UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BARBARA ZOTTOLA, on behalf of herself and all others similarly situated, Plaintiff, v. EISAI, INC., et al., Defendants.	Civil Case No. 7:20-cv-02600-PMH Oral Argument Requested

ARENA PHARMACEUTICALS, INC.'S SUPPLEMENTAL MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' JOINT MOTION TO DISMISS

Pursuant to the Court's July 29, 2020 Order, Defendant Arena Pharmaceuticals, Inc. ("Arena") respectfully submits this Supplemental Memorandum of Law in Support of Defendants' Joint Motion to Dismiss ("Supplemental Memorandum"). Arena has fully joined in the Defendants' Joint Memorandum of Law in Support of Motions to Dismiss ("Joint Memorandum"), and agrees that Plaintiff's complaint should be dismissed for all of the reasons set forth therein.

Arena files this Supplemental Memorandum to highlight that the Complaint filed by Plaintiff fails to make particularized allegations as to Arena, making it even more clear that Rules 8 and 12 of the Federal Rules of Civil Procedure require dismissal as to Arena. In the Complaint, Plaintiff is unable to do more than make bare conclusory allegations, with little factual support against Arena. As such, the Complaint should be dismissed with prejudice.

ARGUMENT

I. PLAINTIFF FAILS TO STATE A CLAIM AGAINST ARENA BECAUSE SHE RELIES ON IMPERMISSIBLE GROUP PLEADING.

It is well established that general allegations as to all defendants, collectively, cannot support liability against an individual defendant who is not alleged to have actually engaged in the identified activity. *See Atuahene v. City of Hartford,* 10 F. App'x 33, 34 (2d Cir. 2001) (affirming district court dismissal of complaint under Rule 12(b)(6) upon noting "a complaint [must] give each defendant 'fair notice of what the plaintiff's claim is and the ground upon which it rests'"); *Ochre LLC v. Rockwell Architecture Planning & Design, P.C.*, No. 12-cv-2837 (KBF), 2012 WL 6082387, at *6 (S.D.N.Y. Dec. 3, 2012) ("Where a complaint names multiple defendants, that complaint must provide a plausible factual basis to distinguish the conduct of each of the defendants."); *In re Rezulin Prods. Liab. Litig.*, 168 F. Supp. 2d 136, 139 (S.D.N.Y. 2001) (no basis for claim where complaint "attribute[ed] wrongdoing to the collective 'defendants'").

Here, Plaintiff alleges that "Defendants," collectively "distributed, and sold" (Compl. ¶ 38(a), 39, 46, 88, 93 and 100), were involved in "distributing, and selling" (*id.* ¶¶ 39, 84), or were "selling" (*id.* ¶¶ 38(b), 81) Belviq®, which is not true as applied to Arena. Arena did not ever sell or distribute Belviq® to consumers or pharmacies in the United States. *See* Highlights of Prescribing Information for Belviq, FDA (June 2012), https://www.accessdata.fda.gov/drugsatfda_docs/label/2012/022529lbl.pdf (at 23, 28); Highlights of Prescribing Information for Belviq, FDA (Dec. 2014), https://www.accessdata.fda.gov/drugsatfda_docs/label/2014/022529s003lbl.pdf (at 23, 29); Highlights of Prescribing Information for Belviq/Belviq XR, FDA (May 2017), https://www.accessdata.fda.gov/drugsatfda_docs/label/2017/022529s005s007,208524s001lbl.pdf

(at 24, 27) (all stating that Belviq® was "Distributed by Eisai Inc.").[1] This illustrates one reason, among others, why allegations directed to "Defendants," collectively, are insufficient, particularly in this action. Accordingly, on this basis alone, Plaintiff's generalized allegations relating to all "Defendants" fail to establish her claims as a matter of law and should therefore be dismissed.[2]

II. PLAINTIFF'S CLAIMS AGAINST ARENA BASED ON THE SALE OR DISTRIBUTION OF BELVIQ SHOULD BE DISMISSED FOR THE INDEPENDENT REASON THAT ARENA DID NOT SELL OR DISTRIBUTE BELVIQ.

As set forth above, Arena never sold or distributed, Belviq® in the United States. Plaintiff's mischaracterization of Arena as the seller or distributor of Belviq® is an independent reason why there is no basis for Plaintiff's claims against Arena for breach of implied warranty, violations of consumer fraud statutes, unjust enrichment, fraud and conversion (Counts 1-7) to the extent those claims are premised on the sale or distribution of Belviq® to U.S. consumers.

III. PLAINTIFF'S CLAIMS FOR BREACH OF IMPLIED WARRANTY AND UNDER NY GENERAL BUSINESS LAW SECTIONS 349 AND 350 FAIL TO STATE A CLAIM AS TO ARENA FOR OTHER INDEPENDENT REASONS.

A. The Implied Warranty Claim (Count I) Must Be Dismissed Because Plaintiff Is Not In Privity With Arena.

Under New York law, a breach of implied warranty claim cannot stand "absent any privity of contract between Plaintiff and Defendant . . . except to recover for personal injuries." *Weisblum*

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[1] It is well established in this Circuit that a court may judicially notice information contained on the FDA website for purposes of a Rule 12(b)(6) motion to dismiss. *See Apotex Inc. v. Acorda Therapeutics, Inc.*, 823 F.3d 51, 59-60 (2d Cir. 2016) ("we may properly take judicial notice of this document (without converting [Defendant's] motion to dismiss into a motion for summary judgment) because the [document] is publicly available and its accuracy cannot reasonably be questioned"); *see also Montero v. Teva Pharm. USA Inc.*, No. 19-cv-9304 (AKH), 2019 WL 6907467, at *1 (S.D.N.Y. Dec. 4, 2019) (taking judicial notice of records from the FDA that show Defendant has never been approved to sell the product).

[2] Before seeking this Court's permission to file motions to dismiss, Arena exchanged pre-motion letters with Plaintiff's counsel, which identified the specific pleading deficiencies in her complaint, including this issue, and where applicable, sought a more definite statement. Plaintiff declined to amend her complaint.

v. Prophase Labs, Inc., 88 F. Supp. 3d 283, 296 (S.D.N.Y. 2015) (citation omitted). Here, Plaintiff does not assert that the personal injury exception applies so she must show that she is in privity with Arena in order to recover. *See Freidman v. Gen. Motors Corp.*, No. 08-cv-2458 (SAS), 2009 WL 454252, at *2 (S.D.N.Y. Feb. 23, 2009) ("[I]n the absence of a claim for personal injury, purchasers may not recover for breach of an implied warranty from a party with whom they are not in privity."). Plaintiff does not—because she cannot—allege privity with Arena and therefore her breach of implied warranty claim (Count I), as to Arena, must be dismissed.

B. Plaintiff's NY GBL §§ 349 and 350 Claims (Counts II & III) Require Dismissal Because Plaintiff Cannot Allege "Consumer-Oriented" Conduct By Arena.

As set forth in the Joint Memorandum, a prerequisite for a claim under NY GBL 349 and 350 is "consumer-oriented" conduct. *See Kommer v. Bayer Consumer Health*, 252 F. Supp. 3d 304, 310 (S.D.N.Y. 2017). *Accord Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank*, 85 N.Y.2d 20, 25 (1995) ("[A]s a threshold matter, plaintiffs claiming the benefit of section 349 . . . must charge conduct of the defendant that is *consumer-oriented*.") (emphasis added). But, as set forth above, Arena did not sell or distribute Belviq® to consumers (or even to pharmacies) in the United States.

Moreover, any statements allegedly made by Arena regarding Belviq® are not "consumer-oriented" simply because they may have some derivative effect on consumers. Instead, the statements must be directed to, and intended to mislead, the consumer. Courts have repeatedly rejected claims under the NY GBL where, as here, the alleged misconduct was directed to an intermediary, and not at the consumer. *See In re Rezulin Prods. Liab. Litig.*, 392 F. Supp. 2d 597, 613-14 (S.D.N.Y. 2005) (dismissing Section 349 claim regarding drug manufacturer's allegedly misleading marketing statements made to pharmacy benefit managers ("PBMs") to promote

inclusion of an FDA-approved medication on formularies because the manufacturers' representations were not "intended for" patients, but rather a sophisticated intermediary (the PBM)); *see also Weiss v. Polymer Plastics Corp.*, 21 A.D.3d 1095, 1096-97 (2d Dep't 2005) (affirming grant of summary judgments to defendants on Section 349 claim because defendants sold product to contractor and not plaintiff directly). *See also* Joint Memorandum at I.A – I.C.

Here, Plaintiff's attempt to assert claims against Arena under the NY GBL fails because Plaintiff cannot allege that Arena engaged in "consumer-oriented" conduct. Accordingly, Plaintiff's Counts II and III must be dismissed.

CONCLUSION

For the reasons explained herein, and in the Joint Memorandum, this Court should dismiss Plaintiff's complaint in its entirety as to Arena.

Respectfully submitted,

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