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NY Rulings Show Tough Odds For 'Made With' Class Actions

By **Ashley Simonsen and Kaixin Fan** (October 20, 2023, 5:33 PM EDT)


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If the packaging of a food product represents that it is "made with" a certain ingredient, or otherwise features that ingredient, does that mean the product is made exclusively from that ingredient? Relatedly, does that at least mean the ingredient is present in a certain amount relative to other ingredients?

Courts in the Second Circuit, popular fora for consumer class actions, have long answered "no" to the first question. In other words, representations that a particular ingredient is present are unlikely to lead a reasonable consumer to believe that the product is made exclusively of that ingredient. Courts had dealt less frequently with the second question, until recently.

Two recent cases — Venticinque v. Back to Nature Foods Co. LLC in the U.S. District Court for the Southern District of New York and Van Orden v. Hikari Sales U.S.A. Inc. in the U.S. District Court for the Northern District of New York — were dismissed after alleging that representations about a particular ingredient on product packaging were misleading because that ingredient was present in an amount less than reasonable consumers allegedly would expect.

Background

A pivotal case in this area is Mantikas v. Kellogg Company.[1] There, the U.S. Court of Appeals for the Second Circuit held in 2018 that "whole grain" or "made with whole grain" claims in large print in the center of a Cheez-It box could plausibly mislead a reasonable consumer to believe that the grain ingredient in the crackers was exclusively or predominately whole grain.

In so holding, the court distinguished several out-of-circuit cases, where the ingredient featured was obviously not the product's primary ingredient.

For example, a reasonable consumer, when confronted with the claim that a cracker is "made with real vegetables," likely would not conclude that the cracker was made predominantly of vegetables.

By contrast, crackers are typically made predominantly of grain, and a reasonable consumer might look to the bold assertion on the packaging to discern what type of grain. As a result, the "whole grain" representation on the Cheez-It box was plausibly misleading when the predominant grain ingredient in the crackers was in fact enriched white flour.

Following Mantikas, courts have largely dealt with the question of whether highlighting a specific ingredient implies the exclusion of others.

According to the U.S. District Court for the Eastern District of New York's 2020 decision in Harris v. Mondelez Global LLC, "[c]ourts following Mantikas have reaffirmed that a representation that a food is made with a real ingredient does not necessarily mislead from the truth that the advertised ingredient may have been combined with another."[2]

For example, in Weaver v. Champion Petfoods USA Inc., the U.S. Court of Appeals for the Seventh Circuit in 2021 affirmed the dismissal of claims predicated on the theory that "made with fresh regional ingredients" meant the products used solely fresh ingredients, observing that "[s]everal district courts have held that references to ingredients used do not imply that ingredient is used exclusively."[3]

To the extent courts after Mantikas have dealt with a deception theory based on the predominance of a featured ingredient compared to others, the ingredient at issue often has been one that a consumer would not expect to be the primary ingredient, or that was indeed predominant relative to other ingredients in the same category.

For example, in Kennedy v. Mondelez Global, the court held that a reasonable consumer would not interpret "made with real honey" on a graham cracker box to mean that honey was the predominant sweetener, because honey is obviously not the primary ingredient in grahams.[4]

And in Sarr v. BEF Foods Inc., the Eastern District of New York in 2020 dismissed a challenge to the statement "made with real butter," because the product's predominant fat ingredient was indeed butter.[5]

Two recent decisions, discussed below, dealt with the issue more generally, and reinforced the principle that statements about the presence of a particular ingredient do not necessarily signal anything about the amount of that ingredient in the product.

Recent Decisions

In Venticinque v. Back to Nature Foods, the Southern District of New York held in August that the claim "organic whole wheat flour" at the bottom of a cracker box would not mislead a reasonable consumer into believing that whole wheat flour was the primary flour ingredient in the crackers.[6]

The Venticinque court distinguished Mantikas, noting that the front pack of Cheez-It crackers at issue there contained the words "whole grain" in large, bold letters. It was plausible that this "conspicuous" claim communicated to a reasonable consumer the misleading message that the grain content of the crackers was exclusively, or at least predominantly, whole grain.

By contrast, the "whole wheat flour" representation on the crackers at issue in Venticinque was not front-and-center on the package. Additionally, it was listed along with two other ingredients — organic whole brown flax seed and sea salt — in what was "a non-exhaustive list of ingredients."

Moreover, the crackers' name, Stoneground Wheat Crackers, "d[id] not specify whole wheat." As such, a reasonable consumer would at best find the front pack ambiguous as to whether the crackers' primary source of flour was whole wheat, and any such ambiguity could be resolved by consulting the ingredient

list on the back of the package.

Similarly, in Van Orden v. Hikari Sales, the Northern District of New York dismissed the plaintiff's claim in August that the labeling of a fish food "overstate[d] the presence of algae."[7]

Specifically, the plaintiff pointed to statements on the label that the product was "Ideal for Algae Eaters," "Contain[ed] Pure-Cultured Spirulina," had a "Natural Green Color From Multiple Beneficial Algaes," and was a "Vegetable Rich Wafer," and a picture of a "wafer shaped algae disc."

The plaintiff contended that such representations implied that the product consisted exclusively or predominantly of algae, with a non-de minimis amount of spirulina and vegetables. The court, however, rejected this theory of deception.

The court held that no reasonable consumer would glean from the product label that algae was present in an amount greater than that indicated by the ingredient list on the label.

The court reasoned that the product label contained no representation whatsoever that the product had a specific amount of algae; as a result, the plaintiff could not plausibly allege that the labeling would mislead a reasonable consumer into believing it consisted entirely or predominately of algae.

Even if the statements created some ambiguity as to the amount of algae relative to other ingredients, the court reasoned, that ambiguity could be resolved by a reference to the label's ingredient list, which clearly listed all ingredients in order of prominence.

The court distinguished Mantikas, reasoning that unlike the statement that the crackers were "made with whole grain" in "large bold type," the front of the package of algae wafer products contained no language suggesting that the wafers contained predominantly algae.

Implications

This recent pair of decisions suggests a growing skepticism by courts of challenges to "made with"-type claims, and a cabining of the Second Circuit's decision in Mantikas.

Going forward, plaintiffs may have a harder time convincing courts that a reasonable consumer would expect a product to consist primarily of one ingredient simply because the packaging contains claims or pictures of that ingredient.

This would be true not only when that ingredient is an obviously nonpredominant ingredient, like a vegetable in a cracker, but also when the ingredient may be thought of as a primary ingredient, such as wheat or flour in a cracker.

The decisions also reinforce a growing trend of recent cases holding that while a back-label disclosure cannot correct a plainly false or deceptive representation, the back label, including the ingredient list, would set plaintiffs straight when the challenged statements on the front pack are merely ambiguous.[7]

So what does this mean for food, beverage and consumer packaged goods companies wishing to reduce litigation risk related to such ingredient claims?

The basic principle remains unchanged: Companies can reduce litigation risk by avoiding unqualified

representations about the presence of a particular ingredient, if reasonable consumers could expect the product to be comprised exclusively or predominately of that type of ingredient — and that is not the case.

But if the company does decide to make such a claim, the two decisions discussed above suggest the following options to lower the risks of a successful challenge by plaintiffs.

- Avoid making the representation in large and bold letters or on the front and center of the package.
- In a similar vein, avoid featuring that ingredient directly in the product name.
- Highlight two or three ingredients, instead of only one, so that it is apparent to consumers that the "made with" claim is a nonexhaustive list of ingredients.

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[1] Mantikas v. Kellogg Co., 910 F.3d 633 (2d Cir. 2018).

[2] Harris v. Mondelez Glob. LLC, 2020 WL 4336390 (E.D.N.Y. July 28, 2020).

[3] Weaver v. Champion Petfoods USA Inc., 3 F.4th 927 (7th Cir. 2021).

[4] Kennedy v. Mondelez Glob. LLC, 2020 WL 4006197 (E.D.N.Y. July 10, 2020).

[5] Sarr v. BEF Foods, Inc., 2020 WL 729883 (E.D.N.Y. Feb. 13, 2020).

[6] Venticinque v. Back to Nature Foods Co., LLC, 2023 WL 5055034 (S.D.N.Y. Aug. 8, 2023).

[7] Van Orden v. Hikari Sales U.S.A., Inc., 2023 WL 5336813 (N.D.N.Y. Aug. 18, 2023).

[8] See, e.g., McGinity v. Procter & Gamble Co., 69 F.4th 1093 (9th Cir. 2023).