UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE WHOLE FOODS MARKET GROUP, INC. OVERCHARGING LITIGATION	Civil Action No. 1:15-cv-5838 (PAE)

PLAINTIFFS' MEMORANDUM OF LAW
IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

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INTRODUCTION

Plaintiffs' claim is as simple as it is compelling. Both Plaintiffs Sean John and Joseph Bassolino are regular shoppers at Whole Foods Market Group, Inc. ("Whole Foods") stores in New York City, where they regularly purchase prepackaged foods that are priced according to their weight. At least, that is what Plaintiffs reasonably expected. Unfortunately, Whole Foods regularly and systematically labels its prepackaged food products with weights that are substantially above what they actually weigh. In other words, Whole Foods puts its thumb on the scale, a classic example of a deceptive practice.

That Plaintiffs purchased underweight products is not mere conjecture; to the contrary, the New York Department of Consumer Affairs ("DCA") conducted an investigation of Whole Foods' weighing and labeling practices, and on June 24, 2015, the DCA issued a press release disclosing its findings:

> Department of Consumer Affairs (DCA) Commissioner Julie Menin today announced an ongoing investigation into Whole Foods after finding that the company's New York City stores *routinely overstated the weights of its pre-packaged products* – including meats, dairy and baked goods – resulting in customers being overcharged. DCA tested packages of 80 different types of pre-packaged products and found *all of the products had packages with mislabeled weights*. Additionally, 89 percent of the packages tested did not meet the federal standard for the maximum amount that an individual package can deviate from the actual weight, which is set by the U.S. Department of Commerce . . . In some cases, this issue was found for the same exact products at multiple stores.

Department of Consumer Affairs Investigation Uncovers Systemic Overcharging for Pre-packaged Foods at City's Whole Foods (emphasis added).[1]

DCA's investigation was not reflective of isolated mistakes in one store; rather, in the Fall of 2014, DCA conducted "in-depth inspections" into Defendant's weighing practices and it

[1] The DCA press release, available at http://www1.nyc.gov/site/dca/media/pr062415.page, is attached as Exhibit 1, and it is incorporated by reference in the Amended Complaint, ¶25 n. 12.

discovered "troubling issues with their labeling of the weight of pre-packaged foods." *Id.* DCA reinvestigated the issue last winter and it again "found products continued to be mislabeled." *Id.*

There is no dispute that Plaintiffs purchased the types of products included in the DCA investigation. Both Plaintiffs allege that they routinely shopped at Whole Foods stores in New York City. Amended Class Action Complaint ("Amended Complaint") ¶¶ 17, 18. Among the products Mr. John purchased were prepackaged cheeses and chocolate cupcakes, and he made such purchases one or two times a month during 2014 and 2015. Amended Complaint ¶ 22. Similarly, Mr. Bassolino has been purchasing prepackaged goods from Whole Foods in New York City on a monthly basis since 2010, including chicken fingers. Amended Complaint ¶¶ 18, 23. Both Plaintiffs made numerous purchases during the time in which the DCA conducted its investigations.

Whole Foods identified the specific types of products that were the subject of the DCA investigation, and they include the products Plaintiffs purchased. In his October 19, 2015 Declaration,[2] Whole Foods Senior Data Mining Analyst Jeffrey Moll attached a list of products that "is a subset of a larger list of product categories . . . certain packages of which the [DCA] alleged were inaccurately labeled based on weights-and-measures labeling issues." Moll Dec. ¶ 3. That list includes cheese and chocolate cupcakes, Moll. Dec. Ex. A, items regularly purchased by Mr. John. Mr. Bassolino purchased, among other products, chicken fingers, and the DCA's investigation included various types of pre-cooked chicken portions. *See* DCA Press Release (identifying underweight packages of chicken tenders) and Moll Dec. Ex. A (identifying rotisserie chicken, split chicken breasts, and chicken wings).

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[2] The "Moll Dec." is at *Bassolino v. Whole* Foods, No. 15-06046 (Docket No. 41) and it is also attached here as Exhibit 2.

Defendant's motion to dismiss turns on one proposition, that Plaintiffs failed to plausibly allege that they purchased an underweight product from Whole Foods. On the basis of this argument, Defendant contends that Plaintiffs lack standing and that they fail to state a claim because they were not injured. But at this pleading stage the Court need not determine that Plaintiffs absolutely and definitively purchased an underweight product, or even whether it is probable or more likely than not that Whole Foods sold Plaintiffs an underweight product. Rather, this Court need only find that the allegations in the Amended Complaint render Plaintiffs claim that they purchased underweight products plausible. And this they have done. The DCA determined that Whole Foods "routinely overstated" weights, "resulting in customers being overcharged." Exhibit 1. Indeed, DCA found that packages of all of the 80 products it tested were falsely labeled as to weight. *Id.* The DCA also found that "89 percent of the packages tested did not meet the federal standard for the maximum amount that an individual package can deviate from the actual weight" and that the improper labels included "overcharges" ranging from $0.80 to $14.84. *Id.* DCA also found that this was a "systematic problem" and that "packages are routinely not weighed or are inaccurately weighed, resulting in overcharges for consumers." *Id.* Moreover, Plaintiffs shopped at Whole Foods dozens of times a year, and they purchased packages of the same products the DCA identified as being mislabeled. It is not only plausible that Plaintiffs purchased underweight products given their monthly purchases over the course of many years, it is a virtual certainty. As such, Defendant's motion should be denied and this action should be allowed to proceed so that Plaintiffs and other consumers similarly cheated by Whole Foods can seek recompense.

ARGUMENT

Plaintiffs plead facts that render their claim that Whole Foods sold them underweight products more than plausible. Therefore Defendant's motion to dismiss should be denied.

I. Plaintiffs Need Only Allege Facts That Render Their Claims Plausible.

Courts review a pleading for plausibility on a motion to dismiss. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678–79 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *see also Amidax Trading Grp. v. S.W.I.F.T. SCRL*, 671 F.3d 140, 145 (2d Cir. 2011) (applying plausibility standard to facial attack on subject matter jurisdiction). To review for plausibility, courts accept all well-pleaded factual allegations as true and draw all reasonable inferences in the pleader's favor. *Iqbal*, 556 U.S. at 678–79 (citing *Twombly*, 550 U.S. at 555). Thus, "[a] motion to dismiss serves to test the sufficiency of the complaint and not to weigh evidentiary proffers." *Goonewardena v. New York State Workers' Comp. Bd.,* No. 09-8244, 2011 WL 4822553, *3 (S.D.N.Y. Oct. 5, 2011). Therefore, "[a]t the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561 (1992).

A defendant's attempt to attack the factual sufficiency of a plaintiff's allegations is not appropriate at the pleading stage. *See Goldemberg v. Johnson & Johnson Consumer Cos.*, 8 F. Supp. 3d 467, 480 (S.D.N.Y. 2014) (denying motion to dismiss because a court cannot find as a matter of law that product labels are not misleading); *see also Ackerman v. Coca-Cola Co.*, No. 09-0395, 2010 WL 2925955, at *4 (E.D.N.Y. July 21, 2010) (denying motion to dismiss and holding that "[m]otions to dismiss pursuant to Rule 12(b)(6) test the legal, not the factual, sufficiency of a complaint."); *Quinn v. Walgreen Co*., 958 F. Supp. 2d 533, 543 (S.D.N.Y. 2013) (denying motion to dismiss consumer protection claim); *Hughes v. Ester C Co*., 930 F. Supp. 2d 439, 465 (E.D.N.Y. 2013) (same).

II. It Is More Than Plausible That Plaintiffs Purchased Underweight Products.

Ignoring the allegations in the Amended Complaint, Defendant contends that Plaintiffs fail to allege that they *actually* purchased an underweight product. Def. Mem. *seriatim*. But that is not the standard. Rather, Plaintiffs need only plead that it is plausible that they purchased an underweight product, not that they did so to a complete certainty. Indeed, the Second Circuit instructs that a plaintiff's allegations need not rise to the level of probability, and a court may not dismiss a claim even if it believes that a claim is improbable and that recovery is very remote and unlikely:

> [I]n determining whether a complaint states a claim that is plausible, the court is required to proceed "on the *assumption that all the [factual] allegations in the complaint are true*." *Twombly,* 550 U.S. at 555, 127 S.Ct. 1955 (emphasis added). Even if their truth seems doubtful, "Rule 12(b)(6) does not countenance . . . dismissals based on a judge's disbelief of a complaint's factual allegations," *id.* at 556, 127 S.Ct. 1955 (internal quotation marks omitted). Given that the plausibility requirement "*does not* impose a *probability* requirement at the pleading stage," the *Twombly* Court noted that "a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of the facts alleged is improbable, and that a recovery is very remote and unlikely." *Id.* (internal quotation marks omitted) (emphases added).

Anderson News, L.L.C. v. Am. Media, Inc., 680 F.3d 162, 185 (2d Cir. 2012) (reversing grant of motion to dismiss). Thus, the likelihood that Plaintiffs' allegations are true need not be "more likely than not." *Id.* at 184. *See also Monje v. Spin Master Inc.*, No. 09-1713, 2013 WL 2390625, at *14 (D. Ariz. May 30, 2013) (denying Rule 12(b)(6) motion, citing *Anderson News*, and holding that "[p]lausible does not mean likely."); *EQT Infrastructure Ltd. v. Smith*, 861 F. Supp. 2d 220, 230 (S.D.N.Y. 2012) (denying in part motion to dismiss where "I find it perhaps not likely, but plausible that a Type II agreement was intended."). As one New York federal court cautioned, "[i]n evaluating a complaint, however, the Court must take care not to turn *Twombly's* plausibility standard into a probability requirement. The question is not whether the Court believes that plaintiffs' allegations are likely true, but whether, on their face, they state a

plausible, rather than fanciful, claim." *Peck v. Hillside Children's Ctr.*, 915 F. Supp. 2d 435, 439 (W.D.N.Y. 2013) (denying motion to dismiss and citing *Anderson News*, 680 F.3d at 184-85; *Ideal Steel Supply Corp. v. Anza,* 652 F.3d 310, 323–24 (2d Cir. 2011); and *Arista Records, LLC v. Doe 3,* 604 F.3d 110, 120 (2d Cir. 2010) (noting that neither *Twombly* nor *Iqbal* heightened the pleading requirements under the federal rules, and that in fact *Twombly* made clear that any standard requiring the pleading of specific facts beyond those necessary to state a claim and the grounds showing entitlement to relief is "impermissibl[e]")).

In the face of Plaintiffs' allegations that they are regular Whole Foods shoppers, and that the DCA found that Whole Foods regularly and systematically sold underweight products of the specific type that Plaintiffs purchased, Defendant contends that it is within the realm of possibility that all of the packages they bought over several years encompassed by the statutory period were in fact accurately labeled or even overweight. Def. Mem. at 2 ("Because the DCA's allegations did not implicate every pre-packaged product sold at every Whole Foods store during the past five years, the packages that Plaintiffs purchased could have had labels bearing a lower weight, a higher weight, or the correct weight."). But the Second Circuit forecloses the Court from concluding that all of the packages purchased by Plaintiffs might have just as well been overweight as opposed to underweight: "The choice between two plausible inferences that may be drawn from factual allegations is not a choice to be made by the court on a Rule 12(b)(6) motion. A court ruling on such a motion may not properly dismiss a complaint that states a plausible version of the events merely because the court finds a different version more plausible." *Anderson News*, 680 F.3d at 185 (citing *Todd v. Exxon Corp.,* 275 F.3d 191, 203 (2d Cir. 2001) ("[F]act-specific question[s] cannot be resolved on the pleadings.")). And of course,

the DCA did not find that the products were just as often overweight; to the contrary, the DCA found that Whole Foods' mislabeling regularly resulted in overcharges.

Defendant's contention that some consumers might have benefited from Whole Foods' practice of selling improperly weighed products is based on a "subsequent media investigation." Def. Mem. at 4. Presumably, Defendant refers to an "investigation" by The Daily News (as reported in Justin Wm. Moyer, *Whole Foods Under Investigation for Overcharging in NYC*, WASHINGTON POST (July 24, 2015) (cited in Amended Complaint ¶ 28 n. 15). The Daily News reporter "went shopping . . . and stumbled onto a discount" in the form of overweight mini roast beef sandwiches and breaded chicken breasts -- two products which neither Plaintiff alleges they purchased. *Id.* This "investigation" that found two products overweight pales in comparison to the repeated and thorough DCA investigation that concluded that Whole Foods was guilty of systematically overcharging its customers. Defendant fails to mention that the Daily News also noted that Whole Foods has been found guilty of engaging in a systematic practice of selling improperly priced goods in New York: "[T]he city's Whole Foods stores have received more than 800 violations during 107 separate inspections since 2010, totaling more than $58,000 in fines." *Id.*[3]

III. Plaintiffs Have Standing To Bring Their Claims

"[T]o satisfy Article III's standing requirements, a plaintiff must show (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed

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[3] Plaintiffs' claims are also plausible because this is not the first time Whole Foods has been found guilty of placing its thumb on the scale. Indeed, the cities of Los Angeles, San Diego, and Santa Monica recently concluded a civil action against Whole Foods for selling underweight packaging, resulting in an $800,000 fine. Amended Complaint ¶¶ 29, 30.

by a favorable decision." *Hirsch v. Hui Zhen Huang*, No. 10-9497, 2011 WL 6129939, at *1 (S.D.N.Y. Dec. 9, 2011) (citing *Friends of the Earth Inc. v. Laidlaw Environmental Services,* 528 U.S. 167, 180–81 (2000)). That mislabeling the weights of *other* products sold at Defendant's stores could have actually benefitted Plaintiffs, as Defendant contends, does not negate Plaintiffs' standing. *See Ross v. Bank of Am., N.A. (USA),* 524 F.3d 217, 222 (2d Cir. 2008) ("Injury in fact is a low threshold" and "'the fact that an injury may be outweighed by other benefits, while often sufficient to defeat a claim for damages, does not negate standing.'") (quoting *Denney v. Deutsche Bank AG,* 443 F.3d 253, 265 (2d Cir. 2006)).

Defendant's citation to *Dimond v. Darden Restaurants, Inc.*, No. 13 5244, 2014 WL 3377105 (S.D.N.Y. July 9, 2014) is unavailing. The plaintiff there failed to plead injury because he confused deception with injury. The claim was that it was deceptive for a restaurant to impose an 18% gratuity and to fail to list the price of certain beverages on the menu. *Id.* at *1. But the plaintiff failed to allege that he would not have tipped 18% anyway or that he would not have purchased and paid for the drinks. *Id.* at *9. Here, there can be no dispute that the sale of underweight products is a deceptive act that causes injury.

Defendant's citation to *Spiro v. Healthport Techs., LLC*, 73 F. Supp. 3d 259, 268 (S.D.N.Y. 2014), where the plaintiffs claimed to have been overcharged for medical records, is likewise unavailing. Defendant states that the *Spiro* "plaintiffs argued that they had a standing-creating injury because they were *required* to reimburse the form for these costs – and actually did so . . ." Def. Mem. at 10. But *Spiro* is distinguishable because the plaintiffs were not in fact required to pay the charges and therefore they were not injured: "[O]n the facts as pled, the decision by plaintiffs to reimburse Simonson, after the fact, for the copying costs he had paid was a volitional act—an act of grace." *Id.* at 268. Here, of course, Plaintiffs were injured by

Defendant's deceptive conduct because they purchased a product that was falsely labeled as to weight, and weight is one the most material aspects of any food purchase, particularly those involving cheese and chocolate cupcakes. Defendant does not contend that selling underweight packages is not a deceptive practice that causes consumers injury.

Nor is *Wallace v. ConAgra Foods, Inc.*, 747 F.3d 1025, 1028 (8th Cir. 2014) germane to this action. There, the plaintiffs alleged that *some* Hebrew National beef products were not in fact kosher. But those plaintiffs failed to plead any facts that allowed the court to infer how plausible it was that the products the plaintiffs purchased were tainted with non-Kosher meats:

> As we cannot discern from the complaint how many packages were tainted with non-kosher beef, it is unclear whether even a bare majority of Hebrew National packages were not kosher. Which means, it is pure speculation to say the particular packages sold to the consumers were tainted by non-kosher beef, while it is quite plausible ConAgra sold the consumers *exactly what was promised:* a higher quality, kosher meat product.

Id. at 1030-31.[4] In contrast, Plaintiffs here plead more than sufficient facts to render their claim that they purchased underweight packages not just plausible but virtually certain: they both shopped at New York City Whole Foods over a long period of time, they both purchased packages of the types of products the DCA identified as being mislabeled, and the DCA concluded after a long and thorough investigation that Whole Foods systematically overcharges consumers for prepackaged foods. *Wallace* is unpersuasive here.[5]

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[4] To the extent *Wallace* stands for the proposition that a claim is rendered implausible where there is another plausible version of events, or that plaintiffs must allege facts that render their claims for injury more likely than not to be true, it is incompatible with *Anderson News*.

[5] *Boarding Sch. Review, LLC v. Delta Career Educ. Corp.*, No. 11-8921, 2013 WL 6670584, at *4-5 (S.D.N.Y. Mar. 29, 2013) is likewise distinguishable. There, the plaintiff alleged trademark confusion merely because it was within the realm of possibility that users of a website might have been confused about which company was associated with the defendant. But the plaintiff there failed to plead any facts as to how likely that was. *Id.* at *4-5. Indeed, the court referred to the possibility of confusion as "remote." *Id*. at *5. Here, in contrast, it is virtually certain that Plaintiffs purchased underweight products.

Defendant does not contest, nor could it, that the sale of even one underweight product to Plaintiffs results in an injury in fact. Plaintiffs more than adequately allege facts that render their claim that Whole Foods sold them underweight packages plausible, and therefore they have standing to pursue their claims.

IV. Plaintiffs' Claims For Relief Are Plausible.

Defendant's contention that Plaintiffs fail to state a claim for relief is the same as its argument with respect to standing, namely its infirm contention that Plaintiffs fail to plead facts rendering their claim that they purchased underweight products plausible. For the same reasons, this argument fails.

A. Plaintiffs Plausibly Plead Injury Under G.B.L. § 349 And § 350.

"Claims under Section 349 and 350 are not subject to the pleading-with-particularity requirements of Rule 9(b), Fed. R. Civ. P., and need only meet the bare-bones notice-pleading requirements of Rule 8(a), Fed. R. Civ. P." *Williamson v. Stryker Corp*., No. 12-CV-7083, 2013 WL 3833081, at *13 (S.D.N.Y. July 23, 2013) (citations omitted).[6] "To state a claim for

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[6] Under Rule 8, "a complaint must include only 'a short and plain statement of the claim showing that the pleader is entitled to relief.'" *In re Methyl Tertiary Butyl Ether (MTBE) Products Liab. Litig.,* 379 F. Supp. 2d 348, 367 (S.D.N.Y. 2005) (citations omitted). "[A] plaintiff need not 'set out in detail the facts upon which [it] bases [its] claim,' nor allege a prima facie case." *Id.* Detailed evidence, legal theories, and specific authority "are *not* requirements imposed by Rule 8." *Wynder v. McMahon,* 360 F.3d 73, 77 (2d Cir. 2004) (emphasis in the original) (holding that the district court could not dismiss plaintiff's action for failure to comply with order to supply complaint that substantially exceeded requirements of Rule 8). "The issue is not whether a plaintiff has alleged certain facts, but whether the facts asserted give the defendant fair notice of the claim and the basis for such claim . . . [to] enable the adverse party to answer and prepare for trial, allow the application of res judicata, and identify the nature of the case so that it may be assigned the proper form of trial." *In re MTBE Products Liab. Litig.,* 379 F. Supp. 2d at 367 (citation and internal quotation marks omitted). "This notice pleading standard 'relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims.'" *Id.* at 367-368 (citations omitted). "If a pleading fails to specify the allegations in a manner that provides sufficient notice, a defendant can move for a

deceptive practices under either section, a plaintiff must show . . . that the plaintiff was injured as a result of the deceptive practice, act or advertisement." *Williamson,* 2013 WL 3833081, at *13 (citations omitted). Plaintiffs have alleged that Defendant sold them products that contained less weight than Whole Foods represented on the label. This allegation satisfies the injury requirement under GBL §§ 349 and 350 "because it show[s] that plaintiffs paid more than they would have for the good but for the deceptive practices of the defendant-sellers." *Orlander v. Staples, Inc.,* 802 F.3d 289, 302 (2d Cir. 2015); *see also Servedio v. State Farm Ins. Co.,* 889 F. Supp. 2d 450, 453 (E.D.N.Y. 2012) *aff'd*, 531 Fed. Appx. 110 (2d Cir. 2013) ("[A] plaintiff who alleges that a deceptive practice caused him to pay more than the good or service he actually received was worth may be able to satisfy the injury requirement"); *Ackerman*, 2010 WL 2925955, at *23 ("Injury is adequately alleged under [section 349] by a claim that a plaintiff paid a premium for a product based on defendants' inaccurate representations"); *Koenig v. Boulder Brands, Inc.*, 995 F. Supp. 2d 274, 288 (S.D.N.Y. 2014) (the plaintiffs adequately alleged injury under GBL § 349 by claiming they paid price premiums specifically based on Defendants' misrepresentations.); *Lazaroff v. Paraco Gas Corp.,* 967 N.Y.S.2d 867, 2011 WL 9962089 (N.Y. Sup. Ct. Kings Cty. Feb. 25, 2011) (finding a sufficiently-pled § 349 injury where plaintiff alleged that he would not have paid the price charged for a "20 pound" propane cylinder had he known it contained only 15 pounds of propane).[7]

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more definite statement under Rule 12(e) before responding." *Id.* at 368 (internal quotation marks omitted). Accordingly, a claim can only be dismissed if "'no relief could be granted under *any* set of facts that could be proved consistent with the allegations.'" *Id.*

[7] Plaintiffs are not obligated under the notice-pleading standards of Fed. R. Civ. P. 8(a) to plead detailed evidence of actual injury. *See Wynder,* 360 F.3d at 77 (holding that detailed evidence is not required under Rule 8). That Mr. Bassolino included a different level of detail in another case is of no moment here.

Defendant's citation to *Preira v. Bancorp Bank*, 885 F. Supp. 2d 672 (S.D.N.Y. 2012) is unavailing. Unlike here, the *Preira* plaintiff's own claim for injury was directly contradicted by other allegations in the complaint:

> Plaintiff alleges that she and other similarly situated consumers "are left with balances on their Gift Cards which are too small for use in many transactions" because some merchants will not allow consumers to engage in split transactions, and they have "no options or recourse to reclaim the unused, prepaid balances on the Gift Cards," (Compl. ¶¶ 3, 4, 42), but these contentions are belied by Plaintiff's Complaint and motion papers, as well as the documents that I may consider on a motion to dismiss.

Id. at 677. Because, contrary to the plaintiff's allegations, there were options to exhaust the value of the card, the court concluded that injury was not adequately alleged. Here, the issue is entirely different. Defendant does not question that sale of a product with a label that misrepresents weight is a deceptive act that leads to injury. Rather, Defendant contends that Plaintiffs fail to plead that they were actually affected by its improper labeling practices. But, as noted above, Defendant's contention is erroneous.

B. Plaintiffs Plausibly State A Claim For Unjust Enrichment.

Plaintiffs allege that Defendant sold them a package that contained less of the product for which they bargained. Because Whole Foods provided Plaintiffs with less product than they paid for, Whole Foods was able to sell some of the product it should have given Plaintiffs to other consumers, effectively selling the missing amount twice. Thus, Whole Foods was unjustly enriched at Plaintiffs' direct expense. These allegations are more than sufficient to state a claim for unjust enrichment. *See Beth Israel Med. Ctr. v. Horizon Blue Cross and Blue Shield of New Jersey, Inc.*, 448 F.3d 573, 586 (2d Cir. 2006) ("To prevail on a claim for unjust enrichment in New York, a plaintiff must establish (1) that the defendant benefitted; (2) at the plaintiff's expense; and (3) that equity and good conscience require restitution."). Defendant's only

response is to repeat its claim that Plaintiffs fail to plausibly allege that they purchased an underweight package, a claim that is, as noted, infirm.

V. <u>Plaintiffs' Claims For Injunctive Relief Should Not Be Dismissed.</u>

Defendant contends that Plaintiffs fail to allege that they are at risk of future harm because they do not allege they will shop at Whole Foods in the future. Def. Mem. at 21. To the contrary, both Plaintiffs allege that the regularly shop at Whole Foods. Amended Complaint ¶¶ 6, 7. Thus, Plaintiffs have standing to pursue injunctive relief against Defendant; they continue to shop at Whole Foods, the deceptive conduct is ongoing, and therefore they remain vulnerable to future harm. *See In re Methyl Tertiary Butyl Ether (MTBE) Products Liab. Litig.,* 643 F. Supp. 2d 446, 453 (S.D.N.Y. 2009) ("An injury-in-fact may simply be the fear or anxiety of future harm.") (citing *Denney*, 443 F.3d at 265).

Moreover, whether Plaintiffs still shop at Whole Foods is irrelevant to their claim for injunctive relief. Courts "consistently [hold] that plaintiffs have standing to seek injunctive relief based on the allegation that a product's labeling or marketing is misleading to a reasonable consumer." *Ackerman v. Coca-Cola Co.*, No. 09-CV-395, 2013 WL 7044866, at *15-16 n. 23 (E.D.N.Y. July 18, 2013) (finding that the plaintiffs had standing to seek injunctive relief although they had become "aware of vitaminwater's sugar content and ha[d] stopped drinking it" because "the fact that they discovered the alleged deception years ago does not render defendants' advertising or labeling any more accurate or truthful. This is the harm New York's and California's consumer protection statutes are designed to redress."). To hold otherwise would "effectively bar any consumer who avoids the offending product from seeking injunctive relief." *Id.* (citing *Koehler v. Litehouse, Inc.,* No. 12-04055, 2012 WL 6217635, at *6 (N.D. Cal. Dec.13, 2012) (concluding that the plaintiff had standing to sue for injunctive relief even though

he admitted he did not intend to make another purchase of the product in question because the product did not "boost immunity" as advertised).[8]

CONCLUSION

Plaintiffs did not make just one purchase at one Whole Foods. Instead, they shopped at Whole Foods on a monthly basis for years, including during the specific period during which the DCA determined that Whole Foods packages were systematically mislabeled owing to significant underweighting. Defendant's motion to dismiss the complaint should be denied.

[8] *See also Ries v. Arizona Beverages USA LLC,* 287 F.R.D. 523, 533 (N.D. Cal. 2012) ("[W]ere the Court to accept the suggestion that plaintiffs' mere recognition of the alleged deception operates to defeat standing for an injunction, then injunctive relief would never be available in false advertising cases, a wholly unrealistic result."); *Larsen v. Trader Joe's Co.,* No. 11-05188, 2012 WL 5458396, at *4 (N.D. Cal. June 14, 2012) (holding that the plaintiffs had standing to seek injunctive relief even though they would not purchase the food items in question again because of their synthetic ingredients); *Henderson v. Gruma Corp.,* No. 10-4173, 2011 WL 1362188, at *7 (C.D. Cal. Apr. 11, 2011) ("If the Court were to construe Article III standing for FAL and UCL claims as narrowly as the Defendant advocates, federal courts would be precluded from enjoining false advertising under California consumer protection laws because a plaintiff who had been injured would always be deemed to avoid the cause of the injury thereafter ('once bitten, twice shy') and would never have Article III standing."); *Fortyune v. Am. Multi–Cinema, Inc.,* No. 10-CV-5551, 2002 WL 32985838, at *7 (C.D. Cal. Oct. 22, 2002) ("If this Court rules otherwise [and does not find standing], like defendants would always be able to avoid enforcement of the ADA. This court is reluctant to embrace a rule of standing that would allow an alleged wrongdoer to evade the court's jurisdiction so long as he does not injure the same person twice.") (quotation omitted).

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