UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOSE IZQUIERDO and JOHN DOES 1-100, on behalf of themselves and others similarly situated, *Plaintiffs*, v. MONDELĒZ INTERNATIONAL, INC., MONDELĒZ GLOBAL, LLC, and DOES 1 through 10, inclusive *Defendants.*	Case No. 1:16-cv-04697-CM

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS CLASS ACTION COMPLAINT

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INTRODUCTION

This lawsuit is the *fourteenth* class action filed by Plaintiff's counsel challenging the presence of empty space (so-called "slack-fill") in various consumer product packaging. Plaintiff's counsel's latest target is Mondelēz Global LLC's 3.5-ounce Sour Patch Kids Watermelon candy, which is packaged in a plastic bag within a thin cardboard box. Recycling the same rote language used in the other thirteen (and counting) lawsuits filed by Plaintiff's counsel, this complaint alleges that the size of the Sour Patch Kids box "mislead[s] consumers into believing that they were receiving more [p]roduct than they actually were." Dkt. 1 ¶ 30.[1]

This cut-and-paste complaint must be dismissed for several independent reasons:

First, Plaintiff's claims must be dismissed for failure to assert a plausible claim that a reasonable consumer would be deceived by the box. As the U.S. Food and Drug Administration has explained, slack-fill by itself is not deceptive or impermissible. Only *nonfunctional* slack-fill is barred under the law. But Plaintiff has not explained why the slack-fill in the Sour Patch Kids box is nonfunctional or deceptive. In reality, slack-fill in the Sour Patch Kids boxes serves important purposes:

- The slack-fill is necessary to accommodate how the unique watermelon-shaped candies may "settle" in the box, which may lead to more (or less) space being available in the box.
- The extra space in the box also protects the contents of the product by preventing the sticky, gummy Sour Patch Kids candies from stacking on top of each other and sticking together.
- It also serves a functional purpose of allowing the box to stand and be displayed at a movie theater concession stand or a store shelf (without any "bulging" that would tip the box over).
- Finally, the slack-fill is necessary to allow the machinery to be able to seal the box without the glue seeping into the plastic bag containing the candies.

[1] The assembly-line nature of these lawsuits is evident by references to "chewing gum" and "sugar-free gum," which are obviously remnants of the other similar lawsuits filed by Plaintiff's counsel. Dkt. 1 ¶¶ 29, 52.

All of these purposes are expressly recognized by the FDA as legitimate uses for slack-fill. 21 C.F.R. § 100.100(a) (describing various functional slack-fill purposes).

Most critically, the alleged claim of deception rings hollow because consumers are alerted to any slack-fill in the Sour Patch Kids box once they hear the familiar rustling sound created by the empty space and feel the candies moving from side to side within the box. And even a gentle squeezing of the thin cardboard box makes clear that the box is not filled to the brim with the sticky candy. Further, the packaging expressly discloses the net weight of the product and even the quantity of candy contained in it. Plaintiff cannot rely on willful blindness to allege that he was deceived. One U.S. Court of Appeals recently affirmed dismissal of a slack-fill lawsuit in which the district court found that the plaintiff could not identify any "case[] in which [allegedly over-sized] packaging, when paired with an accurate net quantity label, . . . constituted deceptive marketing practices." *Ebner v. Fresh Inc.*, No. 13-00477, 2013 WL 9760035, at *7 (C.D. Cal. Sept. 11, 2013), *aff'd*, 818 F.3d 799 (9th Cir. 2016).

Second, the complaint must be dismissed as preempted under the Nutrition Labeling and Education Act ("NLEA"), which prohibits any state law claim that imposes a requirement not identical to those set forth in federal law. Plaintiff's conclusory recitation of the relevant FDA regulation is insufficient to avoid preemption because he never explains why the Sour Patch Kids box does not comply with the slack-fill regulation.

Third, because Plaintiff fails to allege specifically when or where he purchased the products at issue, the complaint must be dismissed for failure to plead with the particularity required by Rule 9(b).

Fourth, Plaintiff does not have standing to seek injunctive relief or damages under New York General Business Law Section 349 ("Section 349"). Plaintiff has not alleged sufficient facts to establish a threat of future injury or that he paid a price premium for the Sour Patch Kids box.

Fifth, Plaintiff's common law claims for negligent misrepresentation and unjust enrichment fail as a matter of law. The negligent misrepresentation claim is barred by the

economic loss doctrine, while the unjust enrichment claim must be dismissed as duplicative of Plaintiff's other tort claims.

Finally, even if the complaint is not dismissed, Plaintiff's nationwide class allegations must nonetheless be stricken. Section 349 applies only to conduct that occurs within the state of New York and therefore cannot serve as a basis for a nationwide class. Moreover, Plaintiff cannot pursue his common law claims on behalf of a nationwide class where, as here, there are material differences among the laws of the 50 states and each state has a strong interest in applying its own law to the transactions at issue.

FACTUAL AND PROCEDURAL BACKGROUND

I. The FDA Permits Functional Slack-Fill In Packaged Foods.

"Slack-fill" is "the difference between the actual capacity of a container and the volume of product contained therein." 21 C.F.R. § 100.100(a). According to the FDA, the presence of *non*functional slack-fill renders food packaging "misleading." *Id.* (emphasis added). But "in many products, a certain level of slack-fill has a functional purpose (e.g., protecting the product) and, therefore, can be justified." U.S. Food & Drug Admin., *Misleading Containers; Nonfunctional Slack-Fill*, 58 FR 2957-01, 2960 (Jan. 6, 1993).

In fact, slack-fill is expressly permitted under FDA regulations if it satisfies one of six enumerated functions, including:

- "Unavoidable product settling during shipping and handling."
- "Protection of the contents of the package."
- "The need for the package to perform a specific function (e.g., where packaging plays a role in the preparation or consumption of a food), where such function is inherent to the nature of the food and is clearly communicated to consumers."
- "The requirements of the machines used for enclosing the contents in such package."

21 C.F.R. § 100.100(a). The FDA has recognized that "consumer demand for convenience has led to the development of food products that may be cooked in, or eaten out of, the containers in

which they are purchased," and that such packaging may contain *functional* slack-fill related to the method of consumption. 58 FR at 2961. The FDA has further acknowledged that "settling" of contents — especially those products that are shaped in unique ways such that they take varying amounts of space depending on how they "settle" — "is a normal, unavoidable process for many types of food." *Id.*

II. Mondelēz Global's Sour Patch Kids Box Is Designed For Display.

Mondelēz Global LLC manufactures and distributes Sour Patch Kids Watermelon Candy in the United States in a variety of packaging, including the Sour Patch Kids box at issue in this case.[2] Dkt. 1 ¶ 23. The candy is packaged in a clear bag, which is then sealed in a cardboard box. *Id.* ¶ 5. The cardboard box was originally designed for display in movie theater concession stands, though the product is now sold widely in stores. *See, e.g., https://www.walmart.com/ip/Sour-Patch-Watermelon-Soft-Chewy-Candy-3.5-oz/20918530* (last visited August 28, 2016) (noting that this item is "sold at a Walmart store"). This Court can take judicial notice of this fact under the incorporation-by-reference doctrine because Paragraph 57 of the complaint references items available at Walmart.com. *See Newman & Schwartz v. Asplundh Tree Expert Co.*, 102 F.3d 660, 662 (2d Cir. 1996) (a court can consider facts "incorporated in the complaint by reference" in resolving a motion to dismiss).

The box allows the product to stand upright in a display case and ensures visibility at the movie theater concession stand or on shelves of stores. The front of each Sour Patch Kids box discloses the net weight of the product contained therein. Dkt. 1 ¶ 5. The nutrition panel further discloses the number of candy pieces in each serving and the number of servings in each box.

[2] As noted above, Plaintiff incorrectly names as a co-Defendant the global holding company, Mondelēz International, Inc., although Mondelēz Global LLC is the operating company that sold and distributed the products at issue in the United States.

Front of box with net weight

Back of box with serving size and number of pieces per container highlighted

See Hanian Decl. ¶ 3.[3]

[3] Images of the Sour Patch Kids box are contained in the concurrently-filed Declaration of Sandra Hanian. In deciding a Rule 12 motion, courts are entitled to consider evidence outside the complaint if the complaint "'relies heavily upon its terms and effect,' thereby rendering the

III. Plaintiff Challenges The Slack-Fill In The Sour Patch Kids Box.

Plaintiff filed a putative class action alleging that the size of the Sour Patch Kids boxes "misleads consumers into believing that they were receiving more Product than they actually were." Dkt. 1 ¶ 30. Specifically, Plaintiff claims that he "relied on the size of the thin cardboard box to believe that the entire volume of the packaging of the [Sour Patch Kids box] would be filled to capacity," when in fact the box has a "non-functional slack-fill of approximately 44% of its actual capacity." *Id.* ¶¶ 32, 36. Below is the image provided in the complaint (*Id.* ¶ 5):

But the amount of slack-fill is exaggerated in Plaintiff's picture because the candies are apparently stacked on top of each other such that they exceed the height of the box:

[evidence] 'integral' to the complaint," and there is no dispute regarding its authenticity or accuracy. *DiFolco v. MSNBC Cable L.L.C.*, 622 F.3d 104, 111 (2d Cir. 2010) (citation omitted). Here, Plaintiff's complaint "relies heavily" upon the packaging of the Sour Patch Kids box in alleging that the packaging is deceptive.

Hanian Decl. ¶ 3. If the candies are laid flat (as they must to fit into the box), the amount of slack-fill is minimal and tailored to its functional purposes:

Id.

The complaint further alleges that "because the [Sour Patch Kids box] is sold at movie theaters and therefore expected to be consumed in dark auditoriums, consumers are less able to visually perceive how much of the Product they are receiving." Dkt. 1 ¶ 38. Plaintiff contends that the use of such slack fill is "in violation of federal and state laws." *Id.* ¶ 35. The complaint asserts that the alleged slack-fill in Mondelēz Global's Sour Patch Kids box is "nonfunctional." *See, e.g.*, *Id.* ¶¶ 28, 45.

Finally, Plaintiff claims that he purchased the Sour Patch Kids at an unidentified "AMC movie theater in New York County" for "the premium price of $2.49 (or more)." *Id.* ¶ 21. Plaintiff asserts claims under Section 349, as well as claims for unjust enrichment, negligent misrepresentation, and fraud. *Id.* ¶¶ 73-114.

ARGUMENT

"[C]onclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss." *Smith v. Local 819 I.B.T. Pension Plan*, 291 F.3d 236, 240 (2d Cir. 2002) (citation and internal quotation marks omitted). Further, '[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements'" do not suffice. *Harris v. Mills*, 572 F.3d 66, 72 (2d Cir. 2009) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). Rather, to survive a motion to dismiss, "a complaint must contain 'enough facts to state a claim to relief that is plausible on its face.'" *Biro v. Conde Nast*, 807 F.3d 541, 544 (2d Cir. 2015) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

Importantly, a court must "draw on its judicial experience and common sense" in ruling on a motion to dismiss. *Pension Ben. Guar. Corp. ex rel. St. Vincent Catholic Med. Ctrs. Ret. Plan v. Morgan Stanley Inv. Mgmt. Inc.*, 712 F.3d 705, 718 (2d Cir. 2013) (quoting *Iqbal*, 556 U.S. at 679). "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint . . . has not 'show[n]' . . . that the pleader is entitled to relief." *Id.* (quoting *Iqbal*, 556 U.S. at 679) (alteration in original). Rather, the plaintiff must "allege more by way of factual content to 'nudg[e] his claim'" of unlawful action "'across the line from conceivable to plausible.'" *Iqbal*, 556 U.S. at 683 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

I. Plaintiff Fails To Plausibly Allege That A Reasonable Consumer Would Be Materially Misled By The Sour Patch Kids Box.

To state a claim for deceptive business practices under Section 349, Plaintiff must plausibly allege that Mondelēz Global engaged in conduct that is "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 and internal quotation marks omitted); *see also Gristede's Foods, Inc. v. Unkechauge Nation*, 532 F. Supp. 2d 439, 450 (E.D.N.Y. 2007). A complaint must be dismissed if it fails to allege that the challenged business practice was material — *i.e.*, that it affected the plaintiff's purchase decision. *See Bildstein v. MasterCard Int'l Inc.*, 329 F. Supp. 2d 410, 414 (S.D.N.Y. 2004) (granting motion to dismiss due to failure to plead materiality); *Ballas v. Virgin Media, Inc.*, 875 N.Y.S.2d 523, 524-25 (App. Div. 2009) (dismissing claims based on statements not likely to deceive a reasonable consumer). Materiality is not a given, and numerous courts in this district have dismissed claims at the pleading stage for failure to allege the existence of business practices that would deceive a reasonable consumer. *See, e.g., Welch v. TD Ameritrade Holding Corp.*, No. 07-6904, 2009 WL 2356131, at *49 (S.D.N.Y. July 27, 2009).

Here, Plaintiff fails to plausibly allege that a reasonable consumer would be materially misled by the existence of slack-fill in the Sour Patch Kids box. First, Plaintiff has failed to assert sufficient, non-conclusory facts to support his claim that the alleged slack-fill is nonfunctional and therefore misleading. Second, Plaintiff has failed to plausibly allege that consumers are likely to be deceived by the product packaging because (a) the container accurately discloses the net weight of the snack contained within, and (b) a consumer is necessarily on notice of any empty space in the container as soon as she holds the product in her hand.

A. Plaintiff fails to allege sufficient non-conclusory facts to nudge his claim across the line from conceivable to plausible.

FDA regulations establish that slack-fill is functional and therefore *not* misleading as a matter of law when the empty space fulfills one of six enumerated functions. 21 C.F.R. § 100.100(a). Four of the specified functions apply here:

- The FDA has held that a container may contain empty space because of the way that the individual pieces of snacks may "settle" in it, which could affect how much of the container the snacks occupy. *See* 21 C.F.R. § 100.100(a). "Settling" occurs when the

shape of the food items may lead to varying amounts of container space taken, depending on how the items stack and settle on top of each other. Here, the Sour Patch Kids candies are shaped to look like watermelons, and the unique shape of these candies means that they can take up more (or less) space in a box depending on how they "settle."

- The FDA also allows slack-fill to help protect the contents of the package. *See id.* Sour Patch Kids candies are gummy candies that stick to each other; if the box was filled to the brim, the candies would necessarily stick to each other and make it difficult for people to eat them.
- The FDA has recognized that slack-fill may serve a "specific function," such as allowing the product container to stand upright in a display case. *Id.* Here, the slack-fill allows the box to stand upright. If the boxes were filled to the brim, they would likely bulge (depending on how the candies settle in the box), which would make it difficult for them to stand upright.
- The FDA further allows slack-fill to accommodate the machinery used to seal the product. *See id.* The candies are wrapped in a plastic bag to maintain freshness and prevent tampering before they are mechanically placed in a box, which is then sealed shut with glue on the box flaps. If the box was filled to the top with candies, the glue used to seal the box would likely seep and attach to the plastic bag as well. In short, the slack-fill allows the Sour Patch Kids boxes to be properly glued and sealed.

To satisfy the pleading standard articulated by the Supreme Court in *Iqbal* and *Twombly*, Plaintiff must set forth non-conclusory facts sufficient to explain why the alleged slack-fill in the Sour Patch Kids box is *nonfunctional* as opposed to an integral part of the packaging included for one of the purposes specifically permitted by the FDA. Plaintiff, however, merely sets forth the text of the applicable FDA regulation and then provides only conclusory assertions that the alleged slack-fill is unlawful. *See* Dkt. 1 ¶¶ 27, 28, 45 (asserting that "none of the above [FDA] safe-harbor provisions applies" and that "[t]here is no practical reason for the non-functional slack-fill"). These allegations are the quintessential "[t]hreadbare recitals of the elements of a

cause of action, supported by mere conclusory statements" that must be dismissed under *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

Indeed, federal courts regularly dismiss claims based on bald assertions that a defendant has violated an FDA regulation. As one court aptly put it, a plaintiff cannot "simply incant the magic words [Defendants] violated FDA regulations" to state a claim. *Wolicki-Gables v. Arrow Int'l, Inc.*, 634 F.3d 1296, 1301 (11th Cir. 2011) (citation omitted); *see also Gelber v. Stryker Corp.*, 752 F. Supp. 2d 328, 334 (S.D.N.Y. 2010) (dismissing complaint that was "woefully lacking in factual allegation" because "*Twombly* clearly requires more than a conclusory statement that Defendants violated federal [FDA] code and rule."); *Victor v. R.C. Bigelow, Inc.*, No. 13-02976, 2014 WL 1028881, at *16 (N.D. Cal. Mar. 14, 2014) (finding that a complaint consisting of "a litany of FDA regulations and federal statutes, and no factual allegation about how [the defendant's] actions . . . are either unlawful or fraudulent aside from conclusory statements . . . do[es] not suffice for Rule 8's 'plausibility' standard, let alone Rule 9's 'particularity' standard for pleading").[4]

The analogous case of *O'Connor v. Henkel Corp*. is instructive. No. 14-5547, 2015 WL 5922183 (E.D.N.Y. Sept. 22, 2015). The plaintiffs there claimed that the net weight listed on the defendants' product was false and misleading because the actual net weight of the product was less than the advertised amount. *Id.* at *2. The relevant federal regulations permitted variations from the stated net quantity in certain circumstances, but did not allow for under-filling resulting from "intentional and systematic" practice. *Id.* at *7-9. The complaint asserted only that the "labeling and packaging as alleged herein is deceptive and misleading and was designed to increase sales of the Products. Defendants' misrepresentations are part of their systematic Product packaging practice." *Id*. at *9. The court rejected these conclusory statements as

[4] *See also Park v. Welch Foods, Inc.*, No. 12-06449, 2013 WL 5405318, at *5 (N.D. Cal. Sept. 26, 2013) (dismissing amended complaint that provided "little more than a long summary of the FDCA and its food labeling regulations, a formulaic recitation of how these regulations apply to Defendants' products, and conclusory allegations regarding Defendants' 'unlawfulness'").

"'naked assertion[s]' devoid of 'further factual enhancement.'" *Id*. (quoting *Twombly*, 550 U.S. at 557). Because the plaintiffs had "no well-pleaded factual allegations . . . permitting this court to reasonably infer that defendants acted intentionally and systematically in under-filling their products," the court dismissed the claims. *Id*.

Similarly here, Plaintiff sets forth only "naked assertions" regarding the alleged slack-fill in the Sour Patch Kids box. Plaintiff alleges that the "non-functional slack-fill [is] in violation of federal and state laws." Dkt. 1 ¶ 35. But, as noted above, Plaintiff does not articulate any reasons *why* the Sour Patch Kids box's slack-fill is not permissible under one or more of the FDA's enumerated functions. Given the absence of non-conclusory factual allegations, it is just as possible (and indeed much more plausible) that the empty space in the Sour Patch Kids box serves a functional purpose as opposed to an impermissible one. As in *Henkel*, Plaintiff has proffered "no well-pleaded factual allegations . . . permitting this court to reasonably infer" that the Sour Patch Kids box's empty space is nonfunctional. 2015 WL 5922183, at *9. Because Plaintiff has failed to "'nudg[e] his claim'" of unlawful action "'across the line from conceivable to plausible,'" the complaint must be dismissed. *Iqbal*, 556 U.S. at 683 (quoting *Twombly*, 550 U.S. at 570)).

B. Plaintiff cannot plausibly claim that a reasonable consumer would be misled by the product's packaging.

Plaintiff's claims must be dismissed for another independent reason: He cannot plausibly claim that a reasonable consumer would be misled by the Sour Patch Kids box packaging.

First, Plaintiff claims that he "paid the full price of the Product and received less of what Defendant represented [he] would be getting" as a result of the allegedly non-functional slack-fill. Dkt. 1 ¶ 52. Yet this allegation is belied by the packaging itself, which prominently discloses the amount of product the consumer will receive. The Sour Patch Kids box discloses both the total weight of the product ("NET WT 3.5 OZ (99g)") as well as the number of servings contained therein ("about 2.5"). *Id.* ¶ 5; Hanian Decl. ¶ 3. The nutrition panel further states that there are 11 pieces of candy in each serving, for a total of approximately 27 pieces of candy per

Sour Patch Kids box. *Id.* Plaintiff does not allege that these disclosures are inaccurate in any way, and he in fact acknowledges that the box "specifies the weight of chewy gummy candies contained within." Dkt. 1 ¶ 40. Thus, there is no indication that Plaintiff (or the rest of the putative class) received anything less than 100% of the product that was promised.

Federal courts have squarely addressed this issue in similar suits involving slack-fill claims. In *Ebner v. Fresh Inc.*, for example, the plaintiff alleged that the defendant's lip balm packaging was misleading because it created the impression that each unit had a larger quantity of product than it actually contained. 2013 WL 9760035, at *1-2. In granting the defendant's motion to dismiss, the district court held that "in light of [the lip balm's] label, which accurately states the net quantity of product in the tube, it is not reasonable to infer that the oversized packaging and metallic weight would mislead reasonable consumers as to the quantity they are receiving." *Id.* at *7. The Ninth Circuit affirmed, finding that "[b]ecause Plaintiff cannot plausibly allege that [the lip balm's] design and packaging is deceptive, the district court did not err in dismissing the packaging-based claims." 818 F.3d at 807.

Here, as in *Ebner*, "it is not reasonable to infer that the [allegedly] oversized packaging . . . would mislead reasonable consumers as to the quantity they are receiving," since the package clearly indicates (1) the net weight; (2) the serving size; and (3) the number of candy pieces per serving. Plaintiff cannot focus on the size of a product's package to the exclusion of the other disclosures, as allegedly misleading packaging must be viewed "as a whole." *Belfiore v. Procter & Gamble Co.*, 311 F.R.D. 29, 53 (E.D.N.Y. 2015); *see also Stoltz v. Fage Dairy Processing Indus., S.A.*, No. 14-3826, 2015 WL 5579872, at *16 (E.D.N.Y. Sept. 22, 2015) ("In assessing the likelihood that a reasonable consumer would be misled, it is necessary to consider not only the allegedly misleading statement but also the surrounding context based on the content of the entire label or advertisement at issue.").

Second, Plaintiff claims that "[b]ecause the thin cardboard packaging of the Product is non-transparent," consumers "had no reason to know" about the slack-fill in the container. Dkt.

1 ¶¶ 35, 49.[5] Yet the lack of transparent packaging does not give Plaintiff permission to suspend common sense when making his purchasing decisions. *See Midland Funding, LLC v. Giraldo*, 961 N.Y.S.2d 743, 751 (Dist. Ct. 2013) ("[Actionable] deceptive acts and practices . . . [are] limited to those likely to mislead a *reasonable* consumer acting *reasonably* under the circumstances." (emphasis added)). Any reasonable consumer would inevitably hear an audible rustling sound and would feel the contents of the (relatively heavy) Sour Patch Kids box moving around as soon as they handled the product, clearly revealing any empty space in the container and providing plenty of opportunity to rescind the purchase. Further, Plaintiff admits that the cardboard box is "thin," Dkt. 1 ¶ 1, allowing a consumer to press the box gently to determine that there is some slack-fill. And if a consumer's interaction with the product raised any questions regarding the amount of product contained therein, "any potential ambiguity could be resolved" by reference to the net weight and serving size prominently disclosed on each container. *Workman v. Plum Inc.*, 141 F. Supp. 3d 1032, 1035 (N.D. Cal. 2015) (citation omitted) ("[A]ny potential ambiguity could be resolved by the back panel of the products, which listed all ingredients in order of predominance, as required by the FDA. . . . '[R]easonable consumers expect that the ingredient list contains more detailed information about the product that confirms other representations on the packaging.'").

A federal court addressed a similar issue in *Hawkins v. UGI Corp.*, where the plaintiffs alleged that the defendants' instructions for dropping off empty propane tanks were misleading because consumers could not visually observe the amount of propane in the opaque steel cylinder and therefore could not determine if they had used all of the product. No. 14-08461, 2016 WL 2595990, at *3 (C.D. Cal. May 4, 2016). The court dismissed the plaintiffs' claims as implausible, holding that the "inability to visually inspect a [product's] contents does not . . .

[5] Plaintiff also argues that "because the [Product] is sold at movie theaters and therefore expected to be consumed in dark auditoriums, consumers are less able to visually perceive how much of the Product they are receiving." *Id.* ¶ 38. But a consumer buys the product in the brightly lit concession stand, not the darkened theater. Further, Sour Patch Kids in the 3.5 ounce boxes are sold at stores also, not just in theaters. *See supra* at 4; *see also* Hanian Decl. ¶ 2.

prevent a consumer from determining whether some product remains." *Id.* Rather, a consumer could determine whether product remained in the tanks by "audibly sloshing remaining liquid around in the cylinder." *Id.* As in *Hawkins*, Plaintiff's assertion that he "had no reason to know" that the products contained slack-fill because the packaging was not transparent is implausible as a matter of law. Because the Sour Patch Kids box allows (and, in fact, inevitably requires) the consumer to hear and feel any empty space contained within, the product is not deceptive as a matter of law. Plaintiff cannot rely on willful blindness to pursue his claims.

Plaintiff's reliance on *Waldman v. New Chapter, Inc.*, 714 F. Supp. 2d 398 (E.D.N.Y. 2010) and *United States v. 174 Cases, More or Less, Delson Thin Mints Chocolate Covered*, 287 F. 2d 246 (3rd Cir. 1961) is misplaced. Dkt. 1 ¶ 40. In *Waldman*, the product at issue — a powder — was packaged in an opaque jar inside a cardboard box. The plaintiff alleged that the package's size, in relation to the amount of product it contained, misled consumers into believing they were buying "more" than the jar actually held. 714 F. Supp. 2d at 400. The court noted that because the package "accurately disclose[d]" the weight of the product and the number of servings, the only potential misrepresentation could have been "the product's *volume* and *density*" since, "if [the product] was less dense, then 180 grams of product might, in fact, fill the unnecessarily large jar it came in." *Id.* at 402-03. But the court found that the plaintiff had pled "nothing to suggest that she, or other class members, cared about [the product's] density" or that the product's "unexpectedly higher density deluded her, or other class members, into thinking that [the product's] box contained more than the 30 servings it expressly listed." *Id.* at 403. For this reason, the court found that the plaintiff had "failed to plead facts sufficient to establish the alleged misrepresentation's materiality," and dismissed the plaintiff's claim for fraud. *Id.*[6]

[6] Though the *Waldman* court refused to dismiss the plaintiff's New York consumer protection claims as a result of the distinction between a "material misrepresentation" (as prohibited by common law fraud) and a "materially misleading" statement (as prohibited by New York's consumer protection statute), *id.* at 405 n.9, it provided no explanation as to how the size of the box could be materially misleading when the plaintiffs had pled "nothing to suggest that she, or other class members, cared about [the product's] density," *id.* at 403. This court need not follow

Similarly, here, Plaintiff has pled nothing to suggest that he or other class members cared about the density of the candy in the Sour Patch Kids box, or that they were "deluded . . . into thinking that [each Sour Patch Kids box] contained more than the [2.5] servings it expressly listed." Thus, Plaintiff has failed to identify any representation "likely to mislead a reasonable consumer acting reasonably under the circumstances." *Cohen*, 498 F.3d at 126. Further, unlike the candies at issue here, the silent powder in *Waldman* provided no audible clue about the slack-fill contained inside.

Additionally, *174 Cases* is not instructive because that case was decided long before 21 C.F.R. § 100.100(a) was promulgated. Rather than assessing whether the alleged slack-fill met any of the permissible functions enumerated by the FDA, the court analyzed whether "the form and filling of the package is justified by considerations of safety and is reasonable in the light of available alternative safety features." 287 F.2d at 247. Nonetheless, the court ultimately found that the package at issue was "not misbranded or misleading." *174 Cases*, 195 F. Supp. 326, 330 (D.N.J. 1961), *aff'd,* 302 F.2d 724 (3d Cir. 1962).

* * *

In sum, Plaintiff focuses exclusively on the size of the Sour Patch Kids box while ignoring the express disclosures of weight and serving size, the rustling of the contents inside, and the fact that a consumer can easily press the thin cardboard box to feel the contents. Because Plaintiff fails to nudge his claim of deceptive packaging "across the line from conceivable to plausible," the Court must dismiss the complaint in its entirety.

II. Plaintiff Cannot Avoid Preemption Through Conclusory Allegations That Defendants Violated Federal Regulations.

Plaintiff's theory of the case suffers from another fundamental flaw: Mondelēz Global has followed federal regulations that set a national uniform standard for food products. Congress included a broad preemption provision in the NLEA because it wanted to avoid a patchwork

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unpersuasive non-binding authority. At the very least, *Waldman* supports dismissal of Plaintiff's fraud claim.

quilt of conflicting state-law labeling standards. 21 U.S.C. § 343-1(a); *see generally Mills v. Giant of Md., LLC*, 441 F. Supp. 2d 104, 106-09 (D.D.C. 2006) (noting the expansive scope of the NLEA preemption clause). The NLEA provides that "*no State* or political subdivision of a State *may directly or indirectly establish . . . any requirement for . . . labeling of food . . . that is not identical* to the requirement[s]" set forth in the NLEA. 21 U.S.C. § 343-1(a) (emphasis added). "'Not identical to' does not refer to the specific words in the requirement but instead means that the State requirement directly or indirectly imposes obligations or contains provisions" that are "not imposed by or contained in" or that "[d]iffer from those specifically imposed by or contained in" the statute or its implementing regulations. 21 C.F.R. § 100.1(c)(4).

In other words, states cannot impose their own unique labeling standards that go "beyond, or [are] different from" the federal labeling standards that Congress has established. *In re Pepsico, Inc., Bottled Water Mktg. & Sales Practices Litig.*, 588 F. Supp. 2d 527, 532 (S.D.N.Y. 2008); *see also Turek v. Gen. Mills, Inc.*, 662 F.3d 423, 427 (7th Cir. 2011) ("Even if the disclaimers that the plaintiff wants added would be consistent with the requirements imposed by the Food, Drug, and Cosmetic Act, consistency is not the test [for NLEA preemption]; identity is."). As a result, "where federal requirements address the subject matter that is being challenged through state law claims," including claims brought under consumer protection laws such as Section 349, "such state law claims are preempted to the extent they do not impose identical requirements." *O'Connor*, 2015 WL 5922183, at *5.

Here, Plaintiff provides only conclusory assertions that the alleged slack-fill is nonfunctional under the FDCA. He sets forth the text of the applicable FDA regulation and then conclusorily asserts that "none of the above [FDA] safe-harbor provisions applies" and that "[t]here is no practical reason for the non-functional slack-fill." Dkt. 1 ¶¶ 27, 28, 45. Yet courts have held that a plaintiff cannot "simply incant the magic words '[Defendant] violated FDA regulations' in order to avoid preemption." *Wolicki-Gable*, 634 F.3d at 1301 (citation omitted); *see also Simon v. Smith & Nephew, Inc.*, 990 F. Supp. 2d 395, 403 (S.D.N.Y. 2013) (citation omitted) (finding that in order to avoid preemption and satisfy the *Twombly* and *Iqbal* pleading

standards, plaintiffs "cannot simply make the conclusory allegation that defendant's conduct violated FDA regulations.").[7] In the absence of non-conclusory factual allegations explaining *why* the Sour Patch Kids box violates the applicable FDA regulation, Plaintiff's complaint must be dismissed as preempted.

Moreover, common sense dictates that the empty space in the Sour Patch Kids box does in fact serve one or more of the functionalities articulated by the FDA. The thin cardboard box naturally serves a "specific function" by allowing the product to stand upright in a display case and ensure visibility to theater-goers. The empty space is also logically necessary given the sticky nature of the sugary candies, which require space to avoid sticking together. Further, the space is understandably necessary to accommodate both the "settling" of the candy during production and transit, and the machinery used to seal the bag and the box. Courts regularly apply common sense to dispose of claims at the pleading stage. *See, e.g., Sanchez v. Abderrahman*, No. 10-3641, 2012 WL 1077842, at *8 (E.D.N.Y. Mar. 30, 2012) (finding that the plaintiffs' claim failed because "[c]ommon sense and experience make . . . [the plaintiffs'] conclusion implausible").[8]

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[7] *See also Parker v. Stryker Corp.*, 584 F. Supp. 2d 1298, 1301 (D. Colo. 2008) (finding conclusory allegation that device "was sold in direct violation of the Code of Federal Regulations" insufficient under *Twombly* to save claim from FDCA preemption); *In re Medtronic, Inc. Sprint Fidelis Leads Products Liab. Litig.*, 592 F. Supp. 2d 1147, 1158 (D. Minn. 2009), *aff'd sub nom, In re Medtronic, Inc., Sprint Fidelis Leads Products Liab. Litig.*, 623 F.3d 1200 (8th Cir. 2010) ("Merely alleging that [Defendant] failed to comply with the [federal regulations] . . . is insufficient [to survive preemption] without some factual detail about *why* [the Defendant's action] violates federal standards.").

[8] *See also Stuart v. Cadbury Adams USA, LLC*, 458 F. App'x 689, 690 (9th Cir. 2011) (affirming dismissal of false advertising lawsuit that "def[ied] common sense"); *Videtto v. Kellogg USA*, No. 08-01324, 2009 WL 1439086, at *4 (E.D. Cal. May 21, 2009) (dismissing complaint where underlying allegations of the false advertising claim would require the court to "ignore . . . common sense"); *see generally Iqbal*, 556 U.S. at 663-64 (quoting *Twombly*, 550 U.S. at 556) ("[D]etermining whether a complaint states a plausible claim is context-specific, requiring the reviewing court to draw on its experience and common sense.")

Here, because the empty space in the Sour Patch Kids box logically serves one or more of the permissible functions outlined in the applicable regulation, Plaintiff's claims are preempted. *See O'Connor*, 2015 WL 5922183, at *5.

III. Plaintiff Fails To Plead His Claims With The Requisite Particularity.

Because the gravamen of Plaintiff's complaint is that Sour Patch Kids is deceptively packaged, Plaintiff must meet the heightened pleading requirements of Federal Rule of Civil Procedure 9(b), which requires that a plaintiff "state with particularity the circumstances constituting fraud." *See Welch v. TD Ameritrade Holding Corp.*, No. 07-6904, 2009 WL 2356131, at *26 (S.D.N.Y. July 27, 2009) (finding that the heightened Rule 9(b) pleading requirements apply to claims premised on fraudulent conduct). To satisfy Rule 9(b)'s particularity requirement, a pleading must "specify the who, what, where, when[,] and why of the alleged fraud; specifying which statements were [purportedly] fraudulent and why, who made the statements to whom, and when and where the statements were made." *In re Ford Fusion & C-Max Fuel Econ. Litig.*, No. 13-2450, 2015 WL 7018369, at *12 (S.D.N.Y. Nov. 12, 2015) (citation omitted).

Plaintiff has not met these pleading requirements. The complaint contains no specific information about *where* he purchased the Sour Patch Kids box, aside from an unidentified "AMC movie theater in New York County" Dkt. 1 ¶ 21. The complaint also contains no information about *when* Plaintiff purchased the product at issue. The complaint should therefore be dismissed for failure to satisfy Rule 9(b).

IV. Plaintiff Lacks Standing To Seek Injunctive Relief Under Section 349.

To establish Article III standing for a claim seeking injunctive relief, a plaintiff must show "a real and immediate — as opposed to a merely conjectural or hypothetical — threat of *future* injury." *Grella v. Avis Budget Grp., Inc.*, No. 14-8273, 2016 WL 638748, at *4 (S.D.N.Y. Feb. 11, 2016) (citation omitted). In other words, "[a]bsent a sufficient likelihood that [they] will again be wronged in a similar way," plaintiffs lack constitutional standing to seek injunctive

relief. *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983); *see also Pungitore v. Barbera,* 506 F. App'x 40, 41 (2d Cir. 2012).

Here, Plaintiff alleges no threat of future harm. To the contrary, Plaintiff admits that he will not purchase Sour Patch Kids in the future unless "Defendant engages in corrective advertising." Dkt. 1 ¶ 21. He further concedes that were he to "encounter the Product in the future, he could not rely on the truthfulness of the packaging." *Id.* Without a "real and immediate . . . threat of *future* injury," Plaintiff's claim for injunctive relief must be dismissed. *Grella*, 2016 WL 638748, at *4 (citation omitted).

V. Plaintiff's Section 349 Claim Must Be Dismissed For Failure To Allege Injury.

A plaintiff establishes statutory standing under Section 349 by "claiming that he paid a premium for a product based on the allegedly misleading representations." *Hidalgo v. Johnson & Johnson Consumer Cos.*, 148 F. Supp. 3d 285, 295 (S.D.N.Y. 2015) (citation omitted). Here, Plaintiff hinges his price premium allegations — and thus his claim of injury under Section 349 — on the price difference between the Sour Patch Kids box sold at AMC Theaters, and Hot Tamales and Junior Mints sold at, respectively, Jet.com and Walmart.com. Dkt. 1 ¶ 57. Plaintiff's allegations fail to establish statutory injury for several reasons.

First, a price differential between products can only serve as evidence of a price premium resulting from allegedly misleading packaging when the competing product does not suffer from the same alleged infirmity as the challenged product. *See, e.g.*, *Hidalgo v. Johnson & Johnson Consumer Companies, Inc.*, 148 F. Supp. 3d 285, 290 (S.D.N.Y. 2015) (the plaintiff adequately alleged injury under Section 349 by claiming that the defendant's Bedtime Products, which were labeled as "clinically proven" to help babies sleep better, were sold at a premium of at least 25% over the defendant's baby products sold without the relevant claim); *Ebin v. Kangadis Food Inc.*, No. 13-2311, 2013 WL 6504547, at *1-5 (S.D.N.Y. Dec. 11, 2013) (the plaintiff adequately alleged injury under Section 349 by claiming that the defendant's "100% Pure Olive Oil" was actually pomace oil being sold at a higher price than a competing product labeled as "pomace").

Here, however, Plaintiff has alleged no facts to suggest that Hot Tamales and Junior Mints are packaged *without* non-functional slack-fill. For this reason, the proffered comparison cannot establish injury under Section 349.

Second, Plaintiff's attempt to assign significance to the price differential between candy purchased at a movie theater, and candy purchased from low-cost online retailers, must be rejected. It is widely known that candy is significantly more expensive at movie theater concession stands than almost anywhere else.[9] Thus, Plaintiff has pled only a *movie theater markup*, which is simply an artifact of *where* the product was purchased — it provides no support for the existence of a price premium based on the product packaging.

Third, Plaintiff has not provided any details showing that Sour Patch Kids is comparable to Junior Mints or Hot Tamales.

Finally, Plaintiff has not alleged that he received less than the 3.5 ounces of candy he was promised. *Lazaroff v. Paraco Gas Corp.*, 967 N.Y.S.2d 867, 2011 WL 9962089 (N.Y. Sup. Ct. Kings Cty., Feb. 25, 2011) is instructive here. *Lazaroff* involved a 20-pound capacity propane cylinder with a plastic cap that read "FULL." *Id.* at *1. The cylinder contained only 15 pounds of propane, and the plaintiff alleged that he consequently paid a higher price per pound of propane than he would have if the cylinder were full. *Id.* at *2. Although each cylinder had a label indicating the accurate amount of propane inside, the label was hidden by a mesh metal cage that the cylinder was kept in and removed only after the plaintiff purchased the product, and therefore "not conspicuous for the average consumer." *Id.* at *4-5. The court found that the plaintiff adequately alleged an injury under Section 349. *Id.* at *6. Here, Plaintiff does not allege that the net weight disclosure on the Sour Patch Kids box was obscured in any way. He was on notice that he was purchasing 3.5 ounces of candy. Because Plaintiff has not adequately alleged a price premium, his Section 349 claim must be dismissed.

[9] As noted above, Courts regularly apply common sense to dispose of claims at the pleading stage. *See supra* at n.8 and authorities cited therein.

VI. The Negligent Misrepresentation Claim Is Barred By The Economic Loss Doctrine.

Under the economic loss doctrine, a plaintiff who has "suffered economic loss, but not personal or property injury," may not recover in tort "[i]f the damages are the type remedial in contract." *Weisblum v. Prophase Labs, Inc.*, 88 F. Supp. 3d 283, 297 (S.D.N.Y. 2015) (citation and internal quotation marks omitted)*; see also Elkind v. Revlon Consumer Prods. Corp.*, No. 14-2484, 2015 WL 2344134, at *12 (E.D.N.Y. May 14, 2015) (dismissing negligent misrepresentation claim pursuant to the economic loss doctrine); *Cherny v. Emigrant Bank*, 604 F. Supp. 2d 605, 609 (S.D.N.Y. 2009) (same). Here, because Plaintiff alleges no damages beyond pure economic loss, his negligent misrepresentation claim must be dismissed.

Plaintiff attempts to sidestep the economic loss doctrine by alleging a "special relationship" with Mondelēz Global. Dkt. 1 ¶ 93. While a special relationship can serve as an exception to the economic loss doctrine, courts have found that "[t]o allege a special relationship, [the plaintiff] must establish something beyond an ordinary arm's length transaction." *Segedie v. Hain Celestial Grp., Inc.*, No. 14-5029, 2015 WL 2168374, at *14 (S.D.N.Y. May 7, 2015) (citing *Nautright v. Weiss*, 826 F. Supp. 2d 676, 688 (S.D.N.Y. 2011)). Moreover, the "obligation to label products truthfully does not arise from any special relationship." *Id.* As Plaintiff has not pled facts to establish that his purchase of the Sour Patch Kids box was anything other than a routine commercial transaction, he cannot circumvent the economic loss rule.

VII. Plaintiff's Unjust Enrichment Claim Is Impermissibly Duplicative.

An unjust enrichment claim "is not available where it simply duplicates, or replaces, a conventional contract or tort claim." *Corsello v. Verizon N.Y., Inc.*, 18 N.Y.3d 777, 790 (2012) (citation omitted). Rather, it is viable only in "unusual situations when, though the defendant has not breached a contract nor committed a recognized tort, circumstances create an equitable obligation running from the defendant to the plaintiff." *Id.* New York courts regularly dismiss unjust enrichment claims as duplicative when they are based on the same factual allegations as other tort claims. *See, e.g., Ebin v. Kangadis Food Inc.*, No. 13-2311, 2013 WL 6504547, at *7

(S.D.N.Y. Dec. 11, 2013) (dismissing unjust enrichment claim where "plaintiffs have failed to explain how their unjust enrichment claim is not merely duplicative of their other causes of action"); *In re Ford Fusion,* 2015 WL 7018369, at *39 ("Plaintiffs have failed to show how their unjust enrichment claim differs from [their] ... tort claims[,] which seek relief from the same conduct, and therefore it must be dismissed under New York law.") (citation and internal quotation marks omitted); *Hidalgo*, 148 F. Supp. 3d at 298 (same).

Here, Plaintiff's unjust enrichment claim is based on the same allegations supporting the other tort claims asserted in the complaint. *See* Dkt. 1 ¶ 110 ("Plaintiff[] reallege[s] and incorporate[s] herein by reference the allegations contained in all preceding paragraphs . . . "). Accordingly, the unjust enrichment claim must be dismissed.

VIII. The Nationwide Class Must Be Stricken As A Matter Of Law.

In the event the complaint is not dismissed, the nationwide class allegations must be stricken. A defendant may properly "move to strike class action allegations prior to discovery" where "the complaint itself demonstrates that the requirements for maintaining a class action cannot be met." *Clark v. McDonald's Corp.*, 213 F.R.D. 198, 205 n.3 (D.N.J. 2003); *see also Sanders v. Apple Inc.*, 672 F. Supp. 2d 978, 990 (N.D. Cal. 2009) (granting motion to strike class claims); *Semenko v. Wendy's Int'l, Inc.*, No. 12-0836, 2013 WL 1568407, at *11 (W.D. Pa. Apr. 12, 2013) (same).[10] Pursuant to Federal Rule of Civil Procedure 12(f), moreover, a party may move to strike from a pleading "any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f). Here, the plain language of Section 349, in addition to New York's choice-of-law rules, preclude Plaintiff from pursuing his statutory and common law claims on behalf of a nationwide class. Dkt. 1 ¶ 59.

First, any attempt by Plaintiff to pursue Section 349 claims on behalf of a nationwide class fails as a matter of law, as that statute applies only to conduct occurring within the state of

[10] *See also Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 160 (1982) (recognizing that "sometimes the [class] issues are plain enough from the pleadings to determine whether the interests of absent parties are fairly encompassed within the named plaintiff's claim").

New York. *See* N.Y. Gen. Bus. Law § 349 (emphasis added) ("Deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service *in this state* are hereby declared unlawful."); *see also Szymczak v. Nissan N. Am., Inc.*, No. 10-7493, 2011 WL 7095432, at *12 (S.D.N.Y. Dec. 16, 2011) (dismissing Section 349 claims of plaintiffs in a putative class action when they did not purchase the product at issue in New York because the statute "do[es] not apply to transactions occurring outside the state."). Plaintiff does not allege (and there is no reason to believe) that the putative nationwide class members purchased the Sour Patch Kids box anywhere other than their home states. Thus, Section 349 is inapplicable to the nationwide class claims.

Second, New York's choice-of-law rules prevent Plaintiff from pursuing his remaining common law claims on behalf of a nationwide class. Under New York's interest analysis, the law of the state with "the greatest interest in the litigation" is applied to the claims. *Lewis Tree Serv., Inc. v. Lucent Techs. Inc.*, 211 F.R.D. 228, 236 (S.D.N.Y. 2002) (citing *Lee v. Bankers Trust Co.*, 166 F.3d 540, 545 (2d Cir. 1999)). This typically requires application of the law of the place of the tort. *Id.* Here, because the alleged misrepresentations to the nationwide class members took place in each of the fifty states, the substantive law of each state must be applied to Plaintiff's claims. However, the common law of unjust enrichment, negligent misrepresentation, and fraud varies materially from state to state. *Id.* In the face of such variation and lack of uniformity, courts have found that "a single nationwide class is not manageable," and "common issues of law cannot predominate over those affecting individual members of the class." *Id; see also In re Rezulin Prods. Liab. Litig.*, 210 F.R.D. 61, 71 (S.D.N.Y. 2002) (finding that "individual issues arising by virtue of the multiplicity of varying state laws predominated over the common issues" when the choice of law rules dictated that the laws of all or substantially all 50 states had to be applied to the class members' claims). The same rule applies here.

Although the viability of class allegations is often resolved at the class certification stage, "[c]ourts, nonetheless, can address this [issue] in response to a Rule 12(b)(6) motion" and have stricken class allegations at the pleading stage. *Szymczak*, 2011 WL 7095432, at *12.[11]

CONCLUSION

For the foregoing reasons, Mondelēz Global and Mondelēz International LLC respectfully requests that the Court dismiss the complaint in its entirety or, in the alternative, strike the nationwide class allegations.

Dated: August 29, 2016

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By: /s Kenneth K. Lee

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[11] *See also, e.g., Davison v. Kia Motors Am., Inc.*, No. 15-00239, 2015 WL 3970502, at *2-3 (C.D. Cal. June 29, 2015) (dismissing with prejudice plaintiff's California statutory consumer protection nationwide class claims at the motion to dismiss stage); *Advanced Acupuncture Clinic, Inc. v. Allstate Ins. Co.*, No. 07-4925, 2008 WL 4056244, at *11 (D.N.J. Aug. 26, 2008) (finding that the plaintiffs' class allegations must be stricken from the complaint because "the class potentially includes plaintiffs from each of the fifty states, [and] fifty different state laws could apply . . . , rendering the class action unmanageable."); *Cooper v. Samsung Elecs. Am., Inc.,* 374 Fed. App'x. 250, 255 n. 5 (3d Cir. 2010) (affirming the district court's decision to resolve the choice-of-law determination regarding the plaintiff's statutory consumer fraud claim at the motion to dismiss stage).