UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MATTHEW MAROTTO on behalf of himself, all others similarly situated, and the general public, Plaintiff, -against- KELLOGG COMPANY, KELLOGG USA INC., KELLOGG SALES COMPANY, PRINGLES LLC, and PRINGLES MANUFACTURING CO., Defendants.	:	**ORDER DENYING IN PART AND GRANTING IN PART DEFENDANTS' MOTION TO TRANSFER, STAY, OR DISMISS** 18 Civ. 3545 (AKH)

ALVIN K. HELLERSTEIN, U.S.D.J.:

Plaintiff alleges that the Kellogg Company, Kellogg USA Inc., Kellogg Sales Company, Pringles LLC, and Pringles Manufacturing Co. ("Defendants") misled Plaintiff and other New York consumers through the packaging of Pringles Salt and Vinegar chips ("Product"), which Defendants manufacture and market. Plaintiff Matthew Marotto ("Plaintiff"), filed this case on April 20, 2018. ECF 1.

This action arises under New York Law. The complaint asserts claims for unfair and deceptive business practices, N.Y. Gen. Bus. L. § 349; false advertising, N.Y. Gen. Bus. L. § 350; negligent misrepresentation; fraud, N.Y. C.P.L.R. 213; breach of express warranty; breach of implied warranty of merchantability; and restitution. The complaint seeks statutory, compensatory, and punitive damages, disgorgement of unjust enrichment, interest, costs, expenses, reasonable attorneys' fees, and to enjoin Defendants from marketing the Product in a

deceptive manner. Compl. ¶ 150. Plaintiff also seeks to represent a class of similarly situated New York consumers. Compl. ¶ 75.

Pending before the court is Defendants' motion to stay, transfer, or dismiss the case. Defendants argue that the case is substantially similar to an earlier action, *Allred v. Kelly*, No. 17-1354, which was filed in 2017 in California. In the alternative, Defendants assert that the case should be dismissed, because Plaintiffs fail to plausibly allege their claims. For the reasons stated below, Defendants' motion is denied in part and granted in part.

Background

A. Parties

Plaintiff Mathew Marotto is a New Jersey resident. Compl. ¶ 6. Plaintiff alleges that he purchased the Product in New York. Compl. ¶ 63. Plaintiff has purchased the Product on multiple occasions since 2008 and through 2018. Compl. ¶ 64.

Defendants Kellogg Company, Pringles Manufacturing Co., and Kellogg Sales Company are Delaware corporations with their principal place of business in Michigan. Compl. ¶¶ 7, 9, 11. Defendant Kellogg USA Inc. is a Michigan profit corporation with its principal place of business in Michigan. Compl. ¶ 8. Defendant Pringles LLC is a Delaware limited liability company with its principal place of business in Michigan. Compl. ¶ 10. Defendants "jointly produce, manufacture, create, advertise, and otherwise assist in the creation and marketing of" Pringles Salt and Vinegar Chips. Compl. ¶ 13.

B. The Allred Action

On May 11, 2017, Barry and Mandy Allred filed a putative class action in the Superior Court of California for the County of San Diego. Def. Br. at 3, ECF 13; Ex. A, ECF

13-1. The Allred complaint named Kellogg Company, Kellogg Sales Company, and Pringles LLC as defendants. Ex. A ¶ 14–16. The complaint alleges that the Allred plaintiffs purchased the same Product, Pringles Salt and Vinegar Chips, in California. Ex. A ¶ 13. The complaint alleged that the design of the Product's label implies that the Product is flavored only with natural ingredients and deceives consumers who reasonably believe they are purchasing "a premium 'all natural' product with natural flavoring ingredients." Ex. A ¶¶ 9–10. The complaint alleged that Defendants added two artificial ingredients, sodium diacetate and malic acid to produce the vinegar flavor in the Product. Ex. A ¶ 20. The complaint alleges that the Product did contain vinegar, but the amount was insufficient to flavor the product. Ex. A ¶ 19. Further, the complaint alleged deficient labeling of the ingredients, in violation of California and federal law, because the packaging "misleadingly identifies the malic acid flavoring agent only as a generic 'malic acid' instead of using the specific, non-generic name of the ingredient." Ex. A ¶ 23.

The complaint alleged violations of California's Consumer Legal Remedies Act, Cal. Civ. Code §§ 1750 *et seq.*; California's Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200 *et seq.*; California's False Advertising Law, Cal. Bus. & Prof. Code §§ 17500 *et seq.* Ex. A ¶¶ 98–153. The complaint also alleges breach of express and implied warranties. Ex. A ¶¶ 154–79. The complaint seeks damages, disgorgement of profits, restitution, and injunctive relief. Ex. A at 26–27. The Allred complaint defined the class as "[a]ll consumers who purchased the Product from a retailer within the state of California . . . ." Ex A ¶ 80.

On July 5, 2017, Defendants removed the Allred action to the U.S. District Court for the Southern District of California. Def. Br. at 3. On January 9, 2018, the court denied the *Allred* plaintiffs' motion for remand, and on February 23, 2018, the court denied Defendants'

motion to dismiss. *Allred v. Kellogg, et al.*, No. 17-1354, ECF 19, 20. Since the *Allred* action has been filed, the parties have engaged in discovery and the court has ordered briefing on plaintiffs' October 1, 2018 motion for class certification. *Allred v. Kellogg, et al.*, No. 17-1354, ECF 39, 40, 42.

C. The Marotto Action

The following facts are based on the allegations in the complaint. The complaint alleges facts similar to the *Allred* action. Like *Allred*, the complaint alleges that the Product's label design is misleading, because it "gives consumers the impression of freshly baked chips, with the salt flavoring coming from the sprinkled salt and the vinegar flavoring coming from the bottles," not artificial ingredients. Compl. ¶¶ 1-2. Unlike the *Allred* complaint, the instant complaint alleges that the Product's back label specifically contains the words, "NO ARTIFICIAL FLAVORS." Compl. ¶ 3. The complaint alleges that this claim is false. Compl. ¶ 24. Like the *Allred* action, the complaint alleges that the Product contains sodium diacetate and malic acid, two additional artificial "flavoring ingredients that overwhelm the flavor of the small amount of *actual* vinegar in the seasoning . . . ." Compl. ¶ 21, 23 (emphasis in original). While acknowledging that sodium diacetate may be found in nature, the complaint alleges that the sodium diacetate in the Product is industrially synthesized. Compl. ¶ 28. Similarly, the complaint alleges that, while one form of malic acid, L-Malic acid, exists in nature, the Product also contains a second form of malic acid, D-Malic acid, which can only be produced by artificial chemical synthesis. Compl. ¶ 38.

"Plaintiff seeks to represent a class comprised of all persons in New York who [sic] purchased the Product for personal or household use, and not for resale." Compl. ¶ 75. The complaint asserts claims for unfair and deceptive business practices, N.Y. Gen. Bus. L. § 349;

false advertising, N.Y. Gen. Bus. L. § 350; negligent misrepresentation; fraud, N.Y. C.P.L.R. 213; breach of express warranty; breach of implied warranty of merchantability; and restitution.

Discussion

A. Legal Background

1. Motion to Transfer Venue

The general rule among federal district courts is to avoid duplicative litigation. *Wyler-Wittenberg v. MetLife Home Loans, Inc.*, 899 F. Supp. 2d 235, 247 (E.D.N.Y. 2012) (citing *Colorado River Water Conservation Dist. v. United States,* 424 U.S. 800, 817 (1976)). "Motions for transfer lie within the broad discretion of the district court and are determined upon notions of convenience and fairness on a case-by-case basis." *In re Cuyahoga Equipment Corp.,* 980 F.2d 110, 117 (2d Cir.1992).

"The goal of Section 1404(a) 'is to prevent waste of time, energy and money and to protect litigants, witnesses and the public against unnecessary inconvenience and expense.'" *Wyler-Wittenberg v. MetLife Home Loans, Inc.*, 899 F. Supp. 2d 235, 248 (E.D.N.Y. 2012) (quoting *Van Dusen v. Barrack*, 376 U.S. 612, 616 (1964)) (internal quotation marks removed).

Section 1404(a) provides in part that "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented." In weighing a motion to transfer under Section 1404, a court may consider a number of factors, including:

> (1) the plaintiff's choice of forum, (2) the convenience of witnesses, (3) the location of relevant documents and relative ease of access to sources of proof, (4) the convenience of parties, (5) the locus of operative facts,

> (6) the availability of process to compel the attendance of unwilling witnesses, (7) the relative means of the parties, (8) the forum's familiarity with the governing law, and (9) trial efficiency and the interests of justice, based on the totality of the circumstances.

Albert Fadem Tr. v. Duke Energy Corp., 214 F. Supp. 2d 341, 343 (S.D.N.Y. 2002). "These [§ 1404] factors do not comprise an exclusive list, nor are they to be applied in a mechanical or formulaic manner. Rather, they, and any other factors peculiar to the particular case in question, serve as guideposts to the Court's informed exercise of discretion." *Id.*

2. First-Filed Rule

The first-filed rule provides that "[a]s a general rule, '[w]here there are two competing lawsuits, the first suit should have priority.'" *Employers Ins. of Wausau v. Fox Entm't Grp., Inc.*, 522 F.3d 271, 274–75 (2d Cir. 2008) (quoting *First City Nat'l Bank & Trust Co. v. Simmons,* 878 F.2d 76, 79 (2d Cir.1989)); *see also New York Marine & Gen. Ins. Co. v. Lafarge N. Am., Inc.*, 599 F.3d 102, 112 (2d Cir. 2010). "This rule 'embodies considerations of judicial administration and conservation of resources' by avoiding duplicative litigation and honoring the plaintiff's choice of forum." 522 F.3d at 274–75. "[T]he first-filed rule does not supersede the inquiry into the balance of convenience required under § 1404(a)." *River Rd. Int'l, L.P. v. Josephthal Lyon & Ross Inc.*, 871 F. Supp. 210, 214 (S.D.N.Y. 1995).

"The first-filed rule 'applies when identical or substantially similar parties and claims are present in both courts.'" *Pippins v. KPMG LLP*, No. 11-cv-0377 (CM), 2011 WL 1143010, at *2 (S.D.N.Y. Mar. 21, 2011) (quoting *In re Cuyahoga Equip. Corp.,* 980 F.2d at 116–17). "[T]he Second Circuit plainly does not require the first-filed action and the subsequent action to consist of identical parties." *Wyler-Wittenberg v. MetLife Home Loans, Inc.*, 899 F. Supp. 2d 235, 244 (E.D.N.Y. 2012).

"Although it is typically invoked in non-class contexts, the first-filed rule has been applied to class action suits filed by different plaintiff classes against the same defendant. In that setting, for the rule to apply, 'identical or substantially similar parties and claims [must be]' present in both courts." *Quinn v. Walgreen Co.*, 958 F. Supp. 2d 533, 539 (S.D.N.Y. 2013) (quoting *Bukhari v. Deloitte & Touche LLP,* 2012 WL 5904815, at *3 (S.D.N.Y. Nov. 26, 2012)). "[C]ourts have applied the rule to parallel class actions filed against the same defendant and involving claims based, at least in substantial part, on the same law." *Bukhari v. Deloitte & Touche LLP*, No. 12-cv-4290 (PAE), 2012 WL 5904815, at *3 (S.D.N.Y. Nov. 26, 2012) (citing *Tate-Small v. Saks Inc.*, No. 12-cv-1008 (HB), 2012 WL 1957709, at *4 (S.D.N.Y. May 31, 2012) ("the FLSA claims here render these cases substantially similar")). Courts have declined to apply the first-filed rule where the cases are filed in different states, do not overlap, and "where resolution of the first suit would not be conclusive of the claims asserted in the second." *See, e.g.*, *Thomas v. Apple-Metro, Inc.*, No. 14-cv-4120 (VEC), 2015 WL 505384, at *4 (S.D.N.Y. Feb. 5, 2015) (citing *Quinn v. Walgreen Co.,* 958 F.Supp.2d at 539–40; *Lloyd v. J.P. Morgan Chase & Co.,* No. 11-cv-9305, 2012 WL 3339045, at *1 (S.D.N.Y. Aug. 14, 2012); *Raniere v. Citigroup, Inc.,* 827 F.Supp.2d 294, 301–02 (S.D.N.Y.2011)).

"The interests of justice require that the cases be related, not identical." *Manufacturers Hanover Tr. Co. v. Palmer Corp.*, 798 F. Supp. 161, 167 (S.D.N.Y. 1992). "When applying the first-filed rule to assertedly duplicative actions, the court must carefully consider whether the suits are, in fact, duplicative, and must 'not to be swayed by a rough resemblance between the two suits without assuring itself that beyond the resemblance already noted, the claims asserted in both suits are also the same.'" *Quinn v. Walgreen Co.*, 958 F. Supp. 2d at 539 (quoting *Curtis v. Citibank, N.A.*, 226 F.3d 133, 136 (2d Cir. 2000)).

One of two recognized exceptions to the first-filed rule is the "balance of convenience" exception. *Emp'rs Ins. of Wausau,* 522 F.3d at 275. "The rule that grants priority to the suit first filed is subject in this Circuit to an exception that looks to other special circumstances that would make granting priority to the suit filed second more appropriate." *In re Cuyahoga Equip. Corp.*, 980 F.2d at 117. "The party claiming exceptions to the fist-filed rule bears the burden of overcoming the presumption by showing that 'equitable considerations recommend the later action.'" *Pippins v. KPMG LLP*, 2011 WL 1143010, at *2 (quoting *GT Plus, Ltd. v. Ja-Ru, Inc.*, 41 F. Supp. 2d 421, 424 (S.D.N.Y. 1998)).

3. Motion to Stay

"In determining whether an action should be stayed, courts in this circuit generally consider: '(1) the private interests of the plaintiffs in proceeding expeditiously with the civil litigation as balanced against the prejudice to the plaintiffs if delayed; (2) the private interests of and burden on the defendants; (3) the interests of the courts; (4) the interests of persons not parties to the civil litigation; and (5) the public interest.'" *Am. Steamship Owners Mut. Prot. & Indem. Ass'n, Inc. v. Lafarge N. Am., Inc.*, 474 F. Supp. At 482 (S.D.N.Y. 2007), *aff'd sub nom. New York Marine & Gen. Ins. Co. v. Lafarge N. Am., Inc.*, 599 F.3d 102 (2d Cir. 2010) (citing *GTFM, Inc. v. Park,* No. 02-cv-7020, 2002 WL 31890940, at *2 (S.D.N.Y. Dec. 30, 2002)).

4. Motion to Dismiss Standard

In ruling on a motion to dismiss, the court must accept the factual allegations in the complaint as true and draw all reasonable inferences in favor of the nonmoving party. *Gregory v. Daly*, 243 F.3d 687, 691 (2d Cir. 2001), *as amended* (Apr. 20, 2001). In order to survive a motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true,

to 'state a claim to relief that is plausible on its face.'" *Ashcroft*, 556 U.S. at 678 (quoting *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." *Id.*

B. Application of Law

5. Does the First-Filed Rule Govern In This Case?

Defendants argue that the first-filed rule applies in this case and supports transfer. Defendants point to the similarities between the suits and observe that transferring the case to California may result in additional judicial efficiencies.

The facts of *Quinn v. Walgreen Co.* are particularly instructive to the Court's analysis here. In *Quinn v. Walgreen Co.*, the named plaintiff in an earlier filed in Illinois action had alleged under California law deceptive packaging of a supplement purchased in California. *Quinn v. Walgreen Co.*, 958 F. Supp. 2d at 538. The subsequent action sought to assert claims under New York and Connecticut law for New York and Connecticut classes. The court in *Quinn v. Walgreen Co.* found that the first-filed rule did not apply, even though the earlier-filed action sought to certify a multi-state class that could have potentially encompassed the subsequently filed classes. Here, the *Allred* action has no such potential. Similarly, courts have held that the first-filed rule did not apply where the parallel actions with non-overlapping classes solely raised separate state law claims, despite similar facts. *Bukhari v. Deloitte & Touche LLP*, No. 12-cv-4290 (PAE), 2012 WL 5904815, at *4 (S.D.N.Y. Nov. 26, 2012). Resolution of the Allred claims in California will not be dispositive of the claims in this case. *See Catalano v. BMW of N. Am., LLC*, 167 F. Supp. 3d 540, 552 (S.D.N.Y. 2016) (declining to apply first-filed rule to second class action alleging consumer fraud claims in the absence of "overlapping federal

claims" and common parties); *see also Lloyd v. J.P. Morgan Chase & Co.*, No. 11 CIV. 9305 LTS, 2012 WL 3339045, at *1 (S.D.N.Y. Aug. 14, 2012)).

Nevertheless, courts have applied the first-filed rule to competing class actions, even where they assert differing state-law claims. *Tate-Small v. Saks Inc.*, No. 12-cv-1008 (HB), 2012 WL 1957709, at *1 (S.D.N.Y. May 31, 2012) (finding substantial similarity because of the common FSLA claims, in spite of "notable differences" between New York and California law. *Id.* at *2. As in the present case, plaintiffs sought to certify class actions specific to the respective states, producing effectively no overlap between the suits. *Id.*

Similarly, Judge McMahon determined that the first-filed rule applied to another pair of FLSA actions, in which the classes of employees and claims were identical save one additional claim by the latter-filed action. *Pippins v. KPMG LLP*, 2011 WL 1143010, at *4 (nevertheless finding the balance of convenience favored maintaining the second action independently). A district court in this Circuit has applied the first-filed rule to an FLSA action with substantial but incomplete class overlap. *Wyler-Wittenberg v. MetLife Home Loans, Inc.*, 899 F. Supp. 2d 235, 247 (E.D.N.Y. 2012).

Applying these principles, the first-filed rule does not govern in this case. The parties in the two actions differ substantially. Not only are there differences among the defendants, the plaintiff classes consist of two distinct groups of consumers, from different states, and between whom there is likely little or no overlap. Similarly, although there is substantial overlap in the factual allegations in the two actions, the claims concern distinct California and New York laws. This case is thus distinguishable from those concerning FSLA claims, which presented a common issue of federal law.

Having concluded that the first-filed rule does not apply, the Court analyzes Defendant's motion to transfer under the principles of venue transfer.

6. Forum Transfer and the Balance of Convenience

"The burden of justifying transferring venue lies with the moving party." *Hernandez v. Blackbird Holdings, Inc.*, No. 01-cv-4561 (GBD), 2002 WL 265130, at *1 (S.D.N.Y. Feb. 25, 2002) (citing *Factors v. Pro Arts Inc.*, 579 F.2d 215, 218 (2d Cir.1978), *overruled on other grounds by*, *Pirone v. Macmillon, Inc.*, 894 F.2d 579 (2d Cir.1990)). As a threshold issue, this case satisfies the Section 1404 requirement that it might have been brought in the Southern District of California. *See* 28 U.S.C. § 1404(a). The California court has personal jurisdiction over Defendants by their implied consent in making this motion. *See Bent v. Zounds Hearing Franchising, LLC*, No. 15-cv-6555 (PAE), 2016 WL 153092, at *5 (S.D.N.Y. Jan. 12, 2016) (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 n.14 (1985)). Relying on the application of the first-filed rule, Defendants have directed minimal effort to meeting the burden of justifying the transfer of venue. *See* Br. at 9. As a result, the Court's treatment of the balance of convenience factors can be brief.

a. Weight Accorded to Plaintiff's Choice of Forum

"[T]he plaintiff's choice of forum is a less significant consideration in a (here, putative) class action than in an individual action." *In re Warrick*, 70 F.3d 736, 741 n.7 (2d Cir. 1995). Nevertheless, the proposed class is composed of New York consumers. Following the reasoning of *Warrick*, the Court may presume that a disproportionate share of the putative New York consumer class members reside in and near the chosen forum, so that a denial of the motion to transfer would serve the convenience of a disproportionate share of the class. *Id.*

b. Convenience of Witnesses

"Some courts have found the convenience of witnesses to be the most important factor in a motion to transfer." *Lafarge*, 474 F. Supp. 2d at 482. Here, Defendants have made no claims that witnesses would be inconvenienced by proceedings in this forum.

c. Convenience of the Parties

Plaintiff argues that the putative class, consisting of New York individuals, would face more expensive litigation if the case were transferred to California. Opp. at 17. While Defendants have no special connection to either New York or California that would impose a particular hardship, they could potentially reduce litigation costs by transferring this action to California. As a result, this factor does not conclusively support either maintaining or transferring the case.

d. Locus of Operating Facts

Plaintiffs argue that because the Pringles were purchased in New York, the operative facts occurred within the forum. Opp. at 13.

e. Availability to Compel Attendance of Unwilling Witnesses

There is no indication that any witness would fail to testify without compulsion. As a result, this factor is neutral with respect to the question of transfer. *See AIG Fin. Prods. Corp. v. Pub. Util. Dist. No. 1*, 675 F. Supp. 2d 354, 371 (S.D.N.Y. 2009) ("The availability of process to compel the attendance of witnesses is a neutral factor here because neither party has identified a witness who would be unwilling to testify without compulsion.").

f. Relative Means of the Parties

Plaintiffs argue that the same considerations at play in weighing the convenience of the parties favor denying transfer of the case to California. Opp. at 17. The factor is at best neutral and does not support transfer to California.

g. Forum's Familiarity with the Governing Law

"A forum's familiarity with the governing law . . . is one of the least important factors in determining a motion to transfer, especially where no complex questions of foreign law are involved." *Bent v. Zounds Hearing Franchising, LLC*, No. 15-cv-6555 (PAE), 2016 WL 153092, at *8 (S.D.N.Y. Jan. 12, 2016) (quoting *Posven, C.A. v. Liberty Mut. Ins. Co.*, 303 F. Supp. 2d 391, 405 (S.D.N.Y. 2004)). The factor here is neutral on the question of transfer.

h. Trial Efficiency and the Interests of Justice

Defendants argue that the relatively advanced state of the California litigation supports the conservation of judicial resources and transfer of this case to California. They point to the close factual similarities between the cases.

The local SDNY rules also provide guidance on the relatedness of the two actions. Local Rule 13(a)(1) provides that a civil case will be deemed related "when the interests of justice and efficiency will be served. In determining relatedness, a judge will consider whether (A) the actions concern the same or substantially similar parties, property, transactions or events; (B) there is substantial factual overlap; (C) the parties could be subjected to conflicting orders; and (D) whether absent a determination of relatedness there would be a substantial duplication of effort and expense, delay, or undue burden on the Court, parties or witnesses." Local Rule 13(a)(2) further provides that "[c]ivil cases shall not be deemed related merely because they involve common legal issues or the same parties."

As discussed, there are significant differences in the parties, events, and facts. The California action will not have a preclusive or dispositive effect on this New York action. Although the transfer of this case to California may produce some efficiency gains, efficiency is not the sole consideration, and coordination of the two actions can mitigate some of the inefficiencies associated with maintaining this case in New York.

7. Motion to Stay

For the same reasons discussed, Defendants' motion to stay is not warranted here. Defendants focus on the first-filed rule, and they have not shown that the requisite considerations favor staying the action.

8. Motion to Dismiss

In the alternative, Defendants argue that Plaintiffs have not plausibly alleged that a reasonable consumer would be misled by the Pringles packaging. First, Defendants assert that Plaintiff's claims that the Product contains artificial ingredients is conclusory, because the ingredients in question also exist in natural forms. Second, Defendants claim that Plaintiff claims with insufficient particularity that the ingredients were used as *flavors* (instead of other uses, such as pH control agents). Third, Defendants assert that a reasonable consumer would not be misled by the packaging, because the Product is in fact salt and vinegar flavored.

i. New York Law Claims

Natural ingredients. Defendant argues that Plaintiff has failed to plausibly allege that the Product contains the artificial forms of the ingredients at issue. Defendants argue that Plaintiff is speculating that the Product contains the artificial version of the ingredients and awaiting discovery to determine whether the guess is correct. *See* Br. at 11.

Here, as in the earlier *Allred* action, Plaintiff distinguishes the natural and artificial forms of the ingredients and alleges that the Product contains the latter form. Compl. ¶¶ 29, 31. Although not binding, the Court finds the *Allred* Court's treatment of this same issue persuasive. *Allred v. Kellogg Co.*, No. 17-CV-1354-AJB-BLM, 2018 WL 1158885, at *2 (S.D. Cal. Feb. 23, 2018). Unlike earlier cases cited by Defendants, Plaintiff specifies in detail the chemical differences between the natural and artificial forms of the ingredients and identifies differences in their manufacture. *See* Compl. ¶¶ 31, 38. Plaintiffs in earlier cases cited by Defendants did not make such a showing, *See Figy v. Frito-Law N. Am., Inc.*, 67 F. Supp. 3d 1075, 1090 (N.D. Cal. 2014) ("Plaintiffs have not pleaded any facts explaining what these ingredients are and how they are unnatural . . . ."); *Osborne v. Kraft Foods Group, Inc.*, No. 15-02653 (N.D. Cal. Oct. 15, 2015). At the pleading stage, the Court must accept Plaintiff's allegations as true. As a result, the Court concludes that Plaintiff has sufficiently pled that the ingredients are artificial.

Flavor vs other uses. Defendant argues that Plaintiff fails to plead sufficient facts to support its claims that the ingredients at issue are used as flavors, rather than for other purposes. Defendant points to the fact that the ingredients can have other uses, including, for example, as a pH control or antimicrobial agent. Br. at 13. Defendants also identify other products that highlight other properties of the ingredients. *Id.* Here, however, Plaintiff has pled facts showing in support of its claims. For example, Plaintiff claims that the amount of vinegar is insufficient to produce the vinegar flavor in the chips. Compl. ¶ 20. Plaintiff alleges that the ingredients "simulate and reinforce the Product's *characteristic* vinegar flavor," which disambiguates the alleged purpose and effects of the ingredients from other hypothetical roles suggested by Defendants. Compl. ¶ 21 (emphasis added).

Reasonable consumer. Defendant argues that because the packaging truthfully states that the Product is flavored by salt and vinegar. This argument, even if accepted, is insufficient to answer Plaintiff's claim that the Product's packaging also contains the words "NO ARTIFICIAL FLAVORS." Compl. ¶ 3. Accepting the Plaintiff's allegations as true, a reasonable consumer could see this text and infer that the product contains no flavors derived from artificial chemical synthesis rather than from natural sources. Contrary to Plaintiff's arguments, to the extent that Plaintiff alleges that the ingredient label did not specify whether the ingredients used were the natural or artificial forms, the ingredients section of the Product label is insufficient to dispel any misleading impressions. *See* Opp. at 17.

j. Warranty Claims

i. Breach of Express Warranty

A breach of express warranty requires an allegation of an "affirmation of fact or promise made by the seller to the buyer . . . ." N.Y. U.C.C. Law § 2-313(1)(a). Here, Plaintiff's allegation that the Product contains the text "NO ARTIFICIAL FLAVORS," coupled with the allegation that the product contains flavors derived from artificial chemical synthesis is sufficient to plead a breach of express warranty. This is not a case in which the alleged statement accurately describe[d] th product." *Viggiano v. Hansen Nat. Corp.*, 944 F. Supp. 2d 877, 893–94 (C.D. Cal. 2013).

ii. Breach of Implied Warranty of Merchantability

Plaintiff alleges that Defendants breach an implied warranty of merchantability, because the Product allegedly contains artificial ingredients contrary to its labeling. Defendant asserts that these allegations are insufficient to plead a breach of implied warranty of merchantability. "A warranty of merchantability, however, does not mean that the product will

fulfill a buyer's every expectation but rather simply provides for a minimum level of quality." *Ackerman v. Coca-Cola Co.*, No. 09-cv-0395 (JG), 2010 WL 2925955, at *25 (E.D.N.Y. July 21, 2010) (quoting *Viscusi v. Proctor & Gamble,* No. 05–cv–01528 (DLI) (LB), 2007 WL 2071546, at *13 (E.D.N.Y. July 16, 2007) (internal quotation marks removed). "Where the sale of a food or beverage is concerned, courts have ruled that the product need only be fit for human consumption to be of merchantable quality." *Silva v. Smucker Nat. Foods, Inc.*, No. 14-cv-6154 (JG) (RML), 2015 WL 5360022, at *11 (E.D.N.Y. Sept. 14, 2015).

In its opposition papers, Plaintiff cites no legal authority to the contrary. As a result, Plaintiff's claim for breach of implied warranty of merchantability is dismissed.

k. Standing for Injunctive Relief

A plaintiff who seeks 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).

Economic Harm. Defendants argue that Plaintiff lacks standing for injunctive relief, because he cannot show ongoing injury. Plaintiff has pled that he would not have purchased the Product in the absence of Defendants' alleged misrepresentations and that its value was less than Plaintiff paid. Compl. ¶¶ 54, 56. While this first claim represents the "deception as injury" theory rejected by other courts, the latter claim is permissible. *See Izquierdo v. Mondelez Int'l, Inc.*, No. 16-cv-04697 (CM), 2016 WL 6459832, at *7 (S.D.N.Y. Oct. 26, 2016) ("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.'") (quoting *Orlander v. Staples, Inc.*, 802 F.3d 289, 302 (2d Cir. 2015)).

Defendant argues that Plaintiff, having become aware of the alleged misrepresentation, is no longer at risk of deception and thus no longer being harmed. *See City of Los Angeles v.* Lyons, 461 U.S. 95, 96 (1983) ("Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects."). Plaintiff claims future injury by stating his intention to purchase the Product once the allegedly deceptive labeling has been corrected. Compl. ¶ 70. In this way, Plaintiff seeks to distinguish this case from those cited by Defendants in *Hidalgo v. Johnson & Johnson Consumer Companies, Inc.*, 148 F. Supp. 3d 285, 296 (S.D.N.Y. 2015), which found plaintiff lacked standing where "the [c]omplaint contains *no allegations* that [plaintiff] intends to purchase the [product] again" (emphasis added). To the extent that Plaintiff alleges, for the purposes of seeking injunctive relief, that he intends to purchase the product in the future, he is admitting that he is not actually harmed. Thus, I find that Plaintiff lacks standing to seek injunctive relief.

Conclusion

For the reasons stated in this order, Defendant's motion to transfer, stay, or dismiss the action is denied in part and granted in part. Oral argument scheduled for November 29, 2018 is unnecessary and is cancelled. Defendants shall file their answer within 30 days of this order. The parties shall appear at a status conference on January 18, 2019, at 10 a.m. The Clerk is instructed to terminate the motion (ECF 12).

SO ORDERED.

Dated: November 28, 2018
New York, New York

ALVIN K. HELLERSTEIN
United States District Judge