UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BARBARA ZOTTOLA, on behalf of herself and all others similarly situated, Plaintiff, v. EISAI, INC. et al., Defendants.	Civil Case No. 7:20-cv-02600 Judge Philip M. Halpern Oral Argument Requested

DEFENDANT CVS PHARMACY, INC.'S
SUPPLEMENTAL MEMORANDUM OF LAW ON INDIVIDUAL ISSUES

Pursuant to this Court's July 29, 2020 Minute Entry (Dkt. No. 23), Defendant CVS Pharmacy, Inc. ("CVS") submits this Supplemental Memorandum of Law in support of dismissal of Plaintiff Barbara Zottola's claims. Plaintiff cannot sustain CBL, conversion, unjust enrichment, or fraud claims for the reasons stated in the Defendants' Joint Memorandum of Law (Dkt. No. 42). Plaintiff has further affirmed she is not bringing fraud claims against CVS (*see* Dkt. No. 24 at n.2). This supplemental brief addresses why Plaintiff has no claims against CVS, including breach of implied warranty, regardless of how those claims are labeled.

I. PLAINTIFF ZOTTOLA HAS NOT ALLEGED A VIABLE CLAIM AGAINST CVS.

New York law does not impose liability against a pharmacy merely for filling a prescription as written, and Plaintiff's claims against CVS should be dismissed in their entirety. "[U]nder New York law, it is clear that a pharmacist is not liable to the same manner or degree as the manufacturer of the drug." *Negrin v. Alza Corp.*, No. 98 CIV. 4772 DAB, 1999 WL 144507, at *5 (S.D.N.Y. Mar. 17, 1999) (dismissing negligence, breach of warranty, and strict liability claims against pharmacy defendant). In *Negrin*, the Southern District of New York agreed the pharmacy defendant had been fraudulently joined because the complaint was "devoid of any allegations that

[the pharmacy defendant] did anything other tha[n] correctly fill a prescription, and dispense the product as packaged by Defendant Manufacturers." *Id.*

The *Negrin* court relied on numerous New York state cases where the courts held that pharmacies are not subject to claims for dispensing a prescription as written. *Id.* at *3. First, in *Bichler v. Willing,* 397 N.Y.S.2d 57 (N.Y. App. Div. 1st Dep't 1977), the Appellate Division dismissed claims of negligence, breach of warranty, and strict products liability against a pharmacist who dispensed a prescription drug to the plaintiff, because pharmacies are ***not*** treated like "any other retailer." *Id.* at 58. It explained that, "when a consumer asks a druggist to fill a prescription, thus enabling him to obtain a drug which is not otherwise available to the public, he does not rely on the druggist's judgment as to whether that particular drug is inherently fit for its intended purpose but rather he places that confidence and reliance in the physician who prescribed the remedy." *Id.* at 59. The *Negrin* court next relied on *Ullman v. Grant*, 450 N.Y.S.2d 955 (N.Y. Sup. Ct. 1982), where the court confirmed that it is the duty of the manufacturer or prescriber, not the pharmacist, to warn of possible side effects in the use of a prescription drug. *Id.* at 956.

Other New York state courts have also confirmed that pharmacies are not liable for correctly dispensing a prescription. For example, the *In re Diet Drug* court noted, "[s]ince there is no allegation that the pharmacy defendants failed to fill the prescriptions precisely as they were directed by the manufacturers and physicians, and plaintiffs do not allege that they had a condition of which the pharmacists were aware rendering prescription of the drugs at issue contraindicated, there is no basis to hold the pharmacists liable under theories of negligence, breach of warranty or strict liability, and the complaint against the pharmacists was properly dismissed." *In re New York Cty. Diet Drug Litig.*, 262 A.D.2d 132, 132-33 (N.Y. 1st Dep't. 1999).

MDL courts in New York similarly have explained why pharmacies are not liable for breach of warranty or other similar causes of action simply for filling a prescription: "[A]lmost every state that has considered the issue has declined to find pharmacists liable for breach of either implied or express warranty with respect to properties of prescription drugs. And these cases make sense from a public policy perspective: One of the purposes of imposing strict liability or liability for breach of warranty on retailers is to encourage retailers to pressure manufacturers to make safer products. Yet this goal is lost on pharmacists, who have little or no impact on a manufacturer's marketing of prescription drugs." *In re Rezulin Prods. Liab. Litig.*, 133 F. Supp. 2d 272, 292 (S.D.N.Y. 2001) (footnote omitted). A pharmacy dispenses a drug that is prescribed by the patient's physician and performs a service of implementing a physician's orders. *Id.* As such, "there is no basis for adopting the view that a pharmacist is a retail merchant like any other with respect to the sale of prescription drugs." *Id.* That is true regardless of the label Plaintiff attaches to her cause of action, and precludes liability under any cause of action, however labeled.

Plaintiff's argument against this confirmed and consistent rule precluding pharmacy liability is that the rule does not apply when a plaintiff is not personally injured and instead brings only an economic loss claim. Plaintiff offers no law to support this untenable distinction, which perversely would allow an implied warranty claim against CVS to proceed *only* if a plaintiff were *not* physically injured. The policy reasons rejecting implied warranty claims against pharmacies apply equally to personal injury and economic loss claims: the pharmacist is not a "merchant" that "warrants" its products' merchantability. As explained by the *In re Rezulin* court in rejecting warranty claims: "A pharmacist's sales of prescription drugs are *not* attributable to his or her marketing the properties of the drugs. They are attributable to physicians' prescriptions." *In re Rezulin*, 133 F. Supp. 2d at 292 (emphasis added). The pharmacist provides a service, "in the same

sense as a technician who takes an x-ray or analyzes a blood sample on a doctor's order." *Id.* (citation omitted). New York courts have repeatedly refused to imply pharmacy warranties, even if the drug sold "later produces harmful side effects"—which is what Plaintiff alleges here, even if she alleges that those side effects only "harmed" her because she purchased a drug prescribed by her physician that she wishes she had not purchased. *See, e.g.*, *Bichler*, 397 N.Y.S.2d at 58–59 (warranties not implied in sale of prescription drugs, as patient places confidence in doctor's skill, not pharmacist's). The same rationale that refusing to imply pharmacy warranties supports dismissal of Plaintiff's CBL claims as well—nothing CVS did was "consumer oriented" or could have deceived Plaintiff, because CVS simply provides the service of dispensing a prescription ordered by a physician.

Essentially, Plaintiff asks this Court to create a new theory of liability against pharmacies, making them responsible for alleged economic loss when a prescription drug does not live up to its promised safety profile based on an alleged intrinsic flaw in the drug. The law does not countenance such an expansion of liability, as this Court in *Winters v. Alza Corp.* explained:

> By asking that pharmacies ensure the complete safety of any product that they dispense—even when the defect at issue is the result of an intrinsic design flaw—the plaintiff would have us place pharmacies on par with drug manufacturers for the purposes of tort liability. This is not only wrong as a matter of law, but it would also impose a duty on pharmacists that is grossly disproportional to their limited degree of expertise—which entails competently dispensing drugs as directed, with appropriate instructions for customers, while monitoring for potential contraindications.

690 F. Supp. 2d 350, 356 (S.D.N.Y. 2010) (footnotes omitted). CVS is not Belviq's manufacturer, is not liable to Plaintiff here, no matter the legal theory, and should be dismissed from this case.

II. PLAINTIFF ZOTTOLA'S SHOTGUN PLEADING ALLEGATIONS ARE INSUFFICIENT TO STATE A CLAIM OUTSIDE OF DISPENSING A PRESCRIPTION.

Plaintiff cannot state a claim against CVS as a pharmacy for dispensing a prescription drug as written. Plaintiff does not allege that CVS did anything beyond that, and even after CVS raised

this issue, Plaintiff has not amended her Complaint or identified allegations against CVS as doing anything other than simply dispensing Belviq.

Allegations in a complaint which merely lump all the defendants together and fail to distinguish their individual conduct or provide a specific allegation of wrongdoing as to each defendant are insufficient. *Medina v. Bauer*, No. 02 Civ. 8837(DC), 2004 WL 136636, at *5–6 (S.D.N.Y. Jan. 27, 2004); *see also Atuahene v. City of Hartford*, 10 F. App'x 33, 34 (2d Cir. 2001). Further, where the complaint "is painted with a broad brush" such that none of the complaint allegations "sets forth a particularized allegation of wrongdoing" against the defendant and none of the causes of action are directed at the particular defendant, the complaint is properly dismissed. *Stratakos v. Nassau Cty.*, No. 15-CV-7244(ADS)(ARL), 2016 WL 6902143, at *7–8 (E.D.N.Y. Nov. 23, 2016) (finding that broad allegations were too vague and non-particularized to satisfy the pleading requirements of Rule 8). Thus, Plaintiff cannot rely on any broad-based allegations made against "Defendants" generally to save her claims against CVS. CVS did nothing deceptive, fraudulent, unjust, or even negligent. Plaintiff does not claim otherwise. Plaintiff's only allegations against CVS are that it dispensed a prescription medicine.

Plaintiff's claims against CVS are unprecedented, seeking a broad expansion of liability never before seen or imposed by a New York court. A pharmacy is simply not liable, as Plaintiff suggests, for filling a doctor's prescription. For the reasons explained above and in the Joint Memorandum, this Court should dismiss all claims against CVS.

Respectfully submitted,

By: */s/ Kara M. Kapke*

Kara M. Kapke, Sarah E. Johnston, James F. Murdica
Barnes & Thornburg LLP
11 S. Meridian Street
Indianapolis, IN 46204
Phone: (317) 231-6491
Attorneys for Defendant CVS Pharmacy, Inc.

CERTIFICATE OF SERVICE

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

By: */s/ Kara M. Kapke*