23-735-cv

United States Court of Appeals

FOR THE SECOND CIRCUIT

WILLIAM MONTGOMERY and DONALD WOOD, JR., individually and on behalf of all others similarly situated,

Plaintiffs-Appellants,

– v. –

STANLEY BLACK & DECKER, INC., d/b/a CRAFTSMAN,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

PLAINTIFFS-APPELLANTS' OPENING BRIEF

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INTRODUCTION

This is a Rule 23 consumer class action concerning Craftsman-brand wet/dry Vacuums[1] manufactured by Defendant-Appellee Stanley Black & Decker, Inc. ("Defendant" or "Craftsman"). Plaintiffs-Appellants William Montgomery ("Montgomery") and Donald Wood, Jr. ("Wood") (collectively, "Plaintiffs") are consumer purchasers who allege they were misled by representations on the Vacuums' labeling and packaging stating that their vacuums could produce "5.0 Peak HP [(Horsepower)]" and "5.5 Peak HP," respectively, when in fact they cannot produce said horsepower in ordinary use. Appendix at A-118 to A-120 ¶¶ 5-6, A-126 to A-127 ¶ 16. Plaintiffs allege that Craftsman's horsepower claims are "exaggerated by approximately 60-85%." A-126 to A-127 ¶ 16. In fact, Defendant's Vacuums are *physically incapable* of producing anywhere near the stated horsepower under any circumstances, given the amount of electricity delivered by the standard 120-volt outlet for which the Vacuums are designed. A-117 ¶ 2, A-129 ¶ 22. Defendant has therefore misled consumers "into believing that the Vacuums can in fact generate the claimed horsepower, even though these claims . . . can never be obtained in actual use." A-116 to A-117 ¶ 1. The numbers provided in the "Peak HP" representations are totally fictitious. *Id.*

[1] As used herein, the term "Vacuums" refers to the products at issue, as defined in Plaintiffs' Second Amended Complaint ("SAC"). *See* A-121 to A-122 ¶ 8.

Defendant does not even argue that its Vacuums can achieve "5.0 Peak HP" or "5.5 Peak HP," instead contending that the packaging contains a curative disclaimer. Namely, on the packaging of the Vacuums, there is a dagger symbol (*i.e.*, "†") next to the "Peak HP" representation which refers to certain fine-print language on the bottom of the packaging. A-193 ¶ 10, A-198. This fine-print language states: "'Peak Horsepower' (PHP) is a term used in the wet-dry vacuum industry for consumer comparison purposes. It does not denote the operational horsepower of a wet-dry vacuum but rather the horsepower output of a motor, including the motor's inertial contribution, achieved in laboratory testing. In actual use, wet dry vacuum motors do not operate the peak horsepower shown." A-132 to A-133 ¶ 35. The disclaimer language is derived from a class action settlement agreement involving similar claims against a different manufacturer. *In re Shop-Vac Mktg. & Sales Practices Litig.*, MDL No. 2380, Case No. 4:12-md-02380-YK ("*In re Shop-Vac*"), ECF 162-1, at p. 12 (M.D. Pa.). Neither Plaintiffs nor Defendant were parties to that settlement. Further, the settlement agreement in *In re Shop-Vac* was silent as to the size, placement, and prominence of the disclaimer, which is one of the main issues in this case. A-133 ¶ 36.

Critically, it appears that the presentation of the fine-print language here was engineered by Defendant to be as *inconspicuous as possible*. The actionable misrepresentation – "5.0 Peak HP" – is prominently displayed on the top left panel

of the Vacuums' packaging (in approximately size 72 font); the disclaimer appears in small print (size 7 font) on the bottom of the package, on the opposite edge of the packaging, among other fine-print language. *Id*. The disclaimer is therefore "not in close proximity to the challenged 'Peak HP' claim that appears in the upper left of the packaging." *Id*. To put the size of the disclaimer in perspective, the Vacuums' "packaging is 18.9374 inches wide and 22.0625 inches high, or approximately 1.5 feet wide by 1.8 feet high (i.e., 417.8 square inches)" whereas "the disclaimer is less than an inch tall and 3.88 inches wide (i.e., 1.45 square inches)." A-134 ¶ 37. This means that the disclaimer accounts for 0.3% of the product packaging. *Id*. The disclaimer does not contain any capitalized or bolded language, nor does it contain any borders to differentiate it from the other small print at the bottom of the box. A-134 ¶¶ 37-38.

Pursuant to the remand order from the first appeal in this case, *Montgomery v. Stanley Black & Decker Inc.*, 2021 WL 3745759 (2d Cir. Aug. 25, 2021), Plaintiffs filed their SAC on October 18, 2021. A-279 (Doc. No. 53). Defendant moved to dismiss Plaintiffs' SAC before the district court, relying on three main arguments: (1) that the approval of the disclaimer language by the court in *In re Shop-Vac* exonerates it from liability, (2) that the use of the dagger symbol next to the numerical portion of the "Peak HP" claim sufficiently places a reasonable consumer on notice of the disclaimer language, and (3) that the "Peak HP"

representation is not false and misleading to a reasonable consumer. A-161 to A-162, A-173 to A-182.

Plaintiffs opposed, arguing in response: (1) that the *In re Shop-Vac* settlement is inapposite because that settlement involved third parties settling claims related solely to the Shop-Vac brand (not Craftsman); (2) that a fact question exists regarding whether a reasonable consumer would be misled by the "Peak HP" misrepresentations on the product packaging, and (3) that Defendant's inconspicuously-placed disclaimer was insufficient to establish as a matter of law that a reasonable consumer would not be deceived by the "Peak HP" representation. A-208 to A-210, A-213 to A-224.

On March 31, 2023, the district court heard argument on Defendant's motion to dismiss and issued a decision on the record granting the motion. A-266 to A-271(Transcript p. 34:22-39:13). The district court ruled that "no reasonable consumer would have been misled by the vacuum labeling or packaging," as a matter of law. A-271 (Transcript p. 39:6-13). In reaching that conclusion, the district court found that "the term 'PEAK HP' [is] more ambiguous than misleading, regardless the number accompanying the phrase, whether it's 5.0, 5.5 or the like, the term does not on its face have any, let alone a singular, obvious factual meaning," and "[t]his is not a case where the seller makes an affirmative factual representation." A-269 (Transcript p. 37:9-19). The district court then

concluded that through Defendant's "use of the dagger symbol, the packaging specifically directs the consumer to the clarifying language, and that language unequivocally dispels any confusion, ambiguity or misapprehension that the user may have been belaboring under." A-269 (Transcript p. 37:20-24).

The district court erred in reaching its conclusion for several reasons. First, the district court disregarded this Court's precedent, *Mantikas v. Kellogg Co.*, 910 F.3d 633, 637 (2d Cir. 2018), which holds that a reasonable consumer should not be "expected to look beyond misleading representations on the front of the box to discover the truth . . . in small print on the side of the box." *Mantikas* applies here because the disclaimer language is separated from the false and misleading representation and is intentionally small and inconspicuous. *See, e.g., In re Frito–Lay N. Am., Inc. All Nat. Litig.*, 2013 WL 4647512 *16 (E.D.N.Y. Aug. 29, 2013) (finding that a disclaimer that appeared on the front of the label did not "as a matter of law extinguish the possibility that reasonable consumers could be misled by [the defendants'] labeling and marketing").

The district court deviated from *Mantikas* because it applied a legal framework formulated by some district courts (but not this Court) in disclaimer cases that distinguish between representations that are affirmatively false or misleading versus statements that are ambiguous. Under this framework, on the one hand, where a statement is false or misleading, the defendant may not rely on a

disclaimer that contradicts a false or misleading statement on the front of the packaging. This is the *Mantikas* analysis. On the other hand, an ambiguous representation with clarifying language leads a reasonable consumer to seek more information. *See, e.g., Bynum v. Fam. Dollar Stores, Inc.*, 592 F. Supp. 3d 304, 311 (S.D.N.Y. 2022) ("Since the label was ambiguous, . . . 'reasonable consumers would need additional information to understand the meaning of [the representation]' and 'would know exactly where to look to investigate — the ingredient list.' . . . Judge Furman distinguished *Mantikas* because the label there was unambiguously misleading, *which could not be cured by the 'small print'* of the ingredients list.").

Even applying this framework, the district court erred. Specifically, the district court erred because the "Peak HP" representations are false and misleading factual representations; they are not merely ambiguous. *See In re Shop-Vac Mktg. & Sales Pracs. Litig.*, 2014 WL 3557189, at *12 (M.D. Pa. July 17, 2014) (finding that the court could not conclude at the pleading stage "that a reasonable consumer would not understand the term 'peak horsepower' to mean horsepower achieved in actual use of the vacuum"). Normal consumers understand and use horsepower as a standard unit of measurement for determining the work power of a particular device. A-127 ¶ 17. As such, a Vacuum prominently labeled to reach, for example, 5.5 peak horsepower would suggest to a reasonable consumer that the

device would in fact reach the stated peak horsepower during normal use and operation. In fact, Plaintiffs, who are reasonable consumers, allege that this is exactly what they expected when purchasing their vacuums. A-118 to A-120 ¶¶ 5-6. Thus, the district court relied on a flawed premise, that this was a case of an ambiguous statement qualified by clarifying language – as opposed to a false and misleading statement with a disclaimer attempting to correct a deceptive act.

In short, the district court erred in concluding that this case presents the sort of "rare situation" wherein "the advertisement itself made it impossible for the plaintiff to prove that a reasonable consumer was likely to be deceived." *Williams v. Gerber Prod. Co.*, 552 F.3d 934, 939 (9th Cir. 2008); *see also Mantikas*, 910 F.3d at 637 (citing *Williams* approvingly).

Second, Defendant's use of the dagger symbol does not alter the analysis, as "whether a reasonable consumer would notice [the dagger] and follow it to the disclaimer" is a question of fact. *See, e.g., Anthony v. Pharmavite*, 2019 WL 109446, at *4 (N.D. Cal. Jan. 4, 2019) (collecting cases with a similar "asterisk" and disclaimer). Considering the packaging as a whole, including the small and inconspicuous print of the disclaimer, there is a question of fact as to whether a reasonable consumer would be sufficiently apprised of the disclaimer language. *Lemberg L., LLC v. eGeneration Mktg., Inc.*, 2020 WL 2813177, at *8 (D. Conn. May 29, 2020) ("[A] footnote or disclaimer that … is *so inconspicuously located*

or in such fine print that readers tend to overlook it[] will not remedy the misleading nature of the claims.") (emphasis in original) (internal quotation marks omitted). Notably, neither Plaintiff even recalls seeing the disclaimer language when purchasing their Vacuums. A-118 to A-120 ¶¶ 5-6.

The district court's Order and Judgment granting Craftsman's motion to dismiss should be reversed and vacated, and the case should be remanded for further proceedings.

JURISDICTIONAL STATEMENT

The district court had subject matter jurisdiction pursuant to 28 U.S.C. § 1332(d)(2)(A) because there are more than 100 class members, the aggregate amount in controversy exceeds $5,000,000, exclusive of interest, fees, and costs, and Plaintiffs, as well as most members of the proposed class, are citizens of states different from Craftsman. A-122 ¶ 9. The District of Connecticut was the proper venue for this action pursuant to 28 U.S.C. § 1391 because a substantial part of the events, omissions, and acts giving rise to Plaintiffs' claims took place within the District of Connecticut. A-122 ¶ 10. Additionally, Craftsman is incorporated and is headquartered in the District of Connecticut. *Id*. Further, Craftsman distributed, marketed, advertised, and sold the Vacuums at issue from its headquarters in the District of Connecticut. *Id.*

Appellate jurisdiction is proper under Federal Rule of Appellate Procedure 4(a)(1)(A). On March 31, 2023, the district court issued an Order on the record granting Craftsman's motion to dismiss in full, thereby dismissing each of Plaintiffs' claims with prejudice. A-266 to A-271 (Transcript p. 34:22-39:13). The district court entered final judgment the same day. A-232. On April 28, 2023, Plaintiffs filed a timely Notice of Appeal as to: (i) the Court's March 31, 2023 Order granting Defendant's Motion To Dismiss, and (ii) the Court's March 31, 2023 Judgment. A-273 to A-274; *see also* A-277 (Doc. No. 71).

ISSUES PRESENTED

1. Whether, upon *de novo* review, the district court erred by finding, as a matter of law, that "no reasonable consumer would have been misled by the vacuum labeling or packaging." A-271 (Transcript p. 39:6-13).

2. Whether, upon *de novo* review, the district court erred by finding, as a matter of law, that through "the use of the dagger symbol, the packaging specifically directs the consumer to the clarifying language, and that language unequivocally dispels any confusion, ambiguity or misapprehension that the user may have been belaboring under." A-269 (Transcript p. 37:20-24).

STATEMENT OF THE FACTS

Plaintiffs, consumer purchasers of Craftsman-brand wet/dry Vacuums, allege that the labeling and packaging of the Vacuums is "replete with false and

misleading horsepower ('HP') claims, namely that the Vacuums purportedly produce '1.75 Peak HP,' '2.0 Peak HP,' '2.5 Peak HP,' '3.0 Peak HP,' '3.5 Peak HP,' '4.0 Peak HP,' '4.25 Peak HP,' '5.0 Peak HP,' '5.5 Peak HP,' '6.0 Peak HP,' or '6.5 Peak HP'" (collectively, the "HP Claims"). A-116 to A-117 ¶ 1. Plaintiffs allege that "these claims are illusory and can never be obtained in actual use." *Id.* As a result, Plaintiffs allege that Craftsman "is able to charge a substantial price premium for its Vacuums on account of these fictitious HP Claims." *Id.*

Plaintiffs allege that the HP Claims are "uniformly and prominently featured" on the Vacuums' labeling, packaging, and marketing materials. A-123 ¶ 12. For example, the online retailer Amazon.com prominently displays the HP Claims to "allow consumers to make a comparative assessment of the various Craftsman wet/dry vacuums available on the market" when deciding which product to purchase:




CMXEVBE17250	CMXEVBE17612	CMXEVBE17925	CMXEVBE17584	CMXEVBE17590	CMXEVBE17594
2.5 Gallon	4 Gallon	5 Gallon	6 Gallon	9 Gallon	12 Gallon
1.75 Peak HP	5.0 Peak HP	5.0 Peak HP	3.5 Peak HP	4.25 Peak HP	6.0 Peak HP

CMXEVBE17594	CMXEVBE17606	CMXEVBE17595	CMXEVBE17607	CMXEVBE17596	CMXEVBE17656
12 Gallon	12 Gallon	16 Gallon	16 Gallon	20 Gallon	20 Gallon
6.0 Peak HP	6.0 Peak HP	6.5 Peak HP	6.5 Peak HP	6.5 Peak HP	6.5 Peak HP

Id. Additionally, the HP Claims are prominently displayed "[o]n retail packaging on [store] shelves at Ace Hardware and Lowe's:"

A-124 to A-125 ¶ 14. Furthermore, the HP Claims are prominently displayed "directly on many of the Vacuums themselves:"

A-125 to A-126 ¶ 15.

Plaintiffs allege that these claims "are false and misleading, as the actual operating power and functionality of the Vacuums, under any condition, is only a small fraction of [Craftsman's] representations." A-126 to A-127 ¶ 16. In fact, "[i]t is physically impossible for any of the Vacuums to achieve a horsepower output anywhere close to Defendant's HP Claims," given "the wattages and amperages of the Vacuums" when compared to the HP Claims. A-117 ¶ 2. For example, pursuant to testing performed by Underwriters Laboratories ("UL"), a

prestigious third-party laboratory specializing in electrical appliances with whom Craftsman collaborated prior to the sale of the Vacuums, "the total electrical power input possible at any instance for the '5 Peak HP' model is only 1200 watts." *Id.* As such, "the total possible output power of the '5 Peak HP' models is only about 1.609 horsepower (one horsepower equals about 745.7 watts)." *Id.* "This is 67.8% below the claimed '5 Peak HP.'" *Id.* As another example, "the total electrical power input possible at any instance for the '6.0 Peak HP' models is only 1260 watts, or about 1.689 horsepower," which is "71.8% below the claimed '6.0 Peak HP.'" *Id.*

Together, Plaintiffs allege that Craftsman's HP Claims are "exaggerated by approximately 60-85%:"

HP Claim	**Actual Max HP**	**% Difference**	**Amperage, in Amps (at 120V)**	**Max Watts (*i.e.*, Amps times 120V)**
1.75	**0.483**	**-72.4%**	3.0 amps	360 watts
3.5	**1.207**	**-65.5%**	7.5 amps	900 watts
4.0	**1.529**	**-61.8%**	9.5 amps	1140 watts
4.25	**1.336**	**-68.6%**	8.3 amps	996 watts
5.0 (Model No. CMXEVBE17925)	**0.805**	**-83.9%**	5.0 amps	600 watts
5.0 (Model No. CMXEVBE17612)	**1.207**	**-75.9%**	7.5 amps	900 watts

HP Claim	**Actual Max HP**	**% Difference**	**Amperage, in Amps (at 120V)**	**Max Watts (*i.e.*, Amps times 120V)**
5.0 (Model No. CMXEVBCPC1650)	**1.609**	**-67.8%**	10 amps	1200 watts
6.0	**1.690**	**-71.8%**	10.5 amps	1260 watts
6.5	**1.931**	**-70.3%**	12.0 amps	1440 watts

A-126 to A-127 ¶ 16.

Plaintiffs allege that Craftsman "knew that the HP Claims were false and misleading, yet nonetheless still advertised, labeled, and packaged the Vacuums with the exaggerated horsepower claims." A-132 ¶ 32. This is because such representations are "highly material to consumers and serve to differentiate the Vacuums from competitors' vacuums." A-117 to A-118 ¶ 3. When purchasing their Vacuums, Plaintiffs and class members "relied on [Craftsman's] HP Claims to determine the strength and suction ability of their Vacuums compared to" comparable models. *Id.* As a result, Craftsman's "Peak HP" claims, "which a reasonable consumer assumes is correct, forms a substantial basis of [the] bargain, and in turn allows [Craftsman] to command a price premium for the Vacuums over comparable models." *Id.* But as Plaintiffs allege, they "did not receive the benefit of [their] bargain, because [their] Craftsman vacuum[s], in fact, do[] not produce anywhere near [the represented] horsepower," nor would they "have purchased

[their] Craftsman vacuum[s] on the same terms had [they] known these representations were not true." A-118 to A-120 ¶¶ 5-6.

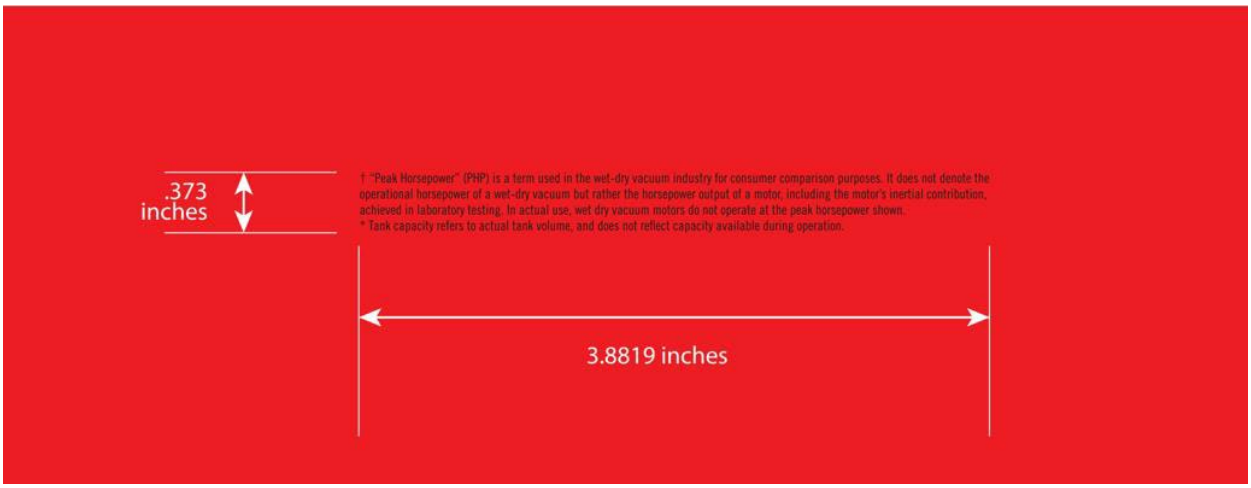
Beginning in 2018, Defendant included a purported disclaimer on the packaging of the Vacuums that states:

> "Peak Horsepower" (PHP) is a term used in the wet-dry vacuum industry for consumer comparison purposes. It does not denote the operational horsepower of a wet-dry vacuum but rather the horsepower output of a motor, including the motor's inertial contribution, achieved in laboratory testing. In actual use, wet dry vacuum motors do not operate the peak horsepower shown.

A-132 to A-133 ¶ 35. The "purported disclaimer on the Vacuums' packaging appears in exactly size 7 font, while the '5.0 Peak HP' representation appears to be in approximately size 72 font." A-133 ¶ 36.

Further, the purported disclaimer is buried on the extreme bottom edge of the packaging's panel, and it is not near the challenged "Peak HP" claim that appears in the upper-left portion of the packaging:


CRAFTSMAN
3 YEAR LIMITED WARRANTY
WE BUILD PRIDE!™
16 GAL* 60.6 LITERS*
5.0† PEAK-HP
16 GALLON WET/DRY VAC
ASPIRADORA PARA LÍQUIDOS/SÓLIDOS DE 16 GALONES
ASPIRATEUR DE DÉCHETS SECS/HUMIDES - 16 GALLONS
LOCKING HOSE
REAR BLOWER
2½" 6,4 cm CLEANING TOOLS
PROUDLY MADE IN THE USA WITH GLOBAL MATERIALS
CRAFTSMAN
CMXEVBCPC1650


.373 inches
† "Peak Horsepower" (PHP) is a term used in the wet-dry vacuum industry for consumer comparison purposes. It does not denote the operational horsepower of a wet-dry vacuum but rather the horsepower output of a motor, including the motor's inertial contribution, achieved in laboratory testing. In actual use, wet dry vacuum motors do not operate at the peak horsepower shown.
* Tank capacity refers to actual tank volume, and does not reflect capacity available during operation.
3.8819 inches

Id. The obscurity of the purported disclaimer is compounded by the fact that the Vacuums' packaging is 18.9374 inches wide and 22.0625 inches high, or approximately 1.5 feet wide by 1.8 feet high (*i.e.*, 417.8 square inches). By contrast, the disclaimer is less than an inch tall and 3.88 inches wide (*i.e.*, 1.45 square inches). In other words, the disclaimer compromises just 0.3% of the product packaging by surface area. A-134 ¶ 37. As can be seen from the packaging, there are no "capitalized letters, bold, or italics to draw the attention of a reasonable consumer. Nor is there a border or otherwise to distinguish the disclaimer's block of text from the other fine print directly next to it." A-134 ¶ 38.

STATEMENT OF THE CASE

Plaintiff Montgomery, a Virginia citizen, filed an initial Class Action Complaint ("CAC") in this matter on August 1, 2019, asserting common law claims and claims under the Connecticut Unfair Trade Practices Act, Conn. Gen. Stat. §§ 42-110a, *et seq.* (the "CUTPA") and the Virginia Consumer Protection Act, §§ 59.1-200, et seq. (the "VCPA"). A-1 to A-28. Thereafter, on October 14, 2019, Plaintiff Montgomery amended the CAC by filing a First Amended Class Action Complaint ("FAC"). A-29 to A-65. The FAC added Plaintiff Wood, a New York citizen, dropped the CUTPA claim, and added claims under New York's General Business Law ("GBL") § 349 and § 350. *Id.*

On October 28, 2019, Craftsman moved to dismiss the FAC, primarily on the grounds that the purported disclaimer shielded it from liability. A-281 (Doc. No. 37). Plaintiffs opposed Craftsman's motion to dismiss on November 18, 2019, arguing that the disclaimer was ineffective. A-280 (Doc. No. 42). On November 30, 2020, the district court granted Defendant's motion to dismiss. A-66 to A-115. The district court concluded that because Plaintiffs did not address Craftsman's disclaimer in the FAC, that the Court would not consider Plaintiffs' arguments regarding the same in its opposition brief. The district court held that "taking into consideration the clarifying language on the packaging, . . . Montgomery and Wood failed to provide sufficient factual support for their conclusory allegation that a reasonable consumer would have been misled by the Peak HP rating." A-93. The district court granted Defendant's motion and dismissed Plaintiffs' FAC with prejudice and without leave to amend.

Plaintiffs appealed and this Court reversed. This Court held:

> The district court erred when it failed to consider Appellants' arguments that the disclaimer's size and placement were insufficient to render Craftsman's claims not misleading to a reasonable consumer. Though we have held that "[a] plaintiff who alleges that he was deceived by an advertisement may not misquote or misleadingly excerpt the language of the advertisement in his pleadings and expect his action to survive a motion to dismiss, or, indeed, to escape admonishment," *Fink v. Time Warner Cable*, 714 F.3d 739, 742 (2d Cir. 2013), Appellants included the full language of the challenged representation about maximum horsepower in their

> pleadings. We remand for the district court to permit Appellants to make the argument that the disclaimer does not render the complaint insufficient, i.e., that the disclaimer's statement about normal operating horsepower does not eliminate the misleading nature of the claim about maximum horsepower.

Montgomery, 2021 WL 3745759, at *2. This Court remanded with the instruction that "the district court [] grant Appellants leave to amend." *Id.* at *3.

Pursuant to this Court's instruction, Plaintiffs filed their SAC on October 18, 2021. A-116 to A-154. Defendant moved to dismiss again, echoing the same arguments about the validity of its disclaimer. Specifically, Craftsman argued that it had developed the text of the disclaimer based off the injunctive relief portion of a settlement in *In re Shop-Vac*, in which Shop-Vac Corporation and Lowe's Home Centers, LLC agreed to add the same disclaimer text to their own wet/dry vacuums. A-161. Craftsman was not a party to this settlement, but it voluntarily added the disclaimer to its own product packaging. Critically, the *In re Shop-Vac* settlement did not have any requirements as to the size, placement, or prominence of the disclaimer.

Further, Craftsman argued that the "product packaging in this case prominently featured—as part of the challenged "PEAK HP†" language—a large dagger (that is, a "†" symbol) which clearly directed consumers to the court-approved clarifying language located on both the front and side panels of the packaging." A-162. Defendant invited the district court to apply the "false and

misleading versus ambiguous" framework espoused by some district courts, but not this Court. A-174 to A-175. Applying that framework, Defendant argued that the "Peak HP" claim was more ambiguous than misleading. A-180.

Plaintiffs opposed Defendant's motion. First, Plaintiffs argued that Defendant was not a party to the *In re Shop-Vac* settlement and that a third-party settlement could not bind non-parties. A-208 to A-209. Further, Plaintiffs argued that "it is plainly a question of fact (and not law) as to (i) whether a reasonable consumer would be misled by the 'Peak HP' representations, and (ii) the effects of any purported disclaimers on the same reasonable consumer." A-209. Further, Plaintiffs argued that the inconspicuous placement of the disclaimer as well as the fact that the typeface of the disclaimer pales in comparison to the size of the false and misleading representation about Peak HP rendered the validity of the disclaimer a question of fact. A-209 to A-210. Indeed, it would appear that Defendant designed the disclaimer to be as inconspicuous as possible, given its size, placement, and prominence.

The district court granted Defendant's motion to dismiss, following oral argument, on March 31, 2023. A-266 to A-271 (Transcript p. 34:22-39:13). The district court ruled that "no reasonable consumer would have been misled by the vacuum labeling or packaging." A-271 (Transcript p. 39:6-13). In reaching that conclusion, the district court found that "the term 'PEAK HP' [is] more ambiguous

than misleading, regardless the number accompanying the phrase, whether it's 5.0, 5.5 or the like, the term does not on its face have any, let alone a singular, obvious factual meaning," and "[t]his is not a case where the seller makes an affirmative factual representation." A-269 (Transcript p. 37:9-19). The district court then concluded that through Defendant's "use of the dagger symbol, the packaging specifically directs the consumer to the clarifying language, and that language unequivocally dispels any confusion, ambiguity or misapprehension that the user may have been belaboring under." A-269 (Transcript p. 37:20-24). The district court dismissed all of Plaintiffs' claims on the grounds that "Plaintiffs' statutory and common law claims all derive from the allegation that the vacuum packaging was misleading." A-271 (Transcript p. 39:6-13).[2] The district court entered judgment the same day. A-232.

Plaintiffs filed a timely notice of appeal from the Order and the Judgment on April 28, 2023. A-273 to A-274.

STANDARD OF REVIEW

On appeal, this Court reviews the granting of a motion to dismiss *de novo*, accepting as true all factual claims in the complaint and drawing all reasonable

[2] The district court acknowledged that *In re Shop-Vac* was "not binding" but was persuasive on the point that the disclaimer language itself was sufficient to eliminate confusion. A-270 to A-271 (Transcript p. 38:23-39:5). Plaintiffs agree that *In re Shop-Vac* is non-binding. Further, Plaintiffs challenge the size, placement, and prominence of the disclaimer language.

inferences in the plaintiff's favor. *Capital 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) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. The standard demands "more than a sheer possibility that a defendant has acted unlawfully." *Id.* "Plausibility . . . depends on a host of considerations: the full factual picture presented by the complaint, the particular cause of action and its elements, and the existence of alternative explanations so obvious that they render plaintiff's inferences unreasonable." *L-7 Designs, Inc. v. Old Navy, LLC*, 647 F.3d 419, 430 (2d Cir. 2011).

SUMMARY OF THE ARGUMENT

The district court erred in determining that (1) as a matter of law, "no reasonable consumer would have been misled by the vacuum labeling or packaging;" and (2) that Defendant's "use of the dagger symbol . . . unequivocally dispels any confusion, ambiguity or misapprehension that the user may have been belaboring under." A-269 (Transcript p. 37:20-24).

First, this Court has held that where, as here, there is a false or misleading statement qualified by small print language elsewhere on the packaging, that a reasonable consumer should not be "expected to look beyond misleading representations on the front of the box to discover the truth . . . in small print on the side of the box." *Mantikas*, 910 F.3d at 637. This analysis applies here because Defendant's disclaimer is small and inconspicuously placed on the Vacuum's packaging such that it can easily be missed by a reasonable consumer viewing the misleading "Peak HP" representation prominently displayed in much larger typeface on the package. A-133 ¶ 36. The disclaimer appears to have been designed to be as inconspicuous as possible; the Plaintiffs do not even recall seeing it at all. A-118 to A-120 ¶¶ 5-6

This case does not present the sort of "rare situation" wherein "the advertisement itself made it impossible for the plaintiff to prove that a reasonable consumer was likely to be deceived." *Williams*, 552 F.3d at 939. Plaintiffs have plausibly alleged that Defendant's representations on the Vacuums' packaging regarding the "Peak HP" of the Vacuums are false and misleading because it is impossible for the Vacuums to achieve the stated horsepower in ordinary use. A-116 to A-117 ¶¶ 1-2. Plaintiffs, reasonable consumers, read Defendant's peak horsepower representations to mean that their "Craftsman vacuum[s were] capable of producing the claimed [peak horsepower] during normal use and operation." A-

118 to A-120 ¶¶ 5-6; *In re Shop-Vac Mktg. & Sales Pracs. Litig.*, 2014 WL 3557189, at *12 (finding that the court could not conclude at the pleading stage "that a reasonable consumer would not understand the term 'peak horsepower' to mean horsepower achieved in actual use of the vacuum"). Defendant cannot rely on disclaimers or qualifying language to correct a false and misleading statement prominently displayed on the package.

In reaching its conclusion, the district court applied a legal framework used by some district courts to analyze disclaimers in the context of the reasonable consumer standard. Specifically, the district court differentiated between representations that are affirmatively false or misleading versus statements that are ambiguous. Under the framework adopted by the district court, where a statement is false or misleading, the defendant may not rely on a disclaimer that contradicts a false or misleading statement on the front of the packaging. However, where a statement is ambiguous, a reasonable consumer may be expected to refer to a disclaimer or clarifying language to seek more information. *See, e.g., Bynum*, 592 F. Supp. 3d at 311.

As a threshold matter, this framework has not been adopted by this Court, nor should it be because *Mantikas* is clear. However, even if this Court were to endorse and apply this framework, the district court still erred because the "Peak HP" representation is – literally, per its plain text – a false and misleading factual

representation about the capability of the Vacuums. A reasonable consumer would expect that when purchasing a Vacuum prominently labeled to reach a specified horsepower, that the machine would reach that horsepower in ordinary and customary use. Horsepower is also not an ambiguous term; it has a commonly understood and specific meaning. A-127 ¶ 17. Therefore, even applying the nuanced framework endorsed by the district court, *Mantikas* still controls.

Second, the district court erred in concluding that Defendant's use of the dagger symbol ameliorated any confusion that the "Peak HP" claims created in the mind of a reasonable consumer. However, whether the dagger was sufficient to place a reasonable consumer on notice of the disclaimer is a fact question.

It is well-established that the existence of a disclaimer does not "provide a shield for liability," and that determining "the significance of a disclaimer" is a fact-intensive process that requires an examination of "factors such as the font size and placement of the disclaimer as well as the relative emphasis placed on the disclaimer and the allegedly misleading statement." *Williams*, 552 F.3d at 939-40; *Stoltz v. Fage Dairy Processing Indus., S.A.*, 2015 WL 5579872, at *16 (E.D.N.Y. Sept. 22, 2015). Further, whether an asterisk or a similar symbol, here a dagger, would put a reasonable consumer on notice of a disclaimer is a question of fact. *See, e.g., Anthony*, 2019 WL 109446, at *4 (collecting cases).

The font size, placement, and the relative emphasis on Defendant's disclaimer all weigh in favor of letting a jury decide the issue of the validity of the disclaimer. This is underscored by the fact that both Plaintiffs allege that they did "not recall seeing a disclaimer or any clarifying language prior to purchasing [their] Craftsman vacuum[s]." A-118 to A-120 ¶¶ 5-6.

ARGUMENT

I. ISSUE #1: THE DISTRICT COURT ERRED IN CONCLUDING AS A MATTER OF LAW THAT NO REASONABLE CONSUMER WOULD HAVE BEEN MISLED BY THE VACUUMS' LABELING OR PACKAGING (T39:6-13)

"The New York Court of Appeals has adopted an objective definition of misleading, under which the alleged act must be likely to mislead a reasonable consumer acting reasonably under the circumstances." *Cohen v. JP Morgan Chase & Co.*, 498 F.3d 111, 126 (2d Cir. 2007) (citation omitted). In other words, "Plaintiff[s] must allege that a misrepresentation induced an objectively reasonable expectation about a product and that this expectation was not met." *Dzielak v. Whirlpool Corp.*, 26 F. Supp. 3d 304, 335 (D.N.J. 2014).

"Courts have generally held that since this [inquiry] requires a reasonableness analysis, it cannot be resolved on a motion to dismiss." *Buonasera v. Honest Co., Inc.*, 208 F. Supp. 3d 555, 566 (S.D.N.Y. 2016). The "meaning of an advertisement, the claims or net impressions communicated to reasonable consumers, is fundamentally a question of fact." *F.T.C. v. Wyndham Worldwide*

Corp., 10 F. Supp. 3d 602, 631 (D.N.J. 2014); *see also Lemberg L.*, 2020 WL 2813177, at *9 (internal citations omitted) (quoting *In re Frito-Lay*, 2013 WL 4647512, at *13 ("[W]hat a reasonable consumer would believe often raises a factual dispute that cannot properly be resolved on a motion to dismiss[.]'")).[3] Thus, only "in rare situation[s will] courts [] resolve the [reasonable consumer] issue at the motion-to-dismiss stage." *Barton v. Pret A Manger (USA) Ltd.*, 2021 WL 1664319, at *5 (S.D.N.Y. Apr. 27, 2021) (internal citation and quotation marks omitted). The instant case does not present this rare situation.

Here, Plaintiffs adequately allege that a reasonable consumer would be misled by the Vacuums' false and misleading horsepower ratings "because such representations are highly material to consumers and serve to differentiate the Vacuums from competitors' vacuums." A-117 to A-118 ¶ 3. A reasonable consumer could conclude in reviewing Defendant's representations on the

[3] *See also Barton v. Pret A Manger (USA) Ltd.*, 2021 WL 1664319, at *7 (S.D.N.Y. Apr. 27, 2021) ("As in the many other cases in this Circuit that have considered the question, what a reasonable consumer would ultimately understand the term to mean is a question of fact, which cannot be resolved in the context of this motion to dismiss."); *Lynch v. City of New York*, 952 F.3d 67, 75 (2d Cir. 2020) ("Rule 12(b)(6) does not countenance . . . dismissals based on a judge's disbelief of a complaint's factual allegations.") (citation omitted); *Stoltz*, 2015 WL 5579872, at *20 (quoting *Verizon Directories Corp. v. Yellow Book USA, Inc.*, 309 F. Supp. 2d 401, 407 (E.D.N.Y. 2004)) ("[A] federal trial judge, with a background and experience unlike that of most consumers, is hardly in a position to declare that reasonable consumers would not be misled."); *Campbell v. Whole Foods Mkt. Grp., Inc.*, 516 F. Supp. 3d 370, 384 (S.D.N.Y. 2021).

Vacuums' packaging that the Vacuum he or she is purchasing, for example a "5.0 Peak HP" model, will in fact produce 5.0 peak horsepower under ordinary use. *In re Shop-Vac Mktg. & Sales Pracs. Litig.*, 2014 WL 3557189, at *12. In fact, "[c]onsumers, when purchasing their Vacuums, relied on Defendant's HP Claims to determine the strength and suction ability of their Vacuums compared to others." *Id*. As Plaintiffs explain, "[t]he higher the horsepower number, the more likely a consumer is to purchase the vacuum over another model, and the more money a consumer is willing to spend." *Id.* Thus, the HP Claim, "which a reasonable consumer assumes is correct, forms a substantial basis of his or her bargain, and in turn allows Defendant to command a price premium for the Vacuums over comparable models." *Id.* Consumers "relied on Defendant's horsepower claims, but only received a small fraction of the horsepower promised and expected" because "Defendant's HP Claims are unobtainable, under any conditions." A-117 to A-118 ¶¶ 2-3.

Prior to their purchases, Plaintiffs "reviewed the product's labeling and packaging and saw that the vacuum[s] purportedly had a horsepower rating of '5 Peak HP' and '5.5. Peak HP.'" A-118 to A-120 ¶¶ 5-6. Plaintiffs "saw these representations prior to, and at the time of purchase, and understood them as representations and warranties that [their] Craftsman vacuum[s were] capable of producing the claimed ['Peak HP'] during normal use and operation." *Id.* They

"relied on that labeling and packaging to choose [their] vacuums over comparable models." *Id.* However, Plaintiffs, like class members, "did not receive the benefit of [their] bargain[s], because [their] Craftsman vacuum[s], in fact, [do] not produce anywhere near [the purported] horsepower." *Id.*

While it is true that the Court must "consider the challenged advertisement as a whole, including disclaimers and qualifying language," a reasonable consumer should not be "expected to look beyond misleading representations on the front of the box to discover the truth . . . in small print on the side of the box." *Mantikas*, 910 F.3d at 636; *see also Williams*, 552 F.3d at 939-40 (explaining that disclosures made in small print cannot be used as a "shield [against] liability" for otherwise false or misleading advertising claims). Therefore, because the "Peak HP" representations on Defendant's Vacuums are false and misleading, a reasonable consumer is not expected to refer to a fine print disclaimer, which is what Defendant asks Plaintiffs to do here.

The district court deviated from this Court's precedent in *Mantikas* because it applied a framework devised by some district courts (but not this Court) differentiating between representations that are affirmatively false or misleading versus statements that are ambiguous. Under this framework, on the one hand, where a statement is false or misleading, the defendant may not rely on a

disclaimer that contradicts a false or misleading statement on the front of the packaging. This is the *Mantikas* analysis.

On the other hand, an ambiguous representation with clarifying language leads a reasonable consumer to seek more information. *See, e.g., Bynum*, 592 F. Supp. 3d at 311 ("Since the label was ambiguous, . . . 'reasonable consumers would need additional information to understand the meaning of [the representation] and 'would know exactly where to look to investigate — the ingredient list.' . . . Judge Furman distinguished *Mantikas* because the label there was unambiguously misleading, *which could not be cured by the 'small print'* of the ingredients list."); *Boswell v. Bimbo Bakeries USA, Inc.*, 570 F. Supp. 3d 89, 94 (S.D.N.Y. 2021) ("[T]hese cases yield a standard that distinguishes between two categories of packaging: first, packaging with a prominent label that is unambiguous and misleading; and second, packaging with a prominent label that is ambiguous, but the ambiguity is resolved by reference to the list of ingredients or a Nutrition Facts panel.").

As a threshold matter, this legal framework finds no support in this Court's precedent and should not be adopted here. This case is a straightforward application of *Mantikas*. However, even if this Court were to endorse the "false and misleading versus ambiguous" framework, the district court still erred in concluding that the term "Peak HP" is "more ambiguous than misleading" and that

it is not "an affirmative factual representation." A-269 (Transcript p. 37:9-19). Plaintiffs allege that "[h]orsepower is a common measure of the work power, or power output, of a device. Both normal consumers and technical experts understand and use horsepower as a standard unit of measurement for determining the work power of a particular device." A-127 ¶ 17. As such, a Vacuum prominently labeled to reach, for example, 5.5 peak horsepower is an affirmative factual representation with a clear meaning that can be measured. Therefore, even using the above-mentioned framework, this case would fall on the *Mantikas* side of the line where there is an "unambiguous and misleading" representation on the product such that the reasonable consumer is "lulled into a false sense of security by the bold lettering on the product's package." *Boswell*, 570 F. Supp. 3d at 96.

The district court relied on cases which contained representations that fell on the "ambiguous" side of the line rather than the "affirmative misrepresentation" side of the line, which are inapposite to the facts of this case. For example, in *Dinan v. SanDisk LLC*, 2020 WL 364277 (N.D. Cal. Jan. 22, 2020), *aff'd*, 844 F. App'x 978 (9th Cir. 2021), the court explicitly distinguished its conclusion in that case from *Williams* because "*Williams* and its progeny speak only to situations in which the defendant has actually committed an act of deception on the front of the package." *Id.* at *9. The court continued that because the "disclosure does not attempt to correct a deceptive act" distinguished that case from "a disclaimer []

made in 'fine print' that sought to 'contradict' rather than 'confirm the expectations raised' by the large print." *Id.* (quoting *Anthony*, 2019 WL 109446, at *4).

Here, however, Defendant committed an affirmative act of deception on the front of the package, a clearly false and misleading representation regarding "Peak HP," and sought to correct that deceptive act with a fine-print disclosure. These circumstances clearly place this case in the realm of *Mantikas* and *Williams*, rendering Defendant's disclaimer ineffective.

The district court also cited *Richardson v. Edgewell Pers. Care, LLC*, 2023 WL 1109646 (S.D.N.Y. Jan. 30, 2023) in support of its decision, but there too the court explicitly found that "the 'Reef Friendly*' representation is not misleading but is instead ambiguous because it is susceptible to multiple interpretations." Here, by contrast, there is no ambiguity in Defendant's misrepresentations and the qualifying language is therefore of no avail to Defendant.

II. ISSUE #2: THE DISTRICT COURT ERRED IN CONCLUDING AS A MATTER OF LAW THAT DEFENDANT'S USE OF THE DAGGER SYMBOL CURED CONSUMER CONFUSION REGARDING THE PEAK HP REPRESENTATION ON THE VACUUMS' PACKAGING (T37:20-24)

Under Second Circuit law, "disclaimers in themselves are not dispositive with respect to alleviating consumer confusion." *Hughes v. Design Look Inc.*, 693 F. Supp. 1500, 1507 (S.D.N.Y. 1988) (citing *Home Box Office, Inc. v.*

Showtime/The Movie Channel Inc., 832 F.2d 1311, 1315 (2d Cir. 1987) and *Charles of the Ritz Grp. Ltd. v. Quality King Distributors, Inc.*, 832 F.2d 1317, 1324 (2d Cir. 1987)). Rather, "the significance of a disclaimer" is a fact-intensive process that requires an examination of "factors such as the font size and placement of the disclaimer as well as the relative emphasis placed on the disclaimer and the allegedly misleading statement." *Stoltz*, 2015 WL 5579872, at *16. "Whether a disclaimer effectively turns an otherwise false advertisement into a true one is a matter of fact, which may not, in many circumstances, be properly decided on a Rule 12(b)(6) motion to dismiss." *Lemberg L.*, 2020 WL 2813177, at *9–10.

"[W]here, for example, 'the disclaiming information does not appear in sufficiently close proximity to the infringing statements,' the alleged infringer may be required to 'demonstrate the effectiveness of proposed disclaimers.'" *Id.*, 2020 WL 2813177, at *10 (quoting *Home Box Office*, 832 F.2d at 1315). Similarly, "[i]f a disclaimer is sufficiently inconspicuous due to its location or font, it may fail to cure other misleading statements." *Id.*, 2020 WL 2813177, at *10 (citing *SmithKline Beecham Consumer Healthcare, L.P. v. Johnson & Johnson-Merck Consumer Pharm. Co.*, 906 F. Supp. 178, 182 (S.D.N.Y. 1995), *aff'd*, 100 F.3d 943 (2d Cir. 1996)).

In *Lemberg*, the court considered whether a disclaimer that appeared in small font at the very bottom of a webpage of the defendants' website was effective to cure an allegedly misleading statement contained in the large headline appearing toward the bottom of the same webpage. *Lemberg L.*, 2020 WL 2813177, at *11. In concluding that it was not, the court explained that "in a false advertising claim, where there is a disclaimer included to allegedly avoid consumer confusion, that disclaimer may, upon factual consideration, be held 'insufficient as a matter of law' depending on its size and location." *Id.* at *9-10 (emphasis added and some internal citations omitted). The court further explained that, "[t]o be effective, a disclaimer must be sufficiently bold and clear to dispel any conflicting false conclusions." Applying this principle to the facts and circumstances of *Lemberg*, the court concluded that, "[b]ecause of the 'disclaimer'['s] tiny font, location, and white color, [it] cannot determine whether that [disclaimer] adequately corrects any confusion which may arise . . . at this early stage." *Id*. at *11.

In re Frito–Lay is also instructive. There, the court considered the defendants' motion to dismiss mislabeled food claims based on an allegedly misleading "All Natural" claim on the front label of certain products. *Id*. at *1, 13. In response, the defendants argued that no reasonable consumer would be misled by the "Made with ALL NATURAL ingredients" language on the packaging

because the text was surrounded by an "explanatory ring" of text stating "No MSG—No Preservatives—No Artificial Flavors." *Id*. at *16. In other words, the defendants claimed that to the extent the representation "All Natural," which appeared on the front label on the products at issue, was misleading to reasonable consumers, these misleading representations were cured by other qualifying language or disclaimer(s) *also appearing on the products' front labels*. But the court rejected this argument, holding instead that the disclaimer "does not as a matter of law extinguish the possibility that reasonable consumers could be misled by [the defendants'] labeling and marketing[.]" *Id*. (internal quotation marks omitted and emphasis added) (citing *Ackerman v. Coca-Cola Co.*, 2010 WL 2925955 (E.D.N.Y. July 21, 2010)). Although the court determined that "these additional representations give context to the label's center pronouncement," the court nevertheless concluded that it could not "hold as a matter of law that they show no reasonable consumer would be deceived into believing" that the products at issue were all natural, when in fact they were alleged to contain non-natural ingredients. *Id*.

Here, the "clarifying language" (*i.e.*, the purported disclaimer) does not cure the deceptive nature of the HP Claims due to its inconspicuous placement on the Vacuums' packaging. As Plaintiffs allege, Defendant's disclaimer appears in small text buried in the product packaging, and not situated near the HP Claim. A-

133 ¶ 36 ("[T]he purported disclaimer on the Vacuums' packaging appears in exactly size 7 font, while the '5.0 Peak HP' representation appears to be in approximately size 72 font. Even worse, the purported disclaimer is buried on the extreme bottom edge of the packaging's panel, and it is not in close proximity to the challenged 'Peak HP' claim that appears in the upper-left of the packaging[.]") (emphasis added); A-134 ¶ 37 ("The obscurity of the purported disclaimer is compounded by the fact that … the disclaimer compromises just 0.3% of the product packaging by surface area."); A-134 ¶ 38 ("Furthermore, the disclaimer [does not] contain any capitalized letters, bold, or italics to draw the attention of a reasonable consumer. Nor is there a border or otherwise to distinguish the disclaimer's block of text from the other fine print directly next to it."); A-134 ¶ 39 ("No reasonable consumer would expect that small print language on the lower panels of the Vacuums would contain language inconsistent with the Peak HP representations. Given the placement, size, and lack of emphasis placed on the disclaimer – particularly in comparison to the HP Claim – a reasonable consumer would not be aware that the Vacuums could never produce the horsepower promised by the HP Claims, or that the HP Claims were altogether false and misleading."). Thus, Plaintiffs' allegations establish that Defendant's disclaimer is "inconspicuous due to its location [and] font," among numerous other deficiencies,

and therefore "fail[s] to cure" the misleading HP Claims. *Lemberg L.*, 2020 WL 2813177, at *10.[4]

Further, "whether a reasonable consumer would notice [the dagger] and follow it to the disclaimer" is a question of fact. *See, e.g., Anthony*, 2019 WL 109446, at *4; *Sperling v. Stein Mart, Inc.*, 2016 WL 11265686, at *5 (C.D. Cal. Mar. 15, 2016) ("Pursuant to *Williams*, it would be error for the Court to expect reasonable consumers to look beyond Defendant's price tags to find a definition of the 'Compare At' language, even though Defendant included an asterisk immediately following the words 'Compare At.'"); *Hughes v. Ester C Co.*, 930 F. Supp. 2d 439, 463–64 (E.D.N.Y. 2013) (declining to dismiss consumer protection claims under New York law even where the challenged representations contained an asterisk); *Danone, US, LLC v. Chobani, LLC*, 362 F. Supp. 3d 109, 123 (S.D.N.Y. 2019) ("[A] parent walking down the dairy aisle in a grocery store, possibly with a child or two in tow, is not likely to study with great diligence the contents of a complicated product package, searching for and making sense of fine-print disclosures in asterisked footnotes.").

On this point, *Madenlian v. Flax USA Inc.*, 2014 WL 7723578 (C.D. Cal. Mar. 31, 2014) is instructive. There, plaintiffs brought an action against the

[4] Additionally, Defendant did not include the purported disclaimer on the Vacuums' packaging until 2018, which is, at minimum, nine months into the class period. (SAC ¶ 35.)

defendant because "[t]he front label of the Unsweetened Flax USA Products prominently describes the flaxmilk as an "All Natural Dairy Free Beverage" . . . and misleading because the flaxmilk "contains non-natural ingredients . . . ." *Id.* at *1. The defendant relied on an asterisk disclaimer; specifically, the defendant argued "that the 'All Natural Dairy Free Beverage' representation on the Flax USA Products' label is followed by an asterisk, which corresponds to small text at the bottom of the label indicating that there are 'Added Vitamins and Minerals' in the flaxmilk. *Id.* at *3 n.3. The court rejected the defendant's argument, reasoning that "[t]he small text at the bottom regarding the added vitamins and minerals is much less noticeable than the 'All Natural' representation on the front of the box. . . . The Court finds that the extent to which this additional language clarifies the ambiguity of the 'All Natural' representation is a fact question not suitable for resolution at this stage in the litigation." *Id.* The court also rejected the argument that any ambiguity was resolved by looking to the ingredients list, citing *Williams* for the proposition that a reasonable consumer would expect an ingredient list to confirm the representations, not to contradict them. *Id.* at *4; *see also Brady v. Bayer Corp.*, 26 Cal. App. 5th 1156, 1172 (2018) ("You cannot take away in the back fine print what you gave on the front in large conspicuous print. The ingredient list must *confirm* the expectations raised on the front, not contradict them.").

Here, the question of the validity of Defendant's dagger and placement of the disclaimer on the packaging should be submitted to the jury. This is bolstered by the fact that the purported disclaimer is much smaller than the prominently displayed misrepresentation. *Koenig v. Boulder Brands, Inc.*, 995 F. Supp. 2d 274, 288 (S.D.N.Y. 2014) ("[A] reasonable consumer might also focus on the more prominent portion of the product label that touts the product as 'Fat Free Milk and Omega–3s,' and overlook the smaller text that discloses the fat content on the front of the carton or the nutrition label."); *Delgado v. Ocwen Loan Servicing, LLC*, 2014 WL 4773991, at *8 (E.D.N.Y. Sept. 24, 2014) ("Courts have also found that the mere presence of an accurate disclaimer does not necessarily cure other potentially misleading statements or representations on a product or advertisement."). As noted by the court in *Danone*, a reasonable consumer in a busy store is unlikely to closely study a complicated package, especially where, as here, the purported disclaimer is miniscule. *Danone, US, LLC*, 362 F. Supp. 3d at 123. Further, that the disclaimer contradicts the representations prominently displayed on the packaging adds further weight to the conclusion that the jury should consider the reasonableness of the disclaimer considering the placement, size, and context of text. Neither Plaintiff even recalled seeing the disclaimer when purchasing their respective Vacuums. A-118 to A-120 ¶¶ 5-6.

Therefore, it is a question of fact whether a reasonable consumer would notice and follow the dagger. Further, Defendant's representations are plainly false and misleading, such that a reasonable consumer would not expect that a disclaimer would contradict the "Peak HP" claim. This Court should reverse the district court's decision.

CONCLUSION

For the foregoing reasons, the District Court's Order and Judgment granting the Defendant's motion to dismiss should be reversed and vacated, and the case should be remanded for further proceedings.

Dated: July 26, 2023

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g)(1), the undersigned hereby certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and the typeface and type-style requirements of Fed. R. App. P. 32(a)(5)-(6).

1. Exclusive of the exempted portions of the brief, as provided in Fed. R. App. P. 32(f), the brief contains 8,539 words. As permitted by Fed. R. App. P. 32(g)(1), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

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