Galkowski-Coira v Price Chopper, Inc.
2023 NY Slip Op 30925(U)
March 23, 2023
Supreme Court, New York County
Docket Number: Index No. 155253/2021
Judge: Dakota D. Ramseur
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DAKOTA D. RAMSEUR** **PART** **34M**
Justice

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ELIZABETH GALKOWSKI-COIRA

Plaintiff,

- v -

THE PRICE CHOPPER, INC.,

Defendant.

----------X

INDEX NO. 155253/2021

MOTION DATE 12/20/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 28, 29

were read on this motion to/for STAY.

Plaintiff, Elizabeth Galkowski-Coira (plaintiff), commenced this action pursuant to the General Business Law, for negligent misrepresentation, fraud, breach of warranty, breach of warranty under state and federal Magnuson Moss Warranty Act, 15 U.S.C. § 2301, *et seq.* (MMWA), and for unjust enrichment against defendant, The Price Chopper, Inc. (defendant), stemming from alleged deceptive marketing practices. Defendant now moves pursuant to CPLR 2201 to stay this action pending the resolution of a motion to consolidate this action with another action pending in Suffolk County Supreme Court entitled *St. John v The Price Chopper, Inc.*, Index No. 605458/2021, or in the alternative, pursuant to CPLR 3211(a) to dismiss the amended complaint.[1] The motion is opposed. For the following reason, defendant's motion is granted.

FACTUAL ALLEGATIONS

Plaintiff commenced this action seeking damages based upon allegedly misleading labelling concerning the source of vanilla flavoring contained in Greek yogurt sold by defendant. Plaintiff alleges that defendant manufactures and distributes a vanilla-flavored Greek-style yogurt under its private label PICS brand (the product) (compl at ¶ 1). The front label of the product appears as follows:

[1] Pursuant to the March 24, 2022 letter from counsel for defendant, wherein said counsel indicated that its motion to consolidate the two actions was denied. Thus, the only issue on the instant motion is defendant's motion to dismiss the complaint.

Plaintiff represents a putative class of New York consumers who purchased the product. Plaintiff alleges that defendant misleadingly labeled the product "vanilla," in that the product "*may* contain a *de minimis* or negligible amount of natural vanilla, and that the Product's vanilla taste is mostly from non-vanilla, artificial flavor" (NYSCEF doc. no. 12, compl at ¶ 32 [emphasis in original]). Specifically, plaintiff alleges that the product contains artificial vanillin, derived from guaiacol (*id.* at ¶ 39), and that the product's front label falsely implies that the flavoring is created exclusively with real vanilla (*id.* ¶¶ 18–19). Plaintiff claims that the product "is sold for a price premium," and that plaintiff "would not have bought the product or would have paid less for it" had she known, as plaintiff alleges, that the product was not made with real vanilla (*id.* ¶¶ 59–60).

DISCUSSION

On a motion to dismiss pursuant to CPLR 3211(a)(7), the court must "accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83. 87-88 [1994]; *see also Chapman, Spira & Carson, LLC v Helix BioPharma Corp.*, 115 AD3d 526, 527 [1st Dept 2014]). However, "'factual allegations ... that consist of bare legal conclusions, or that are inherently incredible .... are not entitled to such consideration" ' (*Mamoon v Dot Net Inc.*, 135 AD3d 656, 658 [1st Dept 2016], quoting *Leder v Spiegel*, 31 AD3d 266, 267 [1st Dept 2006], *affd* 9 NY3d 836 [2007], *cert denied* 552 US 1257 [2008]).

New York GBL §§ 349 and 350

In support of the branch of its motion to dismiss plaintiff claims under GBL §§ 349 and 350, defendant first argues that plaintiff fails to allege an injury. Specifically, defendant contends that plaintiff's claim premised on "premium pricing" is contradicted by the fact that the product is priced the same as non-flavored yogurt. Defendant next argues that plaintiff fails to allege a material misrepresentation, since a reasonable consumer would not be misled by the product's label. Defendant contends that the product label depicting the word "vanilla" is not misleading because the consumer receives the product it is seeking to purchase. Defendant further argues that the product label is not misleading because it does not suggest the amount of real vanilla contained in the product. Defendant argues that even if a reasonable consumer was confused about the contents of the product after reading the front label, the ingredient list on the product would disclose the ingredients in the order of predominance in the product. Defendant further argues that plaintiff's "analytical testing" of the product is conclusory and vague, and does not support her claim of misrepresentation. Defendant next argues that plaintiff fails to plead facts demonstrating materiality, since plaintiff fails to allege that any misrepresentation would have been material to an objectively reasonable consumer.

In opposition, plaintiff does not distinguish the cases cited by defendant concerning whether reasonable consumer would distinguish vanilla as an ingredient as opposed to a flavor. Instead, plaintiff argues that the court should not rely on the federal cases finding that a reasonable consumer would not distinguish the product's flavor to be derived mostly from vanilla. Plaintiff next argues that defendant's argument that the violation of federal and state regulations, including Federal Department of Agriculture regulations, are relevant to plaintiff claims. Plaintiff further contends that the ingredient list fails to resolve the misrepresentations by the front label, which, as plaintiff argues, suggests that the product is made with natural vanilla. Plaintiff contends that she did not allege she expected only vanilla, but rather that she believed the product had "a non-negligible amount of extracts from vanilla beans and did not contain artificial flavor" (compl. at ¶ 71). Plaintiff further argues that her allegations concerning artificial flavoring are plausible, in that if vanilla was the exclusive source of flavoring, the ingredient list would state "vanilla extract." Plaintiff next argues that her allegation that she suffered an economic injury is premised on her claim that she paid a higher price for the product.

GBL § 349(a) prohibits deceptive business practices, while section 350 prohibits false advertising. To state a claim under both GBL 349 and 350, a plaintiff must allege that the challenged act or practice was consumer-oriented, that it was misleading in a material way, and that the plaintiff suffered injury as a result of the deceptive act (*Koch v Acker, Merrall & Condit Co.*, 18 NY3d 940, 941 [2012]). An act or omission is materially misleading if it is "likely to mislead a reasonable consumer acting reasonably under the circumstances" (*Oswego Laborers' Loc. 214 Pension Fund v Marine Midland Bank, N.A.*, 85 NY2d 20, 26 [1995]). Further the existence of "deceptive acts and practices" may be determined as a matter of law (*id.*; *Fink v Time Warner Cable*, 714 F.3d 739, 741 [2d Cir. 2013] ["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"]).

Plaintiff essentially alleges that the product's labeling is misleading because it depicts a flower and vanilla beans, the word "vanilla," and immediately thereunder, the phrase "with other

natural flavors," suggesting that the product's flavor is derived from natural vanilla, and not artificial flavors (compl. at ¶ 19).

The Court finds that plaintiff failed to allege that the product's label was misleading or otherwise deceptive. A review of the label on the packaging reveals that the label does not claim that the product is made exclusively or even mostly with vanilla. Rather, the label simply indicates that the product is vanilla flavored. The Court finds that the label on the product would not lead a reasonable consumer to conclude that the product is made from vanilla, especially since there is no allegation that the product claims to be made from vanilla. Plaintiff alleges that the product may in fact contain some vanilla, and has a vanilla flavor (compl. at ¶¶ 29, 32). "Indeed, numerous courts have similarly concluded with respect to comparable claims about vanilla-flavored products that reasonable consumers associate the word vanilla with a flavor, not an ingredient" (*Jones v Orgain, LLC*, No. 20 CV 8463, 2021 WL 4392783, at *3 [SD NY Sept. 24, 2021] [internal quotation marks and citations omitted]; *see Barreto v Westbrae Nat., Inc.*, 518 F. Supp. 3d 795, 802-803 [SD NY 2021] [dismissing a similar GBL claim where there was "no claim anywhere on the packaging that natural vanilla is the predominant source of the vanilla flavor"]; *Wynn v Topco Assocs.*, LLC, No. 19-CV-11104, 2021 WL 168541, at *3 [SD NY Jan. 19, 2021] ["the Court finds that Plaintiffs have failed to plausibly allege that a reasonable customer would in fact conclude that the word 'vanilla' on a product's front label implies that the product's flavoring was derived exclusively from natural vanilla extract, such that the front label would be misleading"]; *Twohig v Shop-Rite Supermarkets, Inc.*, 519 F. Supp. 3d 154, 161 [SD NY 2021] [dismissing plaintiffs' claims pursuant to GBL §§ 349 and 350, where "the front label of the Product does not contain qualifying words that would lead a reasonable consumer to believe that vanilla from vanilla beans is the exclusive or predominant flavor ingredient"]; *Cosgrove v Oregon Chai, Inc.*, 520 F. Supp. 3d 562, 581 [SD NY 2021] [granting the defendant's motion to dismiss plaintiff's claims under GML §§ 349 and 350 where the word "Vanilla" appearing just below the words "Chai Tea Latte" in a slightly larger font "appears to describe a flavor more than an ingredient — more particularly, to distinguish the vanilla flavor from Defendant's other chai tea latte flavors"]; *Myers v Wakefern Food Corp.*, No. 20 CIV. 8470, 2022 WL 603000, at *3 [SD NY Mar. 1, 2022] [finding that defendant's product was not misleading and dismissing plaintiff's claims under GML §§ 349 and 350 where the front label indicates "Vanilla" and depicts a vanilla flower and vanilla beans, since "vanilla" label would not lead a reasonable consumer to understand its flavor to be derived mostly or exclusively from the vanilla bean"] [collecting cases]; *Garadi v Mars Wrigley Confectionery US, LLC*, No. 119 CV 03209, 2021 WL 2843137, at *3 [ED NY July 6, 2021] [granting defendant's motion to dismiss plaintiff's deceptive practice claims where the front label contains the wording "vanilla ice cream," finding that '(n)owhere on the packaging does defendant promise that the ice cream bars are flavored with vanilla from an exclusive source. The front label merely indicates the ice cream is vanilla flavored and plaintiffs do not argue the ice cream does not taste like vanilla"]).

"Simply put, a reasonable consumer would associate the word "vanilla" in the [p]roduct's front label with the [yogurt's] flavor and not as a particular ingredient, much less the predominant one" (*Myers* at *4). Accordingly, defendant's motion to dismiss plaintiff's claim under GBL §§ 349 and 350 is granted.

Negligent Misrepresentation

Defendant next argues that plaintiff's negligent misrepresentation and fraud claims fail because plaintiff fails to allege any facts demonstrating that the product's label misreported the contents of the product. Defendant further contends that plaintiff fails to plead a duty owed by defendant to plaintiff. In opposition, plaintiff argues that she states a claim for negligent misrepresentation by alleging that the product's artificial flavors "simulates, resembles or reinforces the characterizing flavor," and that the front label is required to state, 'Artificially Flavored'" (compl. at ¶¶ 51; see 43-44, 48).

To state a claim for negligent misrepresentation, a plaintiff must allege that "(1) the defendant had a duty, as a result of a special relationship, to give correct information; (2) the defendant made a false representation that he or she should have known was incorrect; (3) the information supplied in the representation was known by the defendant to be desired by the plaintiff for a serious purpose; (4) the plaintiff intended to rely and act upon it; and (5) the plaintiff reasonably relied on it to his or her detriment" (*Anschutz Corp. v Merrill Lynch & Co.*, 690 F.3d 98, 114 [2d Cir. 2012] [internal quotation marks and citations omitted]). A special relationship may be established by "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" (*Kimmell v Schaefer*, 89 NY2d 257, 263 [1996]). A claim for negligent misrepresentation must be plead with the particularity required by CPLR 3016(b) (*Ferro Fabricators, Inc. v 1807-1811 Park Ave. Dev. Corp.*, 127 AD3d 479, 479 [1st Dept 2015]).

At the outset, plaintiff's claim for negligent misrepresentation fails because, as discussed above, the Court finds that plaintiff failed to adequately allege that defendant's product label included misleading or otherwise deceptive information to plaintiffs. Plaintiff's claim also fails because the complaint does not include an allegation that defendant acted with the requisite fraudulent intent.

Plaintiff's negligent misrepresentation claim fails for the additional reason that plaintiff fails to allege the existence of a special relationship or a privity-like relationship. "In the commercial context, a closer degree of trust between the parties than that of the ordinary buyer and seller is required to establish the 'existence of . . . a special relationship . . . [capable of] giv[ing] rise to an exceptional duty regarding commercial speech and justifiable reliance on such speech' " (*Izquierdo v Mondelez Intl, Inc.*, No. 16-CV-04697, 2016 WL 6459832, at *8 [SD NY Oct. 26, 2016], quoting *Kimmell v Schaefer*, 89 NY2d 257, 264, [1996)] [alterations in original]). Here, the complaint does not allege any facts suggesting that her purchase of the product was anything but an arms-length commercial transaction. Without any additional alleged facts to establish a special relationship, plaintiff's negligent misrepresentation claim must be dismissed (*see Stoltz v Fage Dairy Processing Indus., S.A.*, No. 14-CV-3826, 2015 WL 5579872, at *25 [ED NY Sept. 22, 2015) ["The requisite special relationship may not, however, be based solely on Defendants' status as the manufacturer of the [product] because, if this alone were sufficient, a special relationship would necessarily always exist for purposes of misbranded food claims, which is not the case"]).

Here, plaintiff's claim is "based on defendant's position, holding itself out as having special knowledge and experience in this area – a trusted seller of groceries for almost a hundred years" (compl. at ¶ 98). Recent decisions by other courts have found that conclusory allegations nearly identical to those alleged by plaintiff are inadequate to establish a "special relationship" (*see Bynum v Fam. Dollar Stores, Inc.*, 592 F. Supp. 3d 304, 314 [SD NY 2022] [dismissing a negligent misrepresentation claim concerning the sale of almonds labeled as "Smoked Almonds," where plaintiff alleged "that his negligent misrepresentation claim is viable because Defendant had 'special knowledge and experience' in the sale of consumer goods and 'knew that Plaintiff[s] would rely on those claims' "]; *Colpitts v Blue Diamond Growers*, 527 F. Supp. 3d 562, 588 [SD NY 2021] ["Plaintiff's conclusory allegation that Defendant's duty arose from 'having special knowledge and expertise in the production, service and/or sale of the product [(almonds)],' does not plead a special relationship based on Defendant's possession of unique knowledge"]; *Twohig*, 519 F. Supp. 3d 154, 167 [SD NY 2021] [plaintiffs' conclusory allegation that "Defendant 'held itself out as having special knowledge and experience in the production, service and/or sale of the product type [(soymilk)]' " was inadequate to allege a special relationship]). As plaintiff's fails to allege a special relationship between plaintiff and defendant, plaintiff's claim for negligent misrepresenting must be dismissed.

Fraud

To state a claim of fraud under New York law, a plaintiff must allege (1) a material misrepresentation or omission of fact, (2) made with knowledge of its falsity, (3) with an intent to defraud, and (4) reasonable reliance on the part of the plaintiff, (5) that causes damage to the plaintiff (*Schlaifer Nance & Co. v Estate of Warhol*, 119 F.3d 91, 98 [2d Cir. 1997]). A claim of fraud must be alleged with the particularity required by CPLR 3106.

Here, as discussed above, plaintiff fails to allege a material misrepresentation of fact or omission since a reasonable consumer would not conclude that the words and images on the product's label, including the word "vanilla," communicate that the product contains vanilla.

Moreover, plaintiff fails to allege the requisite fraudulent intent. Plaintiff alleges that "Defendant's fraudulent intent is evinced by its knowledge that the Product was not as advertised" (compl ¶ 103). Nearly identical allegations of fraudulent intent have been dismissed as insufficient (*see Campbell v Whole Foods Mkt. Grp., Inc.*, 516 F. Supp. 3d 370, 390 [SD NY 2021] [dismissing fraud claim where "Plaintiff's only allegation about Defendant's intent is that Defendant's fraudulent intent is evinced by its failure to accurately identify the Product on the front label when it knew this was not true"] [internal quotation marks omitted]; *Twohig*, 519 F. Supp. 3d at 166 ["Plaintiffs' fraud claim is separately dismissed because ... [t]he complaint only contains the conclusory allegation that 'Defendant's fraudulent intent is evinced by its failure to accurately identify the Product on the front label and ingredient list, when it knew its statements were neither true nor accurate and misled consumers' "]; *Gilleo v. J.M. Smucker Company*, No. 20 Civ. 2519, 2021 WL 4341056, at *9 [SD NY Sept. 23, 2021] [on a motion to dismiss, plaintiff's claim for negligent misrepresentation, rejecting as insufficient the allegation that "Defendant's fraudulent intent is evinced by its failure to accurately identify the Product on the front label, when it knew its statements were not true nor accurate"]). Accordingly, plaintiff's claim for fraud is dismissed.

Breach of Express Warranty

In support of the branch of defendant's motion to dismiss plaintiff's claim for express breach of warranty, defendant argues that use of the word "vanilla" does not create a warranty that the product is made exclusively with real vanilla. In opposition, plaintiff argues that she states a claim for breach of express warranty, since she alleges that she "desired to purchase a product which contained a nonnegligible amount of extracts from vanilla beans and did not contain artificial flavor" (compl. at ¶ 85). Plaintiff contends that by marketing the product with "the statements, 'vanilla,' 'Other Natural Flavors,' and pictures of vanilla beans and a vanilla flower," defendant represented that the product "contained a nonnegligible amount of extracts from vanilla beans and did not contain artificial flavor" (compl. at ¶¶ 18, 90).

To state a claim for breach of an express warranty, a plaintiff must show "(1) the existence of a material statement amounting to a warranty, (2) the buyer's reliance on this warranty as a basis for the contract with the immediate seller, (3) breach of the warranty, and (4) injury to the buyer caused by the breach" (*Goldemberg v Johnson & Johnson Consumer Cos.*, 8 F. Supp. 3d 467, 482 [SD NY 2014]). "[i]n order to assert a breach of express warranty claim under New York law, 'a buyer must provide the seller with timely notice of the alleged breach of warranty' " (*Lugones v Pete & Gerry's Organic, LLC*, 440 F. Supp. 3d 226, 244–245 [SD NY 2020], quoting *Quinn v Walgreen Co.*, 958 F. Supp. 2d 533, 544 [SD NY 2013]).

As discussed above, as alleged, the product does not represent that its flavor is derived predominantly from natural vanilla or extracts of vanilla beans, and a reasonable consumer would not interpret the product's label claim as much. Thus, plaintiff's claim for breach of express warranty is dismissed.

Plaintiff's claim for breach of warranty is dismissed for the additional reason that plaintiff failed to provide timely notice of the alleged breach. Plaintiff alleges that she "provided or will provide notice to defendant, its agents, representatives, retailers and their employees" (compl. at ¶ 93). "That allegation is insufficient to show that the buyer provided timely notice of the alleged breach—the statement is wholly equivocal. It does not allege that notice has been provided, only that Plaintiff 'provided or will provide' notice" (*Campbell.*, 516 F. Supp. 3d at 391; *see Valcarcel v Ahold U.S.A., Inc.*, 577 F. Supp. 3d 268, 282 [SD NY 2021] [dismissing plaintiff's claim for breach of express warranty where allegation of notice consisted solely of her claim that she "provided or will provide notice to defendant, its agents, representatives, retailers, and their employees"]; *Warren v Stop & Shop Supermarket, LLC*, 592 F. Supp. 3d 268, 285 [SD NY 2022] ["Here, the Court concludes that Plaintiff's express warranty claim fails for lack of timely notice. Plaintiff alleges only that '[she] provided or will provide notice to Defendant, its agents, representatives, retailers and their employees' "]).

Breach of Implied Warranty of Merchantability

Defendant argues that plaintiff's claim for breach of implied warranty of merchantability fails to plead that the product was not fit for human consumption. In opposition, plaintiff argues, in essence, that her claim for breach of implied warranty survives, since plaintiff alleges that the contents of the product did not conform with statements implied by the label.

Plaintiff alleges that the product was "manufactured, labeled and sold by defendant and expressly and impliedly warranted to plaintiff and class members that contained a non-negligible amount of extracts from vanilla beans and did not contain artificial flavor" (compl. at ¶ 90). Plaintiff further alleges that "the Product did not "conform to the promises or affirmations of fact made on the container or label" that it contained "little, if any of the extracts of vanilla beans" and artificial flavor" and that defendant was aware consumers "wanted to consume and use a Greek yogurt that contained a non-negligible amount of extracts from vanilla beans and did not contain artificial flavor" (compl. at ¶¶ 29, 71).

Plaintiff's claim for breach of implied warranty is dismissed. Even assuming that the product's label suggested that the product was made exclusively from natural vanilla, and that the product failed to conform with the label, the complaint fails to allege that the product was unfit for human consumption. "In the sale of goods context, there is an implied warranty that the goods will be of merchantable quality (*see Viscusi v. Proctor & Gamble*, No. 05 CV 01528, 2007 WL 2071546, at *13 [ED NY July 16, 2007], *affd sub nom Viscusi v P & G-Clairol, Inc.*, 346 F. Appx 715 [2d Cir. 2009]). "This warranty, however, does not mean that the product will fulfill a 'buyer's every expectation' . . . . Rather, such a warranty 'provides for a minimum level of quality' " (*id.*; *see Barreto*, 518 F. Supp. 3d 795, 807 [SD NY 2021] ["There are no allegations that the soymilk beverage was unfit for the ordinary purpose of such goods, namely, human consumption"]). As the complaint fails to allege that the product was not fit for human consumption, plaintiff's claim for breach of implied warranty of merchantability is dismissed.

Magnuson-Moss Warranty Act

Defendant next argues that plaintiff's claim under the MMWA fails, since the product label was not a warranty under that statute. Further, defendant argues that the MMWA does not create an additional basis to recover under federal law. In opposition, plaintiff argues that she states a claim under the MMWA, since the product's label includes the word "vanilla" next to the depiction of two vanilla beans and a vanilla flower, with a promise of "Other Natural Flavors," which constitute a "written affirmation of fact or written promise" that the product contained more than a negligible amount of vanilla and did not replace vanilla with artificial flavors (compl. at ¶¶ 2-3, 71).

The MMWA makes a warrantor directly liable to a consumer for breach of a written warranty (*Wilbur v Toyota Motor Sales*, 86 F.3d 23, 26 [2d Cir. 1996]). "At its core, however, the MMWA merely incorporates and federalizes state-law breach of warranty claims, including state-law standards for liability and damages" (*Cosgrove*, 520 F. Supp. 3d 562, 586 [SD NY 2021]). Thus, the MMWA does not create additional bases for recovery under federal law, but rather allows a consumer to recover damages under existing state law claims for breach of written or implied warranty (*Myers* at *7). As plaintiff has not pled a state law claim of express or implied warranty, her MMWA claim fails.

Plaintiff argues that the product's front label constitutes a " 'written affirmation of fact or written promise' that the Product contained more than a negligible amount of vanilla and did not replace vanilla with artificial flavors" (NYSCEF doc. no. 18 at 21, citing compl. ¶¶ 2-3, 71). Neither the words "vanilla," nor other depictions located on the product's label "[s]uggest that

the [yogurt was] defect free or that they will meet a specified level of performance over a specified period of time; instead, they simply describe the product" (*Campbell*, 516 F. Supp. 3d at 393). Thus, the label may not be construed to represent an implied or express warranty.

Unjust Enrichment

In support of the branch of defendant's motion to dismiss plaintiff's claim for unjust enrichment, defendant argues that the product's label was not deceptive. Defendant further argues that plaintiff's claim for unjust enrichment is duplicative of plaintiff's claims for negligent misrepresentation, fraud, and breach of warranty. Plaintiff argues that she may present a claim for unjust enrichment as an alternative theory of liability.

To state a claim for unjust enrichment under New York law, a plaintiff must plead that (1) the defendant was enriched; (2) the enrichment was at the plaintiff's expense; and (3) the circumstances were such that equity and good conscience require the defendant to make restitution (*Hughes v Ester C Co.*, 930 F.Supp.2d 439, 471 [ED NY 2013]).

As discussed in the preceding sections, plaintiff fails to allege that a reasonable customer would be misled or deceived by the product's label (*see Axon v Florida's Nat. Growers, Inc.*, 813 F. Appx 701, 706 [2d Cir. 2020] ["The unjust enrichment claim here fails [because] she has not alleged a fraud that would render Florida's Natural's enrichment 'unjust' "]; *Santiful v Wegmans Food Markets, Inc.*, No. 20-CV-2933, 2022 WL 268955, at *7 [SD NY Jan. 28, 2022] ["Plaintiffs have failed to allege that any gains to Defendant would be unjust because they have not plausibly alleged that a reasonable customer would be misled or deceived by the Product's label"]). Accordingly, as the complaint fails to allege an independent basis to find that a reasonable consumer would be misled or deceived, plaintiff's claim for unjust enrichment also fails.

Plaintiff's claim for unjust enrichment fails for the additional reason that the claim is based on the same allegations as her defective claims for consumer deception (*see Barreto*, 518 F. Supp. 3d at 808–809; *Colpitts*, 527 F. Supp. 3d at 592 [dismissing plaintiff's unjust enrichment claims based on nearly identical allegations because "Plaintiff's unjust enrichment claim . . . merely duplicates his other claims"]).

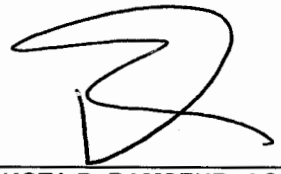
Plaintiff cites to *Emby Hosiery Corp. v Tawil* (196 AD 3d 462, 464 [1st Dept 2021]) in support of the proposition that she may plead her claim for unjust enrichment in the alternative. In that case, an issue existed as to whether "a bona fide dispute exists as to the existence of a contract," thus plaintiff was not required to "[e]lect its remedies and may proceed upon theories of unjust enrichment or quasi-contract (*id.* at 465). Here, there is no such dispute, and thus *Emby Hosiery Corp* does not support plaintiff's argument. Accordingly, plaintiff's claim for unjust enrichment is dismissed.

Accordingly, it is hereby

ORDERED that defendant's motion to dismiss the complaint is granted, and the complaint is dismissed; and it is further

ORDERED that defendant shall serve a copy of this decision and order upon plaintiff, with notice of entry, within ten (10) days of entry.

This constitutes the decision and order of the Court.



3/23/2023
DATE

DAKOTA D. RAMSEUR, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
	X	GRANTED		DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT		REFERENCE