SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX

----------x

JOANNE DE LA CRUZ BERAS, JACQLYN KNIGHT, DAMEKA JONES, AND JAMIE, GIOVANNINI, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Index No. **813805/2024E**

Plaintiff(s), Hon. **FIDEL E. GOMEZ**
Justice

- against -

UPFIELD US INC.,

Defendant(s).

——----------x

The following papers numbered 1 to 4, Read on the motion noticed on 4/17/25, and duly submitted as no. 3 on the Motion Calendar of 4/7/25

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	1	
Answering Affidavit and Exhibits		
Replying Affidavit and Exhibits		
Notice of Cross-Motion - Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Proposed Order		
Filed Papers -		
Memorandum of Law	2-4	

Defendant's motion seeking dismissal of the First Amended Class Action Complaint is decided in accordance with the Decision and Order annexed hereto.

Dated: 7/30/25

Hon. **FIDEL E. GOMEZ, JSC**

X CASE DISPOSED □ NON-FINAL DISPOSITION

MOTION/CROSS-MOTION IS: **X** GRANTED □ DENIED □ GRANTED IN PART □ OTHER

□ SETTLE ORDER □ SUBMIT ORDER □ DO NOT POST □ FIDUCIARY APPOINTMENT
□ REFEREE APPOINTMENT □ NEXT APPEARANCE DATE:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX

----------X

JOANNE DE LA CRUZ BERAS, JACQLYN KNIGHT, DAMEKA JONES, AND JAMIE, GIOVANNINI, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Plaintiffs,

-against-

DECISION AND ORDER

Index No. 813805/2024E

UPFIELD US INC.,

Defendant.

----------X

In the instant action, defendant moves for an Order, pursuant to CPLR § 3211(a)(7), dismissing the complaint.

For the reasons set forth hereinafter, defendant's motion is granted.

BACKGROUND

The first amended complaint (complaint) alleges causes of action for violation of New York General Business Law (GBL) §§ 349 (deceptive business practices) and 350 (false advertising) (1st COA), and fraud (2nd COA).[1] Specifically, the complaint alleges, *inter alia,* as follows: Defendant Upfield US Inc., currently known as Flora Food US Inc. (Flora), sells vegetable oil emulsions, in sticks and tubs, described on the front side of the packaging as "Plant Butter," "Non Dairy," "Made With Avocado Oil," and/or "With Avocado Oil," with an image an avocado in the upper right hand corner, and with smaller print in the lower corners noting that it is a "79% Vegetable Oil Spread," and/or "79% Plant-Based Oil Spread," under its Country

[1]The action is brought as a putative class action, the proposed class consisting of all citizens of New York who purchased the subject Country Crock product for consumption and/or use in New York, during the statutes of limitations.

Crock brand (the Product).[2] The large print on the side panels emphasize how "this [] Plant Butter [is] Made With Ingredients Like Avocado Oil," and/or "Made From Ingredients Like Avocado Oil." Despite the emphasis on avocado oil, the ingredient list, in fine print on the back of the package, reveals the Product's blend of plant-based oils are mainly palm fruit oil, palm kernel oil, canola oil, and/or soybean oil, with avocado present in the smallest amount. Avocado oil costs almost fifteen times canola oil, more than twelve times palm oil, and almost ten times soybean oil. As a result of the false and misleading representations and omissions, the Product is sold at a premium price, approximately $3.79 for four sticks (16 oz.) and $3.49 for a 10.5 oz. container. The price is higher than the Product would be sold for if it were represented in a non-misleading way. Plaintiffs bought the Product, with the labeling/packaging identified in the complaint, at or around the above-referenced price. Plaintiff Joanne De La Cruz Beras (Beras) purchased the Product between October 2019 and July 2024, at stores in New York. Plaintiffs Jacqlyn Knight (Knight), Dameka Jones (Jones) and Jamie Giovannini (Giovannini) purchased the Product between October 2019 and February 2025, at stores in New York. Plaintiffs paid more than they would have had they known avocado oil was not the exclusive or predominant vegetable oil ingredient, nor present in a significant amount.

With respect to their GBL §§ 349 and 350 cause of action, the complaint alleges, *inter alia*: The packaging and labeling of the Product violated the GBL because the representations caused purchasers to expect avocado oil would be the exclusive or predominate vegetable oil ingredient, or at least present in a significant amount. Defendant's false and deceptive representations and omissions with respect to the Product's contents were material in that they were likely to influence consumer purchasing decisions. Plaintiffs paid more for the Product than they otherwise would have paid based on the misleading representations and/or omissions. As a result of defendant's misrepresentations and omissions, plaintiffs were injured and/or were caused to suffer economic or financial damages by payment of a price premium, or higher relative price, for the Product "in the order of" between five and sixty cents per unit.

---

[2]Photographs of the sticks and tubs packaging are embedded within the complaint.

With respect to their fraud cause of action, the complaint alleges: Defendant made material misrepresentations and/or omissions of fact in its advertising and marketing of the Product. Defendant's conduct is fraudulent because it deceives and/or deceived customers into believing that avocado oil would be the exclusive or predominate vegetable oil ingredient, or at least present in a significant amount. In its advertising and marketing, defendant omitted telling consumers the Product did not contain more than a small amount of avocado oil, and used mostly traditional vegetable oils. Defendant knew or should have known this information – that the Product was a traditional vegetable oil spread with only a taste of avocado oil – was material to all reasonable consumers and impacts their purchasing decisions. Plaintiffs read and relied on defendant's representations and omissions before purchasing the Product. Defendant profited by selling the misrepresented Product to consumers throughout the State of New York.

Standard of Review

In deciding a motion to dismiss pursuant to CPLR § 3211, a court must "accept the facts alleged in the complaint is true, accord plaintiffs 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]). The pleading is to be afforded a liberal construction (*id.* at 87). Ambiguous allegations must be resolved in plaintiff's favor (*JF Capital Advisors, LLC v Lightstone Group, LLC,* 23 NY3d 759, 764 [2015]). "The motion must be denied if from the pleadings' four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*511 West 232nd Owners Corp. v Jennifer Realty Co.,* 98 NY2d 144, 152 [2002]). "Where . . . the allegations consist of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, they are not entitled to such consideration" (*Ullman v Norma Kamali, Inc.,* 207 AD2d 691, 692 [1st Dept 1994]).

When a party moves to dismiss a complaint pursuant to CPLR § 3211(a)(7), the standard is whether the pleading states a cause of action, not whether the proponent of the pleading has a cause of action (*Guggenheimer v Ginzburg,* 43 NY2d 268 [1977]). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus" (*EBC I, Inc. v Goldman Sachs &*

Co., 5 NY3d 11, 19 [2005]). On a motion made pursuant to CPLR § 3211(a)(7), the burden never shifts to the nonmoving party to rebut a defense asserted by the moving party (*Sokol v Leader,* 74 AD3d 1180, 1181 [2nd Dept 2010]). While "CPLR § 3211 allows a plaintiff to submit affidavits, [] it does not oblige him to do so on penalty of dismissal" (*Rovello v Orofino Realty Co.,* 40 NY2d 633, 635 [1976]). Affidavits may be received for a limited purpose only, serving normally to remedy defects in the complaint, and such affidavits are not to be examined for the purpose of determining whether there is evidentiary support for the pleading (*id.* at 636). Thus, a plaintiff "will not be penalized because he has not made an evidentiary showing in support of his complaint" (*Rovello* at 635).

However, a court may consider evidentiary material submitted by a defendant, and if it does so, the criterion becomes "whether the proponent of the pleading has a cause of action, not whether he has stated one" (*Guggenheimer* at 275). Affidavits submitted by a defendant "will almost never warrant dismissal under CPLR § 3211 unless they establish conclusively that [the plaintiff] has no cause of action" (*Lawrence v Graubard Miller,* 11 NY3d 588, 595 [1976] quoting *Rovello* at 636). Indeed, a motion to dismiss pursuant to CPLR § 3211(a)(7) must be denied "unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it" (*Guggenheimer* at 275).

Discussion

In support of the motion, defendant contends that: (1) the Product label is not misleading because it does not promise a predominant - or any particular - amount of avocado oil; (2) the composition of the Product is clearly and accurately disclosed on the Product label; and (3) plaintiffs have not adequately alleged actual injury or fraud.

In opposition, plaintiffs contend that: (1) deception is plausible and the ingredient list on the back label is insufficient to dispel deception; (2) plaintiffs adequately allege injury because they paid more for the Product than they would have had they known that the amount of avocado was de minimis; and (3) fraud is pleaded with sufficient particularity as the composition of the Product is peculiarly within the knowledge of defendant.

Violation of GBL §§ 349 and 350 (1st COA)

Under GBL § 349, deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in New York State are unlawful. GBL § 350 provides that false advertising in the conduct of any business, trade or commerce or in the furnishing of any service in New York State is unlawful. Advertising is false if it is misleading in a material respect (GBL § 350-a[1]; *Karlin v IVF America, Inc.,* 93 NY2d 282, 290 [1999]). These consumer protection statutes prohibit deceptive acts and practices that misrepresent the nature or quality of products or services (*Himmelstein, McConnell, Gribben, Donoghue & Joseph, LLP v Matthew Bender & Co., Inc.,* 37 NY3d 169, 176 [2021]; *Teller v Bill Hayes, Ltd.,* 213 AD2d 141, 146 [2d Dept 769]). To state a cause of action under either section, a plaintiff must allege that: (1) defendant's conduct was consumer-oriented; (2) defendant's act or practice was deceptive or misleading in a material way; and (3) plaintiff suffered an injury as a result of the deception (*Plavin v Group Health Inc.,* 35 NY3d 1,10 [2020]; *Goshen v Mutual Life Ins. Co. of N.Y.,* 98 NY2d 314, 324 n1 [2002] ["The standard of recovery under General Business Law § 350, while specific to false advertising, is otherwise identical to Section 349."]; *Denenberg v Rosen,* 71 AD3d 187, 195 [1st Dept 2010] [same]). A plaintiff claiming the benefit of GBL §§ 349 and 350 must demonstrate that the acts or practices have a broader impact on consumers at large (*Plavin* at 10; *Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank, N.A.,* 85 NY2d 20, 25 [1995]; *North State Autobahn, Inc. v Progressive Ins. Group Co.,* 102 AD3d 5,13 [2d Dept 2012]). The conduct need not be repetitive or recurring but defendant's acts or practices must have a broad impact on consumers at large (*New York Univ. v Continental Ins. Co.,* 87 NY2d 308, 320 [1995]; *Oswego Laborers' Local 214 Pension Fund* at 25; *Gomez-Jiminez v New York Law School,* 103 AD3d 13, 16 [1st Dept 2012]). The threshold test is whether the alleged acts are consumer-oriented in the sense that they potentially affect similarly situated consumers (*Oswego Laborers' Local 214 Pension Fund* at 26-27). Also, whether a representation or omission is a deceptive act, practice or advertisement depends on the likelihood that it will mislead a reasonable consumer acting reasonably under the circumstances (*Oswego Laborers' Local 214 Pension Fund* at 26; *Scarola v Verizon Communications, Inc.,* 146 AD3d

692, 603 [1st Dept 2017]; *Gomez-Jiminez* at 16; *Andre Strishak & Associates, P.C. v Hewlett Packard Co.,* 300 AD2d 608, 609 [2d Dept 2002]). What is objectively reasonable depends on the facts and context of the alleged misrepresentations and may be determined as a matter of law or fact (as individual cases require)" (*Himmelstein, McConnell, Gribben, Donoghue & Joseph, LLP* at 178). Significantly, GBL §§ 349 and 350 are "focused on the seller's deception and its subsequent impact on consumer decision-making, not on the consumer's ultimate use of a product" (*Himmelstein, McConnell, Gribben, Donoghue & Joseph, LLP* at 177).

Here, defendants do not contend that the alleged conduct is not consumer-oriented. In any event, the allegations that plaintiffs purchased the Product at stores in New York is sufficient to demonstrate, at the pleading stage, that defendant's conduct was consumer-oriented. However, contrary to plaintiffs' contention, the Court finds the Product's labeling/packaging is neither deceptive nor misleading. Indeed, unlike a label declaring that the product is made entirely or predominantly with avocado oil, the phrase "with avocado oil" does not promise anything about the amount of avocado oil present in the Product. It could thus reasonably be interpreted to mean any amount of avocado oil. Significantly, the front label states "79% vegetable oil" rather than "79% avocado oil." This further decreases the likelihood that a reasonable consumer will believe that the Product is made predominantly with avocado oil, as use of the general term "vegetable oil" implies that other kinds of vegetable oil are also present. Any doubt as to the relative amount of avocado oil present is eliminated by reading the back label, which clearly evinces that avocado is present in a lesser quantity than each of the other vegetable oils, i.e., palm fruit oil, palm kernel oil, canola oil, and/or soybean oil, as it appears last in the list of vegetable oils. As plaintiffs acknowledge, it is common knowledge that ingredients are listed in descending order of quantity on food packaging labels. Thus, it is clear that from reading the back label that avocado oil is one ingredient within the "79% vegetable oil," but not a predominant one.

Nor have plaintiffs sufficiently alleged that they suffered any injury as a result of defendants alleged deceptive conduct. Plaintiffs claim that the Product is sold at a price higher than similar products represented in a non-misleading way. Yet, they do not provide any

information regarding those products and/or the prices of those products. Rather, plaintiffs allege in conclusory fashion that they paid a price premium, or higher relative price, in the amount of five to sixty cents per unit, with no specific allegations concerning the identity or cost of the alleged similar products.

Based on the foregoing, the complaint fails to state a cause of action for violations of GBL §§ 349 and 350. As such, the first cause of action must be dismissed.

Fraud (2nd COA)

The elements of a cause of action for fraud consist of "a misrepresentation or a material omission of fact which was false and known to be false by [the] 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" (*Mandarin Trading Ltd. v Wildenstein,* 16 NY3d 173, 178 [2011]). Such a claim must be pleaded with particularity, stating in detail the circumstances constituting the wrong (CPLR § 3016[b]; *Eurycleia Partners, LP v Seward & Kissel, LLP,* 12 NY3d 553, 559 [2009]). Actual knowledge, however, need only be pleaded generally, given, particularly at the prediscovery stage, that a plaintiff lacks access to the very discovery materials which would illuminate a defendant's state of mind (*Cohen Brothers Realty Corp. v Mapes,* 181 AD3d 401, 404 [1st Dept 2020]; *Oster v Kirschner,* 77 AD3d 51, 55-56 [1st Dept 2010]). As the *Oster* Court noted, "Participants in a fraud do not affirmatively declare to the world that they are engaged in the perpetration of a fraud;" rather, "intent to commit fraud is to be divined from surrounding circumstances" (*Oster* at 55-56). Although under CPLR § 3016(b) the complaint must sufficiently detail the allegedly fraudulent conduct, that requirement should not be confused with unassailable proof of fraud (*Eurycleia Partners, LP v Seward & Kissel, LLP,* 12 NY3d 553, 559 [2009]; *Pludeman v Northern Leasing Sys., Inc.,* 10 NY3d 486, 492 [2008]). Rather, CPLR § 3016(b) may be met when the facts are sufficient to permit a reasonable inference of the alleged conduct (*id.*).

Plaintiffs' fraud claim alleges that defendant made material misrepresentations and/or omissions of fact in its advertising and marketing of the Product, which deceived customers into believing that avocado oil would be the exclusive or predominate vegetable oil ingredient;

defendant knew or should have known that the information that the Product was a traditional vegetable oil spread with only a taste of avocado oil was material to all reasonable consumers and impacts their purchasing decisions; plaintiffs read and relied on defendant's representations and omissions before purchasing the Product; and defendant profited by selling the misrepresented Product to consumers throughout the State of New York.

Here, as discussed above, although plaintiffs allege a material misrepresentation of fact or omission, the complaint itself belies such a claim since a reasonable consumer would not conclude that the words and images on the Product's label, including "with avocado oil," communicates that avocado oil is the exclusive or predominant vegetable oil in the Product.

Also, plaintiffs fail to allege the requisite fraudulent intent. The complaint alleges that defendant knew or should have known that the information that the Product was a traditional vegetable oil spread with only a taste of avocado oil was material to all reasonable consumers and impacts their purchasing decisions; plaintiffs read and relied on defendant's representations and omissions before purchasing the Product; and defendant profited from selling this misleading Product in New York. This is insufficient to give rise to an inference of fraudulent intent especially in light of the fact that the labeling itself makes no promises about the amount of avocado oil in the Product and, indeed, indicates that of all the vegetable oils in the Product, avocado oil is the least prevalent.

As such, plaintiff's fraud claim fails and must be dismissed.

Accordingly, it is hereby

ORDERED that the complaint be dismissed with prejudice.

ORDERED that defendant shall serve a copy of this Decision and Order upon plaintiffs, with Notice of Entry, within thirty (30) days of the date hereof.

This constitutes the Decision and Order of this Court.

Dated: Bronx, New York
July 30, 2025

Hon. FIDEL E. GOMEZ, J.S.C.