UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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MATT KARDOVICH, LILA CHUI, and CINDY CHANG, on behalf of themselves and all others similarly situated,

Plaintiffs,

- against -

PFIZER, INC.,

Defendant.
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MEMORANDUM AND ORDER
13-CV-7378 (RRM) (VVP)

ROSLYNN R. MAUSKOPF, United States District Judge.

Plaintiffs Matt Kardovich, Lila Chui, and Cindy Chang bring this putative class action grounded in various state statutory and common law claims, alleging that defendant Pfizer, Inc. has engaged in pervasive and deceptive labeling of Centrum branded multivitamins. (Am. Class Action Compl. (Doc. No. 13).) On March 31, 2015, the Court granted defendant's motion to dismiss plaintiffs' first amended complaint pursuant to Federal Rule of Civil Procedure 12(b)(6), finding that plaintiffs had failed to plausibly allege any false statements or deceptive acts by defendant. (3/31/15 Mem. & Order (Doc. No. 21).) On June 26, 2015, plaintiffs moved for leave to file a second amended complaint. (Doc. No. 25.) For the reasons set forth below, plaintiffs' motion is denied.

BACKGROUND

A. Factual Allegations[1]

Defendant manufactures and sells the Centrum brand line of multivitamins, which includes Centrum Silver Women 50+, Centrum Silver Men 50+, Centrum Silver Adults 50+, Centrum Women, Centrum Men, and Centrum Adults (collectively, "Centrum"). (Second Am.

[1] The facts in this section are taken from plaintiffs' proposed second amended complaint, and for purposes of this motion to dismiss are accepted as true. *See Stratte-McClure v. Morgan Stanley*, 776 F.3d 94, 97 n.1 (2d Cir. 2015).

Compl. (Doc. No. 25-3) at ¶¶ 5, 79.) Through its labeling and marketing of Centrum, defendant has created in consumers' minds the belief that taking multi-vitamins will afford them positive health benefits and prevent illness and disease. (*Id.* at ¶ 1.) Centrum's packaging characterizes the product as a multivitamin/multimineral supplement, and defendant's 2012 Annual Report calls Centrum the "No. 1 selling brand of multivitamins in the world . . . ." (*Id.* at ¶¶ 5, 17.)

Kardovich,[2] Chui,[3] and Chang[4] regularly purchased Centrum Silver Adults 50+, Centrum Silver Women 50+, and Centrum Adults, respectively, over a period of several years, and in doing so each "relied upon the representation that the products would benefit [their] health." (*Id.* at ¶¶ 9–11.) Specifically, they relied upon the following image and text combinations, or "vignettes," that collectively appeared on the three products:

> [1] [An orange shield above the word IMMUNITY] With antioxidants to support the normal function of the immune system.
>
> [2] [A yellow sun above the word ENVIRONMENTAL STRESS] With vitamins C, E and Selenium to help protect the body's cells from free radicals damage caused by environmental stress.
>
> [3] [A blue runner above the word PHYSICAL STRESS] With vitamins C and E to help protect the body against the effects of physical stress.

(*Id.* at ¶¶ 9–11.)

Plaintiffs argue that these statements are misleading because they contain "buzz words," such as "antioxidants," "immunity," and "protect the body's cells from free radical damage," that

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[2] Kardovich is a citizen of Illinois who resides in Chicago, Illinois. (Second Am. Compl. at ¶ 9) He purchased Centrum Silver Adults 50+ on average once every three months for the last six years from the following locations in Chicago: Target, Dominick's Finer Foods, Wal-Mart, Walgreens, and CVS. (*Id.*) Specifically, he relied on packaging that depicted the first and second vignettes listed above. (*Id.*)

[3] Chui is a citizen of New York who resides in Queens, New York. (*Id.* at ¶ 8.) She purchased Centrum Silver Women 50+ on average once every three months for the last six years from a CVS store located in New York, New York. (*Id.*) Like Kardovich, she relied on packaging that depicted the first and second vignettes listed above. (*Id.*)

[4] Chang is a citizen of California who resides in San Francisco, California. (*Id.* at ¶ 9.) She purchased Centrum Adults once a year for the last five years from a Costco store located in San Francisco, California. (*Id.*) Specifically, she relied upon packaging that depicted the first and third vignettes listed above. (*Id.*)

incorrectly "convey to consumers that Centrum will help them to avoid getting cancer, cardiovascular disease and cognitive decline." (*Id*. at ¶ 14.) Plaintiffs provide a declaration from Professor Edgar Miller of The School of Medicine at The Johns Hopkins University, who states: "In the fields of medicine and epidemiology, when the words and/or phrases 'protect the body's cells from free radical damage', 'antioxidants' and 'protection against physical stress' are used, they speak to the ability to prevent cancer; cardiovascular disease, stroke, cognitive decline, and ultimately mortality." (Decl. Edgar Miller (Doc. No. 25-3) at ¶ 11.) In support of this statement, Miller cites the following:

- "There is growing evidence that the major 'killers', cardiovascular disease and cancer, can be prevented or delayed to some extent by dietary changes, such as reduction in fat intake and increased consumption of fruits, grains, and vegetables. *There is also increasing evidence that free-radical damage is involved in the development of these diseases*." Halliwell, Barry, The Lancet, Sept. 10, 1994 v344 p.721 Subjects: Free Radicals (Chemistry) Health Aspects Antioxidants Physiological Aspect Oxidation-Reduction Reaction Physiological Aspects.
- *"Antioxidants came to public attention in the 1990s, when scientists began to understand that free radical damage was involved in the early stages of artery-clogging atherosclerosis and may contribute to cancer, vision loss, and a host of other chronic conditions*." Harvard T.H. Chan School of Public Health, Antioxidants - Beyond the Hype, *located at* http://www.hsph.harvard.edu/nutritionsource/antioxidants/.
- "[S]tudies indicate that *free radicals* are possibly involved in the pathogenesis of neuron death in A[lzeimer's] D[isease]." Markesbery, William R., Free Radical

> Biology and Medicine, Volume 23, Issue 1, 1997, Oxidative Stress Hypothesis in Alzheimer's Disease.

(Decl. Edgar Miller at ¶ 11. (alterations in original).)

B. Procedural History

Kardovich commenced this suit on December 27, 2013, (Compl. (Doc. No. 1), and was joined by Chui and Chang on May 23, 2014 through their first amended complaint, (Am. Compl. (Doc. No. 13).) On March 31, 2015, the Court granted defendant's motion to dismiss the first amended complaint pursuant to Federal Rule of Civil Procedure 12(b)(6), finding that plaintiffs had failed to plausibly allege any false statements or deceptive acts by defendant. (3/31/15 Mem. & Order at 9) On June 26, 2015, plaintiffs moved for leave to file a second amended complaint, alleging the following causes of action: (i) violation of the California Consumer Legal Remedies Act, Cal. Civ. Code § 1750, *et seq*., (the "CLRA") on behalf of the California Class;[5] (ii) violation of the California False Advertising Law, Cal. Bus. & Prof. Code § 17500, *et seq*., (the "FAL") on behalf of the California Class; (iii) violation of the California Unfair Competition Law, Bus. & Prof. Code § 17200, *et seq*., (the "UCL") on behalf the California Class; (iv) violation of the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS § 505/1, *et seq*., (the "ICFA") on behalf of the Illinois Class;[6] (v) violation of the New York

[5] The proposed California Class consists of all California residents who purchased Centrum during the period December 27, 2009 to the date of class certification for their own or household use rather than resale or distribution, excluding defendant, any entity that has a controlling interest in defendant, and defendant's current or former directors, officers, counsel and their immediate families; governmental entities; and, the judges to whom this case is assigned and any immediate family members thereof. (Second Am. Compl. at ¶ 34.)

[6] The proposed Illinois Class consists of all Illinois residents who purchased Centrum during the period of December 27, 2008 to the date of class certification for their own or household use rather than resale or distribution, excluding defendant, any entity that has a controlling interest in defendant, and defendant's current or former directors, officers, counsel and their immediate families; governmental entities; and, the judges to whom this case is assigned and any immediate family members thereof. (*Id.*)

General Business Law § 349 (the "GBL") on behalf of the New York Class;[7] (vi) unjust enrichment under New York common law;[8] (vii) negligent misrepresentation under New York common law; and (viii) fraud under New York common law. (Second Am. Compl. at ¶¶ 40–96.)

Defendant opposes plaintiffs' motion to amend, arguing that the amendment would be futile. (Def.'s Mem. Opp'n (Doc. No. 26) at 5.) Specifically, they maintain that: (i) plaintiffs fail to allege any false statements or deceptive acts by defendant; (ii) plaintiffs fail to allege causation or reliance with respect to the allegedly misleading statements; (iii) plaintiffs' claims are preempted under the Nutrition Labeling and Education Act of 1990 (the "NLEA"); (iv) Kardovich and Chang have not pled sufficient connections to New York to sustain their claims for negligent misrepresentation or unjust enrichment under New York law; (v) Chui has not pled the requisite "special relationship" with defendant to state a claim for negligent misrepresentation under New York law; and (vi) Chui's unjust enrichment claim fails because her relationship with defendant is too attenuated.

STANDARD OF REVIEW

Rule 15(a)(2) of the Federal Rules of Civil Procedure directs that, aside from amendment as a matter of course under Rule 15(a)(1), a party may only amend its pleading with the other party's consent or leave of the Court. Rule 15(a)(2) also instructs that courts "should freely give leave when justice so requires," and the Second Circuit has held that leave to amend should be

[7] The proposed New York Class consists of all New York residents who purchased Centrum during the period of December 27, 2007, to the date of class certification for their own or household use rather than resale or distribution, excluding defendant, any entity that has a controlling interest in defendant, and defendant's current or former directors, officers, counsel and their immediate families; governmental entities; and, the judges to whom this case is assigned and any immediate family members thereof. (*Id.*)

[8] The proposed Class consists of all persons who purchased Centrum during the period of December 27, 2007, to the date of class certification for their own or household use rather than resale or distribution, other than defendant, any entity that has a controlling interest in defendant, and defendant's current or former directors, officers, counsel, and their immediate families; governmental entities; and, the judges to whom this case is assigned and any immediate family members thereof. (*Id.* at ¶ 33.)

denied "only for such reasons as undue delay, bad faith, futility of the amendment, and perhaps most important, the resulting prejudice to the opposing party." *Aetna Cas. & Sur. Co. v. Aniero Concrete Co.*, 404 F.3d 566, 603–04 (2d Cir. 2005) (citing *Foman v. Davis*, 371 U.S. 178, 182 (1962)); *see also Richardson Greenshields Sec., Inc. v. Lau*, 825 F.2d 647, 653 n.6 (2d Cir. 1987). "Proposed amendments are futile if they would fail to cure prior deficiencies or to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure." *NECA-IBEW Pension Trust Fund v. Lewis*, 607 F. App'x 79, 80 (2d Cir. 2015) (citing *Panther Partners Inc. v. Ikanos Commc'ns, Inc.*, 681 F.3d 114, 119 (2d Cir. 2012)). "The standard for denying leave to amend based on futility is therefore the same as the standard for granting a motion to dismiss." *Id.* (citing *IBEW Local Union No. 58 Pension Trust Fund & Annuity Fund v. Royal Bank of Scotland Grp., PLC*, 783 F.3d 383, 389 (2d Cir. 2015)).

A motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6) requires the Court to examine the legal, rather than factual, sufficiency of a complaint. Generally, under Rule 8(a)(2), a pleading must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." To withstand a motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

A court considering a 12(b)(6) motion must "take[] factual allegations [in the complaint] to be true and draw[] all reasonable inferences in the plaintiff's favor." *Harris v. Mills*, 572 F.3d 66, 71 (2d Cir. 2009) (citation omitted). A complaint need not contain "detailed factual allegations," but it must contain "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555). In other words,

"[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* (citing *Twombly*, 550 U.S. at 555). Rather, a plaintiff's complaint must include "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 663 (citing *Twombly*, 550 U.S. at 570). The determination of whether "a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 663–64 (citing *Iqbal v. Hasty*, 490 F.3d 143, 157–58 (2d Cir. 2007)).

Where, as is the case here, claims are premised on fraud, pleadings are also subject to the heightened standard of Rule 9(b), under which a plaintiff must state with particularity the circumstances constituting the alleged fraud. This heightened requirement requires a complaint to "(1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent." *Mills v. Polar Molecular Corp.*, 12 F.3d 1170, 1175 (2d Cir. 1993). Courts have distilled this formulation to the "who, what, when, where, and how: the first paragraph of any newspaper story." *Am. Federated Title Corp. v. GFI Mgmt. Servs., Inc.*, 39 F. Supp. 3d 516, 520 (S.D.N.Y. 2014) (quoting *DiLeo v. Ernst & Young*, 901 F.2d 624, 627 (7th Cir. 1990)).

In deciding a motion to dismiss, the Court may consider any of the following: "(1) facts alleged in the complaint and documents attached to it or incorporated in it by reference, (2) documents 'integral' to the complaint and relied upon in it, even if not attached or incorporated by reference, (3) documents or information contained in defendant's motion papers if plaintiff has knowledge or possession of the material and relied on it in framing the complaint, (4) public

disclosure documents required by law to be, and that have been, filed with the Securities and Exchange Commission, and (5) facts of which judicial notice may properly be taken under Rule 201 of the Federal Rules of Evidence." *Nasso v. Bio Reference Labs., Inc.*, No. 11-CV-3480, 2012 WL 4336429, at *3 (E.D.N.Y. Sept. 24, 2012) (quoting *In re Merrill Lynch & Co.*, 273 F. Supp. 2d 351, 356–57 (S.D.N.Y. 2003)) (internal citations omitted).

DISCUSSION

A. False Statements or Deceptive Acts

Plaintiffs' claims are pled under the laws of three different states. While those laws do differ in some ways, the core element of each of plaintiffs' causes of action is the existence of a false statement or deceptive act. *See, e.g.*, *Frenzel v. AliphCom*, No. 14–CV–3587, 2014 WL 7387150, at *7 (N.D. Cal. Dec. 29, 2014) ("The standard for all three statutes [the CLRA, UCL, and FAL] is the 'reasonable consumer' test, which requires a plaintiff to show that members of the public are likely to be deceived by the business practice or advertising at issue."); *Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547, 574 (7th Cir. 2012) ("[One of the] elements of a claim under the ICFA [is] . . . a deceptive or unfair act or practice by the defendant . . . ."); *Crawford v. Franklin Health Mgmt. Corp.*, 758 F.3d 473, 490 (2d Cir. 2014) ("To state a claim under GBL § 349, a plaintiff must prove . . . that the challenged act or practice . . . was misleading in a material way . . . ."); *Brady v. Basic Research, L.L.C.*, 101 F. Supp. 3d 217, 237 (E.D.N.Y. 2015) ("Under New York law, a claim for fraud requires a false misrepresentation of a material fact, as do claims for negligent misrepresentation, which require a false representation that [a defendant] should have known was incorrect." (internal citations omitted) (alterations in original)).

Plaintiffs effectively concede that none of the Centrum Statements are technically inaccurate, arguing that defendant "incorrectly asserts that Plaintiffs agree that the statements are accurate" but then failing to point to any inaccurate statements. (Pls.' Reply (Doc. No. 27) at 2.) Plaintiffs therefore in substance only contend that defendant's technically accurate statements are misleading to reasonable consumers because "buzz words" such as "antioxidants," "immunity," and "protect the body's cells from free radical damage" cause consumers to believe that the product will help prevent cancer, cardiovascular disease, and cognitive decline, which in fact it does not do.

As a threshold matter, Miller's affidavit is not properly considered as part of the proposed second amended complaint. Under Federal Rule of Civil Procedure 10(c), "[a] copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes." The Second Circuit recently held in *Smith v. Logan* that an affidavit does not qualify as a written instrument if it is not a document "evidencing legal rights or duties or giving formal expression to a legal act or agreement, such as a deed, will, bond, lease, insurance policy or security agreement." 794 F.3d 249, 254 (2d Cir. 2015). Miller's affidavit, in which he provides his professional opinion regarding vitamins and vitamin supplements, does not so qualify, and the allegations contained therein are not properly before the Court.[9]

[9] Even were the Court to consider Miller's affidavit, it speaks not, as plaintiffs claim, to the way the "buzz words" at issue are interpreted by consumers, but rather to how they are understood "[i]n the fields of medicine and epidemiology." (Decl. Edgar Miller at ¶ 11.) Indeed, the sources cited by Miller say almost nothing about the manner in which consumers interpret these "buzz words." (*See id*. ("There is growing evidence that the major 'killers', cardiovascular disease and cancer, can be prevented or delayed to some extent by dietary changes, such as reduction in fat intake and increased consumption of fruits, grains, and vegetables. There is also increasing evidence that free-radical damage is involved in the development of these diseases. . . . Antioxidants came to public attention in the 1990s, when scientists began to understand that free radical damage was involved in the early stages of artery-clogging atherosclerosis and may contribute to cancer, vision loss, and a host of other chronic conditions. . . . [S]tudies indicate that free radicals are possibly involved in the pathogenesis of neuron death in A[lzeimer's] D[isease].") (citations omitted).) Putting aside the irony in citing studies that would seem to support the efficacy of Centrum in preventing precisely the conditions at issue, these sources fail to allege anything with respect to general consumer understanding, other than stating that "Antioxidants came to public attention in the 1990s . . . ."

Looking thus only to the four corners of plaintiffs' proposed second amended complaint, it is implausible that a reasonable consumer would see defendants' factually accurate statements and be misled to believe that they were claiming to prevent cancer, cardiovascular disease, and cognitive decline. And even accepting plaintiffs' premise that consumers interpret the "buzz words" at issue in the manner alleged, they cite to no authority for the proposition that a seller of goods can be held liable when factually accurate statements are misinterpreted by consumers through no fault of its own. In essence, plaintiffs present a theory of liability almost without limit, which would prohibit the sale of any products with ingredients that are the subject of misinformation or conflicting scientific studies. For example, plaintiffs do not object to the manner in which Centrum conveys the fact that it contains "antioxidants," but instead claim that the word itself is misleading. In contrast to the cases cited by plaintiffs,[10] there is no allegation in this case that defendant is the source of or otherwise responsible for consumer misunderstanding. The second amended complaint thus fails to allege that defendant has engaged in misleading or deceptive conduct. *See Bober v. Glaxo Wellcome PLC*, 246 F.3d 934, 938 (7th Cir. 2001) ("[Plaintiff's] estate asserts that the statements falsely claim that Zantac 75 and Zantac 150 do not contain the same medicine. None of the statements, however, expressly makes such a claim."); *Figy v. Frito-Lay North America, Inc.*, 67 F. Supp. 3d 1075, 1091 (N.D. Cal. 2014) ("In *Lam*[*v. General Mills, Inc.*, 859 F. Supp. 2d 1097, 1103–04 (N.D. Cal. 2012)],

[10] *See Segedie v. Hain Celestial Grp., Inc.*, No. 14–CV–5029, 2015 WL 2168374 (S.D.N.Y. May 7, 2015) (Plaintiffs alleged that products labeled "organic" contained ingredients that applicable law prohibited in organic products and products labeled "natural" contained synthetic ingredients); *Goldemberg v. Johnson & Johnson Consumer Cos.*, 8 F. Supp. 3d 467 (S.D.N.Y. 2014) (defendants used the phrase "Active Naturals" but plaintiffs alleged that most of the product ingredients were synthetic and unnatural); *Suchanek v. Sturm Foods, Inc.*, 764 F.3d 750 (S.D.N.Y. 2014) ("The [product] packaging stated in small font that it contained 'naturally roasted soluble and microground Arabica coffee'; it never explained that soluble coffee is instant coffee. Nor did it mention that the [product] pods contained over 95% instant coffee with only a tiny bit of microground coffee mixed in."); *Ackerman v. Coca-Cola Co.*, No. CV-09-0395, 2010 WL 2925955, at *6 (E.D.N.Y. 2010) ("Plaintiffs no longer contend that the particular vitamins in vitaminwater fail to provide the benefit claimed. Rather, they claim that vitaminwater's labeling and marketing is misleading."); *Hughes v. Ester C Co.*, 930 F. Supp. 2d 439, 463 (E.D.N.Y. 2013) (plaintiffs alleged that product's labeling incorrectly suggested it could prevent colds and flus).

the Court found that an objectively true statement like 'gluten free' on a pack of fruit snacks was unlikely to deceive a reasonable consumer into believing the product also 'contains no partially hydrogenated oils, low amounts of sugar or corn-syrup, or that the [products] are otherwise healthful.' Similarly here, it is implausible that a reasonable consumer would interpret an objectively true statement like 'FAT FREE' as also communicating that the product contains low amounts of sodium or is otherwise healthful.") (second alteration in original); *cf. Hemy v. Perdue Farms, Inc.*, No. 11-CV-888, 2011 WL 6002463, at *19 (D.N.J. 2011) ("Plaintiffs have not pointed to any case law suggesting that using an accurate advertising phrase to promote oneself is actionable under the [New Jersey Consumer Fraud Act].").

B. Causation and Reliance

Defendant also argues that plaintiffs have failed to plead causation or reliance, noting that plaintiffs have only alleged that "[r]easonable consumers read the Centrum labels and believe, based on the language and vignettes used on the labels, that Centrum is capable of preventing cancer, cardiovascular disease, and cognitive decline," but fail to allege that they themselves relied on that understanding when purchasing the Centrum products. (Def.'s Mem. Opp'n at 8 (citing Second Am. Compl. at ¶ 3).) Plaintiffs do not dispute that causation or reliance are required for their causes of action,[11] but cite the portions of the proposed second amended complaint that state that each plaintiff "relied upon the [Centrum Statements] and did so to

[11] *See generally In re Sony Gaming Networks & Customer Data Sec. Breach Litig.*, 903 F. Supp. 2d 942, 969 (S.D. Cal. 2012) ("Under the CLRA, each class member must present actual injury, whereas under the UCL/FAL, even after Proposition 64, only the named Class representatives must [demonstrate] reliance and causation." (citing *In re Steroid Prod. Cases*, 181 Cal. App. 4th 145, 155 (2010))); *Stutman v. Chem. Bank*, 95 N.Y.2d 24, 29 (2000) ("The plaintiff [bringing a GBL § 349 claim] . . . must show that the defendant's 'material deceptive act' caused the injury."); *Siegel v. Shell Oil Co.*, 612 F.3d 932, 935 (7th Cir. 2010) ("[T]o prevail under ICFA, a plaintiff must demonstrate that the defendant's conduct is the proximate cause of the injury."); *Hydro Inv'rs, Inc. v. Trafalgar Power Inc.*, 227 F.3d 8, 20 (2d Cir. 2000) ("Under New York law, [one of] the elements for a negligent misrepresentation claim [is that] the plaintiff reasonably relied on [the false representation] to his or her detriment."); *Banque Arabe et Internationale D'Investissement v. Maryland Nat. Bank*, 57 F.3d 146, 153 (2d Cir. 1995) ("To prove common law fraud under New York law, a plaintiff must show that . . . the plaintiff reasonably relied upon the representation, and . . . suffered damage as a result of such reliance.").

benefit [their] health." (Pls.' Reply at 7 (citing Second Am. Compl. at ¶¶ 9–11).) They continue by stating that "[t]he [proposed second amended complaint] defines the health benefits as the 'prevention of cancer, cardiovascular disease, and cognitive decline.'" (*Id.*)

As with the alleged false statements or deceptive acts, plaintiffs' argument in this regard suffers from a fatal mismatch. Although the *proposed second amended complaint* attempts to define health benefits to mean prevention of cancer, cardiovascular disease, and cognitive decline, never does it allege that to be what *plaintiffs* understood when they read the Centrum packaging. Specifically, plaintiffs only allege that they relied upon "the representation that the products would benefit [their] health." (Second Am. Compl. at ¶¶ 9–11.) But their cause of action is specifically premised upon cancer, cardiovascular disease, and cognitive decline, not general health benefits. Because they fail to allege that they themselves understood that Centrum would prevent the specific health conditions which represent the gravamen of their complaint, they have failed to sufficiently plead causation and reliance.

C. Preemption

i. Statutory Background

Congress passed the Food, Drug, and Cosmetic Act ("FDCA") in 1938, in response to "growing evidence of a need to more effectively regulate U.S. consumer goods, particularly food supply, drugs, cosmetics, and medical devices." Jaime F. Cárdenas-Navia, *Thirty Years of Flawed Incentives: An Empirical and Economic Analysis of Hatch-Waxman Patent-Term Restoration*, 29 Berkeley Tech. L.J. 1301, 1306 (2014). The FDCA established numerous provisions geared toward public safety, including label and advertising requirements, *id.*, and empowered the FDA to "(a) protect the public health by ensuring that 'foods are safe, wholesome, sanitary, and properly labeled'; (b) promulgate regulations pursuant to this

authority; and (c) enforce its regulations through administrative proceedings." *Jovel v. i-Health, Inc.*, No. 12-CV-5614, 2013 WL 5437065, at *3 (E.D.N.Y. Sept. 27, 2013) (citing 21 C.F.R. § 7.1 *et seq.*) (internal citation omitted).

In 1990, Congress amended the FDCA through the NLEA. The purpose of the NLEA was to "clarify and to strengthen the Food and Drug Administration's legal authority to require nutrition labeling on foods, and to establish the circumstances under which claims may be made about the nutrients in foods." *Nutritional Health Alliance v. Shalala*, 144 F.3d 220, 223 (2d Cir. 1998) (citing H.R. Rep. No. 101–538, at 7 (1990), reprinted in 1990 U.S.C.C.A.N. 3336, 3337). The NLEA also added a preemption provision to the FDCA, which provides that states and localities may only adopt rules that are identical to those provided in the NLEA:

> (a) Except as provided in subsection (b) of this section, no State or political subdivision of a State may directly or indirectly establish under any authority or continue in effect as to any food in interstate commerce--
>
> . . .
>
> (5) any requirement respecting any claim of the type described in section 343(r)(1) of this title [which pertains to nutrients and health claims,] made in the label or labeling of food that is not identical to the requirement of section 343(r) of this title . . . .

21 U.S.C. § 343-1(a)(5). Courts have repeatedly interpreted this provision not to preempt state law requirements that effectively parallel or mirror the relevant sections of the NLEA, *Jovel*, 2013 WL 5437065, at *3 (citing *New York State Rest. Ass'n v. N.Y.C. Bd. of Health*, 556 F.3d 114, 123 (2d Cir. 2009)), and federal regulations have clarified that "not identical to" does not refer to specific words, but instead means that states cannot impose obligations in addition to or different from those imposed under the federal scheme. 21 C.F.R. § 100.1(c)(4)(i)-(ii).

In 1994, Congress enacted the Dietary Supplement Health and Education Act ("DSHEA"), which created a new regime for the regulation of dietary supplements. Pursuant to

the DSHEA, certain health claims can be made about dietary supplements without first petitioning the FDA, if the statement: (i) claims a benefit related to a classical nutrient deficiency disease and discloses the prevalence of such disease in the United States; (ii) describes the role of a nutrient or dietary ingredient intended to affect the structure or function in humans; (iii) characterizes the documented mechanism by which a nutrient or dietary ingredient acts to maintain such structure or function; or (iv) describes general well-being from consumption of a nutrient or dietary ingredient. 21 U.S.C. § 343(r)(6)(A). However, such statements are only permitted under the DSHEA if, among other things, "the manufacturer of the dietary supplement has substantiation that such statement is truthful and not misleading . . . ." *Id.* § 343(r)(6)(B).

ii. Analysis

Pursuant to the Supremacy Clause of the United States Constitution, the "Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby . . . ." U.S. Const. art. VI, cl. 2. "From that constitutional principle, it follows, that when acting within the scope of its enumerated powers, Congress may preempt state law." *Wadsworth v. Allied Prof'ls Inc. Co.*, 748 F.3d 100, 105 (2d Cir. 2014). Even in cases of express preemption, a court must begin its analysis "with the assumption that the historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Altra Group, Inc. v. Good*, 555 U.S. 70, 77 (2008). This is particularly true when Congress has legislated in a field traditionally regulated by the states, such as advertising, *see Lorillard Tobacco Co. v Reilly*, 533 U.S. 525, 541–42 (2001), or health and safety regulation, *see Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996). However, the ultimate touchstone of preemption analysis is the purpose of Congress. *Id.* at 486. With respect to the NLEA, Congress

has demonstrated unambiguous intent to preempt state law through an express preemption provision, although it also made clear that the NLEA "shall not be construed to preempt any provision of State law, unless such provision is expressly preempted under [21 U.S.C. § 343–1(a)] of the [FDCA]." *New York State Rest. Ass'n*, 556 F.3d at 123 (citing Pub. L. No. 101–535, § 6(c)(1), 104 Stat. 2353, 2364 (21 U.S.C. § 343–1 note)) (alteration in original).

Defendant contends that plaintiffs' claims are preempted under the NLEA, arguing that "the FDA regulations governing dietary supplements expressly contemplate the use of the term 'antioxidant' on vitamin labeling," which it defines as a "substance [that] participates in physiological, biochemical, or cellular processes that inactivate *free radicals* or prevent free radical-initiated chemical reactions." (Defs. Mem. Opp'n at 13 (citing 21 C.F.R. § 101.54(g)(2)).) Defendant argues that because these terms are "expressly permitted by the NLEA and its implementing regulations," plaintiffs' claims are preempted.

As other courts have noted, although statements on a product's labeling may touch on an area regulated by the FDA, consumer protection claims founded on their falsity are not preempted. *See Jovel*, 2013 WL 5437065, at *5 (citing *Jackson v. Balanced Health Prods.*, No. 8-CV-05584, 2009 WL 1625944, at *3 (N.D. Cal. 2009)). Defendant's analysis fails to take into account that the NLEA authorization is expressly premised upon the satisfaction of certain factors, including that "the manufacturer of the dietary supplement has substantiation that such statement is truthful and not misleading . . . ." 21 U.S.C. § 343(r)(6)(B). By alleging that defendant has engaged in deceptive marking of Centrum, plaintiffs do not seek to impose a burden on defendant greater than or in conflict with the requirements of the NLEA. Accordingly, plaintiffs' claims are not preempted.

D. Negligent Misrepresentation

In their opposition to defendant's motion to dismiss the first amended complaint, plaintiffs conceded that Kardovich and Chang lack sufficient connections to New York and withdrew their New York unjust enrichment and negligent misrepresentation claims as to those plaintiffs. (Pls. Mem. Opp'n (Doc. No. 18) at 26 n.18.) In their reply on the instant motion to amend, plaintiffs ostensibly challenge defendant's argument on this point, but then simply respond by noting that Chui's injury occurred in New York. (Pls.' Reply at 9.) Plaintiffs have thus abandoned the negligent representation claim as to Kardovich and Chang.

As to Chui, defendant contends that her claim of negligent misrepresentation fails because she has not pled a special relationship with defendant. Under New York law, a claim of negligent misrepresentation requires, among other things, a showing that the declarant expressed its words "with knowledge or notice that they will be acted upon, to one to whom the declarant is bound by some relation or duty of care." *Dallas Aerospace, Inc. v. CIS Air Corp.*, 352 F.3d 775, 788 (2d Cir. 2003) (citing *Kimmel v. Schaefer*, 89 N.Y. 2d 257, 264 (1996)). In *Kimmel v. Schaefer*, the New York Court of Appeals explained that "[w]hether the nature and caliber of the relationship between the parties is such that the injured party's reliance on a negligent misrepresentation is justified generally raises an issue of fact," and put forth three factors for courts to consider when determining whether justifiable reliance exists in a particular case: "whether the person making the representation held or appeared to hold unique or special expertise; whether a special relationship of trust or confidence existed between the parties; and whether the speaker was aware of the use to which the information would be put and supplied it for that purpose." 89 N.Y. 2d at 264.

When considering whether two parties stand in a "special relationship," courts have consistently stated that "not all representations made by a seller of goods or provider of services will give rise to a duty to speak with care." *See, e.g.*, *id.* at 263. Instead, negligent misrepresentation requires "a closer degree of trust between the parties than that of the ordinary buyer and seller in order to find reliance on such statements justified." *Landesbank Baden-Wurttemberg v. Goldman, Sachs & Co.*, 478 F. App'x 679, 682 (2d Cir. 2012) (citing *Dallas Aerospace*, 352 F.3d at 788). "Although the contours of the definition are not precise, courts have held that . . . an arm's length business relationship is not enough to create that relationship." *New Earthshell Corp. v. Jobookit Holdings Ltd.*, No. 14-CV-3602, 2015 WL 1000343, at *4 (S.D.N.Y. 2015) (internal quotation marks omitted). Therefore, in a commercial context where no obligations arise from the speaker's professional status, "there must be some identifiable source of a special duty of care" in order to impose tort liability. *Kimmell*, 89 N.Y. 2d at 264.

Chui contends that she has adequately pled the existence of a special relationship with defendant under the *Kimmell* factors. In support of this position, she states that she relied on defendant's special scientific expertise, believing that the statements regarding the positive health benefits of Centrum were backed by science, and that defendant knew or should have known that Chui was going to rely on those statements. (Pls.' Reply at 10.) Although Chui has plausibly shown that defendant held special expertise and was aware that consumers would rely on its representations,[12] she does not plead any facts that allow the Court to infer the critical second factor of a special relationship.

The "most lenient" version of the special relationship standard was originally put forth in *Suez Equity Inv'rs Alley Sports Bar, LLC v. SimplexGrinnell, LP*, No. 13-CV-6579, 2014 WL

[12] As noted above, although Chui has pled that she relied on defendant's representations, she has not pled that relied on the misleading interpretation of those statements put forth in the proposed second amended complaint.

5804362, at *8 (W.D.N.Y. Nov. 7, 2014) (gathering cases). In that case, the Second Circuit held that dismissal was improper where plaintiffs' complaint alleged a "relationship between the parties that extended beyond the typical arm's length business transaction: defendants initiated contact with plaintiffs, induced them to forebear from performing their own due diligence, and repeatedly vouched for the veracity of the allegedly deceptive information." *Suez Equity Inv'rs, L.P. v. Toronto-Dominion Bank*, 250 F.3d 87, 103 (2d Cir. 2001). Going further, however, the court went on to suggest that to the extent a special relationship had been "sparsely pled," a claim for negligent misrepresentation was still appropriate because the complaint "emphatically allege[d] the other two factors enunciated in *Kimmell*." *Id.*

Even under the *Suez Equity Investors* standard, Chui's claim fails for two reasons. The first is that the special relationship of trust is not in this case "sparsely pled," but rather not pled at all, and in fact the relationship between the parties is of a kind that courts have categorically excluded from the scope of negligent misrepresentation. When a special relationship is entirely absent, a claim of negligent misrepresentation cannot be rehabilitated by turning to the other two *Kimmel* factors. *See Eternity Global Master Fund Ltd. v. Morgan Guar. Trust Co. of N.Y.*, 375 F.3d 168, 188 (2d Cir. 2004) (citing *Suez Equity Inv'rs*, 250 F.3d at 103) (finding that defendant's expertise and knowledge of plaintiff's intended use of information did not bring the case within *Suez Equity Investors* where the complaint lacked "any allegation of a special relationship of trust between the parties" and "appears to have been a typical arm's length business transaction"); *Aurthur Properties, S.A. v. ABA Gallery, Inc.*, No. 11-CV-4409, 2011 WL 5910192, at *5 (S.D.N.Y. Nov. 28, 2011) ("Plaintiffs allege nothing beyond defendants' expertise as a basis for any special relationship and, without more, plaintiffs' allegations are

insufficient. Indeed, the alleged purchases appear to have been nothing more than arm's length transactions which did not give rise to a special relationship among the parties.").

Furthermore, even were the Court to consider Chui's claims of a special relationship to be "sparsely pled," as opposed to entirely absent, she would not be able to "emphatically" allege the other two factors. For example, although Chui has pled that defendant has special expertise in the area of vitamins and health, this is not the type of "unique or special expertise" that courts have stressed. *See, e.g.*, *Eternity*, 375 F.3d at 189 ("The New York Court of Appeals has observed that a relationship sufficiently special to justify reliance (and a subsequent action for negligent misrepresentation) may arise when a person '*wholly* without knowledge seek[s] assurances from one with *exclusive* knowledge.' Reliance is less plausible when the defendant is not 'imparting *exclusive* information,' and the plaintiff exhibits familiarity with the 'hazards' inherent to a particular transaction.") (emphasis added) (quoting *Heard v. City of New York*, 82 N.Y.2d 66, 75 (1993)). Similarly, although it is almost certain that defendant expected, and in fact intended, for customers to rely on the representations it included on its packaging, it does not rise to the level of reliance seen in other cases. *See, e.g.*, *Suez Equity Inv'rs*, 250 F.3d at 103–04 (defendants supplied plaintiffs with incomplete investment information and discouraged them from conducting their own investigation); *Kimmell*, 89 N.Y. 2d at 265 ("Defendant testified at trial that he expected plaintiffs to rely on these projections. Defendant also met with each plaintiff, and personally represented that the . . . project would generate some income. Defendant further urged plaintiffs to review and rely on the projections. Indeed, defendant informed [plaintiff] that he could provide 'hot comfort' should plaintiff entertain any reservations about investing."). Although Chui has sufficiently pled the expertise and reliance

factors, she has not, when compared to other cases that have considered negligent misrepresentation, done so "emphatically."

Finally, as a practical matter, for the Court to find that Chui's interactions with defendant qualified as a special relationship would be to attribute special relationships to the sales of a virtually unlimited number of retail products where customers rely on manufacturers' expertise, from televisions to toothbrushes. For the Court to hold that all such transactions are outside of the realm of the "ordinary buyer and seller" would be to eviscerate the standard. As the court noted in *Sanitoy, Inc. v. Shapiro*, "[i]f, as plaintiffs contend, a salesman's representation that the buyer can rely on his expertise and the buyer's reliance were enough to create the necessary special relationship, the exception would swallow the rule." 705 F. Supp. 152, 155 (S.D.N.Y. 1989). Because Chui has not alleged a connection to defendant beyond a typical buyer-seller, arm's length relationship, the Court finds that Chui has failed to plead facts from which a special relationship could plausibly be inferred. Her claims of negligent misrepresentation must therefore be dismissed.

E. Unjust Enrichment

Defendant argues that Chui's claim for unjust enrichment fails under New York law because she has an insufficient relationship with defendant. Although defendant is correct that the connection between a defendant and a plaintiff cannot be "too attenuated," unjust enrichment does not require privity, "direct dealing," or an "actual, substantive relationship." *See, e.g.*, *Grynberg v. ENI S.P.A.*, 503 F. App'x 42, 44 (2d Cir. 2012); *Sperry v. Crompton Corp.*, 8 N.Y. 3d 204, 215–16 (2007).[13] In cases involving consumer products, courts have consistently held

[13] Defendant cites *Sperry* for the proposition that an indirect purchaser's relationship with a manufacturer is too attenuated to support a claim for unjust enrichment. (Def.'s Mem. Opp'n at 14) At issue in that case was the "connection between the purchaser of tires and the producers of chemicals used in the rubber-making process,"

that the relationship between a consumer and a manufacturer is sufficient for purposes of pleading unjust enrichment. *See, e.g., Waldman v. New Chapter, Inc.*, 714 F. Supp. 2d 398, 404 (E.D.N.Y. 2010) (consumers of food products sufficiently connected to manufacturer); *Cox v. Microsoft Corp.*, 8 A.D.3d 39, 40–41 (1st Dep't 2004) (indirect purchasers of software sufficiently connected to manufacturer); *cf. Newbro v. Freed*, No. 6-CV-1722, 2007 WL 642941, at *2 (2d Cir. 2007) ("Even though the [defendants] had no prior dealings with [plaintiff], the fact that money was transferred directly from his account to theirs (albeit by a third party) is enough to sustain a claim for unjust enrichment.").

The benefit that a manufacturer receives from consumers buying its products is the essence of its business. Retailers purchase Centrum from defendant for the single reason that they can then sell it to consumers. Although Chui may not have ever directly dealt with defendant, the benefit that defendant received at Chui's expense is anything but "attenuated."

CONCLUSION

The proposed second amended complaint would not survive a motion to dismiss under 12(b)(6) and is therefore futile. Plaintiffs' motion for leave to amend (Doc. No. 25) is denied. The Clerk of Court is directed to enter Judgment, and close this case.

SO ORDERED.

Dated: Brooklyn, New York
March 30, 2016

Roslynn R. Mauskopf

ROSLYNN R. MAUSKOPF
United States District Judge

Sperry, 8 N.Y. 3d at 216, which is not comparable to the connection between a manufacturer of a consumer product and a purchaser of that product.