SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. KARLA MOSKOWITZ PART 03
Justice

STATE OF NEW YORK, by Eliot Spitzer,

Plaintiff,

- against -

DAICEL CHEMICAL INDUSTRIES, LTD., EASTMAN CHEMICAL COMPANY, HOECHSTAKTIENGESELLSCHAFT, NUTRINOVA NUTRITION SPECIALTIES & FOOD INGREDIENTS, GMBH, HOECHST CELANESE CORPORATION, a/k/a CNA HOLDINGS, INC., NUTRINOVA, INC., CELANESE AG, AVENTIS S.A., NIPPON GOHSEI, a/k/a NIPPON SYNTHETIC CHEMICAL INDUSTRY CO., LTD., and UENO FINE CHEMICALS INDUSTRY, LTD.,

Defendants.

INDEX NO. 403878/2002
MOTION DATE
MOTION SEQ. NO. 006
MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is

FILED
AUG 16 2005
COUNTY CLERK'S OFFICE
NEW YORK

ORDERED that the motion is decided in accordance with the accompanying Decision and Order.

Dated: August 09, 2005

KARLA MOSKOWITZ J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 3

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STATE OF NEW YORK, by Eliot Spitzer,

Plaintiff,

Index No. 403878/2002

-against-

DAICEL CHEMICAL INDUSTRIES, LTD., EASTMAN CHEMICAL COMPANY, HOECHST AKTIENGESELLSCHAFT, NUTRINOVA NUTRITION SPECIALTIES & FOOD INGREDIENTS, GMBH, HOECHST CELANESE CORPORATION, a/k/a CNA HOLDINGS, INC., NUTRINOVA, INC., CELANESE AG, NIPPON GOHSEI, a/k/a NIPPON SYNTHETIC CHEMICAL INDUSTRY CO., LTD., and UENO FINE CHEMICALS INDUSTRY, LTD.,

DECISION and ORDER

Defendants.

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KARLA MOSKOWITZ, J.:

The motions with sequence numbers 006 and 007 are hereby consolidated for disposition. Number 006 consists of a motion and a cross-motion, pursuant to CPLR 2221 (d), to reargue a part of one of this court's previous decisions. Number 007 is a motion, pursuant to CPLR 3211 (a) (7), for an order dismissing the plaintiff's first amended complaint. For the following reasons, 006 is denied and 007 is granted.

BACKGROUND

The Defendants

As the court observed in its decision dated September 24, 2004 (the September 24 decision), the defendants in this action are all large, international corporations that manufacture and/or sell "sorbates" - i.e., minuscule amounts of chemical additive salts that are commonly used to extend the shelf life of food and other consumer products. Defendant Daicel Chemical

Industries, Ltd. (Daicel) is a Japanese sorbate manufacturer, headquartered in Tokyo, that markets sorbates in the United States through two non-party subsidiary corporations, Daicel (U.S.A.), Inc. (Daicel USA) and Mitsui & Co. (U.S.A.), Inc. (Mitsui USA). (See Notice of Motion [motion sequence number 006], Exhibit C [first amended complaint], ¶ 7). Defendant Eastman Chemical Company, an American sorbate manufacturing and marketing corporation, is licensed in Delaware and has its principal place of business in Tennessee (Eastman). (Id., ¶ 8). Defendant Hoechst Aktiengesellschaft is a German corporation headquartered in Frankfurt (Hoechst AG). (Id., ¶ 9). Defendants Nutrinova Nutrition Specialties & Food Ingredients, GmbH (Nutrinova), another German corporation headquartered in Frankfurt, and Hoechst Celanese Corporation, a/k/a CNA Holdings, Inc. (CNA Holdings), and Nutrinova, Inc. (Nutrinova, Inc.), two Delaware corporations both headquartered in New Jersey, were all direct or indirect subsidiaries of Hoechst AG. (Id., ¶¶ 10-12). Hoechst AG and Nutrinova manufacture sorbates; and CNA Holdings and Nutrinova, Inc. market them in the United States. (Id., ¶ 14). In 1999, defendant Celanese AG (Celanese AG), a German corporation headquartered in Kronberg im Taunus, acquired Nutrinova, CNA Holdings, and Nutrinova, Inc. from Hoechst.[1] (Id., ¶¶ 13, 15). Defendant Nippon Gohsei, a/k/a Nippon Synthetic Chemical Industry Co., Ltd. (Nippon Gohsei) is a Japanese sorbate manufacturer, headquartered in Osaka, that markets sorbates in the United States through non-party Mitsui USA.

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[1] Actually, Hoechst AG spun off its subsidiaries, Nutrinova, CNA Holdings and Nutrinova, Inc., so that the new corporate entity called Celanese AG could purchase them. (See Notice of Motion [motion sequence number 006], Exhibit C [first amended complaint], ¶ 15). The original complaint stated that Hoechst AG ceased to exist when, after the Celanese AG transaction, Hoechst AG executed the sale of its stock and remaining assets to former defendant (now non-party) Aventis S.A., a French corporation headquartered in Strasbourg, France. (Id., Exhibit B, ¶ 16). The first amended complaint omits the foregoing information, however, and alleges that Hoechst AG still exists independently. (Id., Exhibit C, ¶ 9).

(Id., ¶ 16). Defendant Ueno Fine Chemicals Industry, Ltd. (Ueno) is also a Japanese sorbate manufacturer, headquartered in Osaka, that markets sorbates in the United States through non-party Kanematsu U.S.A., Inc. (Kanematsu USA). (Id., ¶ 17).

Prior Proceedings

The plaintiff New York State Attorney General (State AG) asserts that, between January 1979 and June 1997, the defendants and others engaged in a world-wide, illegal conspiracy to fix prices in the commercial sorbates industry, and that this conspiracy had economic consequences in New York State. (Id., ¶¶ 2, 4, 34-36, 44-45). The State AG commenced this action in October 2002 after several of the defendants had already pled guilty to federal criminal antitrust conspiracy charges or settled private class action claims based on the same activity. (Id., ¶¶ 2-3, 37-42). In the original complaint, the State AG asserted causes of action for: 1) violation of General Business Law § 340 et seq ("the Donnelly Act"); 2) violation of Executive Law § 63 (12) ("fraudulent or illegal business transactions"); 3) violation of General Business Law § 349 ("unfair or deceptive trade practices"); and 4) unjust enrichment. (Id., Exhibit B). Rather than answer the original complaint, however, the defendants each submitted separate CPLR 3211 motions to dismiss the State AG's four causes of action. In the September 24 decision, this court consolidated those motions for disposition and granted the motions solely to the extent of dismissing the State AG's first cause of action with leave to replead. (Id., Exhibit A). Thereafter, in October of 2004, the State AG served a first amended complaint in which he now asserts the same four causes of action with some different factual allegations. (Id., Exhibit C). Ueno filed an answer to the first amended complaint on December 8, 2004; however, the other defendants did not. Instead, Daicel, Eastman, Hoechst AG, Nutrinova, CNA Holdings,

Nutrinova, Inc., Celanese AG and Nippon Gohsei served, respectively, a motion to reargue a portion of the September 24 decision and a motion to dismiss the first amended complaint. Ueno cross moved to join in the relief requested in the reargument motion.

DISCUSSION

I. Motions to Reargue

Pursuant to CPLR 2221, a "motion for leave to reargue may be granted only upon a showing 'that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision'." (See William P. Pahl Equipment Corp. v Kassis, 182 AD2d 22, 27 [1st Dept 1992]; citing Schneider v Solowey, 141 AD2d 813 [2d Dept 1988]). "Reargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided." (Id. at 27; citing Pro Brokerage, Inc. v Home Insurance Co., 99 AD2d 971 [1st Dept 1984]). Nor does a reargument motion provide a party "an opportunity to advance arguments different from those tendered on the original application." (See Rubinstein v Goldman, at 328 supra.; quoting Foley v Roche, 68 AD2d 558, 568 [1st Dept 1979]). Here, the defendants move to reargue three of the court's legal findings in the September 24 decision.

The court grants reargument and, on reargument adheres to its prior decision.

A. Direct Purchaser Claims

First, the defendants state that "the [September 24 decision] was premised on the Court's erroneous belief that 'there is no evidence that the State or any of the direct purchaser claimants have yet recovered damages from the defendants'." (See Memorandum of Law in Support of Motion [motion sequence number 006], at 2). The defendants argue that "[i]n fact, Plaintiff's Complaint affirmatively and correctly alleged that Defendants settled all direct purchaser claims

nationwide for approximately $96.5 million [emphasis in original]." Id. Accordingly, the defendants request that the court reconsider its decision as to the first cause of action.

The defendants' characterization of the pleadings is inaccurate, however, as is their resulting legal argument.

Paragraph 3 of the original complaint states, in pertinent part, that:

> 3. In addition, private parties have filed actions arising from the Defendants' conspiracy in courts in California, Kansas, Tennessee and Wisconsin, which have settled in whole or in part. By way of summary:
>
> (a) In or about November 2000, certain of the Defendants settled a private class action filed in the United States Court for the Northern District of California on behalf of direct purchasers nationwide for approximately $82 million ("the California Federal Action"). Two other settlements in the case, totaling approximately $14.5 million, have since been approved either preliminarily or by the court. ...

(See Notice of Motion [motion sequence number 006] Exhibit B, ¶ 3). The foregoing language plainly does not use the word "all." Accordingly, there is no support for the defendants' contention that the court should have interpreted paragraph 3 as a statement that the defendants had settled the claims of "all direct purchasers," including those from New York. Without a specific statement either that all of the potential New York based purchasers of sorbates had joined the nationwide class in the California Federal Action or that the defendants had satisfied the claims of all New York based purchasers, there was no context from which the court could assume either of those facts. Further, the State AG did not claim to be pursuing relief on behalf of only indirect purchasers in the original complaint and his memorandum of law contained arguments suggesting that he was pursuing claims on behalf of both direct and indirect purchasers. Consequently, the court found that the original complaint was sufficiently ambiguous to admit of the possibility that some New York based direct purchasers of sorbates

had not yet recovered damages from the defendants.

When reviewing a motion to dismiss pursuant to CPLR 3211 (a), the test is "not whether the plaintiff has artfully drafted the complaint but whether, deeming the complaint to allege whatever can be reasonably implied from its statements, a cause of action can be sustained." (Jones Lang Wootton USA v LeBoeuf, Lamb, Greene & MacRae, 243 AD2d 168, 176 [1st Dept 1998], quoting Stendig, Inc. v Thom Rock Realty Co., 163 AD2d 46, 48 [1st Dept 1990]). Because the court had found the State AG's first cause of action potentially sustainable on behalf of any New York based direct purchasers of sorbates, the court permitted the State AG to replead the facts underlying that cause of action with greater specificity than he had in paragraph 3 of the original complaint. In permitting plaintiff to replead, the court analyzed the pleadings, not the proof, the court's function when analyzing a CPLR 3211 motion to dismiss. The court did not misapprehend either the law or the facts. Defendants' present argument is based on a fact that plaintiff did not clearly state in the original complaint, i.e., that the State AG is actually only pursuing claims on behalf of indirect purchasers. And because of recent case law from the Appellate Division First Department, the court is constrained to dismiss this lawsuit. However, it does not afford the defendants grounds to reargue the manner in which the court applied the law governing CPLR 3211 motions in last year's decision. Accordingly, the court rejects the defendants' first argument.

B. Statute of Limitations

The defendants next argue that the court previously misapplied the statutes of limitations to the State AG's second and third causes of action, both of which the court should dismiss as untimely. (See Memorandum of Law in Support of Motion [motion sequence number 006], at 2-4). After careful review, it appears that the court was, indeed, mistaken in two of its conclusions

of law. However, for reasons stated elsewhere in the September 24 decision, the court's decision not to dismiss the State AG's second and third causes of action was, nonetheless, correct.

The State AG's second cause of action alleged a violation of Executive Law § 63 (12), to which the court applied a six-year statute of limitations in reliance on the Court of Appeals' holding in State v Cortelle Corp (38 NY2d 83 [1975]). (See Notice of Motion [motion sequence number 006], Exhibit A, at 21). The original complaint alleged that:

> 55. Defendants' acts violated the Sherman Act, 15 U.S.C. § 1, the Donnelly Act, the Canadian Competition Act, and ... N.Y. Gen. Bus. Law § 349, and constituted fraudulent and/or illegal conduct [emphasis added].

(Id., Exhibit B, ¶ 55). The defendants contend that the foregoing cause of action was based solely on "conduct made illegal by statute." (See Memorandum of Law in Support of Motion [motion sequence number 006], at 3). The court originally found otherwise, because the above language clearly bases the Executive Law § 63 (12) claim upon the defendants' purported fraud and illegal conduct in addition to their purported statutory violations. Similarly, in State v Cortelle Corp., the State AG had charged the defendant both with violating N.Y. Bus. Corp. Law § 1101 and with committing "fraudulent and illegal activity" pursuant to Executive Law § 63 (12). The Court of Appeals did not view the latter allegation as mere surplusage, but rather found that the alleged "fraudulent activity" was proscribed by both the statute and the common law.[2] The Court reasoned that, because the statute did not actually create a new liability, penalty or forfeiture, the six-year fraud statute of limitations should apply to the Executive Law § 63 (12) claim. (State v Cortelle Corp., 38 NY2d at 87). This court applied the same logic in the

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[2] The court notes in passing that the defendants inaccurately stated that the Court of Appeals only applied the six-year statute of limitations to the plaintiff's Executive Law § 63 (12) cause of action in State v Cortelle Corp."because the underlying claim was not based on any statute [emphasis added]." See Memorandum of Law in Support of Motion (motion sequence number 006), at 3.

that this cause of action was timely, because Gen. Bus. Law § 342-c tolled it. (See Notice of Motion [motion sequence number 006], Exhibit A, at 24-25). The defendants now argue that the court's ruling was mistaken, because Gen. Bus. Law § 342-c specifically tolls only claims brought pursuant to Gen. Bus. Law §§340, 342 and 342-a, but excludes, by omission, claims brought pursuant to Gen. Bus. Law § 349 or any other portion of the Donnelly Act. (See Memorandum of Law in Support of Motion [motion sequence number 006], at 3). The defendants' interpretation of the statute's plain language appears to be correct. The original complaint recited that the defendants' conspiracy persisted until June 1997 and the State AG commenced this action in October 2002. Accordingly, pursuant to the holding of Gaidon v Guardian Life Ins. Co. of America (96 NY2d 201), the expiration of the applicable three-year statute of limitations would normally bar the State AG's Gen. Bus. Law § 349 claim. The defendants are also correct that the court implicitly rejected the State AG's fraudulent concealment/equitable tolling argument when it opined that the Gaidon holding compelled it to measure the statute of limitations period from the date of the last antitrust violation (i.e., June 1997), not the date that plaintiff was put on notice of the violation.[3] (See e.g. Wender v Gilberg Agency, 276 AD2d 311 [1st Dept 2000] [The court rejected the argument that the "date of discovery rule" tolled the limitations period for a Gen. Bus. Law § 349 claim]).

Further, it is indeed the case that neither the original nor the amended complaint sets forth any facts from which to infer that the defendants fraudulently attempted to conceal their conspiracy after they had ended it in June of 1997. Finally, the defendants correctly argue that the State AG cannot prevail on a class action tolling argument that relies on the commencement

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[3] See Notice of Motion (motion sequence number 006), Exhibit A, at 24-25.

of a Tennessee antitrust action grounded in Tennessee state law. (See Reply Memorandum of Law in Support of Motion [motion sequence number 006], at 5-7). Although the claims raised in Orlando's Bakery v Nutrinova Nutrition Specialities & Food Ingredients were doubtlessly "related" to this Gen. Bus. Law § 349 claim, they cannot be deemed the same, because Tennessee's consumer protection statutes are different from New York's. (See e.g. Board of Regents of University of State of N. Y. v Tomanio, 446 US 478, 486 [1980] [no section of (New York) law provides, however, that the time for filing a cause of action is tolled during the period in which a litigant pursues a related, but independent cause of action."]; see also Raggi v Wegmans Food Markets, Inc., 779 F Supp 705, 709 [WD NY 1991]).

Accordingly, the defendants have demonstrated both that the court misapprehended the application of Gen. Bus. Law § 342-c in the September 24 decision, and that the State AG's alternative arguments in favor of tolling are unavailing. It, therefore, follows that the court should have accorded the State AG's Gen. Bus. Law § 349 claim a three-year statute of limitations period.

Nonetheless, the court finds that its prior decision not to dismiss either the second or the third causes of action in the original complaint as untimely was correct. In the portion of the September 24 decision that disposed of Ueno's prior motion to dismiss (motion sequence number 002), the court noted that the federal Clayton Act contains a tolling provision that provides that "every private or State right of action arising under said [federal antitrust] laws and based in whole or in part on any matter complained of in said [federal] proceeding shall be suspended during the pendency thereof and for one year thereafter [emphasis added]." 15 USC § 16 (I). This federal toll applies to both the State AG's second and third causes of action. At one point, the court noted that the "defendants' guilty pleas to violations of the Sherman Act ... provide a

basis for am Executive Law 63 (12) claim." (See Notice of Motion [motion sequence number 006], Exhibit A, at 21). Thus, the state law claim is clearly "based ... on ... matter complained of in the federal antitrust prosecution.

Similarly, later in the September 24 decision, the court also noted that "[t]he Gen. Bus. Law § 349 claim obviously involves matters in the previous federal antitrust prosecutions." (Id., at 25). The defendants raise no credible argument now to refute this, and, indeed, they cannot. The federal authorities conducted antitrust prosecutions against several of the defendants between September 1998 and March 2002. Given that both the Executive Law 63 (12) claim and the Gen. Bus. Law § 349 claim accrued in June of 1997 at the end of the defendants' conspiracy, the statute of limitations had run for fourteen months when the commencement of the federal Clayton Act antitrust prosecutions tolled it. After the completion of those actions in March of 2002, there was still one year left of the federal tolling provision. Because the State AG commenced this action within that year, i.e., in October of 2002, both the Executive Law 63 (12) claim and the Gen. Bus. Law § 349 were still timely. In sum, although the court misapplied New York State law in the September 24 decision, it still arrived at the correct result vis a vis both the Executive Law 63 (12) claim and the Gen. Bus. Law § 349 claim pursuant to the controlling federal law. Accordingly, the court rejects the second argument in the defendants' reargument motion.

C. Duplicative Recovery

The last portion of the defendants' reargument motion asserts that the court misapplied Gen. Bus. Law § 340 (6), the provision of the Donnelly Act that admonishes the court to take steps to prevent "duplicative recovery" in actions commenced on behalf of both direct and

indirect purchasers, because the defendants have already satisfied all of the direct purchaser claims against them. (See Memorandum of Law in Support of Motion [motion sequence number 006], at 4-5). The defendants specifically argue that, by permitting the State AG to use Executive Law § 63 (12), Gen. Bus. Law § 349 and unjust enrichment claims to obtain recovery for indirect purchasers in this action, the court improperly exposed the defendants to liability a second time. (Id). The State AG counters that the defendants' argument misconceives the state legislature's purpose in enacting Gen. Bus. Law § 340 (6), that was to repeal the ban on indirect purchaser claims that the U. S. Supreme Court's decision in Illinois Brick Co. v Illinois, (431 US 720 [1977]) had created.[4] (See Plaintiff's Memorandum in Opposition to Motion [motion sequence number 006], at 9-12).

The State AG is correct to an extent. As I previously discussed, the original complaint was ambiguous as to whether the State AG's claims sought recovery for direct or indirect purchasers. Gen. Bus. Law § 340 (6) certainly does not preclude the State AG from asserting claims on behalf of indirect purchasers. It merely requires the court to act to prevent duplicate recovery. In this case, because the original pleading of the claims was deficient, there was no way for the court to determine whether there was a risk of duplicate recovery. Dismissing the State AG's claims under those circumstances would have been uncalled for, because the state legislature specifically enacted Gen. Bus. Law § 340 (6) to authorize that class of claims. The only case that the defendants cite to support their proposition that the potential for duplicate

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[4] In California v ARC America Corp. (490 US 93 [1989]), the U. S. Supreme Court held that the individual states could determine whether to permit indirect purchasers to assert claims as a result of antitrust price fixing prosecutions. In the wake of that holding, most states, including New York, enacted "Illinois Brick repealer statutes" to authorize such claims.

recovery is a ground for dismissal did not involve a poorly pled cause of action like the one at bar. (See Ho v Visa U.S.A. Inc., 3 Misc3d 1105[A] [Sup Ct NY County 2004] aff'd on other grounds 16 AD3d 256 [1st Dept 2005]).

Accordingly, the court rejects the defendants' third argument and, after granting reargument, again denies defendants' motions for dismissal.

Motion to Dismiss

The second motion sequence seeks dismissal of the State AG's first amended complaint. As the court previously observed, in reviewing a motion to dismiss, pursuant to CPLR 3211 (a), the test "is not whether the plaintiff has artfully drafted the complaint but whether, deeming the complaint to allege whatever can be reasonably implied from its statements, a cause of action can be sustained." (Jones Lang Wootton USA v LeBoeuf, Lamb, Greene & MacRae, 243 AD2d at 76, quoting Stendig, Inc. v Thom Rock Realty Co., 163 AD2d at 48). To this end, the court must accept all of the facts alleged in the complaint as true and determine whether they fit within any "cognizable legal theory." (See e.g. Arnav Indus., Inc. Retirement Trust v Brown, Raysman, Millstein, Felder & Steiner, L.L.P., 96 NY2d at 303). At the outset, the court finds that the State AG's first cause of action cannot be sustained under any cognizable legal theory and therefore dismisses it.

The State AG's first cause of action seeks relief pursuant to the Donnelly Act. (See Notice of Motion [motion sequence number 007], Exhibit A, ¶¶ 46-51). As in the original complaint, the first amended complaint specifically states that "[b]eginning in about January 1979 and continuing until in or about June 1997, Defendants and their named and unnamed conspirators participated in a conspiracy [to fix the prices of sorbates] affecting approximately $1

billion in U.S. commerce." (Id., ¶ 2). The first amended complaint also states that "[t]he State of New York does not ... sue for damages on behalf of any person who directly purchased sorbates from the defendants, including any person referred to in the California Federal Action." (Id., ¶ 6). However, as the court observed in the September 24 decision, the Donnelly Act was not amended to permit suits by indirect purchasers until December 23, 1998 and the relief that it permits now is prospective only. (Gen. Bus. Law § 340 [6]; see e.g. Lennon v Philip Morris Companies, Inc., 189 Misc 2d 577). The State AG's first cause of action improperly seeks relief for indirect purchasers prior to the time that the state legislature permitted such purchasers to recover. The defendants argue that "[s]ince the Court has already held that no indirect purchaser claims can be asserted for pre-1998 conduct under the Donnelly Act, Plaintiff cannot assert such a claim in the Amended Complaint." (See Memorandum of Law In Support of Motion [motion sequence number 007], at 2). This is true, however, the court's September 24 decision did not dismiss the Donnelly Act claim outright, but rather afforded the State AG the opportunity to replead it because the facts were ambiguous. Now that the State AG has done so, the court is constrained to dismiss the Donnelly Act claim in its entirety for the reasons stated above. Accordingly, the court grants the defendants' motion with respect to the State AG's first cause of action.

A. Treble Damages

Defendants do not direct the balance of their first dismissal argument at any specific cause of action, but at the State AG's request for treble damages that applies to all causes of action. (See Memorandum of Law In Support of Motion [motion sequence number 007], at 2-4). The defendants assert that neither Executive Law § 63 (12), Gen Bus. Law § 349 nor an equitable

claim of unjust enrichment can serve as a basis for seeking treble damages. (Id). The defendants appear to be correct with respect to Executive Law § 63 (12)[5] and they may be correct with respect to the unjust enrichment claim[6] and the Gen Bus. Law § 349 claim.[7] Nonetheless, a deficiency in an ad damnum clause is not a ground for dismissal, because the demand for relief is not considered part of the statement of the causes of action. (See e.g. Gro-Up Frocks, Inc. v Manners, 55 AD2d 531 [1st Dept 1976]). Further, a prayer for inappropriate relief does not require a dismissal for insufficiency so long as the plaintiff demonstrates a right to some relief. (See e.g. Kaminsky v Kahn, 13 AD2d 143 [1st Dept 1961]). Accordingly, the court rejects the defendants' motion to dismiss the State AG's requests for treble damages as procedurally improper.

B. Remote Injury

The defendants next argue that this court should dismiss the Gen Bus. Law § 349 claim because the injuries to the indirect purchasers on whose behalf the State AG is proceeding were too remote for the law to compensate. (See Memorandum of Law In Support of Motion [motion

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[5] Executive Law § 63 (12) does not provide for treble damages and limits the State AG to seeking only restitution or compensatory damages. (See State by Abrams v Solil Management Corp., 128 Misc2d 767 [Sup Ct NY County 1985] aff'd 114 AD2d 1057 [1st Dept 1985]).

[6] CPLR 4018 acknowledges that treble damages must be authorized by statute and requires the court to calculate them after trial and verdict. (See e.g. Schneider v 44-84 Realty Corp., 169 Misc 249 [Sup Ct NY County 1938] aff'd 257 AD 932 [1st Dept 1939] [Treble damages is a remedy created by law that is unavailable in suits in equity]).

[7] Gen Bus. Law § 349 (h) permits individual claimants to seek treble damages, however § 349 (b) specifically limits the State AG to seeking injunctive relief and/or restitution. (See e.g. Hedaya Bros., Inc. v Federal Ins. Co., 799 F Supp 13 [ED NY 1992] [Federal District Court disallowed application for punitive damages pursuant to Gen Bus. Law § 349]).

sequence number 007], at 4-6). The Court of Appeals recently considered the question of remoteness in Blue Cross and Blue Shield of N.J., Inc. v Philip Morris USA Inc., 3 NY3d 200 (2004).[8] This was a private suit in which the plaintiff insurance company sought to assert Gen Bus. Law § 349 claims against the defendant tobacco companies on the theory that plaintiff had to pay subscribers' medical bills who became ill from smoking. The Court held that "derivative actions are barred" under Gen Bus. Law § 349, and defined "[a]n injury [as] indirect or derivative when the loss arises solely as a result of injuries sustained by another party." (Id. at 207). The court reasoned that "[a]lthough [the plaintiff] actually paid the costs its subscribers incurred, its claims are nonetheless indirect because the losses it experienced arose wholly as a result of smoking related illnesses suffered by those subscribers." (Id). The Court concluded that "it is beyond dispute that section 349 (h) permits an actually (nonderivatively) injured party to sue a tortfeasor," but "that what is required is that the party actually injured be the one to bring suit." (Id). The Court also found it significant that the plaintiff could still seek relief via subrogation after losing the right to proceed under Gen Bus. Law § 349. (Id).

Here, the defendants argue that the alleged injuries are derivative, because they resulted from a price-fixing conspiracy among sorbate manufacturers whose main victims were commercial sorbate distributors, and because that conspiracy only had an ancillary effect upon the subsequent chain of food manufacturers, food wholesalers, food retailers and consumers who later paid inflated prices for the sorbates or for the food products that contained them. (See

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[8] The plaintiff insurance company in Blue Cross and Blue Shield of N.J., Inc. v Philip Morris USA Inc. initially asserted its claim in federal district court. The US Court of Appeals for the Second Circuit eventually certified a question involving the definition of "remoteness" to the New York State Court of Appeals.

Memorandum of Law In Support of Motion [motion sequence number 007], at 5). The State AG responds that, although the consumers on whose behalf he asserts the instant Gen Bus. Law § 349 claim may only have been "indirect purchasers," they nonetheless suffered direct injuries as "the ultimate users of the products, the prices of which [the] defendants fraudulently fixed and inflated," and they were "also readily foreseeable victims." (See Plaintiff's Memorandum of Law in Opposition, at 6). The State AG also points out that the plaintiffs in Blue Cross and Blue Shield of N.J., Inc. v Philip Morris USA Inc. were insurance companies pursuing the private right of action afforded by Gen Bus. Law § 349 (h), whereas here, he is suing on behalf of New York State consumers, pursuant to Gen Bus. Law § 349 (b), as a result of the defendants' admitted illegal activities. Id., at 5. After careful consideration,, the court is constrained to find in favor of the defendants on the issue of remoteness.

Shortly after Blue Cross and Blue Shield of N.J., Inc. v Philip Morris USA Inc., the Appellate Division, First Department, decided Ho v Visa U.S.A., Inc., 16 AD3d 256 (1st Dept 2005). That case also involved a private claim pursuant to Gen Bus. Law § 349 (h). However, the plaintiffs in Ho were private citizen consumers who sought to proceed as a class, whereas the plaintiff in Blue Cross and Blue Shield was a corporation. The plaintiffs in Ho alleged that the defendant credit card companies had used their market influence to force retailers to also accept the defendants' debit cards as a condition to the retailers' continued participation in the defendants' credit card networks. (Ho v Visa U.S.A., Inc., 3 Misc3d 1105[A] [Sup Ct NY County 2004]). The plaintiffs further alleged that the defendants then charged the retailers higher fees for any transactions that involved debit cards, and that the retailers passed those charges along to consumers, such as themselves, in the form of higher prices. (Id). The Appellate

Division, First Department, held that

> Plaintiffs' claim under General Business Law § 349 ... fails because of the remoteness of their damages from the alleged injurious activity. That debit cards result in higher charges to the retailers does not elevate to an actionable claim any perceived injuries to the retailers' customers. Those injuries are too remote and derivative to countenance such a cause of action.

(Ho v Visa U.S.A., Inc., 16 AD3d at 257). The facts of Ho are nearly the same as those in this action. The State AG here alleges that the defendants' sorbates price fixing conspiracy eventually resulted in New York State consumers paying higher prices for products that contained sorbates. However, the defendants correctly point out that, like "the consumers in Ho [who] did not actually purchase the Defendants' product [i.e., the right to participate in a credit/debit card network], ... the consumers in this case ... did not purchase Defendants' sorbates but rather food products in which sorbates were included in minuscule amounts." (See Reply Memorandum of Law in Support of Motion [motion sequence number 007], at 5). In fact, the only dissimilarity between Ho and this action is that the plaintiffs in that case sought private representation and proceeded under Gen Bus. Law § 349 (h), whereas here, the State AG is representing the consumers pursuant to Gen Bus. Law § 349 (b). The court finds that this distinction is of no consequence, however, because the focus of the inquiry must be on the injury and not on the parties' identity.[9] Here, had the defendants' price fixing conspiracy not first injured the direct purchasers of sorbates financially, the consumers would not have suffered any subsequent price increases. Accordingly, the court is constrained to follow the Blue Cross and

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[9] As the court reads the holding of Blue Cross and Blue Shield of N.J., Inc. v Philip Morris USA Inc., an indirect purchaser who suffers a direct injury as a result of an antitrust violation may assert a claim, while even a direct purchaser who suffers a derivative injury may not.

Ho decisions and grant the defendants' dismissal motion with respect to the State AG's third cause of action because the consumers' claims are too remote for recovery.

C. Duplicate Recovery

Defendants contend that the State AG's causes of action may not continue because of the proscription against "duplicate recovery" in Gen Bus. Law § 340 (6). (See Memorandum of Law In Support of Motion [motion sequence number 007], at 6-9). However, by its terms, that statutory proscription only applies to Donnelly Act claims,[10] and the court has already dismissed plaintiff's Donnelly Act claim on other grounds. Accordingly, the defendants' argument is moot with respect to the State AG's first cause of action.

The State AG argues that Gen Bus. Law § 340 (6) "does not cover and could not apply to this case," and that "different causes of action have distinct elements and one should not presume that the legislature simply views them as surrogates for all purposes." (Id., at 11). Plaintiff means that the proscription against duplicate recovery in Gen Bus. Law § 340 (6) does not apply to the claims in this action based on other statutes (i.e., Gen Bus. Law § 349 or Executive Law § 63 [12]) or to the common law (i.e., unjust enrichment). However, because the court has also

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[10] In the portion of its holding in Ho v Visa U.S.A., Inc. that disposed of the plaintiffs' Donnelly Act claim, the Appellate Division, First Department, held that: "these [defendant] credit card issuers were the subject of an action brought by the retailers, which was settled. Thus, they have been subjected to judicial remediation for their wrongs, and any recovery here [i.e., by the plaintiff/consumers] would be duplicative." 16 AD3d at 257. However, the portion of the Ho decision that disposed off the plaintiffs' Gen Bus. Law § 349 claim did not consider duplicate liability as a rationale for dismissal. Id. Here, the defendants have also settled a number of previous antitrust suits by direct purchasers. It is perhaps anomalous that the proposed class of plaintiffs in Ho were all indirect purchasers, not a mix of direct and indirect purchasers, yet the Appellate Division, First Department, still found that the ban on duplicate liability set forth in Gen Bus. Law § 340 (6) was applicable. Nonetheless it did so, and this court is constrained to do so as well.

already dismissed the Gen Bus. Law § 349 claim on other grounds, it need only consider the State AG's argument as it applies to his second and fourth causes of action.

At first blush, it appears that the State AG is correct. The plain language of Gen Bus. Law § 340 (6) limits its application to Donnelly Act claims only, and neither Blue Cross and Blue Shield of N.J., Inc. v Philip Morris USA Inc., Ho v Visa U.S.A., Inc., or the unpublished decision in Levine v Abbott Laboratories, that the defendants also cite in their memorandum,[11] specifically holds that a court must dismiss a claim under Executive Law § 63 (12) or a claim for unjust enrichment to avert the possibility of duplicate recovery.

The defendants cite the Appellate Division, First Department's, decision in Cox v Microsoft Corp. (290 AD2d 206, 208 [1st Dept 2002]), and two other decisions,[12] for the proposition that "as a general principle the law forbids duplicate recovery." (See Memorandum of Law in Support of Motion [motion sequence number 007], at 7). Although this may be so, defendants' cases only apply that principle in the limited context of indirect purchaser antitrust claims, and the state legislature specifically enacted Gen. Bus. Law § 340 (6) to guard against duplicate recovery in Donnelly Act claims. Thus, the defendants' argument still does not explain persuasively how the principle that duplicate recovery is disfavored is so "general" that the court should import it when reviewing non-antitrust claims.

In an attempt to do so by analogy, defendants cite Gift & Luggage Outlet, Inc. v People

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[11] See Notice of Motion (motion sequence number 007), Exhibit G.

[12] The other two cases are the unpublished decision in Levine v Abbott Laboratories (Index No. 117320/95, Sup. Ct. N.Y. County, Gammerman, J., November 20, 2996), annexed as Exhibit G to the defendants' moving papers, and the Illinois Brick era decision in Russo and Dubin v Allied Maintenance Corp., 95 Misc2d 344 (Sup Ct NY County 1978).

(194 Misc 2d 582 [N.Y. Cty. 2003]), a case in which the State AG had sued the defendant pursuant to Gen. Bus. Law § 873 for manufacturing and selling dangerously realistic toy firearms. The trial court declined to impose any further penalties under Gen. Bus. Law § 349, as the State AG requested, because it held that Gen. Bus. Law § 873 embodied a "comprehensive statutory scheme," including specific penalty provisions, that it would be improper to upset. The defendants argue for the same result in this case, presumably because this action implicates a similar "comprehensive statutory scheme" governing antitrust violations - i.e., the Donnelly Act. (See Memorandum of Law in Support of Motion [motion sequence number 007], at 8). The court believes that the defendants are correct.

The holdings of Blue Cross and Blue Shield of N.J., Inc. v Philip Morris USA Inc. and Ho v Visa U.S.A., Inc., both discussed earlier, admonish the court to focus on the nature of the injury and not on the status of the party raising the claim. Here, the underlying injury is the financial harm the defendants' admitted criminal antitrust price-fixing conspiracy caused. Indeed, that conspiracy would constitute both the "illegal activity" underlying the State AG's Executive Law 63 (12) claim, and the inequitable conduct giving rise to his unjust enrichment claim. Thus, the allegedly improper conduct in this action is, at bottom line, an antitrust violation. However, the court has already determined that the State AG may not obtain any relief for this injury under New York State's antitrust laws. Those laws - i.e., the Donnelly Act - certainly constitute a "comprehensive statutory scheme" similar to the one set forth in Gen. Bus. Law § 870 et seq that the court reviewed in Gift & Luggage Outlet, Inc. v People, supra. The most striking similarity is found in the portions of those statutes that specify the kinds of relief that private parties and the State AG, respectively, are each allowed to obtain. When the state

legislature sees fit to set limitations, the court is not free to ignore them. Thus, the court believes that it would both frustrate the legislature's intent, and run afoul of appellate precedent, to permit the State AG to use alternative causes of action to obtain relief for an otherwise uncompensable injury.

Nonetheless, the State AG responds that, by the defendants' logic, "if direct purchasers settle a federal antitrust action, then the indirect purchasers cannot pursue either a New York state antitrust action or ... any *other* action based on New York law," and that such a result "would deprive indirect purchasers of any right under state law to recover for their actual injuries" in violation of the New York state legislature's repeal of Illinois Brick. (See Plaintiff's Memorandum in Opposition to Motion [motion sequence number 007], at 10). The court disagrees. New York State law does afford indirect purchasers a right of recovery, however, the facts of this particular case make recovery improper. Although it is certain that claims for "repeated fraudulent or illegal acts," pursuant to Executive Law 63 (12) and equitable claims for unjust enrichment are among the tools available to the State AG to redress a broad range of wrongdoing, the focus must remain on the nature of the wrong. Here, the wrong is an antitrust violation for which New York State's antitrust laws permit the indirect purchasers no recovery. That the State AG is vested with a broad consumer protection mandate and that the second and fourth causes of action are applicable to a wide range of activity are besides the point.

With specific respect to plaintiff's unjust enrichment claim, the court recognizes that in Cox v. Microsoft Corp., 8 AD 3d 29, supra, the Appellate Division, First Department did hold that indirect purchasers who paid inflated prices for Microsoft's products could assert claims under GBL#349 and for unjust enrichment. However, Cox was decided before the Court of

Appeals rendered its decision for Blue Cross. Accordingly, the court grants the portion of the defendants' motion that seeks dismissal of the State AG's second and fourth causes of action.

D. Jurisdiction

The defendants finally argue that the court should dismiss all claims against Hoechst AG for lack of jurisdiction pursuant to CPLR 302 (a) (2). (See Memorandum of Law In Support of Motion [motion sequence number 007], at 9). However, in the September 24 decision, the court found that, although jurisdiction did not lie against Hoechst AG pursuant to CPLR 302 (a) (2), Hoechst AG is subject to the court's jurisdiction pursuant to CPLR 302 (a) (3). (See Notice of Motion [motion sequence number 007], Exhibit C, at 11-12). The defendants did not challenge this portion of the September 24 decision in their reargument motion, and their dismissal motion does not set forth any basis for such a challenge. Accordingly, the earlier jurisdictional finding stands as law of the case and the court denies the portion of the defendants' dismissal motion that seeks to overturn that finding.

DECISION

ACCORDINGLY, for the foregoing reasons, it is hereby

ORDERED that the motion to reargue, pursuant to CPLR 2221 (d), of co-defendants Daicel Chemical Industries, Ltd., Eastman Chemical Company, Hoechst Aktiengesellschaft, Nutrinova Nutrition Specialties & Food Ingredients, GmbH, Hoechst Celanese Corporation, a/k/a CNA Holdings, Inc., Nutrinova, Inc., Celanese AG, Nippon Gohsei, a/k/a Nippon Synthetic Chemical Industry Co., Ltd. (motion sequence number 006) is, in all respects, denied; and it is further

ORDERED that the cross motion, pursuant to CPLR 2221 (d), of co-defendant Ueno Fine

Chemicals Industry, Ltd.(motion sequence number 006) is, in all respects, denied; and it is further

ORDERED that the motion to dismiss, pursuant to CPLR 3211 (a) (7), of co-defendants Daicel Chemical Industries, Ltd., Eastman Chemical Company, Hoechst Aktiengesellschaft, Nutrinova Nutrition Specialties & Food Ingredients, GmbH, Hoechst Celanese Corporation, a/k/a CNA Holdings, Inc., Nutrinova, Inc., Celanese AG, Nippon Gohsei, a/k/a Nippon Synthetic Chemical Industry Co., Ltd. (motion sequence number 007), is granted and the complaint is dismissed; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: August 07, 2005

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J.S.C.

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NEW YORK