponte*, Plaintiffs-Appellants concede that it was entitled to do so. Pls' Op. Br. at 18; *see also, e.g.*, *Leonhard v. United States*, 633 F.2d 599, 609 n.11 (2d Cir. 1980) ("The district court has the power to dismiss a complaint sua sponte for failure to state a claim."). Nor is this a case where, as in Plaintiffs-Appellants' cited cases, the plaintiff was not provided "an opportunity to be heard" on the issue. *See Thomas v. Scully*, 943 F.2d 259, 260 (2d Cir. 1991); *Grant v. County of Erie*, 542 F. App'x 21, 24 (2d Cir. 2013). As evidenced by their briefing in the trial court, Plaintiffs-Appellants had ample opportunity to address the pre-2016 Cheez-It packaging — and did so. *See* Plaintiffs' Memorandum of Law in Opposition to Defendant's Motion to Dismiss Class Action Complaint, *Mantikas v. Kellogg Co.*, No. 16-2552, Dkt. No. 17-3 at 1, 3-7 (E.D.N.Y. Oct. 7, 2016) (Plaintiffs arguing in the District Court that the phrase "WHOLE GRAIN" on the pre-2016 package is "false and misleading").

4. <u>The inapposite FTC and FDA materials cited in the complaint did not require the District Court to deny the motion to dismiss.</u>

Lastly, Plaintiffs-Appellants contend that the District Court erred by "ignor[ing]" their "allegations" that the FDA and FTC "have determined that whole

grain claims, like those at issue here, are likely to deceive reasonable consumers." Pls' Op. Br. at 31. But, contrary to Plaintiffs-Appellants' assertions, neither of the documents cited in their complaint reflect that the FDA or FTC have "determined" anything — much less concluded that the Cheez-It packaging is "likely to deceive reasonable consumers." *See id.*

The first document cited by Plaintiffs-Appellants contains "comments represent[ing] the views of the staff of the Bureau of Consumer Protection, the Bureau of Economics, and the Office of Policy Planning of the Federal Trade Commission." FTC Staff Comment Before the Food and Drug Administration, *In the Matter of Draft Guidance for Industry and FDA Staff: Whole Grains Label Statements*, Docket No. 2006-0066 (Apr. 18, 2006) ("Staff Comments")[11] at Cover Page; *see* A019 ¶ 49 n.11 (citing same). As the document makes explicit, these comments "are ***not*** necessarily the views of the Federal Trade Commission or any individual Commissioner." Staff Comments at Cover Page (emphasis added). Such informal, non-binding staff opinions are not entitled to *Chevron* deference. *See Safeco Ins. Co. of Am. v. Geico*, 551 U.S. 47, 70 n.19 (2007); *see also, e.g.*, *Shelton v. Hal Hays Constr., Inc.*, No. 16-360, 2016 WL 8904414, at *3 (C.D. Cal. July 29, 2016) ("informal [FTC] staff opinions . . . are insufficient to support Plaintiff's allegations").

[11] *Available at* https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-comment-food-and-drug-administration-matter-draft-guidance-industry-and-fda-staff-whole/v060014ftcstaffcommentstothefdaredocketno2006-0066.pdf.

In any event, the Staff Comments actually ***support*** the District Court's conclusion that the Cheez-It packaging would not mislead a reasonable consumer. "The FTC staff comment provides specific suggestions concerning how FDA could expand and clarify its guidance" on whole grain claims, Staff Comments at 2, which is itself non-binding. *See Draft Guidance for Industry and FDA Staff: Whole Grain Label Statements*, 2006 WL 477986, at *1 (Feb. 17, 2006) ("FDA's guidance documents, including this guidance, do not establish legally enforceable responsibilities" but, rather, "should be viewed only as recommendations").[12]

One of those suggestions is that the FDA provide examples of ways that food manufacturers "could provide context to their whole grain claims" on the ground that "[t]here is potential for consumers to be misled or confused by unqualified 'whole grain' claims." Staff Comments at 3; *see also id.* at 6 ("the staff suggests that FDA consider expanding its draft guidance to provide examples of permissible ways for manufacturers to give consumers information that puts factual, quantitative statements about whole grain content on labels into context.").[13] This is exactly what Kellogg did here, by including "MADE WITH 8g OF WHOLE GRAIN PER SERVING" on the front of the Cheez-It box.

[12] While non-binding, the FDA draft guidance provides that "[m]anufacturers can make factual statements about whole grains on the label of their products such as '100% whole grain' . . . or '10 grams of whole grains.'" 2006 WL 477986, at *1.

[13] The Staff Comments acknowledge that there are not "definitive standards for either the percentage or amount of whole grain that should be in products labeled with unqualified claims." Staff Comments at 11.

The second document cited in Plaintiffs-Appellants' complaint (*see* A021 at ¶ 55 n.12) also does nothing to undermine the District Court's dismissal. Far from indicating that "consumers can be misled by statements about whole grain foods," as Plaintiffs-Appellants assert (*id.*; Pls' Op. Br. at 31), the document simply reflects the FDA's plan to conduct a study to attempt to learn about how consumers interpret statements about whole grains. *Agency Information Collection Activities*, 77 Fed. Reg. 11547-02.[14]

II. The District Court Correctly Held that Plaintiffs-Appellants Lack Article III Standing to Seek Injunctive Relief.

The District Court's ruling that the Cheez-It packaging would not deceive a reasonable consumer fully disposes of the entire lawsuit. The District Court, however, made the additional observation that Plaintiffs-Appellants lack Article III standing for injunctive relief because they did not suffer an injury in fact (since there was no deception) and there is no threat of future injury. A060. The District Court's dismissal is in keeping with other federal court decisions in the Second Circuit.

[14] Although not referenced in their complaint, Plaintiffs-Appellants' brief also cites two USDA guidance documents, neither of which is applicable here. *See* Pls' Op. Br. at 33 n.8. As a preliminary matter, USDA guidance applies only to meat and poultry products — not crackers. *See Kuenzig v. Kraft Foods, Inc.*, No. 12-838, 2011 WL 4031141, at *5 (M.D. Fla. Sept. 12, 2011). Even if applicable, the first document only concerns unqualified "made with" claims; it says nothing about packaging that identifies the precise quantity of whole grains in the product. The second document concerns "organic" claims — a "complex, detailed, and specific" framework not implicated here. *See All One God Faith, Inc. v. Hain Celestial Grp., Inc.*, No. 09-3517, 2009 WL 4907433, at *2 (N.D. Cal. Dec. 14, 2009).

To satisfy the constitutional minimum of standing for injunctive relief, a plaintiff must demonstrate "a real or immediate threat that the plaintiff will be wronged again" "in a similar way." *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983). Thus, past injuries "do not confer standing to seek injunctive relief unless the plaintiff can demonstrate that she is likely to be harmed again in the future in a similar way." *Nicosia v. Amazon.com, Inc.*, 834 F.3d 220, 239 (2d Cir. 2016).

Here, Plaintiffs-Appellants cannot show any risk of future or continuing harm because the Cheez-It packaging is not deceptive as a matter of law. *See supra*, § I; A060. But even if Plaintiffs-Appellants could show that the packaging of Cheez-It crackers is likely to deceive a reasonable consumer — which they cannot — they would still lack standing to seek injunctive relief because they have not plausibly alleged that they are likely to suffer future harm as a result of the challenged statements on the Cheez-it box.

First, Plaintiffs-Appellants allege that they are no longer willing to purchase Cheez-It crackers because they "cannot be confident that the labeling of the products is, and will be, truthful and non-misleading." A013 at ¶ 17; A014 at ¶ 27; A015 at ¶ 35. They also assert that they "would not have purchased the products" in the past "had [they] known [the crackers] were not, in fact, predominantly whole grain." A013 at ¶ 13; A014 at ¶ 22; A015 at ¶ 31. Given their representations that they are only interested in bread and crackers that are predominantly whole grain, it is highly implausible that Plaintiffs-Appellants would purchase Cheez-It crackers in the future, even if the challenged statements were removed from the packaging. *See* A013 at ¶¶ 13, 20; A015 at ¶ 31; A021 at ¶¶ 56-62.

Where it is clear from the complaint that plaintiffs "are unlikely to buy the class products again," courts in this Circuit have routinely found that "they lack standing to seek a forward-looking injunction." *In re Avon Anti-Aging Skincare Creams & Prod. Mktg. & Sales Practices Litig.*, No. 13-150, 2015 WL 5730022, at *8 (S.D.N.Y. Sept. 30, 2015) (plaintiffs lacked standing to seek injunctive relief where "[e]ach Plaintiff state[d] that, if she had been aware of the alleged truth about [the] products, she would not have bought class products").[15]

Second, even if Plaintiffs-Appellants did choose to purchase Cheez-It crackers in the future, there is "no danger that they will again be deceived" since they "are now aware of the alleged misrepresentations that they challenge." *Elkind v. Revlon Consumer Prod. Corp.*, No. 14-2484, 2015 WL 2344134, at *3 (E.D.N.Y. May 14, 2015). As Plaintiffs-Appellants acknowledge in their complaint, they now know that Cheez-It crackers "are not predominantly whole grain" and "contain[] more refined grain than whole grain." A012 at ¶¶ 6, 8. Accordingly, it is implausible that Plaintiffs-Appellants would "actually be personally deceived" again by the same

[15] *See also Nicosia*, 834 F.3d at 239 (plaintiff lacked standing to seek injunctive relief against Amazon where he failed to allege that he intended to use Amazon in the future); *Tomasino v. Estee Lauder Companies Inc.*, 44 F. Supp. 3d 251, 256 (E.D.N.Y. 2014) (plaintiff lacked standing to seek injunctive relief where the complaint "made clear that she . . . would not have purchased [the challenged beauty product] in the first place absent the allegedly misleading advertisements"); *Hughes v. The Ester C Co.*, 317 F.R.D. 333, 357 (E.D.N.Y. 2016), *reconsideration denied*, 320 F.R.D. 337 (E.D.N.Y. 2017) (plaintiffs lacked standing because they "both allege[d] that, if they had been aware of the alleged truth of the Products, they would not have bought them").

alleged misrepresentations. *Chang v. Fage USA Dairy Industry, Inc.*, No. 14-3826, 2016 WL 5415678, at *5 (E.D.N.Y. Sept. 28, 2016).[16]

III. The Lawsuit Is Also Preempted Because the "Whole Grain" Statements Are Permissible Nutrient Content Claims Under Federal Law.

Because the District Court dismissed Plaintiffs-Appellants' state-law consumer protection claims under the reasonable consumer standard, it did not address Kellogg's additional argument that their claims are preempted by federal law. A054 n.2. But preemption provides an alternative basis on which this Court may affirm the District Court's dismissal of Plaintiffs-Appellants' statutory claims. *See Watts*, 786 F.3d at 161 (this Court "may affirm on any ground which finds support in the record") (citation omitted).

The Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 301 *et seq.* (FDCA) establishes a comprehensive and uniform federal scheme of food regulation to ensure that food is safe and labeled in a manner that does not mislead consumers. *See* 21 U.S.C. § 341 *et seq.* Congress amended the FDCA through the passage of the Nutrition Labeling and Education Act (NLEA) to "clarify and to strengthen the Food and Drug Administration's legal authority to require nutrition labeling on foods, and to establish the circumstances under which claims may be made about

[16] *See also Nicosia*, 834 F.3d at 239 (no standing to seek injunctive relief "unless the plaintiff can demonstrate that she is likely to be harmed again in the future ***in a similar way***") (emphasis added); *Whitaker v. Herr Foods, Inc.*, 198 F. Supp. 3d 476, 496 (E.D. Pa. 2016) ("Because Plaintiff is now familiar with Defendant's labeling practices, it is a 'speculative stretch' to say Plaintiff would 'unwittingly accept' the labels' assertions in the future.") (citation omitted); *Reid v. Unilever U.S., Inc.*, 964 F. Supp. 2d 893, 918 (N.D. Ill. 2013) (same).

nutrients in foods." H.R. Rep. No. 101-538, at 9 (1990), *reprinted in* 1990 U.S.C.C.A.N. 3336, 3337. The NLEA sets forth specific requirements for the labeling of nutrition information and the making of nutrient content claims. *See* 21 U.S.C. § 343(q), (r).

The NLEA establishes a uniform standard for food labeling by including a broad express preemption provision. 21 U.S.C. § 343-1(a)(3); *see Mills v. Giant of Md., LLC*, 441 F. Supp. 2d 104, 106-09 (D.D.C. 2006) (noting the expansive scope of the NLEA preemption clause). Congress established this express preemption provision because it did not want food manufacturers to have to comply with potentially 50 different state food labeling standards, the costs of which would then be ultimately borne by consumers. Accordingly, NLEA provides that "***no State*** or political subdivision of a State ***may directly or indirectly establish*** . . . ***any requirement for nutrition labeling of food*** . . . ***that is not identical*** to the requirement[s]" set forth in the NLEA." *See* 21 U.S.C. § 343-1(a)(4), (5) (emphases added). In other words, states cannot impose their own unique labeling standards that go "beyond, or [are] different front" the federal labeling standards that Congress has established. *In re Pepsico, Inc. Bottled Water Mktg. & Sales Practices Litig.*, 588 F. Supp. 2d 527, 532, 534 (S.D.N.Y. 2008). *Cf. also Turek v. Gen. Mills, Inc.*, 662 F.3d 423, 427 (7th Cir. 2011) ("Even if the disclaimers that the plaintiff wants added would be consistent with the requirements imposed by the Food, Drug, and Cosmetic Act, consistency is not the test [for preemption]; identity is.").

Federal regulations issued pursuant to the NLEA expressly permit a food manufacturer to make both an "expressed nutrient content claim" and an "implied

nutrient content claim." An express nutrient content claim is "any direct statement about the level (or range) of a nutrient in the food, e.g., 'low sodium' or 'contains 100 calories." 21 C.F.R. § 101.13(b)(1). In other words, it makes an explicit assertion about the amount of a particular nutrient in a product. An implied nutrient content claim, in contrast, is "any claim that . . . [d]escribes the food or an ingredient therein in a manner that suggests a nutrient is absent or present in a certain amount." *Id.* § 101.13(b)(2).

Here, the "whole grain" statements are nutrient content claims that are expressly preempted.

"MADE WITH 8g [or 5g] OF WHOLE GRAIN": There can be no doubt that this statement is an express nutrient content claim because it expressly refers to the amount of whole grain in the product. *See Red v. Kraft Foods, Inc.*, 754 F. Supp. 2d 1137, 1139 (C.D. Cal. 2010) ("'whole grain' per serving [claims] were not actionable on the ground that they are preempted by federal law").

"MADE WITH WHOLE GRAIN" or "WHOLE GRAIN": Likewise, a claim challenging this statement is preempted because it is an implied nutrient content claim. According to Plaintiffs-Appellants' own reading of the statement, it "suggests a nutrient is . . . present in a certain amount" in an implied manner (*i.e.*, Plaintiffs-Appellants claim that "MADE WITH WHOLE GRAIN" and "WHOLE GRAIN" imply that the crackers contain a substantial amount of whole grains). *See, e.g.*, Pls' Op. Br. at 20-21; 21 C.F.R. § 101.13(b)(2).

An instructive decision is *Chacanaca v. Quaker Oats Co.*, 752 F. Supp. 2d 1111 (N.D. Cal. 2010). The plaintiffs there had challenged, among other things, the

statement "Made With Whole Grain Oats" even though they conceded it was not "directly false" because "they acknowledge that Chewy Bars contain whole grain oats." *Id.* at 1121-22. The court explained that while "a simple statement of an ingredient need not necessarily count as a nutrient content claim," the "FDA has instructed . . . that it may function as such a claim under some circumstances." *Id.* at 1121. The court then concluded that "Made With Whole Grain Oats" was an implied nutrient content claim because, according to the plaintiffs' theory of the case, the statement suggested the Chewy Bars contained a certain amount of whole grain oats. *Id.* at 1121-22. Likewise, here, "MADE WITH WHOLE GRAIN" or "WHOLE GRAIN" is an implied nutrient content claim because, under Plaintiffs-Appellants' theory, the statement implies that the crackers contain a substantial amount of whole grains. Plaintiffs-Appellants' state-law claim challenging the "MADE WITH WHOLE GRAIN" and "WHOLE GRAIN" statements is, therefore, preempted.

Even if these statements were not determined to be an implied nutrient claim, Plaintiffs-Appellants' argument still fails under a preemption analysis because the phrase "MADE WITH WHOLE GRAIN" (or "WHOLE GRAIN") cannot be read in isolation without taking into context the "MADE WITH 8g [or 5g] OF WHOLE GRAIN" statement. The *Hairston v. South Beach Beverage Co.* decision is on point. No. 12-1429, 2012 WL 1893818 (C.D. Cal. May 18, 2012). There, the plaintiff challenged the labeling of SoBe Lifewater beverages on the ground that, among other things, the label included the phrase "all natural," which was used in close proximity to statements on the label about the presence of vitamins and fruit flavors.

Id. at *1. After holding that other challenged statements (including the use of the common fruit and vitamin names) were not actionable because they were expressly allowed under federal regulations, the court held that the plaintiff could not state a claim based on the remaining phrase "all natural." *Id.* at *4. "[O]nce the . . . statements regarding fruit names and vitamin labeling are removed," the court reasoned, "Plaintiff's claim is based on a single out-of-context phrase found in one component of Lifewater's label." *Id.* Because "Lifewater does not use the 'all natural' language in a vacuum," the court concluded, "it will be impossible for Plaintiff to allege how the 'all natural' language is deceptive without relying on the . . . statements regarding fruit names and vitamins." *Id.*

Similarly here, the statement "MADE WITH 8g OF WHOLE GRAIN" is indisputably an express nutrient content claim that is permitted by federal law. And "once [that] preempted statement[]" is "removed, Plaintiff's claim is based on a single out-of-context phrase" that is not actionable. *Id.* In short, the statements "MADE WITH 8g [or 5g] OF WHOLE GRAIN" and "MADE WITH WHOLE GRAIN" (or "WHOLE GRAIN") both appear on the front of the Cheez-It packaging and must be read in context. Plaintiffs-Appellants cannot selectively pick-and-choose to focus on one statement alone, especially where one of them is inarguably permitted under federal law.

CONCLUSION

For the foregoing reasons, Kellogg Company respectfully requests that the Court affirm the decision of the District Court.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations set forth in Federal Rule of Appellate Procedure 32(a)(7)(B) and Local Rule 32.1. The brief contains 11,835 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word, in 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

I hereby certify that on December 20, 2017, I caused the foregoing brief to be served on all registered counsel through the Court's CM/ECF system.

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