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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

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NATURE OF PROCEEDINGS

A. Overview of the Case

Plaintiffs are New York-based union health funds that provide prescription-drug benefits to their individual members. They sue solely on their own behalf, not on behalf of their members, in their capacity as "third-party payers" ("TPPs") of drug costs. Although they challenge the marketing of the prescription drug Nexium® (esomeprazole magnesium), Plaintiffs nowhere allege that *they* received any allegedly false marketing or that they were deceived into covering Nexium. Indeed, they concede that they have continued to provide reimbursement for Nexium for over a decade since they filed this suit.

Plaintiffs claim instead they are the passive victims of a deception they presume occurred when their members' physicians chose to prescribe Nexium rather than a potentially cheaper alternative. The fundamental problem with their complaint is that the link between the alleged wrongful conduct (the marketing) and their injury (paying or reimbursing for Nexium, rather than a cheaper alternative) is non-existent.

The Superior Court applied Delaware law in dismissing Plaintiffs' claim for unjust enrichment, holding that Plaintiffs failed to plead a causal link between the marketing conduct and their alleged injury. Plaintiffs have not appealed that dismissal. Instead they focus on the court's choice of law determination on which

it grounded its dismissal of their "consumer fraud" claims under New York law. But the Court need not address or even resolve those choice-of-law issues, because the same no-causation pleading defect that led to dismissal of the unjust enrichment claim warrants dismissal of the remaining claims.

Should this Court address choice-of-law, it is evident that the Superior Court properly held the choice presented is between the consumer fraud statutes of New York and Delaware (rather than other states where Plaintiffs' members purchased Nexium), that New York law would apply, and that Plaintiffs fail to state a claim under New York law. For this reason as well, the judgment should be affirmed.

B. Summary of Procedural Background

Plaintiffs are associated with the Teamsters Local 237 union, which represents New York City employees. A169-171; B53. On November 18, 2004, Plaintiffs filed this action in the Superior Court against Defendants AstraZeneca Pharmaceuticals LP and Zeneca, Inc. (collectively, "AstraZeneca"), on behalf of themselves and a putative nationwide class of TPPs – insurance companies, union health plans, and other entities that provide prescription-drug benefits. A2. On May 4, 2005, this action was stayed pending resolution of essentially identical class actions consolidated in the District of Delaware, *Pa. Emp. Benefit Trust Fund v. Zeneca, Inc.* ("*Zeneca*"), Cons. C.A. No. 05-075, where plaintiffs' counsel included the same counsel who represent Plaintiffs here. A17-18.

Around this time, other actions were filed across the country challenging the marketing of Nexium under various state statutes. Cases in Arkansas and Florida were dismissed for failure of causation and because the courts found that the challenged promotions were consistent with studies appearing on Nexium's label, as approved by the Food and Drug Administration ("FDA"). *Depriest v. AstraZeneca Pharms. L.P.*, 2008 WL 3243562 (Ark. Cir. Ct. July 31, 2008), *aff'd*, 351 S.W.3d 168 (Ark. 2009); *Prohias v. AstraZeneca Pharms., L.P.*, 958 So. 2d 1054 (Fla. Ct. App. 2007). In California, AstraZeneca prevailed on summary judgment and defeated class certification based on "overwhelming evidence" that individuals, including the named plaintiffs, were prescribed Nexium for a variety of reasons unrelated to advertising. *See Weiss v. AstraZeneca Pharms. LP*, 2010 WL 3387220 (Cal. Ct. App. Aug. 30, 2010).[1]

In *Zeneca*, the district court granted AstraZeneca's initial motion to dismiss, and after time on appeal and remand,[2] it granted a second motion to dismiss. 710 F. Supp. 2d 458 (D. Del. 2010). That court held that: (1) the law of plaintiffs' home states (Pennsylvania, New York, and Michigan) controlled rather than the

[1] The outlier was the Massachusetts litigation referenced by Plaintiffs (AOB 29), in which claims survived summary judgment because the lower court interpreted Massachusetts law as not requiring causation or injury-in-fact beyond the purchase of a product that was allegedly deceptively advertised.

[2] *See Zeneca*, 2005 WL 2993937, at *3-4 (D. Del. Nov. 8, 2005), *aff'd in part*, 499 F.3d 239 (3d Cir. 2007). The Supreme Court vacated and remanded the case in light of *Wyeth v. Levine*, 555 U.S. 555 (2009). *Zeneca*, 710 F. Supp. 2d at 464-66.

Delaware Consumer Fraud Act ("DCFA") (*id.* at 466-77); and (2) plaintiffs failed to plead facts showing causation (*id.* at 480-86). Plaintiffs received leave to amend but declined to do so, *see Zeneca*, Dkt. No. 152, and did not appeal.

The Superior Court lifted the stay of this action in February 6, 2014, long after *Zeneca*'s resolution.[3] On April 10, 2014, Plaintiffs filed their Second Amended Complaint ("SAC"). Before doing so, Plaintiffs were aware of *Zeneca* and that AstraZeneca would move to dismiss on causation grounds. Plaintiffs' counsel acknowledged to the Superior Court that "it's going to be a one shot deal" whether or not their claims would survive a motion to dismiss. A156. Yet they repeated the same claims dismissed in *Zeneca*: (1) violation of the DCFA; (2) violation of consumer protection acts of fourteen other states; (3) unjust enrichment; and (4) negligent misrepresentation. A11, A209-20. The SAC did nothing to bolster the allegations of causation found fatally defective in *Zeneca*.

C. The Superior Court's Ruling

On July 8, 2015, after full briefing and argument, A14-16, 231-384; B46-209, the Superior Court granted AstraZeneca's motion to dismiss with prejudice.

The court found an "actual conflict" between the DCFA and New York's General Business Law ("GBL") § 349, given specific New York precedent

[3] Plaintiffs requested a lift of the stay on August 16, 2010 but took no further action until 2013, when a Superior Court clerk contacted the parties. AstraZeneca moved to dismiss the case for prosecutorial neglect, B38-45, but the motion was denied.

defining causation for false advertising claims. It then held that under the "most significant-relationship" test prescribed by the RESTATEMENT (SECOND) OF CONFLICT OF LAWS ("Restatement"), New York's GBL § 349 governs Plaintiffs' claims, rather than the DCFA applying nationwide. Opinion ("Op.") at 14-20. The court rejected Plaintiffs' alternative argument – to apply the laws of various states where Plaintiffs' members purchased Nexium – because Plaintiffs' claims as TPPs flowed from their actions and from payments they made from New York, and not from where their members may have purchased Nexium. *Id.* at 14-15.

The court then found that Plaintiffs failed adequately to plead causation under GBL § 349, including because they did not allege that they, their members, or their members' physicians saw the challenged ads prior to purchase. *Id.* at 20-21. It held: "[A]ny purported chain of causation that runs from the allegedly deceptive advertisements" through "the decisions of individual doctors to prescribe a drug to their patients to causally affect the payer unions in this case is simply too attenuated." Op. 21. In pertinent part, the court also held that Plaintiffs' unjust enrichment claim could be addressed under Delaware law because as to that claim no conflict of law existed, but the claim still failed for the same reasons as with their consumer fraud claims: Plaintiffs failed to plead "a causal connection between the alleged 'enrichment' and the alleged 'impoverishment.'" *Id.* at 22.

On August 5, 2015, Plaintiffs filed a Notice of Appeal. A16.

SUMMARY OF ARGUMENT

I. Plaintiffs Fail to Plead Causation and Injury Under any State's Law

1. Although Plaintiffs present three choice-of-law issues on appeal, they cannot state a claim under any applicable law, as shown by the dismissal of their unjust enrichment claim. Plaintiffs do not allege that Nexium's marketing directly affected them in any way. Any attempt to state a claim based on the conduct of their members or the medical prescribing decisions of their members' physicians is too attenuated. In addition, a TPP – as a financial intermediary in the business of collecting premiums in exchange for providing defined health benefits – suffers no cognizable injury when a physician prescribes a drug that the TPP has chosen, and has collected premiums, to pay for.[4] The Superior Court properly dismissed the claims with prejudice, as the defects are inherent in the nature of these claims, and Plaintiffs cannot address them, despite having had the opportunity to do so.

II. The Superior Court Properly Held that New York's GBL § 349 Applies.

2. *Plaintiffs' contention*: *The DCFA applies because there is no conflict of law*. Denied. Plaintiffs attempt to dilute New York law. For false advertising cases, New York law requires that plaintiffs specifically plead in the complaint awareness of particular misleading ads before the purchase, *Gale v. Int'l Bus.*

[4] *See, e.g.*, *State of São Paulo of Federative Rep. of Braz. v. Am. Tobacco Co.*, 919 A.2d 1116, 1119, 1123-26 (Del. 2007); *Ironworkers Local Union 68 v. AstraZeneca Pharms.*, LP, 634 F.3d 1352, 1364-68 (11th Cir. 2011).

Machs. Corp., 781 N.Y.S.2d 45, 47 (App. Div. 2004), which Plaintiffs have not done. GBL § 349 also has specific standing rules that support dismissal of Plaintiffs' claims. The only way to avoid a conflict is for this Court to clarify that the DCFA imposes causation and standing requirements comparable to those in *Gale* and GBL § 349.

3. *Plaintiffs' Contention*: *If there is a conflict, the DCFA should govern the claims of all TPPs nationwide*. Denied. Under both the Restatement and principles of federalism, Plaintiffs' home state has the predominant interest in applying its consumer protection statutes to its residents. That AstraZeneca allegedly conducted its advertising for Nexium out of its Delaware headquarters does not support applying the DCFA nationwide. *See Maniscalco v. Brother Int'l (USA) Corp.*, 709 F.3d 202, 209-10 (3d Cir. 2013).

4. *Plaintiff's contention: Alternatively, the law of various states in which Plaintiffs' members purchased Nexium applies*. Denied. Plaintiffs are New York union funds asserting claims on their own behalf, not on behalf of their members. Even if some New York City employees/members filled their prescriptions outside New York, that does not alter the facts that *Plaintiffs* reside and operate in New York and pay or reimburse for Nexium from New York. New York has the most significant relationship to the claims that *Plaintiffs* seek to advance.

STATEMENT OF FACTS

AstraZeneca makes Prilosec and Nexium, which are in a class of prescription drugs known as proton pump inhibitors ("PPIs"), which treat disorders that require "gastric acid inhibition," including erosive esophagitis ("EE") and gastroesophageal reflux disease ("GERD"). A165-66,172. Prilosec® (omeprazole) was the first "global standard" PPI. A165, 172. In February 2001, AstraZeneca obtained FDA approval to introduce Nexium. A182. Compared to Prilosec, Nexium has certain differences in chemical formulation and was approved at a maximum 40 mg dose for treating EE, whereas Prilosec was approved at 20 mg for that condition. A174, 179-80. Both are safe and effective drugs for their approved indications.

Plaintiffs claim that AstraZeneca launched Nexium in 2001 by falsely promoting it to consumers and doctors as "superior" to Prilosec. A166-67, 174-75, 182, 186-87, 201. Although Plaintiffs claim that the studies do not establish "superiority," they conceded that Nexium was in fact proven more effective than Prilosec in certain metrics and in certain clinical studies. A175-76 (SAC ¶¶ 43, 45); *see also* B012-13 (First Am. Compl. ¶¶ 44, 46, admitting that studies appearing on Nexium's FDA-approved package insert showed statistically significant better results with Nexium 40 mg compared to Prilosec 20 mg).

Much of the advertising challenged in the SAC involves mere slogans such as "Today's Purple Pill," the "New Purple Pill," and "From the Makers of Prilosec." A193. Other allegations attempt to piggyback on discovery in a similar but long-dismissed action by referring, for example, to sales messages conveyed to unidentified physicians in California. *See* A189; *see also, e.g.*, A192 (citing Rule 30(b)(6) testimony of AstraZeneca representative "in the California Nexium litigation"). Notably, however, Plaintiffs never allege that *they* were aware of, or were misled by, any promotions in their purchasing decisions. Nor do they specifically allege that any of their members or their members' physicians were exposed to or misled by any alleged false advertising, let alone identify those members or physicians and what particular communications they received.

Plaintiffs allege that they were injured by paying for Nexium because they "would not have purchased Nexium had they known the truth." A207. But Plaintiffs themselves concede that they *still* continue to purchase Nexium, even though it is evident that each Plaintiff has known this alleged "truth" for many years. *See* A169-70 (each Plaintiff "pays for Nexium"); A260. Beyond that, the SAC only conclusorily alleges that each Plaintiff "is a health and welfare fund that pays for Nexium," and that each "was injured as a result of the unlawful conduct alleged herein." A169-71.

ARGUMENT

I. Appellees Respectfully Request That This Court Affirm Based on Plaintiffs' Failure to Plead Causation and Injury

A. Question Presented

Whether, under any applicable law, this Court should affirm the dismissal of the SAC with prejudice for failure to state a claim? This issue was preserved below. B055-56, 067-072, 176-179, 190-93.

B. Scope of Review

Orders granting a motion to dismiss are reviewed *de novo*. *Clinton v. Enter. Rent-A-Car Co.*, 977 A.2d 892, 895 (Del. 2009). "[C]onclusory allegations unsupported by specific facts" need not be accepted as true. *Id.* Consumer fraud claims, including the elements of causation and injury, must be pled with "particularity." Del. Super. Ct. R. 9(b).[5] On *de novo* review, the Court may affirm based on any ground appearing in the record. *Windom v. William C. Ungerer, W.C.*, 903 A.2d 276, 281 n.18 (Del. 2006). Denial of leave to amend is reviewed for abuse of discretion. *Shively v. Klein*, 551 A.2d 41, 44 (Del. 1988).

C. Merits of the Argument

The Superior Court's dismissal of both the unjust enrichment claim under Delaware law and the consumer protection claim under New York law reveals a

[5] *See, e.g.*, *Marshall v. Priceline.com, Inc.*, 2006 WL 3175318, at *2 n.11 (Del. Super. Ct. Oct. 31, 2006); *Cornell Glasgow, LLC v. La Grange Props., LLC*, 2012 WL 2106945, at *8 (Del. Super. Ct. June 6, 2012).

fundamental flaw in Plaintiffs' claims, under any law. Plaintiffs purport to sue for false advertising, but they do not allege that they received, or were directly affected by, any false promotions. Instead, their theory of injury runs through the assumed deception, and corresponding conduct, of their members' physicians in prescribing Nexium, rather than a potentially cheaper alternative.

The court below and myriad federal courts have dismissed TPP claims similar to these for failure of causation and injury. This Court, in *São Paulo*, 919 A.2d at 1123-26, likewise rejected tort claims by a TPP to recover health costs allegedly incurred due to deceptive marketing to its members. It identified several problems with such claims akin to defects in proximate causation and injury and ultimately held that product manufacturers simply have no duty of care to TPPs.

Whether viewed as a lack of causation, injury, or standing, there are two fundamental defects in Plaintiffs' theory: (1) a failure to connect AstraZeneca's marketing specifically to the prescribing decisions for Plaintiffs' members; and (2) independently, TPPs cannot complain of any "injury" incurred when physicians prescribe a safe and effective drug that they themselves have agreed to cover.

1. Plaintiffs Have Not Pled a Sufficient Connection Between the Advertising and Their Members' Nexium Prescriptions

Plaintiffs themselves argue that the consumer protection statutes of Delaware and New York, as well as various other states, are not in conflict because

those statutes all require "causation," which is a "fundamental tenet" of any "tort." AOB 13. All Plaintiffs allege, however, is that they purchased or reimbursed for a drug that was deceptively advertised to the general public. They never allege that *their members' physicians* actually were exposed to, much less affected by, any misleading promotions. That is fatal under Rule 9(b) or even Rule 8, as courts across jurisdictions hold that false advertising claims require, if not reliance itself, that at the very least that the claimants were exposed to the challenged advertising. Contrary to what Plaintiffs assert (AOB 18), exposure is not something a court simply infers but is something Plaintiffs must be able to plead.

Under New York law, for example, although "[r]eliance is not an element of a claim under [GBL] § 349," to state a false advertising claim, the plaintiff must "plead causation with sufficient specificity" by alleging what "particular misleading statements" the plaintiff saw prior to purchase. *Gale*, 781 N.Y.S.2d at 47. "If the plaintiff did not see any of these statements, they could not have been the cause of his injury, there being no connection between the deceptive act and the plaintiff's injury." *Id.* (affirming granting of motion to dismiss). Courts applying the laws of other states identified in the complaint are in accord.[6]

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[6] See, *e.g.*, cases interpreting the consumer fraud statutes of **Arizona,** *Kuehn v. Stanley*, 208 Ariz. 124, 129 (Ariz. Ct. App. 2004) (proximate causation of injury from false advertising requires that the "consumer relie[d], even unreasonably, on false or misrepresented information"); **Connecticut**, *Agrella v. Ford Motor Co.*, 2006 WL 1493823, at *5-6 (Conn. Super. Ct. May 18, 2006) (causation requires

Even the primary case on which Plaintiffs rely – *Yarger v. ING Bank,* 285 F.R.D. 308, 323 & n.21 (D. Del. 2012) –supports this point. In *Yarger*, the court found no necessary conflict between the DCFA and GBL § 349 as to causation in a class action attacking mortgage-rate disclosures, where plaintiffs proffered specific evidence that they and all class members actually received materially the same, misleading written communications. *Yarger*, 285 F.R.D. at 314-15, 326.[7]

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allegedly false ads actually reached each class member); **Florida,** *Prohias*, 958 So. 2d at 1054 (affirming dismissal of claims challenging promotion of Nexium on causation and other grounds); **Kentucky,** *Maynard v. Am. Med. & Life Ins. Co.*, 2012 WL 2571160, at *4 (W.D. Ky. July 2, 2012) (no claim unless plaintiff can "recall the content of the advertising she saw"); **Missouri**, *In re 5-hour ENERGY Mktg. & Sales Practices Litig.*, 2014 WL 5311272, at *16, 24 (C.D. Cal. Sept. 4, 2014) (dismissing MMPA claim because no allegation that plaintiffs read or heard marketing statements); **New Jersey**, *District 1199P Health & Welfare Plan v. Janssen, L.P.*, 784 F. Supp. 2d 508, 531 (D.N.J. 2011) (claim failed where plaintiffs did "not plead that they, or any of their prescribing doctors, received a misrepresentation of fact from [d]efendants and relied on that misrepresentation"); **Pennsylvania**, *Kern v. Lehigh Valley Hosp., Inc.*, 108 A.3d 1281, 1288-90 (Pa. Super. Ct. Jan 28, 2015) (requiring reliance in a false advertising case); **Tennessee,** *Harvey v. Ford Motor Credit Co.*, 8 S.W.3d 273, 276 (Tenn. Ct. App. 1999) ("Regardless of whether reliance is a required element under the T.C.P.A., plaintiffs must at least allege that they were exposed to the offensive conduct."); and **Washington**, *Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc.*, 162 Wash. 2d 59, 83-85 (Wash. 2007) (en banc.) (requiring "but for" proximate causation, rather than mere purchase of deceptively advertised product).

[7] In *Stephenson v. Capano Dev., Inc.*, 462 A.2d 1069, 1074 (Del. 1983), this Court held an "unlawful practice under section 2513(a) … is committed regardless of actual reliance by the plaintiff." *Stephenson* involved facts in which the plaintiffs had relied on the challenged representations. While this Court has not elaborated on precisely what evidence is required to establish that a person is a "victim" of a violation able to bring a private cause of action under 6 Del. 2525(a), the Court has never suggested that the purchase of an allegedly deceptively advertised product is, by itself, sufficient "causation." To the extent the DCFA includes a causation requirement equivalent to traditional tort law (AOB 13), the advertising must be a "but for" cause of, or at least a "substantial factor" in, the purchase. *See Culver v. Bennett*, 588 A.2d 1094, 1097-98 (Del. 1991) (discussing forms of tort causation).

Even if Plaintiffs had alleged that their members' physicians were exposed to the marketing, that would not suffice. As the Superior Court observed, "any purported chain of causation that runs" through "the decisions of individual doctors to prescribe a drug to their patients … is simply too attenuated." Op. 21. The reason is "there are 'many factors that a doctor may consider in determining what medication to administer to a given patient,' and 'doctors are presumed to go beyond the advertising medium and use their independent knowledge in making medical decisions.'" *Id.* (quoting *Se. Laborers Health & Welfare Fund v. Bayer Corp.*, 655 F. Supp. 2d 1270, 1280-81 (S.D. Fla. 2009) (dismissing TPPs' claims for lack of causation, despite state law not requiring reliance), *aff'd*, 444 F. App'x. 401, 404, 406 n.1 (11th Cir. 2011)). Myriad courts have rejected similar claims by TPPs on this fundamental failure-of-causation ground.[8] *Cf. São Paulo*, 919 A.2d at

[8] *See, e.g., Employer Teamsters-Local Nos. 175/505 Health & Welfare Trust Fund v. Bristol Myers Squibb Co.*, 969 F. Supp. 2d 463, 475 (S.D.W.V. 2013) (dismissing TPPs' claim for lack of proximate causation, without deciding whether "reliance" was required, because of "vast array of intervening events, including the 'independent medical judgment' of doctors," between challenged marketing and TPPs' reimbursements); *District 1199P Health & Welfare Plan v. Janssen, L.P.*, 2008 WL 5413105, at *9 (D.N.J. Dec. 23, 2008) (reliance not required, but dismissing TPPs' claim because "the independent and individualized decision-making of physicians … breaks any chain of causation"); *see also In re Yasmin & Yaz (Drospirenone) Mktg., Sales Pracs. & Prods. Liab. Litig.*, 2010 WL 3119499, at *7-8 (S.D. Ill. Aug. 5, 2010); *Pa. Employees Benefit Trust Fund v. AstraZeneca Pharms. LP*, 2009 WL 2231686, at *4-6 (M.D. Fla. July 20, 2009); *In re Schering-Plough Corp. Intron/Temodar Consumer Class Action*, 2009 WL 2043604, (D.N.J. July 10, 2009), 2010 WL 2346624 (D.N.J. June 9, 2010), *aff'd*, 678 F.3d 235 (3d Cir. 2012); *In re Actimmune Mktg. Litig.*, 2010 WL 3463491, at *11 (N.D. Cal. Sept. 1, 2010), *aff'd*, 464 F. App'x 651 (9th Cir. 2011).

1123-25 (observing problems of allowing TPPs to recover based on conduct of members that was not caused by false advertising).

Rather than respond to these points or the authority referenced in the Superior Court's opinion, Plaintiffs cite irrelevant cases. For example, in *In re Methyl Tertiary Butyl Ether Prods. Liab. Litig.*, 175 F. Supp. 2d 593 (S.D.N.Y. 2001) (AOB 17-18), the claim was not false advertising in a consumer transaction, but that petroleum companies failed to disclose "dangers and safety concerns" about conduct causing groundwater contamination, injuring plaintiffs whose wells were contaminated. *Id.* at 631. *Reyes v. Netdeposit, LLC*, 2015 U.S. App. LEXIS 15577 (3d Cir. Sept. 2, 2015) (AOB 21), is inapposite because it involved RICO conspiracy claims for a telemarketing scheme that sold *worthless* products and "was a 'complete sham' lacking any legitimate business substance." *Id.* at *21-22. Neither case is applicable here, as Plaintiffs concede that Nexium is safe and effective, and they themselves have reimbursed for Nexium for over a decade.[9]

Unlike claims involving, for example, defective products, hidden fees, or antitrust violations, this is not a case in which a purchase itself gives rise to injury. Plaintiffs' theory requires that their members and members' physicians have been deceived into choosing Nexium rather than a cheaper alternative. Plaintiffs never

[9] Plaintiffs below cited some cases allowing TPP claims that were distinguishable, including because the TPPs alleged they were directly deceived. *See* B187-89. Notably, Plaintiffs abandon reliance on such cases in their Opening Brief.

explain how, under their theory of harm, causation can exist absent a direct link between the marketing and the individual prescribing decisions of their members' physicians. Nor do they explain how they can state a claim under the DCFA when they cannot plead causation for unjust enrichment under Delaware law. Appellees respectfully request that the Court affirm the judgment given the fundamental failure to plead causation under any conceivable pleading requirement.

2. Plaintiffs' Independent Conduct as TPPs Further Precludes Them from Pleading Causation and Injury

An independent reason why Plaintiffs' claims fail is that a TPP suffers no cognizable injury by paying for a safe and effective prescription drug that it has chosen to cover. As observed in *São Paulo*, TPPs "are essentially financial intermediaries" who pay for their members' health costs by collecting premiums. 919 A.2d at 1124-26. TPPs are expected to "us[e] proper actuarial methods" to charge necessary premiums "whether the costs of care are high or low." *Id.* TPPs thus "suffer no damage" as long as premiums are sufficient to cover the costs. *Id*. Under *São Paulo*, Plaintiffs suffered no injury reimbursing for Nexium.

Federal courts have reached similar conclusions in rejecting state consumer protection claims in the prescription-drug context. As these courts explained, TPPs manage prescription-drug costs by setting premiums, obtaining rebates from manufacturers, and using cost-control mechanisms such as choosing what drugs

the TPP will cover and what members' co-pays will be for a given drug. *See Ironworkers*, 634 F.3d at 1367-68; *UFCW Local 1776 v. Eli Lilly & Co.*, 620 F.3d 121, 133-34 (2d Cir. 2010); *In re Rezulin Prods. Liab. Litg.*, 392 F. Supp. 2d 597, 601-04 (S.D.N.Y. 2005); A173. Physicians have no legal duty to prescribe drugs based on cost or what is cheapest for TPPs. So long as a drug is safe and effective as prescribed, TPPs suffer no cognizable injury when they pay for a drug that they voluntarily cover and have collected premiums to pay for. *See Ironworkers*, 634 F.3d. at 1363-68; *Health Care Serv. Corp. v. Pfizer, Inc.*, 2012 WL 2505555, at *3 (E.D. Tex. Apr. 23, 2012) (same); *see also UFCW*, 620 F.3d at 133-34 (alleged false advertising to physicians could not be proximate cause of any TPP injury, given choice to cover drug); *In re Yasmin*, 2010 WL 3119499, at *7-8 (citing TPPs' coverage decision as breaking chain of causation).

Plaintiffs' independent decision to pay for Nexium, and to continue paying for Nexium even after bringing this action, breaks any causal chain and precludes any claim of cognizable injury.[10] Further, although Plaintiffs allege that Nexium costs more than generic Prilosec on a per-pill basis, they do not plead that they suffered any actual damages, taking into account premiums they collected or based

[10] For similar reasons as in *São Paulo*, the Court could construe these defects as a failure of standing under 6 Del. C. § 2525(a). Plaintiffs below attempted to distinguish *São Paulo* as limited to the tobacco context, because TPPs are purchasers of prescription drugs, but not cigarettes. The reasoning in *São Paulo* is fully applicable here and consistent with *Ironworkers* and similar cases, and it has particular force because TPPs can readily choose *not* to cover a particular drug.

on the price *they* paid for Nexium, after considering rebates, copays, and other factors. *See Ironworkers*, 634 F.3d at 1364-68; *São Paulo*, 919 A.2d at 1124 (TPPs "would suffer no damage unless, and only to the extent, that the actual costs of providing" benefits "exceeded the premiums received," and any such calculation would be "at best, highly speculative").

3. The Superior Court Did Not Abuse Its Discretion in Dismissing the Claims with Prejudice

Plaintiffs also argue that they should have been given leave to amend. AOB 18. The defects above are fundamental and inherent. Moreover, courts have discretion to dismiss with prejudice when a plaintiff has failed to cure defects despite opportunity to amend. *See In re Alpharma Inc. Sec. Litig.*, 372 F.3d 137, 153-54 (3d Cir. 2004); *Luscavage v. Dominion Dental USA,, Inc.*, 2007 WL 901641, at *2-3 (Del. Super. Ct. Mar. 20, 2007). Here, "Plaintiffs had ample opportunity to amend their pleadings since 2004 to cure the defects identified in *Zeneca*." Op. 23. Plaintiffs were well aware of the case law and causation issues identified in *Zeneca* and told the court that the SAC was "going to be a one shot deal." A156. Yet Plaintiffs made no attempt to bolster their causation allegation to respond to *Zeneca*, and Plaintiffs did not proffer below – and *still* do not proffer – how they could cure the defects. The Superior Court did not abuse its discretion in dismissing the SAC with prejudice.

II. Should This Court Find It Is Necessary to Reach the Issue, New York's GBL § 349, Rather than the DCFA or Other States' Consumer Protection Laws, Must Apply in the Event of a Conflict of Law

A. Question Presented

Did the Superior Court err in its choice-of-law analysis of Plaintiffs' consumer protection claims? *See* Op. 9-20. This Question has three parts: (1) does an actual conflict of law exist between the DCFA and New York's GBL § 349; (2) if so, whether the Restatement factors favor applying the DCFA or GBL § 349; and (3) in the alternative, whether the Superior Court should have applied the law of each of various states in which Plaintiffs' members' purchased Nexium? These issues were preserved below. *See* B055, 60-63, 180-85.

B. Scope of Review

Choice of law rulings are reviewed *de novo. Bell Helicopter Textron, Inc. v. Arteaga*, 113 A.3d 1045, 1052 (Del. 2015).

C. Merits of the Argument

"Delaware courts use a two-part test to determine which sovereign's law to apply when there is a conflict: first, the court determines whether there is an actual conflict of law between the proposed jurisdictions. If there is, then the court must determine 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." *Bell Helicopter*, 113 A.3d at 1050.

A choice-of-law analysis is significant because "[e]ach sovereign is entitled to conduct its own cost-benefit analysis to determine the appropriate balance between compensating victims and fostering commercial activity within its borders," and that "comity requires [courts] to respect the balance established by those states." *Bell Helicopter*, 113 A.3d at 1052. An actual conflict will exist if there is any "material difference" between states' laws, such that a party is "more likely" to prevail, or has a "better chance," under one versus the other. *Berg Chilling Sys., Inc. v. Hull Corp.*, 435 F.3d 455, 462 (3d Cir. 2006), *cited with approval Deuley v. DynCorp Int'l, Inc.*, 8 A.3d 1156, 1161 n.18 (Del. 2010); *see also Fin. One Public Co. Ltd. v. Lehman Bros. Special Fin., Inc.*, 414 F.3d 325, 331-32 (2d Cir. 2005) (choice-of-law analysis does not require deciding the merits under each state's law but only asking whether differences could have a "significant *possible* effect on the outcome") (internal quotations omitted).

Here, Plaintiffs principally assert a choice between Delaware law (the DCFA) and New York law (GBL § 349). For the reasons above, this Court can avoid reaching that issue. But if the Court addresses the choice-of-law issue, then it should hold that New York law properly applies and requires dismissal.

1. Plaintiffs' Claims Cannot Survive Absent an Actual Conflict Between GBL § 349 and the DCFA

a. Plaintiffs Cannot Avoid New York Precedent Interpreting Causation Under GBL § 349

Plaintiffs argue that there is no conflict between the DCFA and GBL § 349 because neither requires "reliance" and both require "causation" (the DCFA doing so only implicitly), and they urge that Superior Court erred by holding that the DCFA "does not require *any* proof of causation whatsoever." AOB 12-13. That argument mischaracterizes both the Superior Court's opinion and the issue, which is not whether the DCFA has "*any*" form of causation requirement, but whether there are potential, material differences in the states' application of their laws.[11]

Under New York law, there is explicit precedent holding that, to state a claim based on false advertising under GBL § 349, the plaintiff must "plead causation with sufficient specificity" by alleging in the complaint what "particular misleading statements" the plaintiff saw prior to purchase. *Gale*, 781 N.Y.S.2d at 47. No such explicit precedent currently exists under the DCFA, which is why *Zeneca* and the Superior Court below found a conflict. *See* Op. 16; *Zeneca*, 710 F.

[11] "Causation" is a very broad concept that can be applied differently, and "[d]ifferences … exist [among states] in judicial interpretations of the requirements for proof of proximate cause between the consumer fraud act violation and the damage claims asserted." *Fink v. Ricoh Corp.*, 839 A.2d 942, 976 (N.J. Super. Ct. 2003); *cf. In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1300 (7th Cir. 1995) ("at some level of generality the law of negligence is one," but "nuance" matters and differences can arise in "judicial formulations" and "subordinate concepts").

Supp. 2d at 473-75; *see also Fink*, 839 A.2d at 977-78 (finding conflict between DCFA and other states on question of causation based on specificity of applicable precedent). From the perspective of a lower court, if one state has explicit precedent on an issue and another state does not, that is a material difference.

While this Court could now clarify that the DCFA's causation requirement is at least as demanding as GBL § 349's, that would not save Plaintiffs' claims because they do not plead facts sufficient to satisfy that standard. Therefore, to prevail, Plaintiffs would have to show both that the DCFA creates liability for deceptive advertising *per se*, and that the DCFA applies.

b. Plaintiffs' Arguments, Including Their Attempt to Dispute the Requirements of GBL § 349, Fail

Plaintiffs apparently dispute whether GBL § 349 really requires "awareness" as part of causation for a false advertising claim, AOB 16, but they never raised that argument below and therefore waived it. Del. Sup. Ct. Rule 8; *Riedel v. ICI Americas Inc.*, 968 A.2d 17, 25 (Del. 2009). In any event, Plaintiffs are wrong. *Gale* is the prevailing precedent interpreting New York law, and the rule it expresses is widely cited and applied by both state[12] and federal[13] courts.

[12] *See, e.g.*, *Sutherland v. Remax 2000*, 2008 WL 3307201, at *4-5 (N.Y. Sup. Aug. 7, 2008) (citing *Gale*; dismissing GBL § 349 claim because "[t]here are no allegations that [plaintiff] observed or was influenced by any advertisements"); *Baron v. Pfizer, Inc.*, 2006 WL 1623052, at *4 (N.Y. Sup. May 2, 2006) (citing *Gale*; dismissing GBL § 349 claim for misrepresentation of drug to consumers because, *inter alia*, "plaintiff has failed to include in her complaint any allegations

The cases Plaintiffs cite (AOB 16) are non-precedential federal district court decisions, none of which address *Gale* or dispute the awareness requirement for false advertising cases. *Bose v. Interclick, Inc.*, 2011 U.S. Dist. LEXIS 93663, at *22-23 (S.D.N.Y. Aug. 17, 2011), did not involve false advertising, but software that collected private information without consent. In other cases, the plaintiffs specifically alleged exposure to specific misrepresentations in connection with a purchase.[14] Plaintiffs also cite three federal cases purportedly allowing GBL § 349

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regarding how the defendant's alleged deceptive acts or practices mislead her or her physician, resulting in actual harm"), *aff'd*, 42 A.D.3d 627 (2007); *see also U.S. Bank N.A. v. De Los Rios*, No. 09-37317, 2014 N.Y. Slip. Op. 30153(U), at *5 (N.Y. Sup. Ct. Jan. 9, 2014) (citing *Gale*); *Kuperstein v. Lawrence*, 2010 N.Y. Misc. LEXIS 4189, at *13-14 (N.Y. Sup. Ct. Aug. 16, 2010) (same).

[13] *See, e.g.*, *Fenerjian v. Nongshim Co., Ltd.*, 72 F. Supp. 3d 1058, 1085 (N.D. Cal. 2014) (citing *Gale* and dismissing § 349 claims with prejudice "because there is no allegation that any of the indirect purchaser plaintiffs actually saw the alleged misrepresentations"); *Fleisher v. Fiber Composites, LLC*, 2012 WL 5381381, at *10-11 (E.D. Pa. Nov. 2, 2012) (citing *Gale* and dismissing, in part, claim under GBL § 349 because "at the minimum, the complaint must allege that the plaintiffs saw the deceptive statements prior to purchasing the defendant's product"); *In re Ford Motor Co. E-350 Van Prods. Liab. Litig. (No. II)*, 2012 WL 379944 at *14 (D.N.J. Feb. 6, 2012) (citing *Gale* and explaining: "Courts in New York have recognized that a consumer cannot show causation when he or she was not exposed to the alleged misrepresentation."); *see also Douyon v. NY Med. Health Care, P.C.*, 894 F. Supp. 2d 245, 263-64 (E.D.N.Y. 2012) (citing *Gale*); *In re: MI Windows and Doors, Inc. Prods. Liab. Litig.*, 908 F. Supp. 2d 720, 725 (D.S.C. 2012) (same); *In re Hydroxycut Mktg. & Sales Practices Litig.*, 2010 WL 2839480, at *5 (S.D. Cal. July 20, 2010) (citing *Gale* and dismissing GBL § 349 claim for misrepresentations of drugs "because [plaintiff] never alleged that she actually saw or read any of the deceptive statements … prior to purchasing them").

[14] *See Zaccagnino v. Nissan N. Am., Inc.*, 2015 U.S. Dist. LEXIS 78441, at *2 (S.D.N.Y. June 16, 2015) (plaintiff expressly alleged that he saw allegedly misleading ads before purchase and that ads "influenced Plaintiff's decision to purchase"); *In re Scotts EZ Seed Litig.*, 304 F.R.D. 397, 403-04 (S.D.N.Y. 2015) (plaintiff challenged statements on product packaging itself).

claims "in the TPP-prescription drug context," but those decisions addressed motions to dismiss on grounds other than causation.[15] Plaintiffs thus fail to cite any persuasive authority for ignoring the clear New York legal precedent and the overwhelming authority following it as controlling law.

For the reasons explained above, *Yarger* does not support Plaintiffs' position because in *Yarger* the plaintiffs proffered evidence that they and all class members actually received materially the same, allegedly misleading written communications. *Yarger*, 285 F.R.D. at 314-15, 326. Plaintiffs rely on *In re Warfarin Sodium Antitrust Litig.*, 212 F.R.D. 231 (D. Del. 2002) (AOB at 9, 14 n.10), but that case concerned a class settlement in which the claims would never be litigated, and the court did *not* undertake a choice-of-law analysis because "differences between the state laws … are irrelevant to the certification of a settlement class." *Id.* at 249-250; *see also In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 529 (3d Cir. 2004) (noting this "difference is key"); *Yarger*, 285 F.R.D. at 322 n.18 (*Warfarin* irrelevant for choice-of-law analysis).

[15] Specifically, they address a separate issue of GBL § 349 standing – whether conduct was "consumer-oriented" – and they are also distinguishable, in that two involved antitrust claims for supracompetitive pricing and the third involved a drug that was withdrawn from the market for safety reasons. *See In re Suboxone (Buprenorphine Hydrochloride & Naloxone) Antitrust Litig.*, 64 F. Supp. 3d 665, 702 (E.D. Pa. 2014); *In re DDAVP Indirect Purchaser Antitrust Litig.*, 903 F. Supp. 2d 198, 228 (S.D.N.Y. 2012); *In re Bextra & Celebrex Mktg., Sales Practices & Prod. Liab. Litig.*, 495 F. Supp. 2d 1027, 1035 (N.D. Cal. 2007).

c. Plaintiffs Also Ignore GBL § 349 Standing Issues

Plaintiffs narrowly focus only on "causation," but ignore that GBL § 349 has specific, threshold standing requirements. The statute only protects against "consumer-oriented" conduct. Thus, courts have rejected claims where, as here, the plaintiffs are a *business* alleging harm to themselves.[16] Even if Plaintiffs are alleging an intent to deceive the consuming public generally, TPPs lack standing to sue under GBL § 349 based on losses that are derivative of the alleged deception of their members because such "claims are too remote." *Blue Cross & Blue Shield of N.J., Inc. v. Philip Morris USA Inc.*, 3 N.Y. 3d 200, 208 (N.Y. 2004).[17] This line of authority – which is consistent with this Court's *São Paulo* decision – establishes a bright-line rule for standing that defeats Plaintiffs' claims, which wholly involve advertising directed to consumers generally.[18]

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[16] *See In re Rezulin*, 392 F. Supp. 2d at 614 (even under "a broad definition" of "consumer-oriented," TPPs lacked standing under GBL § 349 because they alleged TPPs were "true targets" of misrepresentations of drug and sought recovery only for TPPs "who allegedly over paid"); *Vitolo v. Mentor H/S, Inc.*, 426 F. Supp. 2d 28, 34 (E.D.N.Y. 2006) ("'[W]here the gravamen of the complaint is harm to a business as opposed to the public at large, the business does not have a cognizable cause of action under § 349.'"). Some of the cases cited in Appellants' Opening Brief have found claims by TPPs to be sufficiently "consumer-oriented" (AOB 16-17), but the SAC here alleges TPPs, not consumers, are "the true victims." A202.

[17] *See also City of New York v. Smokes-Spirits.Com, Inc.*, 12 N.Y.3d 616, 622-23 (N.Y. 2009) ("Since *Blue Cross*, it has been clear that allegations of indirect or derivative injuries will not suffice" under GBL § 349); *In re Wellbutrin XL Antitrust Litig.*, 260 F.R.D. 143, 164-65 (E.D. Pa. 2009) (dismissing TPPs' GBL § 349 claim because TPPs' injury was "too remote from the allegedly deceptive acts to state a claim under New York law").

[18] As noted in briefing below, New York law would have to apply in any event if

* * *

Plaintiffs would not have raised three issues on appeal – all directed at avoiding New York law – if they did not think the DCFA provided an advantage over GBL § 349. Although Plaintiffs' "consumer fraud" claim should fail under any law, it is deficient under explicit New York precedent, such that the only conceivable way to avoid dismissal would be for the Court to find a conflict between New York and Delaware law. In that case, the Court would then have to proceed to the second step of the choice of law analysis.

2. New York Law Has the Most "Significant Relationship," as Compared to Applying the DCFA Nationwide

To the extent a conflict exists, the Superior Court correctly applied the Restatement factors in concluding that New York law applies. Op. 11-20. Under the prescribed Restatement analysis, New York has the most substantial relationship to claims by New York-based health funds, whereas neither law, policy, or the weight of authority support applying Delaware law nationwide.

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this case proceeded, because there is a material difference between the "safe harbor" provisions under the GBL § 349 and the DCFA. Under GBL § 349(d), practices are not actionable if they comply with the regulations of any federal agency, including the FDA. Thus, the "safe harbor" applies to advertising consistent with a drug's FDA-approved label. *See Cytyc Corp. v. Neuromedical Sys., Inc.*, 12 F. Supp. 2d 296, 300-01 (S.D.N.Y. 1998). In contrast, the DCFA "safe harbor" only references FTC regulations. 6 Del. C. § 2513(b)(2). Whether AstraZeneca's marketing was supported by Nexium's FDA-approved labeling and thus protected under the GBL § 349 safe harbor – as courts have found under similar safe harbors – would be a significant issue if this case proceeded. *See DePriest*, 351 S.W.3d at 178; *Prohias*, 958 So. 2d at 1056.

a. Restatement §6 (1) Is Inapplicable

Plaintiffs first rely on Restatement § 6(1), which provides that a "court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law." Plaintiffs argue that 6 Del. C. § 2512 is such a "statutory directive" because the DCFA covers practices occurring "in part or wholly within" Delaware. AOB 20-24. This argument is misconceived.

Even if a statute *permits* extraterritorial application, that does not make it a "statutory directive." Restatement § 6(1) applies only "rarely" when a statute is "expressly directed to choice of law" and "explicitly" requires applying the home state's law "rather than the local law of another state." Restatement § 6(1), cmts. a, b; *see also Yelton v. PHI, Inc.*, 669 F.3d 577, 581-84 (5th Cir. 2012) (just because statute permits extraterritoriality does not make it a § 6(1) directive); *Thornton v. Hamilton Sundstrand Corp.*, 2013 WL 4011008, at *4, 6 (N.D. Ill. Aug. 6, 2013) (same). Nothing in the plain language of the DCFA's text operates as a such a mandate. *See Zeneca*, 710 F. Supp.2d at 473 ("§ 6 does not dictate that Delaware law should control"). Indeed, 6 Del. C. § 2512 is viewed as *restricting* the DCFA's extraterritorial reach. *Nieves v. All Star Title, Inc.*, 2010 WL 2977966, at *4 (Del. Super. Ct. July 27, 2010); *Marshall* , 2006 WL 3175318, at *2.

None of Plaintiffs' cases actually determined that a statutory directive exists under Restatement § 6(1). *See, e.g., Lony v. E.I. du Pont de Nemours & Co.*, 821

F. Supp. 956, 961 (D. Del. 1993) (holding merely held that a foreign plaintiff could have *standing* under DCFA).[19] Plaintiffs' theory also would violate traditional principles of comity—it would *require* applying the DCFA whenever conduct "in part" occurred in Delaware, even if all other considerations favor applying another state's law to residents or transactions in that state. Such a rule would serve no purpose except to make Delaware courts a magnet for false advertising claims against Delaware companies by plaintiffs, wherever they reside, because they think the DCFA will guarantee certification of a nationwide class under Delaware law.

b. The Superior Court Properly Applied the Restatement § 148 Factors

Once this Court rejects Plaintiffs' argument under Restatement § 6(1), it should apply Restatement § 148(2), which identifies the factors to evaluate which state "has the most significant relationship to the occurrence and the parties":

> (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 domicil, 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 as been induced to enter by the false representations of the defendant.

[19] *Lony v. E.I. Du Pont de Nemours & Co.*, 886 F.2d 628, 643 (3d Cir. 1989) addressed choice-of-law but preceded this Court's adoption of the Restatement test in *Travelers Indem. Co. v. Lake*, 594 A.2d 38, 40 (Del. 1991), and declined to apply it. *Yarger* did not consider Restatement § 6(1) at all. 285 F.R.D. at 323.

See Op. 13-14 (quoting factors).

"If any two of the [six factors], apart from the defendant's domicil … are located wholly in a single state, this will usually be the state of the applicable law with respect to most issues." Restatement § 148, cmt. j; *see also Maniscalco*, 709 F.3d at 209; *Zeneca*, 710 F. Supp. 2d at 468-69. Moreover, "[t]he domicil, residence and place of business of the plaintiff are more important than are similar contacts on the part of the defendant," and are of "*substantial* significance when the loss is pecuniary" because "a financial loss will usually be of greatest concern to the state with which the person suffering the loss has the closest relationship." Restatement § 148(2), cmt. i (emphasis added), *cited by* Op. 15 n.40; *Maniscalco*, 709 F.3d at 208; *Zeneca*, 710 F. Supp. 2d at 472 n.5; *Brown v. SAP Am., Inc.*, 1999 WL 803888, at *7 (D. Del. Sept. 13, 1999) (same).

Both the *Zeneca* court and Superior Court below found, factors (a), (b), and (d) all weigh in favor of New York law because that is where (1) Plaintiffs would have "received" and acted in reliance on any alleged misrepresentations, and (2) where Plaintiffs are headquartered and would have felt any financial loss from paying for Nexium. Op. 18-19. As the Superior Court explained:

> Plaintiffs are third-party payer unions providing benefits for current and former New York City employees. While some of the individual members may currently reside elsewhere, and thus may have purchased Nexium 'in nearly two-thirds of the United States,' New York is the place with the most significant interest in enforcing its

> consumer protection laws in this action. Plaintiffs are headquartered in New York where their contractual relationships with their members, their decisions to reimburse for Nexium, and their money payments necessarily were made.

Op. 15; *see also Zeneca*, 710 F. Supp. 2d at 475-76.

That reasoning is consistent with "the overwhelming majority" of courts, which hold that the state with the most significant relationship in a consumer fraud claim is usually the claimant's home state. Consumer protection statutes are intended to protect and delineate the rights of consumers within that state, whereas states generally have a weak interest in projecting their statutes onto consumers acting from other states. *See Maniscalco*, 709 F.3d at 209; *In re Vioxx Prods. Liab. Litig.*, 861 F. Supp. 2d 756, 763-65 (E.D. La. 2012) (surveying case law showing that majority of cases "have applied the law of the state of the plaintiff's residence to the plaintiff's consumer fraud claim"); *In re K-Dur Antitrust Litig.*, 2008 WL 2660783, at *5 (D.N.J. Mar. 19, 2008).

The only factor on which Plaintiffs rely is § 148(2)(c) – the place where the defendant made the representations. Although the SAC alleges that representations were "made" in various places, including New York (A171), Plaintiffs construe AstraZeneca's Delaware headquarters as the place from which Nexium marketing emanated, and citing *In re Mercedes-Benz Tele Aid Contract Litig.*, 257 F.R.D. 46, 67 (D.N.J. 2009), Plaintiffs contend that this factor is dispositive. AOB 23-24.

The cases Plaintiffs cite are outliers and do not represent the better view. "[T]he overwhelming majority" of courts hold that the place of a defendant's headquarters – even if viewed as the place from which a misrepresentation emanated – is not dispositive and normally will not outweigh factors favoring application of the law of a plaintiff's home state. *Maniscalco*, 709 F.3d at 209-10 (collecting authority and disapproving *Mercedes-Benz* as misapplying the Restatement factors); *Zeneca*, 710 F. Supp. 2d at 472 & n.7 (even if misrepresentations were "made" from Delaware, that did not outweigh the other factors favoring law of plaintiffs' home states); *In re Vioxx*, 861 F. Supp. 2d at 763-65 (observing that the "*Mercedes-Benz* decision has been criticized, minimized, and rejected by numerous courts"); *In re Rezulin*, 392 F. Supp. 2d at 611-12 (New York controlled as place of TPPs' business).[20]

c. Applying New York Law Is Consistent with Principles of Comity and Federalism

Applying the law of Plaintiffs' home state, as opposed to applying Delaware law nationwide, is also consistent with Restatement § 6(2), which directs courts to consider factors such as principles of interstate comity and the justified expectations of the parties. As courts have explained, "the interests of interstate

[20] Plaintiffs also cite *Kelly v. Microsoft Corp.*, 251 F.R.D. 544, 552 (W.D. Wash. 2008), and *Parkinson v. Hyundai Motor Am.*, 258 F.R.D. 580, 585, 598 (C.D. Cal 2008), which are also outliers and distinguishable because the plaintiffs resided in the forum state and received and relied on representations there. *Parkinson* also applied California choice-of-law rules, which differ from the Restatement.

comity favor applying the law of the individual claimant's own state," whereas applying the forum state's law "to every potential out-of-state claimant would frustrate the policies of each claimant's state." *Maniscalco*, 709 F.3d at 209-10; *see also Fink*, 839 A.2d at 983 ("The 'interests of interstate comity' clearly require application of the law of any potential claimant's state of residence because application of any other state's law would frustrate the domiciliary state's legislative policies[.]"); *K-Dur Antitrust Litig.*, 2008 WL 2660783, at *4.

Under Plaintiffs view of the world, nationwide putative class actions would almost always be decided under the law of the defendant's principal place of business. That would mean not only that Delaware law applies nationwide to all conduct by Delaware-headquartered companies, but also that Texas, Michigan, or other state's laws would apply nationwide for companies headquartered in those states, even where the claimants are Delaware-based consumers. As a matter of law or policy, that makes no sense. Moreover, there is nothing unique about this action that warrants the nationwide application of Delaware law.

3. Plaintiffs' Argument to Apply the Law Based on Where Their Members Purchased Nexium Also Fails

Plaintiffs also argue that their injury occurred "at the pharmacy counter in whatever state the pharmacy is situated," and they cite that as the basis to apply Delaware law nationwide or, alternatively, the laws of the various states in which

their members purchased Nexium. AOB 25-27. The claimants here are the TPPs, not their members. Plaintiffs do not go to the local pharmacy to purchase drugs. Rather, they issue payments from their place of business in New York, based on contractual obligations they entered into with insureds who are or were New York City employees.[21] Thus, it is fiction to say that the injury occurred "at the pharmacy" counter. The more relevant contact remains the plaintiff's domicil – the place where any pecuniary loss is felt. *See* Restatement § 148 cmt. i.

For these reasons, courts have rejected the position Plaintiffs take here, holding that "neither the residence of TPP participants nor the location of their purchases is determinative of the law governing the claims asserted by a TPP on its own behalf."[22] Whether some New York City employees happened to live in or retire to other states (including Delaware) is fortuitous. In these circumstances, "[i]t logically follows that New York law best protects the third-party payers' justified expectations with respect to their consumer fraud claims." Op. 15.

[21] Plaintiffs do not interact with the pharmacy "at the point of purchase" at all but instead contract with Pharmacy Benefit Managers ("PBMs") to administer the drug benefits, and then they "reimburse such PBMs for the cost of the prescription drugs prescribed for their members." B27 (First Am. Compl. ¶ 95).

[22] Op. 15 (quoting *K-Dur*, 2008 WL 2660783, at *5); *see also In re Rezulin*, 392 F. Supp. 2d at 611 n.85 (where TPP's members filled prescriptions is "immaterial" when "[t]he only injury asserted here—namely the loss [the TPP] allegedly suffered when it overpaid for diabetes drugs—occurred in New York" where it is headquartered); *Zeneca*, 710 F. Supp. 2d at 464, 471-73 (Pennsylvania law applied to Pennsylvania TPP despite members residing in other states *including Delaware*).

Plaintiffs' cases that apply the law of the "purchase state" (AOB 27-31) are inapposite. They involve *antitrust* claims, which are not governed by Restatement § 148 and implicate distinct choice-of-law factors focusing on the location of the transaction, as distinguished from where the plaintiff was domiciled and felt the loss. *Compare In re Flonase Antirust Litig.*, 815 F. Supp. 2d 867, 882-85 (E.D. Pa. 2011) (applying Restatement § 145), *with* Restatement § 148 cmt. i. Moreover, several of those cases – such as *Wellbutrin*, *Sheet Metal Workers*, and *Relafen* – involved claims by *consumers*, as well as TPPs, giving the place of purchase true relevance. And other cases (AOB 30-31) do not address choice-of-law at all.[23]

Plaintiffs attempt to cite to a settlement in a Massachusetts litigation, AOB 29, but egregiously misrepresent the procedural posture. There, a *Massachusetts* TPP brought claims under *Massachusetts* law on behalf of a class of "persons or entities *in Massachusetts* who purchased Nexium." B208. No choice-of-law issue existed because the case never included TPPs outside of Massachusetts.[24]

[23] Equally unavailing is *Bobbitt v. Milberg LLP*, 2015 U.S. App. LEXIS 16082 (9th Cir. Sept. 10, 2015), where the court held that, *in a malpractice claim* arising from a class action, the injury and critical contacts are in the forum state of the underlying litigation, rather than class members' domicil. *Id.* at *6-7.

[24] As noted above, the Massachusetts litigation was the outlier, as claims challenging the marketing of Nexium have failed in every action in which the state law required causation (as opposed to merely the fact of a purchase). *See supra* at 3 & n.1.

Plaintiffs also cite *Goshen v. Mut. Life Ins. Co.*, 774 N.E.2d 1190, 1196 (N.Y. 2002) to support that "New York has no interest in applying GBL § 349 to Nexium purchases in other states." AOB 24. *Goshen* concerned standing, not choice-of-law. It held that a foreign plaintiff who received allegedly deceptive advertising outside of New York, could not sue a New York company under GBL § 349 merely because it "conceived and orchestrated" the advertising from New York. *Id.* Here, Plaintiffs are trying to do exactly what *Goshen* forbids, but through the DCFA. Here, New York law has not only *an* interest but the *predominant* interest in applying its law to New York union health funds for New York City employees. And for all of the reasons above, Plaintiffs' claims necessarily fail under New York law.

CONCLUSION

For the foregoing reasons, AstraZeneca respectfully requests that this Court affirm the judgment dismissing the Second Amended Complaint with prejudice.

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CERTIFICATE OF SERVICE

I, Michael P. Kelly, Esquire, hereby certify that, on October 21, 2015, a true and correct copy of the foregoing Appellees' Answering Brief has been served on the following counsel listed below via File & ServeXpress:

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