UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

TREVOR SINGLETON,
individually and on behalf of all
others similarly situated,

Plaintiff,

v. **5:15-CV-474 (BKS/TWD)**

FIFTH GENERATION, INC., d/b/a
TITO'S HANDMADE VODKA,

Defendant.

APPEARANCES:

For Plaintiff:

Eduard Korsinsky
Shannon L. Hopkins
Nancy A. Kulesa
Courtney Maccarone
Stephanie A. Bartone
Levi & Korsinsky LLP
30 Broad Street, 24th Floor
New York, NY 10004

For Defendant:

David L. Nocilly
Bond, Schoeneck & King, PLLC
One Lincoln Center
Syracuse, NY 13202

Ricky L. Shackelford
Greenberg Traurig, LLP - Los Angeles Office
1840 Century Park East, Suite 1900
Los Angeles, CA 90067

Hon. Brenda K. Sannes, United States District Judge:

MEMORANDUM-DECISION AND ORDER

I. INTRODUCTION

Plaintiff Trevor Singleton brings this proposed class action under 28 U.S.C. § 1332(d)(2) against Defendant Fifth Generation, Inc., doing business as Tito's Handmade Vodka ("Tito's" or "Defendant"), seeking compensatory and injunctive relief for Defendant's allegedly false, deceptive, and misleading advertising and trade practices with respect to the promotion and sale of its Tito's Handmade Vodka. (Dkt. No. 1). Plaintiff asserts claims on behalf of all persons in New York who purchased Tito's Handmade Vodka for: violation of New York General Business Law § 349 (Count I); breach of express warranties under New York law (Count II); negligent misrepresentation under New York law (Count III); and intentional misrepresentation under New York law (Count IV). Defendant moves to dismiss under 12(b)(6) of the Federal Rules of Civil Procedure on the grounds that federal and state regulatory approval of the Tito's label creates a safe harbor which bars Plaintiff's claims, and moreover, Plaintiff fails to state a claim for violation of New York General Business Law § 349 ("N.Y. G.B.L. § 349"), breach of warranties, negligent misrepresentation, and intentional misrepresentation. (Dkt. No. 23). Defendant also requests that the Court take judicial notice of certain facts and documents. (Dkt. No. 23-2). Plaintiff opposes Defendant's motion to dismiss. (Dkt. No. 28). For the reasons that follow, Defendant's request for judicial notice is granted, and Defendant's motion to dismiss is granted in part and denied in part.

II. BACKGROUND

A. Facts in the Complaint[1]

This action stems from the advertising of Tito's Handmade Vodka, which is manufactured and sold by Defendant with labels on the bottle stating that the vodka is "Handmade" and "Crafted in an Old Fashioned Pot Still by America's Original Microdistillery." (Dkt. No. 1, ¶¶ 1, 2, 21). The Tito's website describes its vodka as follows:

> Tito's Handmade Vodka is produced in Austin at Texas' first and oldest legal distillery. It's made in small batches in an old fashioned pot still by Tito Beveridge (actual name), a 50-something geologist, and distilled six times. Tito's Handmade Vodka is designed to be savored by spirit connoisseurs and everyday drinkers alike. It is microdistilled in an old-fashioned pot still, just like fine single malt scotches and high-end French cognacs. This time-honored method of distillation requires more skill and effort than modern stills, but it's well worth it.

(*Id.*, ¶ 22). The website also states that Tito's vodka is "Handcrafted in Texas" and "HANDCRAFTED TO BE SAVORED RESPONSIBLY." (*Id.*, ¶ 23).

Plaintiff alleges that "Defendant's representations are deceptive, false and misleading because Defendant's Vodka is not handmade,[2] but is actually manufactured and/or produced in 'massive buildings containing ten floor-to-ceiling stills and bottling 500 cases an hour' using mechanized and/or automated processes, which involve little to no human supervision, assistance, or involvement." (*Id.*, ¶ 24) (quoting a Forbes magazine article titled *The Troubling Success of Tito's Handmade Vodka*, dated July 15, 2013, available at http://www.forbes.com/sites/meghancasserly/2013/06/26/haunted-spirits-thetroubling-success-

[1] The following facts are taken from the Complaint and assumed to be true for the purposes of this decision. *Faber v. Metro. Life Ins. Co.*, 648 F.3d 98, 104 (2d Cir. 2011).

[2] Plaintiff cites two dictionary definitions of handmade: "According to Merriam-Webster dictionary, handmade is defined as 'made with the hands or by using hand tools.' Oxford Dictionary defines handmade as 'Made by hand, not by machine, and typically therefore of superior quality.'" (Dkt. No. 1, p. 7 n.4).

of-titos-handmade-vodka/) (last visited January 12, 2016). Defendant bottled 850,000 cases of vodka in 2012 and sold 1.2 million cases in 2013. (*Id.*, ¶ 25). Plaintiff alleges that the Distilled Spirits Council of the United States defines "craft spirits" as spirits produced in quantities of fewer than 40,000 cases per year. (*Id.*).

Plaintiff further alleges that, "[b]y representing that Tito's Handmade Vodka was 'Handmade' and crafted in an 'Old Fashioned Pot Still,' Defendant concealed the highly automated nature of the vodka's manufacturing and bottling process that occurs in massive buildings containing ten floor-to-ceiling stills." (*Id.*, ¶ 26). In addition, Plaintiff alleges that, "[b]y representing that Tito's Handmade Vodka is 'Handmade' and crafted in an 'Old Fashioned Pot Still,' Defendant seeks to capitalize on consumers' preferences for a higher quality vodka." (*Id.*, ¶ 27). Plaintiff alleges that "Defendant has marketed its vodka as 'Handmade,' despite the fact it uses mechanized processes, in order to induce the purchase of its product for a higher price and at a greater sales volume," which has enabled Defendant "to sell Tito's Handmade Vodka at a higher price in comparison to competitors' products" due "to the better quality associated with handmade products." (*Id.*, ¶ 28).

"As a result of that misleading marketing and packaging, Plaintiff believed that Tito's Handmade Vodka was 'Handmade' and 'Crafted in an Old Fashioned Pot Still' and not created through a mechanized and/or automated process." (*Id.*, ¶ 17). "Based on Defendant's representations, Plaintiff and the Class believed that Tito's Handmade Vodka was in fact 'Handmade' and 'miscrodistilled [sic] in an old-fashioned pot,' thus making it a higher quality and more costly than its non-handmade counterparts." (*Id.*, ¶ 6). They purchased Defendant's vodka in reliance on these representations; had they been made aware "that Tito's Vodka was not

'Handmade' or crafted in small batches, they would not have purchased the product, or would have paid less for it." (*Id.*, ¶¶ 7, 30). Plaintiff first purchased Tito's Handmade Vodka in Hancock, New York in 2007. (*Id.*, ¶ 16). Since at least 2010, Plaintiff purchased approximately 1.75 liters of Tito's Handmade Vodka per week in the Syracuse area; Plaintiff also sometimes bought the smaller 750 mL bottle. (*Id.*). Plaintiff saw and relied on the Tito's product label at the time of purchase. (*Id.*). Plaintiff paid approximately $32.99 for each of the 1.75 liter bottles and approximately $20.00 for each of the 750 mL bottles. (*Id.*). In comparison, Plaintiff alleges that a 750 mL bottle of competing vodka, "which is not handmade, costs between $9.99 and $16.00." (*Id.*, ¶ 29). Finally, Plaintiff alleges that "[a]s a result of Defendant's false and misleading statements, Plaintiff and the Class have suffered, and continue to suffer, injury in fact including the loss of money and/or property." (*Id.*, ¶ 8).

B. Facts Outside the Complaint

Defendant requests that the Court take judicial notice of the following documents and facts pursuant to Federal Rule of Evidence 201:

1) Fifth Generation's Registration of the Tito's Handmade Vodka mark with the United States Patent and Trademark Office on November 6, 2007;

2) Certificates of Label Approval issued by the Alcohol and Tobacco Tax and Trade Bureau between 2008 and 2013;

3) A copy of the front and back label of Tito's Handmade Vodka;

4) Labels used in New York during the time Singleton was buying Tito's Handmade Vodka in New York were approved by the State Liquor Authority in 2007 and in 2010; and

5) Brand Label Registration approvals in 2007 and 2010.

(Dkt. No. 23-2).

"In considering a motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6), a district court must limit itself to facts stated in the complaint or in documents attached to the complaint as exhibits or incorporated in the complaint by reference." *Kramer v. Time Warner Inc.*, 937 F.2d 767, 773 (2d Cir. 1991). The Court "may also consider matters of which judicial notice may be taken under Fed. R. Evid. 201." *Id.* Under Rule 201(b)(2), the Court may take judicial notice of a fact that is not subject to reasonable dispute because it "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(2). The Court may take judicial notice of such facts on its own, and "must take judicial notice if a party requests it and the court is supplied with the necessary information." Fed. R. Evid. 201(c). Thus, matters of public record are suitable for judicial notice, *see e.g.*, *Giraldo v. Kessler*, 694 F.3d 161, 164 (2d Cir. 2012), including administrative decisions by federal regulatory agencies. *See Colon v. Holdridge*, No. 9:13-CV-1546 DNH/ATB, 2015 WL 1730240, at *4, 2015 U.S. Dist. LEXIS 48528, at *10 (N.D.N.Y. Apr. 14, 2015) ("the court may consider matters of which judicial notice may be taken, such as public filings and administrative decisions") (citing *Kavowras v. N.Y. Times Co.*, 328 F.3d 50, 57 (2d Cir. 2003)); *see also In re Zypreza Prods. Liab. Litig.*, 549 F. Supp. 2d 496, 501 (E.D.N.Y. 2008) ("Public documents issued by government agencies such as the Food and Drug Administration may also be" judicially noticed). Further, the Court may consider matters of which judicial notice may be taken without converting a motion to dismiss into one for summary judgment. *See Staehr v. Hartford Fin. Servs. Grp., Inc.*, 547 F.3d 406, 425 (2d Cir. 2008).

Since the Complaint incorporates the Tito's labels by reference, the Court will consider the front and back labels submitted by Defendant.[3] Further, Plaintiff does not oppose Defendant's request for judicial notice, and the Court finds that the registration and approval documents submitted by Defendants are suitable for notice because they are matters of public record and the parties do not dispute their authenticity or accuracy. Therefore, the Court grants Defendant's request, and will discuss the facts in the noticed documents below.

III. STANDARD OF REVIEW

To survive a motion to dismiss, "a complaint must provide 'enough facts to state a claim to relief that is plausible on its face.'" *Mayor & City Council of Balt. v. Citigroup, Inc.*, 709 F.3d 129, 135 (2d Cir. 2013) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The plaintiff must provide factual allegations sufficient "to raise a right to relief above the speculative level." *Id.* (quoting *Bell*, 550 U.S. at 555). The Court must accept as true all factual allegations in the complaint and draw all reasonable inferences in the plaintiff's favor. *See E.E.O.C. v. Port Auth. of N.Y. & N.J.*, 768 F.3d 247, 253 (2d Cir. 2014) (citing *ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 98 (2d Cir. 2007)). Dismissal under Fed. R. Civ. P. 12(b)(6) "is

[3] The Complaint contains a copy of the front label and repeatedly refers to the labels. (*See* Dkt. No. 1, p. 6). The back label states the following:

> Tito's Handmade Vodka is designed to be savored by spirit connoisseurs. It is micro-distilled in an old fashioned pot still, just like fine single malt scotches and high-end French cognacs. This time-honored method of distillation requires more skill and effort than modern column stills, but it's well worth it. Our handcrafted technique offers more control over the distillation process, resulting in a spectacularly clean product of incomparable excellence. Only the heart of the run, "the nectar," is taken, leaving behind residual higher and lower alcohols. The vodka is cleansed of phenols, esters, congeners and organic acids by filtering it through the finest activated carbon available. Critics call Tito's "a homegrown symphonic spirit to applaud" and say "it can go head to head with any of the world's greats and not break a sweat."

(Dkt. No. 23-2, p. 60).

appropriate when a defendant raises . . . [a statutory bar] as an affirmative defense and it is clear from the face of the complaint, *and matters of which the court may take judicial notice*, that the plaintiff's claims are barred as a matter of law." *Staehr*, 547 F.3d at 425 (citation and quotation omitted).

IV. DISCUSSION

Defendant argues that the Complaint must be dismissed on the grounds that: 1) federal and state regulatory approval of the Tito's Handmade Vodka label creates a safe harbor which bars all of Plaintiff's claims; 2) Plaintiff fails to state a claim for violation of N.Y. G.B.L. § 349; 3) Plaintiff fails to state a claim for breach of express warranties; 4) Plaintiff fails to state a claim for negligent misrepresentation; and 5) Plaintiff fails to state a claim for intentional misrepresentation. (Dkt. No. 23-1). The Court will consider each argument in turn.

A. Safe Harbor

Defendant asserts that the Tito's vodka bottle labels at issue in this case were approved by the United States Alcohol and Tobacco Tax and Trade Bureau ("TTB") and the New York State Liquor Authority, and therefore, all of Plaintiff's claims are barred by New York General Business Law § 349(d), which states:

> In any such action it shall be a complete defense that the act or practice is, or if in interstate commerce would be, subject to and complies with the rules and regulations of, and the statutes administered by, the federal trade commission or any official department, division, commission or agency of the United States as such rules, regulations or statutes are interpreted by the federal trade commission or such department, division, commission or agency or the federal courts.

N.Y. Gen. Bus. Law § 349(d). The Court has taken judicial notice of the Certificates of Label Approved ("COLA") issued by the TTB for various Tito's vodka bottles between 2008 and 2013 (Dkt. No. 23-2, pp. 7-58) and the New York State Liquor Authority's ("NYSLA") Brand Label

Registration approvals issued in 2007 and 2010 (Dkt. No. 23-2, pp. 65-82). According to Defendant, "[t]hese express regulatory approvals take Plaintiff's claim straight into the safe harbor recognized by N.Y. GBL § 349(d)." (Dkt. No. 23-1, p. 18). Plaintiff argues in opposition that "[t]he fact that the TTB and NYSLA approved Tito's label does not mean Plaintiff's deceptive consumer act claims are barred as a matter of law under New York's safe harbor provision." (Dkt. No. 28, p. 11).

As an initial matter, the safe harbor provision specifically applies to actions under N.Y. G.B.L. § 349, which declares unlawful "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state," and provides for both a private right of action and one by the Attorney General of the State of New York. *See* N.Y. Gen. Bus. Law. § 349(a), (b), (h). By its clear plain language, the safe harbor provision only provides a defense against actions under N.Y. G.B.L. § 349, not any and all claims that sound in similar theories of liability.[4] Further, the safe harbor provision refers only to interpretations by *federal* administrative bodies.[5] Therefore, the Court will only consider whether the COLAs issued by the TTB are sufficient to invoke the safe harbor to bar Plaintiff's claim under N.Y. G.B.L. § 349.

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[4] Defendant cites no authority for the proposition that the safe harbor applies to claims beyond those alleged under the statute, and the cases reviewed by the Court have only applied the safe harbor to § 349 claims. *See, e.g.*, *Stone v. Contl. Airlines*, 10 Misc. 3d 811, 814-815 (N.Y. Civ. Ct. 2005) (dismissing § 349 claim based on safe harbor but entering judgment on contract damages claim); *see also Jacobs v. ABN Amro Bank N.V.*, No. 03-CV-4125 (NGG), 2004 WL 869557, at *3, 2004 U.S. Dist. LEXIS 6888, at *7 (E.D.N.Y. Apr. 21, 2004) ("The court finds that the plain language of the statute does not state that the absence of permissive federal regulation is a 'necessary element' to every claim under § 349, but rather that such federal regulation is a 'complete defense' to any such claim.").

[5] In contrast, § 350-d provides a safe harbor under that statute for conduct in compliance with rules, regulations, and statutes interpreted by federal *and* state administrative bodies. *See* N.Y. Gen. Bus. Law § 350-d ("In any such action it shall be a complete defense that the advertisement is subject to and complies with the rules and regulations of, and the statutes administered by the Federal Trade Commission or any official department, division, commission or agency of the state of New York.").

The issuance of COLAs for distilled spirits including vodka is subject to federal regulations interpreted by the TTB:

> Distilled spirits shall not be bottled or removed from a plant, except as provided in paragraph (b) of this section, unless the proprietor possesses a certificate of label approval, TTB Form 5100.31, covering the labels on the bottle, issued by the appropriate TTB officer pursuant to application on such form.

27 C.F.R. § 5.55(a). An applicant for a COLA is required to submit TTB application form 5100.31, which is then reviewed by a TTB officer; if the application "complies with applicable laws and regulations," a COLA is issued. 27 C.F.R. § 13.21(a), (b).[6] The applicable regulations include a prohibition on misleading brand names:

> No label shall contain any brand name, which, standing alone, or in association with other printed or graphic matter, creates any impression or inference as to the age, origin, identity, or other characteristics of the product unless the appropriate TTB officer finds that such brand name (when appropriately qualified if required) conveys no erroneous impressions as to the age, origin, identity, or other characteristics of the product.

27 C.F.R. § 5.34(a). In addition, the regulations state that labels on bottles containing distilled spirits shall not contain "[a]ny statement that is false or untrue in any particular, or that, irrespective of falsity, directly, or by ambiguity, omission, or inference, or by the addition of irrelevant, scientific or technical matter, tends to create a misleading impression." 27 C.F.R. § 5.42(a). The TTB application form itself requires the applicant to certify that all statements appearing in the application are true and correct and that "the representations on the labels attached to this form . . . truly and correctly represent the content of the containers to which these

[6] Within ninety days of receipt of an application, the TTB officer must notify the applicant whether the application has been approved or denied. 27 C.F.R. § 13.21(b). COLAs may also be revoked by the TTB officer "upon a finding that the label or bottle at issue is not in compliance with the applicable laws or regulations." 27 C.F.R. § 13.41.

labels will be applied." *See* TTB Application for Certification/Exemption of Label/Bottle Approval, Form 5100.31, dated October 2012, available at http://www.ttb.gov/forms/f510031.pdf (last visited January 12, 2016).[7] The application further states that "[t]his certificate does not relieve you from liability for violations of the Federal Alcohol Administration Act, the Alcoholic Beverage Labeling Act of 1988, the Internal Revenue Code of 1986, or related regulations and rulings." *Id.*, p. 2.

As both parties recognize, the safe harbor provision in N.Y. G.B.L. § 349(d) has not been applied in the context of TTB label approval. Defendant argues that the TTB "approved the precise elements" of the labels at issue, and thus this case falls squarely within N.Y. G.B.L. § 349(d).[8] (Dkt. No. 23-1, pp. 18-19). In other words, Defendant contends that, by approving the Tito's label, the TTB determined that it complied with federal regulations and found the "Handmade" representation to be neither false or misleading. In opposition, Plaintiff argues that Defendant's conduct is not protected by the safe harbor provision "because no federal or state law or regulation specifically permits Defendant to deceptively label its vodka as 'Handmade.'" (Dkt. No. 28, p. 11). Plaintiff further argues that the "the TTB's approval of Tito's 'Handmade' label simply demonstrates that the TTB took Defendant's word at face value, but does not suggest that the TTB knew the process by which Tito's was actually made or that the TTB ever

[7] The Court takes judicial notice of the complete TTB Form 5100.31 as a publicly available document that is excerpted in the COLAs and referenced in the relevant regulations.

[8] Defendant also states that the TTB specifically considered the use of the "Handmade" representation on the label during an audit at the Tito's distillery in 2005 and 2006, and "re-affirmed its prior determination that the term handmade as applied to Tito's Handmade Vodka was *not* misleading." (Dkt. No. 23-1, p. 15). Defendant states that the TTB has since "performed repeat site visits that involved detailed distillation-process inspections and review of label claims, and then issued new COLAs, once again approving the label for Tito's Handmade Vodka." (*Id.*). However, there is no record of the audit or inspections in the noticed COLAs, and thus the Court cannot consider Defendant's statements of fact at the motion to dismiss stage of the case.

conducted an investigation to verify Tito's representations." (*Id.*, pp. 14-15). Plaintiff contends that "the fact that Tito's label has not been rejected does not mean that the TTB has expressly authorized the misrepresentations on the label." (*Id.*, p. 16).[9] In response, Defendant argues that the Court should not "second-guess the TTB's determination to issue the COLAs," which are alleged to be "protected property interests." (Dkt. No. 30, pp. 5-10).

The parties cite a number of cases from other jurisdictions where defendants have sought to invoke similar safe harbor provisions based on TTB approval of labels for alcoholic beverages, including Tito's vodka, with mixed results.[10]

In *Cruz v. Anheuser-Busch, LLC*, the plaintiffs brought a putative class action against Anheuser-Busch, relating to certain Bud Light Lime Lime-A-Rita products that displayed the Bud Light Lime logo. No. CV 14-09670 AB ASX, 2015 WL 3561536, at *1, 2015 U.S. Dist. LEXIS 76027, at *2 (C.D. Cal. June 3, 2015). The plaintiffs alleged that incorporating the word "light" on the products was misleading because it created an impression that these products were

[9] Plaintiff also argues that the safe harbor provision does not bar his claims because "Defendant's misrepresentations are not only present on its labels, but also appear on the Tito's website, which is not subject to TTB or NYSLA approval." (Dkt. No. 28, p. 11). Defendant counters that "Plaintiff's Complaint fails to allege he even saw, much less relied upon, the website prior to purchasing Tito's Handmade Vodka." (Dkt. No. 30, p. 11 n.4). Plaintiff concedes this fact, but argues that he has standing to bring claims based on representations on Tito's website, "which is a question for class certification and not appropriate for determination on a Rule 12 motion to dismiss." (Dkt. No. 28, p. 6 n.2). As discussed below, the Court concludes that at this stage the safe harbor provision does not bar Plaintiff's claims based on the Tito's labels, and thus need not decide whether Plaintiff has class standing to assert claims on behalf of consumers who viewed and relied upon the Tito's website. *See In re Frito-Lay N.A., Inc. All Nat. Litig.*, No. 12-MD-2413 RRM RLM, 2013 WL 4647512, at *13, 2013 U.S. Dist. LEXIS 123824, at *42 (E.D.N.Y. Aug. 29, 2013) ("In sum, because the plaintiffs have Article III standing, at this stage, they may press claims, on behalf of putative class members, arising out of products that the plaintiffs did not themselves purchase. Whether the plaintiffs' injuries are sufficiently similar to those of the putative class members who purchased other products—and whether plaintiffs will therefore adequately represent the interests of the class—is a question the Court will consider on a Rule 23 certification motion.") (citing *NECA-IBEW Health & Welfare Fund v. Goldman Sachs & Co.*, 693 F.3d 145, 162 (2d Cir. 2012)).

[10] As one court has observed, "[t]he rationale underlying the exemptive provisions of all of these statutes is the need for uniformity in the regulation of advertising and labeling and a deference to the expertise of the responsible regulatory agency." *Am. Home Prods. Corp. v. Johnson & Johnson*, 672 F. Supp. 135, 144 (S.D.N.Y. 1987).

low in calories and carbohydrates. *Id.* The defendant moved to dismiss based on the fact that the TTB had approved the labels at issue. The court concluded that the California safe harbor doctrine[11] barred the plaintiffs' claims because the TTB had issued COLAs and thus determined that the labels complied with federal regulations and a TTB ruling regarding statements of calorie and carbohydrate content in the labeling and advertising of alcoholic beverages. 2015 WL 3561536, at *5-6, 2015 U.S. Dist. LEXIS 76027, at *15-19.

In *Pye v. Fifth Generation, Inc.*, much like this case, the plaintiffs alleged that Tito's vodka labels were false or misleading because they stated that Tito's is "handmade" and made in an "old fashioned pot still." No. 4:14CV493-RH/CAS, 2015 WL 5634600, at *1, 2015 U.S. Dist. LEXIS 128594, at *1 (N.D. Fla. Sept. 23, 2015). The defendants moved to dismiss the plaintiffs' claim for violation of the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA"), based on the statutory safe harbor, which states that the FDUTPA does not apply to "[a]n act or practice required or specifically permitted by federal or state law." Fla. Stat. Ann. § 501.212(1). The court applied the safe harbor and dismissed the plaintiffs' FDUTPA claim, based on the fact that "TTB has expressly approved the Tito's label." 2015 WL 5634600, at *4, 2015 U.S. Dist. LEXIS 128594, at *9-10. The court explained: "[T]he TTB, a regulator charged with ensuring that the representations on the Tito's label are not misleading, has approved the use of the terms 'handmade' and 'old fashioned pot still.' The use of these terms is specifically permitted by federal law within the meaning of [the safe harbor]." *Id.* *See also Aliano v. Fifth*

[11] "Under the California safe harbor doctrine, '[t]o forestall an action under the unfair competition law, another provision must actually 'bar' the action or clearly permit the conduct," such as a specific law or regulation. *Davis v. HSBC Bank Nev., N.A.*, 691 F.3d 1152, 1164 (9th Cir. 2012) (quoting *Cel-Tech Commun., Inc. v. L.A. Cellular Tel. Co.*, 973 P.2d 527, 541 (Cal. 1999)).

Generation, Inc., No. 14 C 10086, 2015 WL 5675423, at *4, 2015 U.S. Dist. LEXIS 128104, at *12 (N.D. Ill. Sept. 24, 2015) (dismissing claim under Illinois Consumer Fraud and Deceptive Trade Practices Act ("ICFA"), concluding that "TTB approval of Tito's label triggers the safe harbor provision of the ICFA").

However, in *Hofmann v. Fifth Generation, Inc.*, the court declined to apply the California safe harbor to dismiss a claim that Tito's "handmade" label statement is false and misleading, despite approval by the TTB. No. 14-CV-2569 JM JLB, 2015 WL 5440330, at *1, 2015 U.S. Dist. LEXIS 65398, at *2 (S.D. Cal. Mar. 18, 2015). The court noted that there was no guidance in the relevant regulations or from the TTB regarding the meaning of the word "handmade," and there were no facts properly before the court regarding the defendant's assertion that the TTB specifically investigated and approved the "handmade" statement. 2015 WL 5440330, at *7, 2015 U.S. Dist. LEXIS 65398, at *19. Thus, the court concluded, "it is not clear at this point that the TTB's approval of the labels is sufficient to invoke the safe harbor." *Id.* Similarly in *Aliano v. WhistlePig, LLC*, the plaintiffs alleged that the defendant's bottle label was misleading because it stated that the whiskey was "hand bottled" in Vermont whereas it was in fact mass-produced in Canada. No. 14 C 10148, 2015 WL 2399354, at *6, 2015 U.S. Dist. LEXIS 64401, at *18 (N.D. Ill. May 18, 2015). The defendant moved to dismiss the plaintiff's consumer fraud claims based on TTB approval of the labels, which allegedly triggered Illinois statutory safe harbor provisions.[12] But the court explained that it was "not convinced that provision of a

[12] *See* 815 Ill. Comp. Stat. Ann. 505/10b(1) (Illinois Consumer Fraud and Deceptive Trade Practices Act does not apply to "[a]ctions or transactions specifically authorized by laws administered by any regulatory body or officer acting under statutory authority of this State or the United States."); 815 Ill. Comp. Stat. Ann. 510/4(1) (Illinois

Certificate of Label Approval constitutes sufficient government authorization to invoke the statutory safe harbor provisions," given the fact that "there is no evidence that the TTB affirmatively investigated or confirmed the validity of the 'hand bottled' representation, or that it even has established criteria for evaluating the use of that term. Nor is it clear that the TTB label approval process is akin to those in the highly regulated tobacco, food and drug industries." 2015 WL 2399354, at *8, 2015 U.S. Dist. LEXIS 64401, at *26.

Applying the same reasoning, a number of other courts have declined to dismiss consumer fraud claims based on safe harbor provisions linked to TTB label approval. *See Welk v. Beam Suntory Import Co.*, No. 15CV328-LAB JMA, 2015 WL 5022527, at *2, 2015 U.S. Dist. LEXIS 111164, at *6 (S.D. Cal. Aug. 21, 2015) (finding that "the TTB certificates [approving whiskey label] don't reveal whether the TTB specifically investigated and approved the veracity of Jim Beam's use of the term 'handcrafted'"); *Aliano v. Louisville Distilling Co., LLC*, No. 15 C 00794, 2015 WL 4429202, at *8, 2015 U.S. Dist. LEXIS 93790, at *20 (N.D. Ill. July 20, 2015) ("While the label itself [stating that whisky was 'hand crafted'] was approved by TTB, it is not clear what statements on it were actually reviewed and approved."); *see also Nowrouzi v. Maker's Mark Distillery, Inc.*, No. 14CV2885 JAH NHS, 2015 WL 4523551, at *5, 2015 U.S. Dist. LEXIS 97752, at *12 (S.D. Cal. July 27, 2015) (finding that TTB approval of label for "handmade" whiskey was insufficient to invoke the safe harbor doctrine at the motion to dismiss stage).

Uniform Deceptive Trade Practices Act does not apply to "conduct in compliance with the orders or rules of or a statute administered by a Federal, state or local governmental agency").

A review of cases analyzing New York's safe harbor in other regulatory contexts indicates that it has been applied where a federal law or regulation specifically authorizes the challenged conduct, or a federal agency specifically approves the challenged conduct. For example, in *L. Offices of K.C. Okoli, P.C. v. BNB Bank, N.A.*, the plaintiff brought a putative class action alleging deceptive business practices in violation of N.Y. G.B.L. § 349 based on the defendant bank's failure to make funds from a deposited check available for withdrawal as soon as those funds had been collected from the check drawer. 481 F. App'x 622, 624 (2d Cir. 2012). The Second Circuit affirmed the district court's dismissal of the plaintiff's claim, finding that the safe harbor applied because the regulations directly on point required only that the bank make the proceeds of the plaintiff's check available within seven days. *Id.* at 626. Similarly, the safe harbor has been found to apply where allegedly misleading drug warning labels complied with specific warning requirements issued by the Food and Drug Administration. *See In re Fosamax (Alendronate Sodium) Prods. Liab. Litig.*, No. CIV.A. 08-08, 2013 WL 1558697, at *7-8, 2013 U.S. Dist. LEXIS 52172, at *23-24 (D.N.J. Apr. 11, 2013); *Am. Home Prods. Corp. v. Johnson & Johnson*, 672 F. Supp. 135, 144-145 (S.D.N.Y. 1987). The safe harbor also barred claims related to overbooking airline flights where a regulation specifically permitted the practice and governed terms of disclosure. *See Stone v. Cont'l Airlines*, 10 Misc. 3d 811, 815 (N.Y. Civ. Ct. 2005); *Mendelson v. Trans World Airlines, Inc.*, 466 N.Y.S.2d 168, 170 (N.Y. Sup. Ct. 1983).

In this case, based on the COLAs before the Court, it is not clear whether the TTB has determined that each representation on Tito's labels complies with the relevant regulations, as required to apply the safe harbor in N.Y. G.B.L. § 349(d). The record does not reflect whether the TTB investigated or ruled upon the representations that Tito's vodka is 'handmade" and

"crafted in an old-fashioned pot still." The COLAs filled out by Defendant and certified by Defendant to be true and correct are simply marked approved by the TTB. In contrast, when Tito's added the term "Gluten-Free" to its labels, the COLAs approved the label based on a specific TTB ruling, pending rulemaking on gluten-free references by the FDA. (*See* Dkt. No. 23-2, pp. 46-50, 53-55). Similarly, in the *Cruz* case relied upon by Defendant, the TTB approved the label in question based on a specific TTB ruling regarding caloric and carbohydrate representations, which set the conditions for using the words "light" or "lite" on labels for malt beverages. *Cruz*, 2015 WL 3561536, at *5-6; 2015 U.S. Dist. LEXIS 76027, at *13-14. In addition, there is no federal regulation for the TTB to interpret under § 349(d) that defines the terms "handmade" and "crafted in an old-fashioned pot still." By comparison, when a label describes a distilled spirit as "organic," the TTB can interpret the FDA regulation that defines the term. *See* 27 C.F.R. § 5.71(b) ("Any use of the term 'organic' on a distilled spirits label or in advertising of distilled spirits must comply with the United States Department of Agriculture's (USDA) National Organic Program rules, 7 CFR part 205, as interpreted by the USDA.").

Although Defendant claims that the TTB specifically investigated and approved the "Handmade" representation on the Tito's label, those facts are not properly before the Court. Moreover, the COLA application form states that the issuance of a certificate does not relieve Defendant from liability for violations of the Federal Alcohol Administrative Act ("FAA Act"), which itself prohibits false and misleading labeling, 27 U.S.C.A. § 205(e), suggesting that TTB approval is not intended to carry pre-emptive weight.[13] In sum, it is not clear at the motion to

[13] The TTB's predecessor agency, the Bureau of Alcohol, Tobacco and Firearms ("ATF"), stated that the COLA "was never intended to convey any type of proprietary interest to the certificate holder," such as trademark

dismiss stage that the TTB's approval of the labels is sufficient to apply the safe harbor. *See In re Frito-Lay N. Am., Inc.*, No. 12-MD-2413 RRM RLM, 2013 WL 4647512, at *22, 2013 U.S. Dist. LEXIS 123824, at *68-69 (E.D.N.Y. Aug. 29, 2013) (declining to dismiss § 349 claim based on safe harbor where, *inter alia*, it was not clear that defendant's labeling complied with FDA guidance); *Frey v. Bekins Van Lines, Inc.*, 748 F. Supp. 2d 176, 182 (E.D.N.Y. 2010) (stating that ruling as to applicability of safe harbor was "completely premature" at motion to dismiss stage); *Banks v. Consumer Home Mortg.*, Inc., No. 01-CV-8508 (ILG), 2003 WL 21251584, at *13, 2003 U.S. Dist. LEXIS 8230, at *41 (E.D.N.Y. Mar. 28, 2003) (holding that safe harbor defense based on disputed compliance with regulations would have to await the completion of discovery).

B. N.Y. General Business Law § 349

Defendant argues that, even without the safe harbor, Plaintiff fails to state a claim under N.Y. G.B.L. § 349. (Dkt. No. 23-1, p. 20-24). Section 349 prohibits deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in New York State. N.Y. Gen. Bus. Law § 349(a). "To state a claim, a plaintiff must allege (1) that the defendant's acts were consumer oriented, (2) that the acts or practices are 'deceptive or misleading in a material way,' and (3) that the plaintiff has been injured as a result."

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protection, and that the COLA is simply "a statutorily mandated tool used to help ATF in its enforcement of the labeling requirements of the FAA Act." *See* Procedures for the Issuance, Denial, and Revocation of Certificates of Label Approval, Certificates of Exemption From Label Approval, and Distinctive Liquor Bottle Approvals (93F-029P), 64 Fed. Reg. 2122-01 (January 13, 1999). In addition, the ATF stated that "proceedings regarding the approval or denial of a label do not constitute formal adjudicatory proceedings" under the Administrative Procedure Act "since the FAA Act does not require that proceedings regarding labels must be determined on the record after opportunity for an agency hearing." *Id.* (internal quotation omitted).

Goldemberg v. Johnson & Johnson Consumer Cos., Inc., 8 F. Supp. 3d 467, 478 (S.D.N.Y. 2014) (quoting *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A.*, 85 N.Y.2d 20, 25, 623 N.Y.S.2d 529, 647 N.E.2d 741 (1995)). Defendant argues that the Complaint fails to satisfy the second and third elements of this claim.[14]

1) Whether a Reasonable Consumer Could Be Misled

Defendant asserts that Plaintiff fails to plausibly allege that Tito's labels are deceptive or misleading because no reasonable consumer could believe that the vodka was physically made by human hands without machinery. (Dkt. No. 23-1, p. 22-24; Dkt. No. 30, pp. 12-13). Further, Defendant argues that the label in fact explains that "handmade" means "crafted in an old-fashioned pot still." (Dkt. No. 23-1, p. 24). "The New York Court of Appeals has established an objective standard for determining whether acts or practices are materially deceptive or misleading 'to a reasonable consumer acting reasonably under the circumstances.'" *Goldemberg*, 8 F. Supp. 3d at 478 (quoting *Oswego*, 85 N.Y.2d at 26, 623 N.Y.S.2d 529, 647 N.E.2d 741). "A court may make this determination as a matter of law, although usually such a determination is a question of fact." *Id.* (internal citations omitted).

According to Plaintiff, a reasonable consumer could plausibly believe that Tito's vodka was "handmade." (Dkt. No. 28, p. 20). Plaintiff does not contend that "handmade" means literally made by hand. Rather, Plaintiff argues that a reasonable consumer would believe that "handmade" means made with "certain basic tools . . . without complex automated machinery."

[14] There is no dispute that the Complaint plausibly alleges that Defendant's actions were consumer oriented.

(*Id.*).[15] Thus, Plaintiff argues "that a reasonable consumer would believe Defendant's representations, both on Tito's labels and its website, that Tito's is 'handmade' and crafted in 'Old-Fashioned Pot Stills' to mean that Tito's is made with little automated machinery and by human hand." (*Id.*, p. 22). Plaintiff alleges that he believed that Tito's was "handmade" and "miscrodistilled [sic] in an old-fashioned pot," and that these representations are misleading because Tito's is actually manufactured in massive buildings containing ten floor to-ceiling stills, using automated machinery and highly-mechanized processes which involve little to no human supervision, assistance, or involvement. (Dkt. No. 1, ¶¶ 3, 6, 24).

In the Court's view, based on the allegations in the Complaint, and drawing all reasonable inferences in Plaintiff's favor, Tito's labels could plausibly mislead a reasonable consumer to believe that its vodka is made in a hands-on, small-batch process, when it is allegedly mass-produced in a highly-automated one.[16] Several courts have reached similar conclusions. *See Hofmann*, 2015 WL 5440330, at *8, 2015 U.S. Dist. LEXIS, at *22 (finding that "the representation that vodka that is (allegedly) mass-produced in automated modern stills from commercially manufactured neutral grain spirit is nonetheless 'Handmade' in old-fashioned pot stills arguably could mislead a reasonable consumer"); *Aliano*, 2015 WL 4429202, at *6,

[15] The Complaint cites a dictionary definition of handmade as "made with hands *or by using hand tools*." (Dkt. No. 1, p. 7 n.4) (emphasis added).

[16] *See Callman on Unfair Competition, Trademarks and Monopolies*, § 5:42 (4th ed.) ("If the desirability of a product depends on the process by which it is manufactured, any false or misleading statement concerning that process inevitably involves a misleading representation with respect to quality.").

2015 U.S. Dist. LEXIS 93790, at *15 (finding that "a consumer could reasonably believe the phrase 'hand crafted' on the finished whiskey label meant it was not mass-produced").[17]

Defendant asserts that it uses old-fashioned pot stills instead of modern column stills, which "is more hands-on and labor intensive, and results in smaller yields, but the finished product is superior." (Dkt. No. 23-1, p. 11). Defendant further states that "[e]very pot-distilled batched is distilled and worked until it satisfies the tasting standards of the individual Fifth Generation distillers, who personally ensure consistent quality. This process is what makes Tito's Handmade Vodka handmade." (*Id.*, p. 12). However, these facts are not on the labels, and not properly before the Court. At this stage of the case, Plaintiff has plausibly alleged that Defendant's labels are deceptive or misleading in a material way because Tito's vodka is not made in a hands-on, small-batch process.[18] *See Goldemberg*, 8 F. Supp. 3d at 480 (declining to

[17] Another court has suggested that defendant's use of the term "handmade" on the Tito's label, standing alone, would not mislead a reasonable consumer, but the label as whole could be misleading where plaintiffs plausibly alleged that defendant made a false statement by representing that the vodka is made in an "old-fashioned pot still." *Pye*, 2015 WL 5634600, at *3, 2015 U.S. Dist. LEXIS 128594, at *6-7. The court concluded "[t]his is not the kind of dispute that can properly be resolved on a motion to dismiss." *Id.*

[18] The cases cited by Defendant in support of dismissal on this ground are readily distinguishable. Both of the cases relied upon by Defendant considered the term "handmade" on the label of Maker's Mark bourbon whiskey. In *Salters v. Beam Suntory, Inc.*, the court concluded that:

> [N]o reasonable person would understand "handmade" in this context to mean literally made by hand. No reasonable person would understand "handmade" in this context to mean substantial equipment was not used. If "handmade" means only made from scratch, or in small units, or in a carefully monitored process, then the plaintiffs have alleged no facts plausibly suggesting the statement is untrue.

No. 4:14CV659-RH/CAS, 2015 WL 2124939, at *3, 2015 U.S. Dist. LEXIS 62146, at *7 (N.D. Fla. May 1, 2015). In contrast, here plaintiff has plausibly alleged that Tito's vodka is not made in small batches or in a carefully monitored hands-on process, as the label may suggest. In *Nowrouzi*, the court noted that the public website for Maker's Mark contained videos and photographs demonstrating the actual production process, and that the label described the process in part and invited customers to visit the website for more information. 2015 WL 4523551, at *5, 2015 U.S. Dist. LEXIS 97752, at *14. The court agreed with *Salters*, finding that "handmade cannot reasonably be interpreted as meaning literally by hand nor that a reasonable consumer would understand the term to mean no equipment or automated process was used to manufacture the whisky." 2015 WL 4523551, at *7, 2015 U.S. Dist.

dismiss § 349 claim where "the Court cannot hold as a matter of law that the product labels are not misleading to a reasonable consumer"); *Silva v. Smucker Nat. Foods, Inc.*, No. 14-CV-6154 JG RML, 2015 WL 5360022, at *10, 2015 U.S. Dist. LEXIS 122186, at *27 (E.D.N.Y. Sept. 14, 2015) ("What a reasonable consumer's interpretation of a seller's representation might be is generally an issue of fact that is not appropriate for decision on a motion to dismiss. I cannot say as a matter of law at this early stage of the case that a reasonable consumer could not interpret Smucker's representations to be a factual claim about Natural Brew's ingredients.") (internal citation omitted); *Verizon Directories Corp. v. Yellow Book USA, Inc.*, 309 F.Supp.2d 401, 407 (E.D.N.Y. 2004) (observing that judges without the benefit of a record are not well-situated to declare that reasonable consumers would not be misled).

2) Whether Plaintiff Was Injured

Defendant argues that Plaintiff's claim also fails because he alleges no actual injury. (Dkt. No. 23-1, pp. 20-22). Specifically, Defendant argues that Plaintiff "does not allege that he in fact paid more for Tito's Handmade Vodka than for a comparable product, and, therefore, his supposed allegations of inflated prices are nothing more than conjecture." (Dkt. No. 30, p. 13). However, the Complaint alleges that Plaintiff paid a premium (an inflated price) for Tito's vodka based on Defendant's representations that it is handmade and crafted in an old-fashioned pot still: "Plaintiff and the Class believed that Tito's Handmade Vodka was in fact 'Handmade' and 'miscrodistilled [sic] in an old-fashioned pot,' thus making it a higher quality and more costly

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LEXIS 97752, at *17. In contrast, here the Tito's label states that the vodka is not only "handmade," but also crafted in an "old-fashioned pot still," which together may suggest a hands-on, small-batch process that is not automated.

than its non-handmade counterparts." (Dkt. No. 1, ¶ 6). Further, the Complaint alleges that, had they known "the truth" about the vodka, that it was not handmade or crafted in small batches, they would not have bought the vodka,[19] or "would have paid less for it." (*Id.*, ¶¶ 7, 30, 50). Plaintiff also alleges that he paid approximately $20.00 for each 750 mL bottle of Tito's vodka, while a 750 mL bottle of vodka from Tito's competitors, "which is not handmade, costs between $9.99 and $16.00." (*Id.*, ¶¶ 16, 29).

Plaintiff argues that he has plausibly alleged an economic injury: "Plaintiff was injured by paying more for a product which he believed was genuinely 'Handmade,' when it was not, and he received a product that was worth less than what he was promised." (Dkt. No. 28, p. 18). It is well-established that paying a premium for a product can constitute an actual injury under N.Y. G.B.L. § 349. *See, e.g.*, *Koenig v. Boulder Brands, Inc.*, 995 F. Supp. 2d 274, 288 (S.D.N.Y. 2014) ("A plaintiff adequately alleges injury under GBL § 349 by claiming that he paid a premium for a product based on the allegedly misleading representations."). Moreover, at the pleading stage, it is not necessary to specifically identify the amount of the premium based on prices of competing products. *See Goldemberg*, 8 F. Supp. 3d at 481-482 (citing cases). Here, Plaintiff has alleged that he paid a premium for Tito's vodka based on Defendant's misrepresentations, and Plaintiff has approximated the amount of the premium, based on prices for competing vodka that is not "handmade." Accordingly, Plaintiff has plausibly alleged an actual injury under N.Y. G.B.L. § 349. *See also Stoltz v. Fage Dairy Processing Indus., S.A.*,

[19] The Court of Appeals has rejected the idea "that consumers who buy a product that they would not have purchased, absent a manufacturer's deceptive commercial practices, have suffered an injury under General Business Law § 349." *Small v. Lorillard Tobacco Co., Inc.*, 720 N.E.2d 892, 898, 94 N.Y.2d 43, 56 (N.Y. 1999). However, the court distinguished injuries caused by an "inflated price." *Id.*, at 58 n.5.

No. 14-CV-3826 MKB, 2015 WL 5579872, at *22, 2015 U.S. Dist. LEXIS 126880, at *69 (E.D.N.Y. Sept. 22, 2015) (plaintiff sufficiently alleged injury based on paying premium price for yogurt products); *Segedie v. Hain Celestial Grp., Inc.*, No. 14-CV-5029 NSR, 2015 WL 2168374, at *12, 2015 U.S. Dist. LEXIS 60739, at *31 (S.D.N.Y. May 7, 2015) ("Plaintiffs have also adequately alleged injury by claiming that they paid a price premium that they would not have paid if the products were not labeled 'natural' or 'all natural.'"); *Ackerman v. Coca-Cola Co.*, No. CV-09-0395 (JG), 2010 WL 2925955, at *23, 2010 U.S. Dist. LEXIS 73156, at *88 (E.D.N.Y. July 21, 2010) ("Injury is adequately alleged under GBL §§ 349 or 350 by a claim that a plaintiff paid a premium for a product based on defendants' inaccurate representations."); *Jernow v. Wendy's Intern., Inc.*, No. 07 CIV.3971(LTS)(THK), 2007 WL 4116241, at *3, 2007 U.S. Dist. LEXIS 85104, at *8 (S.D.N.Y. Nov. 15, 2007) ("Under New York law, a premium could constitute an actual injury compensable under Section 349.").

In sum, based on the allegations in the Complaint and drawing all reasonable inferences in Plaintiff's favor, the Court concludes that Plaintiff has stated a claim under N.Y. G.B.L. § 349.[20]

C. Breach of Express Warranties

Defendant argues that Plaintiff fails to state a claim for breach of express warranties for two reasons: (1) Plaintiff's "allegations are based upon his subjective interpretation of a part of the label, not a promise the label actually stated"; and (2) Plaintiff failed to provide the required notice before filing suit. (Dkt. No. 23-1, pp. 20-21). "To state a claim for breach of express

[20] The cases cited by Defendant in support of dismissal on this ground are inapposite as they do not involve any allegation of injury based on paying a premium price for a product. (*See* Dkt. No. 23-1, p. 22).

warranty under New York law, a plaintiff must allege (1) the existence of a material statement amounting to a warranty, (2) the buyer's reliance on this warranty as a basis for the contract with the immediate seller, (3) breach of the warranty, and (4) injury to the buyer caused by the breach." *Goldemberg*, 8 F. Supp. 3d at 482. According to the New York Uniform Commercial Code, "[a]ny affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise," and "[a]ny description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description." N.Y. U.C.C. Law § 2-313(1)(a), (b).[21]

Here, Plaintiff alleges that Defendant promised that its vodka was "handmade" and "crafted in an old-fashioned pot still," and breached these express warranties by providing vodka that was mass-produced using automated machinery and highly-mechanized processes. (Dkt. No. 1, ¶¶ 53-54). Whether Plaintiff's interpretation of the label was erroneous or reflected a promise made by Defendant necessarily depends on what a reasonable consumer would believe. *See Ault v. J.M. Smucker Co.*, No. 13 CIV. 3409 PAC, 2014 WL 1998235, at *6, 2014 U.S. Dist. LEXIS 67118, at *20 (S.D.N.Y. May 15, 2014) ("Generalized statements . . . do not support an express warranty claim if they are such that a reasonable consumer would not interpret the statement as a factual claim upon which he or she could rely.") (quotation and citation omitted). As discussed above, Plaintiff has plausibly alleged that Defendant's vodka bottle labels could mislead a reasonable consumer, and therefore, Plaintiff plausibly alleges breach of express

[21] "It is not necessary to the creation of an express warranty that the seller . . . have a specific intention to make a warranty." N.Y. U.C.C. Law § 2-313(2).

warranties for the same reasons. *See Elkind v. Revlon Consumer Prods. Corp.*, No. 14-CV-2484 JS AKT, 2015 WL 2344134, at *13, 2015 U.S. Dist. LEXIS 63464, at *30 (E.D.N.Y. May 14, 2015) ("'Age Defying with DNA Advantage' may be plausibly inferred to suggest that the product would combat or reverse aging by interacting with one's DNA. At this early pleading stage, such a statement of fact regarding the Products' efficacy is sufficient to constitute an express warranty."); *Ault*, 2014 WL 1998235, at *6, 2014 U.S. Dist. LEXIS 67118, at *20 (finding that the plaintiff alleged actionable warranty where "it cannot be said that a reasonable consumer cannot interpret 'All Natural' as a factual claim about Crisco oil"); *Goldemberg*, 8 F. Supp. 3d at 483 ("as the Court is unable to determine as a matter of law that the statements are not misleading under GBL § 349, it is equally inappropriate to determine they are not misleading for the warranty claim").

However, Plaintiff's express warranties claim must fail because there is no allegation that he made a timely notification to Defendant of any breach of warranty. Under New York law, a buyer must provide the seller with timely notice of an alleged breach of warranty. N.Y. U.C.C. Law § 2-607(3)(a) ("Where a tender has been accepted . . . the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy."). Plaintiff does not dispute that he did not provide notice to Defendant, but argues that Defendant must have been aware of Plaintiff's false and misleading advertising claims due to similar suits pending against Defendant. (Dkt. No. 28, p. 27). Thus, Plaintiff argues, "[t]he policies underlying § 2-607(3)(a)'s notice requirement are best served by finding that Defendant was on notice." (*Id.*).

In general, "the rule of requiring notification is designed to defeat commercial bad faith, not to deprive a good faith consumer of his remedy." N.Y. U.C.C. Law § 2-607 (Official Comment 4). "The notification which saves the buyer's rights . . . need only be such as informs the seller that the transaction is claimed to involve a breach, and thus opens the way for normal settlement through negotiation." *Id.* "The primary reason for requiring notice is to give the seller the opportunity to make adjustments or replacements, opportunities to minimize the buyer's loss and reduce the seller's own liability." *Besicorp Group, Inc. v. Thermo Electron Corp.*, 981 F. Supp. 86, 101-102 (N.D.N.Y. 1997). "The second reason for requiring notice is to give the seller a chance to prepare for negotiation and litigation." *Id.* In analyzing the Uniform Sales Act provision which preceded and corresponds to U.C.C. § 2-607, Judge Learned Hand made the following observation:

> The plaintiff replies that the buyer is not required to give notice of what the seller already knows, but this confuses two quite different things. The notice "of the breach" required is not of the facts, which the seller presumably knows quite as well as, if not better than, the buyer, but of buyer's claim that they constitute a breach. The purpose of the notice is to advise the seller that he must meet a claim for damages, as to which, rightly or wrongly, the law requires that he shall have early warning.

Am. Mfg. Co. v. U.S. Shipping Bd. Emergency Corp., 7 F.2d 565, 566 (2d Cir. 1925). Here, the fact that Defendant may have been aware of similar claims involving Tito's labels did not put Defendant on notice of Plaintiff's particular claims. As the *buyer* of the vodka in this case, Plaintiff was required to inform Defendant, within a reasonable time, of the alleged breach involving his own purchase. In this case the Complaint does not even allege when Plaintiff discovered the alleged breach. Since Plaintiff has failed to allege that he provided timely notice

to Defendant of the alleged breach, Plaintiff's express warranties claim must be dismissed.[22] *See Tomasino v. Estee Lauder Cos. Inc.*, 44 F. Supp. 3d 251, 262 (E.D.N.Y. 2014) (dismissing plaintiff's breach of warranty claims "for failure to provide notice of the alleged breaches to the defendants within a reasonable time"); *Quinn v. Walgreen Co.*, 958 F. Supp. 2d 533, 544 (S.D.N.Y. 2013) ("Here, plaintiffs have failed to allege they provided Walgreens with timely notice of the alleged breach of warranty. Accordingly, plaintiffs' breach of warranty claims are dismissed."); *Mid Island LP v. Hess Corp.*, 983 N.Y.S.2d 204, at *4, 41 Misc. 3d 1237(A), at *12 (N.Y. Sup. Ct. 2013) ("As the preservation of the claim through timely notice is a condition precedent to bringing an action for breach of warranty, it is plaintiffs' burden to plead and prove timely notice, which they have failed to do."); *see also In re Frito-Lay N.A., Inc. All Nat. Litig.*, 2013 WL 4647512, at *27-28, 2013 U.S. Dist. LEXIS 123824, at *87-88 (dismissing express warranty claim for failure to allege timely notice and observing that notice provided by other plaintiffs "is likely insufficient as to any plaintiff other than on whose behalf it was provided"); *Schmidt v. Ford Motor Co.*, 972 F. Supp. 2d 712, 719 (E.D. Pa. 2013) (analyzing analogous sections of Arkansas, California, Pennsylvania, and New Jersey law, and finding that third party complaints failed to satisfy notice requirement); *Connick v. Suzuki Motor Co., Ltd.*, 675 N.E.2d 584, 590 (Ill. 1996) ("Suzuki's generalized knowledge about the safety concerns of third parties is insufficient to fulfill plaintiffs' UCC notice requirement.").

[22] The case cited by Plaintiff in opposition to dismissal on this ground, *In re Bridgestone/Firestone, Inc. Tires Products Liab. Litig.*, does not state that third party complaints necessarily establish notice, but rather that, "whether a defendant had actual notice before the plaintiff filed suit is one factor which should be considered in determining whether the lawsuit was adequate notice in a given case, regardless of whether actual notice by itself is sufficient to constitute notice." 155 F. Supp. 2d 1069, 1111 n. 48 (S.D. Ind. 2001) (applying Michigan and Tennessee law) *on reconsideration in part*, MDL NO. 1373, 2001 WL 34691976 (S.D. Ind. Nov. 14, 2001) and *on reconsideration in part sub nom. In re Bridgestone/Firestone Inc. Tires Products Liab. Litig.*, 205 F.R.D. 503 (S.D. Ind. 2001) *rev'd in part sub nom. In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012 (7th Cir. 2002).

D. Negligent Misrepresentation

Defendant argues that Plaintiff "fails to plead the essential elements of a negligent misrepresentation claim under New York law." (Dkt. No. 23-1, p. 27). Plaintiff has not responded to Defendant's arguments; instead Plaintiff has argued that his three other causes of action are sufficiently pled. (Dkt. No. 28, p. 8). The Court therefore deems Plaintiff's negligent representation claim abandoned and appropriate for dismissal. *See Haining Zhang v. Schlatter*, 557 F. App'x 9, 13 (2d Cir. 2014) (deeming claims abandoned where the "plaintiffs have failed meaningfully to challenge the dismissal of their claims"); *Moccio v. Cornell U.*, No. 09 CIV. 3601 (GEL), 2009 WL 2176626, at *4, 2009 U.S. Dist. LEXIS 62052, at *12 (S.D.N.Y. July 21, 2009) ("Whatever the merit of [the defendants'] argument [for dismissal], plaintiff has abandoned the . . . claim, as her motion papers fail to contest or otherwise respond to defendants' contention.") *aff'd*, 526 F. App'x 124 (2d Cir. 2013); *Brandon v. City of New York*, 705 F. Supp. 2d 261, 268 (S.D.N.Y. 2010) (dismissing claims as abandoned where the plaintiff "did not raise any arguments opposing Defendants' motion regarding these . . . claims") (citing cases); *Barmore v. Aidala*, 419 F. Supp. 2d 193, 201-02 (N.D.N.Y. 2005) ("The failure to oppose a motion to dismiss a claim is deemed abandonment of the claim . . . and, in the Northern District of New York, is deemed consent to granting that portion of the motion.") (internal citation omitted).

Even if Plaintiff's negligent misrepresentation claim was not deemed abandoned, however, the Complaint fails to allege a plausible cause of action. To state a claim for negligent misrepresentation under New York law, the plaintiff must allege that "(1) the defendant had a duty, as a result of a special relationship, to give correct information; (2) the defendant made a

false representation that he or she should have known was incorrect; (3) the information supplied in the representation was known by the defendant to be desired by the plaintiff for a serious purpose; (4) the plaintiff intended to rely and act upon it; and (5) the plaintiff reasonably relied on it to his or her detriment." *Hydro Inv'rs, Inc. v. Trafalgar Power Inc.*, 227 F.3d 8, 20 (2d Cir. 2000). Here, Defendant argues that Plaintiff's claim fails for several reasons, including the absence of any allegation of a special relationship (Dkt. No. 23-1, pp. 28-29), which the Court finds dispositive. Because Plaintiff alleges only that he purchased Defendant's vodka in a garden variety retail transaction, there is no plausible special relationship between the parties to give rise to a duty of care for purposes of a negligent misrepresentation claim. Therefore, Plaintiff's claim must be dismissed. *See Stoltz*, 2015 WL 5579872, at *25-26, 2015 U.S. Dist. LEXIS 126880, at *72-78 (dismissing negligent misrepresentation claim based on advertising of yogurt products for lack of special relationship) (citing cases); *Segedie*, 2015 WL 2168374, at *14, 2015 U.S. Dist. LEXIS 60739, at *36 ("Defendant's obligation to label products truthfully does not arise from any special relationship."); *see also U.S. Express Leasing, Inc. v. Elite Tech. (N.Y.), Inc.*, 928 N.Y.S.2d 696, 700 (N.Y. App. Div. 1st Dept. 2011) ("A special relationship does not arise out of an ordinary arm's length business transaction between two parties.").

E. Intentional Misrepresentation

Defendant argues that Plaintiff fails to state a claim for intentional misrepresentation because he "has not alleged facts supporting reliance or the recovery of damages," and moreover, "because the Tito's Handmade Vodka label explains that 'handmade' in context means made in [an] old fashioned pot still, Plaintiff cannot plausibly allege that Fifth Generation intentionally led him to fashion any different definition, or that he acted reasonably in doing so." (Dkt. No.

23-1, p. 31). In response, Plaintiff contends that Defendant's representation of its vodka as "Handmade" is materially false, Defendant knew it was false, Plaintiff relied on the representation, and was damaged as a result. (Dkt. No. 28, p. 28).

"The elements of common-law fraud and intentional misrepresentation under New York law are the same." *B & M Linen, Corp. v. Kannegiesser, USA, Corp.*, 679 F. Supp. 2d 474, 480 (S.D.N.Y. 2010) (citing *Indep. Order of Foresters v. Donald, Lufkin & Jenrette, Inc.*, 157 F.3d 933, 940 (2d Cir. 1998)). "In either case, a plaintiff must show that: '(1) the defendant made a material false statement or omission; (2) the defendant intended to defraud the plaintiff; (3) the plaintiff reasonably relied upon the representation or omission; and (4) the plaintiff suffered damage as a result of such reliance.'" *Id.* (quoting *Cent. Pacific, Inc. v. Hilton Hotels Corp.*, 528 F.Supp.2d 206, 218 (S.D.N.Y. 2007)).[23] First, as discussed above, Plaintiff plausibly alleges that Defendant falsely described its vodka as "Handmade" and "crafted in an old-fashioned pot still" because it is not made in a hands-on, small batch process. Second, Plaintiff plausibly alleges intent: Defendant knowingly made these false representations and "concealed the highly automated nature of the vodka's manufacturing and bottling process" in order "to capitalize on consumers' preferences for a higher quality vodka." (Dkt. No. 1, ¶¶ 26-31, 68-70). Third, Plaintiff plausibly alleges reliance: he saw the product label featuring the false representations and bought Tito's vodka as a result.[24] (*Id.*, ¶¶ 16, 71). Fourth, as discussed above, Plaintiff

[23] As a fraud claim, intentional misrepresentation is subject to the pleading requirements of Fed. R. Civ. P. 9(b), which states that, "in alleging fraud or mistake, a party must state with particularity the circumstances constituting the fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally."

[24] Whether Plaintiff's reliance was reasonable necessarily depends on what a reasonable consumer would believe, which the Court cannot resolve at this stage for the reasons discussed above. *See also Hughes v. Ester C Co.*, 930 F. Supp. 2d 439, 473 (E.D.N.Y. 2013) ("Based on the allegations before it in this particular case, the Court cannot

plausibly alleges that he paid a premium for Defendant's vodka based on the false representations, thereby suffering an economic injury.

Accordingly, based on these allegations, and drawing all reasonable inferences in Plaintiff's favor, the Court concludes that Plaintiff has stated a claim for intentional misrepresentation. *See Elkind*, 2015 WL 2344134, at *12, 2015 U.S. Dist. LEXIS 63464, *28 (finding that plaintiffs stated intentional misrepresentation claim based on allegations that defendant made false misrepresentation by using terms DNA, DNA Advantage, with DNA Advantage, and Age Defying with DNA Advantage on products' labels, that defendant knew that those terms did not have the effects suggested, from which an intent to defraud could be inferred, and that plaintiffs relied on labels and suffered economic injury as result); *Weisblum v. Prophase Labs, Inc.*, 88 F. Supp. 3d 283, 298 (S.D.N.Y. 2015) (concluding that the plaintiffs stated fraud claim based on allegations that the defendants made misrepresentations about cold remedy products, which induced the plaintiffs to buy the products); *Hughes v. Ester C Co.*, 930 F. Supp. 2d 439, 472 (E.D.N.Y. 2013) (finding that the plaintiffs stated intentional misrepresentation claim based on allegations that the defendants made a material false representation—that vitamin products protected consumers from illness, that the defendants knew the representation was false, and that the plaintiffs reasonably relied on the representation in purchasing products at a premium, thereby causing damages); *Ackerman*, 2010 WL 2925955, at *26, 2010 U.S. Dist. LEXIS 73156, at *98-99 (concluding that the plaintiffs stated intentional

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conclude as a matter of law that the cited statements here could not have been reasonably relied on by consumers; it, therefore, declines to dismiss plaintiffs' intentional misrepresentation claim on this ground.").

misrepresentation claim based on allegations that the defendant overstated vitamin water's health benefits and the plaintiffs purchased water at premium price based on the defendant's misrepresentations).

V. CONCLUSION

ORDERED that Defendant's motion to dismiss (Dkt. No. 23) is **GRANTED** in part and **DENIED** in part; and it is further

ORDERED that Plaintiff's claim for breach of express warranties (Count II of the Complaint) is **DISMISSED**; and it is further

ORDERED that Plaintiff's claim for negligent misrepresentation (Count III of the Complaint) is **DISMISSED**; and is further

ORDERED that Defendant's motion to dismiss is otherwise **DENIED.**

IT IS SO ORDERED.

January 12, 2016
Syracuse, New York

Brenda K. Sannes
U.S. District Judge