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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' REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

I. Plaintiffs adequately plead causation and injury.

Defendants perpetuated a multi-billion dollar fraud by engaging in a nationwide deceptive media saturation campaign touting Nexium, a patent-protected brand name prescription drug, as superior to the cheaper and multi-sourced generic Prilosec. These calculated misrepresentations emanated from Defendants' Delaware headquarters and were directed at the general public and doctors via direct-to-consumer advertising and doctor detailing. But the intended targets of the fraud—and the primary victims—were Plaintiffs and other TPPs[1] who paid for the vast majority of monopoly-priced Nexium. Defendants now seek to avoid all liability for themselves and potentially every other drug manufacturer by claiming, under the guise of "causation," that TPPs can never recover prescription drug overcharges from drug manufacturers, no matter how egregious the fraud. *See* AAB[2] at 12-18. Defendants' self-serving argument is wrong.

In cases on point, Defendants' "no injury," "too attenuated," and "no causation" arguments are consistently rejected. Federal appeals courts in factually similar cases brought by TPPs alleging prescription drug overcharges due to illegal or deceptive marketing practices have found causation and injury to be alleged. The Third Circuit's recent decision in *In re Avandia Mktg. Sales Practices &*

[1] Defined terms have the same meaning as in Appellants' Opening Brief.

[2] References to Appellants' Opening Brief ("Opening Brief") are cited as "AOB at __," and references to Appellees' Answering Brief are cited as "AAB at __."

Prods. Liab. Litig., No. 14-1948, 2015 U.S. App. LEXIS 18633 (3d Cir. Oct. 26, 2015)—in addition to dispelling the Superior Court's causation analysis and several of the arguments Defendants advance here—is the latest in a line of Court of Appeals decisions holding that TPPs' overpayment for prescription drugs constitutes a legally sufficient claim of direct economic loss.[3] This Court should not deviate.

A. Defendants' false and deceptive marketing of Nexium caused Plaintiffs to suffer direct economic loss.

Defendants argue there is no "connection" between Defendants' deceptive marketing of Nexium and Plaintiffs' injuries. AAB at 11-13 (Plaintiffs "never allege that their members' physicians actually were exposed to, much less affected by, any misleading promotions."). Defendants feign ignorance of, and the Superior Court disregarded, the reality of how prescription drugs are paid for in this country—a fact Defendants knew and capitalized on in their overall Nexium strategy. The consuming public, to which Defendants falsely touted Nexium's superiority, pays a small fraction of the cost of the drug (generally via co-pays); the vast majority of the cost of the drug is funded by TPPs. *See* A202. Thus, the "connection" Defendants claim to be lacking is evident and supported by the record: Defendants' historically successful nationwide marketing campaign to

[3] *See In re Neurontin Mktg. and Sales Practices Litig*., 712 F.3d 21 (1st Cir. 2013); *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516 (3d Cir. 2004)*; Desiano v. Warner-Lambert Co*., 326 F.3d 339 (2d Cir. 2003).

convince physicians and consumers that Nexium was superior to Prilosec injured Plaintiffs and other TPPs by causing them to unnecessarily pay for billions of dollars of their members' Nexium prescriptions (sold at a premium due to its supposed superiority) when the cheaper generic Prilosec would have been just as effective. *See* A169 ("as a result of AstraZeneca's promotional and sales practices, third party payers have unnecessarily spent billions of dollars on Nexium"); A179-202, A205. Put simply, but-for Defendants' misrepresentations, Plaintiffs would have purchased the cheaper generic Prilosec rather than premium-priced Nexium.

Federal appellate courts in similar cases have found that pharmaceutical companies' deceptive marketing causes TPPs direct economic harm.

In *Avandia*, TPPs brought RICO and state consumer protection law claims[4] against drug manufacturer GlaxoSmithKline LLC ("GSK") "alleg[ing] that GSK selectively manipulated data and scientific literature, made false and misleading statements in its 2007 advertising campaign, and intimidated physicians to publish false and misleading articles—all in order to increase Avandia sales."[5] *Avandia,*

[4] The state consumer protection claims were not addressed on appeal. *Avandia*, 2015 U.S. App. LEXIS 18633, at *11 n.11. However, in the district court, TPPs' GBL § 349 claims and Pennsylvania Unfair Trade Practices and Consumer Protection Law claims were upheld. *In re Avandia Mktg. Sales Practices & Prods. Liab. Litig.*, No. 10-cv-5419, 2013 U.S. Dist. LEXIS 152726, at *36-40 (E.D. Pa. Oct. 22, 2013).

[5] Like Plaintiffs here, the *Avandia* "[p]laintiffs allege that Avandia was worth less than the favorable rates at which they covered it (their 'excess price' theory). Similarly, they allege that physicians relied on GSK's misrepresentations in

2015 U.S. App. LEXIS 18633, at *2, 8-9. The Third Circuit held that TPPs' overpayment for Avandia stemming from GSK's deceptive practices is a legally cognizable injury. *Id.* at *16-17; *see id.* at *31 (GSK's "fraudulent scheme could have been successful only if plaintiffs paid for Avandia, and this is the very injury that plaintiffs seek recovery for").

Avandia relied on *Warfarin Sodium*, a case involving comparable facts to those at issue here. *See id.* at *16-18. There, TPPs and consumers alleged defendant DuPont Pharmaceuticals, "in response to the competition from lower-priced generic warfarin sodium, disseminated false and misleading information to consumers, TPPs, and others about the safety and equivalence of generic warfarin sodium," which competed with DuPont's Coumadin, the branded and more expensive form of the drug. *Warfarin Sodium*, 391 F.3d at 522. The Third Circuit affirmed a nationwide settlement class for claims under the DCFA and other statutes, holding that "TPPs, like individual consumers, suffered direct economic harm when, as a result of DuPont's alleged misrepresentations, they paid supracompetitive prices for Coumadin instead of purchasing lower-priced generic warfarin sodium." *Id.* at 531.

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deciding to prescribe Avandia and would have prescribed Avandia to fewer patients had GSK not concealed Avandia's risks (their 'quantity effect' theory)." *Avandia*, 2015 U.S. App. LEXIS 18633, at *9.

In *Desiano*, Pfizer suppressed negative clinical information concerning Rezulin, and TPPs suffered economic harm when they paid for the drug. *Desiano*, 326 F.3d at 349. The Second Circuit reversed the district court's granting of defendants' motion to dismiss and held that when a pharmaceutical drug manufacturer engages in deceptive marketing, TPPs' "claims of damages [are] caused directly by Defendants' alleged fraud." *Id.* at 340. *Desiano* also provides an informative hypothetical that is similar to the facts at hand:

> Consider, for example, a hypothetical in which a defendant drug company markets a "new," much more expensive drug claiming it is a great advancement (safer, more effective, etc. than metformin – the standard diabetes drug) when in fact the company is simply replicating the metformin formula and putting a new label on it. In other words, the only difference between metformin and the "new" drug is the new name and the higher prescription price (paid almost entirely by the insurance company). In that case, the "new" drug would be exactly as safe and effective as metformin, and there could be no [physical] injury to any of the insurance company's insured. Nevertheless, the insurance companies would be able to claim—precisely as they do here—that the defendants engaged in a scheme to defraud it, and that the company suffered direct economic losses as a result.

Id. at 349-50.

Defendants' repeated assertions (AAB at 1, 6, 11-13) that Plaintiffs and TPPs generally cannot demonstrate that they "were directly affected by any false promotions"—in addition to contradicting the pleading—conflates reliance with causation. Reliance is not an element of any of the consumer protection statutes

pled.[6] And, the appellate decisions cited above establish that a drug manufacturers' deceptive marketing does cause TPPs' injuries.

B. Prescribing doctors do not break the chain of causation.

The Superior Court found Plaintiffs' causation theory "too attenuated" due to the role of doctors who must prescribe Nexium to patients before the drug can be purchased. AOB Ex. A at 21. *See also* AAB at 14-16. That argument was rejected in *Neurontin* and *Avandia*.

In *Neurontin*, Pfizer appealed a jury verdict that found its off-label promotion of Neurontin violated RICO, and awarded Kaiser, a major TPP, over $142 million in damages after trebling. 712 F.3d at 26. The First Circuit concluded that "Kaiser was [] a 'primary and intended victim[] of [Pfizer's] scheme to defraud.' Its injury was a 'foreseeable and natural consequence' of Pfizer's scheme—a scheme that was designed to fraudulently inflate the number of Neurontin prescriptions for which TPPs paid." *Id.* at 37 (quoting *Bridge v.*

[6] Despite purchasing Nexium in several states, Plaintiffs limited their claims to fifteen states' consumer protection statutes that do not require a showing of reliance. *See* A209, A214-18; AOB at 4, 9. In the proceedings below, Plaintiffs provided the Superior Court with a chart listing the elements of the fourteen states' consumer fraud statutes and citing case law that a showing of reliance is not required. A278-85. That the DCFA does not require reliance is not in dispute. *See Stephenson v. Capano Dev. Inc.*, 462 A.2d 1069, 1074 (Del. 1983). Defendants cite cases in nine of the states (AAB at 12-13 n.6) but the only one that involved TPPs' claims, *Dist. 1199P Health & Plan v. Janssen, L.P.*, 06-cv-3044, 2008 U.S. Dist. LEXIS 103526 (D.N.J. Dec. 23, 2008), cannot be reconciled with the Third Circuit's recent decision in *Avandia*.

Phoenix Bond & Indem. Co., 553 U.S. 639, 658 (2008) (alterations in original)). The Court of Appeals "reject[ed] Pfizer's core defense that there are too many steps in the causal chain between its misrepresentations and Kaiser's alleged injury." *Id.* at 38. The First Circuit elaborated:

> [T]he causal chain in this case is anything but attenuated. Pfizer has always known that, because of the structure of the American health care system, physicians would not be the ones paying for the drugs they prescribed. Pfizer's fraudulent marketing plan, meant to increase its revenues and profits, only became successful once Pfizer received payments for the additional Neurontin prescriptions it induced. Those payments came from Kaiser and other TPPs.

Id. at 38-39.

Avandia similarly rejected GSK's defense that "the presence of intermediaries, doctors and patients, destroys proximate causation because they were the ones who ultimately decided whether to rely on GSK's misrepresentations." *Avandia*, 2015 U.S. App. LEXIS 18633, at *31 (finding that TPPs' injuries were a foreseeable and natural consequence of GSK's scheme, regardless of whether the TPPs relied on the misrepresentations).[7]

[7] Defendants cite a "myriad" of federal district court decisions that dismissed TPPs' claims on this "failure of causation ground." AAB at 14 and n.8. Yet, Defendants do not address *Neurontin*, *Desiano*, and *Warfarin Sodium* which cannot be reconciled with the district court cases Defendants cite. Moreover, as noted above, *Dist. 1199P* is no longer good law after *Avandia*. And, in *Avandia*, the Third Circuit found GSK's similar reliance on *In re Schering-Plough Corp. Intron/Temodar Consumer Class Action*, 678 F.3d 235 (3d Cir. 2012), "misplaced." *See Avandia*, 2015 U.S. App. LEXIS 18633, at *18. *See also* A255

Requiring a TPP to prove on a prescription-by-prescription basis that a pharmaceutical manufacturer's fraud resulted in overpayments, as a practical matter, deprives TPPs of any realistic claim for relief and immunizes those who commit widespread health insurance frauds from civil liability.

At best, these supposed causation deficiencies present factual issues inappropriate for resolution on a motion to dismiss.

C. Plaintiffs were injured by Defendants' deceptive marketing practices.[8]

Defendants claim that TPPs categorically "suffer no cognizable injury when they pay for a drug" because they statistically anticipate a certain level of fraud and recover it by collecting premiums from their members. AAB at 16-18 (citing *Ironworkers Local Union 68 v. AstraZeneca Pharms., LP*, 634 F.3d 1352 (11th Cir. 2011)). Defendants ask this Court to find that TPPs should treat fraud as a normal cost of doing business and effectively bar TPPs from recovery of any pharmaceutical fraud. This argument was specifically rejected in *Avandia*.

First, premium pass-on is a factual question not appropriate to be decided on a motion to dismiss. *See Avandia*, 2015 U.S. App. LEXIS 18633, at *20. Second, "the argument lacks a limiting principle." *Id.* at *20-21 and n.45 ("[t]aken to its

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(distinguishing *Schering-Plough*). Additionally, the cases Defendants cite turned on a showing of reliance. *See* A256.

[8] The Superior Court did not address these issues. *See* AOB Ex. A at 20 n.58.

ultimate conclusion . . . a retailer would be unable to claim injury from shoplifting, or a bank from robbery, on the ground that their business models presumably accounted for such losses in pricing their products and services") (citation omitted; alterations in original). No law or policy justifies such a result.

Defendants' other no-injury argument (AAB at 6, 17), that Plaintiffs keeping Nexium on their formularies even after filing this lawsuit precludes any claim of injury, is also addressed by *Avandia*. *See Avandia*, 2015 U.S. App. LEXIS 18633, at *28 (rejecting GSK's argument that "plaintiffs cannot establish causation because they continued to cover Avandia prescriptions after its safety risks were publicly exposed"). Moreover, Plaintiffs' formulary decisions regarding Nexium were forced on them by the immense success of Defendants' vast marketing campaign, which misled doctors as to Nexium's superiority and indoctrinated the general public to demand Nexium to treat heartburn. *See* A201-02.

Lastly, Defendants' reliance on *State of São Paulo of Federative Rep. of Braz. v. Am. Tobacco Co.*, 919 A.2d 1116 (Del. 2007), is misplaced. *See* AAB at 6, 16-18. *State of São Paulo* involved foreign governments' claims against tobacco companies to recover their increased medical expenditures resulting from their citizens' smoking-related illnesses. *State of São Paulo*, 919 A.2d at 1119. As Defendants themselves point out (AAB at 17 n.10), those claims were deemed "highly speculative," because TPPs do not buy cigarettes. *See State of São Paulo*,

919 A.2d at 1119. However, pertinent to the facts of this case, TPPs do buy prescription drugs. A169-70. As the Third Circuit explained, "claims by consumers who had suffered physical injuries from defective products, which in turn resulted in increased medical costs of covered insureds and increased payments by TPPs,"—*e.g.*, cigarettes—are distinguishable from "the direct and independent harm suffered by TPPs" that purchase drugs such as Nexium. *See Warfarin Sodium*, 391 F.3d at 531.[9]

[9] *See also Avandia*, 2015 U.S. App. LEXIS 18633, at *32 (distinguishing *Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris*, 171 F.3d 912, 932 (3d Cir. Pa. 1999), a tobacco case similar to *State of São Paulo*, where "plaintiffs only 'suffered a loss because of the harm that the defendants brought upon th[at] third party,' [whereas a]lthough GSK identifies third parties, doctors and patients, within the causal chain, plaintiffs did not suffer economic harm because those third parties were injured"); *Desiano*, 326 F.3d at 349 (distinguishing tobacco case similar to *State of São Paulo*: "In *Laborers Local 17* [*Health and Benefit Fund v. Philip Morris, Inc.*, 191 F.3d 229 (2d Cir. 1999)], the tobacco companies' alleged tort directly harmed only the smokers, who suffered both a health injury (smoking-related illness) and an economic injury (the purchase price of the fraudulently marketed cigarettes). The smokers' health injuries, in turn, caused economic losses to the insurance companies, who had to reimburse patients for the cost of their smoking-related illnesses. That case was therefore clearly one in which the plaintiffs' damages were entirely derivative of the injuries to their insured. … In the instant case, instead, Plaintiffs allege an injury directly to themselves.").

II. The Superior Court erred in its application of Delaware's choice of law principles and in its conclusion that Plaintiffs fail to state a claim under GBL § 349.

A. Plaintiffs' injuries, overpayment for Nexium at pharmacies in fifteen states, should be governed by the laws of those states.

This case does not present the typical conflict of law facts, and for a simple reason: the injury for which Plaintiffs seek relief is dispersed through fifteen states. The classic conflict of law question arises when a Delaware citizen is injured in a car accident in Florida and the defendant is a citizen of New York. If the relevant statutes conflict, a court must determine whether to apply the laws of plaintiff's state, Delaware, the law of the state the injury took place, Florida, or the law of defendant's state, New York. But there can only be one answer; there is a single injury to be governed under a single state's laws.

That is not the case here. Plaintiffs were injured in each of the fifteen states where they overpaid for Nexium. Even if there is an "actual conflict" between the laws of those states, no choice of law is necessary—the consumer protection laws of each of the fifteen states can and should be applied to the Nexium transactions occurring in their state. This approach prevents superimposing one state's law (New York) to govern transactions occurring in fourteen other states, as the Superior Court did here. *See Goshen v. Mut. Life Ins. Co.*, 774 N.E.2d 1190, 1196 (N.Y. 2002) (GBL § 349 "was not intended to police the out-of-state transactions of New York companies"). Thus, even if the Superior Court correctly determined

that Plaintiffs' GBL § 349 claim fails, that should not invalidate Plaintiffs' legitimate claims for Nexium purchases in other states—such as Delaware where the Court below implicitly found that Plaintiffs state a claim under the DCFA.[10] Neither the Superior Court nor Defendants offer a compelling reason to impinge on fourteen states' sovereign laws.

Defendants counter that "it is fiction to say that [Plaintiffs'] injury occurred 'at the pharmacy' counter." AAB at 33. But they do not explain why or how it is "fiction." Plaintiffs and their members are dual-purchasers or "endpayers" for Nexium prescriptions at the points of sale. *See* A202.[11] When Plaintiffs' members fill Nexium prescriptions, they generally only pay 20% of the price. *See id.* When overcharged on their 20%, (presumably even Defendants would agree) the members' claims for relief would be governed by the laws of the state where the injury occurred, *i.e.* the state where their pharmacies are located. The same logic should apply to the other 80% of the cost of the prescription Nexium borne by Plaintiffs as part of the same transactions. The injuries cannot be bifurcated.

[10] Because an "actual conflict" must be dispositive, *see infra* Section II.B, by finding an "actual conflict" between the DCFA and GBL § 349 and later holding that Plaintiffs fail to state a claim under GBL § 349, the Superior Court implicitly held that Plaintiffs state a claim under the DCFA. *See* AOB Ex. A at 17, 20-21.

[11] *See also* AOB at 30-31 (listing cases certifying "endpayer" classes—*i.e.*, TPPs and consumers, the joint purchasers of prescription drugs).

In their Opening Brief, Plaintiffs cite several prescription drug overcharge cases holding that TPPs' claims are governed by the law of the state where the overcharged prescription was filed.[12] Defendants attempt to distinguish those cases because they involve antitrust claims. AAB at 34. But that is irrelevant. *See Associated Gen. Contractors v. Cal. State Council of Carpenters*, 459 U.S. 519, 547 (1983) ("antitrust violations are essentially tortious acts"). The injury TPPs incur by overpaying for a prescription drug is the same whether the overpayment was a result of an agreement not to compete or a fraudulent marketing campaign. Moreover, the antitrust claim under Florida law pleaded in those cases falls under Florida's consumer protection statute, the same statute Plaintiffs invoke here. *See* Fla. Stat. § 501.201-213, *et. seq.* (Florida's Deceptive and Unfair Trade Practices Act);[13] A215. Defendants also—without citation to any court's reasoning turning on this fact—attempt to distinguish those cases on account that consumer plaintiffs also asserted claims for relief. *See* AAB at 34. But, that in no way detracts from those courts applying the place of purchase rule to all the TPP plaintiffs' claims,

[12] AOB at 27-29 (citing *In re Wellbutrin XL Antitrust Litig.*, 282 F.R.D. 126 (E.D. Pa. 2011); *In re Flonase Antitrust Litig.*, 815 F. Supp. 2d 867 (E.D. Pa. 2011); *Sheet Metal Workers Local 441 Health & Welfare Plan v. GlaxoSmithKline, PLC*, 737 F. Supp. 2d 380 (E.D. Pa. 2010); *In re Relafen Antitrust Litig*., 221 F.R.D. 260 (D. Mass. 2004)).

[13] *See Mack v. Bristol-Myers Squibb Co.*, 673 So. 2d 100, 104 (Fla. Dist. Ct. App. 1996) (holding that "the acts proscribed by subsection 501.204(1) include antitrust violations").

finding that the TPPs were injured at the point of sale and upholding application of multiple states' laws.

In their Opening Brief, Plaintiffs also cite several pharmaceutical drug litigations that adjudicated TPPs' claims on a state-by-state basis rather than superimposing a single state's laws to claims brought under the laws of several states, as the Superior Court did here. AOB at 30-31. Defendants offer no response, and for good reason: under Defendants' view all of those cases wrongly eschewed a choice of law analysis. Furthermore, Defendants adopted this approach in the settlement of a similar Nexium action under Massachusetts law allowing TPP plaintiffs domiciled outside of Massachusetts to recover for their Nexium purchases in Massachusetts. *See* AOB at 29-30; A360. Defendants unconvincingly refer to this as an "outlier." AAB at 34 n.24.

B. There is no "actual conflict" of law between the DCFA and GBL § 349.

In a conflict of law analysis, Delaware courts only look to the Restatement factors if there is an "actual conflict." *Bell Helicopter Textron, Inc. v. Arteaga*, 113 A.3d 1045, 1050 (Del. 2015). To defend the Superior Court's finding of a conflict between the DCFA and GBL § 349, Defendants resort to changing the playing field. They rely on non-Delaware cases for the proposition that an "actual conflict" exists if a party has a "better chance" under another state's law or if there may be "potential material differences" between the statutes. *See* AAB at 20. But

that is not Delaware's standard. In Delaware, the "actual conflict" must be dispositive. *See* AOB at 10-11 (citing Delaware cases that an "actual conflict" exists only if the competing laws yield different results).[14] *See also Caballero v. Ford Motor Co.*, No. N11C-09-170 JRJ, 2014 Del. Super. LEXIS 304 (Del. Super. June 24, 2014).

Viewed under the lens of Delaware law, there is no "actual conflict" between the DCFA and GBL § 349 (or the other statutes) that would yield conflicting results for these claims. The elements required under each statute are met; both statutes require a showing of causation (as any tort must) and neither requires reliance. *See* AOB at 11-13. The DCFA can and should govern Plaintiffs' Nexium purchases in and outside of Delaware because: (a) Plaintiffs purchased Nexium in Delaware and suffered injury in Delaware; (b) the DCFA does not conflict with the other pleaded consumer protection statutes; and (c) Defendants avail themselves of Delaware's laws, reside in Delaware, and their deceptive marketing of Nexium emanated from Delaware."[15] *See Yarger v. ING*

[14] Defendants cannot, and do not attempt to, counter the Delaware cases Plaintiffs cite in their Opening Brief. The one Delaware case Defendants mention (as "cited with approval") (AAB at 20) is inapposite. *See Deuley v. DynCorp Int'l, Inc.*, 8 A.3d 1156, 1161 (Del. 2010) (finding no actual conflict because the "result would be the same under both Delaware and Dubai law").

[15] *See* AOB 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")

Bank, 285 F.R.D. 308, 322-23 (D. Del. 2012) ("the DCFA may be applied to class members outside of Delaware 'so long as the 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'") (quoting *In re Warfarin Sodium Antitrust Litig.*, 212 F.R.D. 231, 248 n.15 (D. Del. 2002)).

The Superior Court construed a conflict by wholly adopting the conclusion reached in *Pa. Emple. Benefit Trust Fund v. Zeneca, Inc.*, 710 F. Supp. 2d 458 (D. Del. 2010), that GBL § 349 contains a heightened causation element requiring a plaintiff to have "some awareness" linking the deceptive marketing to a plaintiff's damages, whereas the DCFA does not require a causal relationship. AOB Ex. A at 16-17. However, that conclusion was rejected by the District of Delaware in *Yarger*. 285 F.R.D. 308, 323 and n.21. *Yarger* found that the DCFA has a causation element and held that the DCFA and GBL § 349 do not conflict. *Id.* Defendants focus on whether the *Yarger* plaintiffs and class members "actually received" the misleading communications trying to conflate reliance with causation. *See* AAB at 13, 24. Under the DCFA, a plaintiff must show that the defendant intended for the misrepresentation to be relied on, even though a plaintiff need not plead individualized reliance. *See Yarger*, 285 F.R.D. at 326 (citation omitted).

(quoting *Pa. Emple. Benefit Trust Fund v. Zeneca*, 710 F. Supp. 2d 458, 470 (D. Del. 2010)); A171, 209.

The Superior Court also erred in its interpretation of New York law. In their Opening Brief, Plaintiffs demonstrate that the Superior Court's conclusion that GBL § 349 has an implicit "awareness" requirement is not the prevailing interpretation of GBL § 349.[16] *See* AOB at 16-17. Plaintiffs cite multiple cases, including three comparable to this one, in which TPPs' GBL § 349 claims stemming from overpayment for prescription drugs were upheld on a motion to dismiss.[17] Defendants attempt to marginalize those cases by noting they involved antitrust and other claims, not false advertising. AAB at 24 and n.15. But, as noted above, Defendants fail to explain why allegations of differing conduct somehow lessen or nullify the "awareness" element of GBL § 349. There can be no dispute that under the heightened GBL § 349 causation standard adopted by the

[16] Defendants claim that Plaintiffs somehow waived the argument that GBL § 349 does not have a heightened "awareness" element. AAB at 22. That is incorrect. In their briefing below, Plaintiffs devoted a subsection titled "Plaintiffs State a Claim Under New York's GBL § 349." A271. Plaintiffs cited a New York Court of Appeals decision listing the elements for a GBL § 349 claim—of which "awareness" in not one—and cited the TPP cases discussed herein which upheld GBL § 349 claims despite the lack of the heightened awareness element. A272-73.

[17] AOB at 16-17 (citing *In re Bextra & Celebrex Mktg., Sales Practices & Prod. Liab. Litig.*, 495 F. Supp. 2d 1027, 1035 (N.D. Cal. 2007); *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. v. Ferring Pharms., Inc.*, 903 F. Supp. 2d 198, 228 (S.D.N.Y. 2012)). Defendants dismiss these and other cases as not "precedential" federal district court decisions. AAB at 23. However, many of the cases Defendants cite, including *Zeneca*, suffer from the same supposed infirmity.

Superior Court, the GBL § 349 claims in those cases should have been dismissed. That they were not is telling.

C. Plaintiffs, as purchasers of Nexium, have standing to pursue a GBL § 349 claim.[18]

Defendants argue that Plaintiffs lack standing under GBL § 349 because the statute covers only "consumer-oriented" acts and TPPs are not "consumers." AAB at 25. However, Plaintiffs demonstrate above and in their Opening Brief that they, together with their members, are the dual purchasers (and thus consumers) of Nexium. AOB at 23, 27. *See* A202. As evidenced by the federal appellate court decisions cited earlier—as the primary purchasers of prescription drugs—TPPs suffer direct economic harm from a drug manufacturer's marketing fraud.

Additionally, as Defendants acknowledge (*see* AAB at 25 n.16), several courts have found TPPs' GBL § 349 claims to be sufficiently "consumer oriented" when the challenged conduct was "misleading advertising to doctors and consumers," as it is here. *In re Bextra*, 495 F. Supp. 2d at 1035; *see also In re Suboxone*, 64 F. Supp. 3d at 702; *In re DDAVP*, 903 F. Supp. 2d at 228.[19]

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[18] The Superior Court did not address this issue. AOB Ex. A at 20 n.58.

[19] Defendants' reliance (AAB at 25) on *Blue Cross & Blue Shield of N.J., Inc. v Philip Morris USA Inc.*, 3 N.Y.3d 200 (2004), as a "bright-line rule" is inapposite. In *Blue Cross*, (similar to *State of São Paulo, supra*) a TPP sued a tobacco company for the increased medical costs resulting from their members' smoking-related illnesses. *Id.* at 204. The New York Court of Appeals held that the TPP lacked standing for the "indirect injuries" of its members, but clarified that "it is beyond dispute that section 349(h) permits an actually (nonderivatively) injured

D. The Restatement factors support application of Delaware law.

Having determined that the DCFA and GBL § 349 present an "actual conflict," the Superior Court then weighed the Restatement § 148 factors and determined that New York law governs Plaintiffs' claims in all fifteen states at issue. AOB Ex. A at 11-20. The Superior Court erred on two fronts.

First, the Superior Court did not address Plaintiffs' argument (A265-66) that, in accordance with Restatement § 6(1),[20] the DCFA has a "statutory directive" allowing it to be invoked by non-Delaware consumers. The DCFA prohibits "unfair or deceptive merchandising practices" that occur "in part or wholly within" Delaware. 6 Del. C. § 2512. Although no Delaware court has ever analyzed whether Restatement § 6(1) would support application of the DCFA in a nationwide consumer fraud action, the inclusion of the (otherwise superfluous) "in part" clause demonstrates the legislature's intent to protect even non-Delaware consumers from deceptive practices emanating from Delaware.[21]

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party to sue a tortfeasor. We hold simply that what is required is that the party actually injured be the one to bring suit." *Id.* at 207-08. That is precisely the case here.

[20] Restatement § 6(1) states: "A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law."

[21] Defendants rely (AAB at 27) on inapposite, non-Delaware cases and claim the DCFA, despite the plain language to the contrary, has no such "statutory directive." *See Yelton, v. PHI,, Inc.*, 669 F.3d 577 (5th Cir. 2012) (finding that a statutory amendment to omit the words "in this state" is not a "statutory directive"); *Thornton v. Hamilton, Sundstrand Corp.*, No. 12C329, 2013 U.S. Dist.

Second, as explained in depth in Plaintiffs' Opening Brief, the Superior Court improperly weighed the Restatement § 148(2) factors. AOB at 21-24. Plaintiffs will not rehash those arguments on Reply, except to point out that Defendants' assertion that all the cases Plaintiffs cite are "outliers"—a description repeated throughout Defendants' brief—and "do not represent the better view," is simply Defendants' opinion. *See* AAB at 31.

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LEXIS 109937 (N.D. Ill. Aug. 6, 2013) (finding no language in the Illinois statute to support an inference of a "statutory directive").