UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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SAMELINE ALCE and DESIRÉ NUGENT, on behalf of themselves and others similarly situated,

Plaintiffs,

-against -

WISE FOODS, INC.,

Defendant.
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**MEMORANDUM AND ORDER**

17 Civ. 2402 (NRB)

**NAOMI REICE BUCHWALD**
**UNITED STATES DISTRICT JUDGE**

Plaintiffs Sameline Alce ("Alce") and Desiré Nugent ("Nugent"), on behalf of themselves and others similarly situated, bring this action against defendant Wise Foods, Inc. ("defendant"), alleging violations of the Federal Food Drug & Cosmetic Act, the New York General Business Law, and the District of Columbia Consumer Protection Procedures Act. Plaintiffs allege that defendant's opaque bags of potato chips contain "non-functional slack-fill," essentially wasted, empty air, which misleads consumers as to the amount of product contained therein.[1] Defendant now moves, pursuant to Federal Rules of Civil Procedure 12(b)(1) & (6), to dismiss plaintiffs' First Amended Class Action Complaint ("Am. Compl.") for lack of

[1] It should be noted that there is no suggestion that the weight listed on defendant's packages do not accurately reflect the weight of the potato chips the costumer actually receives.

subject matter jurisdiction and for failure to state a claim upon which relief can be granted. For the following reasons, defendant's motion is granted.

## BACKGROUND

### I. Factual Background

Defendant, a Pennsylvania company, "manufactures, markets, advertises, and sells its extensive 'Wise®' line of snack products" to "millions of customers nationwide." Am. Compl. ¶ 57. On August 19, 2016, Nugent, a resident of the District of Columbia, purchased a 6.75 oz. bag of Wise Honey BBQ potato chips for $2.00 from a Giant grocery store in Washington, D.C. Id. ¶ 51. On August 23, 2016, Alce, a Bronx resident, purchased a 7 oz. bag of Wise Golden Original potato chips for $1.94 at Merrick Farms, a grocery store in Nassau County, New York. Id. ¶ 46.

In addition to the two products plaintiffs purchased, defendant also manufactures and sells another nineteen varieties of potato chips, each packaged in an opaque bag (collectively, "Products"): (1) Jalapeño New York Deli Kettle Cooked (8.5 oz.); (2) Jalapeño Kettle Cooked (8.5 oz.); (3) Reduced Fat Sea Salt & Balsamic Vinegar Kettle Cooked (8.5 oz.); (4) Sea Salt & Balsamic Vinegar Kettle Cooked (8.5 oz.); (5) Reduced Fat Original Kettle Cooked (8.5 oz.); (6) Reduced Fat Barbecue Kettle Cooked (8.5 oz.); (7) Barbecue Kettle Cooked (8.5 oz.);

(8) Original Kettle Cooked (8.5 oz.); (9) Beef Barbacoa Tacos (8.5 oz.); (10) Unsalted (7 oz.); (11) Lightly Salted (7 oz.); (12) Salt & Vinegar (6.75 oz., 8.75 oz.); (13) BBQ (6.75 oz., 8.75 oz.); (14) Onion & Garlic (6.75 oz., 8.75 oz.); (15) Cheddar & Sour Cream Ridgies (4.5 oz., 6.75 oz., 8.75 oz.); (16) Sour Cream & Onion Ridgies (2.75 oz., 4.5 oz., 6.75 oz., 8.75 oz.); (17) Dill Pickle Ridgies (8.75 oz.); (18) Barbecue Ridgies (6.75 oz.); and (19) All Natural Ridgies (7 oz.).[2] Id. ¶ 2 & Ex. A.

Each of the Products contains a certain amount of empty air or "slack-fill." For example: Wise Salt & Vinegar Potato Chips (8.75 oz.) are 7.75" wide, with 3.75" out of their 13.5" vertical capacity filled with chips, meaning 72% is slack-fill; Wise Sea Salt & Balsamic Vinegar Kettle Potato Chips (8.5 oz.) are 6.5" wide, with 5" of their 12" vertical capacity filled with chips, meaning 58% is slack-fill; Wise Golden Original Potato Chips (7 oz.) are 6.5" wide, with 4" of their 12" vertical capacity filled with chips, meaning 67% is slack-fill; Wise Ridgies Sour Cream and Onion Potato Chips (6.75 oz.) are 6.5" wide, with 4" of their 12" vertical capacity filled with chips, meaning 67% is slack-fill; Wise Ridgies Sour Cream and Onion Potato Chips (4.5 oz.) are 6.25" wide, with 3.75" of their 10" vertical capacity filled with chips, meaning 62.5% is slack-

[2] In addition to the 6.75 oz. bag Nugent purchased, defendant also makes an 8.75 oz. bag of Honey BBQ potato chips. See Am. Compl. Ex. A, at 7.

fill; Wise Ridgies Sour Cream and Onion Potato Chips (2.75 oz.) are 6.25" wide, with 2.5" of their 10" vertical capacity filled with chips, meaning 75% is slack-fill. Id. Ex. B; see id. ¶¶ 12-30.

According to plaintiffs, "[t]he size of the plastic and aluminum chip bags in comparison to the volume of the Products contained therein makes it appear to Plaintiffs and Class members that they are buying more than what is actually being sold, thereby denying Plaintiffs and Class members the benefit of their bargain because they pay for full bags of chips (with only minimal air) but actually receive far fewer chips." Id. ¶ 8. "In other words, customers receive fewer chips than defendant represents that they are getting, such that Plaintiffs and Class members pay more money for each quantity of chips than had been bargained for." Id. "[H]ad Defendant not deceptively created the false impression that each Product bag contained far more chips than it actually does, Plaintiffs and Class members would have paid less money for the quantity of chips they actually received under the bargained-for Product sale price." Id. "Instead, Defendant's deceptive practices directly caused Plaintiffs and Class members to pay a higher price for the Product than they would have paid otherwise." Id.

## II. Procedural Background

Plaintiffs filed the operative First Amended Class Action Complaint on June 27, 2017. Plaintiffs allege, on behalf of two separate classes of consumers—those who purchased the Products in the State of New York, and those who did so in the District of Columbia—that defendant "manufactures, markets and sells the Products with excessive air" in violation of the Food Drug & Cosmetic Act ("FDCA"), 21 U.S.C. § 301 et seq. Am. Compl. ¶ 7. However, as the FDCA does not provide a private right of action, plaintiffs bring claims pursuant to New York's prohibition on (1) deceptive and unfair trade practices, N.Y. Gen. Bus. Law § 349 ("GBL § 349"), and (2) false advertising, id. §§ 350, 350-a ("GBL §§ 350, 350-a"), see Am. Compl. ¶¶ 105-32, as well as (3) the District of Columbia Consumer Protection Procedures Act ("CPPA"), D.C. Code § 28-3904(a), (e), (h), and (x), see Am. Compl. ¶¶ 133-53. Plaintiffs also assert a claim of unjust enrichment under New York law. See Am. Compl. ¶¶ 154-60.

On August 14, 2017, defendant moved to dismiss the First Amended Class Action Complaint. See Dkt. No. 20. Defendant argues that: (1) plaintiffs do not have standing with respect to Products they did not purchase; (2) Alce does not have standing with respect to the injunctive relief he seeks; (3) Nugent's claims under the CPPA are preempted by federal regulations; (4)

plaintiffs have not plausibly pleaded that the slack-fill in the Products is "non-functional," in violation of the FDCA; (5) no reasonable consumer would be misled by the Products; (6) Alce has failed to establish an injury under GBL Sections 349, 350, and 350-a; and (7) plaintiffs have failed to state a claim for unjust enrichment.

**DISCUSSION**

**I. Standards of Review**

"The standards of review for a motion to dismiss under Rule 12(b)(6) for failure to state a claim and under Rule 12(b)(1) for lack of subject matter jurisdiction 'are substantively identical,' although the movant bears the burden of proof on a 12(b)(6) motion and the party invoking the court's jurisdiction bears the burden on a 12(b)(1) motion." Andrews v. Ford, No. 08 Civ. 3938(LAP), 2009 WL 2870086, at *2 (S.D.N.Y. Sept. 3, 2009) (quoting Lerner v. Fleet Bank, N.A., 318 F.3d 113, 128 (2d Cir. 2003)). "In deciding both types of motions, the Court must accept all factual allegations in the complaint as true, and draw inferences from those allegations in the light most favorable to the plaintiff." Pearl River Union Free Sch. Dist. v. Duncan, 56 F. Supp. 3d 339, 351 (S.D.N.Y. 2015) (quoting Gonzalez v. Option One Mortg. Corp., No. 3:12-CV-1470 (CSH), 2014 WL 2475893, at *2 (D. Conn. June 3, 2014)).

To survive a motion to dismiss, a complaint must include "enough facts to state a claim for relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).

"In considering a motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6), a district court may consider the facts alleged in the complaint, documents attached to the complaint as exhibits, and documents incorporated by reference in the complaint." DiFolco v. MSNBC Cable L.L.C., 622 F.3d 104, 111 (2d Cir. 2010) (citing Chambers v. Time Warner, Inc., 282 F.3d 147, 153 (2d Cir. 2002)). In deciding a Rule 12(b)(1) motion, by contrast, "a district court . . . may refer to evidence outside the pleadings." Makarova v. United States, 201 F.3d 110, 113 (2d Cir. 2000) (citing Kamen v. Am. Tel & Tel Co., 791 F.2d 1006, 1011 (2d Cir. 1986)).

## II. Federal and State Regulatory Schemes

### a. Federal Regulatory Scheme

By enacting the FDCA, Congress established the Federal Food and Drug Administration ("FDA") to "promote public health" by "ensuring that foods are safe, wholesome, sanitary, and properly labeled." See 21 U.S.C. § 393. The FDA enforces the

FDCA and the accompanying regulations it promulgates; there is no private right of action under the FDCA. PDK Labs, Inc. v. Friedlander, 103 F.3d 1105, 1113 (2d Cir. 1997).

Congress later amended the FDCA by enacting the Nutrition Labeling and Education Act of 1990 ("NLEA"), which "sought 'to clarify and to strengthen the [FDA's] legal 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). Among other requirements, Section 343(d) provides that "a food shall be misbranded" if "its container is so made, formed, or filled as to be misleading." 21 U.S.C. § 343(d).

One category of misleading products are those that contain "slack-fill," defined as "the difference between the actual capacity of a container and the volume of product contained therein." 21 C.F.R. § 100.100(a). Yet not all slack-fill is misleading; rather, slack-fill is only misleading if (1) consumers are unable to fully view the contents of the package, and (2) the slack-fill is non-functional. See id. Slack-fill is, in turn, non-functional only if none of the following reasons for its existence apply: (1) protection of the contents of the package; (2) requirements of the machines used to enclose

the contents in the package; (3) unavoidable settling during shipping and handling; (4) the need for the package to perform a specific function; (5) the food is packaged in a reusable container with empty space as part of the presentation of the food; and/or (6) the inability to increase the fill level or reduce the package size because, for example, the size is necessary to accommodate food labeling requirements or to discourage theft. See id. § 100.100(a)(1)-(6).

**b. State Regulatory Schemes**

In this case, plaintiffs assert claims under New York and District of Columbia law.

New York law provides that "[f]ood shall be deemed to be misbranded . . . [i]f its container is so made, formed, colored or filled as to be misleading." N.Y. Agric. & Mkts. 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." Izquierdo v. Mondelez Int'l, Inc., No. 16-cv-04697 (CM), 2016 WL 6459832, at *3 (S.D.N.Y. Oct. 26, 2016). GBL Sections 349, 350 and 350-a in particular have been interpreted to provide a private right of action for excessive slack-fill. See Mennen Co. v. Gillette Co., 565 F. Supp. 648, 655 (S.D.N.Y. 1983), aff'd sub nom. Mennen v. Gillette, 742 F.2d 1437 (2d Cir. 1984); see also

Waldman v. New Chapter, Inc., 714 F. Supp. 2d 398, 406 (E.D.N.Y. 2010).

District of Columbia law, and specifically the CPPA, forbids a variety of unlawful trade practices and "establishes an enforceable right to truthful information from merchants about consumer goods and services that are or would be purchased, leased, or received in the District of Columbia." See D.C. Code § 28-3901(c). It defines a "trade practice" as "any act which does or would create, alter, repair, furnish, make available, provide information about, or, directly or indirectly, solicit or offer for or effectuate a sale, lease or transfer, of consumer goods or services." Id. § 28-3901(a)(6). Section 28-3904, in turn, contains a nonexclusive list of unlawful trade practices, including: (a) "represent[ing] that goods or services have a source, sponsorship, approval, certification, accessories, characteristics, ingredients, uses, benefits, or quantities that they do not have"; (e) "misrepresent[ing] as to a material fact which has a tendency to mislead"; (h) "advertis[ing] or offer[ing] goods or services without the intent to sell them . . . as advertised or offered"; and (x) "sell[ing] consumer goods in a condition or manner not consistent with that warranted . . . by operation or requirement of federal law." Id. § 28-3904(a), (e), (h), (x).

**c. Preemption**

"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." Izquierdo, 2016 WL 6459832, at *3 (quoting 21 U.S.C. § 343-1(a)). "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." Id. at *4. "State laws that impose affirmatively different labeling requirements from federal law in these areas are preempted." Id. However, "state laws that seek to impose labeling requirements identical to those required by federal regulations are not preempted." Id. (citing Koenig v. Boulder Brands, Inc., 995 F. Supp. 2d 274, 284 (S.D.N.Y. 2014)).

In other words, "[b]ecause any claim for slack-fill deemed permissible under the FDCA would be preempted, [p]laintiff[s] must allege [d]efendant['s] product contains slack-fill that is non-functional, i.e., misleading, as defined by the FDCA," in order to state an actionable claim under either the GBL or CPPA. Daniel v. Mondelez Int'l, Inc., No. 17-CV-00174 (MKB), 2018 WL

1087953, at *5 n.7 (E.D.N.Y. Feb. 26, 2018); see Martin v. Wm. Wrigley Jr. Co., No. 4:17-cv-00541-NKL, 2017 WL 4797530, at *2 (W.D. Mo. Oct. 24, 2017) ("[T]he Court must construe the [Missouri Merchandising Practices Act] provisions governing Plaintiff's claims, which purport to concern misleading containers and slack-fill, as being no broader than corresponding federal law."); cf. Bautista v. CytoSport, Inc., 223 F. Supp. 3d 182, 192 (S.D.N.Y. 2016); Izquierdo, 2016 WL 6459832, at *4.[3]

**III. Article III Standing**

Defendant raises two different Article III standing arguments: (1) that plaintiffs Alce and Nugent were not injured, and thus do not have standing, with respect to the Products they did not personally purchase; and (2) that Alce, who seeks an injunction pursuant to GBL Section 349, has not demonstrated that he is likely to be injured in the future by defendant's allegedly misleading packaging.

In order to bring a suit in federal court, a plaintiff must demonstrate that he possesses standing to do so. Under well settled Supreme Court precedent, in order to demonstrate

[3] Defendant argues that Nugent's claims under the CPPA fail simply because, unlike the GBL, the CPPA does not "make[] it a complete defense to a claim that the practice complies with federal rules and regulations." Def.'s Supp. at 11. In other words, because the CPPA does not explicitly provide that if defendant's practices pass muster under federal law, there is no state-law violation, the state-law claims are automatically preempted. We need not address this argument, however, as we conclude *infra* that the Products comply with federal law because they do not contain non-functional slack-fill, rendering any state-law claims futile.

standing, a plaintiff must show three elements: (1) an injury in fact, (2) that is fairly traceable to the defendant's allegedly unlawful conduct, (3) that is likely to be redressed by a favorable decision. Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1547 (2016). The "injury in fact" must be a "concrete and particularized" harm to a "legally protectable interest" that is "actual or imminent not conjectural or hypothetical." Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (internal quotation marks omitted). A "particularized" injury is one that "affect[s] the plaintiff in a personal and individual way." Id. at 560 n.1.

"That a suit may be a class action . . . adds nothing to the question of standing, for even named plaintiffs who represent a class must allege and show that they personally have been injured." Lewis v. Casey, 518 U.S. 343, 357 (1996) (internal quotation marks omitted) (quoting Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 40 n.20 (1976)). Thus, "[f]or each claim asserted in a class action, there must be at least one class representative . . . with standing to assert that claim." Fort Worth Emps.' Ret. Fund v. J.P. Morgan Chase & Co., 862 F. Supp. 2d 322, 331-32 (S.D.N.Y. 2012) (citing Cent. States Se. & Sw. Areas Health & Welfare Fund v. Merck-Medco Managed Care, L.L.C., 504 F.3d 229, 241 (2d Cir. 2007)).

**a. Standing for Substantive Violations of GBL and CPPA**

Plaintiffs seek to represent putative classes of purchasers of the Products from both New York State and the District of Columbia. As Alce and Nugent, the lead plaintiffs for each respective class, are alleged only to have purchased, and thus been injured by over-paying for, one of the twenty-one Products, defendant asserts that they lack standing to bring claims for all of the Products they did not purchase. See Def.'s Supp. at 17-21.

"[C]ourts in this Circuit have held that, subject to further inquiry at the class certification stage, a named plaintiff has standing to bring class action claims under state consumer protection laws for products that he did not purchase, so long as those products, and the false and deceptive manner in which they were marketed, are 'sufficiently similar' to the products that the named plaintiff did purchase." Mosley v. Vitalize Labs, LLC, Nos. 13 CV 2470(RJD)(RLM), 14 CV 4474(RJD)(RLM), 2015 WL 5022635, at *7 (E.D.N.Y. Aug. 24, 2015); see Bautista, 223 F. Supp. 3d at 188-89; Kacocha v. Nestle Purina Petcare Co., No. 15-CV-5489 (KMK), 2016 WL 4367991, at *9-10 (S.D.N.Y. Aug. 12, 2016); Quinn v. Walgreen Co., 958 F. Supp. 2d 533, 541-42 (S.D.N.Y. 2013).

Here, the purchased and unpurchased Products are sufficiently similar for plaintiffs to satisfy Article III

standing at the motion to dismiss stage: all of the Products are (1) potato chips; (2) manufactured by Wise; (3) with a single exception (2.75 oz. Sour Cream and Onion), within a 4.25 oz. range (4.5 oz. at the lowest (e.g., Cheddar & Sour Cream), 8.75 oz. at the highest (e.g., BBQ)); and (4) alleged to contain between 58 and 75% slack-fill. Am. Compl. ¶ 31 & Exs. A, B; see Bautista, 223 F. Supp. 3d at 188 (plaintiff alleges that all of defendant's products are packaged in "large, opaque containers that contain approximately 30% or more of empty space" (internal quotation marks omitted)); Buonasera v. Honest Co., 208 F. Supp. 3d 555, 563 (S.D.N.Y. 2016) ("Although the unpurchased products may contain different ingredients compared to the purchased products . . . the Amended Complaint adequately alleges that the misrepresentation claimed with respect to the unpurchased products is sufficiently similar to the misrepresentation for the purchased products."); Jovel v. i-Health, Inc., No. 12-CV-5614 (JG), 2013 WL 5437065, at *10 (E.D.N.Y. Sept. 27, 2013) (sufficient similarities in, *inter alia*, packaging and labeling of products and unpurchased products to survive motion to dismiss for lack of standing).

**b. Standing for Injunctive Relief under GBL**

Alce, on behalf of the New York class, seeks to enjoin defendant from violating GBL Section 349 in the future by refraining from "packaging its Products with non-functional

slack-fill." Am. Compl. ¶ 110. Yet defendant argues that even if Alce was injured by overpaying for the Product that he purchased, there is no likelihood that he will purchase another Product, and thus be injured again, depriving him of standing to seek injunctive relief. See Def.'s Supp. at 21-23.

As with claims for damages, a plaintiff seeking an injunction "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)). "Plaintiffs lack standing to pursue injunctive relief where they are unable to establish a 'real or immediate threat' of injury." Nicosia v. Amazon.com, Inc., 834 F.3d 220, 239 (2d Cir. 2016) (quoting City of Los Angeles v. Lyons, 461 U.S. 95, 111-12 (1983)). "The Supreme Court has repeatedly reiterated that the threatened injury must be certainly impending to constitute injury in fact, and that allegations of possible future injury are not sufficient." Am. Civil Liberties Union v. Clapper, 785 F.3d 787, 800 (2d Cir. 2015) (internal quotation marks omitted).

Alce alleges that he "is at risk of several types of future injury, each of which justifies the imposition of an injunction." Am. Compl. ¶ 111. First, Alce "is willing to purchase all of Defendant's Products in their current formulation, and so is in imminent risk of being deceived into

purchasing a Product with misleading packaging and consequently less chips than he had bargained for." Id. Second, Alce "is no longer able to rely on Defendant's representations, regardless of whether the representations are true or false." Id. ¶ 112. Third, Alce "may in the future hesitate to purchase Defendant's Products, even if it ceases its unlawful labeling practices and begins packaging its Products without slack-fill." Id. ¶ 113. None of these allegations, however, are sufficient to "establish a 'real or immediate threat of injury.'" Nicosia, 834 F.3d at 239.

First, Alce's professed intention to re-purchase Products as they are currently packaged is subject to an important condition: Alce "would still be willing to repurchase the type of Product he purchased in its current formulation as long as he is not compelled to pay for empty space within the container when buying the Product. He is ready to make such a purchase immediately, provided only that the price paid correspond[s] to the chips within the container." Am. Compl. ¶ 50 (emphasis added). The Court interprets this condition to mean that Alce will not purchase Products unless defendant changes the price of the Products, in which event he will not be injured at all. Cf. Izquierdo, 2016 WL 6459832, at *5.

Alce's proffered second and third alleged injuries—that he will no longer be able to confidently rely on defendant's

representations, and that he will refrain from purchasing Products in the future even if they conform to his expectations—assume that the status quo holds.[4] In other words, according to Alce, it's "fool me once, shame on you, fool me twice, shame on you." This argument is meritless. "Consumers who were misled by deceptive food labels lack standing for injunctive relief because there is no danger that they will be misled in the future." Ham v. Hain Celestial Grp., Inc., 70 F. Supp. 3d 1188, 1196 (N.D. Cal. 2014) (internal quotation marks omitted); see Garrison v. Whole Foods Mkt. Grp, Inc., No. 13-cv-05222-VC, 2014 WL 2451290, at *5 (N.D. Cal. June 2, 2014) ("The named plaintiffs in this case allege that had they known the Whole Foods products they purchased contained [Sodium Acid Pyrophosphate], they would not have purchased them. . . . Now they know. There is therefore no danger that they will be misled in the future."); Morgan v. Wallaby Yogurt Co., No. 13-cv-00296-WHO, 2014 WL 1017879, at *6 (N.D. Cal. Mar. 13, 2014).

**IV. Functionality of Slack-Fill**

Given the FDCA's preemption requirement, to state an actionable claim under the GBL and CPPA, plaintiffs must first allege that the slack-fill in the Products is non-functional.[5]

[4] Alce's effort to define his injury as defendant's lost-sales is "touching," but legally meritless.

[5] There is no dispute that the Products "do[] not allow the consumer to fully view [their] contents." 21 C.F.R. § 100.100(a).

Here, plaintiffs only offer conclusory allegations, rather than facts, to establish that none of the functional purposes of slack-fill apply. Further, plaintiffs' indirect attempt at establishing non-functionality—comparing Products to bags of chips containing less slack-fill—is inconsistent with FDA guidance, and otherwise insufficiently alleged.

According to the amended complaint, "Defendant's slack-fill serves no purpose other than to mislead consumers about the quantity of food they are actually purchasing." Am. Compl. ¶ 70; see id. ¶ 5 ("Most of the empty space in each bag is empty air that does not serve any legitimate purpose, and only serves to mislead consumers."). Courts, however, have routinely found such conclusory allegations insufficient to state a claim. See, e.g., Bautista, 223 F. Supp. 3d at 190; O'Connor v. Henkel Corp., No. 14-CV-5547 (ARR)(MDG), 2015 WL 5922183, at *9 (E.D.N.Y. Sept. 22, 2015) (plaintiff's claims included only "nake[d] assertions" that product labeling was "deceptive and misleading . . . and designed to increase sales"). Bautista is particularly instructive on this point. There, plaintiff alleged that defendant's package of protein powder was misleading in that it contained 30% non-functional slack-fill. 223 F. Supp. 3d at 190. Specifically, plaintiff alleged "that the 30% empty space was not used to protect product, necessary for enclosing the product, or because of settling." Id.

(internal quotation marks omitted). "Such wholly conclusory allegations," the court concluded, "are insufficient to state a non[-]functional slack[-]fill claim." Id. "It may be challenging for a plaintiff to present such facts before discovery . . . , but where a claim is valid it is not impossible; for example, experts in the relevant field can be consulted or comparisons to similar products can be made. In any event, the law is clear that 'the doors of discovery' are not unlocked 'for a plaintiff armed with nothing more than conclusions.'" Id. at 191 (quoting Iqbal, 556 U.S. 678-79).

Plaintiffs' amended complaint presents the same infirmities. As in Bautista, plaintiffs have failed to plead any facts to support their allegation that the slack-fill in the Products is nonfunctional with respect to the relevant criteria. Plaintiffs have not demonstrated, with factual assertions, that the slack-fill in the Products is unnecessary to protect the chips, or does not the reflect the requirements of the machines used for enclosing the packages, or is not the result of unavoidable product settling, or is not the consequence of an inability to increase the level of fill or to further reduce the size of the package. See 21 C.F.R. § 100.100(a).

Plaintiffs also attempt to establish functionality, or lack thereof, indirectly. They assert that "[b]y comparing the bags of Defendant's Products to the bags of Defendant's other snack

chip lines and chips of its competitors, it is possible to establish that the Products contain non-functional slack-fill." Am. Compl. ¶ 16. More specifically, plaintiffs allege that to the extent similarly sized, if not smaller, bags of chips contain less slack-fill than the Products, the difference must be non-functional slack-fill. See id. ¶ 72. Plaintiffs' comparisons include: (1) the Products to 8.5 oz. and 6.25 oz. Ruffles potato chip bags; (2) the Products to a 9.25 oz. bag of Wise Dipsy Doodles Original Wavy Corn Chips; and (3) the same-sized 2.75 oz. and 4.5 oz. bags of Wise Ridges Sour Cream & Onion Potato Chips.[6]

[6] Specifically, the Amended Complaint contains a variety of side-by-side comparisons between the Products and the comparator bags of chips. First, whereas Wise 8.75 oz. bags (7.75" wide, 13.5" vertical capacity) are filled 3.75" tall (72% slack-fill), Ruffles 8.5 oz. bags (6.5" wide, 11.5" vertical capacity) are filled 8" tall (30% slack-fill). See Am. Compl. ¶ 71(f) & Ex. B, at 23-25. Second, whereas Wise 8.5 oz. bags (6.5" wide, 12" vertical capacity) are filled 5" tall (58% slack-fill), Ruffles 8.5 oz. bags (6.5" wide, 11.5" vertical capacity) are filled 8" tall (30% slack-fill). See id. ¶ 71(e) & Ex. B, at 20-22. Third, whereas Wise 7 oz. bags (6.5" wide, 12" vertical capacity) are filled 4" tall (67% slack-fill), Ruffles 8.5 oz. bags (6.5" wide, 11.5" vertical capacity) are filled 8" tall (30% slack-fill). See id. ¶ 71(a) & Ex. B, at 1-8. Fourth, whereas Wise 6.75 oz. bags (6.5" wide, 12" vertical capacity) are filled 4" tall (67% slack-fill), Ruffles 8.5 oz. bags (6.5" wide, 11.5" vertical capacity) are filled 8" tall (30% slack-fill). See id. ¶ 71(b) & Ex. B, at 9-12. Fifth, whereas Wise 4.5 oz. bags (6.25" wide, 10" vertical capacity) are filled 3.75" tall (62% slack-fill), Ruffles 6.25 oz. bags (6" wide, 10.5" vertical capacity) are filled 6.5" tall (38% slack-fill). See id. ¶ 71(d) & Ex. B, at 17-19. Sixth, whereas Wise 2.75 oz. bags (6.25" wide, 10" vertical capacity) are filled 2.5" tall (75% slack-fill), Ruffles 6.25 oz. bags (6" wide, 10.5" vertical capacity) are filled 6.5" tall (38% slack-fill). See id. ¶ 71(c) & Ex. B, at 13-16. Further, plaintiffs note that a 9.25 oz. bag of Wise Display Doodles Original Wavy Corn Chips (5.5" wide, 10" vertical capacity) is filled taller, at 7.25", than all of the Products. See id. Ex. B. Finally, the 2.75 oz. and 4.5 oz. bags of Wise Ridges Sour Cream & Onion Potato Chips are packed in the same bag. See Am. Compl. ¶ 73.

Plaintiffs cite only *dicta* from a single case for the proposition that such comparisons are sufficient to allege non-functional slack-fill. See Pls.' Opp'n at 3 (quoting Bautista, 223 F. Supp. 3d at 191).[7] That is not entirely surprising given that FDA guidance is inconsistent with this approach. The FDA has explained that "differences in the physical characteristics of a given product, including the need to protect the product from breakage, and precision of filling equipment result in a high degree of variability in the level of functional slack-fill within commodity classes." Misleading Containers; Nonfunctional Slack-Fill, 58 Fed. Reg. 2957-01, 2959, 1993 WL 1564 (Jan. 6, 1993) (emphasis added); see Misleading Containers; Nonfunctional Slack-Fill, 58 Fed. Reg. 64123-01, 64135, 1993 WL 498605 (Dec. 6, 1993) ("FDA recognizes that there is significant variability in the amount of the slack-fill in packages, both between and within commodity classes and even within a single-product line." (emphasis added)). The FDA "collected sufficient data to determine that it is possible to distinguish between functional and nonfunctional slack-fill on a plant-by-plant basis for

[7] Moreover, we read Bautista as standing for the proposition that comparisons could potentially be used, in addition to other non-conclusory assertions, to state a plausible claim of non-functional slack-fill. See Bautista, 223 F. Supp. 3d at 191 ("Plaintiff provides no facts rendering plausible his 'naked assertion' that the slackfill in Defendant's products is nonfunctional . . . . It may be challenging for a plaintiff to present such facts before discovery . . . but where a claim is valid it is not impossible; for example, . . . comparisons to similar products can be made. In any event, the law is clear that 'the doors of discovery' are not unlocked 'for a plaintiff armed with nothing more than conclusions.'" (emphasis added and internal quotations marks omitted)).

specific products in given container sizes." 58 Fed. Reg. at 2959. Consistent with those variations, the FDA rejected the idea of a specific volume threshold after which slack-fill in a particular product, such as potato chips, would be deemed non-functional. See 58 Fed. Reg. at 64135 ("[N]o specific numerical value could adequately describe the amount of nonfunctional slack-fill that would be significant.").

Further, even assuming, *arguendo*, that comparing similar products were a permissible means for establishing non-functional slack-fill, plaintiffs' efforts would still fail. Plaintiffs assert that the comparisons they offer between the Products and the other bags of chips are "between the same kind of packaging that is enclosed in the same way by the same kind of technology." Am. Compl. ¶ 72. However, "[r]epeatedly asserting that the [bags of chips] are the 'same' does not make them so. Plaintiff[s] must avoid a common pitfall—telling, rather than showing—and explain to the Court why the [chips] and their packaging are the same or sufficiently similar." Daniel, 2018 WL 1087953, at *6.

Here, plaintiffs only demonstrate that Wise potato chips and the comparators are all roughly 2 inches in diameter and 2 grams in weight. See Am. Compl. Ex. C. But even a cursory inspection of the exhibits demonstrates that there are substantial differences between the products. Among other

things, the proportions and volumes of the comparator bags are different; the products are manufactured by different corporations; the chips have different shapes (rectangular versus round); the surfaces are different (ridges versus flat); and the ingredients are different (corn versus potato). See id. Exs. B & C.

In sum, plaintiffs have not adequately alleged that the Products contain non-functional slack-fill, or, in other words, are impermissible under the FDCA. "[B]ecause any claim for slack-fill deemed permissible under the FDCA" is preempted, plaintiffs' claims necessarily fail. See Daniel, 2018 WL 1087953, at *5 n.7.

**V. Misleading Under the Circumstances**

Even assuming plaintiffs were able to establish that the Products contain non-functional slack-fill, plaintiffs would still fail to state a claim under the GBL, or under one of the CPPA provisions upon which plaintiffs rely. Under these provisions, whether the Products are misleading, and thus actionable, necessitates an objective, contextual analysis.

A cause of action under GBL § 349 has three elements: (i) "the challenged act or practice was consumer-oriented"; (ii) "it was misleading in a material way"; and (iii) "the plaintiff suffered injury as a result of the deceptive act." Crawford v. Franklin Credit Mgmt. Corp., 758 F.3d 473, 490 (2d Cir. 2014)

(citing Stutman v. Chem. Bank, 95 N.Y.2d 24, 29, 731 N.E.2d 608 (2000)). Claims under GBL §§ 350 and 350-a "must meet all of the same elements as a claim under GBL § 349." Wurtzburger v. Ky. Fried Chicken, No. 16-CV-08186 (NSR), 2017 WL 6416296, at *2 (S.D.N.Y. Dec. 13, 2017) (citing Goshen v. Mut. Life Ins. Co. of N.Y., 98 N.Y.2d 314, 324 n.1, 774 N.E.2d 1190 (2002)). To state a claim under D.C. Code § 28-3904(e), "the plaintiff must allege that the defendant made a material misrepresentation or omission that has a tendency to mislead." Alice v. MCI Commc'ns Corp., 111 F.3d 909, 912 (D.C. Cir. 1997) (citing D.C. Code § 28-3904(e), (f)).[8]

The New York Court of Appeals has adopted an "objective definition of 'misleading' under §§ 349 and 350, whereby the act or omission must be 'likely to mislead a reasonable consumer acting reasonably under the circumstances.'" Braynina v. TJX Cos., No. 15 Civ. 5897 (KPF), 2016 WL 5374134, at *5 (S.D.N.Y. Sept. 26, 2016) (emphasis added) (quoting Orlander v Staples, Inc., 802 F.3d 289, 300 (2d Cir. 2015)); see In re Frito Lay N. Am., Inc. All Nat. Litig., No. 12-MD-2413 (RRM)(RLM), 2013 WL 4647512, at *16 (E.D.N.Y. Aug. 29, 2013) ("[I]n resolving the

[8] Unlike plaintiffs' claims under D.C. Code § 28-3904(e), claims under § 28-3904(a), (h), and (x) do not require a material misrepresentation that has a tendency to mislead. See, e.g., Carroll v. Fremont Inv. & Loan, 636 F. Supp. 2d 41, 52 (D.D.C. 2009). Accordingly, the analysis of whether a reasonable consumer would be misled under the circumstances does not apply to those provisions. That, of course, does not render those other claims any more successful given plaintiffs' inability at the threshold to establish that the slack-fill in the Products is non-functional. See Daniel, 2018 WL 1087953, at *7.

reasonable consumer inquiry, one most consider the entire context of the label."); Ackerman v. Coca-Cola Co., No. CV-09-0395 (JG)(RML), 2010 WL 2925955, at *15 (E.D.N.Y. July 21, 2010) (determining the likelihood that reasonable consumers would be misled entails "[v]iewing each allegedly misleading statement in light of its context on the label and in connection with the marketing of [the product] as a whole"). Similarly, "under District of Columbia law a claim 'of an unfair trade practice is properly considered in terms of how the practice would be viewed and understood by a reasonable consumer.'" Whiting v. AARP, 637 F.3d 355, 363 (D.C. Cir. 2011) (quoting Pearson v. Soo Chung, 961 A.2d 1067, 1075 (D.C. 2008)); see Gebretsadike v. Travelers Home & Marine Ins. Co., 103 F. Supp. 3d 78, 84 (D.D.C. 2015). Therefore, GBL §§ 349, 350 and 350-a, and D.C. Code § 28-3904(e) "require more than a determination as to whether the slack-fill, standing alone, constitutes a misrepresentation. Rather, [these provisions] require an additional finding that a reasonable consumer in like circumstances would consider the misrepresentation material." See Daniel, 2018 WL 1087953, at *7 (citing Kommer v. Bayer Consumer Health, 252 F. Supp. 3d 304, 312 (S.D.N.Y. 2017), aff'd sub nom. Kommer v. Bayer Consumer Health, a div. of Bayer AG, 710 F. App'x 43 (2d Cir. 2018)); see also Bush v. Mondelez Int'l, Inc., No. 16-cv-02460-RS, 2016 WL 7324990, at *3 (N.D. Cal. Dec. 16, 2016) ("Courts, not the FDA,

determine whether a product is misleading under [state consumer protection] laws."). Further, "[i]t 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." Fink v. Time Warner Cable, 714 F.3d 739, 741 (2d Cir. 2013) (per curiam); Man v. Bahi, 251 F. Supp. 3d 112, 126 (D.D.C. 2017).

We conclude, as a matter of law, that the slack-fill enclosed in the Products would not mislead a reasonable consumer.

First and foremost, the weight of the chips enclosed is prominently displayed on the front of each Product, in large sized font, in a color differentiated from the package background, and there is no allegation that the full weight represented is not actually in the bag. See, e.g., Am. Compl. Ex. B, at 9, 20, 23. In Fermin v. Pfizer, Inc., 215 F. Supp. 3d 209, 210-11 (E.D.N.Y. 2016), plaintiffs alleged that, due to the presence of slack-fill in Advil bottles, they were misled as to the amount of pills contained therein. The court concluded in short shrift that no reasonable consumer would be misled: "each of the packages in Plaintiffs' Complaint clearly display [sic] the total-pill count on the label." Id. at 211.

> Plaintiffs provide no basis for disregarding the clearly stated pill-counts on the labels, nor do they dispute the fact that the tablet-count is clearly and

> prominently displayed on each of the labels. Plaintiffs' own exhibits . . . plainly negate any supposed 'reliance' on the size of the packaging as it is impossible to view the products without also reading the total number of pills contained in each package. . . . It defies logic to accept that the reasonable consumer would not rely upon the stated pill count.

Id. at 212; see Daniel, 2018 WL 1087953, at *10 ("[A]bsent exceptional circumstances, a reasonable consumer acting reasonably would find accurate, clearly visible representations of net weight, serving size, and number of servings to offset any misrepresentations arising from non-functional slack-fill."); United States v. 174 Cases, More or Less, Delson Thin Mints Chocolate Covered, 195 F. Supp. 326, 328 (D.N.J. 1961) (noting, in granting motion to dismiss, that "[t]he Correct net weight of the candy is disclosed on the wrapper of the accused package"), aff'd, 302 F.2d 724 (3d Cir. 1962); cf. Wurtzburger, 2017 WL 6416296, at *1, 3 (no reasonable consumer would believe that a bucket of chicken would be "filled to the rim" when advertisements disclaimed that the bucket consisted of an "eight piece bucket of chicken"); Bowring v. Sapporo U.S.A., Inc., 234 F. Supp. 3d 386, 390-92 (E.D.N.Y. 2017) (no reasonable consumer would believe that Sapporo beer was brewed in Japan, despite the use of Japanese imagery, a trademarked symbol representing Japan, and the word "imported" on the label, where the label also bore a disclosure, in small font, that the beer was

"[b]rewed and canned . . . [in] Ontario, Canada" (internal quotation marks omitted)); Whiting v. AARP, 701 F. Supp. 2d 21, 29 (D.D.C. 2010), aff'd, 637 F.3d 355 (D.C. Cir. 2011) (no reasonable consumer would be misled into believing an alternative health plan was meant to provide primary medical insurance where, despite potentially confusing claims in advertisements, the letter informing plaintiff about her plan explained it was "an alternative plan that is not major medical").

As with the bottles of Advil in Fermin, plaintiffs "provide no basis" for disregarding the clearly and prominently stated weight on the front of the packages. Plaintiffs' own exhibits "negate any supposed 'reliance' on the size of the packaging as it is impossible to view the products without also reading" the weight of the Product contained therein. See, e.g., Am. Compl. Ex. B, at 9 20, 23. Indeed, plaintiffs themselves acknowledge they did not solely rely on the package size: "Plaintiffs and Class members viewed Defendant's misleading Product packaging, and reasonably relied in substantial part on the Product packaging's implicit representations of quantity and volume when purchasing the Products." Am. Compl. ¶ 36 (emphasis added).

Second, and as plaintiffs acknowledge, "consumers may have come to expect significant slack-fill in potato chips and other

snack products." Am. Compl. ¶ 77; see Ebner v. Fresh, Inc., 838 F.3d 958, 967 (9th Cir. 2016) ("Because of the widespread nature of this practice, no reasonable consumer expects the weight or overall size of the packaging to reflect directly the quantity of product contained therein."); Daniel, 2018 WL 1087953, at *8 ("[B]ecause consumers have come to expect at least some slack-fill, context, including labels, are likely important considerations in assessing product amount or quantity."); Bush, 2016 WL 7324990, at *2 ("[C]onsumers expect there to be some slack-fill in opaque snack containers."); United States v. 116 Boxes, etc., Arden Assorted Candy Drops, 80 F. Supp. 911, 913 (D. Mass. 1948) ("[F]rom buying various types of five-cent candies, cough drops, and lozenges packed by machine in standard rectangular containers, [consumers] ha[ve] come to expect some slack or air space.").

Accordingly, given the prominence with which the Products' weight appears on the front of the packages, as well as consumers' expectations of slack-fill, we conclude as a matter of law that no reasonable consumer would be misled by the presence of slack-fill, even assuming it were non-functional, in the Products' packaging.[9]

[9] Because we have concluded that, under New York law, no reasonable consumer would be materially misled by the Products' packaging, we need not consider defendant's contention that plaintiff Alce was not injured as GBL §§ 349, 350, and 350-a require. See Def.'s Supp. at 8-10.

**VI. Unjust Enrichment**

Plaintiffs' final claim is for unjust enrichment under New York law.[10] See Am. Compl. ¶¶ 154-60. To state a claim for unjust enrichment, a plaintiff must show "(1) that the defendant benefitted; (2) at the plaintiff's expense; and (3) that equity and good conscience require restitution." In re Mid-Island Hosp., Inc., 276 F.3d 123, 129 (2d Cir. 2002) (quoting Kaye v. Grossman, 202 F.3d 611, 616 (2d Cir. 2000)). Unjust enrichment is "available only in unusual situations when, though the defendant has not breached a contract nor committed a recognized tort, circumstances create an equitable obligation running from the defendant to the plaintiff." Corsello v. Verizon N.Y., Inc., 18 N.Y.3d 777, 790, 967 N.E.2d 1177 (2012).

"Courts in the Second Circuit have recognized that 'an unjust enrichment claim cannot survive where it simply duplicates, or replaces, a conventional contract or tort claim.'" Reynolds v. Lifewatch, Inc., 136 F. Supp. 3d 503, 524 (S.D.N.Y. 2015) (quoting Koenig, 995 F. Supp. 2d at 290); see

[10] Despite asserting an unjust enrichment claim on behalf of both the New York and District of Columbia classes, the Amended Complaint only refers to unjust enrichment claims under New York law. See Am. Compl. ¶¶ 158, 160. Further, with the exception of defendant's argument in the alternative that plaintiffs' unjust enrichment claims would still fail under District of Columbia law, see Def.'s Supp. at 23-25, the parties' briefs assume that New York law applies. Accordingly, the Court will apply New York law without a choice-of-law inquiry. See Golden Pac. Bancorp v. FDIC, 273 F.3d 509, 514 n.4 (2d Cir. 2001) ("The parties' briefs assume that New York substantive law governs the issues of contract interpretation and statute of limitations here, and such implied consent is, of course, sufficient to establish the applicable choice of law." (citing Krumme v. WestPoint Stevens Inc., 238 F.3d 133, 135 (2d Cir. 2000))); OTG Brands, LLC v. Walgreen Co., No. 1:13-cv-09066 (ALC), 2015 WL 1499559, at *5 n.3 (S.D.N.Y. Mar. 31, 2015).

Ebin v. Kangadis Food Inc., No. 13 Civ. 2311(JSR), 2013 WL 6504547, at *7 (S.D.N.Y. Dec. 11, 2013). Thus, in Koenig, the court dismissed an unjust enrichment claim in which plaintiffs alleged that they had "purchased Smart Balance because of Defendants' purported misrepresentations." 995 F. Supp. 2d at 290. The court explained that "to the extent that Plaintiffs' other claims succeed, 'the unjust enrichment claim is duplicative,' and 'if plaintiffs' other claims are defective, an unjust enrichment claim cannot remedy the defects.'" Id. (quoting Corsello, 18 N.Y.3d at 790-91, 967 N.E.2d 1177).

Here, plaintiffs allege that it would "violate equity and good conscience" for defendant "to retain the ill-gotten benefits that it received" given that "the volume of the Products purchased . . . was not what Defendant represented it as being through the Products' packaging." Am. Compl. ¶ 159. It would be "unjust and inequitable" for defendant to "retain the benefit of selling its Products in packaging containing non-functional slack-fill" because purchasers "did not receive the full benefit of their bargain." Id. "In order for Plaintiffs and Class members to be made whole, they must receive a refund . . . equal to the percentage of non-functional slack-fill" in the Products they purchased. Id. These allegations are a mere regurgitation of those made with respect to plaintiffs' slack-fill claims under the GBL and CPPA.

Accordingly, as in Koenig, they are dismissed as duplicative. See Bautista, 223 F. Supp. 3d at 193-94 (dismissing unjust enrichment claim as duplicative of GBL §§ 349, 350, 350-a slack-fill claim); Izquierdo, 2016 WL 6459832, at *9-10 (same).

**CONCLUSION**

For the foregoing reasons, defendant's motion to dismiss plaintiffs' First Amended Class Action Complaint is granted. The Clerk of the Court is respectfully directed to terminate docket numbers 20 and 25; enter judgment for defendant; and close this case.

Dated: New York, New York
March 27, 2018

NAOMI REICE BUCHWALD
UNITED STATES DISTRICT JUDGE