

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK**

STEFANIE ANTHONY and SUSAN)
SEIDITA, on behalf of themselves and all other)
similarly situated individuals.)

Plaintiffs.)

v.)

NOVARTIS AG, NOVARTIS)
CORPORATION, and, NOVARTIS)
CONSUMER HEALTH, INC.,)

Defendants.)

Case No. **CV - 14** **0161**

SPATT, J.

Jury Demanded

WALL, M.J.

CLASS ACTION COMPLAINT

Plaintiffs, by and through the undersigned counsel, file this complaint and assert as follows:

NATURE OF THE ACTION

1. This is an action for damages and injunctive relief arising out of Novartis' sale of Excedrin Migraine at a higher price than the pharmacologically identical product Excedrin Extra Strength.

2. Defendants' conduct has harmed consumers, including Plaintiffs and a class of similarly situated individuals, who paid more for Excedrin Migraine than they would have paid for Excedrin Extra Strength.

U.S. DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

★ JAN 09 2014

LONG ISLAND CITY

THE PARTIES

3. Plaintiff Stefanie Anthony is a citizen of New York who resides in Garden City, New York.

4. Plaintiff Susan Seidita is a citizen of New York who resides in New Hyde Park, New York.

5. Defendant Novartis AG, the parent company of the Novartis group of entities, is a multinational pharmaceutical company headquartered at Fabrikstrasse 2, CH-4002 Basel, Switzerland.

6. Defendant Novartis Corporation is a New York corporation headquartered at 1 South Ridgedale Avenue in East Hanover, New Jersey. Novartis Corporation is the U.S. arm of Defendant Novartis AG and oversees research and development, manufacturing, sales, and marketing of pharmaceutical products, including Excedrin Migraine and Excedrin Extra Strength.

7. Defendant Novartis Consumer Health, Inc. is a Delaware corporation headquartered at 200 Kimball Drive in Parsippany, New Jersey. Novartis Consumer Health, Inc. engages in research and development, manufacturing, sales, and marketing of over-the-counter pharmaceutical products, including Excedrin Migraine and Excedrin Extra Strength.

JURISDICTION AND VENUE

8. This Court has subject matter jurisdiction over this action pursuant to the Class Action Fairness Act, 28 U.S.C. § 1332(d), because (a) at least one member of the putative class is a citizen of a state different from at least one Defendant, (b) the proposed class has more than 100 members, and (c) the amount in controversy exceeds \$5 million.

9. This Court has personal jurisdiction over Defendants because Defendants regularly transact business within the State of New York and Defendant Novartis Corporation resides in New York.

10. Venue is proper in the Eastern District of New York pursuant to 28 U.S.C. § 1391 because Plaintiffs and numerous class members reside in this District, were subject to Defendants' deceptive practices in this District, purchased Excedrin Migraine products in this District, and sustained damages in this District.

FACTUAL ALLEGATIONS

About Excedrin Migraine and Excedrin Extra Strength

11. Excedrin Migraine and Excedrin Extra Strength ("Excedrin ES") are over-the-counter combination pain relievers.

12. Excedrin Extra Strength was first approved in the 1960s by the Food and Drug Administration for the temporary relief of minor aches and pains due to headache. Each unit of Excedrin Extra Strength currently contains 250 milligrams of acetaminophen, 250 milligrams of aspirin, and 65 milligrams of caffeine as the active ingredients. This formulation of Excedrin Extra Strength has been marketed in the United States since 1978.

13. In January 1997, Bristol-Myers Squibb, Co. sought FDA approval of a migraine indication for Excedrin Extra Strength. Bristol-Myers presented the FDA with clinical studies indicating Excedrin Extra Strength was effective at providing relief of migraine pain and asked to add this information to the drug's label. The formulation remained unchanged.

14. The FDA approved Excedrin Migraine in January 1998 for the temporary relief of mild to moderate migraine headache pain with the same formulation and dosage as Excedrin Extra Strength. According to a Bristol-Myers press release on the approval, Excedrin Migraine was given its own trademark and packaging "in order to provide important information about appropriate use and when to consult a doctor" but would be available at the same suggested retail price as Excedrin Extra Strength.

15. Newspaper ads published in February 1998 emphasized the identical formulation of Excedrin Migraine and Excedrin Extra Strength. The ads depicted the two products side-by-side and stated, "Clinical research has just proven that the formula in Excedrin actually relieves migraine pain. And because of the distinct nature of migraines, the FDA worked with Excedrin to develop a

different package with specific information for migraine sufferers. So now next to Excedrin, there's a new package – same medicine – called Excedrin Migraine.”

16. In August 2005, the Novartis defendants purchased the Excedrin brand from Bristol-Myers and took over the manufacture and sale of the products, including the Migraine and Extra Strength versions.

Higher Price Charged for Excedrin Migraine

17. When Excedrin Migraine was first marketed in the United States, Bristol-Myers sold the products at the same wholesale price and provided the same suggested retail price for both products.

18. Defendants currently sell Excedrin Migraine and Excedrin Extra Strength at different wholesale prices that reflect a premium for the Migraine version. Defendants sell 24-count packages of Excedrin Migraine at a wholesale price of \$3.60, a 12.5% premium over the \$3.20 wholesale price for Excedrin Extra Strength. Defendants sell 100-count packages at \$10.25 wholesale, a 13.26% premium over the \$9.05 wholesale price for Excedrin Extra Strength, and 200-count packages at \$13.50, a 12.5% premium over the \$12.00 wholesale price for Excedrin Extra Strength.

19. Defendants' higher wholesale prices for Excedrin Migraine are reflected in the prices retailers charge consumers for Excedrin Migraine and Excedrin Extra Strength. Walmart.com, for instance, sells 100-count packages of Excedrin Migraine at a \$0.50 premium over Excedrin Extra Strength. Rite-Aid Pharmacy sells 100-count packages of Excedrin Migraine at a \$0.50 premium and 200-count package at a \$1.00 premium. Amazon.com charges a \$1.05 premium for a 300-count package of Excedrin Migraine, while Walgreens charges a \$1.00 premium for a 200-count package.

20. By selling Excedrin Migraine at a higher wholesale price that is carried through to retail prices paid by consumers, Defendants are engaging in a deceptive business practice in violation of New York's General Business Law section 349.

Plaintiffs' Experiences

21. Plaintiff Anthony purchased Excedrin Migraine in December 2012 in Garden City, New York, paying more for the medication than the advertised price for Excedrin Extra Strength. Plaintiff Anthony has purchased a few bottles of Excedrin Migraine each year for the past five years or more. Because Excedrin Migraine is sold at a higher price than Excedrin Extra Strength, Plaintiff Anthony understood and believed that it provided greater benefits than Excedrin Extra Strength.

22. Plaintiff Seidita purchased a bottle of Excedrin Migraine in May 2013 in Westbury, New York. Plaintiff Seidita uses Excedrin Migraine to treat her recurrent migraine headaches and has purchased Excedrin Migraine once or twice a year for several times. Based on the price differential between Excedrin Migraine and Excedrin Extra Strength, Plaintiff Seidita believed that Excedrin Migraine was different than Excedrin Extra Strength.

CLASS ACTION ALLEGATIONS

23. Plaintiffs bring this action pursuant to the Federal Rules of Civil Procedure on behalf of themselves and a class defined as:

All persons who purchased Excedrin Migraine at a higher price than Excedrin Extra Strength on or after August 1, 2005 in the State of New York for personal, family, or household purposes.

24. **Numerosity.** The members of the proposed class are estimated to be in the tens of thousands at least, making individual joinder of all class members impracticable. Plaintiffs will determine the exact number and identity of class members through appropriate discovery.

25. **Commonality.** Plaintiffs' and class members' claims raise common factual and legal questions that predominate over individualized inquiries. Common legal and factual questions that can be answered for all class members through a single class-wide proceeding include, but are not limited to, the following:

- a. Are Excedrin Extra Strength and Excedrin Migraine pharmacologically identical products?
- b. Do Defendants sell Excedrin Migraine at a higher price than Excedrin Extra Strength?

26. **Typicality.** Plaintiff's claims are typical of the claims of class members because each claim arises from the same practices by Defendants.

27. **Adequacy.** Plaintiffs will fairly and adequately protect the interests of the class. Plaintiffs' interests do not conflict with other class members' interests and Plaintiffs have retained counsel experienced in complex class action litigation and consumer fraud lawsuits to vigorously prosecute this action on behalf of the class.

28. The class mechanism is superior to other available means for the fair and efficient adjudication of the claims of Plaintiffs and the class. Each individual class member may lack the resources to undergo the burden and expense of individual prosecution of the complex and extensive litigation necessary to establish Defendants' liability. Individualized litigation would also result in delay and increased expenses to all parties, over-burden the judicial system, and present a potential for inconsistent and contradictory judgments. Class treatment will ensure that all claims and claimants receive fair, consistent, and efficient adjudication.

CAUSE OF ACTION

(For Violation of New York General Business Law § 349)

29. Plaintiffs incorporate the above allegations by reference.

30. Defendant's acts and practices as described herein were designed to, and did, result in the purchase of Excedrin Migraine by consumers primarily for personal, family, or household purposes.

31. Defendants' practice of charging a higher price for Excedrin Migraine than for the pharmacologically identical product Excedrin Extra Strength was likely to mislead and did mislead reasonable consumers, including Plaintiffs and class members, about the value and benefits of Excedrin Migraine.

32. Plaintiffs and class members suffered injury as a result of Defendants' deceptive practices in that they paid more for Excedrin Migraine than the pharmacologically identical product Excedrin Extra Strength.

33. Plaintiffs, on behalf of themselves and the class, seek injunctive relief, damages, treble damages and reasonable attorneys' fees pursuant to General Business Law section 349(h).

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs, individually and on behalf of a class of similarly situated individuals, pray for the following relief:

- A. Certification of this action as a class action on behalf of the class defined above, appointment of Plaintiffs as the class representatives, and appointment of Plaintiffs' counsel as class counsel;
- B. An award of injunctive and other equitable relief as necessary to protect the interests of Plaintiffs and the class;

- C. An award of damages and treble damages;
- D. An order that Defendants disgorge all profits wrongfully obtained through their illegal conduct;
- E. An order that Defendants pay restitution to Plaintiffs and the class;
- F. An award to Plaintiffs and the class for reasonable litigation expenses and attorneys' fees;
- G. An award to Plaintiffs and the class of pre- and post-judgment interest, to the extent allowable;
- H. An award of such other and further relief as the Court deems necessary and appropriate.

JURY TRIAL

Plaintiff demands a trial by jury for all issues so triable in the above referenced matter.

Dated: January 9, 2014

Baker Sanders, LLC

By: 

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Eric Gibbs (pending Pro Hac Vice application)

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Facsimile: (415) 981-4846

Attorneys for Plaintiffs

JS 44 (Rev. 1/2013)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

STEFANIE ANTHONY and SUSAN SEIDITA, on behalf of themselves and all other similarly situated individuals

(b) County of Residence of First Listed Plaintiff NASSAU COUNTY
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)
Todd D. Muhlstock - Baker Sanders, LLC
100 Garden City Plaza, Suite 500
Garden City, NY 11530

DEFENDANTS

NOVARTIS AG, NOVARTIS CORPORATION, and, NOVARTIS CONSUMER HEALTH, INC.

County of Residence of First Listed Defendant NJ - MORRIS COUNTY
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

SPATT, J.
WALL, M.J.

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff
☐ 2 U.S. Government Defendant
☐ 3 Federal Question (U.S. Government Not a Party)
☒ 4 Diversity (Indicate Citizenship of Parties in Item III)

NO SUMMONS ISSUED

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- | | PTF | DEF | | PTF | DEF |
|---|---------------------------------------|----------------------------|---|----------------------------|---------------------------------------|
| Citizen of This State | <input checked="" type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input checked="" type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES	
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excludes Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input checked="" type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Medical Malpractice	PERSONAL INJURY <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Management Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Employee Retirement Income Security Act IMMIGRATION <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes
REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	CIVIL RIGHTS <input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 448 Education	PRISONER PETITIONS Habeas Corpus: <input type="checkbox"/> 463 Alien Detainee <input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty Other: <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition <input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement			

V. ORIGIN (Place an "X" in One Box Only)

- ☒ 1 Original Proceeding
☐ 2 Removed from State Court
☐ 3 Remanded from Appellate Court
☐ 4 Reinstated or Reopened
☐ 5 Transferred from Another District (specify)
☐ 6 Multidistrict Litigation

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
New York General Business Law § 349

Brief description of cause:
Consumer fraud in the sale of over the counter medicine

VII. REQUESTED IN COMPLAINT:

☒ CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P.

DEMAND \$

CHECK YES only if demanded in complaint.

JURY DEMAND: ☒ Yes ☐ No

VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE

DOCKET NUMBER

DATE

01/09/2014

SIGNATURE OF ATTORNEY OF RECORD

FOR OFFICE USE ONLY

RECEIPT #

14252

AMOUNT

\$400.00

APPLYING IFP

JUDGE

MAG. JUDGE

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D.N.Y.

★ JAN 09 2014 ★

LONG ISLAND OFFICE

CERTIFICATION OF ARBITRATION ELIGIBILITY

Local Arbitration Rule 83.10 provides that with certain exceptions, actions seeking money damages only in an amount not in excess of \$150,000, exclusive of interest and costs, are eligible for compulsory arbitration. The amount of damages is presumed to be below the threshold amount unless a certification to the contrary is filed.

I, Todd D. Muhlstock, counsel for Plaintiff, do hereby certify that the above captioned civil action is ineligible for compulsory arbitration for the following reason(s):

- ☒ monetary damages sought are in excess of \$150,000, exclusive of interest and costs,
- ☐ the complaint seeks injunctive relief,
- ☐ the matter is otherwise ineligible for the following reason

DISCLOSURE STATEMENT - FEDERAL RULES CIVIL PROCEDURE 7.1

Identify any parent corporation and any publicly held corporation that owns 10% or more of its stocks:

RELATED CASE STATEMENT (Section VIII on the Front of this Form)

Please list all cases that are arguably related pursuant to Division of Business Rule 50.3.1 in Section VIII on the front of this form. Rule 50.3.1 (a) provides that "A civil case is "related" to another civil case for purposes of this guideline when, because of the similarity of facts and legal issues or because the cases arise from the same transactions or events, a substantial saving of judicial resources is likely to result from assigning both cases to the same judge and magistrate judge." Rule 50.3.1 (b) provides that "A civil case shall not be deemed "related" to another civil case merely because the civil case: (A) involves identical legal issues, or (B) involves the same parties." Rule 50.3.1 (c) further provides that "Presumptively, and subject to the power of a judge to determine otherwise pursuant to paragraph (d), civil cases shall not be deemed to be "related" unless both cases are still pending before the court."

NY-E DIVISION OF BUSINESS RULE 50.1(d)(2)

- 1.) Is the civil action being filed in the Eastern District removed from a New York State Court located in Nassau or Suffolk County? No
- 2.) If you answered "no" above:
- a) Did the events or omissions giving rise to the claim or claims, or a substantial part thereof, occur in Nassau or Suffolk County? Yes
- b) Did the events or omissions giving rise to the claim or claims, or a substantial part thereof, occur in the Eastern District? YES

If your answer to question 2 (b) is "No," does the defendant (or a majority of the defendants, if there is more than one) reside in Nassau or Suffolk County, or, in an interpleader action, does the claimant (or a majority of the claimants, if there is more than one) reside in Nassau or Suffolk County? _____

(Note: A corporation shall be considered a resident of the County in which it has the most significant contacts).

BAR ADMISSION

I am currently admitted in the Eastern District of New York and currently a member in good standing of the bar of this court.

☒ Yes ☐ No

Are you currently the subject of any disciplinary action (s) in this or any other state or federal court?

☐ Yes (If yes, please explain) ☒ No

I certify the accuracy of all information provided above.

Signature: _____

