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IN THE SUPREME COURT OF THE STATE OF DELAWARE

TEAMSTERS LOCAL 237 WELFARE FUND; LOCAL 237 TEAMSTERS RETIREES' BENEFIT FUND; LOCAL 237 TEAMSTERS-PLAINVIEW-OLD BETHPAGE CENTRAL SCHOOL DISTRICT HEALTH AND WELFARE TRUST FUND; LOCAL 237 TEAMSTERS-NORTH BABYLON SCHOOL DISTRICT HEALTH AND WELFARE TRUST FUND; LOCAL 237 TEAMSTERS-BRENTWOOD SCHOOL DISTRICT HEALTH AND WELFARE TRUST FUND; AND LOCAL 237 TEAMSTERS-SUFFOLK REGIONAL OFF-TRACK BETTING CORPORATION HEALTH AND WELFARE TRUST FUND, on behalf of themselves and all others similarly situated, Plaintiffs-Below, Appellants, v. ASTRAZENECA PHARMACEUTICALS LP; AND ZENECA, INC., Defendants-Below, Appellees.	No. 415, 2015 APPEAL FROM THE OPINION AND ORDER DATED JULY 8, 2015 OF THE SUPERIOR COURT OF THE STATE OF DELAWARE IN C.A. No. N04C-11-191-VLM

APPELLANTS' OPENING BRIEF

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NATURE OF PROCEEDINGS

This is an appeal from a decision of the Superior Court of the State of Delaware, in and for New Castle County. Plaintiffs are third party payer health insurers ("TPPs") who commenced this action on behalf of a class of TPPs on November 18, 2004. Plaintiffs allege that Defendants, pharmaceutical drug manufacturers AstraZeneca Pharmaceuticals LP and Zeneca, Inc. (collectively, "Defendants" or "AstraZeneca"), fraudulently marketed their prescription drug Nexium, causing TPPs to pay the majority of the cost of monopoly-priced Nexium prescriptions instead of the cheaper and therapeutically equivalent generic Prilosec. A165-69.

While this case is old, in terms of merits litigation it remains in its infancy. On May 4, 2005, upon a joint stipulation of the parties, the Superior Court stayed this action to await resolution and/or progress of federal court actions involving the same underlying facts and overlapping proposed classes. *See* A17-23; *Pa. Emple. Benefit Trust Fund v. Zeneca, Inc.*, 710 F. Supp. 2d 458 (D. Del. 2010) ("*Zeneca*"). Despite Plaintiffs' subsequent and repeated requests to advance the litigation, the stay remained in effect until February 6, 2014. A21-94, 159-60.[1]

[1] Plaintiffs' last request to lift the stay, on August 16, 2010, was not opposed by Defendants, but, according to the Civil Case Manager to the Superior Court, "slip[ped] through the cracks" at the Superior Court. A90-94, 105. Defendants moved to dismiss the action for failure to prosecute, which the Superior Court

Using the logic of the decision and analysis presented in *Zeneca*—which conducted a choice-of-law analysis, found a conflict between the consumer protection laws of Delaware, Michigan, New York and Pennsylvania, and ultimately granted the defendants' motion to dismiss, *Zeneca*, 710 F. Supp. 2d at 471-77—as a roadmap on how to successfully bring their claims, Plaintiffs amended their complaint on April 9, 2014 ("SAC"). *See* A11, 161-229. Plaintiffs asserted four claims for relief stemming from Defendants' deceptive marketing of Nexium and Plaintiffs' purchase of Nexium in Delaware and fourteen other states: a) violation of the Delaware Consumer Fraud Act, 6 Del. C. § 2513 *et seq.* (the "DCFA"), A209-14; b) violation of the consumer protection laws of fourteen other states (twelve of which were not at issue in *Zeneca*) whose consumer protection statutes, like the DCFA, do not require a showing of reliance,[2] A209, 214-18; c) unjust enrichment, A218-19; and d) negligent misrepresentation, A219-20.[3]

Defendants removed the action to federal court, and on November 18, 2014, the district court granted Plaintiffs' motion to remand. A11; *Teamsters Local 237 Welfare Fund v. Astrazeneca Pharms. LP*, Civ. No. 14-587-SLR, 2014 U.S. Dist.

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denied. A8, 147, 155 (refusing to dismiss the action when "[t]he Court did not respond" to Plaintiffs' letter).

[2] The 14 states are: Arizona, Colorado, Connecticut, Florida, Hawaii, Kentucky, Louisiana, Missouri, New Jersey, New Mexico, New York, Pennsylvania, Tennessee, and Washington. A215-17.

[3] Plaintiffs are not appealing the dismissal of their unjust enrichment and negligent misrepresentation claims.

LEXIS 162048 (D. Del. Nov. 18, 2014).

Defendants then moved to dismiss the action. A13. The Superior Court held oral argument on the motion on April 23, 2015, A15, and issued its Opinion granting Defendants' motion and dismissed the SAC with prejudice on July 8, 2015, A16.[4] The court below, perceiving the facts to be entirely indistinguishable from *Zeneca*, made the following rulings—each independently dispositive:

a) There is an "actual conflict" of law between the DCFA and New York's General Business Law ("GBL") § 349 as to causation. Ex. A at 17.

b) There is no need to conduct a choice-of-law analysis as to the consumer protection statutes of the other thirteen states. Ex. A at 14-15.

c) The "most significant-relationship" test set out in RESTATEMENT (SECOND) OF CONFLICT OF LAWS ("Restatement") §§ 145 and 148 directs that New York's GBL § 349 governs Plaintiffs' claims in all fifteen states. Ex. A at 19-20.

d) Plaintiffs fail to state a claim under GBL § 349. Ex. A at 20-21.

On August 5, 2015, Plaintiffs timely filed a Notice of Appeal with this Court to seek review of the Superior Court's dismissal of their claims. Transaction ID No. 57655918.

[4] The Opinion is attached to this Brief as Exhibit A ("Ex. A. at __").

SUMMARY OF ARGUMENT

1. Cognizant of the dismissal in *Zeneca*, the subsequent criticism of that decision, and the decisions involving similar claims in other courts, Plaintiffs tailored their claims to recover damages based on their Nexium purchases in fifteen states whose consumer protection statutes are substantially the same. From that premise, Plaintiffs argued that because a) they purchased Nexium in Delaware and suffered injury in Delaware, b) the DCFA does not conflict with the other fourteen states' statutes, and c) Defendants avail themselves of Delaware's laws, reside in Delaware, and their misrepresentations concerning Nexium were "made in Delaware,"[5] Delaware law governs all of Plaintiffs' claims.

The Superior Court, relying on *Zeneca*, found an "actual"—and thus dispositive—conflict between the DCFA and GBL § 349. It erred on two fronts. First, it incorrectly concluded that the DCFA does ***not*** require a plaintiff to "show that the defendant's act causes the complained-of injury," whereas GBL § 349 does, conflating reliance under the DCFA (not required) with outright causation (a required element in any tort). Notably, *Yarger v. ING Bank* specifically rejected *Zeneca* on this point. 285 F.R.D. 308, 323 n.18 (D. Del. 2012). Second, again relying on *Zeneca*, the Superior Court inaccurately interpreted GBL § 349 to

[5] Ex. A at 18 ("'the alleged misrepresentations underlying Plaintiffs' claims were 'made' in Delaware because that is the place where the substance of the factual statements comprising the alleged misrepresentations emanated'") (quoting *Zeneca*, 710 F. Supp. 2d at 470); A171, 209.

require a heightened showing of causation—an "awareness" of the deceptive act. Ex. A at 20-21. Several New York courts reject that notion.

2. Plaintiffs alternatively asked the trial court (in case it found a dispositive conflict) to apply Delaware law because, consistent with Restatement § 6(1), the DCFA has a "statutory directive" designed to regulate Delaware corporations even beyond Delaware's borders. The Superior Court failed to address this point. The Restatement factors the Superior Court did look to, §§ 145 and 148, should have guided it to apply Delaware law, not New York law.

3. The injuries pleaded in this action transpired in the several states where TPPs purchased Nexium. Plaintiffs therefore alternatively asked the trial court to apply the law of the state where the overcharged Nexium prescriptions were paid for—the place of injury—so that each state would adequately protect consumer purchases within its borders with its own laws. *See Bell Helicopter Textron, Inc. v. Arteaga*, 113 A.3d 1045, 1052 (Del. 2015) ("trial courts should be extremely cautious not to intrude on the legitimate interests of other sovereign states"). The Superior Court deemed it sufficient to analyze only whether New York law conflicts with Delaware law, reasoning that the laws of the single state where a TPP is headquartered necessarily govern *all* of the TPPs' drug purchases irrespective of where the purchases—and injury—actually occur. *See* Ex. A at 14-15. Several courts have either explicitly or implicitly rejected this rationale.

STATEMENT OF FACTS

The pleaded facts are not in dispute for the purposes of this appeal.

Every year since the 1990s, AstraZeneca has sold in the United States billions of dollars of pills containing the chemical compound omeprazole as a treatment for heartburn and esophageal erosions. *See* A172. Initially, the omeprazole drug was Prilosec, a protein-pump inhibitor ("PPI"). *Id*. By the year 2000, AstraZeneca's Prilosec—"the purple pill"—was the top-selling drug in the world, with annual sales of $6 billion. *Id.*

This action arises from Defendants' strategy to combat Prilosec's looming patent expiration in 2001 in order to avoid the severe and negative financial impact that would have resulted from increased competition in the Prilosec market from cheaper generics. A165-66, 173-74. The group tasked with solving the pending patent-expiration disaster was internally dubbed the "Shark Fin Project" (after the dismal shape the sales chart would form, resembling a shark's fin, if they did nothing). A166. The group devised and implemented a multi-prong attack, the key component of which was to introduce Nexium, a new branded PPI drug which is a therapeutically identical omeprazole treatment that has double the amount of omeprazole (*i.e.*, it is virtually the same as two Prilosec pills), market it to doctors and the general public as superior to Prilosec, and have it succeed Prilosec as the gold standard in the PPI market. *Id.*

This calculated and robust marketing strategy emanating from Defendants' Delaware headquarters—encompassing as many as 70,000 weekly visits with doctors each week in addition to direct-to-consumer advertising on TV and in print—proved to be a resounding success. A187-202. By 2012, worldwide sales of Prilosec and its generic equivalent plunged to less than $750,000, whereas worldwide sales of Nexium topped $6 billion, of which more than $2 billion was in the United States. A203-05. However, as Plaintiffs pled in detail, Nexium's success was a product of AstraZeneca's misrepresentations over its superiority as compared to Prilosec despite the fact that the U.S. Food and Drug Administration continuously found that Nexium was not superior to Prilosec. A175-81.

Defendants' deceptive nationwide marketing campaign blitzed doctors and consumers with studies and advertising proclaiming Nexium, "the new purple pill," was superior to Prilosec. A182-201. The end result of these efforts was, as AstraZeneca planned, unlimited access to TPPs' treasuries, who paid billions of dollars for Nexium rather than the cheaper and therapeutically equivalent generic Prilosec. A201-05. Plaintiffs purchased Nexium in nearly two-thirds of the United States, including Delaware, Arizona, Colorado, Connecticut, Florida, Hawaii, Kentucky, Louisiana, Missouri, New Jersey, New Mexico, New York, Pennsylvania, Tennessee, and Washington. A171.

ARGUMENT

I. The Superior Court erred in finding an actual conflict-of-law between the DCFA and New York's GBL § 349.

1. QUESTION PRESENTED

Did the Superior Court err in concluding that the DCFA and New York's GBL § 349—neither of which requires a showing of reliance—presented a dispositive conflict-of-law as applied to the pleaded facts? This issue was preserved for appeal. A261-64, 271-74, 278-85, 353-54, 373-80, 382-83.

2. SCOPE OF REVIEW

Choice of law is a legal question that this Court reviews *de novo*. *Tumlinson v. Advanced Micro Devices, Inc.*, 106 A.3d 983, 986 (Del. 2013) (citation omitted). The Court also reviews a trial court's grant of a motion to dismiss *de novo*. *RBC Capital Mkts., LLC v. Educ. Loan Trust IV*, 87 A.3d 632, 639 (Del. 2014) (citation omitted). "When reviewing a ruling on a motion to dismiss, we (1) accept all well pleaded factual allegations as true, (2) accept even vague allegations as 'well pleaded' if they give the opposing party notice of the claim, (3) draw all reasonable inferences in favor of the non-moving party, and (4) do not affirm a dismissal unless the plaintiff would not be entitled to recover under any reasonably conceivable set of circumstances." *Id.* (citation omitted). Denial of leave to replead is reviewed for abuse of discretion. *Mergenthaler, Inc. v. Jefferson*, 332 A.2d 396, 398 (Del. 1975).

3. MERITS OF THE ARGUMENT

Plaintiffs assert claims for relief stemming from Defendants' deceptive and misleading marketing of Nexium under the consumer protection laws of fifteen states. Therefore, the Superior Court's decision below and this appeal center on a straightforward choice of law question: which states' consumer protection laws govern Plaintiffs' claims?

Plaintiffs argued that the DCFA should govern all of their Nexium purchases in the fifteen states at issue because Plaintiffs purchased Nexium in Delaware, the fifteen pleaded states' consumer fraud statutes share the same basic elements, and Defendants' marketing scheme emanated from their Delaware headquarters.[6] A261-64, 278-85. *See In re Warfarin Sodium Antitrust Litig.*, 212 F.R.D. 231, 248 n.15 (D. Del. 2002), *aff'd, Warfarin Sodium*, 391 F.3d 516 (3d Cir. 2004) (the DCFA may be applied to prescription drug purchases made outside of Delaware "so long as the [class] members' own state consumer fraud statutes do not have material conflicts with the Delaware statute and Delaware has significant contacts with the asserted claims of these plaintiffs.") (citation omitted).

a) Delaware Choice of Law: Is there a Conflict?

When conducting a conflict of law analysis, Delaware courts looks to Delaware's choice of law rules. *See Pallano v. AES Corp.*, C.A. No. N09C-11-

[6] *See supra* n.5

021JRJ, 2011 Del. Super. LEXIS 313, at *35 (Del. Super. Ct. July 15, 2011). Delaware courts use a two-part test to determine which state's law to apply. *Bell Helicopter*, 113 A.3d at 1050. "[F]irst, the court determines whether there is an actual conflict of law between the proposed jurisdictions. If there is a conflict, the court determines which jurisdiction has the 'most significant relationship to the occurrence and the parties' based on the factors (termed 'contacts') listed in the Restatement (Second) of Conflict of Laws." *Id.* (quoting *Travelers Indem. Co. v. Lake*, 594 A.2d 38, 47 (Del. 1991)). There must be an actual conflict in the outcome that would result based on the facts alleged, or "the Court should avoid the choice-of-law analysis altogether." *Deuley v. DynCorp Int'l, Inc.*, 8 A.3d 1156, 1161 (Del. 2010); *Great Am. Opportunities, Inc. v. Cherrydale Fundraising, LLC*, No. 3718, 2010 Del. Ch. LEXIS 15, at *28 (Del. Ch. Jan. 29, 2010) ("Accordingly, because the laws of the several interested states relevant to the issues in this case all would produce the same decision no matter which state's law is applied, there is no real conflict and a choice of law analysis would be superfluous.").

"In determining whether there is an "actual conflict," Delaware state courts (and the federal courts applying Delaware's rules) answer a single and simple query: does application of the competing laws yield the same result?" *Laugelle v. Bell Helicopter Textron, Inc.*, No. 10C-12-054 PRW, 2013 Del. Super. LEXIS 418, at *3-5 (Del. Super. Ct. Oct. 1, 2013) (citing *Deuley*, 8 A.3d at 1161); *Underhill*

Inv. Corp. v. Fixed Income Discount Advisory Co., 319 F. App'x 137, 140-41 (3d Cir. 2009) (applying Delaware choice-of-law rules and noting that where the laws of the two jurisdictions would produce an identical result, a "false conflict" exists).

Here, relying on *Zeneca,* the Superior Court found "that an actual conflict exists between Delaware and New York law, specifically with respect to the elements of causation in a consumer fraud claim." Ex. A at 17. The "actual conflict" was straightforward: the Superior Court held that Plaintiffs failed to state a claim under New York law, and, by implication, concluded that Plaintiffs *do* state a claim under the DCFA.[7] *See* Ex. A at 20-21.

A careful analysis of the elements for each claim and the relevant case law demonstrates that the trial court erred. The two statutes do not diverge in any material way.

b) The DCFA vs. GBL § 349.

To prove a claim under the DCFA,[8] a plaintiff must show: (1) that the

[7] If the trial court found that Plaintiffs failed to state a claim under the DCFA as well as GBL § 349, that would produce a "false conflict." *See* Ex. A at 11.

[8] The DCFA provides in relevant part:

> The act, use or employment by any person of any deception, fraud, false pretense, false promise, misrepresentation, or the concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale, lease or advertisement of any merchandise, whether or not any person has in fact been misled, deceived or damaged thereby, is an unlawful practice.

defendant's advertisements/marketing contained a false representation and/or omitted a material fact; (2) that the defendant intended for plaintiffs to rely on the representation or omission; and (3) damages. *Yarger*, 285 F.R.D. at 326 (citation omitted). A showing of reliance is not required. *Stephenson v. Capano Dev. Inc.*, 462 A.2d 1069, 1074 (Del. 1983) ("An unlawful practice under [the DCFA], however, is committed regardless of actual reliance by the plaintiff.").

The elements of a GBL § 349[9] claim are "first, that the challenged act or practice was consumer-oriented; second, that it was misleading in a material way; and third, that the plaintiff suffered injury as a result of the deceptive act." *Stutman v. Chem. Bank*, 731 N.E.2d 608, 611 (N.Y. 2000). GBL § 349 also does not require that a plaintiff show reliance on the alleged deceptive act. *Id.* ("reliance is not an element of a section 349 claim").

On their face, there is no conflict between the two statutes that would yield competing results for the claims alleged here. Plaintiffs have pleaded a textbook violation of both the DCFA and GBL § 349: AstraZeneca (1) planned and implemented a nationwide marketing campaign aimed at physicians and consumers to falsely convince them that Nexium was superior to Prilosec, A179-202; (2)

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6 Del. C. § 2513.

[9] GBL § 349(a) provides: "Deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful."

intended to and did cause TPPs to pay for Nexium instead of Prilosec, A187-90; and (3) injured Plaintiffs and other TPPs in the form of billions of dollars paid for Nexium when the cheaper, generic Prilosec would have been just as effective, A205.

The Superior Court focused almost exclusively on *Zeneca*'s conclusion that "although a New York plaintiff need not prove individual reliance, he must nevertheless 'show that the defendant's act caused the complained-of injury,'" by demonstrating "some awareness" linking the deceptive marketing practice to the injury, whereas the DCFA does not require any causal link. *See* Ex. A at 17, 20 (quoting *Zeneca*, 710 F. Supp. 2d at 472, 474). By constructing a conflict on this point, the Court below effectively determined that the DCFA is uniquely permissive on reliance and does not require ***any*** proof of causation whatsoever. Such an interpretation is untenable. Every tort has a causation element; otherwise there is nothing to bridge the defendant's damaging act or breach to the plaintiff's injury. The DCFA is not an exception to this fundamental tenet.

For this very reason, a judge from the same federal court rejected *Zeneca* on this point: "*Zeneca* found a conflict between the DCFA and [GBL §] 349 because GBL 349 requires a causation element linking the plaintiff's damages to the defendant's deceptive act. However, the DCFA similarly contains a causation requirement, albeit implicitly." *Yarger*, 285 F.R.D. at 323 n. 21 (citing multiple

cases).[10] By wholly adopting *Zeneca*'s rationale, the Superior Court's holding suffers from the same shortcoming.[11]

Yarger is instructive. There, plaintiffs alleged that the defendant bank conducted a fraudulent and uniform advertising campaign from its Delaware headquarters and sought to have the DCFA apply to class members' claims in several states. *Yarger*, 285 F.R.D. at 315. The district court conducted a choice-of-law analysis and held that the DCFA applies to class members' claims in nine states. *Id.* at 323. It found that a) Delaware had significant contacts with class

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[10] *Yarger*, 285 F.R.D. at 323 n.21, cited the following cases (emphasis in original):

> *Smith v. Peninsula Adjusting Co., Inc.*, 2011 Del. Super. LEXIS 307, 2011 WL 2791252, at *5 (Del. Super. Ct. June 16, 2011) ("A private cause of action may be brought by a consumer under the Act to recover for ***losses suffered as a result of*** fraud or deception under 6 Del. C. § 2513"); *Stephenson v. Capano Dev., Inc.*, 462 A.2d 1069, 1074 (Del. [] 1983) (noting that, except with respect to specifically enumerated differences, DCFA "must be in interpreted in light of established common law definitions of fraud and deceit," which would require causal link between defendant's conduct and plaintiff's resulting damages); *see also Crowell Corp. v. Himont USA, Inc.*, 1994 Del. Super. LEXIS 557, 1994 WL 762663, at *4 (Del. Super. Ct. Dec. 8, 1994) (stating that, under DCFA, "all damages proximately caused by and naturally flowing from a violation of the Act are recoverable").

See also Warfarin Sodium, 212 F.R.D. at 249 ("Where state consumer fraud statutes do not require proof of reliance, as is the case here, plaintiff need only establish a causal link between the [deceptive] conduct at issue and his or her injury") (citation omitted; alteration in original).

[11] The Court below criticized Plaintiffs for asking it to "in effect[] 'correct' [*Zeneca*]'s ruling." Ex. A at 10. However, *Yarger* had effectively already done so, and the SAC is factually distinct from *Zeneca* in pleading Delaware purchases.

members from every state and b) there was no material conflict between the DCFA and the consumer fraud statutes of the nine states[12] *including New York*, because "like Delaware—[they] do not require reliance." *Id.* at 323. A similar conclusion should have been reached here.

The Superior Court's finding that New York's and Delaware's consumer protection statutes diverge with regard to causation was mistaken either because it reduced the causation element of the DCFA to a nullity, a point *Yarger* explicitly rejected, or because it injected an elevated level of individual reliance foreign to New York law, as explained below.

c) The Superior Court incorrectly determined that Plaintiffs failed to state a claim under GBL § 349.

"A prima facie case [for a GBL § 349] requires [] a showing that defendant is engaging in an act or practice that is deceptive or misleading in a material way and that plaintiff has been injured by reason thereof." *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A.*, 647 N.E.2d 741, 744 (N.Y. 1995). "To satisfy the 'by reason of' requirement, plaintiffs need only allege that "the defendant[s'] 'material deceptive act[s]' caused the injury." *In re Methyl Tertiary Butyl Ether Prods. Liab. Litig.*, 175 F. Supp. 2d 593, 631 (S.D.N.Y. 2001) (quoting *Stutman*, 731 N.E.2d at 612; alterations in original).

[12] The nine states are: Colorado, Connecticut, Florida, Illinois, Massachusetts, Minnesota, New Jersey, New York and Washington. *Yarger*, 285 F.R.D. at 323.

The Superior Court interpreted GBL § 349 to require "'some awareness' of a defendant's misrepresentation prior to purchasing the product in order to establish the element of causation." *See* Ex. A at 20 (quoting *Zeneca,* 710 F. Supp. 2d at 474). This was the underlying premise of it finding an "actual conflict," but it is not the prevailing interpretation of GBL § 349. *See, e.g., Bose v. Interclick, Inc.*, 10-cv-9183, 2011 U.S. Dist. LEXIS 93663, at *23 (S.D.N.Y. Aug. 17, 2011) (rejecting defendants' argument that because "[p]laintiff was unaware of [defendant]'s actions while they were occurring, [p]laintiff could not have been misled" because that would "interpose a reliance element into the Section 349 analysis"); *Zaccagnino v. Nissan N. Am., Inc*., 14-cv-3690, 2015 U.S. Dist. LEXIS 78441, at *6 (S.D.N.Y. June 16, 2015) ("A claim that the price of the product was inflated as a result of the defendant's deception' is sufficient to allege injury.").[13]

Courts in the TPP-prescription drug context have specifically refused to impose an "awareness" requirement on GBL § 349 claims. *See In re Bextra & Celebrex Mktg., Sales Practices & Prod. Liab. Litig.*, 495 F. Supp. 2d 1027, 1035 (N.D. Cal. 2007) (upholding TPPs' GBL § 349 claims in a case alleging

[13] *In re Scotts EZ Seed Litig.*, 304 F.R.D. 397 (S.D.N.Y. 2015), is also informative. The district court certified a class of purchasers of EZ Seed claiming violation of GBL § 349 because "[c]lasswide evidence will be used to establish whether Scotts's labeling of EZ Seed was false, and if so, whether it was likely to mislead a reasonable consumer acting reasonably under the circumstances. . . . Likewise, classwide evidence will determine whether plaintiffs were injured." *Id.* at 409. Such a class could not be certified under the Superior Court's GBL § 349 "awareness" constraint.

"misleading advertising to doctors and consumers"); *see also In re Suboxone (Buprenorphine Hydrochloride & Naloxone) Antitrust Litig.*, 64 F. Supp. 3d 665, 702 (E.D. Pa. 2014) (upholding TPPs' GBL § 349 claim on allegations of "fabricated safety issues" with no mention of an awareness requirement"); *In re DDAVP Indirect Purchaser Antitrust Litig. v. Ferring Pharms., Inc.*, 903 F. Supp. 2d 198, 228 (S.D.N.Y. 2012) (upholding TPPs' GBL § 349 claim with no mention of an awareness requirement).

At the very least, the cases cited above demonstrate that several courts interpreting GBL § 349 have determined that the statute does not have an elevated causation requirement. Under that rationale, GBL § 349 and the DCFA do not conflict, let alone present a dispositive "actual conflict." The Superior Court should have deferred to those courts' rational assessments.

Moreover, even if the Superior Court was correct, on a motion to dismiss Plaintiffs should have been accorded the reasonable inference that the "awareness" element was met. Plaintiffs pled awareness due to the stark shift in market share from Prilosec to Nexium following Defendants' vast marketing campaign that indoctrinated doctors and the general public with false claims of Nexium's superiority. A203-05 (charting Prilosec and Nexium sales from 1998 to 2012). Nexium became a revenue juggernaut because that message necessarily reached Plaintiffs' members or their doctors. *See In re Methyl,* 175 F. Supp. 2d at 631

(upholding a GBL § 349 claim when plaintiffs alleged, as Plaintiffs do here, "that defendants' conduct misled all consumers, including plaintiffs, as to the dangers and safety concerns"); *see also Reyes v. Netdeposit, LLC,* No. 14-1228, 2015 U.S. App. LEXIS 15577, at *21-22 (3d Cir. Sept. 2, 2015) ("'[I]t is unnecessary and unfair to impose modalities of proof that are specific to such nonexistent personal relationships to insulate defendants from classwide liability to those with whom they related on a classwide basis.'") (quoting Elizabeth J. Cabraser, *Trends and Developments in the Filing, Certification, Settlement, Trial and Appeal of Class Actions*, SE99 A.L.I.-A.B.A. 743, 821 (2000)).

At worst, "awareness" is a question of fact that Plaintiffs should have been afforded the opportunity to replead. *See* A378, A274. Despite this action being commenced in 2004, the decision below is the first to test Plaintiffs' pleading. The Superior Court abused its discretion when it dismissed with prejudice based on its assumptions about Plaintiffs here given that the *Zeneca* plaintiffs did not replead after their dismissal. *See* Ex. A at 23. *See also Mullen v. Alarmguard of Delmarva, Inc.*, 625 A.2d 258, 263 (Del. 1993) ("In the absence of prejudice to another party, the trial court is required to exercise its discretion in favor of granting leave to amend.").

II. The Superior Court erred in determining that New York had a more "significant relationship" to Plaintiffs' claims than Delaware.

1. QUESTION PRESENTED

Did the Superior Court properly apply the Restatement's "most significant relationship" test? This issue was preserved for appeal. A261-62, 264-70, 373-75, 379-80.

2. SCOPE OF REVIEW

Choice of law is a legal question that this Court reviews *de novo*. *Tumlinson*, 106 A.3d at 986 (citation omitted). The Court also reviews a trial court's grant of a motion to dismiss *de novo*. *RBC Capital*, 87 A.3d at 639 (citation omitted).

3. MERITS OF THE ARGUMENT

Once it determined that there was a conflict of law between the DCFA and GBL § 349, the Superior Court applied the Restatement's most significant relationship test and (again following *Zeneca* in lockstep) determined that New York law should apply. The Superior Court looked to the Restatement §§ 6, 145 and 148 to make its determination. Ex. A at 11-20. However, its analysis of those principles was flawed.

a) The Superior Court ignored Restatement § 6(1) which calls for the application of Delaware law.

"Pursuant to Section 145 of the [] Restatement, the local law of the state

which 'has the most significant relationship to the occurrence and the parties *under the principles stated in § 6*' will govern the rights of litigants in a tort suit." *Travelers*, 594 A.2d at 47 (quoting Restatement § 145(1); emphasis added). Restatement § 6(1) in turn states: "A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law."[14] The DCFA has such a "statutory directive."

While some consumer fraud statutes are limited to protecting solely home-state consumers, the DCFA's charter is more expansive. The plain language of the DCFA—prohibiting "unfair or deceptive merchandising practices" that occur "in part or wholly within" Delaware, 6 Del. C. § 2512—demonstrates the legislature's intent to curtail the abuses of Delaware's corporate citizens and to protect consumers nationwide from deceptive practices emanating from the state. *See Lony v. E.I. DuPont de Nemours & Co., Inc.*, 821 F. Supp. 956, 961 (D. Del. 1993) ("If the Court were to accept [defendant's] proposition that only Delaware residents are afforded the protections of the [Delaware] Consumer Fraud statute, the construction mandated by the Delaware General Assembly would be lost. . . . [T]he [DCFA] speaks to the protection of [all] consumers, not merely consumers residing in Delaware."); *Marshall v. Priceline.com*, 2006 Del. Super. LEXIS 447,

[14] *See also* Restatement § 6, Comment a ("Provided that it is constitutional to do so, the court will apply a local statute in the manner intended by the legislature even when the local law of another state would be applicable under usual choice-of-law principles.").

at *7 n.10 (Oct. 31, 2006) (noting that "non-resident consumers are protected under the DCFA"); *Yarger*, 285 F.R.D. at 322 (same; citing cases).

Plaintiffs pled Delaware contacts that are significant to the allegations: Plaintiffs purchased overpriced Nexium in Delaware; Defendants' deceptive marketing scheme emanated from Delaware; and Defendants are incorporated, do business, and have their principal headquarters in the state. *See* A171, 209; *supra* n.5. Plaintiffs therefore argued that Delaware has the most significant interest in the application of its law to the claims asserted. *See Lony v. E. I. Du Pont de Nemours & Co.*, 886 F.2d 628, 643 (3d Cir. 1989) (applying Delaware law when "the place of injury was Germany, but the place of the alleged wrongful conduct, the misrepresentation that allegedly caused the injury, was Delaware."); *Yarger*, 285 F.R.D. at 323 ("Here, Delaware has significant contacts with the asserted claims of members of the Proposed Class from every state because [ ] the allegedly misleading [ ] ads which are the subjects of the claims emanated from Delaware").

The second part of the Superior Court's choice-of-law analysis should have started (and ended) with Restatement § 6(1) due to the "statutory directive" in the DCFA. However, while referencing Restatement § 6 generally, Ex. A at 11-12, 17, 18, the Court below ignored Restatement § 6(1). This was reversible error.

b) The Superior Court improperly weighed the Restatement factors.

In its conflict-of-law analysis, the Superior Court focused on the § 148

factors which "recasts the rule set forth in §145 with greater precision with respect to fraud or misrepresentation claims." Ex. A at 13 (citing *Zeneca*, 710 F. Supp. 2d. at 468). Specifically, the Court below looked to the Restatement § 148(2) factors which are relevant where the plaintiff's act (purchasing Nexium) takes place in a different state from where the false representations emanated (Delaware). *See id.* The Restatement § 148(2) factors are:

> (a) the place, or places, where the plaintiff acted in reliance upon the defendant's representations, (b) the place where the plaintiff received the representations, (c) the place where the defendant made the representations, (d) the domicile, residence, nationality, place of incorporation and place of business of the parties, (e) the place where a tangible thing which is the subject of the transaction between the parties was situated at the time, and (f) the place where the plaintiff is to render performance under a contract which he has been induced to enter by the false representations of the defendant.[15]

The Superior Court provided three reasons why § 148(2) dictates that New York law governs. Ex. at 18-19. None are persuasive.

First, the Superior Court, looking at § 148(2)(b), found that "Plaintiffs 'received' Defendants' representations in New York, because that is where Plaintiffs were located when they paid for Nexium." Ex. A at 18. However, in the context of purchasing prescription drugs, the receipt of the false marketing is a

[15] "The Restatement test does not authorize a court to simply add up the interests on both sides of the equation and automatically apply the law of the jurisdiction meeting the highest number of contacts listed in Sections 145 and 6. Section 145 has a qualitative aspect." *Travelers*, 594 A.2d at 48 n.6.

neutral factor where, as here, it came in the form of a saturation marketing campaign received in Delaware by Plaintiffs' beneficiaries residing there. Plaintiffs' injury transpired at the pharmacy counter where Nexium was paid for instead of Prilosec.

Second, the Superior Court, looking at § 148(2)(a), determined that "Plaintiffs 'acted in reliance upon' the allegedly deceptive statements in New York because that is where they reimbursed their members for the purchase of Nexium." Ex. A at 18-19. The Superior Court misconstrued the TPPs' role in the purchasing of prescription drugs. Plaintiffs (and virtually every other TPP) are one-half of a "two-headed endpayer." They, along with their members, are the dual-purchasers of prescription drugs at the point of purchase, *i.e.*, at the pharmacy counter in whatever state it is located.[16] They do not "reimburse" their members after the fact (from New York or anywhere else) as the Superior Court presumed.

Third, the Superior Court, looking at §148(2)(d), relied on the fact that "Plaintiffs' place of business is New York." Ex. A at 18-19 (citing *Zeneca*, 710 F. Supp. 2d at 471). However, this factor does not outweigh the fact that Defendants are Delaware entities with their principal place of business in Delaware. *See id.*, A169-71. Moreover, the Court below glossed over § 148(2)(c), which weighs in favor of applying Delaware law because Defendants' marketing fraud was rooted

[16] *See infra* p. 30-31 (listing cases certifying "endpayer" classes—*i.e.*, TPP and consumers, the joint purchasers of prescription drugs).

in and emanated from Delaware.[17]

The Superior Court concluded that New York law governs Plaintiffs' Nexium purchases in fourteen other states. However, New York has no interest in applying GBL § 349 to Nexium purchases in other states. *See Goshen v. Mut. Life Ins. Co.*, 774 N.E.2d 1190, 1196 (N.Y. 2002). If one state's laws should govern all the Nexium purchases at issue, it should be Delaware's laws. That is where the deceptive acts originated, and only it can claim a significant interest in the application of its laws extra-territorially due to its unique interest in regulating Delaware corporations beyond its borders.[18]

[17] Section 148(2)(e)—the location of the "tangible thing which is the subject of the transaction between the parties"—is irrelevant in this context, and § 148(2)(f) is inapplicable because there is no relevant contract between the parties.

[18] Comparable consumer fraud class actions have reached similar conclusions. *See, e.g.*, *In re Mercedes-Benz Tele Aid Contract Litig.*, 257 F.R.D. 46, 67 (D.N.J. 2009) (applying New Jersey law ("NJ") "[g]iven the fact that all of the conduct underlying Plaintiffs' consumer fraud claim took place in [New Jersey], and consideration of 'the place where the defendant made the representations' strongly supports applying [New Jersey law] to Plaintiffs' claims") (quoting Restatement § 148(2)(c)); *Kelley v. Microsoft Corp.*, 251 F.R.D. 544, 553 (W.D. Wash. 2008) (analyzing the Restatement §§ 145 and 148 factors and applying Washington law because "the most significant contacts in the context of Plaintiffs' [deceptive marketing] claims are to Washington, where Defendant resides and created the allegedly unfair or deceptive marketing scheme"); *Parkinson v. Hyundai Motor Am.*, 258 F.R.D. 580, 598 (C.D. Cal. 2008) (applying California's consumer protection law to a nationwide class' claims because "the wrongful acts underlying those claims emanated from defendant's California headquarters").

III. By predetermining that one state's laws govern all Plaintiffs' claims, the Superior Court ignored the other states' respective interests in having their own laws govern purchases injuring consumers in their states.

1. QUESTION PRESENTED

In an action by TPPs alleging injury via fraudulently-induced purchases in several states and asserting claims under the respective consumer protection laws of those states, should a court apply only the consumer protection law of the single state where the TPP is headquartered, as the Superior Court did here, or apply each state's respective consumer protection laws to the purchases (*i.e.*, injury) occurring in that state, ensuring that each state's laws protect consumer purchases within its own borders as intended? This issue was preserved for appeal. A261-62, 270-71, 289-91, 353-54, 373-75, 379-80.

2. SCOPE OF REVIEW

Choice of law is a legal question that this Court reviews *de novo*. *Tumlinson*, 106 A.3d at 986 (citation omitted). The Court also reviews a trial court's grant of a motion to dismiss *de novo*. *RBC Capital*, 87 A.3d at 639 (citation omitted).

3. MERITS OF THE ARGUMENT

The Superior Court found an "actual conflict" between the DCFA and GBL § 349. Ex. A at 17. But that is where the Superior Court's conflict analysis ended. *See* Ex. A at 14 ("the Court finds that the [only] competing laws at issue are the

laws of Delaware and New York"); Ex. A at 15 ("when conducting its choice of law analysis, this Court will consider the laws of Delaware and New York as the competing interests in this case"). The Court below neglected to address the application of the other consumer protection laws at issue, despite the fact that the injury in question—overpayment of Nexium at the pharmacy counter—also occurred in those states.[19] As a result, New York's consumer protection law was foisted on fourteen sovereign states whose legislatures enacted their own consumer protection statutes (without the "awareness" element the trial court read into New York law) to protect consumer purchases within their borders.

The Superior Court reasoned that only New York law needed to be compared to Delaware law because Plaintiffs "provide benefits to current and former New York City Employees . . . . Plaintiffs are headquartered in New York where their contractual relationships with their members, their decision to reimburse for Nexium and their money payments necessarily were made." Ex. A at 15. Absent from those factors is, however, the crucial location of the injury in question, which took place in fifteen states, only one of which is New York.

[19] The Superior Court misconstrued Plaintiffs' argument below to seek to apply "the law of each of the 14 states in which individual members reside . . . because, according to Plaintiffs, that is where their members most likely purchased Nexium." *See* Ex. A at 14-15. Plaintiffs argued in the alternative that if the DCFA was deemed not to govern (because of a dispositive conflict of law), the law of the *place of purchase* should govern. *See* A243, 262, 270-71. The location of purchases in the fifteen states was a pleaded fact. A171. An individual member's residence is not and never was a factor.

This oversight may have stemmed from the Superior Court's mischaracterization of Plaintiffs' role in purchasing Nexium. As noted above, the court below improperly focused on where the money used to "reimburse" Plaintiffs' members for their Nexium purchases came from. Ex. A at 10, 18-19. But, Plaintiffs (and virtually every other TPP), along with their members, are the dual-purchasers of prescription drugs at the point of purchase, with TPPs usually paying at least 80% of the cost. *See* A202. They do not "reimburse" their members after the fact as the Superior Court inferred. Thus, Plaintiffs' *injury* of overpaying for Nexium occurs at the pharmacy counter in whatever state the pharmacy is situated.

Courts confronted with this very issue in prescription drug overcharge cases have rejected the Superior Court's conclusion that the interest of the state where a TPP is headquartered outweighs the interest of the state where the purchase induced by fraud occurred. In *In re Wellbutrin XL Antitrust Litig.*, 282 F.R.D. 126, 134-37 (E.D. Pa. 2011), the district court conducted a choice-of-law analysis and, after weighing the relevant Restatement factors,[20] looked to the laws of the state where the alleged overcharged prescription was filled.

[20] In *Wellbutrin XL*, TPP plaintiffs asserted antitrust claims under the antitrust and consumer protection statutes of six states. *See Wellbutrin XL*, 282 F.R.D. at 131. Like the court below, in its conflict analysis the district court looked to the Restatement § 145(2) factors. *Id.* at 135 (reasoning that "antitrust violations are essentially tortious acts") (quoting *Associated Gen. Contractors v. Cal. State Council of Carpenters*, 459 U.S. 519, 547 (1983)).

> The place of purchase is where the relationship between the parties is centered; it is where the transaction with the alleged overcharge actually occurs. A place-of-purchase rule protects justified expectations because an in-state transaction will be governed by the antitrust laws and/or consumer protection laws of that state and not by the chance location of the TPP's principal place of business, the location of the TPP's [Pharmacy Benefit Manager] or an individual purchaser's residence. This approach will also provide consistent results because all purchases within a state will be treated uniformly.

Id. at 135.

Wellbutrin XL found additional support for its conclusion from the New York Court of Appeals' decision in *Goshen*, 774 N.E.2d 1190. *Goshen* held that "our General Business Law analysis does not turn on the residency of the parties. As both the text of the statute and the history suggest, the intent is to protect consumers in their transactions that take place in New York State. It was not intended to police the out-of-state transactions of New York companies…." *Id.* at 1196. The Superior Court's decision is at odds with *Goshen.*

Other courts have also applied the laws of the state where the injurious prescription is filled. *See, e.g., In re Flonase Antitrust Litig.*, 815 F. Supp. 2d 867, 883, 885 (E.D. Pa. 2011) (applying "the law of the purchase states" to plaintiffs' claims because: "The state laws at issue here are intended to protect consumers from being overcharged. The purchase states have a serious interest in applying their law to allow consumers (or in this case, the Plans covering the consumers) to recover the money that they were overcharged in a transaction occurring in their

states."); *Sheet Metal Workers Local 441 Health & Welfare Plan v. GlaxoSmithKline, PLC,* 737 F. Supp. 2d 380, 393 (E.D. Pa. 2010) ("Because the Plans, and their members, suffered injury in the states where they purchased Wellbutrin SR, each state has a significant interest in enforcing its antitrust laws in light of alleged violations by [defendant]."); *In re Relafen Antitrust Litig*., 221 F.R.D. 260, 277-78 (D. Mass. 2004) ("[s]tates have a strong interest in protecting consumers with respect to sales within their borders, … but they have a relatively weak interest, if any, in applying their policies to consumers or sales in neighboring states"; "the Court considers the more significant contact in this context to be the location of the injury -- that is, the location of the sales to the end payor plaintiffs.").

Notably, Defendants have conceded the appropriateness of applying the law of the place of purchase by virtue of the language used to effectuate their $20 million class settlement of allegations related to Nexium's marketing under Massachusetts's G.L. 93A § 9(2). That settlement paid TPPs located in any state for Nexium purchases in Massachusetts pharmacies, not just Massachusetts TPPs. *See* A360 ("you are a member of the settlement Class if you are a person or entity who, during the period from March 1, 2001, through February 6, 2013: (a) purchased Nexium® in or from Massachusetts, or (b) reimbursed or paid for Nexium® dispensed in Massachusetts, or (c) reimbursed or paid for Nexium®

purchased by mail order from Massachusetts").

The Ninth Circuit's recent decision in *Bobbitt v. Milberg LLP*, No. 13-15812, 2015 U.S. App. LEXIS 16082 (9th Cir. Sept. 10, 2015), is also instructive. The Court of Appeals found that the district court's denial of class certification was an abuse of discretion when its choice-of-law analysis "assume[d] that any economic injury necessarily occurs in the victim's domicile state." *Id.* at *7. That is the precise mistake the Superior Court made here. The Ninth Circuit held, as Plaintiffs advocate here, that the "focus[is] not on the place where the victim feels the consequences of the injury, but on the location of injury itself."

Moreover, multiple courts in pharmaceutical drug litigations have adjudicated plaintiffs' claims on a state-by-state basis, and have not stripped plaintiffs of remedies under other state's laws, as the Superior Court did here. *See, e.g., Astrazeneca AB v. UFCW (In re Nexium Antitrust Litig.)*, 777 F.3d 9 (1st Cir. 2015) (affirming certification of a class of endpayers (*i.e.*, TPPs and consumers) claiming damages under the antitrust and consumer protection laws of 24 states and the District of Columbia, including states plaintiffs did not reside in); *In re DDAVP*, 903 F. Supp. 2d 198 (sustaining TPPs' antitrust and consumer protection claims, including states in which the TPPs did not reside); *In re Terazosin Hydrochloride Antitrust Litig*., 220 F.R.D. 672, 701 n.45, 703 (S.D. Fla. 2004) (certifying classes of endpayers under the laws of different states); *In re Cardizem CD*

Antitrust Litig., 200 F.R.D. 326, 332, 352 (E.D. Mich. 2001) (same); *In re Lidoderm Antitrust Litig.*, No. 14-md-02521-WHO, 2015 U.S. Dist. LEXIS 58979 (N.D. Cal. May 5, 2015) (sustaining TPPs' antitrust and consumer protection claims, including states in which the TPPs did not reside); *In re Aggrenox Antitrust Litig.*, MDL No. 2516, 2015 U.S. Dist. LEXIS 35634 (D. Conn. Mar. 23, 2015) (same); *In re Suboxone* , 64 F. Supp. 3d 665(same).

The injuries at issue here transpired in several states and were not confined to New York. The Superior Court thus erred in superimposing New York's law on the other fourteen states and infringing on those states' sovereign rights.

CONCLUSION

The Superior Court failed to acknowledge that the SAC alleged different places of injury and states' laws not at issue in *Zeneca*. It applied *Zeneca*, ignoring the distinctions, and conjured a conflict between the DCFA and GBL § 349. The Superior Court then erroneously held that New York law governs Plaintiffs' claims in all fifteen states at issue, and that Plaintiffs fail to state a claim under GBL § 349, again relying on *Zeneca*. *Zeneca* has thus become the case of the "fox terrier coming to court," where a bad precedent spawns bad law:

> In a recurring theme that inspired many of his books and essays on natural history, the prominent biologist Stephen Jay Gould often documented how, not uncommonly, an error enters into scientific theories and writings, and later becomes perpetuated when the fallacy is uncritically adopted and copied by subsequent scholars, at times expressed with identical phrases, arguments and illustrations. *See, e.g.*, Stephen Jay Gould, *Bully for Brontosaurus* 163-64 (1991) (finding the description of Eohippus, the so-called dawn horse, as resembling "the size of a fox terrier" in two-thirds of modern American biology textbooks, and tracing the archaic simile verbatim to a 1904 article by an eminent American scholar). In consequence, flawed or false concepts gain currency in scientific literature, and then become axiomatic through generations of literal repetition in succeeding texts, sometimes long after the rationale for the original proposition has been lost, and even after the theory has been roundly discredited or disproved. The law has its own version of this practice reflected in some judicial opinions.

Anwar v. Fairfield Greenwich Ltd., 728 F. Supp. 2d 354, 357 (S.D.N.Y. 2010).

Plaintiffs respectfully request that the Court reverse the Superior Court's decision.

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