UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

PATRICIA DONADIO, *individually and on behalf of all others similarly situated,*

Plaintiff,

v.

BAYER HEALTHCARE, LLC,

Defendant.

No. 6:22-cv-06521-EAW

DEFENDANT BAYER HEALTHCARE, LLC'S NOTICE OF MOTION TO DISMISS

PLEASE TAKE NOTICE that Defendant Bayer Healthcare, LLC ("Bayer"), by its attorneys, hereby moves this Court for an Order (i) dismissing Plaintiff's First Amended Class Action Complaint (ECF No. 17) with prejudice under Fed. R. Civ. P. 12(b)(6) for failure to state a claim; and (ii) awarding Bayer such other and further relief as the Court deems just and proper. In the alternative, this Court should use Fed. R. Civ. P. 12(f) to strike the "Consumer Fraud Multi-State Class" from the Complaint, because Plaintiff is not a member of that proposed class. Bayer's motion is supported by Bayer's Memorandum of Law, the Declaration of Jochen Hipp and the exhibit attached thereto, and any reply filed by or further argument made by Bayer.

PLEASE TAKE NOTICE that the motion is returnable before the Honorable Elizabeth A. Wolford at the United States Courthouse, Kenneth B. Keating Federal Building, 100 State Street, Rochester, New York at a time, date, and manner to be determined by the Court.

PLEASE TAKE FURTHER NOTICE that, pursuant to Local Rule of Civil Procedure 7(a)(1), Bayer intends to file and serve reply papers in further support of this motion.

Respectfully submitted,

Dated: May 17, 2023

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 17, 2023, I caused a true and correct copy of the foregoing to be filed with the Clerk of the Court via CM/ECF, which will send notice of electronic filling to all counsel of record.

/s/ Brian J. Capitummino
Brian J. Capitummino, Esq.

UNITED STATES DISTRICT COURT
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DEFENDANT BAYER HEALTHCARE, LLC'S MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

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INTRODUCTION

Plaintiff Patricia Donadio filed this lawsuit accusing Bayer Healthcare, LLC ("Bayer") of misleading consumers about the ingredients in its Alka-Seltzer Plus evening cold and flu mix-in packets. According to Plaintiff, the "Honey Lemon Zest" language on the medicine's package and the images of a honey dipper and a lemon wedge imply that the medicine contains more than a "de minimis" amount of honey and lemon. Am. Compl. ¶ 32. Plaintiff advances this theory even though the medicine package does not list honey, lemon, or lemon zest among its active or inactive ingredients.

Courts have overwhelmingly rejected Plaintiff's theory, including in similar cases filed by Plaintiff's counsel.[1] All of Plaintiff's claims require her to identify a statement that is false or capable of misleading a reasonable consumer. But as numerous courts have held in dismissing similar complaints filed by Plaintiff's counsel, unless a product package states that it is "made with" honey or lemon—which Bayer's medicine package does not—no reasonable consumer could think honey or lemon are included within the medicine. *See, e.g.*, *Cruz v. D.F. Stauffer Biscuit Co., Inc.*, 2021 WL 5119395, at *6 (S.D.N.Y. Nov. 4, 2021), *report and recommendation adopted*, 2022 WL 4592616 (S.D.N.Y. Sept. 29, 2022) (dismissing similar claim challenging the absence of real lemon in "Lemon Snaps"); *Warren v. Stop & Shop Supermarket, LLC*, 592 F. Supp.

[1] As another judge in this district recently noted, Plaintiff's counsel has made a "cottage industry" out of filing lawsuits that challenge product packaging, filing "over 70 such cases in the Second Circuit, and a few dozen more in other circuits nationwide," even though the "vast majority" of these cases have been dismissed for failure to plead sufficient facts to support the claims. *Devey v. Big Lots, Inc.*, 2022 WL 6827447, at *4 n.3 (W.D.N.Y. Oct. 12, 2022); *see also Gordon v. Target Corp.*, 2022 WL 836773, at 19 n.11 (S.D.N.Y. Mar. 18, 2022) ("[T]he Court is well aware that Plaintiff's counsel routinely files cases such as these, which bring identical claims, and that they are just as routinely dismissed for failure to state a claim."); *Matthews v. Polar Corp.*, No. 22-cv-649, Dkt. 35 (N.D. Ill. Apr. 6, 2023) ("At some point, a losing streak should tell you something. By all appearances, attorney Sheehan keeps bringing cases about how to read product labels, but he can't seem to read the tea leaves from the judiciary.").

3d 268, 278 (S.D.N.Y. 2022) (dismissing similar claim challenging the absence of honey from honey graham crackers). That conclusion holds especially true in this case, because the product at issue is medicine, not food.

Plaintiff's claims fail for numerous other reasons as well. Her New York General Business Law ("GBL") claims are defective because Plaintiff does not plausibly allege that she paid any premium to purchase the medicine. The "State Consumer Fraud Acts" claim fails because the Amended Complaint makes no attempt to identify which statutes have been violated, let alone allege the elements of those claims. The breach-of-express-warranty claim should be dismissed because Plaintiff did not provide pre-suit notice of that claim. The breach-of-implied-warranty claim should be dismissed because Plaintiff did not provide pre-suit notice, has not alleged that the medicine was unsafe, and has failed to allege that she was in privity with Bayer. The Magnuson-Moss Warranty Act ("MMWA") claim should be dismissed because there was no written warranty between Bayer and Plaintiff, and because Plaintiff's claims do not satisfy the MMWA's amount-in-controversy or numerosity requirements. The common-law fraud claim should be dismissed because Plaintiff has not alleged injury or fraudulent intent. And Plaintiff cannot represent her proposed class of non-New York class members because she is not a member of that class.

Bayer pointed out these defects in a motion to dismiss Plaintiff's initial complaint, but Plaintiff did not correct them. The time now has come to dismiss the Amended Complaint.

BACKGROUND

A. The "Honey Lemon Zest" Alka-Seltzer Plus Medicine Package.

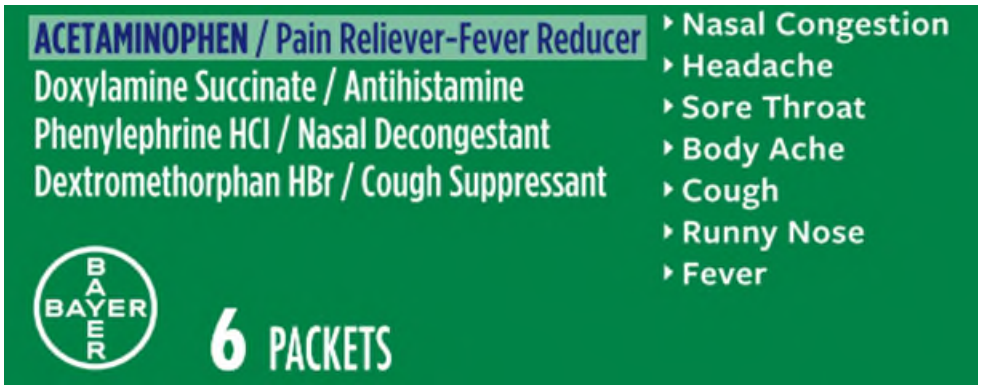
Bayer sells evening cold and flu mix-in packets under its "Alka-Seltzer Plus" brand. Am. Compl. ¶ 1. The package contains the phrase "Honey Lemon Zest" on the front of the box, below

images of a honey dipper and a lemon, to reflect the flavor of the medicine. *Id.* The statements and images appear in a small portion on the left side of the front label:

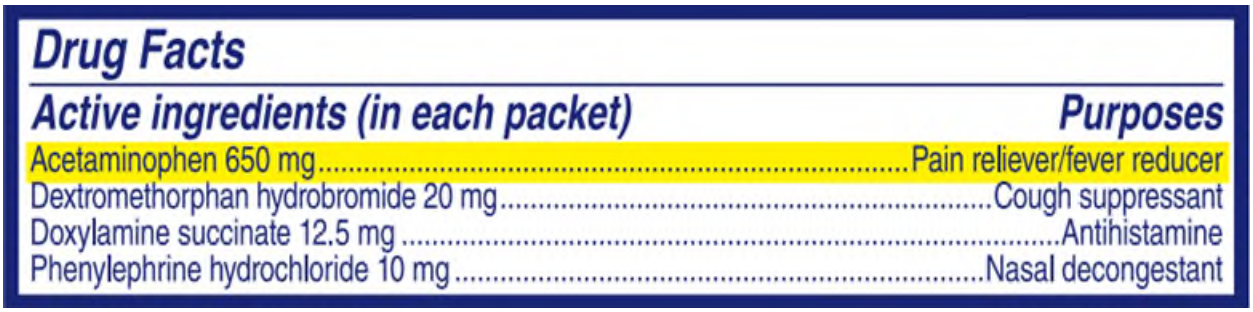
Ex. A to Hipp Decl. at 1 (red box added).[2]

The list of the medicine's four active ingredients—which, under federal law, are the ingredients that "furnish pharmacological activity or other direct effect in the . . . treatment[] or prevention of disease," 21 C.F.R. § 201.66(b)(2)—appear in two places on the medicine's package. First, at the bottom of the front label and visually separated by a green background, the medicine's four active ingredients—acetaminophen, doxylamine succinate, phenylephrine HCl, and dextromethorphan HBr—are listed with their designed effect (pain reliever-fever reducer, antihistamine, nasal decongestant, and cough suppressant, respectively) in treating cold and flu. Am. Compl. ¶ 1. Each of the active ingredients are chemical reagents.

[2] Although the Amended Complaint provides only a few images from the product's label, *see* Am. Compl. ¶¶ 1, 16, this Court may consider the entire label (attached as Exhibit A to the Declaration of Jochen Hipp) in ruling on this Motion to Dismiss because it is incorporated by reference in the Complaint. *See DiFolco v. MSNBC Cable L.L.C.*, 622 F.3d 104, 111 (2d Cir. 2010); *Randolph v. Mondelēz Glob. LLC*, 2022 WL 953301, at *1 (S.D.N.Y. Mar. 30, 2022) ("[F]ull labels, provided via a defendant's declaration, are cognizable on a motion to dismiss . . . because the full packaging is integral to the complaint and incorporated by reference.").

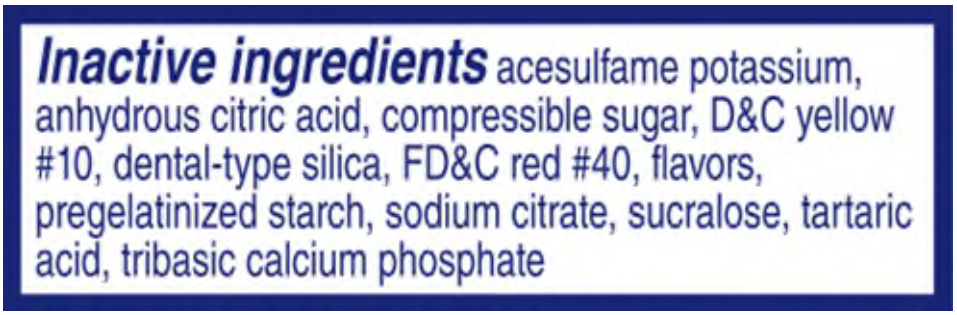


Ex. A to Hipp Decl. at 1. Second, the back of the package identifies the same four active ingredients and their purpose:



Id. at 1. Honey, lemon, and lemon zest are not listed among the medicine's "active ingredients."

The side panel of the medicine's package also identifies all of the "inactive ingredients" in the medicine. Inactive ingredients are "any component" of a product "other than the active ingredient." 21 C.F.R. § 201.66(b)(8). The inactive ingredients in the medicine include, among other things, "flavors":



Ex. A to Hipp Decl. at 1. Again, honey, lemon, and lemon zest are not listed among the medicine's "inactive ingredients."

B. Plaintiff's Lawsuit.

Plaintiff initially filed a complaint that misquoted the package at issue. *See, e.g.*, Compl. ¶¶ 1, 13-14 (alleging that the package says "Honey [and] Lemon Zest" (alteration in original)). After Bayer filed a motion to dismiss that pointed out this and many other fatal defects with the Complaint, *see* ECF No. 13, Plaintiff filed an Amended Complaint, *see* ECF No. 17.

Plaintiff's current theory is that the medicine's package led her to believe that the medicine "contained honey and lemon ingredients beyond a de minimis amount" and that the products contain "a meaningful amount" of lemon and honey "sufficient to confer therapeutic benefits." Am. Compl. ¶¶ 17, 32 (emphasis added). Plaintiff advances this theory even though she acknowledges that "honey," "lemon," and "lemon zest" do not appear anywhere in the medicine's list of active or inactive ingredients. *Id.* ¶ 16.

The Amended Complaint otherwise contains many of the same defects that plagued Plaintiff's initial complaint. For example, Plaintiff still does not allege how much she specifically paid for the medicine. *See id.* ¶¶ 30, 37 (claiming she paid "at or exceeding" $8.99). She still does not allege how often she bought the medicine. *See id.* ¶ 31. She still does not allege that the medicine lacks a "honey lemon zest" flavor. And she still does not allege that the medicine failed to treat the cold- and flu-like symptoms that apparently led her to purchase the medicine.

Based on these allegations, Plaintiff continues to assert claims for (i) violations of New York's GBL §§ 349 and 350, *id.* ¶¶ 47–50; (ii) violations of unspecified "State Consumer Fraud Acts" of nine states, *id.* ¶¶ 51–53; (iii) breaches of various express and implied warranties, *id.* ¶¶ 54–66; and (iv) common law fraud, *id.* ¶¶ 67. Plaintiff, a resident of New York, seeks to represent both a "New York" class and a "Consumer Fraud Multi-State Class" composed of citizens of nine states besides New York. *Id.* ¶ 40.

PROCEDURAL STANDARD

"To survive a motion to dismiss," a complaint must "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).[3] Deciding whether a complaint states a plausible claim is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 679. "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Express Gold Cash, Inc. v. Beyond 79, LLC*, 2019 WL 4394567, at *2 (W.D.N.Y. Sept. 13, 2019) (Wolford, J.). "Nor does a complaint suffice if it tenders naked assertion[s] devoid of further factual enhancement." *Iqbal*, 556 U.S. at 678. Instead, "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). This standard is intended to expose pleading deficiencies "at the point of minimum expenditure of time and money by the parties and the court." *Id.* at 558.

ARGUMENT

I. ALL OF PLAINTIFF'S CLAIMS SHOULD BE DISMISSED BECAUSE THE MEDICINE'S PACKAGE IS NOT MISLEADING.

Under New York law, all of Plaintiff's claims require allegations that a defendant made a false or misleading statement. *See Chufen Chen v. Dunkin' Brands, Inc.*, 954 F.3d 492, 500 (2d Cir. 2020) (GBL § 349 claim); *Goshen v. Mut. Life Ins. Co. of N.Y.*, 98 N.Y.2d 314, 324 n.1 (2002) (GBL § 350 claim); *Lugones v. Pete & Gerry's Organic, LLC*, 440 F. Supp. 3d 226, 244 (S.D.N.Y. 2020) (warranty claim); *Fin. Guar. Ins. Co. v. Putnam Advisory Co.*, 783 F.3d 395, 402 (2d Cir.

[3] All internal quotations are omitted unless otherwise noted.

2015) (fraud claim). For purposes of a GBL and warranty claim, a false or misleading statement is one that is "likely to mislead a reasonable consumer acting reasonably under the circumstances." *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank*, 85 N.Y.2d 20, 26 (1995); *see also Hesse v. Godiva Chocolatier, Inc.*, 463 F. Supp. 3d 453, 469 (S.D.N.Y. 2020). Plaintiff's fraud claim, however, requires an actual false statement—and "[a] practice may carry the capacity to mislead or deceive a reasonable person but not be fraudulent." *Gaidon v. Guardian Life Ins. Co. of Am.*, 94 N.Y.2d 330, 348 (1999).

"It is well settled that a court may determine as a matter of law that an allegedly deceptive advertisement would not have misled a reasonable consumer." *Fink v. Time Warner Cable*, 714 F.3d 739, 741 (2d Cir. 2013). For this reason, the Second Circuit has routinely affirmed the dismissal of implausible deception claims at the pleading stage. *See Chufen Chen*, 954 F.3d at 501 (affirming dismissal of false advertising claim where "context" demonstrated a reasonable consumer "would not be misled"); *Housey v. Proctor & Gamble Co.*, 2022 WL 17844403, at *2 (2d Cir. Dec. 22, 2022) (affirming dismissal of false advertising claim where the plaintiff has failed to allege that the product at issue was deceptive and likely to mislead a reasonable consumer); *Jessani v. Monini N. Am., Inc.*, 744 F. App'x 18, 19 (2d Cir. 2018) (rejecting argument that "whether a reasonable consumer is likely to be misled by a labeling claim is . . . inappropriate for decision on a motion to dismiss," and affirming dismissal where plaintiffs' own allegations made clear that advertisement was not misleading). "When analyzing whether a label is deceptive, courts do not view the label in isolation. Instead, courts view each allegedly misleading statement in light of its context on the product label or advertisement as a whole." *Pichardo v. Only What You Need, Inc.*, 2020 WL 6323775, at *2 (S.D.N.Y. Oct. 27, 2020).

A. "Honey Lemon Zest" Refers to the Medicine's Flavor—Not Its Ingredients.

Plaintiff alleges that the medicine package falsely leads consumers to believe that the medicine contains "honey and lemon as ingredients beyond a de minimis amount." Am. Compl. ¶ 32. No reasonable consumer could draw that conclusion.

"Honey Lemon Zest" is not an ingredient that exists in the world. The list of active and inactive ingredients do not list honey, lemon, or lemon zest as ingredients, either. *See Jessani*, 744 F. App'x at 19 (lack of truffle on list of ingredients, in combination with context of challenged statements, leads reasonable consumer to know truffles were not source of flavor); *Davis v. Pur Co. (USA), Inc.*, 2023 WL 3024407, at *4 (W.D.N.Y. Apr. 20, 2023) ("[A]ny consumer who was confused about whether the front label was designating a flavor, an ingredient, or both, could simply read the Product's listed ingredients, which do not include peppermint oil or peppermint extract."); *Cruz v. D.F. Stauffer Biscuit Co.*, 2021 WL 5119395, at *6 (S.D.N.Y. Nov. 4, 2021) (no misrepresentation where the ingredients list confirms that the product contains "natural and artificial flavors" and the front label does not state that the product is "made with lemons"), *report and recommendation adopted*, 2022 WL 4592616 (S.D.N.Y. Sept. 29, 2022). That is not a surprise; the product is medicine, not food. A reasonable consumer interested in purchasing medicine and looking at the active ingredients on the front of the product package—acetaminophen, doxylamine succinate, phenylephrine HCl, and dextromethorphan HBr—will conclude that "Honey Lemon Zest" reflects to the medicine's flavor, not its ingredients.

The rest of the package also makes clear to a reasonable consumer that honey, lemon, and lemon zest are not ingredients in the medicine. Where language or imagery reflecting a flavor is separate from the product's actual ingredients—through font, color, or spacing—courts have dismissed suits like Plaintiff's. *See, e.g., Warren v. Stop & Shop Supermarket, LLC*, 592 F. Supp. 3d 268, 279–80 (S.D.N.Y. 2022) (dismissal despite packaging displaying a large honey dipper

dripping honey on a graham cracker because "honey" was in a smaller white font below "Graham Crackers" in a larger blue font—suggesting that "honey" was subordinate to "Graham Crackers," and thus not an ingredient). Here, the visual separation, different color schemes, and different fonts between "Honey Lemon Zest" and the list of active ingredients on the front of the package would lead to a reasonable consumer to conclude that "Honey Lemon Zest" is not among the active ingredients in the medicine.

Indeed, for images or language to imply the presence of real honey or lemon, courts have found that the label must state that the product is "made with lemons" or "made with honey"—which the package here does not. *Cruz*, 2021 WL 5119395, at *6 (Lemon Snaps package not misleading because it did not say "made with lemon"); *Warren*, 592 F. Supp. 3d at 278 (honey graham cracker package not misleading because it did not say "made with honey"); *Angeles v. Nestlé USA, Inc.*, 2022 WL 4626916, at *4 (S.D.N.Y. Sept. 30, 2022) (dismissing deception claims because the product did not state "made with lemon" or "made with lemon zest").

For this reason, numerous courts have found—in cases filed by Plaintiff's counsel—that neither pictures of lemons or honey dippers, nor text stating "Lemon" or "Honey," could lead reasonable consumers to believe that the product contains honey or lemon ingredients. *Rudy v. D.F. Stauffer Biscuit, Co.*, 2023 WL 2711612, at *6 (N.D. Ill. Mar. 30, 2023) (dismissing similar claim filed by Plaintiff's counsel because "[n]either pictures of lemons nor the color yellow or text stating 'Lemon' gives reasonable consumers the impression that the product contains any particular amount of actual lemon—and surely not the specific expectation of a 'non-*de minimis*' amount."); *see also Davis*, 2023 WL 3024407, at *4 (dismissing similar claim filed by Plaintiff's counsel because "the word 'peppermint,' like the word 'vanilla,' can be used and commonly understood to refer to a product's scent or flavor: it does not, by itself, necessarily promise the

inclusion of any particular ingredient."). After all, "[t]here is a big difference between saying 'lemon' [or 'honey'] and saying 'this product contains X amount of lemon [or honey].' The former is an attribute, and the latter is an amount. . . . No reasonable consumer would confuse the two." *Matthews v. Polar Corp.*, 2023 WL 2599871, at *7 (N.D. Ill. Mar. 22, 2023) (dismissing similar claim filed by Plaintiff's counsel).

Cruz and *Warren*—two cases from this Circuit addressing similar allegations made by Plaintiff's counsel about lemon- and honey-flavored products—are instructive. In *Cruz*, the court found that "Lemon Snaps" cookies did not mislead consumers into believing the product had more than a "'de minimis amount' of real lemon" because "the Product label contains no ingredient claim such as 'made with lemons' or 'made from lemons.'" 2021 WL 5119395, at *6. In the court's view, the word "Lemon" above images of lemons neither "states [n]or implies that the cookies' flavor is derived entirely or predominantly from real lemons." *Id.* Similarly, in *Warren*, the court concluded that a box of honey graham crackers, without an express reference to "flavor" on its front label, did not mislead consumers into thinking the crackers contained a "non-*de minimis*" amount of honey, despite displaying a large honey dipper dripping honey on a graham cracker, because the product's packaging "does not use language such as 'made with honey' or 'made with real honey,' or anything similar." 592 F. Supp. 3d at 278.

So too here. The Alka-Seltzer package simply represents that it tastes like "Honey Lemon Zest," and "Plaintiff does not allege that the [p]roduct did not deliver on that representation." *Warren* 592 F. Supp. 3d at 278 (cleaned up); *Angeles*, 2022 WL 4626916, at *4 ("'Lemon & Lemon Zest' merely represents that the Product is lemon flavored."); *see also Brown v. Kellogg Sales Co.*, 2022 WL 992627, at *6 (S.D.N.Y. Mar. 31, 2022) (image of halved strawberry and

"Strawberry" in title indicated flavor, not ingredients); *Cosgrove v. Or. Chai, Inc.*, 520 F. Supp. 3d 562, 584 (S.D.N.Y. 2021) (finding "vanilla" used to describe flavor, not presence of vanilla).

Seeking to avoid this result, Plaintiff added to her Amended Complaint images of other companies' products, but this effort is unavailing. The cough syrup products that contain honey or lemon ingredients list them on "their ingredient lists," Am. Compl. ¶ 11, which confirm that reasonable consumers look to ingredient lists to determine whether honey or lemon are ingredients in a product. And although some companies may explicitly note that a product contains honey or lemon "flavors," *see id.* ¶ 12, there is no *requirement* that Bayer must do so. Indeed, those product packages are different from Bayer's medicine package: unlike Bayer's medicine, the honey and lemon imagery and words appear below (not above) the list of active ingredients, and they are not set off by a different color background. *Compare id.* ¶ 1, *with id.* ¶ 12. In any event, how Bayer's competitors market their product cannot establish that there is anything misleading about Bayer's product. *See, e.g., Brown v. Coty, Inc.*, 2023 WL 2691581, at *5 (S.D.N.Y. Mar. 29, 2023) (competitor's use of "clean" on product label could not be used to establish anything misleading about defendant's product not marketed as "clean"); *Davis v. Hain Celestial Grp., Inc.*, 297 F. Supp. 3d 327, 335 (E.D.N.Y. 2018) (finding attempts to focus on "the differences between [defendant] and its competitors . . . unpersuasive" in establishing anything misleading about defendant's label). This is especially true considering Plaintiff does not allege where these products are sold, or that she saw these other products before purchasing Bayer's medicine.

Nor does the Amended Complaint contain any factual allegations—such as consumer survey data—to support Plaintiff's bald allegation that a reasonable consumer would interpret the medicine's package to mean that the medicine contains a certain amount of honey and lemon are ingredients. Under similar circumstances, courts have dismissed complaints. *See Dashnau v.*

Unilever Mfg. (US), Inc., 529 F. Supp. 3d 235, 242 (S.D.N.Y. 2021) (dismissing consumer deception claims because plaintiffs provided "no empirical basis to substantiate their assertion that reasonable consumers would interpret" a reference to "vanilla" without additional modifiers to be a claim about ingredients, as opposed to a flavor); *Bynum v. Family Dollar Stores, Inc.*, 592 F. Supp. 3d 304, 312 (S.D.N.Y. 2022) (dismissing claim where plaintiff provided "no empirical basis" to show that a reasonable consumer would read "Smoked Almonds" to imply smoking as a source of flavoring); *Lee v. Mondelez Int'l, Inc.*, 2022 WL 16555586, at *13 (S.D.N.Y. Oct. 28, 2022) (dismissal warranted where plaintiff provided "no surveys" showing that a reasonable consumer "would understand a reference to cacao on a chocolate bar to be a reference to its unprocessed or minimally processed form"); *Wynn v. Topco Assocs., LLC*, 2021 WL 168541, at *3 (S.D.N.Y. Jan. 19, 2021) (dismissing claim where plaintiffs offered no survey data showing that "reasonable customers interpret 'vanilla' to mean 'flavored with exclusively natural vanilla'"); *Cruz*, 2021 WL 5119395, at *6 (dismissing claim where plaintiff provided no empirical evidence showing that a consumer would read "Lemon Snaps" to mean the product contains lemon). The same result is warranted here.

B. Federal Law Preempts Any Attempt To Force Bayer To Add The Word "Flavor" To The Medicine's Package.

Plaintiff's claims fail for another reason. At bottom, Plaintiff's claims amount to a contention that state law requires Bayer to add the word "flavor" next to "Honey Lemon Zest" on the front of the medicine package in order to avoid violating state-law prohibitions against false or misleading statements. *See id.* ¶ 14. Any attempt to use state law to impose such a requirement is expressly preempted by federal law.

The Federal Food, Drug, and Cosmetic Act contains an express preemption provision that provides that "no State or political subdivision of a State may establish or continue in effect any

requirement" that relates to an over-the-counter drug that is "different from or in addition to, or that is otherwise not identical with" federal law. 21 U.S.C. § 379r. A state requirement is "not identical to" federal law if it "directly or indirectly" imposes labeling requirements that are "not imposed by or contained in the applicable [federal] provision (including any implementing regulation)" or "[d]iffer[s] from those specifically imposed or contained in the applicable provision." 21 C.F.R. § 100.1(c)(4) (interpreting similar preemption provision for food labeling). Put another way, "preemption is certainly appropriate when a state law prohibits labeling that is permitted under federal law," but it is also appropriate "when a state law prohibits labeling that is *not prohibited* under federal law." *Bowling v. Johnson & Johnson*, 65 F. Supp. 3d 371, 375 (S.D.N.Y. 2014). That is because the FDCA preempts "*any* state law that provides for labeling requirements that are not *exactly the same* as those set forth in the FDCA and its regulations." *Critcher v. L'Oreal USA, Inc.*, 959 F.3d 31, 35–36 (2d Cir. 2020); *see also Goldstein v. Walmart, Inc.*, 2022 WL 16540837, at *11 (S.D.N.Y. Oct. 28, 2022) ("affirmative misrepresentation[s] and misrepresentation by omission" both are preempted under to the FDCA's "expansive" preemption clause); *Harris v. Topco Assocs., LLC*, 538 F. Supp. 3d 826, 833 (N.D. Ill. 2021) (state claims preempted if they seek to "impose additional obligations . . . not imposed by" a monograph).

Plaintiff admits that federal law permits the use of the term "flavors" on the inactive ingredient list located on the back of the package to indicate the presence of "a de minimis amount of lemon and honey." Am. Compl. ¶ 17. However, she does not—and cannot—allege that the medicine violates any FDA regulations for how OTC medications may be labeled. FDA regulations merely state that "graphical images . . . shall not appear in or in any way interrupt" the required representations on the drug facts panel, 21 C.F.R. § 201.66(d)(7), and the Alka-Seltzer

medicine complies with this requirement. *See supra* at 8–11. There is no FDA requirement that a medicine package must contain the word "flavor" on the front of package like this one.

In effect, Plaintiff claims that the only way Bayer can market this medicine is if it adds the word "flavor" to the front of the package. But when "[t]he only way for the manufacturer to avoid liability would be to 'make an additional disclosure on its packaging,'" the claim is preempted. *Goldstein*, 2022 WL 16540837, at *11 (quoting *Critcher*, 959 F.3d at 36). As the Second Circuit has stated: "The regulations have therefore stated, with specificity, what information is necessary to avoid misleading consumers. . . . In light of the technical nature of such requirements—combined with Congress's broad, categorical statement of preemption in the FDCA—we are reluctant to conclude that states may impose *other* labeling requirements that have not been imposed by Congress or the FDA." *Critcher*, 959 F.3d at 38. While Bayer could voluntarily choose to add that word to its label, there is no federal requirement that it must do so. "If the FDA had prohibited the [Honey Lemon Zest] label, there would be a regulation saying so. But there is no such regulation." *Bowling*, 65 F. Supp. 3d at 376. Thus, "[i]f successful, this litigation would do exactly what Congress, in passing section 379r of the FDCA, sought to forbid: using state law causes of action to bootstrap labeling requirements that are 'not identical with' federal regulation." *Id*. Plaintiff's claims should therefore be dismissed on express preemption grounds as well.

II. PLAINTIFF'S GBL CLAIM FAILS FOR ADDITIONAL REASONS.

To assert a claim under New York's GBL for deceptive trade practices (GBL § 349) or false advertising (GBL § 350), Plaintiff must show that Bayer's actions (1) were consumer-oriented, (2) materially misleading, and (3) caused injury to Plaintiff. *See Chufen Chen*, 954 F.3d at 500. As discussed above, the Court should dismiss Plaintiff's GBL claims because Plaintiff has not demonstrated that the representations on the package were misleading. *See supra* at 6–12.

Plaintiff's GBL claim also fails because she has not demonstrated that she suffered injury. Plaintiff alleges that, absent the claimed misrepresentations, she either (1) "would not have purchased the Product," or (2) would not have "paid as much" for the medicine. Am. Compl. ¶ 50. Neither allegation is sufficient to establish injury.

As for the first theory—that Plaintiff would not have purchased the medicine altogether—"it is well-settled that a consumer is not entitled to a refund of the price of a good or service whose purchase was allegedly procured through deception under Sections 349 and 350 of the New York General Business Law." *Dash v. Seagate Tech. (U.S.) Holdings, Inc.*, 27 F. Supp. 3d 357, 361 (E.D.N.Y. 2014); *see also Rodriguez v. It's Just Lunch Int'l*, 2018 WL 3733944, at *5 (S.D.N.Y. Aug. 6, 2018) (dismissing GBL claims because "[a] full refund is not . . . a tenable model of damages under the benefit-of-the-bargain rule"); *Small v. Lorillard Tobacco Co.*, 720 N.E.2d 892, 898 (N.Y. 1999) (finding that the plaintiffs cannot recover for the purchase price of cigarettes where the "plaintiffs do not allege that the cost of cigarettes was affected by the alleged misrepresentation"). This is because "deceived consumers may nevertheless receive—and retain the benefits of—something of value, even if it is not precisely what they believed they were buying." *Dash*, 27 F. Supp. 3d at 361–62; *Baron v. Pfizer, Inc.*, 840 N.Y.S.2d 445 448 (App. Div. 2007) (allegation that plaintiff would not have purchased the product absent deceptive practices not a "cognizable injury").

As for the second theory—that Plaintiff would not have paid "as much" for the medicine—"plaintiffs alleging a 'price premium' theory must do more than merely allege that they paid a premium price for their product." *Marshall v. Hyundai Motor Am.*, 334 F.R.D. 36, 59 (S.D.N.Y. 2019) (cleaned up). Although the Amended Complaint lists the price of the medicine, there are no factual allegations that plausibly establish that the medicine's sale price reflects a "premium," such

as a comparison with other similar medicines that do not have this packaging. *See Colella v. Atkins Nutritionals, Inc.*, 348 F. Supp. 3d 120, 142–43 (E.D.N.Y. 2018) (dismissing mislabeling claims where "plaintiff only conclusorily asserts that Atkins Nutritionals charges a premium for its products and provides no facts regarding what the premium was, what price he paid for the products, or the price of non-premium products"); *Izquierdo v. Mondelez Int'l, Inc.*, 2016 WL 6459832, at *7 (S.D.N.Y. Oct. 26, 2016) (failure to provide adequate comparison renders "premium" claim conclusory); *see also Housey v. Proctor & Gamble Co.*, 2022 WL 874731, at *8 (S.D.N.Y. Mar. 24. 2022) ("Plaintiff cannot compare the toothpaste at issue to a completely different product in order to manufacture a price premium").

Plaintiff appears to suggest that consumers are willing to pay a premium for "Natural OTC" products," Am. Compl. ¶ 2, which Plaintiff defines as "self-care products that consumers use either to prevent or treat minor ailments that are *drug-free*," *id.* ¶ 3 (emphasis added). But no reasonable consumer could think Bayer's medicine is "drug-free" and therefore reflects a price premium on that basis. The product package contains the phrase "Drug Facts." Ex. A to Hipp Decl. at 1. It also lists the active ingredients on both front and back of its packaging—acetaminophen, doxylamine succinate, phenylephrine HCl, and dextromethorphan HBr—none of which a reasonable consumer would consider components of a "natural OTC." Am. Compl. ¶ 1; *see Jessani*, 744 F. App'x at 19 ("[I]t is simply not plausible that a significant portion of the general consuming public acting reasonably would conclude that [defendant's] mass produced, modestly-priced olive oil was made with the most expensive food in the world." (footnote omitted)); *Mustakis v. Chattem, Inc.*, 2022 WL 714095, at *3 (E.D.N.Y. Mar. 9, 2022) ("No reasonable consumer would believe that [shampoo] containing three percent salicylic acid is entirely free from synthetic ingredients.").

III. THE "STATE CONSUMER FRAUD ACTS" CLAIM FAILS.

Plaintiff purports to assert misrepresentation claims under the consumer protection statutes of nine other states. *See* Am. Compl. ¶¶ 40, 51–53. This claim should be dismissed because Plaintiff fails to allege a material misrepresentation for reasons discussed above. *See supra* at 6–12; *Housey*, 2022 WL 874731, at *4 (dismissing plaintiff's claims under non-New York state consumer protection statutes because plaintiff could not plausibly allege a deceptive act).

Dismissal is also warranted because, as Bayer pointed out in its initial motion to dismiss, *see* ECF No. 13-3 at 16–17, the Amended Complaint still fails to articulate *which statutes* Plaintiff is suing under. Indeed, Plaintiff merely asserts that she is bringing her claims under the "Consumer Fraud Acts" of nine states, without identifying what statutes Plaintiff believes have been violated. Am. Compl. ¶¶ 40, 51–53. Plaintiff's failure to identify the statutes under which she is seeking to maintain her claims, much less to plead *any* of the elements of those claims, makes it "entirely unclear what legal rights have been violated or how [Bayer] may have violated those rights." *Incorvati v. CIS Ombudsman*, 2021 WL 3417830, at *2 (N.D.N.Y. Aug. 5, 2021). That is textbook grounds for dismissal. *See In re Aluminum Warehousing Antitrust Litig.*, 833 F.3d 151, 163 (2d Cir. 2016) (affirming dismissal where "[t]he complaint does little more than list a couple dozen state statutes in alphabetical order by state, without pleading any of their elements."); *In re Trilegiant Corp.*, 11 F. Supp. 3d 82, 124–25 (D. Conn. 2014) (same).

Furthermore, by failing to articulate which statutes she is seeking to sue under, Plaintiff fails to demonstrate that she has statutory standing to assert claims under non-New York consumer protection statutes. *Cf. Ngwa v. Castle Point Mortg., Inc.*, 2008 WL 3891263, at *13 (S.D.N.Y. Aug. 20, 2008) (granting motion to dismiss where the plaintiff failed to identify the statute under which the claim is being made). "Statutory standing" refers to a situation in which, although the plaintiff has been injured in the Article III sense, she is suing under a statute that "was not intended

to give h[er] a right to sue" because "[s]he is not within the class intended to be protected by it." *Kohen v. Pac. Inv. Mgmt. Co.*, 571 F.3d 672, 677 (7th Cir. 2009); *Robainas v. Metro. Life Ins. Co.*, 2015 WL 5918200 (S.D.N.Y. Oct. 9, 2015) ("For statutory standing, the question is whether the plaintiff has a cause of action under the statute."). It is "well settled" that a plaintiff "does not have standing to bring claims for violations of consumer fraud statutes of states other than . . . the state where she resides." *Jurgensen v. Felix Storch, Inc.*, 2012 WL 2354247, at *10 (S.D.N.Y. Jun. 14, 2012). As a citizen of New York who does not claim to have purchased the medicine anywhere other than in New York, *see* Am. Compl. ¶¶ 27, 31, Plaintiff cannot establish that she suffered injury outside of New York. Plaintiff's desire to maintain this case as a class action does not affect the analysis, because "plaintiffs cannot use class actions to escape pleading requirements." *In re Bayer Corp. Combination Aspirin Prods. Mktg. & Sales Pracs. Litig.*, 701 F. Supp. 2d 356, 378 (E.D.N.Y. 2010). Because Plaintiff does not have the right to bring claims under non-New York statutes, those claims should be dismissed.

IV. THE WARRANTY CLAIMS FAIL.

Plaintiff brings an express warranty claim, an implied warranty claim, and a claim under the Magnuson-Moss Warranty Act ("MMWA"). Am. Compl. ¶¶ 54–66. Each warranty claim fails for several independent reasons. Although Bayer pointed out these defects in Plaintiffs' initial Complaint, *see* ECF No. 13-3 at 18–22, Plaintiff made no attempt to fix them. These claims therefore should be dismissed.

A. Plaintiff's Express Warranty Claim Fails For Multiple Reasons.

To state a claim for breach of an express warranty, Plaintiff must allege that (1) Bayer made a material statement amounting to a warranty; (2) Plaintiff relied on this warranty "as a basis" for purchasing Bayer's medicine; (3) Bayer breached this warranty; and (4) the breach injured

Plaintiff. *Lugones v. Pete & Gerry's Organic, LLC*, 440 F. Supp. 3d 226, 244 (S.D.N.Y. 2020). This claim should be dismissed for two reasons.

First, where a plaintiff asserts a breach-of-warranty claim premised on allegedly deceptive advertising, the claim necessarily fails if the plaintiff cannot establish that the advertising is materially misleading. *See Avola v. Louisiana-Pac. Corp.*, 991 F. Supp. 2d 381, 392 n.9 (E.D.N.Y. 2013) ("Proof of 'breach' for express warranty claims and 'falsity' for false advertising claims are essentially the same."). As explained above, *see supra* at 6–12, there are no plausible allegations that Bayer stated that the medicine "contained honey and lemon ingredients beyond a de minimis amount," which is the warranty Plaintiff says was breached. Am. Compl. ¶ 58.

Second, Plaintiff failed to allege that she provided timely pre-suit notice. A buyer who fails to notify the seller of an alleged breach of warranty "within a reasonable time after he discovers or should have discovered any breach" is "barred from any remedy." N.Y. U.C.C. § 2-607(3)(a). Failure to allege timely notice is grounds for dismissing any breach of warranty claim. *See Quinn v. Walgreen Co.*, 958 F. Supp. 2d 533, 544 (S.D.N.Y. 2013) (dismissing warranty claims because plaintiffs "failed to allege they provided [defendant] with timely notice").

The filing of the original complaint does not satisfy the *pre-suit* notice requirement. *Anderson v. Unilever United States, Inc.*, 607 F. Supp. 3d 441, 458 (S.D.N.Y. 2022) (rejecting the argument that "[p]laintiff's original Complaint constitutes notice"). Plaintiff "must allege some form of timely, *pre-litigation* notice," which she has not done. *Lugones v. Pete & Gerry's Organic, LLC*, 440 F. Supp. 3d 226, 245 (S.D.N.Y. 2020) (emphasis added).

Instead, Plaintiff once again offers the vague allegation that she "provided or provides notice" to Bayer of its alleged breach, and that Bayer "received notice and should have been aware of these issues due to complaints by third parties." Am. Compl. ¶¶ 62–63. Courts in this Circuit

have routinely rejected these exact allegations (in cases brought by Plaintiff's counsel) as insufficient to plausibly allege pre-suit notice. *See, e.g.*, *Warren*, 592 F. Supp. 3d at 285–86 & n.6; *Bynum*, 592 F. Supp. 3d at 315; *Campbell v. Whole Foods Mkt. Grp.*, 516 F. Supp. 3d 370, 391 (S.D.N.Y. 2021). The allegation that Bayer "received notice" from third parties "does not suggest that the *buyer* provided timely notice," as is required under New York law. *Warren*, 592 F. Supp. 3d at 286 & n.6 (emphasis added). And the allegation that Plaintiff "provided or provides notice" to Bayer is "wholly equivocal." *Id.* at 285–86. Plaintiff alleges both that she did provide notice, and that she did not do so but will do so in the future. That sort of non-answer is insufficient to plead pre-suit notice. *Bynum*, 592 F. Supp. 3d at 315. As another judge put it when faced with the same allegations: "Plaintiff must allege that [s]he provided notice. If [s]he had done so, [s]he could surely have so pleaded." *Id.* The same principle applies here.

B. Plaintiff's Implied Warranty Claim Also Fails For Several Reasons.

Plaintiff's breach-of-implied-warranty claims fail for the same reasons as they did in her initial complaint. *See* ECF No. 13-3 at 19–20.

First, like express warranty claims, implied warranty claims also require pre-suit notice, which (as explained immediately above) Plaintiff did not provide. *Warren v. Whole Foods Mkt. Grp., Inc.*, 574 F. Supp. 3d 102, 119 (E.D.N.Y. 2021); *Bynum*, 592 F. Supp. 3d at 315 ("[T]he U.C.C.'s notice requirement also applies to claims for breach of implied warranty.").

Second, the Amended Complaint concedes that privity does not exist between Bayer and Plaintiff, even though privity is required to state any implied warranty claim under New York law. *Cosgrove*, 520 F. Supp. 3d at 586 ("New York law requires a showing of privity between the manufacturer and the plaintiff" to state a claim for breach of an implied warranty). It is well established that a "remote purchaser, such as a retail purchaser, is not in privity with a good's manufacturer." *Hoffmann v. Kashi Sales, LLC*, 2022 WL 17823171, at *6 (S.D.N.Y. Dec. 20,

2022). Plaintiff admits that she purchased the medicine "at locations including Walmart." Am. Compl. ¶ 31. She does not assert that she purchased the medicine from Bayer. Privity therefore does not exist.

Third, the implied warranty of merchantability "requires only that the goods sold be of a minimal level of quality" so that they are "fit for the ordinary purposes for which such goods are used." *Caronia v. Phillip Morris USA, Inc.*, 715 F.3d 417, 433–34 (2d Cir. 2013). That means Plaintiff must show that her Alka-Seltzer medicine was unsafe to use or unfit for human consumption. *See Wynn*, 2021 WL 168541, at *7 (implied warranty claim dismissed because "there is no allegation that the almond milk was unfit for human consumption"); *Barreto v. Westbrae Nat., Inc.*, 518 F. Supp. 3d 795, 807 (S.D.N.Y. 2021) (dismissing implied warranty claim where there were "no allegations" that beverage was unfit for human consumption); *Brumfield v. Trader Joe's Co.*, 2018 WL 4168956, at *4 (S.D.N.Y. Aug. 30, 2018) (implied warranty claim dismissed because there were no allegations that black truffle oil did not "mak[e] food taste like black truffle"). Plaintiff does not—and cannot—allege that the medicine is unsafe or unfit for human consumption.

C. Plaintiff's Magnuson-Moss Warranty Claims Fail For Several Reasons.

MMWA claims "stand or fall with the express and implied warranty claims under state law." *Brumfield*, 2018 WL 4168956, at *4. Because Plaintiff has not plausibly alleged that Bayer breached any express or implied warranty, *see supra* at 18–20, her MMWA claim necessarily fails.

The MMWA claim fails for three additional reasons. *First*, Plaintiff has not alleged that a "written warranty" existed between her and Bayer within the meaning of the MMWA. *Bynum*, 592 F. Supp. 3d at 315 (noting that the MMWA protects consumers who are damaged by a warrantor's failure to comply with a "written warranty"). A written warranty is a "written affirmation that a consumer product will be defect free or will meet a specified level of

performance over a specified period of time." *Bowling*, 65 F. Supp. 3d at 377–78 (emphasis omitted). Product descriptions, such as medicine labels, are not MMWA warranties. *Id.* at 378 ("'Restores Enamel' is a product description, not a promise of performance over time."); *In re Frito-Lay N. Am., Inc. All Natural Litig.*, 2013 WL 4647512, at *17 (E.D.N.Y. Aug. 29, 2013) ("All Natural" label on chip and dip products is a "product description," not an MMWA warranty). Applied here, the "Honey Lemon Zest" reference "do[es] not suggest that the [product is] defect free or that [it] will meet a specified level of performance over a specified period of time; instead, [it] simply describe[s] the product." *Campbell*, 516 F. Supp. 3d at 393.

Second, Plaintiff has not satisfied the $25 amount-in-controversy threshold for MMWA claims. Under the MMWA, "[n]o claim shall be cognizable . . . if the amount in controversy of any individual claim is less than the sum or value of $25." 15 U.S.C. § 2310(d)(3)(A). The Class Action Fairness Act ("CAFA") does not abrogate that requirement—the MMWA's "independent jurisdictional requirements" must be satisfied. *Ebin v. Kangadas Food Inc.*, 2013 WL 3936193, at *1 (S.D.N.Y. Jul. 26, 2013) (rejecting argument that CAFA jurisdiction allows a plaintiff to avoid the MMWA's amount-in-controversy requirement); *see also Bayne v. Target Corp.*, 2022 WL 4467455, at *4 (S.D.N.Y. Sept. 23, 2022) ("majority" of courts have held that CAFA cannot override the MMWA's jurisdictional requirements). Plaintiff does not allege that she paid more than $25 to purchase the medicine. *See* Am. Compl. ¶¶ 30, 37. She therefore is barred from asserting a claim under the MMWA. *See Trisvan v. Regal Ent. Grp.*, 2021 WL 620981, at *4 (E.D.N.Y. Feb. 17, 2021) (dismissing MMWA claim when plaintiff did not meet amount-in-controversy requirement); *Ebin*, 2013 WL 3936193, at *1 (S.D.N.Y. Jul. 26, 2013) (dismissing MMWA claim because plaintiff did not meet the amount-in-controversy requirement).

Third, MMWA claims may proceed only if there are more than 100 *named plaintiffs*. *See* 15 U.S.C. § 2310(d)(3)(C) ("No claim shall be cognizable . . . if the action is brought as a class action, and the number of named plaintiffs is less than one hundred."). Because Plaintiff is the sole named plaintiff, she does not meet the 100-named-plaintiff threshold to bring an MMWA claim. *See Glover v. Bob's Disc. Furniture, LLC*, 2022 WL 3353454, at *6 (S.D.N.Y. Aug. 12, 2022) (dismissing MMWA claims "[b]ecause there are not 100 named plaintiffs in this class action"); *Gavilanes v. Gerber Prods. Co.*, 2021 WL 5052896, at *7 (E.D.N.Y. Nov. 1, 2021) (same).

V. THE FRAUD CLAIM FAILS.

To state a fraud claim under New York law, Plaintiff must show (1) "a material misrepresentation or omission of fact"; (2) that Bayer "knew to be false"; (3) which Bayer made "with the intent to defraud"; (4) upon which Plaintiff "reasonably relied"; and (5) which caused injury to Plaintiff. *Fin. Guar. Ins. Co.*, 783 F.3d at 402. This claim is subject to Rule 9(b)'s heightened pleading requirements. *Lerner v. Fleet Bank, N.A.*, 459 F.3d 273, 290 (2d Cir. 2006). The fraud claim fails for the same reasons discussed above.

First, Plaintiff does not plausibly allege that there is anything deceptive about the medicine's package. *See supra* at 6–12.

Second, Plaintiff may not seek to recover the full value of her purchase under a fraud theory, and she fails to sufficiently allege that she paid any price premium. *See supra* at 15–16; *see also Chevron Corp. v. Donzinger*, 2013 WL 3879702, at *2 (S.D.N.Y. Jul. 29, 2013) ("New York law awards only 'out of pocket' expenses in fraud causes, entitling plaintiffs to damages solely for their actual pecuniary losses.").

Third, Plaintiff does not allege that Bayer acted with fraudulent intent. A plaintiff alleging fraud must plead specific facts giving rise to a "strong inference of fraudulent intent, which may

be established by (1) alleging facts to show that defendants had both motive and opportunity to commit fraud, or by (2) alleging facts that constitute strong circumstantial evidence of conscious misbehavior or recklessness." *In re Fyre Festival Litig.*, 399 F. Supp. 3d 203, 213 (S.D.N.Y. 2019). "[C]onclusory and legal allegations, devoid of particularized facts giving rise to an inference of scienter, are insufficient . . . under Rule 9(b)." *Hesse*, 463 F. Supp. 3d at 473.

In fact, Plaintiff's one-paragraph fraud claim does not even contain the word "intent." She merely alleges that Bayer "misrepresented and/or omitted the attributes and qualities of the Product, that it contained honey and lemon ingredients beyond a de minimis amount." Am. Compl. ¶ 67. Although a separate portion of her Amended Complaint alleges, without explanation, that Bayer "intended" that consumers "would rely on its deceptive conduct," Am. Compl. ¶ 53, merely alleging that a defendant "intentionally concealed and failed to disclose the true facts about" a product "is not enough to adequately plead fraudulent intent" under Rule 9(b). *Dash*, 27 F. Supp. 3d at 362. Nor is a conclusory allegation that a defendant was aware that its statement was false when it was made. *Prickett v. New York Life Ins. Co.*, 896 F. Sup. 2d 236, 246 (S.D.N.Y. 2012) (finding that allegation too conclusory). Yet that is all that Plaintiff alleges here. Such a vague, conclusory allegation is insufficient to state claim for fraud. *See Barreto*, 518 F. Supp. 3d at 808 (allegation that defendant knew the representations on the product's package were untrue was insufficient to state a claim for fraud); *Zachmann v. Coleman Co. Inc.*, 2022 WL 161480, at *7 (S.D.N.Y. Jan. 18, 2022) (same); *Rodriguez v. Hanesbrand Inc.*, 2018 WL 2078116, at *7 (E.D.N.Y. Feb. 20, 2018) (dismissing fraud claim because "rank speculation does not support a strong inference of intent").

VI. AT A MINIMUM, THIS COURT SHOULD STRIKE THE NON-NEW YORK CLASS BECAUSE PLAINTIFF IS NOT A MEMBER OF THAT CLASS.

Where "[t]he record is already clear" that a class cannot be certified, Fed. R. Civ. P. 12(f) permits this Court to strike class allegations from a pleading. *Camacho v. City of N.Y.*, 2020 WL 4014902, at *3–4 (S.D.N.Y. Jul. 16, 2020) (striking class allegations from the complaint because it was clear plaintiff could not demonstrate numerosity); *Chen-Oster v. Goldman, Sachs & Co.*, 877 F. Supp. 2d 113, 117 (S.D.N.Y. 2012) (striking class allegations where Supreme Court precedent stripped plaintiffs of standing); *Wexler v. AT&T Corp.*, 323 F.R.D. 128, 129 (E.D.N.Y. 2018) (striking class allegations due to inadequacy of class representative).

Here, Plaintiff intends to represent a "Consumer Fraud Multi-State Class" composed of all residents of Kansas, New Mexico, Utah, Idaho, North Dakota, West Virginia, Montana, Mississippi, and Arkansas who purchased the medicine during the Class Period. Am. Compl. ¶ 40. But it is black-letter law that "named plaintiffs in a class action cannot represent a class of whom they are not a part." *Irvin v. Harris*, 944 F.3d 63, 71 (2d Cir. 2019); *accord Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348-49 (2011) ("[C]lass representative must" at a minimum "be part of the class"). As a New York resident, Plaintiff is not part of the proposed "Consumer Fraud Multi-State Class" that includes only non-New York residents. Am. Compl. ¶ 20. This Court should therefore strike the "Consumer Fraud Multi-State Class" from the Amended Complaint. *See, e.g.*, *Rice v. Electrolux Home Prod., Inc.*, 2015 WL 4545520, at *11 (M.D. Pa. Jul. 28, 2015) (striking proposed subclass that did not include plaintiff); *Morris v. BMW of N. Am., LLC*, 2014 WL 793550, at *12 (D.N.J. Feb. 26, 2014) (striking subclass that did not include plaintiff).

CONCLUSION

This Court should dismiss the Amended Complaint with prejudice.

Respectfully submitted,

Dated: May 17, 2023

/s/ Brian J. Capitummino

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 17, 2023, I caused a true and correct copy of the foregoing to be filed with the Clerk of the Court via CM/ECF, which will send notice of electronic filling to all counsel of record.

/s/ Brian J. Capitummino
Brian J. Capitummino, Esq.