UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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ASHLEY PELMAN, a child under the age of 18 years, by her Mother and Natural Guardian ROBERTA PELMAN, ROBERTA PELMAN, Individually, JAZLYN BRADLEY, a child under the age of 18 years, by her Father and Natural Guardian ISRAEL BRADLEY, and ISRAEL BRADLEY, Individually,

Plaintiffs,

- against -

McDONALD'S CORPORATION,

Defendant.

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02 Civ. 7821 (RWS)

O P I N I O N

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Sweet, D.J.,

Defendant McDonald's Corporation ("McDonald's") has moved pursuant to Rule 12(b)(6) to dismiss the amended complaint of plaintiffs Ashley Pelman, Roberta Pelman, Jazlyn Bradley and Israel Bradley. The plaintiffs have cross-moved for partial summary judgment.

For the reasons set forth below, the motion to dismiss by McDonald's is granted and the motion for partial summary judgment by plaintiffs is denied. Leave to amend the complaint is denied.

Prior Proceedings

The plaintiffs commenced suit by filing their initial complaint on August 22, 2002 in the State Supreme Court of New York, Bronx County. Defendants removed the action to the Southern District of New York on September 30, 2002. By opinion of January 22, 2003, this Court dismissed the original complaint, but granted leave to amend the complaint within 30 days in order to address the deficiencies listed in the opinion. See Pelman v. McDonald's Corp., 237 F. Supp.2d 512 (S.D.N.Y. 2003).

On February 19, 2003, plaintiffs filed an amended complaint. McDonald's filed a motion to dismiss the amended complaint on April 14, 2003. On May 16, 2003, plaintiffs cross-

moved for summary judgment and in opposition to the motion. After submission of briefs, oral argument on both motions was held on June 25, 2003, and the motions were considered fully submitted at that time.

Facts

As befits a motion to dismiss, the following facts are drawn from the allegations in the complaint and do not constitute findings of fact by the Court.

Parties

Ashley Pelman, a minor, and her mother and natural guardian Roberta Pelman are residents of the Bronx, New York.

Jazlyn Bradley, a minor, and her father and natural guardian Israel Bradley are residents of New York, New York.

The infant plaintiffs are consumers who have purchased and consumed the defendant's products in New York State outlets and, as a result thereof, such consumption has been a significant or substantial factor in the development of their obesity, diabetes, coronary heart disease, high blood pressure, elevated cholesterol intake, and/or other detrimental and adverse health effects and/or diseases.

Defendant McDonald's Corporation is a Delaware corporation with its principal place of business in Oak Brook, Illinois. It does substantial business with outlets in the State of New York, as well as throughout the fifty States and the world.

McDonald's Advertising Campaigns

In one survey of the frequency of purchases by visitors to McDonald's restaurants, McDonald's found that 72% of its customers were "Heavy Users," meaning they visit McDonald's at least once a week, see Amended Compl., Exh. E, p. 45 (trial testimony of David Green, McDonald's U.S. Vice-President of Marketing), and that approximately 22% of its customers are "Super Heavy Users," or "SHUs," meaning that they eat "at McDonald's ten times or more a month." Id. at 43. Super Heavy Users make up approximately 75% of McDonald's sales. Many of McDonald's advertisements, therefore, are designed to increase the consumption of Heavy Users or Super Heavy Users. The plaintiffs allege that to achieve that goal, McDonald's engaged in advertising campaigns which represented that McDonald's foods are nutritious and can easily be part of a healthy lifestyle.

Advertising campaigns run by McDonald's from 1987 onward claimed that it sold "Good basic nutritious food. Food that's been the foundation of well-balanced diets for generations. And will be for generations to come." Amended Compl. ¶ 44(B)(1) (quoting

McDonald's advertisement, Exh. G-3). McDonald's also represented that it would be "easy" to follow USDA and Health and Human Services guidelines for a healthful diet "and still enjoy your meal at McDonald's." Id. at § 44(B)(3) (quoting McDonald's advertisement, Exh. G-7). McDonald's has described its beef as "nutritious" and "leaner than you think." Id. at ¶ 44(E)(1) (quoting McDonald's advertisement, Exh. G-15). And it has described its french fries as "well within the established guidelines for good nutrition." Id. at ¶ 44(F)(1) (quoting McDonald's advertisement, Exh. G-17).

While making these broad claims about its nutritious value, McDonald's has declined to make its nutrition information readily available at its restaurants. In 1987, McDonald's entered into a settlement agreement with the New York State Attorney General in which it agreed to

> provide [nutritional] information in easily understood pamphlets or brochures which will be free to all customers so they could take them with them for further study [and] to place signs, including in-store advertising to inform customers who walk in, and drive through information and notices would be placed where drive-through customers could see them.

Id. at ¶ 41. Despite this agreement, the plaintiffs have alleged that nutritional information was not adequately available to them for inspection upon request. Id. at ¶ 42.

Claims

In the amended complaint, the plaintiffs alleged four causes of action as members of a putative class action of minors residing in New York State who have purchased and consumed McDonald's products. Shortly before oral argument, however, the plaintiffs informed the Court that they are dropping their fourth cause of action, which alleged negligence by McDonald's because of its failure to warn plaintiffs of the dangers and adverse health effects of eating processed foods from McDonald's.

The three remaining causes of action are based on deceptive acts in practices in violation of the Consumer Protection Act, New York General Business Law §§ 349 and 250. Count I alleges that McDonald's misled the plaintiffs, through advertising campaigns and other publicity, that its food products were nutritious, of a beneficial nutritional nature or effect, and/or were easily part of a healthy lifestyle if consumed on a daily basis. Count II alleges that McDonald's failed adequately to disclose the fact that certain of its foods were substantially less healthier, as a result of processing and ingredient additives, than represented by McDonald's in its advertising campaigns and other publicity. Count III alleges that McDonald's engaged in unfair and deceptive acts and practices by representing to the New York Attorney General and to New York consumers that it provides nutritional brochures and information at all of its stores when in

fact such information was and is not adequately available to the plaintiffs at a significant number of McDonald's outlets.

The plaintiffs allege that as a result of the deceptive acts and practices enumerated in all three counts, they have suffered damages including, but not limited to, an increased likelihood of the development of obesity, diabetes, coronary heart disease, high blood pressure, elevated cholesterol intake, related cancers, and/or detrimental and adverse health effects and/or diseases.

Discussion

I. The Motion to Dismiss Standard

In reviewing a Rule 12(b)(6) motion, courts must "accept as true the factual allegations made in the complaint and draw all inferences in favor of the pleader." Grandon v. Merrill Lynch & Co. Inc., 147 F.3d 184, 188 (2d Cir. 1998) (citing Mills v. Polar Molecular Corp., 12 F.3d 1170, 1174 (2d Cir. 1993)). However, "legal conclusions, deductions or opinions couched as factual allegations are not given a presumption of truthfulness." Ying Jing Gan v. City of New York, 996 F.2d 522, 534 (2d Cir. 1993) (quoting Moore's Federal Practice ¶ 12.07[2.-5], at 12-63 to 12-64 (2d ed. 1993)). The complaint may only be dismissed when "it appears beyond doubt that the plaintiff can prove not set of facts

in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1956); see also Desiano v. Warner-Lambert Co., 326 F.3d 339, 347 (2d Cir. 2003).

Review must be limited to the complaint and documents attached or incorporated by reference thereto. Kramer v. Time Warner, Inc., 937 F.2d 767, 773 (2d Cir. 1991). In this context, the Second Circuit has held that a complaint is deemed to include ". . . documents that the plaintiffs either possessed or knew about and upon which they relied in bringing the suit." Rothman v. Gregor, 220 F.3d 81, 88 (2d Cir. 2000).

Plaintiffs, however, in their opposition papers rely on facts outside the pleading. The Court of Appeals has made clear that where a District Court is provided with materials outside the pleadings in the context of a 12(b)(6) motion to dismiss, it has two options: the court may exclude the additional materials and decide the motion on the complaint alone or convert the motion to one from summary judgment under Fed. R. Civ. P. 56 and afford all parties the opportunity to present supporting material. Fed. R. Civ. P. 12(b). Kopec v. Coughlin, 922 F.2d 152, 154 (2d Cir. 1991) (quoting Fonte v. Board of Managers of Continental Towers Condominium, 848 F.2d 24, 25 (2d Cir. 1988)). The Court has not converted this motion to one for summary judgment and thus will not consider statements outside the pleadings in reaching its holding.

Counts I, II and III: Plaintiffs Fail to State a Claim Pursuant to N.Y. GBL §§ 349 and 350

Counts I, II and III allege that McDonald's violated the New York Consumer Protection Act, N.Y. Gen. Bus. Law §§ 349 and 350, by (1) misleading the plaintiffs into believing that its food products "were nutritious, of a beneficial nature/effect, and/or easily part of a healthy lifestyle if consumed on a daily basis. . ." (Compl. ¶ 59); (2) failing adequately to disclose the fact that certain of its foods "were substantially less healthier (as a result of processing and ingredient additives)" than represented by McDonald's in its advertising campaigns and other publicity. Id., ¶ 65; and (3) representing to the New York Attorney General and to New York consumers "that it provides nutritional brochures and information at all of [its] stores, when in fact, such information was/is not adequately available" to the plaintiffs at a significant number of McDonald's outlets. Id., ¶ 70.

Section 349 of New York General Business Law makes 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." N.Y. Gen. Bus. Law § 349(a).[1] Section 350 prohibits

[1] As indicated by the statute's "expansive" language, section 349 was intended to be broadly applicable, extending far beyond the reach of common law fraud. Blue Cross and Blue Shield of New Jersey, 178 F. Supp.2d at 230-31 (upholding claim under section 349 that tobacco companies engaged in scheme to distort public knowledge concerning risks of smoking); Gaidon v. Guardian Life Ins. Co. of Am., 94 N.Y.2d 330, 343, 704 N.Y.S.2d 177, 182, 725

"[f]alse advertising in the conduct of any business." N.Y. Gen. Bus. Law § 350. To state a claim for deceptive practices under either section, a plaintiff must show: (1) that the act, practice or advertisement was consumer-oriented; (2) that the act, practice or advertisement was misleading in a material respect, and (3) that the plaintiff was injured as a result of the deceptive practice, act or advertisement. E.g., Stutman v. Chem. Bank, 95 N.Y.2d 24, 29, 709 N.Y.S.2d 892, 731 N.E.2d 608 (2000); St. Patrick's Home for Aged and Infirm v. Laticrete Intern., Inc., 264 A.D.2d 652, 655, 696 N.Y.S.2d 117, 122 (1st Dep't 1999); BNI NY Ltd. v. DeSanto, 177 Misc. 2d 9, 14, 675 N.Y.S.2d 752, 755 (N.Y. City Ct. 1998). See also Berrios v. Sprint Corp., 1998 WL 199842, at *3 (E.D.N.Y. March 16, 1998). The standard for whether an act or practice is misleading is objective, requiring a showing that a reasonable consumer would have been misled by the defendant's conduct. Marcus v. AT&T, 138 F.3d 46, 64 (2d Cir. 1998); Oswego Laborers v. Marine Midland Bank, 85 N.Y.2d 20, 26, 623 N.Y.S.2d 529, 533 (1995). Omissions, as well as acts, may form the basis of a deceptive practices claim. Stutman, 95 N.Y.2d at 29 (citing Oswego Laborers, 85 N.Y.2d at 26 (delineating different inquiry in case of claim of deceit by omission)). Further, traditional showings of reliance

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N.E.2d 598, 603 (1999) ("In contrast to common-law fraud, General Business Law § 349 is a creature of statute based on broad consumer-protection concerns."); Karlin v. IVF Am., Inc., 93 N.Y.2d 282, 291, 690 N.Y.S.2d 495, 498, 712 N.E.2d 662, 665 (1999) ("The reach of th[is] statut[e] 'provide[s] needed authority to cope with the numerous, ever-changing types of false and deceptive business practices which plague consumers in our State.'") (quoting N.Y. Dept. of Law, Mem. to Governor, 1963 N.Y. Legis. Ann., at 105).

and scienter are not required under § 349. Blue Cross and Blue Shield of New Jersey, Inc. v. Philip Morris, Inc., 178 F. Supp.2d 198, 231 (E.D.N.Y. 2001) (Weinstein, J.).

McDonald's argues that plaintiffs' claims under §§ 349 and 350 fail because (1) each of the alleged misrepresentations fall outside of the applicable statute of limitations; (2) plaintiffs do not allege that they saw the alleged misrepresentations; (3) the plaintiffs fail to allege that any particular alleged misrepresentation caused any injury; and (4) the alleged misrepresentations are either not deceptive or are nonactionable puffery.

The Statute of Limitations Bars All Claims Except for Those of the Infant Plaintiffs

In reviewing plaintiffs' initial complaint, the Court considered allegations that related to actions taken against McDonald's advertising practices in the late 1980's by state attorney generals from several states, including New York State. At that time, this Court noted that "a review of those advertisements and that state attorney general's analysis of them may assist plaintiffs in shaping a claim." Pelman, 237 F. Supp.2d at 528. But the Court also warned that "any claim based on the advertisements would likely be time barred." Id. (citing Morelli v. Weider Nutrition Group, Inc., 275 A.D.2d 607, 608, 712 N.Y.S.2d 551

(1st Dept. 2000) (three-year limitations period for deceptive practices actions)). Despite that warning, plaintiffs have submitted several allegedly deceptive advertisements, promotions and statements that date from those same investigations.

Plaintiffs allege in their complaint that the advertisements that were the subject of the investigation were never "removed or terminated although requested by the New York State Attorney General . . . and that said advertisements continued for several years." (Amended Compl. ¶ 40). However, that statement is immediately followed by a 1994 statement by David Green, the Vice-President of Marketing for McDonald's, who testified at a trial in the United Kingdom that following the investigation, "we continued the campaign for not only a number of months but for a few years." Id. Green's use of the past tense that the campaign had ended by 1994, well outside of the statute of limitations period for a complaint filed in 2002.

Plaintiffs argue that McDonald's was engaged in a scheme of continuing deceptive practices, and that the statute of limitations is therefore tolled upon each successive deceptive statement in furtherance of the overall scheme. The "continuing practice" exception to which plaintiffs refer has been "long described as disfavored by the Second Circuit," De La Fuente v. DCI Telecomms., 259 F. Supp.2d 250, 267 n.12 (S.D.N.Y. 2003), and is

"not recognized" outside of the employment discrimination context. Id. at 266.

Plaintiffs also argue that the statute of limitations is tolled by the "separate accrual rule" the Second Circuit has adopted for RICO claims. See In re Merrill Lynch Ltd. Partnerships Litig., 154 F.3d 56, 59 (2d Cir. 1998) (per curiam); Bingham v. Zolt, 66 F.3d 553, 559 (2d Cir. 1995). Under the separate accrual rule for civil RICO actions, "a new claim accrues, triggering a new four-year limitations period, each time a plaintiff discovers, or should have discovered, a new injury caused by the predicate RICO violations." Bingham, 66 F.3d at 559. The separate accrual rule has recently been extended to section 349 claims. See Blue Cross, 178 F. Supp.2d at 272.

Plaintiffs cannot take advantage of the special accrual rule, however, because they have failed to allege that new injuries have taken place within the limitations period. Instead, plaintiffs have alleged only that by continuing to purchase and consume McDonald's food, plaintiffs' "respective injuries also continue[d] to accrue, thereby triggering a new limitations period each time a plaintiffs' added injury [was] manifested (additional weight gain, diabetes, heart disease) [that was] caused by the predicate violations." Pl. Opp. Mem. at 37. Additional injuries that are an outgrowth of the initial injury are insufficient to toll the statute of limitations. See Bingham, 66 F.3d at 558-560

(injuries must be "separate and independent" in order to toll statute of limitations under separate accrual rule); Bankers Trust Co. v. Rhoades, 859 F.2d 1096, 1103 (2d Cir. 1988) (a civil RICO claim accrues each time "a new and independent injury is incurred from the same violation"). Because any additional weight gain or other injuries that may be suffered by plaintiffs are not independent of initial injury to the plaintiffs -- obesity -- the statute of limitations is not tolled under the separate accrual rule.

Plaintiffs further argue that the statute of limitations should be tolled under the "diligence-discovery accrual rule." Under this rule, "accrual may be postponed until the plaintiff has or with reasonable diligence should have discovered the critical facts of both his injury and its cause." Corcoran v. New York Power Auth., 202 F.3d 530, 544 (2d Cir. 1999). However, discovery of the critical facts of injury and causation

> requires only knowledge of, or knowledge that could lead to, the basic facts of the injury, i.e., knowledge of the injury's existence and knowledge of its cause or of the person or entity that inflicted it ... A plaintiff need not know each and every relevant fact of his injury or even that the injury implicates a cognizable legal claim. Rather, a claim will accrue when the plaintiff knows, or should know, enough of the critical facts of injury and causation to protect himself by seeking legal advice.

Id. (ellipses in original) (quoting Kronisch v. United States, 150 F.3d 112, 121 (2d Cir. 1998)). This Court has previously held that

"[i]t is well-known that fast food in general, and McDonald's products in particular, contain high levels of cholesterol, fat, salt and sugar, and that such attributes are bad for one." Pelman, 237 F. Supp.2d at 532. The plaintiffs therefore either knew or should have known enough of the critical facts of their injury that their claims accrued upon being injured.

Lastly, plaintiffs argue that the statute of limitations is tolled due to the infancy of plaintiffs Ashley Pelman, Jazlyn Bradley, and proposed infant class members Niassa Bradley, Shakima Bradley, Julian Tawfik, Gregory Rhymes and William Scaglione. Under New York CPLR § 208, the statute of limitations for a cause of action is tolled during the period when a person is "under a disability because of infancy." For an infant plaintiff, the statute of limitations does not begin to accrue until the plaintiff reaches eighteen years old. See CPLR § 105(j); Henry v. City of New York, 94 N.Y.2d 275, 281, 724 N.E.2d 372, 702 N.Y.S.2d 580 (N.Y. 1999). The infancy toll of the statute of limitations is not terminated by acts of a guardian or legal representative who takes steps to pursue claims on the infant's behalf. See Henry, 94 N.Y.2d at 279-280.

McDonald's has responded that the infant plaintiffs were either not alive at the time of the 1987 advertisements or could not read or write. Such arguments relate to questions of reliance or causation, but do not address the infancy toll on the statute of

limitations. McDonald's has made no showing as to why the statute of limitations should not be tolled as to the infant plaintiffs.[2] The statute of limitations is therefore not a bar to the infant plaintiffs pursuing their claims. However, CPLR § 208 provides no protection to the adult plaintiffs Roberta Pelman and Israel Bradley, even though they are suing as the guardians of the infant plaintiffs. See Rosado v. Langsam Prop. Serv. Corp., 251 A.D.2d 258, 259 675 N.Y.S.2d 53 (1st Dept. 1998) ("The infant plaintiff's mother cannot claim the protection of the infancy disability toll."); Quinones v. NYRAC, 277 A.D.2d 110, 111 717 N.Y.S.2d 36, 37 (1st Dept. 2000) (same). Any claims by the adult plaintiffs based on misrepresentations made more than three years before the commencement of suit on August 22, 2002 are therefore barred by the statute of limitations.

Plaintiffs Have Successfully Stated Reliance on a Single Allegedly Deceptive Advertising Campaign

McDonald's argues that the consumer protection claims under both § 349 and § 350 must be dismissed because the plaintiffs do not "allege that any of them ever saw even one of the McDonald's statements and advertisements described in the Amended Complaint." McDonald's Mem. at 36. The plaintiffs counter that they have alleged that their misconceptions about the healthiness of

[2] Although plaintiff Jazlyn Bradley is now 19 years old, the suit on her behalf was commenced within three years after the disability of infancy ceased. Claims made on her behalf are therefore timely.

McDonald's food resulted from "a long-term deceptive campaign by Defendant of misrepresenting the nutritional benefits of their foods over last approximate [*sic*] fifteen (15) years." Pl. Opp. Mem. at 25. Plaintiffs further argue that reliance is not an element of New York GBL § 349.

Plaintiffs are correct that it is not necessary to allege reliance on defendant's deceptive practices in the context of a § 349 claim. See, e.g., F.T.C. v. Crescent Pub. Group, Inc., 129 F. Supp.2d 311, 321 n.67 (S.D.N.Y. 2001) (§ 349 imposes no requirement of justifiable reliance); Stutman, 95 N.Y.2d at 29 ("we have repeatedly stated [that] reliance is not an element of a section 349 claim"); Small v. Lorillard Tobacco Co., 252 A.D.2d 1, 7 (N.Y. App. Div. 1st Dept. 1998) ("General Business Law § 349 'does not require proof of justifiable reliance.'") (quoting Oswego Laborers, 85 N.Y.2d at 26).

To state a claim under Section 350 for false advertising, however, it is necessary to allege reliance on the allegedly false advertisement. See, e.g., Andre Strishak & Associates, P.C. v. Hewlett Packard Co., 300 A.D.2d 608, 610 (N.Y. App. Div. 2d Dept. 2002) (affirming dismissal of § 350 cause of action because "plaintiffs failed to show that they relied upon or were aware of the allegedly false advertisement when purchasing the printers."); Small, 252 A.D.2d at 8 ("individualized proof of reliance is essential to the cause[] of action for false advertising under

General Business Law § 350"); McGill v. General Motors Corp., 231 A.D.2d 449, 450 (N.Y. App. Div. 1st Dept. 1996) (same); Gershon v Hertz Corp., 215 A.D.2d 202, 203 (N.Y. App. Div. 1995) (same).[3] Further, plaintiffs are not entitled to a presumption of reliance, which would preclude making explicit allegations,

> where plaintiffs had a reasonable opportunity to discover the facts about the transaction beforehand by using ordinary intelligence ... Only when defendants effectively controlled all the information about the transaction will the existence of misrepresentations give rise to an inference of reliance without need for further proof.

Small, 252 A.D.2d at 8 (citations omitted). While plaintiffs have alleged that McDonald's has made it difficult to obtain nutritional

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[3] Plaintiffs rely on Committee on Children's Television, Inc. v. General Foods Corp., 673 P.2d 660, 668 (Cal. 1983) for the proposition that "[a]llegations of actual deception, reasonable reliance and damage are unnecessary." That decision is based entirely on California unfair competition and false advertising law. The fact that California's consumer protection statutes lack a reliance requirement does not change the settled law in New York.

McDonald's persuasively argues that the plaintiffs' reliance on Children's Television throughout their opposition brief is misplaced. First, in that decision, an unfair competition plaintiff need not have seen the advertisement, been deceived by it, or been damaged by it. See id. In New York, however, a claim under §§ 349 or 350 "must show that the defendant engaged in a material deceptive act or practice that caused actual ... harm." Oswego Laborers, 85 N.Y.2d at 26. Second, the Children's Television court applied a subjective standard to determine the deceptiveness of the advertisements. It excused the need to plead the substance of each allegedly deceptive advertisement because even with such knowledge, it would still "be difficult for judges unaided by expert testimony to determine how a three-year old would interpret that advertisement." Id. at 670. Because New York employs an objective standard of deceptiveness, see Oswego Laborers, 85 N.Y.2d at 25, such difficulties are avoided, and plaintiffs are required to plead the substance of the advertisements upon which they allegedly relied.

information about its products, see Amended Compl. ¶ 42, they have not alleged that McDonald's controlled all relevant information. Indeed, the complaint cites the complete ingredients of several McDonald's products. Amended Compl. ¶ 44(F)(7) (French fries), 44(I)(3) (Chicken McNuggets), 44(K)(2) (Fish Filet Patty). Plaintiffs are therefore required to allege reliance in order to survive a motion to dismiss.

The plaintiffs' vague allegations of reliance on a "long-term deceptive campaign" are insufficient to fulfill the reliance requirement of § 350 for otherwise unspecified advertisements. Even assuming that the specific advertisements cited by the plaintiffs would be considered deceptive, it cannot be determined that the other advertisements upon which the plaintiffs are alleged to have relied are also deceptive without citing at least one instance of such advertisements. Absent an example of an alleged false advertisement on which plaintiffs relied, the amended complaint states only a legal conclusion -- that the campaign in its entirety is deceptive -- without making a factual allegation. Such conclusory allegations are not entitled to a presumption of truthfulness. See Ying Jing Gan, 996 F.2d at 534. The rationale behind this doctrine is that the defendants must be given sufficient notice to have the opportunity to challenge the alleged deceptiveness of particular advertisements. Plaintiffs must therefore enumerate the allegedly deceptive practices along with

plaintiffs' reliance thereon, rather than merely asserting their deceptiveness.

Plaintiffs argue that it would be impracticable to require each of the tens of thousands of potential class members to state exactly when and where they observed the deceptive advertisements. Before a class has been certified, however, the number of infant plaintiffs is only two, making the task much more manageable. It is true that it would be unduly burdensome for plaintiffs, at this stage, to allege the particular time and place that they saw the advertisements which allegedly caused their injuries. It will therefore be considered sufficient for plaintiffs to allege in general terms that plaintiffs were aware of the false advertisement, and that they relied to their detriment on the advertisement.

Nowhere in the amended complaint is it explicitly alleged that plaintiffs witnessed any of the allegedly false advertisements cited. In one instance, plaintiffs do allege that despite McDonald's representations that "nutritional brochures are/were available in every store for New York consumers," such "information was not adequately available to the Plaintiff consumers at a significant number of the Defendant's New York stores for inspection upon request." Amended Compl. ¶¶ 42, 42.[4] However,

[4] The amended complaint contains a second paragraph 42 between paragraphs 43 and 44.

this allegation is made "upon information and belief," id., despite that fact that the details about plaintiffs' visits to McDonald's and requests for brochures are uniquely within the plaintiffs' knowledge. Allegations made upon information and belief are insufficient to support a cause of action under New York's consumer protection laws. See Weaver v. Chrysler Corp., 172 F.R.D. 96, 100 (S.D.N.Y. 1997); Tinlee Enters., Inc. v. Aetna Cas. & Sur. Co., 834 F. Supp. 605, 610 (E.D.N.Y. 1993). Another allegation that the 2002 advertising campaign with the slogans "McChicken Everyday!" and "Big N' Tasty Everyday!" imparted to the plaintiffs the belief "that Defendant's foods are nutritious, healthy, and can be consumed every day without incurring any detrimental health effects," Amended Compl. at ¶¶ 44(L)(8), 44(L)(9), is also made upon information and belief and cannot support a consumer protection law claim.

Making all reasonable inferences in favor of the plaintiffs, the complaint implicitly alleges only one instance in which the infant plaintiffs were aware of allegedly false advertisements. The plaintiffs implicitly allege that they were aware of McDonald's national advertising campaign announcing that it was switching to "100 percent vegetable oil" in its French fries and hash browns, and that McDonald's fries contained zero milligrams of cholesterol, when they claim that they "would not have purchased or consumed said french fries or hash browns, or purchased and consumed in such quantities," had McDonald's

disclosed the fact that these products "contain beef or extracts and trans fatty acids." Amended Compl. ¶ 44(F)(8).[5]

The complaint also includes a statement applicable to all of the plaintiffs' claims that the plaintiffs "would not have purchased and/or consumed the Defendant's aforementioned products, in their entirety, or [with] such frequency but for the aforementioned alleged representations and campaigns made by Defendant." Id. at ¶ 47. This statement is sufficient to allege reliance on the alleged misrepresentation listed above for purposes of section 350.

Plaintiffs Have Failed to Allege that Consumption of McDonald's Food Caused Their Injuries

The most formidable hurdle for plaintiffs is to demonstrate that they "suffered injury as a result of the deceptive act." Smith v. Chase Manhattan Bank USA, N.A., 293 A.D.2d 598, 599, 741 N.Y.S.2d 100, 102 (App. Div. 2d Dep't 2002). McDonald's argues that plaintiffs have failed to allege that any particular deceptive act caused any injury. The plaintiffs reply that they have alleged numerous injuries that have resulted from McDonald's

[5] Many of the allegations related to the nutritional content of McDonald's french fries are also made upon information and belief. However, plaintiff has included examples of such advertisements in the amended complaint. More importantly, the allegations concerning the plaintiffs -- that they would not have otherwise consumed french fries in such quantities -- is not made upon information and belief.

deceptive practices, and that statistical sampling may be used to establish causation.

Causation under New York's Consumer Protection Act differs from proximate cause as applied under the common law. See Blue Cross, 178 F. Supp.2d at 241 ("Cases in consumer fraud expand the reach of proximate causation . . . Causation is thus more broadly construed to carry out state policy against fraud on consumers.") It would therefore be inappropriate to apply the standard from plaintiffs' voluntarily dismissed negligence action to the statutory claims. The plaintiffs need not "establish that the defendant's conduct was a substantial cause in bringing about the harm." Pelman, 237 F. Supp.2d at 538 (emphasis added). Nevertheless, "[t]he causation element is essential: 'The plaintiff . . . must show that the defendant's material deceptive act caused the injury.'" Petitt v. Celebrity Cruises, Inc., 153 F. Supp.2d 240, 266 (S.D.N.Y. 2001) (quoting Stutman, 95 N.Y.2d at 29). In Petitt, the district court first dismissed the plaintiff's negligence claim under the more rigorous standard of proximate causation, and then dismissed the statutory claims because "plaintiffs are unable to show that Celebrity's actions resulted in such injuries, directly or indirectly." Id.

The causation requirement is also distinct from the reliance requirement. As explained by the New York Court of Appeals,

> Reliance and causation are twin concepts, but they are not identical. In the context of fraud, they are often intertwined... . But there is a difference between reliance and causation, as illustrated by the facts of this case. Here, plaintiffs allege that because of defendant's deceptive act, they were forced to pay a $275 fee that they had been led to believe was not required. In other words, plaintiffs allege that defendant's material deception caused them to suffer a $275 loss. This allegation satisfies the causation requirement. Plaintiffs need not additionally allege that they would not otherwise have entered into the transaction. Nothing more is required.

Stutman, 95 N.Y.2d at 30. The absence of a reliance requirement effectively allows plaintiffs to allege a deceptive practice and then to show some connection between that practice and the injury without having to allege specifically that the individual plaintiff was deceived or that the deception was the only reason that the plaintiff purchased the product or, as in the present case, purchased it as frequently as they did.

The absence of a reliance requirement does not, however, dispense with the need to allege some kind of connection between the allegedly deceptive practice and the plaintiffs' injuries. If a plaintiff had never seen a particular advertisement, she could obviously not allege that her injuries were suffered "as a result" of that advertisement. Excusing the reliance requirement only allows the plaintiff to forgo the heightened pleading burden that is necessary for common law fraud claims. It cannot, however, create a causal connection between a deceptive practice and a plaintiff's injury where none has been alleged. Accordingly, this

Court required that to state a claim under § 349 in an amended complaint, plaintiffs would "have to set forth grounds to establish . . . that they suffered some injury as a result of that particular promotion." Pelman, 237 F. Supp.2d at 530.

Although proceeding under a different standard, the proximate cause analysis undertaken by this Court in considering the initial complaint demonstrates that the amended complaint fails even to allege the more relaxed level of causation needed to state a claim under section 349.

As discussed above, plaintiffs have successfully alleged that they were witness to only one instance of deceptive acts or practices: the various representations by McDonald's that its French fries and hash browns are made with 100% vegetable oil and/or are cholesterol-free, whereas they are actually cooked and processed in beef tallow. Assuming for the purposes of the causation analysis that these acts are deceptive, and granting all inferences in the plaintiffs' favor, the plaintiffs have stated, albeit just barely, a causal connection between the deceptive acts and the plaintiffs' decisions to consume McDonald's food, or to consume it more frequently than they would have otherwise.

Plaintiffs have failed, however, to draw an adequate causal connection between their consumption of McDonald's food and their alleged injuries. This Court noted that the original

complaint did not adequately allege the causation of plaintiffs' injuries because it did "not specify how often the plaintiffs ate at McDonald's." Pelman, 237 F. Supp.2d at 538. In terms of causation, "the more often a plaintiff had eaten at McDonald's, the stronger the likelihood that it was the McDonald's food (as opposed to other foods) that affected the plaintiffs' health." Id. at 539.

Unlike the initial complaint, the amended complaint does specify how often the plaintiffs ate at McDonald's. For example, Jazlyn Bradley is alleged to have "consumed McDonald's foods her entire life . . . during school lunch breaks and before and after school, approximately five times per week, ordering two meals per day." Amended Compl., ¶ 17. Such frequency is sufficient to begin to raise a factual issue "as to whether McDonald's products played a significant role in the plaintiffs' health problems." Pelman, 237 F. Supp.2d at 538-39.

What plaintiffs have not done, however, is to address the role that "a number of other factors other than diet may come to play in obesity and the health problems of which the plaintiffs complain." Id. This Court specifically apprised the plaintiffs that

> in order to allege that McDonald's products were a significant factor in the plaintiffs' obesity and health problems, the Complaint must address these other variables and, if possible, eliminate them or show that a McDiet is a substantial factor despite these other variables. Similarly, with regard to plaintiffs' health

> problems that they claim resulted from their obesity ..., it would be necessary to allege that such diseases were not merely hereditary or caused by environmental or other factors.

Id. (emphasis added). Plaintiffs have not made any attempt to isolate the particular effect of McDonald's foods on their obesity and other injuries. The amended complaint simply states the frequency of consumption of McDonald's foods and that each infant plaintiff "exceeds the Body Mass Index (BMI) as established by the U.S. Surgeon General, National Institutes of Health, Centers for Disease Control, U.S. Food and Drug Administration and all acceptable scientific, medical guidelines for classification of clinical obesity." Amended Compl. ¶ 15, 17-19, 21, 23.

In their opposition brief, plaintiffs argue that "surveys and sampling techniques" may be employed to establish causation. Plaintiffs' Opp. at 31. While that may be true, it is irrelevant in the present context, where a small number of plaintiffs are alleging measurable injuries. Following this Court's previous opinion, the plaintiffs should have included sufficient information about themselves to be able to draw a causal connection between the alleged deceptive practices and the plaintiffs' obesity and related diseases. Information about the frequency with which the plaintiffs ate at McDonald's is helpful, but only begins to address the issue of causation. Other pertinent, but unanswered questions include: What else did the plaintiffs eat? How much did they exercise? Is there a family history of the diseases which are

alleged to have been caused by McDonald's products? Without this additional information, McDonald's does not have sufficient information to determine if its foods are the cause of plaintiffs' obesity, or if instead McDonald's foods are only a contributing factor.

Plaintiffs also argue that a defendant "must accept an injured party as he finds him, even with a 'thin skull.'" Pl. Opp. Mem. at 32. By this plaintiffs presumably mean that the remainder of the plaintiffs' diet, and their susceptibility to obesity and related diseases are irrelevant so long as McDonald's can be found to have caused the plaintiffs' injuries in some way. The thin skull plaintiff doctrine has not been applied to claims under § 349 or § 350. Even if the doctrine were applicable, McDonald's correctly notes that the doctrine is "one of foreseeability of the scope or extent of injury." McDonald's Reply Mem. at 5. The susceptibility of the plaintiff to injury does not excuse the need to establish causation. See W. Page Keeton et al., Prosser & Keeton on the Law of Torts § 43, at 292 (5th ed. 1984 & Supp. 1988) (discussing thin skull plaintiff rule, and noting that "[t]he defendant of course is liable only for the extent to which the defendant's conduct" caused the harm).

The Advertising Campaign Upon Which Plaintiffs Have Stated Reliance is Not Objectively Deceptive

Even if plaintiffs were able sufficiently to allege that their injuries were causally related to McDonald's representations about its french fries and hash browns, that claim must still be dismissed because the plaintiffs have not alleged that those advertisements were objectively misleading.

In order to demonstrate, under section 349, that a practice or advertisement is deceptive or misleading, it must be shown objectively that a reasonable consumer would have been misled by the defendant's conduct. Marcus, 138 F.3d at 64; Oswego Laborers, 85 N.Y.2d at 26. It is appropriate for a court, given particular facts and circumstances, to determine whether or not a given practice is or is not deceptive as a matter of law. See S.Q.K.F.C. v. Bell Atlantic Triton Leasing Corp., 84 F.3d 629, 636-37 (2d Cir. 1996) (determining, on the basis of the complaint and attached exhibits, that a reasonable consumer would not have been misled by defendant's conduct); Oswego Laborers, 85 N.Y.2d at 26 (same).

The essence of the plaintiffs' claim of deception with regard to McDonald's french fries and hash browns is that McDonald's represented that its fries are cooked in "100 percent vegetable oil" and that they contain zero milligrams of cholesterol whereas in reality they "contain beef or extracts and trans fatty acids." Amended Compl. at ¶ 44(F). However, the citations in the amended complaint to McDonald's advertisements, and the appended

copies of the advertisements, do not bear out the plaintiffs' claims of deception. The first citation is to an advertisement titled "How we're getting a handle on cholesterol," alleged to have commenced in 1987 and to have continued for several years thereafter. The text cited by the plaintiffs states:

> ...a regular order of french fries is surprising low in cholesterol and 4.6 grams of saturated fat. Well within established guidelines for good nutrition.

Id. at 44(F)(1). The text cited in the complaint, however, inexplicably drops several significant words from the text of the advertisement included in the appendix to the amended complaint. The actual advertisement states:

> ...a regular order of french fries is surprising low in cholesterol and saturated fat: only 9 mg of cholesterol and 4.6 grams of saturated fat. Well within established guidelines for good nutrition.

Id., Exhibit G-17 (emphasis added). The advertisement also states that McDonald's uses "a specially blended beef and vegetable shortening to cook our world famous french fries and hash browns." Id.

The plaintiffs next allege that beginning on or around July 23, 1990, McDonald's announced that it would change its french fry recipe and cook its fries in "100 percent vegetable oil," a change that rendered its fries cholesterol-free. Id. at ¶

44(F)(2)-(4). They allege that from the time of the change until May 21, 2001, McDonald's never acknowledged "that it has continued the use of beef tallow in the french fries and hash browns cooking process." Id. at 44(F)(5). On its website, however, McDonald's is alleged to have "admitted the truth about its french fries and hash browns":

> A small amount of beef flavoring is added during potato processing -- at the plant. After the potatoes are washed and steam peeled, they are cut, dried, par-fried and frozen. It is during the par-frying process at the plant that the natural flavoring is used. These fries are then shipped to our U.S. restaurants. Our french fries are cooked in vegetable oil at our restaurants.

Id. While the plaintiffs do allege that the beef flavoring that McDonald's acknowledges using is equivalent to beef tallow, see id. at ¶ 44(F)(6), the complaint does not allege that the beef flavoring contains cholesterol.[6] McDonald's maintains that its "cholesterol disclosure is regulated by the FDA and is entirely accurate and appropriate under the FDA's regulations." McDonald's Reply Mem. at 32 (citing 21 C.F.R. § 101.9(c)(3) (regulating the disclosure of cholesterol levels on food labels)).

[6] Plaintiffs allege in their opposition brief that "beef flavorings and tallow [are] believed to be a source of cholesterol and added fats." Pl. Opp. Mem. at 18 n.11. However, a court may not consider "factual allegations contained in legal briefs or memoranda" when considering a motion to dismiss under Rule 12(b)(6). Friedl v. City of New York, 210 F.3d 79, 83 (2d Cir. 2000).

Plaintiffs further allege that McDonald's claims that its french fries and hash browns are cholesterol-free is also misleading because the oils in which those foods are cooked contain "trans fatty acids responsible for raising detrimental blood cholesterol levels (LDL) in individuals, leading to coronary heart disease." Amended Compl. ¶ 44(F)(7). However, plaintiffs have made no allegations that McDonald's made any representations about the effect of its french fries on blood cholesterol levels. As McDonald's argues,

> The contents of food and the effects of food are entirely different things. A person can become "fat" from eating "fat-free" foods, and a person's blood sugar level can increase from eating "sugar-free" foods.

McDonald's Mem. at 34-35. McDonald's representation that its fries are "cholesterol-free" or contain zero milligrams of cholesterol is therefore objectively non-deceptive.

Because the plaintiffs have failed to allege both that McDonald's caused the plaintiffs' injuries or that McDonald's representations to the public were deceptive, the motion to dismiss the complaint is granted.

II. The Plaintiffs' Motion for Partial Summary Judgment is Denied as Moot

Because all of plaintiffs' claims in the amended complaint have been dismissed as a matter of law, it follows necessarily that plaintiffs' motion for partial summary judgment "regarding the Chicken McNugget and 'cholesterol-free' 45% less saturated fat french fries representations," see Pl. Opp. Mem. at 7, must be denied as moot. See Onandaga Landfill Systems, Inc. v. Williams, 624 F. Supp. 25, 33 (N.D.N.Y. 1985) (dismissing plaintiff's motion for partial summary judgment as moot after granting defendant's motion to dismiss).

III. Leave to Amend is Denied

Leave to amend should be granted "freely . . . when justice so requires." Fed. R. Civ. P. 15(a); Foman v. Davis 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962); Kropelnicki v. Siegel, 290 F.3d 118, 130 (2d Cir. 2002). However, "leave may be denied when there is good reason to do so, such as futility, bad faith, or undue delay." Kropelnicki, 290 F.3d at 130 (citing Chill v. General Electric Co., 101 F.3d 263, 271-72 (2d Cir. 1996).

The plaintiffs have not only been given a chance to amend their complaint in order state a claim, but this Court laid out in some detail the elements that a properly pleaded complaint would need to contain. Despite this guidance, plaintiffs have failed to allege a cause of action for violations of New York's consumer protection laws with respect to McDonald's advertisements and other

publicity. The plaintiffs have made no explicit allegations that they witnessed any particular deceptive advertisement, and they have not provided McDonald's with enough information to determine whether its products are the cause of the alleged injuries. Finally, the one advertisement which plaintiffs implicitly allege to have caused their injuries is objectively non-deceptive.

There is no indication that granting plaintiffs leave to amend a second time would provide an opportunity to correct the failings in the amended complaint. The plaintiffs have been warned that they must make specific allegations about particular advertisements that could have caused plaintiffs' injuries, and to provide detail on the alleged connection between those injuries and the consumption of McDonald's foods. They have failed to remedy the defects of the initial complaint in the face of those warnings. Granting leave to amend would therefore be futile.

In light of the previous decision and the granting of leave to amend, the complaint will be dismissed with prejudice. The plaintiffs

> have no right to a second amendment -- a third bite at the apple -- particularly where, as here, they had ample opportunity to craft their complaints and were advised by the Court, prior to amending their complaints, of certain pleading deficiencies and what the court would require.

In re Merrill Lynch & Co. Research Reports Sec. Litig., -- F. Supp.2d --, 02 MDL 1484, 2003 WL 21920386, at *9 (S.D.N.Y. Aug. 12, 2003). "As Judge Friendly noted in Denny v. Barber, 576 F.2d 465, 471 (2d Cir. 1978), where a district judge puts plaintiff's counsel 'on the plainest notice of what was required,' justice does not require the court to 'engage in still a third go-round.'" Moran v. Kidder Peabody & Co., 617 F. Supp. 1065, 1068 (S.D.N.Y. 1985), aff'd mem., 788 F.2d 3 (2d Cir. 1986).

Conclusion

McDonald's motion to dismiss the amended complaint is granted. The plaintiffs' motion for partial summary judgment is denied as moot. Plaintiffs' request for leave to amend the complaint is denied.

It is so ordered.

New York, NY
September 3, 2003

ROBERT W. SWEET
U.S.D.J.