UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JUAN RAFAEL MARTEN, on behalf of himself and others similarly situated, Plaintiff, v. STARBUCKS CORPORATION, Defendant.	Case No. 1:18-cv-09201-JGK

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S
MOTION TO DISMISS AND MOTION TO STRIKE

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I. Introduction

Plaintiff Juan Marten ("Plaintiff") alleges that Starbucks Corporation's ("Defendant") labeling of its White Chocolate Doubleshot Energy Drink (the "Product") is misleading to consumers. Compl. ¶3. Plaintiff claims that the Product deceives consumers into believing that it contains white chocolate, and as such should be labeled as an "imitation." *Id.* ¶¶2, 22. But the Product, in accordance with federal regulations, is ***clearly*** advertised and labeled as a drink that is "naturally and artificially flavored" to taste like white chocolate. *Id.*, Ex. A. To label it in any other way—for example, as an imitation—would bring the Product into conflict with Food and Drug Administration ("FDA") requirements. This statutory reading supports a common-sense understanding of this action's central issue—that a reasonable consumer would not expect a product appropriately labeled "NATURALLY & ARTIFICIALLY FLAVORED" to be an imitation of white chocolate or be deceived into thinking that such a product would be a substitute for rather than flavored to taste ***like*** white chocolate.

Plaintiff asserts four causes of action based on the alleged mislabeling: Count I for injunctive relief based on violations of New York General Business Law ("GBL") Section 349 (Deceptive and Unfair Trade Practices); Count II for damages based on violations of GBL Section 349; Count III for damages based on violations of GBL Section 350 (False Advertising); and Count IV for damages based on violations of common law fraud. All of the claims are brought on behalf of a nationwide class or, alternatively, a New York class. Compl. Counts I-IV.

Plaintiff's claims fail as a matter of law. First, Plaintiff alleges the Product is imitation white chocolate, despite the fact that the Product is obviously not an imitation, but is rather a coffee drink clearly labeled as naturally and artificially flavored to taste like white chocolate. Second, Plaintiff fails to show that a reasonable consumer would be deceived by Defendant's labeling given federal regulations that permit artificial flavoring, and the Product's clear indication that it contains

white chocolate flavoring. Third, Plaintiff does not plead his common law fraud claim with the specificity required under Federal Rule of Civil Procedure 9(b).

Plaintiff's claims are procedurally deficient as well. His request for injunctive relief must be dismissed, as Plaintiff has not shown any plausible risk of future harm. Nor does the Complaint provide any basis for this Court's exercise of personal jurisdiction over the non-resident class members. Additionally, New York's choice-of-law principles preclude application of GBL Sections 349 and 350 and New York common law fraud claims to the purported nationwide class. Finally, Plaintiff's Complaint is also preempted by federal law, and this Court should exercise its discretion and dismiss the Complaint under the primary jurisdiction doctrine.

Because Plaintiff's claims are defective as a matter of law and cannot be repaired through amendment, as admitted by Plaintiff's counsel in Court, they must be dismissed with prejudice.

II. Background

Defendant is a corporation with its principal place of business and headquarters in Seattle, Washington. Compl. ¶14. It manufactures and sells the Product, a coffee-based energy drink. *Id.* ¶15, Ex. A. The Product's label clearly indicates that it is "naturally & artificially flavored" to taste like white chocolate. *Id.* Ex. A.

Plaintiff is a New York resident who allegedly purchased a 12-pack of the Product for $27.00 "from amazon." *Id.* ¶12. Plaintiff alleges that he relied on the label and mistakenly believed that the Product contained white chocolate, as defined by the FDA's standard of identity. *Id.* ¶¶13, 17-18, 25-28. Plaintiff alleges Defendant's conduct is fraudulent and deceptive. *Id.* ¶¶17-33.

III. Legal Standard

In evaluating a motion to dismiss, the court must accept all of the plaintiff's factual allegations as true. *Nguyen v. New Link Genetics Corp.*, 297 F. Supp. 3d 472, 482 (S.D.N.Y.

2018).[1] However, the complaint must still contain sufficient factual matter to be plausible. *Id.* (citing *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009)). A complaint is plausible when the plaintiff has sufficiently pleaded enough factual allegations for the court to draw a reasonable inference that the defendant is liable for the alleged misconduct. *Iqbal*, 129 S. Ct. at 1950. Therefore, Plaintiff's factual allegations must still be sufficient to raise a right to relief above the speculative level. *In re Kind LLC "Healthy and All Natural" Litig.*, 287 F. Supp. 3d 457, 461 (S.D.N.Y. 2018). Moreover, "[w]hile the Court should construe the factual allegations in the light most favorable to the plaintiff, the tenet that a court must accept as true all of the allegations contained in the complaint is inapplicable to legal conclusions." *U.S. Bank Nat'l Ass'n v. BFPRU I, LLC*, 230 F. Supp. 3d 253, 259 (S.D.N.Y. 2017).

Under Rule 12(f), courts may strike from a pleading any immaterial or impertinent matter. To prevail on a motion to strike, "a party must demonstrate that (1) no evidence in support of the allegations would be admissible; (2) that the allegations have no bearing on the issues in the case; and (3) that to permit the allegations to stand would result in prejudice to the movant." *Shamrock Power Sales, LLC v. Scherer*, 2016 WL 7647597, at *7 (S.D.N.Y. Dec. 8, 2016).

Furthermore, to assert a claim for fraud, plaintiffs must meet a higher pleading standard as required under Federal Rule of Civil Procedure 9(b). A plaintiff must allege that: "(1) the defendant made a material false representation, (2) the defendant intended to defraud the plaintiff thereby, (3) the plaintiff reasonably relied upon the representation, and (4) the plaintiff suffered damage as a result of such reliance." *Nwagboli v. Teamwork Transp. Corp.*, 2009 WL 4797777, at *5 (S.D.N.Y. Dec. 7, 2009).

[1] Unless otherwise noted, internal quotations and citations are omitted.

IV. Argument

A. The Product Is Not An Imitation

Plaintiff's Complaint fails most notably because the Product is not an imitation. The Complaint hinges on a theory that, because the label says that the Product contains white chocolate flavoring, naturally and artificially derived, the Product is an illegal imitation of white chocolate. Compl. ¶¶1-3, 13, 17-24. The Complaint theorizes that, despite the fact that the Product says it is "naturally & artificially flavored," reasonable consumers would expect the Product to contain white chocolate as defined by the FDA. *Id*. ¶¶1-3, 13, 17-33, Ex. A. Therefore, because the Product does not contain actual white chocolate or cocoa butter, it is an improperly-labeled "imitation" in violation of federal and New York law. *Id*. ¶¶17-24.

Plaintiff tries to frame this as an imitation case to get around the fact that the Product fully complies with the FDA's flavoring regulations by disclosing that it contains natural and artificial white chocolate flavoring. 21 U.S.C. §343(k) (regulating artificial flavoring disclosures); N.Y. Agric. & Mkts. Law §201 (same). But the Product is not imitation white chocolate; it is a coffee-based drink with natural and artificial white chocolate flavors. Federal regulations define a food as an imitation "if it is a substitute for and resembles another food but is nutritionally inferior to that food." 21 C.F.R. §101.3(e)(1). In a case that was ultimately affirmed by the Supreme Court, the trial court described the imitation jams at issue by finding that the products:

> [H]ad the appearance of fruit jams for which a definition and standard of identity had been established; that such jams were made to taste like and did taste like standard fruit jams; that they were used by consumers in the place of and as a substitute for standard fruit jams; that they were often advertised as jam and that orders by the consuming public for jam were frequently filled by delivery of such jams; and that they were served by hotels in response to orders for jams or preserves without disclosure that they did not comply with the requirements for standard fruit jam.

See United States v. 62 Cases, More or Less, Containing Six Jars of Jam, 183 F.2d 1014, 1016 (10th Cir. 1950), *rev'd*, *62 Cases, More or Less, Each Containing Six Jars of Jam v. United States*, 71 S. Ct. 515, 517-18, 519-20 (1951). This Product does not fit these descriptions. The Product does not have the appearance of, nor is it used in the place of or as a substitute for, white chocolate. Plaintiff makes no allegation that the Product is nutritionally inferior to white chocolate. The Product is not advertised as white chocolate, nor are orders for white chocolate filled with the Product in the place of white chocolate. The Product is exactly as described: a coffee-based energy drink with white chocolate flavoring. Compl. Ex. A.

Because Plaintiff fails to allege any facts that show the Product is imitation white chocolate, *see id.* ¶¶17-33, the Complaint should be dismissed.

B. A Reasonable Consumer Would Not Be Deceived By The Product's Label

Plaintiff has failed to allege facts plausibly showing that the Product is materially misleading to reasonable consumers, requiring dismissal of Counts I-III. GBL Sections 349 and 350 prohibit deceptive business practices and false advertising, respectively. "To establish a *prima facie* case under either section 349 or 350, a plaintiff must demonstrate that '(1) the defendant's deceptive acts were directed at consumers, (2) the acts are misleading in a material way, and (3) the plaintiff has been injured as a result.'" *Nelson v. MillerCoors, LLC*, 246 F. Supp. 3d 666, 673-74 (E.D.N.Y. 2017) (quoting *Maurizio v. Goldsmith*, 230 F.3d 518, 521 (2d Cir. 2000)). An act is deceptive if it is "likely to mislead a reasonable consumer acting reasonably under the circumstances." *Nelson*, 246 F. Supp. 3d at 673. Importantly, even at the motion to dismiss stage, courts are empowered to make this determination as a matter of law. *Fink v. Time Warner Cable*, 714 F.3d 739, 741 (2d Cir. 2013); *Podpeskar v. Dannon Co., Inc.*, 2017 WL 6001845 at *3 (S.D.N.Y. Dec. 3, 2017) (courts are empowered to determine, as a matter of law, that plaintiffs have not alleged a plausible allegation that a reasonable consumer would be deceived).

Here, Plaintiff alleges the Product's label is deceptive because it would mislead a reasonable consumer into believing the Product contains white chocolate. Compl. ¶¶25-28. Yet under the term "white chocolate," the label clearly states the Product is "NATURALLY & ARTIFICIALLY FLAVORED." *Id.* Ex. A. In labeling the Product this way, Defendant complies with federal flavoring regulations that permit the use of artificial flavoring if that fact is reflected on the product's label. *See* 21 C.F.R. §101.22(i)(1)-(2). Such regulations inform a reasonable consumer's belief, and a product's compliance with these regulations is convincing evidence that the Product is not deceptive. *See, e.g., Kelly v. Cape Cod Potato Chip Co.*, 81 F. Supp. 3d 754, 761-62 (W.D. Mo. 2015).

Indeed, when a product's ingredient list does not include the food at issue and the product's label describes it only as "flavored," courts have found that the product would not confuse a reasonable consumer acting reasonably. *See Jessani v. Monini N. Am., Inc.*, Summary Order, 2018 WL 6287994, at *1 (2d Cir. Dec. 3, 2018) (truffle-flavored olive oil's labeling was not misleading when "the product's ingredient list contains no reference to the word 'truffle' and the primary label describes the product only as being 'Truffle Flavored'"); *see also Brumfield v. Trader Joe's Co.*, 2018 WL 4168956, at *2-3 (S.D.N.Y. Aug. 30, 2018) (dismissing consumer protection claims alleging that "Black Truffle Flavored Extra Virgin Olive Oil" deceived consumers into thinking it contained real truffles when the label on the front of the product "clearly state[d] that the product is 'Black Truffle Flavored'"). Here, the label's ingredient list makes no mention of white chocolate, and the Product indicates that it is "NATURALLY & ARTIFICIALLY FLAVORED." *See* Compl. Exs. A & B. With nothing to suggest the Product contains white chocolate as defined by the FDA's standard of identity and nothing misleading about the Product's flavoring, Plaintiff has not plausibly alleged that a reasonable consumer would be deceived, requiring dismissal of Counts I-III.

C. Plaintiff Does Not Plead Fraud With Particularity

Plaintiff's claim for fraud must be dismissed because he has not made his pleading with the requisite particularity required under Federal Rule of Civil Procedure 9(b). To assert a claim for fraud under New York law, Plaintiff must allege that: "(1) the defendant made a material false representation, (2) the defendant intended to defraud the plaintiff thereby, (3) the plaintiff reasonably relied upon the representation, and (4) the plaintiff suffered damage as a result of such reliance." *Nwagboli*, 2009 WL 4797777, at *5. Plaintiff has not plausibly alleged that Defendant made a materially false statement, nor has he shown that Defendant intended that consumers would rely on an allegedly false statement, and has thus failed to satisfy Rule 9(b)'s heightened pleading requirement.

According to Plaintiff, Defendant materially misled consumers by advertising the Product as a "White Chocolate Doubleshot Energy Drink" containing "real" white chocolate, when the Product does not contain white chocolate as defined by the FDA's standard of identity. Compl. ¶¶1-3, 17-18, 27-28, 32-33. However, as explained previously, *supra* Section IV.B, the Product's label is not misleading, as it clearly states that the Product is "NATURALLY & ARTIFICIALLY FLAVORED," in compliance with federal flavoring regulations. *See* 21 C.F.R. §101.22(i)(1)-(2) (permitting producers and manufacturers to use artificial flavoring so long as that fact is reflected on the product's label). And, despite Plaintiff's repeated protestations that reasonable consumers would believe that the Product contained "real" white chocolate, the Product's label makes no reference to "real" white chocolate. Along with the clear labeling referenced above, the Product's ingredient list states that it includes "natural and artificial flavors," making no reference to "white chocolate." Given its procedurally proper disclosure and accurate ingredient list, the Product contains no "materially false representations."

Additionally, Plaintiff has not plausibly pleaded that Defendant intended to deceive consumers. *See* Comp. ¶¶32-33. Plaintiff alleges that because some of Defendant's other products contain cocoa butter, Defendant must have intended to mislead consumers about the Product's contents. *Id*. ¶33, Exs. A-C. As an initial matter, the products identified in Exhibit C are handcrafted beverages, not pre-packaged products subject to the FDA's labeling requirements, making Plaintiff's comparison irrelevant. Additionally, the ingredient information, published to promote transparency, is hardly the action of a company intent on deceiving its customers. Moreover, since the Product's label discloses that the Product is "NATURALLY & ARTIFICIALLY FLAVORED," unlike the other identified products which do not contain white chocolate flavoring, this distinction is a red herring. *Compare* Compl. Exs. A and B *with* Ex. C. Nevertheless, Plaintiff alleges that "[t]here is reason to believe" that Defendant intended to mislead and deceive its consumers. *Id.* ¶32. But a mere "reason to believe" is not enough particularity to satisfy the requirements of Rule 9(b). *See Deutsche Zentral-Genossenchaftsbank AG v. HSBC N. Am. Holdings, Inc.*, 2013 WL 6667601, at *19 (S.D.N.Y. Dec. 17, 2013) (dismissing common law fraud claims for failure to plead intent with particularity because the plaintiffs failed to "ascribe to the [] Defendants any particular motive for making these fraudulent representations beyond a general profit motive common to all corporations, which does not suffice."). Plaintiff has neither alleged the existence of a materially misleading statement, nor an intent to mislead by Defendant, requiring dismissal of Count IV.

D. Plaintiff Fails To Allege An Injury-In-Fact And Therefore Lacks Standing

For subject matter jurisdiction to exist in federal court, there must be a true "case" or "controversy." U.S. CONST. art. III., § 2, cl. 1. The "irreducible constitutional minimum" of standing has three elements: "[t]he plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by

a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). Accordingly, a plaintiff must "clearly . . . allege[] facts demonstrating" each of the three elements. *Id.* at 1547.

Demonstrating "injury-in-fact" requires that a plaintiff prove an invasion of a protected interest that is both "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Id.* at 1548. A "particularized" injury "must affect the plaintiff in a personal and individual way." *Id.* In addition, to be "particularized," the injury must also be "concrete," or "'*de facto*'; that is, it must actually exist." *Id.* The alleged violation of a statutory right, on its own, is not a "concrete" injury because "not all inaccuracies cause harm or present any material risk of harm." *Id.* at 1550. Instead, a "concrete" injury is one that "actually exist[s]," one that is "'real,' and not 'abstract.'" *Id.* at 1548.

Plaintiff asserts a statutory violation, but such an allegation does not rise to the level of a concrete or particularized harm. The purported harm stems from an alleged failure to label the Product as an "imitation," Compl. ¶¶17-24, a technical violation of 21 U.S.C. §343(c) that could be cured, according to Plaintiff, by adding the term "imitation" to the Product's label. Compl. ¶20. Plaintiff has failed to demonstrate such a violation, however, because the Product is not an "imitation" as that term has been defined by federal regulations or understood by the Supreme Court, *see supra* Section IV.A. The alleged failure to include "imitation" on the Product's label also invites the Court to require that Defendant identify the Product as an "imitation" of white chocolate when it is not. Such a remedy would ***itself*** violate FDA regulations and federal law, since the Product is artificially flavored to taste like white chocolate, and labeling it as "imitation" white chocolate would be improper. *See* 21 C.F.R. §101.22(i)(1)-(2) (permitting producers and manufacturers to use artificial flavoring so long as that fact is reflected on the product's labeling); 21 C.F.R. §101.3(e)(1) ("[a] food shall be deemed to be an imitation . . . if it is a substitute for and resembles another food but is nutritionally inferior to that food"); *see also* 21 U.S.C. §343(c), (k)

(demonstrating that the misbranding of ***imitation*** food and ***artificially flavored*** food are distinct concepts). Such an alleged harm—one that cannot be remedied by the Court—is neither concrete nor particularized. *See Oneida Indian Nation v. United States Dep't of the Interior*, 2018 WL 4054097, at *5-6 (N.D.N.Y. Aug. 24, 2018) (dismissing claims that were not redressable by the courts because the court could not alter the Department of Interior's previous decisions). As such, Plaintiff lacks standing to pursue his claim.

E. Plaintiff's Fraud Claim Is Barred Under The Economic Loss Rule

The economic loss rule bars Plaintiff's fraud claim, which is based solely on an alleged economic injury. "New York's economic loss rule restricts plaintiffs who have suffered 'economic loss,' but not personal or property injury, to an action for the benefit of their bargain. If the damages are the type remedial in contract, a plaintiff may not recover in tort." *Orlando v. Novurania of Am., Inc.*, 162 F. Supp. 2d 220, 225 (S.D.N.Y. 2001). A "simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated." *Clark-Fitzpatrick v. Long Island R.R. Co.*, 70 N.Y.2d 382, 389 (N.Y. 1987); *Bocre Leasing Corp. v. Gen. Motors Corp. (Allison Gas Turbine Div.)*, 840 F. Supp. 231, 234 (E.D.N.Y. 1994) (application of the economic loss doctrine does not require privity of contract between plaintiff and defendant, and courts often apply the rule to "remote purchasers").

Claims of fraud and fraudulent misrepresentation sound in tort, and are thus barred absent "allegations that plaintiff suffered either physical or emotional injury," because such claims do not allege a violation of a legal duty independent of the contract. *Orlando*, 162 F. Supp. 2d at 226 (dismissing a claim based on defendant's fraudulent misrepresentation where the only loss sufficiently pleaded was the alleged loss of the benefit of the bargain and the only violation of a legal duty came from the one owed to the plaintiff under the contract); *see also Kalimantano GmbH v. Motion in Time, Inc.*, 939 F. Supp. 2d 392, 417 (S.D.N.Y. 2013) (dismissing a fraudulent

misrepresentation claim under the economic loss rule because "[the] claim at root seeks only the return of the moneys Plaintiffs paid" under a violation of the duty owed under the oral agreement).

Plaintiff fails to allege personal injury or property damage, instead claiming that he "was injured when he paid money for a beverage that did not deliver the qualities it promised and misled him as to its contents," thus "depriving him of the benefit of his bargain and injuring him in an amount up to the purchase price." Compl. ¶13. This alleged economic injury, based on Defendant's alleged failure to comply with FDA regulations, asks for nothing more than the benefit of his contractual bargain. Compl. ¶¶29-31. Such an exclusively economic injury bars Plaintiff's fraud allegations because it fails to allege the violation of a duty independent of contractual damages. *Shred-It USA Inc. v. Mobile Data Shred*, 222 F. Supp. 2d 376, 379-80 (S.D.N.Y. 2002). Moreover, because Plaintiff has not, and could not, allege "personal or property injury," his fraud claim should be dismissed under the economic loss rule.

F. Plaintiff's Claim For Injunctive Relief Must Be Dismissed Because Plaintiff Has Not Shown A Threat Of Future Harm

Plaintiff's request for injunctive relief must also be dismissed, as Plaintiff has not shown any risk of future harm and therefore lacks standing. *See* Fed. R. Civ. P. 12(b)(1); *see also Atik v. Welch Foods, Inc.*, 2016 WL 5678474, at *5 (E.D.N.Y. Sept. 30, 2016); *Albert v. Blue Diamond Growers*, 151 F. Supp. 3d 412, 418 (S.D.N.Y. 2015). Count I states, "Defendant should be enjoined from representing the Product as 'White Chocolate' on the Product labels pursuant to NY GBL §349." Compl. ¶55. But Plaintiff has no basis for seeking an injunction, as neither he nor the class members are at risk of continuing to purchase the Product now that they are aware that it is naturally and artificially flavored. *See id*. ¶¶3, 13, 27. Nor is Plaintiff's contention that "[h]e would not have been willing to pay the sum he paid had he known [the Product] was mislabeled," *Id.* ¶13, enough to assert standing for injunctive relief. *See DaCorta v. AM Retail Grp., Inc.*, 2018 WL

557909, at *4 (S.D.N.Y. Jan. 23, 2018) (finding a plaintiff's claim "that she would not have purchased [the product] but for [defendant's] false representation . . . failed to allege sufficient facts to support standing for injunctive relief"). Since this action presents no threat of future harm, Count I must be dismissed. *Shain v. Ellison*, 356 F.3d 211, 215-16 (2d Cir. 2004) (explaining that plaintiffs seeking injunctive relief must demonstrate "real and immediate threat of future injury"); *DaCorta*, 2018 WL 557909, at *4-5 (S.D.N.Y. Jan. 23, 2018) (denying injunctive relief when "there are no allegations that Plaintiff will purchase the defendant's products in the future").

Plaintiff's claim for injunctive relief must also be dismissed because it conflicts with federal law. Plaintiff seeks to enjoin Defendant from selling the Product as it is currently labeled—a "NATURALLY & ARTIFICIALLY FLAVORED" white chocolate coffee-based energy drink, Compl. ¶¶55-56—even though the label complies with federal flavoring regulations. *See supra*, Section IV.B; *see also* 21 C.F.R. §101.22(i)(1)-(2). Plaintiff's view that the Product must be labeled as "imitation" white chocolate is at odds with well-settled federal regulations. *See supra*, Section IV.A; *see also* 21 C.F.R. §101.3(e)(1). Plaintiff's proposed injunction would therefore either (1) improperly expand the scope of imitation labeling requirements or (2) bring the Product's labeling into conflict with federal flavoring and food imitation regulations. Both of these options are preempted by federal law, *see infra* Section IV.G, and Plaintiff's request for injunctive relief must therefore be dismissed.

G. Plaintiff's Claims Are Preempted

Plaintiff's claims are preempted by federal legislation and regulation. The Constitution mandates that any "state law that conflicts with federal law is without effect." *Cipollone v. Liggett Grp., Inc.*, 112 S. Ct. 2608, 2617 (1992); U.S. CONST. art. VI, cl. 2. State law can be preempted by both federal statutes as well as federal regulations and agency requirements. *See, e.g.*, *Hillsborough Cty, Fla. v. Automated Med. Labs., Inc.*, 105 S. Ct. 2371, 2375 (1985). Where

Congress has delegated authority to an agency to exercise its discretion in interpreting a statute, the agency's judgments are subject to judicial review only to determine whether the agency exceeded its statutory authority or acted arbitrarily. *See United States v. Shimer*, 81 S. Ct. 1554, 1560 (1961) (quoting *Bates & Guild Co. v. Payne*, 24 S. Ct. 595, 597 (1904)).

Federal law may preempt state law where: (1) Congress expressly preempts state law ("express preemption"); (2) Congress has legislated so comprehensively that federal law occupies an entire field of regulation, leaving no room for state law ("field preemption"); or (3) local law conflicts with its federal counterpart in such a way that it is impossible to comply with both, or local law is an obstacle to the achievement of federal law ("conflict preemption"). *See N.Y. SMSA Ltd. P'ship v. Town of Clarkstown*, 612 F.3d 97, 103-04 (2d Cir. 2010).

Conflict preemption applies where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Marentette v. Abbott Labs., Inc.*, 886 F.3d 112, 117-18 (2d Cir. 2018) (finding it impossible to rule in plaintiffs' favor "without contradicting the certification decision, and, through it, the certification scheme" enacted by Congress); *Geier v. Am. Honda Motor Co.*, 120 S. Ct. 1913, 1920-22 (2000) (claim related to airbag requirement preempted where a U.S. DOT regulation provided vehicle manufacturers with a range of choices). Express preemption "arises when a federal statute expressly directs that state law be ousted." *Air Transp. Ass'n of Am., Inc. v. Cuomo*, 520 F.3d 218, 220 (2d Cir. 2008).

Plaintiff seeks to invoke New York consumer protection statutes to regulate product labeling standards in a manner inconsistent with federal laws and regulations. Compl. ¶¶21-24. This is improper because federal law regulates the labeling of foods containing artificial flavoring. *See* 21 U.S.C. §343(k). Moreover, "Congress included an express preemption clause in the NLEA [Nutrition Labeling and Education Act of 1990, which amended the previously cited 21 U.S.C. §343(k)] that prohibits state and local governments from adopting inconsistent food labeling

requirements." *Silva v. Smucker Nat. Foods, Inc.*, 2015 WL 5360022, at *3 (E.D.N.Y. Sept. 14, 2015). The FDA's flavoring regulations, 21 C.F.R. §101.22(i), "expressly permit a product to identify its 'characterizing flavor,' even if that flavor does not necessarily correspond to the product's ingredients." *Chuang v. Dr. Pepper Snapple Grp., Inc.*, 2017 WL 4286577, at *5 (C.D. Cal. Sept. 20, 2017); *see also McKinniss v. Gen. Mills, Inc.*, 2007 WL 4762172, at *3 (C.D. Cal. Sept. 18, 2017) ("The FDA permits illustrations of fruit on product labels to indicate the product's 'characterizing flavor,' even if the product contains no ingredients derived from the depicted fruit.").

Plaintiff's allegations run counter to the referenced federal regulations. The Product is clearly labeled as "NATURALLY & ARTIFICIALLY FLAVORED" to taste like white chocolate, Compl. Ex. A, in compliance with federal regulations permitting the use of artificial flavoring as long as that fact is reflected on the product's label. *See* 21 C.F.R. §101.22(i)(1)-(2). Plaintiff's central argument—that a product flavored to taste like white chocolate will mislead consumers unless it is actually derived from white chocolate—is therefore at odds with the relevant FDA regulations and would seek to impose labeling requirements contrary to, and more stringent than, federal law. *See In re PepsiCo, Inc. Bottled Water Mktg. & Sales Practice Litig.*, 588 F. Supp. 2d 527, 539 (S.D.N.Y. 2008).

Plaintiff's argument also conflicts with federal laws and regulations regarding imitation products. As explained previously, *supra* Section IV.A, imitation products are those that are meant to be replacements for, and resemble, another food and would otherwise potentially deceive consumers if not labeled as an imitation. *See 62 Cases*, 183 F.2d at 1016, *rev'd, 62 Cases*, 71 S. Ct. at 517-18, 519-20; *see also Dean Foods Co. v. Wis. Dep't of Agric.*, 504 F. Supp. 520, 527 (W.D. Wis. 1980) (explaining that imitation products are "counterfeit" foods that resemble another food in multiple ways including color, flavor, body, sweetness level, texture, etc.); *see also* 21

C.F.R. §101.3(e)(1). Plaintiff's claims, if adopted, would ostensibly rewrite federal law to make any product that advertises itself as "artificially flavored" an imitation product, and would wholly undermine the FDA's flavoring and imitation regulations.

Accordingly, Plaintiff's contention is that the Product either (1) cannot state that it is naturally and artificially flavored to taste like white chocolate, or (2) it must be labeled as "imitation" white chocolate. Either remedy would impose a requirement that runs in contravention of federal law, forcing Defendant to violate federal regulations and, thus, creating an unmanageable conflict. *See Cipollone*, 112 S. Ct. at 2619 (finding that §5 of the 1965 Federal Cigarette Labeling and Advertising Act "pre-empted state and federal rulemaking bodies from mandating particular cautionary statements" in cigarette advertising). Such a conflict with federal law preempts Plaintiff's claims, and they must therefore be dismissed.

H. The Court Should Decline To Hear This Matter Pursuant To The Primary Jurisdiction Doctrine

The Court should decline to adjudicate these claims because they fall within the primary jurisdiction of the FDA. The primary jurisdiction doctrine "requires judicial abstention in cases where protection of the integrity of a regulatory scheme dictates preliminary resort to the agency which administers the scheme." *A. Esteban & Co., Inc. v. Met. Transp. Auth.*, 2003 WL 57003, at *2 (S.D.N.Y. Jan. 6, 2003) (quoting *United States v. Philadelphia Nat'l Bank*, 83 S. Ct. 1715, 1736 (1963)). The doctrine allows the Court to refer a matter "to the appropriate administrative agency if doing so will promot[e] proper relationships between the courts and administrative agencies charged with particular regulatory duties." *Bernhardt v. Pfizer, Inc.*, 2000 WL 1738645, at *2 (S.D.N.Y. Nov. 22, 2000).

The rationale for the doctrine "includes a concern for maintaining uniformity in the regulation of an area entrusted to a federal agency, as well as a desire for utilizing administrative

expertise." *Ellis v. Tribune Television Co.*, 443 F.3d 71, 82 (2d Cir. 2006). "Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure." *Far E. Conference v. United States*, 72 S. Ct. 492, 494 (1952). Accordingly, courts properly invoke the doctrine "whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body." *Ellis*, 443 F.3d at 81 (quoting *United States v. W. Pac. R.R. Co.*, 77 S. Ct. 161, 165 (1956)).

No "fixed formula" governs application of the doctrine, but "the Second Circuit has identified four factors to consider: (1) whether the question at issue is within the conventional experience of judges or whether it involves technical or policy considerations within the agency's particular field of expertise; (2) whether the question at issue is particularly within the agency's discretion; (3) whether there exists a substantial danger of inconsistent rulings; and (4) whether a prior application to the agency has been made." *Bernhardt*, 2000 WL 1738645, at *2 (citing *Nat'l Commc'ns Ass'n v. Am. Tel. & Tel. Co.*, 46 F.3d 220, 222 (2d Cir. 1995)).

Whether the Product's labeling should be revised is an issue wholly within the FDA's "technical or policy" expertise and discretion. *Nat'l Commc'ns Ass'n*, 46 F.3d at 222. The FDA's interest and expertise in this area are shown in its detailed directives and instructions on a product's flavoring labeling. *See* 21 C.F.R. §101.22 (i)(1)-(2). While courts may decide whether labeling is false or misleading, they ***may not*** rule in such a manner that would undermine the FDA's considered judgments. *See N.Y. State Elec. & Gas Corp. v. N.Y. Indep. Sys. Operator, Inc.*, 168 F.

Supp. 2d 23, 29 (N.D.N.Y. 2001) (finding wholesale rates for electricity fell under agency discretion to determine reasonable rates).

The FDA's regulations state, "[i]f the food contains any artificial flavor which simulates, resembles or reinforces the characterizing flavor, the name of the food . . . shall be accompanied by the . . . name(s) of the characterizing flavor . . . and the name of the characterizing flavor shall be accompanied by the word(s) 'artificial' or 'artificially flavored.'" 21 C.F.R. §101.22(i)(2). The Product clearly complies with these requirements. Compl. Ex. A. Yet Plaintiff would have this Court depart from the agency's flavoring regulations, a "technical question[] of fact uniquely within the expertise and experience of [the FDA]," *Goya Foods, Inc. v. Tropicana Prods., Inc.*, 846 F.2d 848, 851 (2d Cir. 1988), and find that the Product is an imitation, and thus that its labeling violates New York Agriculture and Markets Law §201. Because such a ruling would undermine the FDA's considered judgment on a technical question wholly within its expertise and experience, dismissal is warranted.

I. Plaintiff Failed To Plead A Basis For This Court To Exercise Personal Jurisdiction Over Defendant As It Relates To The Non-resident Class Members

Plaintiff's purported nationwide class, Compl. ¶34, must be dismissed, as Plaintiff has failed to plead any basis for this Court to exercise personal jurisdiction over Defendant for non-New York residents. Plaintiff is a New York resident and has pleaded facts indicating he was injured in the state of New York. *Id.* ¶12. Defendant is a Washington corporation. *Id.* ¶14. Plaintiff, however, seeks to certify a nationwide class that includes consumers who are neither residents of New York nor purchased the Product in New York. *Id.* ¶¶5-7, 34. Beyond asserting that the nationwide class was injured in a similar manner under similar state laws elsewhere, Plaintiff provides nothing more. *See id.* ¶¶5-7, 10, 19, 30.

Plaintiff's allegations fail to establish general personal jurisdiction, as Plaintiff fails to allege that Defendant's New York connections "are so constant and pervasive as to render [it] essentially at home" in New York. *Daimler AG v. Bauman*, 134 S. Ct. 746, 751 (2014); *see also BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549, 1559 (2017) (Montana courts did not have general jurisdiction over BNSF Railway even though BNSF "has over 2,000 miles of railroad track and more than 2,000 employees" in the state, because even pervasive "in-state business" is not enough to support "general jurisdiction over claims . . . that are unrelated to any activity occurring in" the forum). With no allegations that Defendant would be "at home" in New York, personal jurisdiction over Defendant in New York fails. *Daimler*, 134 S. Ct. at 760 (German corporation was not "at home" in the forum state, so general personal jurisdiction was not proper).

Plaintiff thus has the burden of establishing specific personal jurisdiction with respect to the out-of-state residents. This requires a showing that the alleged controversy "arises out of or relates to the defendant's contacts with [New York]." *Daimler*, 134 S. Ct. at 754. Specific personal jurisdiction depends on "an affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation." *Bristol-Myers Squibb Co. v. Super. Ct. of Cal., San Francisco Cty.*, 137 S. Ct. 1773, 1780 (2017) (quoting *Goodyear Dunlop Tires Ops., S.A. v. Brown*, 131 S. Ct. 2846, 2851 (2011)); *see also Waldman v. Palestine Liberation Org.*, 835 F.3d 317, 335 (2d Cir. 2016) ("The inquiry whether a forum State may assert specific jurisdiction over a non-resident defendant focuses on the relationship among the defendant, the forum, and the litigation.") (quoting *Walden v. Fiore*, 134 S. Ct. 1115, 1121 (2014)). Therefore, absent a showing that a non-resident's claims stem from business activity in New York, there is no basis upon which to exercise personal jurisdiction under New York's long-arm statute. *See* C.P.L.R. §302(a)(1); *see also Licci ex rel. Licci v. Leb. Can. Bank, SAL*, 732 F.3d 161, 168 (2d Cir. 2013).

As previously mentioned, the only facts presented to establish personal jurisdiction over Defendant for the nationwide class are the allegations that: (i) the Products are sold nationwide, (ii) the non-resident class members were similarly injured by Defendant's conduct, and (iii) the laws of all 50 states prohibit deceptive advertising. Compl. ¶¶6-7, 10, 13, 15, 19, 21, 27, 29-31. These allegations do not show but-for causation between Defendant's conduct and New York, and the allegations state no connection to business activities in New York. *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, 2016 WL 7378980, at *8 (S.D.N.Y. Dec. 20, 2016). They are, therefore, insufficient to provide a basis for this Court to exercise specific personal jurisdiction over Defendant as to the non-resident class members. *Bristol-Myers*, 137 S. Ct. at 1781-82. Accordingly, the claims of non-resident class members must be dismissed for lack of personal jurisdiction. *FrontPoint Asian Event Drive Fund, L.P. v. Citibank, N.A.*, 2017 WL 3600425, at *6-7 (S.D.N.Y. Aug. 18, 2017).

J. New York's General Business Laws Cannot Be Applied To Foreign Transactions

In Counts I-III, Plaintiff seeks to apply GBL Sections 349 and 350 to a nationwide class, regardless of their state of residence or alleged state of purchase. Compl. ¶¶ 47-76. But Plaintiff's attempt to apply New York law to nationwide purchasers who do not reside in this forum nor allegedly purchased the Product in this forum fails because "[s]tates have no interest in applying their consumer protection statutes to buyers who live out of state and whose purchases occur out of state." *Szymczak v. Nissan N. Am., Inc.*, 2011 WL 7095432, at *12 (S.D.N.Y. Dec. 16, 2011) (dismissing claims under New York's GBL as to plaintiffs who did not reside in, nor purchased the product-at-issue in, New York).

As an initial matter, the Complaint's references to a litany of non-New York state consumer protection laws, Compl. ¶7, should be stricken from the Complaint as immaterial and impertinent

under Rule 12(f). Courts may strike such allegations "if they have no real bearing on the case, will likely prejudice the movant, or where they have criminal overtones." *G-I Holdings, Inc. v. Baron & Budd*, 238 F. Supp. 2d 521, 555 (S.D.N.Y. 2002). Because Plaintiff does not assert a claim under ***any*** of these statutes, Compl. Counts I-IV, their presence in the Complaint has no bearing on the case as presently pleaded. Additionally, these irrelevant statutes may prejudice Defendant later in this litigation (if it continues) should Plaintiff refer to them in a future filing without having had to bear the burden of sufficiently pleading them in his Complaint. Plaintiff's laundry list of un-pleaded state statutes should accordingly be stricken under Rule 12(f) as irrelevant, impertinent, and calculated to unduly prejudice Defendant.

Choice-of-law principles prevent application of a state's law if there is no adequate connection between the state, the party, and the facts of the case. In a diversity case, the Court applies the choice-of-law rules of the forum state. *Klaxon Co. v. Stentor Elec. Mfg. Co., Inc.*, 61 S. Ct. 1020, 1021-22 (1941). New York uses an "interest analysis" in considering choice-of-law issues based on the principle that "[j]ustice, fairness and the best practical result . . . may best be achieved by giving controlling effect to the law of the jurisdiction which, because of its relationship or contact with the occurrence or the parties has the greatest concern with the specific issues raised in the litigation." *Babcock v. Jackson*, 191 N.E.2d 279, 283 (N.Y. 1963).

New York has no interest in applying its law to non-resident transactions. Defendant is not a New York corporation. Compl. ¶14. The Complaint does not allege that the Product was manufactured in New York or, absent purchases of the Product in New York, that any conduct giving rise to the claims occurred in New York. *See generally, id.* The state most likely to have an interest in this litigation is the state where each individual purchaser resides: "[i]n a multi-state consumer class action . . . courts have applied the law of the buyer's domicile." *Szymczak*, 2011 WL 7095432, at *12.

New York's consumer protection statutes apply ***only to*** deceptive acts and practices that occurred in New York. In interpreting GBL Section 349, the New York Court of Appeals has held:

> The reference in section 349(a) to deceptive practice in "the conduct of any business, trade or commerce or in the furnishing of any service *in this state*" unambiguously evinces a legislative intent to address commercial misconduct occurring within New York. . . . Thus, to qualify as a prohibited act under the statute, the deception of a consumer must occur in New York.

Goshen v. Mut. Life Ins. Co. of N.Y., 774 N.E.2d 1190, 1195 (N.Y. 2002). The Complaint makes no allegation that Defendant committed any act in, nor includes any facts that would connect out-of-state class members' claims to, New York. As such, the only potential plaintiffs that can state a cause of action under New York law are New York purchasers. *See In re Rezulin Prods. Liab. Litig.*, 210 F.R.D. 61, 70-71 (S.D.N.Y. 2002) (declining to apply New Jersey law to claims made on behalf of a nationwide class of consumers).

V. Conclusion

For the foregoing reasons, Defendant respectfully requests that the Court dismiss the Complaint in its entirety, without prejudice and without leave to amend.

Dated: December 19, 2018

Respectfully submitted,

/s/ Ronald Y. Rothstein

Ronald Y. Rothstein
Adrianne K. Rosenbluth (*pro hac vice*)
WINSTON & STRAWN LLP
35 W. Wacker Dr.
Chicago, IL 60601
Tel: (312) 558-5600
Fax: (312) 558-5700
rrothste@winston.com
arosenbluth@winston.com

Christopher M. Hynes
WINSTON & STRAWN LLP
200 Park Ave.

New York, NY 10166
Tel: (212) 294-5374
Fax: (212) 294-4700
chynes@winston.com

Attorneys for Defendant Starbucks Corporation

CERTIFICATE OF COMPLIANCE

1. The following statement is made in accordance with the Individual Practices of Judge John G. Koeltl.

2. This Memorandum of Law in Support of Defendant's Motion to Dismiss and Motion to Strike was prepared in the processing system Microsoft Word, with Times New Roman typeface, 12-point font.

3. The total number of words in this document, exclusive of the cover page, certificate of compliance, table of contents, table of authorities, and attorney signature block is 6,893 words.

4. This memorandum complies with the formatting rules of the Southern District of New York and the individual practices of Judge John G. Koeltl.

Dated: December 19, 2018

Respectfully submitted,

/s/ Ronald Y. Rothstein

Ronald Y. Rothstein
WINSTON & STRAWN LLP
35 W. Wacker Dr.
Chicago, IL 60601
Tel: (312) 558-5600
Fax: (312) 558-5700
rrothste@winston.com