Short Form Order

INDEX NO: 605458/2021

Supreme Court of the State of New York
IAS Part 23 - County of Suffolk

PRESENT: Hon. Vincent J. Martorana

Annmarie St. John,

Plaintiff,

- against-

The Price Chopper, Inc.,

Defendant.

ORIG. RETURN DATE: 05/25/21
ADJOURNED DATE: 08/26/21
MOTION SEQ. NO.: 001 - MG

PLTF'S/PET'S ATTY:
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DEFT'S/RESP'S,ATTY:
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Upon efiled documents numbered 5-9, 13-14, 20; it is

ORDERED that Defendant's motion seeking dismissal of Plaintiff's complaint based upon failure to state a cause of action, pursuant to CPLR 3211(a)(7) is granted.

The within action seeks injunctive relief, monetary damages and certification of Plaintiff as a class representative of persons who purchased PICS brand vanilla almondmilk from Defendant's stores. Plaintiff alleges that the product at issue contains some artificial flavor and that such inclusion without disclosure caused her economic loss. Defendant now brings a pre-answer motion seeking dismissal of Plaintiff's claims.

Plaintiff's complaint alleges that she is a "citizen of Lake Grove, Suffolk County, New York," and that she suffered damages when she purchased a container or containers of PICS brand vanilla almondmilk on "one or more occasions" from a Price Chopper store in Glenmont, New York, Albany County. Defendant, The Price Chopper, Inc. ("Price Chopper") is a New York corporation with a principal place of business in Schenectady, New York. Plaintiff alleges that such item(s) was purchased in Glenmont in the spring and summer of 2020. The harm alleged by Plaintiff arises from her claim that the vanilla almondmilk contained artificial flavor which was not disclosed on the label. She asserts that she paid a "premium price," approximately $4.49 for a 64 fl oz container and that the product was worth less than she paid, although unflavored PICS almond milk is sold at the same price. She further claims that she "would not have purchased the product in the absence of Defendant's misrepresentations and omissions that the Product did not contain artificial flavor and contained vanilla." The ingredient panel on the label of the vanilla almond milk in question states that it contains "INGREDIENTS: ALMONDMILK (FILTERED WATER, ALMONDS), CANE

SUGAR, CALCIUM CARBONATE, NATURAL VANILLA FLAVOR WITH OTHER NATURAL FLAVORS, SEA SALT, POTASSIUM CITRATE, SUNFLOWER LECITHIN, GELLAN GUM, VITAMIN A PALMITATE, VITAMIN D2, D-ALPHA-TOCOPHEROL (NATURAL VITAMIN E)." The front label states that it is "VANILLA ALMONDMILK." Plaintiff claims that the vanilla almondmilk, when subjected to "analytical testing in 2020" showed the presence of more vanillin than expected and less aromatic compounds than expected, therefore it must contain vanillin (which Plaintiff claims is artificial because vanillin may be derived from chemical sources, yet states that it is "the principal flavoring compound in real vanilla"). Plaintiff further alleges that the absence of "expected" amounts of certain aromatic compounds "means the Product contains, at most, a trace or de minimis amount of vanilla." The essence of Plaintiff's claim is that the vanilla almondmilk might contain a flavoring component that was not derived from vanilla beans and that Defendant's failure to disclose this deceived her into buying an item that she may not have purchased at its marked price or at all, although it may also contain flavor from vanilla beans, just not enough of such flavor. Plaintiff seeks class certification and further seeks to compel Defendant to "correct the challenged practices" and refrain from continuing such behavior, along with disgorgement and monetary damages.

In Plaintiff's first listed cause of action, although not numbered as such, Plaintiff asserts that Defendant violated General Business Law 349 and 350 in that she and the class members wished to buy vanilla flavored products made from "real vanilla and no artificial flavors," that Defendant knowingly misrepresented their product intending to induce reliance on the representations, that Plaintiff and the class members relied on the representations and that a reasonable person would be misled by Defendant's "deceptive conduct," that plaintiff and the class members "would not have purchased the product or paid as much if the truth had been known" and that as a result they suffered damages.

In the second cause of action advanced, Plaintiff claims that Defendant breached an express warranty and implied warranty of merchantability, claiming that Defendant "warranted to plaintiff and class members that it contained an appreciable amount of real vanilla and did not contain artificial flavor." Plaintiff states that Defendant had "a duty to disclose and/or provide non-deceptive descriptions and marketing" because Defendant is a "trusted seller" in the market and that the vanilla almond milk was "not fit to pass in the trade as advertised." Again, Plaintiff asserts that she and the class members "would not have purchased the Product or paid as much if the true facts had been known."

The third listed cause of action alleges negligent misrepresentation. Plaintiff states that Defendant had a duty to truthfully represent the product because Defendant was "holding itself out as having special knowledge and experience in the sale of the product type," that Defendant took advantage of purchaser's "cognitive shortcuts" and trust in Defendant, "reasonably and justifiably" relying on the negligent misrepresentations and omissions. The damages are reiterated as Plaintiff and the class members "would not have purchased the Product or paid as much if the true facts had been known."

Next, fraud is alleged, predicated upon Defendant's "failure to accurately disclose the presence of artificial flavor, when it knew not doing so would mislead consumers, resulting in damages because Plaintiff and the class members "would not have purchased the Product or paid as

much if the true facts had been known."

Plaintiff's final cause of action asserts itself as unjust enrichment, claiming "Defendant obtained benefits and monies because the Product was not as represented and expected, to the detriment and impoverishment of plaintiff and class members, who seek restitution and disgorgement of inequitably obtained profits." This cause of action contains the first and only allegation in the complaint that a state of poverty arose as a result of the purchase of the $4.49 container(s) of vanilla almondmilk. No additional facts are provided in this regard. It should also be noted that Defendant represents that the price of both original and vanilla almondmilk is between $3.19 and $2.99 for a half-gallon.

In considering a party's motion to dismiss for failure to state a cause of action pursuant to CPLR 3211(a)(7), the pleadings must be given a liberal construction, the allegations must be accepted as true and the stated claims must be given every possible favorable inference in determining whether or not they fit into any cognizable legal theory (***Chanko v. Am. Broad. Companies Inc.***, 27 NY3d 46, 29 NYS3d 879 [2016]; ***Goshen v. Mut. Life Ins. Co. of New York***, 98 NY2d 314, 746 NYS2d 858 [2002]; ***Leon v Martinez***, 84 NY2d 83, 88 [1994]). The Court may also consider affidavits submitted to remedy any defects in the complaint in ascertaining whether or not a cause of action exists (***Chanko,*** *supra;* ***Leon*** *supra*). If the Court considers evidentiary material in a motion to dismiss, the analysis becomes whether or not a cause of action exists, not whether or not Plaintiff has stated one (***Sokol v. Leader***, 74 AD3d 1180, 904 NYS2d 153 [2d Dept. 2010]; ***Guggenheimer v. Ginzburg***, 43 NY2d 268, 274–75, 372 NE2d 17 [1977]; ***Porat v. Rybina***, 177 AD3d 632, 111 NYS3d 625 [2d Dept. 2019]). However, a pleading may be dismissed if it is established that a material fact asserted by the pleader is not actually a fact and there is no significant dispute regarding it (***McMahan v. McMahan,*** 131 AD3d 593, 15 NYS3d 190 [2d Dept. 2015]; ***Guggenheimer v. Ginzburg***, 43 NY2d 268, 401 NYS2d 182 [1977]; ***Neuman v. Echevarria***, 171 AD3d 767, 97 NYS3d 203 [2d Dept. 2019]).

Plaintiff's General Business Law Claims

To state a claim for violation of General Business Law §349(h) , "... a plaintiff must allege that a defendant has engaged in (1) consumer-oriented conduct that is (2) materially misleading and that (3) plaintiff suffered injury as a result of the allegedly deceptive act or practice" (***City of New York v. Smokes-Spirits.Com, Inc***., 12 NY3d 616, 621–23, 883 NYS2d 772 [2009]; *see also* ***Barry's Auto Body of NY, LLC v. Allstate Fire & Cas. Ins. Co.***, 190 AD3d 807 [2d Dept. 2021]; ***Koch v. Acker, Merrall & Condit Co.***, 18 NY3d 940, 967 NE2d 675 [2012]; ***Plavin v. Grp. Health Inc.***, 35 NY3d 1, 5, 146 NE3d 1164, 1165, *reargument denied*, 35 NY3d 1007, 149 NE3d 442 [2020]; ***Krobath v. S. Nassau Communities Hosp.***, 178 AD3d 807, 115 NYS3d 389 [2d Dept. 2019]). Conduct complained of must have a broader impact on consumers at large; private business disputes do not fall under the statute (***Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A.***, 85 NY2d 20, 24–27, 647 NE2d 741, 744–45 [1995]; ***Plavin v. Grp. Health Inc.***, *supra*). Similarly, the elements of a General Business Law §350 claim are that an "advertisement (1) had an impact on consumers at large, (2) was deceptive or misleading in a material way, and (3) resulted in injury" (***Andre Strishak & Assocs., P.C. v. Hewlett Packard Co.***, 300 AD2d 608, 609, 752 NYS2d 400, 403 [2d Dept. 2002]). The test for determining whether or not a representation or omission is materially misleading, for claims under both GBL§349 and 350, is whether the act or

advertisement is "likely to mislead a reasonable consumer acting reasonably under the circumstances" ***(Himmelstein, McConnell, Gribben, Donoghue & Joseph, LLP v. Matthew Bender & Co., Inc.***, 37 NY3d 169, 178, 150 NYS3d 79, *reargument denied*, 37 NY3d 1020 [2021] (quoting ***Gaidon v. Guardian Life Ins. Co. of Am.***, 94 NY2d 330 [1999]); see also ***Andre Strishak & Assocs., P.C. v. Hewlett Packard Co.***, 300 AD2d 608, 752 NYS2d 400 [2d Dept. 2002]; ***Moore v. Liberty Power Corp., LLC***, 72 AD3d 660, 897 NYS2d 723 [2d Dept. 2010]). Additionally, actual injury must be alleged as a component of a claim under General Business Law 349 and 350 (***Rice v. Penguin Putnam, Inc.***, 289 AD2d 318, 734 NYS2d 98 [2d Dept. 2001]).

Defendant argues that a reasonable consumer would not be misled by the label at issue because reasonable consumers associate the term"vanilla" with a flavor, not a specific ingredient, and that there is a littany of federal case law (interpreting GBL § 349 and §350) which supports this position. Defendant also asserts that in the unlikely event of confusion, the ingredient label informs the consumer that other natural flavors, along with natural vanilla, are contained in the product. Defendant challenges Plaintiff's generalized assertions about food industry production of vanillin, stating that Plaintiff fails to advance a plausible allegation that any vanillin contained in the vanilla almondmilk here at issue is artificially sourced and further arguing that Plaintiff's vague allegations of chemical analysis conducted by an unidentified person sometime in 2020 fail to provide proper notice of the claim. Defendant concludes that Plaintiff lacks a viable theory of misrepresentation, cannot establish materiality and lacks damages because she did not pay a "premium price" for the product because the PICS vanilla almondmilk is the same price as the PICS unflavored almond milk. It is noted that Plaintiff also claims that she may not have purchased the product if she had understood it to contain artificial flavors.

Plaintiff responds by asserting that it is plausible that compounds contained in the vanilla almondmilk are artificial "due to their relative amounts, industry customs, and consideration that this action is in the pleading stage" and that the presence of such ingredients results in "a de minimus amount of the promised vanilla ingredients." Plaintiff further claims that the "misleading labeling" on the front label which said "Vanilla" caused her to believe that the "Product's flavor was predominantly from vanilla beans and did not contain artificial flavors" and that if she had known the "truth" "she would not have bought the product or would have paid less for it." How she would have "paid less" if she intended to buy the product in Defendant's store is unclear, as is the basis of her further assertion that the product is sold at a "premium price," although Plaintiff claims she will retain an expert to "perform hedonic regression and choice-based conjoint analyses to measure this 'price premium'" which will involve consideration of the market value of product attributes and consumer surveys to determine what consumers would pay absent the 'deceptive act.' In furtherance of the argument that the vanilla almondmilk is misleadingly labeled, Plaintiff includes a copy of a February 26, 2016 opinion letter written by an FDA Consumer Safety Officer to an extract company. Defendant has not questioned the authenticity of this letter and references it in reply papers. The letter discusses various aspects of the vanilla labeling issue as it pertains to 21 Code of Federal Regulations 101.22. It essentially says that if vanillin is derived from a natural process, it may be called a natural flavor but may not be called natural vanilla flavor. If a vanilla flavored product derives its flavor from artificially derived vanillin, then it must be labeled artificially flavored. There is nothing in the letter that indicates that a product which contains both naturally derived vanilla and artificially derived vanillin can't be called "Vanilla" and nothing to indicate that a product may not characterize naturally derived vanillin as "other natural flavor." Defendant avers that its labeling is

in compliance with federal regulations. Such compliance is not dispositive of the issue of whether or not a product label is misleading under New York's General Business law but neither would non-compliance be. There is no indication that the intricacies of federal labeling requirements are generally known to consumers and that they form the basis of purchasing decisions (***Wynn v. Topco Assocs., LLC,*** 2021 WL 168541 [SDNY 2021], ***Twohig v. Shop-Rite Supermarkets, Inc.***, 519 FSupp3d 154 [SDNY 2021]).

Defendant's counsel points out that Plaintiff's counsel has filed more than 130 nearly identical lawsuits in the Second Circuit and other parts of the country and that at least eighteen federal courts have dismissed them in the pleading stage. Plaintiff reminds the court that federal court decisions are not binding authority and encourages it to disregard their analysis of New York law. Plaintiff further argues that consumers want to avoid artificial flavors and that Defendant's vanilla almondmilk contains artificial flavors. As discussed above, Plaintiff claims to know about the alleged artificial ingredients based upon speculative conclusions drawn by extrapolating from results of unspecified testing of the vanilla almondmilk, further averring that an analysis of market factors and product attributes will ultimately establish that the vanilla almondmilk was too expensive.

Plaintiff's counsel has brought many actions in federal court on behalf of numerous plaintiffs seeking damages related to vanilla flavored products. A sampling in the Southern District of New York reveal consistent holdings that the labeling at issue is not misleading. In a case involving a vanilla flavored protein drink, the U.S. District Court for the Southern District of New York found that reasonable consumers associate "vanilla" with a flavor, not an ingredient, and that use of the word vanilla does not imply that there are no other flavoring ingredients (***Pichardo v. Only What You Need, Inc.***, 2020 WL 6323775 [SDNY 2020]). The court further stated that plaintiffs had not explained why the amount of vanilla taste coming from vanilla extract was material and that Plaintiffs had not plead facts from which the court could "plausibly infer that a reasonable consumer would find the amount of vanilla flavor that comes from vanilla extract (as opposed to other sources of vanillin) is material" (***Id at 5***). In a similar case, it was asserted that Wegman's Vanilla ice cream labeling was deceptive because the ice cream contains a "de minimus" amount of vanilla plus flavor from vanillin derived from non-vanilla sources (***Steele v. Wegmans Food Markets, Inc.,*** 472 FSupp3d 47 [SDNY 2020]). The basis of such allegation was that an alleged Mass Spectrometry Analysis showed that testing of the finished product contained insufficient amounts of chemicals naturally present in vanilla beans. The court found that the conclusions drawn from this were speculative and that the test performed was inapplicable because it sought to impose federal specifications for ice cream flavorings which are not enforceable by private plaintiffs. Plaintiff's complaint was dismissed for failing to state a claim of misrepresentation (***Id.***). In another case, it was asserted that the labeling of vanilla flavored ice cream bars under the Magnum brand was misleading because "vanilla bean ice cream," among other things, leads the consumer to believe that only vanilla extract, vanilla flavor or unexhausted vanilla beans provide the flavor and that no other flavors enhance the flavor (***Dashnau v. Unilever Mfg. (US), Inc.***, 529 FSupp3d 235 [SDNY 2021]). Plaintiff in that case made similar arguments about "de minimus" vanilla predicated upon gas chromatography-mass spectrometry analysis and deception of consumers. Noting that seven other courts in the district had dismissed such claims, the court found implausible Plaintiffs' conclusory assertions that a reasonable consumer who reads "vanilla bean ice cream" on a product's label would conclude that the product's flavor is exclusively derived from "real" vanilla or vanilla beans (***Id.***).

Plaintiff's claims under New York's General Business Law §§349 and 350 were dismissed for failure to adequately allege a material misrepresentation, along with their claims of negligent misrepresentation, breach of express warranty, implied warranty of merchantability, fraud and violation of the Magnuson Moss Warranty Act (***Id.***). Plaintiff's counsel also brought a lawsuit on behalf of a different plaintiff as against Topco Associates, LLC, maker of a different vanilla almondmilk which was also sold by Price Chopper (***Wynn v. Topco Assocs., LLC***, 2021 WL 168541 [SDNY 2021]). The arguments were similar to those made in the other cases and in the within action. Here again, the court found "allegations that consumers expect a product labeled "Vanilla Almondmilk" to be flavored exclusively with real vanilla are conclusory statements that the Court is not required to accept" (***Id*** at 3). In addressing the absence of "artificial flavors" in the ingredient list, the court stated that the complained-of ingredients could be both artificially and naturally derived and that Plaintiff had failed to sufficiently allege that the ingredients are artificial (***Id.***) The court held that the complaint failed to plausibly allege that the "Vanilla" label was misleading or that the ingredient label was misleading and the plaintiff's claims of violations of Sections 349 and 350 of the New York General Business Law, negligent misrepresentation, breach of express warranty, breach of the implied warranty of merchantability, fraud, unjust enrichment and violation of the Magnuson Moss Warranty Act were dismissed (***Id.***). In another case, this one involving vanilla soymilk, the same attorneys brought an action against Shop-Rite supermarkets (***Twohig v. Shop-Rite Supermarkets, Inc.***, 519 FSupp3d 154 [SDNY 2021]). The court determined, "Plaintiffs have failed to plausibly allege that a reasonable consumer would in fact conclude that the word "vanilla" on the Product's front label implies that the Product's flavoring was derived exclusively or predominantly from vanilla beans, such that the front label would be misleading. A reasonable consumer would understand that "vanilla" is merely a flavor designator, not an ingredient claim" (***Id.*** at 161). Additionally, the court found that the gas spectrometry analysis offered in support of the premise that the product contained less vanilla than consumers expect was not compelling because the label didn't represent anything about the proportions of flavor ingredients, adding that Plaintiffs had not plausibly alleged that the flavors were derived from artificial sources (***Id.***). The court also opined that the consumer survey commissioned by the plaintiff's counsel and offered in support of the plaintiff's claims about consumer preference was, in the way that the questions were drafted, "sufficiently flawed that it does not contribute enough to render the claims plausible" (***Id*** at 164). Here again, Plaintiff's claims under New York's General Business Law §§349 and 350 were dismissed for failure to adequately allege a material misrepresentation, along with their claims of negligent misrepresentation, breach of express warranty, implied warranty of merchantability, fraud and violation of the Magnuson Moss Warranty Act (the latter claims were also found to be inadequately pleaded) (***Id.***).

Similarly here, Plaintiff has failed to allege sufficient facts to establish that the product label at issue is materially misleading such that it is likely to mislead a reasonable consumer acting reasonably under the circumstances (***Himmelstein, McConnell, Gribben, Donoghue & Joseph, LLP v. Matthew Bender & Co., Inc.***, *supra*). Furthermore, Plaintiff has failed to adequately plead damages as a result of the alleged misrepresentation. Plaintiff's General Business Law claims require an allegation of actual injury apart from the alleged deceptive act itself (***Amalfitano v. NBTY Inc.***, 128 AD3d 743, 9 NYS3d 352 [2d Dept. 2015]). Plaintiff's allegation that she paid a price premium for the vanilla almondmilk lacks sufficient factual basis to offer a semblance of plausibility. Furthermore, the allegation that she may not have purchased the product absent the alleged misrepresentation does not constitute a form of recoverable damage under General Business Law

§349 (***Small v. Lorillard Tobacco Co.***, 94 NY2d 43, 698 N.Y.S.2d 615 [1999]; ***Rice v. Penguin Putnam, Inc.,*** 289 AD2d 318, 734 NYS2d 98 [2d Dept. 2001]; ***Baron v. Pfizer, Inc.***, 42 AD3d 627, 840 NYS2d 445 [3d Dept. 2007]). Plaintiff has failed to state a cause of action under General Business Law §§ 349 and 350. Accordingly, these claims are dismissed.

Plaintiff's Breach of Express Warranty and Implied Warranty of Merchantability Claims

UCC 2-313 (1)(a), entitled "Express Warranties by Affirmation, Promise, Description, Sample," provides that,

> Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.

UCC 2-314, entitled "Implied Warranty: Merchantability; Usage of Trade" provides that,

> (1) Unless excluded or modified (Section 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.
> (2) Goods to be merchantable must be at least such as
> (a) pass without objection in the trade under the contract description; and
> (b) in the case of fungible goods, are of fair average quality within the description; and
> (c) are fit for the ordinary purposes for which such goods are used; and
> (d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and
> (e) are adequately contained, packaged, and labeled as the agreement may require; and
> (f) conform to the promises or affirmations of fact made on the container or label if any.
> (3) Unless excluded or modified (Section 2-316) other implied warranties may arise from course of dealing or usage of trade.

Plaintiff asserts that Defendant warranted that the vanilla almondmilk "contained an appreciable amount of real vanilla and did not contain artificial flavor" and that Defendant breached such warranty. Plaintiff has failed to state sufficient facts to establish the existence of an express warranty or its breach. Plaintiff has also failed to allege sufficient facts to constitute a cause of action for breach of implied warranty. Accordingly, Plaintiff's claims alleging breach of warranty are dismissed.

Plaintiff's Negligent Misrepresentation Claims

"The elements of a cause of action sounding in negligent misrepresentation are (1) a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information" (***Broecker v. Conklin Prop., LLC***, 189 AD3d 751 [2d Dept. 2020]; ***Steinberg v. Armstrong Plumbing & Heating, Inc.***, 153 AD3d 1379, 1380, 61 NYS3d 306, 307 [2d Dept. 2017]; ***Ginsburg***

Dev. Companies, LLC v. Carbone, 134 AD3d 890, 894, 22 NYS3d 485, 490 [2d Dept. 2015]; ***Nugent v. Diocese of Rockville Ctr.***, 137 AD3d 760, 761, 26 NYS3d 556, 558 [2d Dept. 2016]). "[L]iability for negligent misrepresentation has been imposed only on those persons who possess unique or specialized expertise, or who are in a special position of confidence and trust with the injured party such that reliance on the negligent misrepresentation is justified. Professionals, such as lawyers and engineers, by virtue of their training and expertise, may have special relationships of confidence and trust with their clients, and in certain situations [the Court of Appeals has] imposed liability for negligent misrepresentation when they have failed to speak with care" (***Kimmell v. Schaefer***, 89 NY2d 257, 260, 652 NYS2d 715 [1996]; *see also* ***Murphy v. Kuhn***, 90 NY2d 266, 682 NE2d 972 [1997]; ***Krobath v. S. Nassau Communities Hosp.***, 178 AD3d 807, 809, 115 NYS3d 389, 392 [2d Dept. 2019]). In order to impute an exceptional duty to speak with care in a commercial matters, there must be a relationship such that, in consideration of morals and good conscience, one has the right to rely on the other's speech and such reliance must be justifiable in context (***Kimmell v. Schaefer***, 89 NY2d 257, 260, 675 NE2d 450 [1996]; ***Krobath,*** *supra*; ***Murphy v. Kuhn***, 90 NY2d 266; 682 NE2d 972 [1997]). The existence of a contractual relationship, standing alone, is insufficient to impute a duty of care (***Krobath,*** *supra*) as is a "standard consumer-agent insurance placement relationship" even if it is over an extended period of time (***Murphy*** *supra*).

Here, Plaintiff's vague allegations that Defendant held itself out as "having special knowledge and experience in the sale of the product type" was insufficient to articulate a cognizable special duty. Plaintiff has failed to allege sufficient facts to give rise to any special duty requiring Defendant to speak with care and failed to plausibly allege misrepresentation or reasonable reliance on a misrepresentation. Plaintiff's claim asserting negligent misrepresentation is therefore dismissed.

Plaintiff's Fraud Claim

A cause of action seeking to recover damages for fraud is comprised of "a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury" (***Lama Holding Co. v. Smith Barney***, 88 NY2d 413, 421, 646 NYS2d 76, 668 NE2d 1370 [1996]; *see also* ***Connaughton v. Chipotle Mexican Grill, Inc.***, 29 NY3d 137, 142–43, 75 NE3d 1159, 1163 [2017]; ***Hausen v. N. Fork Radiology, P.C.***, 171 AD3d 888, 98 NYS3d 224 [2d Dept. 2019]). CPLR §3016(b) requires that fraud allegations in a complaint be stated in detail. The basis for the claim must be set forth with sufficient particularity that a party is reasonably apprised of the conduct and incidents underpinning the allegation (***Pludeman v. N. Leasing Sys., Inc.***, 10 NY3d 486, 492, 890 NE2d 184, 187 [2008]; ***Lanzi v. Brooks***, 43 NY2d 778, 779, 373 NE2d 278, 279 (1977)). To meet the pleading standard, a party must allege sufficient facts to set forth the elements of the cause of action and to apprise the adverse party of the events at issue.

Plaintiff claims that Defendant misrepresented attributes of the vanilla almondmilk, that Plaintiff knew the product contained artificial flavor and that the failure to disclose this would mislead consumers and that Plaintiff would not have purchased the product or paid as much if the true facts had been known. As discussed above, Plaintiff has failed to state sufficient facts to

constitute a plausible allegation of misrepresentation, justifiable reliance or actual injury. As such, the court need not address the argument that Plaintiff's claim lacks the specificity in pleading required by the CPLR. Plaintiff's fraud claim is dismissed.

Plaintiff's Unjust Enrichment Claim

To state an unjust enrichment claim, one must allege that a party has been enriched at the expense of another and it is against equity and good conscience to permit such party to retain that which is sought to be recovered (***Cty. of Nassau v. Expedia, Inc.***, 120 AD3d 1178, 992 NYS2d 293 [2d Dept. 2014]; ***Wells Fargo Bank, N.A. v. Burke***, 155 AD3d 668, 64 NYS3d 228 [2d Dept. 2017]; ***Mannino v. Passalacqua***, 172 AD3d 1190, 101 NYS.d 381 [2d Dept. 2019]).

Plaintiff alleges that "Defendant obtained benefits and monies because the Product was not as represented and expected, to the detriment and impoverishment of plaintiff and class members, who seek restitution and disgorgement of inequitably obtained profits." Plaintiff has failed to state sufficient facts to constitute a plausible allegation of misrepresentation, that Defendant has been enriched at the expense of another or that good conscience must intervene. Plaintiff's claim for unjust enrichment is dismissed.

Based upon the foregoing, Defendant's motion is granted and Plaintiff's complaint is dismissed in all respects.

Dated: December 10, 2021
Riverhead, New York

VINCENT J. MARTORANA, J.S.C.

CHECK ONE: __X__ FINAL DISPOSITION _____ NON-FINAL DISPOSITION