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 Judge Philip M. Halpern Oral Argument Requested

DEFENDANT EISAI INC.'S
SUPPLEMENTAL MEMORANDUM OF LAW ON INDIVIDUAL ISSUES

Pursuant to this Court's July 29, 2020 Minute Entry (Doc. 23), Defendant Eisai Inc. (Eisai) submits this Supplemental Memorandum of Law in support of its Motion to Dismiss Plaintiff Barbara Zottola's claims under Federal Rule of Civil Procedure 12(b)(6). Eisai adopts and incorporates by reference the Statement of Factual Allegations and Legal Standard in Defendants' Joint Memorandum of Law in support of their Motions to Dismiss.

INTRODUCTION

Defendants' Joint Memorandum of Law sets out the reasons why six of the seven claims in Zottola's complaint—which seeks to recover for economic injuries she alleges to have suffered as a result of purchasing the medication Belviq®—fail as a matter of law. This supplemental brief addresses the seventh claim: breach of implied warranty of merchantability. That claim is legally deficient as to Eisai because there is no privity between Zottola and Eisai, as required by New York law. Indeed, Zottola did not refute that argument in her pre-motion letter to Eisai, stating only that she "plans to assert breach of implied warranty claims against CVS." *See* Doc. 21-2 at

2 n.1. Given that implicit concession that Zottola will be pursuing her warranty claim as to CVS only, the claim should be dismissed as to Eisai.

ARGUMENT

I. ZOTTOLA'S BREACH OF IMPLIED WARRANTY CLAIM SHOULD BE DISMISSED BECAUSE THERE IS NO PRIVITY BETWEEN ZOTTOLA AND EISAI.

"The law is clear that, absent any privity of contract between Plaintiff and Defendant, a breach of implied warranty claim cannot be sustained as a matter of law except to recover for personal injuries." *Gould v. Helen of Troy Ltd.*, 16 Civ. 2033, 2017 WL 1319810, at *5 (S.D.N.Y. Mar. 30, 2017) (quotation marks omitted); *see also Catalano v. BMW of N. Am., LLC*, 167 F. Supp. 3d 540, 556–57 (S.D.N.Y. 2016); *Hole v. Gen. Motors Corp.*, 442 N.Y.S.2d 638, 640 (N.Y. App. Div. 3d Dept. 1981). In other words, "New York courts continue to require privity between a plaintiff and defendant with respect to claims for breach of implied warranties of merchantability and fitness for a particular purpose where the only loss alleged is economic." *Catalano*, 167 F. Supp. 3d at 556. A plaintiff is not in privity with a defendant if the plaintiff purchased the product from a third party and not directly from the defendant. *See Gould*, 2017 WL 1319810, at *5.

Zottola's complaint does not seek to recover for personal injury, only economic damages. Moreover, Zottola alleges that she purchased her prescriptions at CVS on one occasion—she does not allege that she ever purchased Belviq® directly from Eisai. Complaint, Doc. 1, ¶ 27. Accordingly, Zottola's breach of implied warranty claim fails because she has not pleaded any facts showing privity between her and Eisai. In its first pre-motion letter, Eisai explained that Zottola's claim is legally deficient for lack of privity, which Zottola did not refute. Doc. 21 at 1–2; Doc. 21-2 at 1. Instead, Zottola stated only that she "plans to assert breach of implied warranty claims against retailer CVS." Doc. 21-2 at 1 n.1. In light of that apparent concession—as well as

clear New York law on the issue—Zottola's claim for breach of implied warranty should be dismissed as to Eisai for lack of privity.

CONCLUSION

For the reasons explained above, this Court should dismiss Zottola's breach of implied warranty claim against Eisai.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 9, 2020, a copy of the foregoing was filed with the Clerk of Court through the CM/ECF system, which sent notice of the filing to all appearing parties of record.

By: /s/ Michael D. Schissel