

2023 WL 3577867

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United States Court of Appeals, Second Circuit.

RYAN HARDY, individually and on behalf of
all others similarly situated, Plaintiff-Appellant,

v.

OLÉ MEXICAN FOODS, INC., Defendant-Appellee. *

No. 22-1805

|

May 22, 2023

Appeal from a judgment of the United States District Court
for the Western District of New York (John L. Sinatra, Jr.,
Judge).

Attorneys and Law Firms

For Plaintiff-Appellant Timothy J. Peter, Faruqi & Faruqi,
LLP, Philadelphia, PA; Nina M. Varindani, Innessa M. Huot,
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For Defendant-Appellee: Nancy L. Stagg, Kilpatrick
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PRESENT: SUSAN L. CARNEY, RICHARD J.
SULLIVAN, WILLIAM J. NARDINI, Circuit Judges.

Opinion

***1 UPON DUE CONSIDERATION, IT IS HEREBY
ORDERED, ADJUDGED, AND DECREED** that the
judgment of the district court is **AFFIRMED**.

Ryan Hardy appeals from the district court's judgment
dismissing his claims, brought on behalf of himself and other
similarly situated consumers, against Olé Mexican Foods,
Inc. (“Olé”) for violations of [New York General Business Law](#)
[sections 349 and 350](#). Hardy alleged that the packaging of four
“La Banderita” tortilla products (the “La Banderita Products”)
mised consumers into believing that the products originated
from Mexico, when in fact they were made in the United
States. We assume the parties’ familiarity with the underlying
facts, procedural history, and issues on appeal.

We review the grant of a motion to dismiss de novo, accepting
as true all factual claims in the complaint and drawing all
reasonable inferences in the plaintiff’s favor. *Cap. Mgmt.*
Select Fund Ltd. v. Bennett, 680 F.3d 214, 219 (2d Cir. 2012).

“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 v. Iqbal*, 556 U.S.
662, 678 (2009) (internal quotation marks omitted).

As an initial matter, we must determine whether Hardy
has both Article III standing and class-action standing. To
demonstrate Article III standing, a plaintiff must allege (1)
an injury in fact that is (2) fairly traceable to the defendant's
actions and that is (3) redressable by the requested relief.
Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992).
Meanwhile, “a plaintiff has class standing if he plausibly
alleges (1) that he personally has suffered some actual injury
as a result of the putatively illegal conduct of the defendant”
and “(2) that such conduct implicates the same set of concerns
as the conduct alleged to have caused injury to other members
of the putative class by the same defendant[.]” *NECA-IBEW*
Health & Welfare Fund v. Goldman Sachs & Co., 693 F.3d
145, 162 (2d Cir. 2012) (alteration and internal quotation
marks omitted).

Here, Hardy has Article III standing for the one product he
purchased, La Banderita Taco Size Flour Tortillas, and class
standing for the other three La Banderita Products that he did
not purchase – La Banderita Burrito Grande, La Banderita
Sabrosísimas Corn, and La Banderita Whole Wheat Fajita.
According to his complaint, Hardy suffered a cognizable
injury when he paid a price premium for a La Banderita
product that he otherwise would not have purchased had he
known it was not made in Mexico. The complaint also makes
clear that the injury is fairly traceable to the packaging of
Olé’s products, and that it is redressable by damages against
Olé.

Hardy also has class standing because all four La Banderita
Products implicate “the same set of concerns” relating to
whether the packaging misrepresented where the products
were made. *NECA-IBEW*, 693 F.3d at 162. Variations in
size and formulations notwithstanding, the products were
advertised in packaging that displayed almost-identical
statements, color schemes, and designs. As such, we find that
the present dispute involves “claims brought by a purchaser
of one product [that] would raise a set of concerns nearly
identical to that of a purchaser of another ... product.” *See*
DiMuro v. Clinique Lab’ys, LLC, 572 F. App’x 27, 29 (2d Cir.
2014) (internal quotation marks omitted); *see also id.* (finding
that “Plaintiffs lack[ed] class standing to bring claims for
the four [out of seven] products that they did not purchase,”
because “[e]ntirely unique evidence [was] required to prove”

the falsity of approximately thirty-five different advertising statements on each of the seven different products).

*2 Satisfied that Hardy has both Article III and class standing, we now turn to the merits of Hardy's deceptive-practices and false-advertising claims. [New York General Business Law section 349](#) prohibits “[d]eceptive acts or practices in the conduct of any business, trade or commerce,” [N.Y. Gen. Bus. Law § 349](#), and [section 350](#) prohibits “[f]alse advertising in the conduct of any business, trade or commerce,” [id.](#) § 350. To state a claim under either section, “a plaintiff must allege that a defendant has engaged in (1) consumer-oriented conduct that is (2) materially misleading and that (3) plaintiff suffered injury as a result of the allegedly deceptive act or practice.” [Orlander v. Staples, Inc.](#), 802 F.3d 289, 300 (2d Cir. 2015) (internal quotation marks omitted). “[A] plaintiff must plausibly allege that the deceptive conduct was likely to mislead a reasonable consumer acting reasonably under the circumstances.” [Mantikas v. Kellogg Co.](#), 910 F.3d 633, 636 (2d Cir. 2018) (internal quotation marks omitted).

“The primary evidence in a consumer-fraud case arising out of allegedly false advertising is, of course, the advertising itself,” [Fink v. Time Warner Cable](#), 714 F.3d 739, 742 (2d Cir. 2013), which “[w]e ... consider ... as a whole, including disclaimers and qualifying language,” [Mantikas](#), 910 F.3d at 636. On the La Banderita Products, a graphic resembling the Mexican flag (but with corn stalks instead of the coat of arms of Mexico) figures prominently in the center of the packaging and sets the green-white-red color scheme of the packaging.¹ J. App'x at 52, 54, 56, 59, 62.² The “La Banderita” brand is printed in a circle surrounding the flag, along with a descriptor of the tortilla product (e.g., “Flour Tortillas,” “Burrito Grande,” “Sabrosísimas,” or “Fajita”). *Id.* Depending on the product, these words may be repeated at the edges of the packaging, which may also display a smaller version of the flag graphic – this time with a white bull replacing the white segment of the flag – and the phrase “A Taste of Mexico!” *Id.* at 52, 54, 56. The remainder of the packaging describes in English the number of tortillas included, the size of the tortillas, featured ingredients, and the product's net weight. *Id.* at 52, 54, 56, 59, 62. On the back of the packaging there is a La Banderita logo and the flag graphic, followed by a “Nutrition Facts” table, heating instructions, and barcodes. J. App'x at 39, 52, 54, 57, 60, 63. Notably, in the bottom-left corner, the packaging includes graphics stating that the products are “MANUFACTURED

BY: OLÉ MEXICAN FOODS, INC. NORCROSS, GA 30071” and “MADE IN U.S.A.” *Id.*

After considering the “advertisement as a whole,” we agree with the district court that Hardy has not “plausibly allege[d] that the deceptive conduct was likely to mislead a reasonable consumer acting reasonably under the circumstances.” [Mantikas](#), 910 F.3d at 636 (internal quotation marks omitted). Glaringly absent from the packaging is any statement that the La Banderita Products are made in Mexico. To be sure, the front of the packaging displays green, white, and red graphics resembling the Mexican flag and incorporates the phrase “A Taste of Mexico” as well as the Spanish word “La Banderita.” J. App'x at 52, 54, 56, 59, 62. But while these features may encourage consumers to draw *associations* with Mexico and promote the belief that the products contain Mexican-style flavors and ingredients, no reasonable consumer would construe these elements to be an affirmative representation that the La Banderita Products were in fact *manufactured* in Mexico. This is especially true given that the back of the packaging conspicuously states that the products are “MADE IN U.S.A.” and “MANUFACTURED [IN] NORCROSS, GA.” J. App'x at 39, 52, 54, 57, 60, 63. The La Banderita Products' packaging is thus distinguishable from that before the court in [Mantikas](#), in which the front of the product's packaging contained “misleading information set forth in large bold type on the front of the box” that could not be “clarified” or cured by reverse-side disclosures that were nestled in a “Nutrition Facts panel and ingredients list.” *See Mantikas*, 910 F.3d at 636–37.

*3 Hardy's position seems to be that [Mantikas](#) established a rule that information on the back of a product's packaging is always irrelevant to a deceptive-marketing claim; he argues that a front-label representation about *any* aspect of a product can never be clarified by a representation made elsewhere on a product's packaging to avoid a claim under either [section 349](#) or [350](#). This is not what [Mantikas](#) holds. To the contrary, [Mantikas](#) reaffirmed that we will “consider the challenged advertisement as a whole, including disclaimers and qualifying language” and that “context is crucial” in evaluating deceptive-marketing claims. *Id.* at 636 (citing [Fink](#), 714 F.3d at 742). [Mantikas](#) instructs that in considering advertisements regarding a product's nutritional content, a small-print ingredient list cannot “cure” front-label representations that are otherwise highly deceptive because “reasonable consumers expect that the ingredient list contains more detailed information about the product that *confirms* other representations on the packaging.” *Id.* at 637

(internal quotation marks omitted). *Mantikas* does not suggest that its reasoning necessarily applies outside the context of nutritional labels.

Even if *Mantikas*'s reasoning applied to some place-of-origin advertising, however, its "front-of-the-package" rule does not apply here, where the front-side packaging makes no express representations as to the origin of the La Banderita Products, while the back of the packaging unambiguously notes where the products were "made" and "manufactured." J. App'x at 39, 52, 54, 57, 60, 63. For these reasons, the district court did not err in concluding that Hardy failed to "plausibly allege" that a "reasonable consumer acting reasonably under the circumstances" would likely believe that the La Banderita

Products were made in Mexico. *Mantikas*, 910 F.3d at 636 (internal quotation marks omitted).³

We have considered Hardy's remaining arguments and find them to be without merit. For these reasons, we **AFFIRM** the judgment of the district court.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk of Court

All Citations

Not Reported in Fed. Rptr., 2023 WL 3577867

Footnotes

- * The Clerk of Court is respectfully directed to amend the official case caption as set forth above.
- 1 The description above generally applies to the packaging used for Olé's Sabrosísimas corn tortilla product. See J. App'x at 59. Although there are slight variations in the packaging used for the four La Banderita Products, we find that these differences do not meaningfully impact the analysis or outcome of this case.
- 2 The district court took judicial notice of the packaging images that Olé submitted in connection with its motion to dismiss. See *Hardy v. Olé Mexican Foods, Inc.*, 616 F. Supp. 3d 247, 249 n.1 (W.D.N.Y. 2022). Hardy does not challenge this ruling on appeal.
- 3 Hardy makes much of the fact that, in interpreting similar claims brought under provisions of California state laws that resemble [New York General Business Law sections 349 and 350](#), a California district court reached the opposite conclusion concerning whether the La Banderita Products' packaging was misleading. See *de Dios Rodriguez v. Olé Mexican Foods Inc.*, No. EDCV202324JGBSPX, 2021 WL 1731604, at *3–5 (C.D. Cal. Apr. 22, 2021). This is of no moment, since the California district court's decision dealt with a different state's statutes and, in any event, has no binding effect on this Court. See *Glover v. Bausch & Lomb Inc.*, 6 F.4th 229, 240 (2d Cir. 2021), *certified question answered*, 343 Conn. 513 (2022).