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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOSE IZQUIERDO and JOHN DOES 1–100, *on behalf of themselves and others similarly situated*,

Plaintiffs,

-against-

MONDELEZ INTERNATIONAL, INC., MONDELEZ GLOBAL, LLC, and JOHN DOES 1–10, *inclusive*,

Defendants.

No. 16-cv-04697 (CM)

**MEMORANDUM DECISION AND ORDER GRANTING DEFENDANTS' MOTION TO DISMISS AND DENYING DEFENDANTS' MOTION TO STRIKE**

Plaintiffs Jose Izquierdo ("Izquierdo") and John Does 1–100 (collectively, "Plaintiffs") have brought this putative consumer class action against Mōndelez International, Mōndelez Global, LLC, and John Does 1–10 (collectively, "Mōndelez"). The complaint alleges that Mōndelez manufactures, markets, and sells its boxed Sour Patch Watermelon Candy with false and misleading labels in violation of state and common law. Compl. ¶ 2. Plaintiffs seek certification of a nationwide class for all persons who made retail purchases of boxed Sour Patch Kids Watermelon candy. *Id.* They further seek injunctive, declaratory, and monetary relief, in addition to fees and expenses. *Id.* at pp. 28–29.

Pursuant to Federal Rules of Civil Procedure 12(b)(6) and (f), respectively, Mōndelez has moved to dismiss Izquierdo's action and to strike Plaintiffs' allegation for a nationwide class. Plaintiffs requested oral argument, but this Court deems oral argument unnecessary. For the

reasons set forth below, Mōndelez's motion to dismiss is GRANTED and its motion to strike is DENIED as moot.

**BACKGROUND**

The following facts are set forth in the Complaint and are presumed true for purposes of Mōndelez's motion to dismiss. *See Kassner v. 2nd Ave. Delicatessen Inc.*, 496 F.3d 229, 237 (2d Cir. 2007).

On some unspecified time and date, plaintiff Izquierdo, a resident of the Bronx, New York made a concession-stand purchase at one of multiple AMC Theaters locations in New York County. Compl. ¶ 21. Izquierdo bought, for "premium price of $4.29 (or more)," a box of Sour Patch Kids Watermelon candy, a soft and chewy candy shaped like a semicircular slice of watermelon. *Id.*

Though Sour Patch Kids Watermelon is available in at least two types of packaging, the Sour Patch Kids Watermelon candy Izquierdo purchased came in a thin cardboard box that housed a sealed plastic bag containing approximately 28 pieces of candy (the "Candy"). *Id.* ¶ 5. The front of the Candy box indicated a net weight of 3.5 ounces, or 99 grams. *See* figs. following *id.* ¶ 5. The nutrition facts on back of the Candy box provided that each Candy box contained 28 pieces of Candy. *Id.* ¶ 32. Despite all this clearly marked information, Izquierdo asserts that the Candy packaging is misleading because each Candy box could actually hold at least 50 pieces of Candy. *Id.* Plaintiffs calculate that approximately 44% of the Candy box is empty space, which serves no legitimate purpose. *Id.*; *id.* ¶¶ 27–28, 45.

John Doe plaintiffs 1-100 join Izquierdo in these allegations. The John Does are "citizens of any of the fifty states and the District of Columbia" who purchased the Candy at unnamed

locations, "at a premium price," and at some unspecified time "from the applicable limitations period up to and including the present." *Id.* ¶¶ 8, 22.

On June 20, 2016, Plaintiffs brought this putative class action on behalf of themselves and all others similarly situated against Mōndelez, the Virginia-organized and headquartered corporation that manufactures and distributes the Candy. Plaintiffs allege that Mōndelez packages the Candy so as to give the appearance that the boxes contain more product than they actually contain. Mōndelez does this by selling the Candy in a non-transparent box that is larger than it functionally needs to be. Plaintiffs assert that the Candy in fact fills only about half of the box, *see* figs. following *id.* ¶ 5, and that the remaining half serves no other purpose but to mislead consumers.

On these facts, Plaintiffs allege that Mōndelez has committed deceptive acts or practices in the conduct of business, trade or commerce in violation of the New York General Business Law § 349, for which Plaintiffs seek damages and injunctive relief; negligent misrepresentation under the laws of all fifty states and the District of Columbia; common law fraud under the laws of all fifty states and the District of Columbia; and unjust enrichment under the laws of all fifty states and the District of Columbia.

Mōndelez has moved to dismiss Plaintiff's complaint on the bases that the Candy packaging is not materially misleading; that the state-law allegations are preempted by federal law; that the allegations are not pled with the requisite particularity; that Plaintiffs lack standing to seek an injunctive relief; that Plaintiffs failed to plead a cognizable injury; and that Plaintiffs' negligent misrepresentation and unjust enrichment claims also fail as a matter of law. In addition, Mōndelez has moved to strike Plaintiffs' request for an order certifying a nationwide plaintiff class.

**DISCUSSION**

A. Legal Standards

Under Rule 8(a)(2) of the Federal Rules of Civil Procedure, "a pleading that states a claim for relief must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief." Where, however, a case concerns allegations of fraud or mistake under Rule 9(b) of the Federal Rules of Civil Procedure, claims must be pled with particularity. *See* Fed. R. Civ. P. 9(b) ("In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake."). Generally, to comply with Rule 9(b)'s specificity requirements, "the complaint must: (1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent." *Lerner v. Fleet Bank, N.A.*, 459 F.3d 273, 290 (2d Cir. 2006) (quoting *Mills v. Polar Molecular Corp.*, 12 F.3d 1170, 1175 (2d Cir. 1993)) (internal quotation mark omitted). Conclusory allegations of fraud will not survive Rule 9(b)'s heightened pleading standard, and therefore, will be subject to dismissal at the motion to dismiss stage. *See Nasso v. Bio Reference Labs., Inc.*, 892 F. Supp. 2d 439, 446 (E.D.N.Y. 2012) (citing *Shemtob v. Shearson, Hammill & Co.*, 448 F.2d 442, 444 (2d Cir. 1971)).

In reviewing a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), a court must generally "accept all factual allegations in the complaint as true and draw inferences from those allegations in the light most favorable to the plaintiff." *Tsirelman v. Daines*, 794 F.3d 310, 313 (2d Cir. 2015) (quoting *Jaghory v. N.Y. State Dep't of Educ.*, 131 F.3d 326, 329 (2d Cir. 1997)). A complaint must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the

defendant is liable for the misconduct alleged." *Matson v. Bd. of Educ.*, 631 F.3d 57, 63 (2d Cir. 2011) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662 (2009)); *see also Pension Benefit Guar. Corp. ex rel. St. Vincent Catholic Med. Ctrs. Ret. Plan v. Morgan Stanley Inv. Mgmt. Inc.*, 712 F.3d 705, 717–18 (2d Cir. 2013). Although all allegations contained in the complaint are assumed true, this principle is "inapplicable to legal conclusions" or "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements." *Iqbal*, 556 U.S. at 678.

B. Federal Regulatory Scheme

In 1938, Congress enacted the Federal Food, Drug, and Cosmetic Act ("FDCA"), codified at 21 U.S.C. § 301 *et seq.* The FDCA empowered the U.S. Food and Drug Administration ("FDA") to protect the public health by ensuring that "foods are safe, wholesome, sanitary, and properly labeled," 21 U.S.C. § 393(b)(2)(A), and the FDA has promulgated regulations pursuant to this authority, *see, e.g.*, 21 C.F.R. § 101.1 *et seq.* There is no private right of action under the FDCA. *PDK Labs, Inc. v. Friedlander*, 103 F.3d 1105, 1113 (2d Cir. 1997). Rather, the FDA enforces the FDCA and its regulations through administrative proceedings. *See* 21 C.F.R. § 7.1 *et seq.*

In 1990, Congress amended the FDCA by enacting the Nutrition Labeling and Education Act ("NLEA"), codified in scattered sections of title twenty-one of the U.S. Code. "The NLEA aimed to 'clarify and to strengthen the [FDA's] authority to require nutrition labeling on foods, and to establish the circumstances under which claims may be made about nutrients in foods.'" *N.Y. State Rest. Ass'n v. N.Y.C. Bd. of Health*, 556 F.3d 114, 118 (2d Cir. 2009) (quoting H.R. Rep. No. 101–538, at 7 (1990), *reprinted in* 1990 U.S.C.C.A.N. 3336, 3337). For example, 21 U.S.C. § 343 provides that a "food shall be deemed misbranded" if, *inter alia*, "its container is so made, formed, or filled as to be misleading," § 343(d).

One type of misleading packaging is that which contains needless empty space, or "slack-fill." Slack-fill is statutorily defined as "the difference between the actual capacity of a container and the volume of product contained therein." *See* 21 C.F.R. § 100.100. Slack-fill is "misleading" if it is: (1) "nonfunctional" (i.e., not for a valid purpose); and (2) the container "does not allow the consumer to fully view its contents." 21 C.F.R. § 100.100(a). Functional slack-fill, however, is not misleading. Federal regulations lay out the permissible functions for slack-fill, often called "safe harbors." 21 C.F.R. § 100.100(a). If slack-fill is functional, there has been no violation of federal regulations.

C. State Regulatory Scheme

Although Plaintiffs' complaint purports to invoke regulatory laws from "any of the fifty states and the District of Columbia," Izquierdo, a resident of New York, is the only named plaintiff identified to a state. Therefore, the Court will look only to New York statutes and case law for purposes of evaluating the state-law claims alleged Complaint.

New York law provides that "Food shall be deemed to be misbranded . . . If its container is so made, formed, colored or filled as to be misleading." N.Y. Agric. & Markets Law § 201-4. Like its federal counterpart, New York law also provides remedies, including private rights of action, for misbranding food under consumer protection laws. One such law is the New York General Business Law § 349, which broadly prohibits use of "deceptive acts or practices" in business dealings in New York. It has been interpreted to claims for excessive slack-fill. *Mennen Co. v. Gillette Co.*, 565 F. Supp. 648, 655 (S.D.N.Y. 1983) (citing N.Y. Gen. Bus. Law §§ 350, 350–a); *see also Waldman v. New Chapter, Inc.*, 714 F. Supp. 2d 398, 406 (E.D.N.Y. 2010).

New York's General Business Law does not, itself, contain safe harbors for functional slack-fill. *See* N.Y. Gen. Bus. Law §§ 350, 350–a. However, it does make it "a complete defense

that the act or practice is . . . subject to and complies with the rules and regulations of, and the statutes administered by, . . . any official . . . agency of the United States as such rules, regulations or statutes are interpreted by . . . federal courts." N.Y. Gen. Bus. Law § 349(d). Therefore, if slack-fill passes muster under federal law, there is no state-law violation.

D. Application

Mōndelez moves to dismiss the Complaint on the grounds that all of Plaintiffs' causes of action are preempted by federal law or because they contain fatal pleading deficiencies. Each ground is discussed below.

*1. Federal Preemption*

While Plaintiffs claim that Mōndelez violated federal regulations barring non-functional slack-fill, Plaintiffs do not seek relief under federal law. Rather, they argue that, in failing to comply with federal statutes and regulations, Defendants have violated state laws.

Plaintiffs' ability to bring such a claim is circumscribed. Consistent with the NLEA's purpose of promoting uniform national labeling standards, the statute includes an express preemption provision that forbids the states from "directly or indirectly establish[ing] . . . any requirement . . . made in the labeling of food that is not identical to" the federal labeling requirements established by certain specifically enumerated sections of the FDCA. 21 U.S.C § 343–1(a). "Where federal requirements address the subject matter that is being challenged through state law claims, such state law claims are preempted to the extent they do not impose identical requirements." *In re PepsiCo, Inc., Bottled Water Mktg. & Sales Practices Litig.*, 588 F. Supp. 2d 527, 538 (S.D.N.Y. 2008); *see also Wyeth v. Levine*, 555 U.S. 555 (2009) (clarifying the standards by which courts determine whether a federal statute has preempted state law).

Express preemption clauses are to be read narrowly. *See Medtronic*, 518 U.S. at 485 (citing *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 518 (1992)).

The effect of the NLEA's preemption provision is to ensure that the states only enact food labeling requirements that are equivalent to, and consistent with, the federal food labeling requirements for certain products. State laws that impose affirmatively different labeling requirements from federal law in these areas are preempted. However, state laws that seek to impose labeling requirements identical to those required by federal regulations are not preempted. *See, e.g., Koenig v. Boulder Brands, Inc.*, 995 F. Supp. 2d 274, 284 (S.D.N.Y. 2014).

A defendant asserting preemption bears the burden of proving that it applies. *Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 251 n.2 (2011) ("Federal preemption is an affirmative defense upon which the defendants bear the burden of proof") (citations omitted). The affirmative defense will be successful if the defendant shows that: (1) a plaintiff seeks to impose requirements that are not with respect to claims of the sort described in Section 343(d); or (2) the requirements that plaintiff seeks to impose are not identical to those imposed by the FDCA, as amended by the NLEA.

Here, New York law expressly incorporates the standard imposed by the FDCA. It provides that anything that complies with federal law and regulations *per se* complies with state law. That being so, Plaintiffs' state-law claims are not preempted by federal law.

Mōndelez does not necessarily argue to the contrary. It instead argues that Plaintiffs cannot avoid preemption through conclusory allegations that Mōndelez violated federal regulations. This is beside the point. As discussed above, preemption is an affirmative defense and the burden of proof lies with the party propounding it.

*2. Violations of New York General Business Law § 349 (Counts I–II)*

Section 349 of the General Business Law, enacted in 1970 as a broad consumer protection measure, proscribes, "Deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in [New York]." N.Y. Gen. Bus. Law § 349(a). The law was amended in 1980 to give private citizens a right of action for deceptive trade practices, including a right to request an injunction for such practices. *Id.* § 349(h).

Plaintiffs assert two claims for relief under Section 349. First, Plaintiffs seeks to enjoin Mōndelez from packaging its Candy in allegedly misleading containers with non-functional slack-fill. Second, Plaintiffs assert substantive violations of Section 349 for which they seek recompense. Neither claim passes muster.

a. Standing for Injunctive Relief

Plaintiffs seek to enjoin Mōndelez from manufacturing, marketing, or selling the Candy. Any plaintiff seeking injunctive relief "must show the three familiar elements of standing: injury in fact, causation, and redressability." *Cacchillo v. Insmed, Inc.*, 638 F.3d 401, 404 (2d Cir. 2011) (citing *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009)). A plaintiff lacks standing for injunctive relief where the complaint fails to establish a "real or immediate threat" of injury. *Nicosia v. Amazon.com, Inc.*, No. 15-423-cv, 2016 WL 4473225, at *12 (2d Cir. Aug. 25, 2016) (internal quotation marks and citations omitted). "The Supreme Court has 'repeatedly reiterated that "threatened injury must be certainly impending to constitute injury in fact," and that "[a]llegations of *possible* future injury" are not sufficient.'" *Am. Civil Liberties Union v. Clapper*, 785 F.3d 787, 800 (2d Cir. 2015) (quoting *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013) (alteration in original)); *City of Los Angeles v. Lyons*, 461 U.S. 95, 111, (1983).

Here, Izquierdo has alleged that, "should [he] encounter" the Candy in the future, "he could not rely on the truthfulness of the [Candy's] packaging." Compl. ¶ 21. This does not allege that Izquierdo faces "commercial" injury. Nor is the Court certain that Izquierdo would purchase the Candy again even if he were to encounter it. Izquierdo says he "would still be willing to purchase the current formulation" of the Candy "so long as [Mōndelez] engages in corrective advertising." *Id.* The Court interprets conditional statement to mean that Izquierdo will not purchase the Candy unless Mōndelez changes the Candy packaging. If the condition goes unfulfilled—that is, if Mōndelez does not change the Candy packaging—Izquierdo will not purchase the Candy again. Therefore, he will not be injured.

The Complaint pleads that any the following scenarios are possible: Izquierdo may never see the Candy again, perhaps because he will avoid AMC movie theaters; Izquierdo will not purchase the Candy because it is still being offered in the same packaging; or Izquierdo will purchase the Candy with improved packaging. In any and all of these cases, Izquierdo has failed to plead a real or immediate threat of injury by the offending packaging. He has failed to plead standing to seek an injunction.

Citing one case out of the Eastern District, Plaintiffs urge the Court to adopt the view that a "consumer may have standing to seek injunctive relief even though he/she is not likely to re-purchase a product." Compl. ¶ 78 (citing *Belfiore v. Procter & Gamble Co.*, 94 F. Supp. 3d 440, 445 (E.D.N.Y. 2015)). This approach is not well-settled in the Eastern District of New York, *see Albert v. Blue Diamond Growers*, 151 F. Supp. 3d 412, 418 n.4 (S.D.N.Y. 2015) (citing cases), and, in any event, is not binding on this Court. The Supreme Court's position is controlling, however, and it leads me to conclude that Plaintiffs here must plead a likelihood of future injury in order to show standing to sue for an injunction. Izquierdo has not done so here.

John Does 1–100 have nowhere alleged that they would purchase the Candy in the future. They, too, lack standing to seek injunctive relief. Count I of the Complaint is therefore dismissed.

b. Substantive Violation of Section 349

Plaintiffs have also brought a consumer protection claim under New York General Business Law § 349. As noted above, Section 349 proscribes "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in [New York]," N.Y. Gen. Bus. Law § 349(a), and provides a private right of action to "any person who has been injured by reason of any violation of th[e] section," *id.* § 349(h).

New York courts have distilled the text of Section 349 into three elements to be proved by the plaintiff: "first, that the challenged act or practice was consumer-oriented; second, that it was misleading in a material way; and third, that the plaintiff suffered injury as a result of the deceptive act." *Stutman v. Chem. Bank*, 95 N.Y.2d 24, 709 N.Y.S.2d 892, 731 N.E.2d 608, 611 (2000). Each element must be supported with enough facts to state a facially plausible claim to relief. *Pelman ex rel. Pelman v. McDonald's Corp.*, 396 F.3d 508, 511 (2d Cir. 2005). Mōndelez argues that Plaintiffs failed to plead the second and third elements above.

Mōndelez first argues that Plaintiffs' Section 349 claim is without merit because the Candy box is not materially misleading. A reasonable consumer would not be misled by the Candy box, Mōndelez says, because the box clearly shows the net weight of the product and informs consumers of the number of candies in each box. Legislative history and regulatory guidance suggest a contrary conclusion. Federal and state laws provide that food manufacturers are required to label products accurately and package products in a non-misleading way. These obligations are independent of one another; Congress envisioned as much when it recognized

that the law preventing misleading containers is "intended to reach deceptive methods of filling . . . where the package is only partly filled and, *despite the declaration of quantity of contents on the label*, creates the impression that it contains more food than it does." S. Rep. No. 493, 73d Cong., 2d sess. 9 (1934) (emphasis added). Moreover, the FDA itself opined that "[t]o rule that an accurate net weight statement protects against misleading fill would render the prohibition against misleading fill . . . redundant." Misleading Containers; Nonfunctional Slack-Fill, 58 Fed. Reg. 64123-01, 64129 (Dec. 6, 1993) (codified at 21 C.F.R. pt. 100).

Mōndelez also cites to *Fermin v. Pfizer, Inc.*, No. 15-cv-2133 (E.D.N.Y. Oct. 18, 2016) and *Ebner v. Fresh Inc.*, No. 13-00477, 2013 WL 9760035, at *7 (C.D. Cal. Sept. 11, 2013), in support of its argument that food packaging cannot be materially misleading so long as it displays the net weight and lists the number of pieces inside of the package. But those cases do not affect this Court's decision or its reasoning. Those decisions were issued by non-controlling courts and were based, either in whole or in part, on California consumer fraud law. The instant case, however, deals with New York law. The fact remains that Mōndelez does not cite a single controlling decision of law standing for the proposition that food packaging is incapable of being materially misleading if it displays the net weight and lists the number of pieces inside of the package. This Court is unwilling to manufacture such a precedent here.

For the reasons cited, Court declines to adopt Mōndelez's theory that a manufacturer of a deceptively packaged product is immune from suit so long as the package accurately lists the product's net weight and quantity.

Mōndelez separately argues that the Candy box is not misleading because the consumer can plainly feel and hear the existence of empty space in the box upon reasonable inspection. Whether a reasonable consumer would think to shake, squeeze, or manipulate the Candy box,

and whether that reasonable consumer would actually be able to feel the existence of slack-fill, are questions of fact that are inappropriate for resolution at the motion to dismiss stage. *See Atik v. Welch Foods, Inc.*, No. 15-cv-5405, 2016 WL 5678474, at *8 (E.D.N.Y. Sept. 30, 2016).

Next, Mōndelez contends that Plaintiffs' Section 349 count should be dismissed because it fails to adequately allege an injury. Plaintiffs assert that they were financially injured after purchasing the Candy and receiving less Candy than they believed they bargained for. Plaintiffs' argument boils down to the very argument that the New York Court of Appeals expressly rejected as a "flawed 'deception as injury' theory"—that is, "that consumers who buy a product that they would not have purchased, absent a manufacturer's deceptive commercial practices, have suffered an injury under General Business Law § 349." *Small v. Lorillard Tobacco Co.*, 720 N.E.2d 892, 898 (N.Y. 1999); *see also Braynina v. TJX Cos., Inc.*, No. 15-cv-5897, 2016 WL 5374134, at *10 (S.D.N.Y. Sept. 26, 2016). *But see Ebin v. Kangadis Food Inc.*, No. 13-cv-2311, 2013 WL 6504547 (S.D.N.Y. Dec. 11, 2013) (deeming allegations sufficient to state a claim under Section 349 where "[t]he deception is the false and misleading label, and the injury is the purchase price").

An actual injury claim under Section 349 typically requires a plaintiff to "allege that, on account of a materially misleading practice, she purchased a product and did not receive the full value of her purchase." *Orlander v. Staples, Inc.*, 802 F.3d 289, 302 (2d Cir. 2015). This may come in the form of an overpayment or "price premium," whereby a plaintiff pays more than she would have but for the deceptive practice. *See, e.g.*, *Koenig*, 995 F. Supp. 2d at 288–89.

Simply because Plaintiffs here recite the word "premium" multiple times in their Complaint does not make Plaintiffs' injury any more cognizable. Plaintiffs have not alleged that they paid a *higher* price for the Candy than they otherwise would have, absent deceptive acts.

And Plaintiffs' pointing out that the Candy is more expensive per ounce than other sweets on the market brings them no closer to stating a claim for injury. Comparing the Candy to Hot Tamales and Junior Mints is the saccharine equivalent of comparing apples with oranges. Such a comparison tells the Court nothing about the value of the Candy, or whether the cost of the Candy was inflated by Mōndelez's allegedly misleading packaging. Rather, Plaintiffs' have impermissibly set up the deception as both act and injury, a theory specifically disallowed by our courts.

Nor is it clear that Plaintiffs' alleged injury (the price paid) flowed from any act of Mōndelez; the Complaint does not state that Mōndelez—rather than the movie theater—set the price of the Candy. So even if the Candy were marked at a higher price simply because it came in a big box (which the Complaint does not plead), the Complaint still fails to state that *Mōndelez*, and not the ultimate Candy seller, benefited from any price inflation.

Plaintiffs have failed to allege an injury under Section 349 and, accordingly, this claim is dismissed.

*3. Negligent Misrepresentation (Count III)*

The complaint charges that Mōndelez should be liable for negligent misrepresentation based on the Candy packaging. To state a claim for negligent misrepresentation under New York law 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 omitted) (quoting *Hydro Inv'rs v. Trafalgar Power Inc.*, 227 F.3d 8, 20 (2d Cir. 2000)). Negligent misrepresentation claims are subject to the heightened pleading standard under Rule 9(b). *See Aetna Cas. & Sur. Co. v. Aniero Concrete Co.*, 404 F.3d 566, 583 (2d Cir. 2005).

In New York, the "duty" element "limits negligent misrepresentation claims to situations involving 'actual privity of contract between the parties or a relationship so close as to approach that of privity.'" *Anschutz Corp.*, 690 F.3d at 114 (quoting *In re Time Warner Inc. Sec. Litig.*, 9 F.3d 259, 271 (2d Cir. 1993)). "[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." *Kimmell v. Schaefer*, 89 N.Y.2d 257, 263 (1996). 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." *Id.* at 264. *Kimmell* directs courts to examine the following factors to determine whether a special relationship, and a duty to provide correct information, exists: "whether the person making the representation held or appeared to hold unique or special expertise; whether a special relationship of trust or confidence existed between the parties; and whether the speaker was aware of the use to which the information would be put and supplied it for that purpose." *Id.*; *see also Suez Equity Inv'rs, L.P. v. Toronto-Dominion Bank*, 250 F.3d 87, 103 (2d Cir. 2001) (citing *Kimmell* for relevant factors).

The parties in this case dispute whether the transaction between Mōndelez and Plaintiffs created a special relationship within the meaning of New York common law. *Kimmel* made clear

that the vast majority of arms-length commercial transactions, which are comprised of "casual statements and contacts," will not give rise to negligent misrepresentation claims. *See Kimmell*, 89 N.Y.2d at 263, 652 N.Y.S.2d at 719; *see also Stoltz v. Fage Dairy Processing Indus., S.A.*, No. 14-cv-3826, 2015 WL 5579872, at *25 (E.D.N.Y. Sept. 22, 2015) *Nebraskaland, Inc. v. Sunoco, Inc.*, No. 10-cv-1091, 2011 WL 6131313, at *3 (E.D.N.Y. July 13, 2011). The relationship between the parties must instead "suggest a closer degree of trust and reliance than that of the ordinary buyer and seller." *Dallas Aerospace, Inc. v. CIS Air Corp.*, No. 00-cv-1657, 2002 WL 31453789, at *3 (S.D.N.Y. Oct. 31, 2002) (citation omitted).

Plaintiffs cite one case, *Ebin v. Kangadis Food Inc.*, No. 13-cv-2311, 2013 WL 6504547 (S.D.N.Y. Dec. 11, 2013), to support their argument that similar arms-length transactions have survived motions to dismiss in New York courts. Plaintiff's reading of *Ebin* is overblown. The part of that case dealing with negligent misrepresentation did not actually discuss whether or to what extent the elements for negligent misrepresentation were fulfilled. Instead, that section of the opinion appears to be devoted entirely to a discussion of common law fraud. Moreover, relying on *Ebin* would require me to disregard the many well-reasoned decisions that hold to the contrary. Nothing in the complaint suggests that the transaction differs in any way from the numerous cases in this District and Circuit in which courts have held that a basic commercial transaction does not give rise to a special relationship. Indeed, the relationship between Mōndelez and Plaintiffs appears to be even more attenuated than a run-of-the-mill, arms-length commercial transaction because Plaintiffs did not buy the Candy from Mōndelez—they bought it from a movie theater concession stand.

After considering the Complaint in its entirety, I find that Mōndelez and Plaintiffs do not share a special relationship from which a duty arose. Plaintiffs have therefore failed to state a claim for negligent misrepresentation, and this count is dismissed.

*4. Common Law Fraud (Count IV)*

Plaintiffs contend that Mōndelez intentionally made materially false and misleading representations regarding the volume of the Candy, thereby defrauding Plaintiffs within the meaning of New York common law.

To adequately plead fraud based on misrepresentation, the complaint should set forth all the essential elements of such fraud, that is: (1) that the defendant represented or omitted a material fact; (2) that the representation was false; (3) that the defendant knew that it was false and made it with the intention of deceiving the plaintiff; (4) that the plaintiff believed the representation to be true and justifiably acted in reliance on it and was deceived; and (5) that the plaintiff was injured. *See Kerusa Co. LLC v. W10Z/515 Real Estate Ltd. P'ship*, 12 N.Y.3d 236, 242, 906 N.E.2d 1049, 1052 (2009).

In federal court, a plaintiff must plead fraud with particularity pursuant to Federal Rule of Civil Procedure 9(b). In the context of a fraudulent misrepresentation, a plaintiff must: (1) specify the alleged fraudulent statement; (2) identify the speaker; (3) state where, when and to whom the statement was made; and (4) explain why the statement was fraudulent. *See Mills v. Polar Molecular Corp.*, 12 F.3d 1170, 1175 (2d Cir. 1993).

Mōndelez argues that the Complaint has not been pled with particularity here because Izquierdo does not provide detail about where or when Izquierdo purchased the Candy. Plaintiffs respond that, even though the Complaint may lack these two pieces of information, the

Complaint, as a whole, provides Mōndelez with fair notice, and moreover, Mōndelez does not indicate why Izquierdo's date or place of purchase would aid Mōndelez in its defense.

Plaintiffs's arguments are unpersuasive. The Complaint provides only the barest details about Izquierdo's exposure to Mōndelez's alleged fraudulent misrepresentations or omissions. It fails to state *when* Izquierdo purchased the Candy, *where* precisely he purchased the Candy, and it fails even to specify how much Izquierdo paid for the Candy. *See* Compl. ¶ 21 (providing that Izquierdo purchased the Candy for "$4.29 (or more)"). As a whole, the Complaint falls far short of Rule 9(b)'s pleading requirements and Count IV of the Complaint is dismissed.

*5. Unjust Enrichment (Count V)*

Plaintiffs' final cause of action asserts that Mōndelez was unjustly enriched by its deceptive labeling, packaging, advertising, marketing, and sales of the Candy. "A claimant seeking relief under a theory of unjust enrichment in New York must demonstrate '(1) that the defendant benefitted; (2) at the plaintiff's expense; and (3) that equity and good conscience require restitution.'" *Leibowitz v. Cornell Univ.*, 584 F.3d 487, 509 (2d Cir. 2009) (quoting *In re Mid-Island Hosp., Inc.*, 276 F.3d 123, 129 (2d Cir. 2002)). "[I]t is not a prerequisite of an unjust enrichment claim that the one enriched commit a wrongful or unlawful act." *Mayer v. Bishop*, 551 N.Y.S.2d 673, 675 (1990).

"An unjust enrichment claim is not available where it simply duplicates, or replaces, a conventional contract or tort claim." *Corsello v. Verizon New York, Inc.*, 18 N.Y.3d 777, 790–91, 944 N.Y.S.2d 732, 967 N.E.2d 1177 (2012). If a plaintiff's other claims are defective, however, an unjust enrichment claim cannot remedy the defects." *Id.*, 18 N.Y.3d at 790–91, 944 N.Y.S.2d 732, 967 N.E.2d at 1185. Here, all of Plaintiffs' causes of action have been dismissed. Their

unjust enrichment claim cannot cure the failings of their other causes of action. Plaintiffs' unjust enrichment claim is dismissed.

*6. Motion to Strike Class Allegations*

The foregoing opinion dismisses all of Plaintiffs' claims as a matter of law. Therefore, the Court need not address the merits of Mōndelez's motion to strike Plaintiffs' class allegations, and the motion to strike is denied as moot.

**CONCLUSION**

Defendant's motion to dismiss is GRANTED. Having dismissed each and every count in Plaintiffs' complaint, Defendant's motion to strike is DENIED as moot. Plaintiffs' request for oral argument on the motion to dismiss is likewise DENIED. This Memorandum Order and Opinion resolves the items numbered 15 and 22 on the docket.

Dated: October 26, 2016

U.S. District Judge

BY ECF TO ALL COUNSEL