FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LYNN MOORE, SHANQUE KING, and JEFFREY AKWEI, *Plaintiffs-Appellants*, v. TRADER JOE'S COMPANY, *Defendant-Appellee.*	No. 19-16618 D.C. No. 4:18-cv-04118-KAW OPINION

Appeal from the United States District Court
for the Northern District of California
Kandis Westmore, Magistrate Judge, Presiding

Argued and Submitted October 15, 2020
San Francisco, California

Filed July 15, 2021

Before: Kim McLane Wardlaw, Daniel P. Collins, Circuit Judges, and Richard K. Eaton,[*] Judge.

Opinion by Judge Wardlaw

[*] Richard K. Eaton, Judge of the United States Court of International Trade, sitting by designation.

SUMMARY**

Product Labeling

The panel affirmed the district court's Fed. R. Civ. P. 12(b)(6) dismissal of a putative consumer class action alleging that Trader Joe's Company misleadingly labeled its store brand honey as "100% New Zealand Manuka Honey."

The panel held that Trader Joe's Manuka Honey labeling would not mislead a reasonable consumer as a matter of law. By the Food and Drug Administration's own definition, Manuka honey is a honey whose "chief floral source" is the Manuka flower. Trader Joe's Manuka Honey met this standard. The panel agreed with the district court's conclusion that Trader Joe's label was accurate because there was no dispute that all of the honey involved was technically manuka honey, albeit with varying pollen counts.

Even though Trader Joe's front label was accurate under the FDA's guidelines, plaintiffs maintained that "100% New Zealand Manuka Honey" could mislead consumers into thinking that the honey was 100% derived from Manuka flower nectar. The panel held that a reasonable consumer would be dissuaded from this unreasonable interpretation by three key contextual inferences from the product itself: (1) the impossibility of making a honey that is 100% derived from one floral source; (2) the low price of Trader Joe's Manuka Honey, and (3) the presence of the "10+" on the label.

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

The panel held that the district court also properly held that Trader Joe's representation of "Manuka Honey" as the sole ingredient on its ingredient statement was not misleading as a matter of law.

COUNSEL

C. K. Lee (argued), Lee Litigation Group PLLC, New York, New York; David Alan Makman, Law Offices of David A. Makman, Redwood City, California; for Plaintiffs-Appellants.

Dawn Sestito (argued) and Collins Kilgore, O'Melveny & Myers LLP, Los Angeles, California, for Defendant-Appellee.

OPINION

WARDLAW, Circuit Judge:

The parties find themselves in a sticky situation. Trader Joe's Company ("Trader Joe's") markets its store brand Manuka honey as "100% New Zealand Manuka Honey" or "New Zealand Manuka Honey," but Plaintiffs, on behalf of a putative class, claim that because Trader Joe's Manuka Honey actually consists of only between 57.3% and 62.6% honey derived from Manuka flower nectar, Trader Joe's engaged in "false, misleading, and deceptive marketing" of its Manuka honey. Stung by these accusations, Trader Joe's counters that its labeling is consistent with all applicable Food and Drug Administration ("FDA") guidelines, which permit labeling honey by its "chief floral source" and with which Trader Joe's contends its Manuka honey plainly

complies, as Plaintiffs' own tests reveal. Indeed, these guidelines account for the fact that busy bees cannot be prevented from foraging on different types of flowers, despite their keepers' best efforts. As a result, it is impossible for bees to produce honey that is 100% derived from the Manuka flower. Trader Joe's therefore moved to dismiss Plaintiffs' complaint, arguing its Manuka Honey label is accurate, *i.e.*, its product *is* 100% honey whose chief floral source is Manuka, and that no reasonable consumer would believe that it was marketing a product that is impossible to create. The district court agreed and dismissed the action without leave to amend.

Because we conclude that Trader Joe's Manuka Honey labeling would not mislead a reasonable consumer, we affirm.

I.

Honey is a sweet and syrupy food product that bees produce from the nectar of plants that they visit, which is then stored in honeycombs. *See* U.S. Food and Drug Admin., Proper Labeling of Honey and Honey Products: Guidance for Industry (2018) (the "Honey Guidelines"); *Honey*, Encyclopedia Britannica.[1] While the two are often linked, honey is not made from pollen, but, as here, pollen counts can provide a useful estimation of the underlying floral sources for a particular honey.[2] Bees will often forage on different flowering plants, but the FDA permits labeling honey, which is "a single-ingredient food," with "the name

[1] https://tinyurl.com/nh8vp2ah (last visited June 3, 2021).

[2] Bruce Boynton, *National Honey Board: Honey Is Made from Nectar, Not Pollen*, Food Safety News (Apr. 23, 2012), https://tinyurl.com/3x67v4d9 (last visited June 3, 2021).

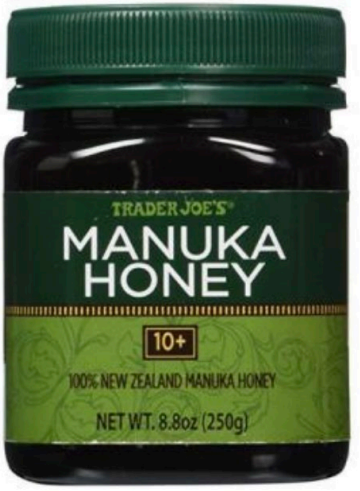
of the plant or blossom if [the manufacturer] or the honey producer has information to support the conclusion that the plant or blossom designated on the label is the chief floral source of the honey." Honey Guidelines at 5 (citing FDA Compliance Policy Guide § 515.300). For example, the Honey Guidelines specify that "Orange Blossom Honey" is an acceptable name for honey if its producer has reason to believe that Orange Blossoms are the "chief floral source" of the honey. *Id.*

"Manuka Honey" is a subset of honey whose chief floral source is the flowers of the Manuka bush, a plant native to Australia and New Zealand. Scientific researchers have found that Manuka honey contains an organic compound, methylglyoxal, which is believed to have antibacterial properties and significant health benefits, particularly when applied topically. Specifically, Manuka honey's "antibacterial potency" gives it significant "efficacy as dressing for wounds, burns, skin ulcers and in reducing inflammation." As a result of Manuka honey's beneficial qualities and the geographic barriers to its widespread production, the product is in high demand and low supply, resulting in a price far in excess of other honeys.

In an effort to regulate and communicate the concentration of Manuka in Manuka Honey products sold to consumers, Manuka honey producers have created a scale to grade the purity of Manuka honey called the Unique Manuka Factor ("UMF") grading system. The UMF system grades honey on a scale of 5+ to 26+ based on the concentration of methylglyoxal that is itself related to the concentration of honey derived from Manuka flower nectar. Thus, among Manuka honeys, higher concentrations of honey derived specifically from Manuka flower nectar, *i.e.*, higher concentrations of methylglyoxal and higher UMF grades,

assertedly correlate directly with greater health benefits, and, accordingly, a higher price than other, lower-concentration Manuka honeys. For example, a bottle of Manuka honey that is 92% derived from Manuka flower nectar, as estimated by pollen content, costs approximately $266, or $21.55 per ounce.

Trader Joe's primarily sells grocery products, among them its own brand of Manuka Honey. Trader Joe's branded Manuka Honey is labeled with a UMF grade of 10+,[3] a relatively low grade, and sells for the comparatively low price of $13.99 per jar, or $1.59 per ounce. Some jars of Trader Joe's Manuka Honey are labeled as "100% New Zealand Manuka Honey" while others are simply labeled "New Zealand Manuka Honey."



[3] Although Trader Joe's Manuka Honey is labeled with a "10+" grade that it received through testing, the labels at issue do not display the official UMF logo. The UMF logo is a trademark that must be purchased from the UMF, and Trader Joe's declined to purchase it.

The ingredient statement, however, is the same across all jars of Trader Joe's Manuka Honey, and lists Manuka honey as the sole ingredient.

Lynn Moore, Jeffrey Akwei, and Shanque King ("Plaintiffs"), allege that they were misled by the product's label when they purchased Trader Joe's Manuka Honey. In July 2018, Plaintiffs filed this lawsuit against Trader Joe's on behalf of a putative class of all United States Trader Joe's consumers in the District Court for the Northern District of California, claiming that Trader Joe's engaged in deceptive marketing practices in violation of a variety of state

consumer protection laws.[4] All three plaintiffs claim they were denied the benefit of their bargain because they paid a premium price for Trader Joe's Manuka Honey that they would not have paid but for the label's allegedly misleading representations.[5]

Specifically, Moore claims to have been misled by the label's statement that the product was "100% New Zealand Manuka Honey" while Akwei and King—who purchased bottles without the "100%" label—claim to have been misled by the ingredient list, which lists "Manuka Honey" as the sole ingredient. Plaintiffs claim that both labeling choices were misrepresentations based on their independent testing, which revealed that only between 57.3% and 62.6% of the honey came from Manuka flower nectar, as estimated by pollen content, with the remainder coming from other floral sources. Plaintiffs allege that the label and ingredient list created the false impression that Trader Joe's Manuka

[4] Specifically, Plaintiffs brought claims under California's Consumer Legal Remedies Act, CAL. CIV. CODE § 1750, et seq.; California's Unfair Competition Law, CAL. BUS. & PROF. CODE § 17200, et seq.; California's False Advertising Law, CAL. BUS. & PROF. CODE § 17500, et seq.; New York's Deceptive Acts and Practices Act, N.Y. GEN. BUS. LAW § 349, et seq.; New York's False Advertising Law, N.Y. GEN. BUS. LAW § 350, et seq.; North Carolina's Unfair and Deceptive Practices Act, N.C. GEN. STAT. § 75-1.1, et seq; North Carolina's Fraudulent and Deceptive Advertising Law, N.C. GEN. STAT. § 14-117, et seq.; Common Law Fraud; and Breach of Express Warranties.

[5] In December of 2018, Plaintiffs amended their class action complaint to include an allegation that Trader Joe's Manuka Honey had been adulterated in violation of 21 U.S.C. § 342(b) and California's Sherman Food, Drug, and Cosmetic Law, CAL. HEALTH & SAFETY CODE § 110585, by amalgamating honey from different hives, thereby mixing more valuable, high-concentration Manuka honey with less valuable, lower-concentration Manuka honey.

Honey contained a far higher percentage of honey derived from Manuka flower nectar.

In June of 2019, the district court granted Trader Joe's motion to dismiss Plaintiffs' complaint for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). First, the district court concluded that, in light of Plaintiffs' clarification at the hearing that their allegations of "adulteration" rested on bees visiting different floral sources and *not* on the manufacturer's mixing of honey from different floral sources, Plaintiffs had failed to allege adulteration under 21 U.S.C. § 342(b). Second, for the mislabeling claims, the district court concluded that Trader Joe's representations were not misleading to a reasonable consumer as a matter of law, and, alternatively, that Plaintiffs' state law causes of actions are preempted by the Federal Food, Drug, and Cosmetic Act ("FDCA"), as amended by the Nutrition Labeling and Education Act ("NLEA").

II.

We have jurisdiction under 28 U.S.C. § 1291 over this timely[6] appeal from a Rule 12(b)(6) dismissal of the

[6] The district court did not abuse its discretion in granting Plaintiffs' motion to extend the time to file the notice of appeal in this case. Sitting en banc in *Pincay v. Andrews*, 389 F.3d 853, 860 (9th Cir. 2004), we refused to adopt a per se rule that attorney or paralegal carelessness was tantamount to inexcusable neglect for purposes of a motion to extend a deadline to appeal. Rather, we held that this determination was properly left to the sound discretion of the district court judge. *Id.* at 860. Here, the district court carefully considered each of the four *Pioneer* factors required by our precedent and permissibly concluded that the modest delay, which apparently resulted from a paralegal's error in carrying out the attorney's instructions, was not prejudicial and did not involve bad

Plaintiffs' case. We review de novo a district court's dismissal of a case under Rule 12(b)(6) for failure to state a claim. *Kroessler v. CVS Health Corp.*, 977 F.3d 803, 807 (9th Cir. 2020) (citation omitted). We also review de novo a district court's conclusion that federal law preempts state law claims. *Id.* (citation omitted). We construe all factual allegations in the light most favorable to the plaintiffs. *Id.* (citation omitted). Dismissal of a complaint under Rule 12(b)(6) is appropriate when the complaint fails to state sufficient facts creating a plausible claim to relief. *Id.* (citing *Weber v. Dep't of Veterans Aff.*, 521 F.3d 1061, 1065 (9th Cir. 2008)).

III.

We address one primary issue on appeal: whether the district court erred in holding that Trader Joe's representations on its label and ingredient statement were not misleading as a matter of law. Because we conclude Trader Joe's representations are not misleading to a reasonable consumer as a matter of law, we do not reach whether Plaintiffs' claims are also preempted by federal labeling laws.[7]

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faith. *See Pioneer Inv. Serv.'s Co. v. Brunswick Assoc. Ltd. P'ship*, 507 U.S. 380, 395 (1993); *see also Pincay*, 389 F.3d at 855–56.

[7] Plaintiffs did not raise their adulteration, breach of warranty, or common law fraud claims in either their opening or reply briefs on appeal. Any arguments regarding those claims are therefore waived. *Freedom from Religion Found., Inc. v. Chino Valley Unif. Sch. Dist.*, 896 F.3d 1132, 1152 (9th Cir. 2018) ("It is well established that an appellant's failure to argue an issue in the opening brief, much less on appeal more generally, waives that issue . . . .").

A.

The district court did not err in concluding that Trader Joe's Manuka Honey label, which advertised its contents as "100% New Zealand Manuka Honey," was not misleading to a reasonable consumer as a matter of law.

The district court based much of its decision on the FDA's Honey Guidelines. The FDCA and its implementing regulations set the standards for "the proper labeling of honey and honey products," Honey Guidelines at 3, and, although the Honey Guidelines are not themselves binding, compliance with them constitutes compliance with the misbranding provisions of the FDCA. *See* 21 U.S.C. §§ 342–43. The Honey Guidelines provide that honey, as a single-ingredient food, must be labeled "'honey,' which is its common or usual name." Honey Guidelines at 5. The Guidelines also permit honey to be labeled with the name of a plant or blossom if the producer has reason to believe the plant or blossom designated on the label is the chief floral source of the honey. *See id*. While the FDA does not specifically define "chief floral source," we interpret it to mean that the principal source of the honey is a single floral source.[8] Thus, by the FDA's own definition, Manuka honey is a honey whose "chief floral source" is the Manuka flower. *Id*.

Trader Joe's Manuka Honey meets this standard. As Plaintiffs' own tests reveal, Trader Joe's Manuka Honey is derived from between 57.3–62.6% Manuka flower nectar (as estimated by pollen count); therefore the honey's "chief

[8] *See* CHIEF, *Merriam-Webster.com Dictionary*, Merriam-Webster, https://tinyurl.com/4p9jhby4 (last accessed June 6, 2021) (defining "chief" as "of greatest importance or influence").

floral source" is the Manuka flower. After foraging for pollen from different flowering plants, bees do not segregate the nectar from different floral sources before producing honey. Therefore, as Plaintiffs conceded, there is no such thing as "pure" batches of honey made from only Manuka flower nectar and other "pure" batches of honey made from other different floral sources. It is all simply honey that a particular hive creates from all of the nectar its bees have foraged. Here, Trader Joe's Manuka Honey is chiefly derived from Manuka flower nectar, and Manuka is therefore the chief floral source for *all* of the product's honey under the FDA's definition, even if some of it is derived from nectar from other floral sources. Thus, the district court was plainly correct in concluding that Trader Joe's label was accurate because "there is no dispute that all of the honey involved is technically manuka honey, albeit with varying pollen counts."

Even though Trader Joe's front label is accurate under the FDA's guidelines, Plaintiffs maintain that "100% New Zealand Manuka Honey" could nonetheless mislead consumers into thinking that the honey was "100%" derived from Manuka flower nectar. Under the consumer protection laws of California, New York, and North Carolina, the states in which Plaintiffs reside, claims based on deceptive or misleading marketing must demonstrate that a "reasonable consumer" is likely to be misled by the representation. *See Ebner v. Fresh Inc.*, 838 F.3d 958, 965 (9th Cir. 2016) (holding that "claims under the California consumer protection statutes are governed by the 'reasonable consumer' test" (citation omitted)); *Solum v. CertainTeed Corp.*, 2015 WL 6505195 at *5 (E.D.N.C. Oct. 27, 2015) ("Under North Carolina law, reliance upon a representation is reasonable only when the recipient of the representation uses reasonable care to ascertain the truth of that

representation." (cleaned up and citation omitted)); *Shapiro v. Berkshire Life Ins. Co.*, 212 F.3d 121, 126 (2d Cir. 2000) (noting that "[u]nder New York law, a deceptive act or practice . . . has been defined as a representation or omission 'likely to mislead a reasonable consumer acting reasonably under the circumstances'" (citation omitted)). This is not a negligible burden. To meet this standard, Plaintiffs must demonstrate "more than a mere possibility that [the seller's] label might conceivably be misunderstood by some few consumers viewing it in an unreasonable manner . . . [r]ather, the reasonable consumer standard requires a probability that a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled." *See Ebner*, 838 F.3d at 965 (internal quotation marks and citation omitted). Indeed, a plaintiff's unreasonable assumptions about a product's label will not suffice. *See Becerra v. Dr. Pepper/Seven Up., Inc.*, 945 F.3d 1225, 1229–30 (9th Cir. 2019).

As noted by the district court, there is some ambiguity as to what "100%" means in the phrase, "100% New Zealand Manuka Honey." In that context, 100% could be a claim that the product was 100% Manuka honey, that its contents were 100% derived from the Manuka flower, or even that 100% of the honey was from New Zealand. To analyze whether this ambiguity could mislead a reasonable consumer, the district court adopted the reasoning of *In re 100% Grated Parmesan Cheese Mktg. & Sales Practices Litig.*, in which the court considered other information readily available to the consumer that could easily resolve the alleged ambiguity. 275 F. Supp. 3d 910, 926 (N.D. Ill. 2017). Although the Seventh Circuit ultimately reversed *100% Grated Parmesan Cheese's* "ambiguity rule for front-label claims" in *Bell v. Publix Super Markets Inc.*, 982 F.3d 468 (7th Cir. 2020),

Bell left undisturbed "the general principle that deceptive advertising claims should take into account all the information available to consumers and the context in which that information is provided and used." *Id.* at 477 (first citing *Davis v. G.N. Mortg. Corp.*, 396 F.3d 869, 884 (7th Cir. 2005); *Beardsall v. CVS Pharmacy, Inc.*, 953 F.3d 969, 977−78 (7th Cir. 2020); then *Fink v. Time Warner Cable*, 714 F.3d 739, 742 (2d Cir. 2013); and then *Freeman v. Time, Inc.*, 68 F.3d 285, 289−90 (9th Cir. 1995)). The district court here concluded that, as a matter of law, other available information about Trader Joe's Manuka Honey would quickly dissuade a reasonable consumer from the belief that Trader Joe's Manuka Honey was derived from 100% Manuka flower nectar. We agree.

Here, reasonable consumers would necessarily require more information before they could reasonably conclude Trader Joe's label promised a honey that was 100% derived from a single, floral source. And, although Trader Joe's ingredient label listed "Manuka Honey" as the only ingredient, which Plaintiffs argue "reinforc[es] the deception created by the front label," information available to a consumer is not limited to the physical label and may involve contextual inferences regarding the product itself and its packaging. *See Bell*, 982 F.3d at 476 ("[T]he context of the entire packaging is relevant."); *Becerra*, 945 F.3d at 1229 (holding that a reasonable consumer would understand the word "diet" on a soda label in context to make a comparative claim only about the product's caloric content, not to make a claim that the soda promotes weight loss generally).

While we agree with the Seventh Circuit that "[d]eceptive advertisements often intentionally use ambiguity to mislead consumers while maintaining some level of deniability about the intended meaning[,]" it also

remains the case that "where plaintiffs base deceptive advertising claims on unreasonable or fanciful interpretations of labels or other advertising, dismissal on the pleadings may well be justified." *Bell*, 982 F.3d at 477. This case is an example of the latter, but we begin with a threshold distinction between the product at issue here and the 100% Grated Parmesan Cheese product. The Seventh Circuit in *Bell* was justifiably concerned about the possible confusion created by manufacturers who claim (in an arguably ambiguous fashion) that the product is 100% cheese, despite their knowledge of the fact that they had added non-cheese ingredients to produce the product, and who then try to retain some "level of deniability" by clarifying the front-label claim with back-label disclosures. *Id*. The sort of conduct by the manufacturer in *100% Grated Parmesan Cheese* to undermine the front-label claim is simply not present here. Bees make the Manuka honey, without input from Trader Joe's or any other manufacturer. Trader Joe's does not insert any additional ingredients to produce the product or mix Manuka honey with other, non-Manuka honeys to dilute it, as Plaintiffs acknowledge. The potential confusion justifying the Seventh Circuit's concern is simply not present in the same way for Trader Joe's Manuka Honey label.

Even setting that distinction aside, a reasonable consumer would be quickly dissuaded from Plaintiffs' "unreasonable or fanciful" interpretation of "100% New Zealand Manuka Honey" based on three key contextual inferences from the product itself: (1) the impossibility of making a honey that is 100% derived from one floral source, (2) the low price of Trader Joe's Manuka Honey, and (3) the presence of the "10+" on the label, all of which is readily available to anyone browsing the aisles of Trader Joe's.

First and foremost, given the foraging nature of bees, a reasonable honey consumer would know that it is impossible to produce honey that is derived exclusively from a single floral source. Although a reasonable consumer might not be an expert in honey production or beekeeping, consumers would generally know that it is impossible to exercise complete control over where bees forage down to each specific flower or plant. *See Honey*, Encyclopedia Britannica.[9] Unlike other domesticated animals, bees cannot be commanded or directed, as any beekeeper worth his salt would readily admit. As explained by one of the foremost producers of New Zealand Manuka Honey, Bees and Trees, "it's still impossible to get 100% pure Manuka Honey out of a hive because there will inevitably be some non-Manuka nectar that the bees get into . . . we can't tell [bees] to only work the Manuka flowers." *Manuka Honey You Can Trust – Satisfaction Guaranteed*, Bees & Trees.[10] Plaintiffs' interpretation of Trader Joe's label is similar to the plaintiffs who claimed that the colorful cereals advertised on certain boxes of "Froot Loops" and "Cap'n Crunch" promised real fruit content, which courts in this circuit properly rejected outright. *See Werbel ex rel. v. Pepsico, Inc.*, 2010 WL 2673860, at *6 (N.D. Cal. July 2, 2010); *McKinnis v. Kellogg USA*, 2007 WL 4766060, at *6 (C.D. Cal. Sept. 19, 2007). A reasonable consumer would not understand Trader Joe's label here as promising something that is impossible to find. *See*, *e.g.*, *Red v. Kraft Foods, Inc*, 2012 WL 5504011 at *3 (C.D. Cal. Oct. 25, 2012) (dismissing deceptive marketing claim based on theory that box of crackers stated it was made with vegetables, because "a reasonable

[9] https://tinyurl.com/nh8vp2ah (last visited Apr. 2, 2021).

[10] https://tinyurl.com/74urzpse (last visited Apr. 2, 2021).

consumer will be familiar with the fact of life that a cracker is not composed of primarily fresh vegetables").

Notably, the Seventh Circuit in *Bell* was careful to "stress[] that consumers are likely to exhibit a low degree of care when purchasing low-priced, everyday items," including "low-cost groceries" like shelf-stable parmesan cheese. 982 F.3d at 479. Consumers of Manuka honey, a niche, specialty product,[11] are undoubtedly more likely to exhibit a higher standard of care than "a parent walking down the dairy aisle in a grocery store, possibly with a child or two in tow," who is "not likely to study with great diligence the contents of a complicated product package." *Danone, US, LLC v. Chobani, LLC*, 362 F. Supp. 3d 109, 123 (S.D.N.Y. 2019). Rather, an average consumer of Manuka honey would likely know more than most about the production of the product and the impossibility of a honey that is 100% derived from Manuka flower nectar. Regardless, given the sheer implausibility of Plaintiffs' alleged interpretation, a consumer of any level of sophistication could not reasonably interpret Trader Joe's label as Plaintiffs assert. *See Gitson v. Trader Joe's Co.*, No. 13-CV-01333-VC, 2015 WL 9121232, at *1 (N.D. Cal. Dec. 1, 2015) ("The reasonable consumer (indeed, even the least

[11] Manuka honey's effete reputation is sufficiently noteworthy that an episode of the popular television show *Broad City* even parodied the perceived high-brow nature of the product. In the episode, one of the main characters purchases Manuka honey at a New York Whole Foods, but only because she is still under the influence of medication she took after she had her wisdom teeth removed. Her inner voice (personified as a giant stuffed animal) even sarcastically describes the jar of Manuka honey as "so reasonably priced" in a grocery trip eventually totaling $1,487.50. *See* Cory Stieg, *Can Manuka Honey Solve All Your Problems?*, Refinery29 (Aug. 20, 2018), https://tinyurl.com/2jyc9kdx (last visited June 3, 2021) (linking to a clip of the scene in question).

sophisticated consumer) does not think soymilk comes from a cow."). Plaintiffs' alleged assumption is not just "unreasonable" or "fanciful." It is implausible.

Second, the inexpensive cost of Trader Joe's Manuka Honey would signal to a reasonable consumer that the product has a relatively lower concentration of honey derived from Manuka flower nectar. Trader Joe's Manuka Honey costs just $13.99 per jar ($1.59 per ounce) while a jar of approximately 92% honey derived from Manuka flower nectar, as estimated by pollen count, costs around $266 ($21.55 per ounce). As Plaintiffs' complaint alleges, the reasonable consumer of Manuka honey, a specialty product, "know[s] that the concentration of manuka [nectar, as measured by pollen,] as opposed to other honey pollens can vary significantly from brand to brand depending on what measures have been taken to maximize manuka purity." "[T]hey attach importance to representations that communicate a higher purity level." A reasonable consumer in the market for Manuka honey, who is well aware of the varying concentrations of Manuka in different Manuka honeys, would thus not reasonably expect a jar of honey that is "100%" derived from Manuka to cost only $13.99. *See*, *e.g.*, *Jessani v. Monini N.A., Inc.*, 744 Fed App'x. 18, 19 (2d Cir. 2018) (noting that no reasonable consumer would believe a bottle of truffle flavored olive oil contained real truffles, "the most expensive food in the world," in part because of its inexpensive price).

Third, Trader Joe's label includes a sticker saying "10+," which represents the honey's rating on the UMF scale. While there are no other details on the jar about what "10+" means, the presence of this rating on the label puts a reasonable consumer on notice that it must represent *something* about the product. Reasonable consumers of

Manuka honey would routinely encounter such ratings and would likely have some knowledge about them. The UMF grading scale reflects a Manuka honey product's concentration of honey derived from Manuka flower nectar and ranges from 5+ to 26+, and ratings are commonly displayed on Manuka honey products. Thus, even a consumer with cursory knowledge of the UMF scale would know Trader Joe's Manuka Honey was decidedly on the lower end of the "purity" scale.

For these reasons, a reasonable consumer could not be left with the conclusion that "100% New Zealand Manuka Honey" represents a claim that the product consists solely of honey derived from Manuka. Rather, a reasonable consumer would be left only with the conclusion that "100% New Zealand Manuka Honey" means that it is 100% honey whose chief floral source is the Manuka plant, which is an accurate statement, as Plaintiffs themselves concede. In Plaintiffs' words, "[t]he Product is '100% Manuka Honey' only in the attenuated legalistic sense that the FDA Honey Guidance may authorize Trader Joe's to market each and every tablespoon of honey in the product as 'Manuka Honey' notwithstanding that 40% of the honey is non-manuka."

Thus, the district court did not err in dismissing Plaintiffs' claims regarding the front label. *See Ebner*, 838 F.3d at 966.

B.

The district court also properly held that Trader Joe's representation of "Manuka Honey" as the sole ingredient on its ingredient statement was not misleading as a matter of law.

Plaintiffs claim that the ingredient statement on Trader Joe's Manuka Honey is misleading because "[l]isting manuka honey as the sole ingredient would create 'an erroneous impression' that more manuka is present in the Product than is actually the case." However, under the FDA's Honey Guidelines, "in the statement of ingredients, the label must follow the requirements set forth in 21 C.F.R. [§] 101.4," and "[t]he labeling must include the common or usual name of each ingredient in the ingredient statement." Honey Guidelines at 6; *see also* 21 C.F.R. § 101.4 ("Ingredients required to be declared on the label or labeling of a food . . . shall be listed by common or usual name in descending order of predominance by weight . . . ."). "Manuka honey" is the "common or usual name" for honey whose chief floral source is the Manuka bush, which Plaintiffs' testing reveals to be true for Trader Joe's Manuka Honey. 21 C.F.R. § 101.4. The product includes no ingredients other than this honey. Thus, under relevant FDA regulations, the sole ingredient in Trader Joe's Manuka Honey is "manuka honey," and so its ingredient statement is accurate.

Plaintiffs nonetheless argue that while "Manuka Honey" may be permissible as a "common or usual name" for a label, listing it as the sole ingredient may nevertheless mislead a reasonable consumer because it creates a misleading impression that the product contains a higher percentage of honey derived from Manuka flower nectar than it actually does. Plaintiffs are correct that FDA regulations do require that "[t]he common or usual name of a food shall include a statement of the presence or absence of any characterizing ingredient(s) or component(s)" that have a "material bearing on price or consumer acceptance" or when the labeling might "create an erroneous impression that such ingredient(s) or component(s) is present." 21 C.F.R.

§ 102.5(c). Because the percentage of honey derived from Manuka "has a material bearing on the price and consumer acceptance of the Products," Plaintiffs argue, Manuka Honey "cannot be the common or usual name of Defendant's Product for purposes of the ingredient statement."

Moreover, Trader Joe's cannot reasonably be said to have claimed in its ingredient statement that the percentage of honey derived from Manuka flower nectar is 100%. Reasonable consumers would understand that Trader Joe's listing Manuka honey as the sole ingredient merely represents the accurate statement that Manuka honey *is* the only ingredient, *i.e.*, that there are no additives or other honeys present in the product, not that it is exclusively derived from Manuka. *See Ebner*, 838 F.3d at 966. Thus, 21 C.F.R. § 102.5(c) does not preclude Trader Joe's from listing Manuka honey as the sole ingredient.

Nonetheless, Plaintiffs argue that listing "'Manuka Honey' in the ingredients statement" could still mislead consumers into believing that "the product consists entirely of manuka honey," particularly when taken together with the statement "100% New Zealand Manuka Honey" when present on the front label. As we have concluded, Trader Joe's Manuka Honey *entirely* consists of Manuka honey, so the ingredients statement does not "display any affirmative misrepresentations" that would mislead a reasonable consumer. *Workman v. Plum, Inc.*, 141 F. Supp. 3d 1032, 1036 (N.D. Cal. 2015). Thus, the ingredients statement simply confirms what the front label of Trader Joe's Manuka Honey accurately conveys, *i.e.*, that the product in fact does "100%" consist of honey whose chief floral source is Manuka. *Williams v. Gerber Products Co.*, 552 F.3d 934, 939–40 (9th Cir. 2008) (holding that "reasonable consumers

expect that the ingredient list . . . confirms other representations on the packaging").

Accordingly, the district court did not err in holding that Trader Joe's properly listed Manuka honey as the sole ingredient and that the ingredient statement is therefore not misleading as a matter of law.

IV.

In sum, the district court properly dismissed this action under Federal Rule of Civil Procedure 12(b)(6) because Trader Joe's representations on the front label and the ingredients statement of its Manuka Honey product are not misleading to a reasonable consumer as a matter of law. Plaintiffs have not alleged, and cannot allege, facts to state a plausible claim that Trader Joe's Manuka Honey is false, deceptive, or misleading. Accordingly, we need not reach the district court's alternative holding that Plaintiffs' claims are also preempted by federal labeling laws.

AFFIRMED.