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

PRESENT: RICHARD B. LOWE III PART 56

0603820/2000

ALTMAN, MARCY
VS
BAYER CORPORATION

INDEX NO. 600

MOTION DATE 5/30/03

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

SEQ 10

DISMISS

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 ordered that this motion

SCANNED
OCT 27 2003

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: 10/17/03

RICHARD B. LOWE III J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 56

..... x

ANNE CUNNINGHAM AND NORMAN MERMELSTEIN, individually and on behalf of all others similarly situated,

Plaintiffs,

-against- Index No. 603820/00

BAYER AG, BAYER CORPORATION, BARR LABORATORIES, INC., THE RUGBY GROUP, INC., WATSON PHARMACEUTICALS, INC. and HOECHST MARION ROUSSEL, INC.,

Defendants.

----------x

LOWE, J.:

In Motion Sequence number 010, defendants Bayer AG, Bayer Corporation (collectively, Bayer), Barr Laboratories, Inc. (Barr), Hoechst Marion Roussel, Inc. (HMR), Watson Pharmaceuticals, Inc. (Watson), and The Rugby Group, Inc. (Rugby) move, pursuant to CPLR 3211 (a) (7), for an order dismissing the action for failure to state a cause of action under General Business Law (GBL) § 340 and 349.

In Motion Sequence number , plaintiffs Anne Cunningham and Norman Mermelstein move for an order: (1) pursuant to CPLR 901 and 902, certifying this action as a class action; and (2) designating the law firms of Milberg Weiss Bershad Hynes & Lerach LLP and Lieff Cabraser Heimann & Bemstein LLP as counsel for the class.

These motion sequences are consolidated for disposition.

I Background

Plaintiffs bring this action on behalf of individuals residing in the United States who indirectly purchased the prescription drug Ciprofloxacin hydrochloride (Cipro) from defendant

Bayer AG or its United States subsidiary, defendant Bayer Corporation, between January 4, 1995 and the present. Plaintiffs base their complaint on the following allegations underlying the alleged antitrust and deceptive trade practices claims.

Cipro was developed by Bayer and patented in the United States under patent number 4,670,444 (the '444 Patent). Bayer filed a patent application on May 29, 1984, which was approved three years later. In October 1987, the Food and Drug Administration (the FDA) approved the marketing of Cipro. Bayer started marketing Cipro in the United States, and it quickly became one of the most widely prescribed and used antibiotics.

On August 16, 1991, Barr filed an abbreviated new drug application (ANDA) 74-124 for a generic equivalent of Cipro, and made a paragraph IV certification with the FDA as required in order to put patentholders on notice of the pending ANDA. Barr estimated that a generic equivalent of Cipro would capture 39% of the market within one year of introduction of a generic drug, 72% within two years, 82% within three years, and 85% within four years of introduction, steering more than $750 million in yearly revenues to producers of a generic equivalent.

On December 6, 1991, Barr sent to Bayer a notice of its ANDA, stating that it considered the '444 Patent invalid and unenforceable, and notifying Bayer of its intent to start manufacturing and marketing a corresponding generic equivalent. Prompted by this notice, on January 16, 1992, Bayer commenced an action for patent infringement against Barr in the United States District Court for the Southern District of New York (the Patent Litigation). According to the Hatch-Waxman amendments to Federal Food, Drug and Cosmetics Act,' the filing of a patent

---

1

If the applicant made a certification described in subclause (IV) of paragraph (2)(A)(vii), the approval shall be made effective

infringement action triggers a 30-month waiting period during which an ANDA applicant may not market a generic drug absent a court decision in its favor. This waiting period was to end on January 4, 1995. However, on November 30, 1992, only 10 months after the filing of the Patent Litigation, Bayer and Barr entered into a stipulation extending the waiting period until a final

---

> immediately unless an action is brought for infringement of a patent which is the subject of the certification before the expiration of forty-five days from the date the notice provided under paragraph (2)(B)(i) is received. If such an action is brought before the expiration of such days, the approval shall be made effective upon the expiration of the thirty-month period beginning on the date of the receipt of the notice provided under paragraph (2)(B)(i) or such shorter or longer period as the court may order because either party to the action failed to reasonably cooperate in expediting the action, except that--
> (I) if before the expiration of such period the court decides that such patent is invalid or not infringed, the approval shall be made effective on the date of the court decision,
> **(11)** if before the expiration of such period the court decides that such patent has been infringed, the approval shall be made effective on such date as the court orders under section 271(e)(4)(A) of Title 35, or
> **(111)** if before the expiration of such period the court grants a preliminary injunction prohibiting the applicant from engaging in the commercial manufacture or sale of the drug until the court decides the issues of patent validity and infringement and if the court decides that such patent is invalid or not infringed, the approval shall be made effective on the date of such court decision.
>
> In such an action, each of the parties shall reasonably cooperate in expediting the action. Until the expiration of forty-five days from the date the notice made under paragraph (2)(B)(i) is received, no action may be brought under section 2201 of Title **28,** for a declaratoryjudgment with respect to the patent. Any action brought under section 2201 shall be brought in the judicial district where the defendant has its principal place of business or a regular and established place of business.

21 USC 355 (j) (5) (B) (iii).

judgment in the Patent Litigation, which would therefore extend to the conclusion of all appeals to the Court of Appeals for the Federal Circuit, or the expiration of the time permitted for such appeals. Affirmation of William V. O'Reilly, Exhibit A. On December 8, 1992, the federal judge signed the stipulation and order.

On January 4, 1995, the FDA tentatively approved Barr's ANDA, allowing Barr to market its generic equivalent of Cipro.

On March 29, 1996, Barr and Rugby entered into an agreement (the Litigation Funding Agreement) for Rugby to assist Barr in funding its patent litigation against Bayer in exchange for a share in any rights and profits from the marketing and distribution of Barr's generic equivalent. According to the Litigation Funding Agreement, any settlement of the Patent Litigation was subject to approval by Rugby, and both Barr and Rugby would share benefits from such settlement in equal parts.

On December 20, 1996, Barr, Rugby, and its parent company, HMR, entered into an amendment to the Litigation Funding Agreement, according to which HMR succeeded to all rights and obligations of Rugby in the agreement, and Rugby agreed to continue to perform "in distribution capacity" with respect to the subject matter of the agreement.

On January 8, 1997, Bayer, Barr, HMR and Rugby entered into four agreements: a settlement agreement and mutual release between Bayer and Barr (the Barr Settlement Agreement), a settlement agreement and mutual release between Bayer, HMR and Rugby (the HMR/Rugby Settlement Agreement), a settlement agreement and mutual release between Bayer and two other parties, Bemard Sherman and Apotex, Inc., (the Apotex Settlement Agreement) and a supply agreement between Bayer, Barr and HMR (the Cipro Supply Agreement)

(collectively, the New York Cipro Agreements).

According to the Barr Settlement Agreement, Barr and Bayer agreed to enter a consent judgment in which Barr would acknowledge the validity and enforceability of the '444 Patent. HMR and Rugby also acknowledged the validity and enforceability of the '444 Patent, and agreed not to infringe the patent or seek reexamination, revocation or nullification of any of the patents in the HMR/Rugby Settlement Agreement. Also, Apotex, Inc. and Sherman, the majority shareholder of Barr and Apotex, Inc., acknowledged the validity of Bayer's patents and agreed not to infringe or seek reexamination of the patents in the Apotex Settlement Agreement. Further, Barr and Bayer entered into the Cipro Supply Agreement, according to which Bayer had an option either to license and supply Barr and HMR with Cipro for resale under a generic label, or to pay quarterly amounts to Barr in the period between 1998 and 2003. As a part of the arrangement, Bayer initially paid $24.5 million each to Barr and Rugby.[2] According to plaintiffs, the total amount paid by Bayer to Barr and Rugby in the course of this settlement arrangement amounted to approximately $400 million.

The parties then submitted a consent judgment stating that Barr recognized the validity of the '444 Patent. However, the consent judgment did not disclose some of the terms of the agreement, chiefly that Bayer would be paying approximately $400 million to Barr and Rugby. Affirmation of William V. O'Reilly, Exhibit B.

In February 1998, Watson purchased Rugby from HMR. Another of Watson's

---

[2] On January 9, 1997, Barr and HMR entered into an escrow agreement (the Barr Escrow Agreement) according to which Barr and HMR agreed to split evenly funds paid by Bayer to an escrow account under the Cipro Supply Agreement.

subsidiaries, Schein Pharmaceutical, Inc. filed an ANDA for its generic version of Cipro. Bayer commenced an action against it, and the court granted summary judgment in favor of Bayer. According to plaintiffs, Schein Pharmaceutical, Inc., as an affiliate of Rugby, will be barred fi-om marketing a Cipro generic by the HMR/Rugby Settlement Agreement even if it ultimately prevails in the patent litigation.

Plaintiffs argue that these agreements between defendants resulted in restraint of trade between horizontal competitors. According to plaintiffs, Bayer paid more than $400 million to settle the Patent Litigation in which Barr acknowledged the validity of Bayer's Cipro patent. Cipro became one of the most widely prescribed and used antibiotics. In 1999, Cipro became the 11th most prescribed drug and the 20* most sold drug in the United States, with annual sales exceeding $921 million. Following the settlement, Bayer increased prices for Cipro by 16.7% in the period between January 1997 and December 1998. According to plaintiffs, consumers were compelled to pay substantially higher prices than they would have paid absent the agreements.

Plaintiffs assert the following claims for: (1) unreasonable restraint of trade and commerce in violation of GBL § 340; (2) conspiracy to monopolize the market for the manufacture, distribution and sale of Cipro; and (3) deceptive acts and practices in violation of GBL § 349.

II Analysis

A. Motion to Dismiss

For purposes of defendants' motion to dismiss, plaintiffs' factual allegations are accepted

as true and plaintiffs are afforded the benefit of all reasonable inferences.[3]

1. Counts I and II

Defendants argue that plaintiffs' class action allegations of unreasonable restraint of trade and commerce, and conspiracy to monopolize the Cipro market should be dismissed because plaintiffs may not maintain a class action for violations of Donnely Act (GBL § 340)[4]

According to CPLR 901 (b),

> [u]nless a statute creating or imposing a penalty, or a minimum measure or recovery specifically authorizes the recovery thereof in a class action, an action to recover a penalty, or minimum measure of recovery created or imposed by statute may not be maintained as a class action.

Section 340 (5) of the GBL provides that, "any person who shall sustain damages by reason of

---

[3] On a motion to dismiss under CPLR 3211 (a) (7), the pleading is to be afforded a liberal construction, allegations are accepted as true, and plaintiffs are accorded the benefit of every possible favorable inference. P.T. Bank Cent. Asia v ABN AMRO Bank N.V., 301 AD2d 373, 375-76 (1st Dept 2003).

[4] New York's antitrust statute, Donnely Act was modeled on the Sherman Act, and it provides that,

> [e]very contract, agreement, arrangement or combination whereby
> A monopoly in the conduct of any business, trade or commerce or in the furnishing of any service in this state, is or may be established or maintained, or whereby
> Competition or the free exercise of any activity in the conduct of any business, trade or commerce or in the furnishing of any service in this state is or may be restrained or whereby
> For the purpose of establishing or maintaining any such monopoly or unlawfully interfering with the free exercise of any activity in the conduct of any business, trade or commerce or in the furnishing of any service in this state any business, trade or commerce or the furnishing of any service is or may be restrained, is hereby declared to be against public policy, illegal and void.

NY Gen Bus Law § 340.

any violation of this section, shall recover three-fold the actual damages sustained thereby, as well as costs not exceeding ten thousand dollars, and reasonable attorneys' fees." The Appellate Division in Cox v Microsoft Corp. (290 AD2d 206,206 [1st Dept 20021) affirmed the dismissal of class action allegations holding that a private person may not bring a class action under **GBL** § 340. The court held that, "the treble damages remedy provided for in subsection 5 constitutes a 'penalty' within the meaning of CPLR 901 (b)," and that because section 340 of the **GBL** does not specifically authorize the recovery of treble damages in a class action, as required under CPLR 901, plaintiffs may not maintain a class action under **GBL** § 340.

Plaintiffs concede that, under the First Appellate Division holding in Cox, plaintiffs' first and second causes of action for violations of **GBL** § 340 may not be maintained as a class action, but they present their arguments in order to preserve related issues for appeal. Plaintiffs argue that, although their claims fail under Cox, the Cox decision was erroneous, and plaintiffs should be able to maintain a class action for violation of GBL § 340. Nevertheless, this court does not need to address the merits of plaintiffs' arguments at this time because, "[d]oubt of the soundness of the decisions of ... the Appellate Division, even if such doubtfulness were conceded, [does not] afford any basis for this court to refuse or fail to follow the authority of those decisions." Vanilla v Moran, 188 Misc 325,334 (Sup Ct, Albany County), affd on other mounds, 272 AD 859 (3rd Dept 1947), affd 298 ***NY*** 796 (1949); In re Weinbaum's Estate, 51 Misc 2d 538, 539 (Sur Ct, Nassau County 1966).

Plaintiffs fail to provide any authority that would mandate the opposite conclusion, and this court is not aware of the existence of such authority at this time. Thus, under the holding in Cox (290 AD2d 206), plaintiffs' class action allegations of violations of **GBL** § 340 stating their

first and second causes of action fail.

2. Count III

Defendants seek dismissal of the third cause of action for consumer deception. Defendants maintain that plaintiffs' allegations of antitrust conspiracy do not represent allegations of deceptive acts for purposes of GBL § 349. Defendants argue that a mere allegation of wrongful or otherwise unlawful acts, without more, is not sufficient to support the claim. Defendants also argue that plaintiffs' mere conclusory assertions of deception are not sufficient to state any consumer oriented deceptive conduct by defendants.

Plaintiffs allege that Barr agreed to withdraw its challenge of the '444 Patent in exchange for payments by Bayer of approximately $400 million. Plaintiffs allege that defendants issued a press statement in which they stated that Bayer and Barr had reached a settlement, and that Bayer would pay $24.5 million each to Barr and Rugby, and would either supply them with Cipro to be marketed under a single trade name pursuant to a license from Bayer, or make additional payments. Plaintiffs state that, even though defendants made this public statement, defendants concealed the material terms of the settlement and omitted all mention of the substantial payments in the consent judgment submitted to the District Court.

Plaintiffs contend that these allegations of a self-concealing antitrust conspiracy are sufficient to sustain a claim under GBL § 349. It is plaintiffs' contention that, as a result of these anticompetitive agreements, the consuming public unknowingly paid high prices for Cipro. Defendants argue that allegations of unfair practices, such as the allegations of the anticompetitive agreements in violation of the antitrust laws, without more, do not state deceptive acts for purposes of this section.

In interpreting statutory provisions, courts are bound, "to implement the will of the Legislature; statutes are to be applied as they are written or interpreted to effectuate the legislative intention." Niesig v Team I, 76 NY2d 363,368 (1990). Courts should construe statutes reasonably so as not to deprive citizens of their important rights. Pansa v Damiano, 14 NY2d 356,359 (1964). It is not for the courts, "to determine the wisdom or propriety of any particular statute, or to correct supposed errors, omissions or defects." National Org. for Women v Metropolitan Life Ins. Co., 131 AD2d 356,358 (1st Dept 1987).

Section 349 (a) of GBL provides that,

> [d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful.

The language of GBL § 349, on its face, does not include a prohibition of unfair practices or otherwise unlawful acts under the scope of the provision. The provision prohibits only "deceptive acts or practices."

Plaintiffs argue that price-fixing activities constitute deceptive practices per se, relying on State of New York v Feldman (210 F Supp 2d 294 [SD NY 20021). In Feldman, New York State asserted a claim under GBL § 349 alleging that defendants conducted secret pre-auction bidding to determine a highest-bidding-co-defendant who would then bid at subsequent public auctions, while other co-defendants would refrain from bidding at the public auctions in exchange for a part of the winning co-defendant's profits. The court held that, because the New York courts frequently interpret section 349 by reference to the federal counterpart statute, section 5 of the Federal Trade Commission Act (the FTCA), and because antitrust violations fall under the scope of section 5 of the FTCA, defendants' antitrust violations were within the scope of section 349.

Feldman, 210 F Supp 2d at 302. While the alleged collusive activity in Feldman may have been deceptive, this court disagrees with the proposition that a mere antitrust violation, without more, falls under the scope of section 349.

According to section 5 of the FTCA, the federal counterpart of section 349 of the GBL,

> [u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.

15 USCA § 45.

Section 349 of the GBL, like corresponding provisions adopted in other jurisdictions, was modeled after section 5 of the FTCA. Various states have enacted similar provisions intending, "to follow in the steps of the Federal Trade Commission with respect to the interpretation of deceptive acts and practices outlawed in Section 5 of the Federal Commission Act." State of New York by Lefkowitz v Colorado State Christian Coll. of Church of Inner Power. Inc., 76 Misc 2d 50, 54 (Sup Ct, NY County 1973). While modeled on section 5, GBL § 349 mirrors the prohibition of "deceptive acts or practices'' contained in section 5 of the FTCA, but omits "unfair methods of competition." Where a law expressly describes a particular act to which it applies, an inference is that what is omitted, or not included in the language determining the scope of the application, is intended to be omitted or not included. GTE Spacenet Corp. v New York State Dept. of Taxation and Fin., 223 AD2d 468,469 (1st Dept 1996) (Plaintiff was subject to taxation and was not a "utility" for purposes of Tax Law § 186-a, which defined "utility" as the service to be provided by or through "wires," because the service provided by plaintiff was classified by the Federal Communications Commission as communications "by radio" and not 'by wire"). Thus, the inference is that the "unfair methods of competition" were intended to be excluded from the

scope of GBL § 349. Id.: See also Patently Unfair: State Unfair Competition Laws and Patent Enforcement, 12 Harv J Law & Tec 469,498 (1999).

This conclusion is also supported by the Report of New York State Antitrust Law of the Antitrust Section of the New York State Bar Association,[5] which proposed the relevant language of GBL § 349, as adopted. The report states, in part, that,

> [t]he Committee considered, but rejected, a proposal that the Legislature be urged to enact a statute in the same form as Section 5 of the Federal Trade Commission Act, which prohibits "unfair methods of competition in commerce, and unfair or deceptive acts and practices in commerce." This was considered because the Federal Trade Commission in 1966 proposed that the States adopt "little Federal Trade Commission Acts."
> Adoption by the States of such statute would fill the gap in coverage of present Section 5 which is limited to acts and practices in commerce, thus offering no protection against purely intrastate acts or practices, or acts and practices merely affecting commerce, but not in commerce. Nevertheless, the Committee is opposed to the incorporation of the concept of "unfair methods of competition" into State law. Enactment would carry with it the great body of federal law, applying "unfair methods of competition" to areas far outside the scope of consumer protection. "Unfair methods of competition" have been held to forbid any conduct prohibited by the Sherman and Clayton Acts. This includes conduct such as price discrimination, exclusive dealing, tie-in sales, territorial restrictions and mergers. Such concepts have no place in a straight forward consumer protection law. Moreover, the Federal Trade Commission's proposal would, in effect, amend the Donnelly Act in those respects in which New York antitrust enforcement under the Donnelly Act differs from federal interpretation of the Sherman and Clayton Act.

Affirmation of William O'Reilly, Exhibit D, at 127-28. While this report does not represent legislative history, it is a contemporaneous commentary on the development of the statute and

---

[5] The report accompanied the bill on the way through the Legislature, and on to the Governor. Lefkowitz, 76 Misc 2d ad 53.

sheds light on the intent of section 349.

In addition, this interpretation is consistent with the antitrust scheme of the Donnelly Act. Plaintiffs are asserting, as a class action claim, a claim for consumer deception under GBL § 349, for what is actually an antitrust claim under the Donnelly Act. **As** discussed above, plaintiffs may not maintain a class action under the Donnelly Act. Allowing plaintiffs to maintain this claim as a class action would undermine the bar on maintaining class actions for violations under the Donnelly Act. Otherwise, such an expansive interpretation of section 349 of the language prohibiting unfair practices would change the entire New **York** antitrust enforcement scheme, which the authors of GBL § 349 specifically intended to avoid by limiting the language of section 349 to deceptive acts and practices and omitting "unfair methods of competition."

Numerous states have enacted statutes that are analogous to section 5 of the FTCA and that prohibit unfair, unlawful or deceptive trade practices. State Antitrust Enforcement, 1371 PLI/Corp 765,773; see e.g. Cal Bus & Prof Code § 17200 ("any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising"); NJ Stat *Ann,* tit. 56, ch.8, **$2** ("any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing concealment, suppression or omission of any material fact"); Fla Stat Ann § 501.204 ("unfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices"); Ill Compiled Stat ***Ann,*** ch. 815, act 505, § 2 ("[u]nfair methods of competition and unfair or deceptive acts or practices"); Mass Gen Laws ***Ann,*** ch. 93A, § **2** ("[u]nfair methods of competition and unfair or deceptive acts or practices"); Texas Bus & Com Code, tit. **2,** § 17.46 ("[f]alse, misleading, or deceptive acts or practices"). Despite the existence of similar statutes in a number of jurisdictions, there is a little guidance

helpful in determining the issue before this court.

Defendants cite the Florida, Texas and New Jersey decisions. Mack v Bristol-Myers Squibb Co., 673 So 2d 100 (Fla App 1st Dist 1996) (A purchaser of infant formula asserted a claim against a manufacturer under the Florida deceptive trade practices act for unfair competition by selling and marketing infant formula at excessively high prices); Abbott Lab.. Inc. {Ross Lab. Div.) v Segura, 907 SW2d 503 (Tex 1995) (A claim by purchasers of infant formula under the Texas deceptive trade practices act based on allegations of agreements to fix prices and monopolize market); and Kieffer v Mylan Lab., 1999 WL 1567726 (NJ Super 1999) (Plaintiffs alleged anticompetitive agreements to fix prices and control supply of active pharmaceutical ingredients necessary for the production of generic drugs).

Plaintiffs correctly note that these cases are distinguishable, because the issue in these cases was whether indirect purchasers may maintain a claim under a state deceptive trade practices law alleging price-fixing activities by defendant, where indirect purchasers lack standing to bring such claims under the state antitrust law. In Abbott, the Texas court held that the indirect purchasers' deceptive trade practices claim alleging price-fixing agreements failed, because allowing indirect purchasers to maintain that claim would conflict with the policies underlying the statutory antitrust scheme and circumvent the limitations imposed by the antitrust laws since indirect purchasers did not have standing to maintain a claim under the Texas antitrust law. Abbott, 907 SW2d at 506-507. The Florida court in Mack noted the approach formulated in Abbott, and reached the contrary conclusion, holding that price-fixing activities fall under the scope of the Florida deceptive trade practices laws because the plain reading of the language of the statute includes within its scope unfair methods of competition. Mack, 673 So 2d at 104. As

the New Jersey court in Kieffer noted, courts have held that antitrust violations equal unfair practices for purposes of the FTCA section 5. Kieffer, 1999 WL 1567726, at *6. Because the language of the Florida deceptive trade practices act explicitly includes unfair methods of competition, and because the statute provides that it should be interpreted in accordance with the FTCA and decisions rendered under the FTCA, antitrust violations fall under the scope of the Florida deception act. Id., citing;Mack at 103-104. The Kieffer court concluded, accordingly, that, "[i]t is thus significant that the New Jersey CFA does not, despite its broad reach, contain the phrase 'unfair methods of competition' under its umbrella," and held that the New Jersey deceptive trade practices act does not afford remedies to indirect purchasers alleging anticompetitive conduct. Id.

Unlike many of the statutes modeled after section 5 of the FTCA, the language of GBL § 349, is narrower in scope.[6] The language of GBL § 349, like the New Jersey deceptive trade practices act, does not explicitly include "unfair methods of competition'' under the scope of the provision.[7] Even though the language of GBL § 349 "deceptive acts or practices" is broadly formulated, this court sees no compelling reason to employ a strained interpretation to extend the scope of this language to include all conduct that violates antitrust laws. One theory underlying

---

[6] See e.g. Cal Bus & Prof Code § 17200; Fla Stat Ann § 501.204; Ill Compiled Stat Ann, ch. 815, act 505, § 2; Mass Gen Laws *Ann,* ch. 93A, § 2; Conn Gen Stat *Ann,* tit. 42, § 110b; and Penn Stat and Cons Stat *Ann,* tit. 73; ch.4, § 201-2.

[7] The Illinois court went further in limiting the applicability of the consumer deception act in Gaebler v New Mexico Potash Co. (676 NE 2d 228 [Ill App 1st Dist 19961). The court stated that, even though the statute covers unfair methods of competition and unfair or deceptive acts or practices, "[t]here is no indication that the legislature intended that the Consumer Fraud Act be an additional antitrust mechanism," and allegations of the price-fixing agreement must be brought under the antitrust law and not under the consumer deception act. Id. at 544 (internal quotations and citation omitted).

the approach that antitrust violations are under the scope of an unfair and deceptive practices provision is, "that consumers are entitled to assume that prices and other conditions of sale have been determined by competitive market forces." State Antitrust Enforcement, 1371 PLI/Corp 765,773-74 (2003). While this court recognizes the merits of the reasoning that consumers are entitled to assume that the prices and other conditions of sale are set by a legally functioning market, such concerns may be properly addressed under the existing antitrust laws. There is support for the position that GBL § 349 should not apply where another scheme of remedies exists to redress the alleged conduct which is not, otherwise, within the scope of the traditionally recognized areas of consumer deception. Givens, Practice Commentaries, McKinney's Cons Laws of NY, Book 19, § 349, at 570, citing Mendelson v Trans World Airlines. Inc., 120 Misc 2d 423 (Sup Ct, Queens County 1983). It is not for courts to create statutory protections where the Legislature did not intend to provide one.

Therefore, this court rejects plaintiffs' argument that price-fixing anticompetitive acts, without more, fall under the scope of GBL § 349. However, while allegations of an anticompetitive act, per se, do not state a claim under GBL § 349, allegations of such **an** act which is deceptive and consumer-oriented may state a claim for consumer deception.

Plaintiffs argue that their allegations are sufficient to sustain the claim relying on the following cases which plaintiffs claim apply GBL § 349 to "incidentally deceptive acts" Lewis v Di Donna (294 AD2d 799 [3d Dept 20021) (Allegations of mislabeling of a drug by a licensed pharmacist are sufficient to state a claim under GBL § 349), Akgul v Prime Time Transp., Inc. (293 AD2d 631 [2d Dept 2002]), Acquista v New York Life Ins. Co. (285 AD2d 73 [1st Dept 20011) (Allegations of the deceptive practices of delaying and denying payment on insurance

claims without reference to their viability are sufficient to state a claim under GBL § 349 against the insurer), Scalp & Blade. Inc. v Advest, Inc. (281 AD2d 882 [4th Dept 20011) (Section 349 of the GBL prohibiting deceptive acts and practices in the furnishing of any services applied to defendant's services regardless of the fact that the services were provided in connection with securities transactions) and In re Methyl Tertiary Butyl Ether ("MTBE") Prod. Liab. Litig., (175 F Supp 2d 593 [SD NY 20011) (Allegations of the distribution of pamphlets and other misrepresentations by defendant in order to mislead the public regarding hazards associated with MTBE and to induce consumer acceptance of gasoline containing MTBE were sufficient to sustain a claim under GBL § 349). Nothing in these cases supports plaintiffs' contention that the courts found the acts complained of to be merely incidentally deceptive. Instead, the courts in these cases have held that the allegations of a consumer-oriented act (Akgul at 634; Scalp at 883; MTBE at 631) likely to mislead consumers in a material way (Acauista at 82) fit within a cognizable claim and satisfy the requirements of GBL § 349.

In order to state a cause of action for violation of GBL § 349, plaintiff must allege consumer oriented acts on behalf of defendant which are misleading in a material way, and which resulted in injury to plaintiff. Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank N.A., 85 NY2d 20, 25 (1995). No cause of action may be stated to redress what is merely a private wrong, instead, plaintiffs must allege consumer-orientedpractices resulting in injury to consumers. Id. While the typical case under GBL § 349 involves claims arising out of a commercial transaction between a consumer and a defendant, there is no requirement of privity and any person injured by a violation of section 349 may bring an action. MTBE at 631. Allegations of a consumer-oriented deceptive conduct that affects the public interest in New

York may be sufficient to state a claim under GBL § 349. MTBE, 175 F Supp 2d at 631.

Plaintiffs base their claim on allegations that the agreements between defendants resulted in restraint of trade between horizontal competitors and ultimately injured consumers because they were compelled to pay substantially higher prices than they would have paid absent the agreements. Plaintiffs argue that defendants' acts were deceptive because they failed to disclose the material terms of the settlement agreements and that they were consumer-oriented because defendants failed to reveal to consumers that they were paying higher prices for Cipro as a result of the anticompetitive agreements between defendants. These allegations do not state a consumer-oriented deceptive acts for purposes of GBL § 349.

Plaintiffs state that Bayer issued the following press release in connection with the settlement:

> Under the terms of the agreement, Barr acknowledges the validity of Bayer's worldwide patents on the broad spectrum anti-infective. Bayer will pay $24.5 million in 1997 each to Barr and Rugby Laboratories, Inc. .... From 1998 to 2003, the year the patent expires, Bayer can provide to both companies product to be marketed under a single trade name pursuant to a license from Bayer. Alternatively, Bayer could make payments to Barr and its partner.

Third Amended Class Action Complaint, ¶ 61. Plaintiffs also maintain that Barr's filing with the Securities and Exchange Commission was deceptive because it portrayed Barr's challenge of the '444 Patent as successful, by stating that,

> [o]n January 6, 1995, the Company received FDA approval to manufacture and market Ciprofloxacin tablets, the generic equivalent of Miles, Inc.'s Cipro. ... The Company is currently challenging the validity of certain patents held by Bayer AG and Miles Inc. for Ciprofloxacin. ... The FDA approval will become effective with the Company's success in its patent challenge, or

upon expiration of the patents in 2003, whichever occurs first.

Third Amended Class Action Complaint, ¶ 46.

While deceptive conduct does not necessarily have to rise to the level of fraud, the alleged conduct must be materially deceptive. Stutman v Chemical Bank, 95 NY2d 24, 29 (2000); Gaidon v Guardian Life Ins. Co. of *Am.*, 94 NY2d 330,341 (1999). Plaintiffs' allegations fail to state such conduct. Contrary to plaintiffs' contention, defendants' public press release discloses the material terms of the settlement agreement, despite the non-disclosure provision contained in the settlement agreements. Also, the language contained in Barr's filing does not portray its challenge of the '444 Patent as successful. To the contrary, this filing discloses that Barr will not be able to enter the market with a generic equivalent of Cipro until it either wins the Patent Lawsuit, or until 2003, when the '444 Patent expires.

Furthermore, even though defendants did not disclose that the settlement of the Patent Litigation would yield more than $400 million to Barr and its partners, this would not render defendants' acts deceitful for purposes of GBL § 349. Consumers were aware that they were paying a price for Cipro that resulted from the fact that Bayer was a brand name manufacturer of a patented drug for which, at the time of purchase, there was no generic equivalent available in the market. The fact that Bayer had a monopoly as a holder of the '444 Patent under patent laws was the condition of the market, regardless of whether the '444 Patent was valid or no one challenged, or agreed not to challenge, the validity of the patent. Also, even if Bayer passed a part of the settlement costs to consumers by raising prices after the settlement of the Patent Litigation, there is nothing that mandates Bayer to disclose specific components of the price charged for Cipro.

Whether the lack of a generic equivalent and recognition of the validity of the '444 Patent resulted from the anticompetitive agreements and whether the agreements between defendants were legal and proper are issues that fall under the scope of the antitrust scheme. While the allegations presented may state a claim for antitrust violations, they are not sufficient to state a consumer-oriented claim for deception. Thus, plaintiffs' third cause of action for violation of GBL § 349 is dismissed.

In addition, defendants argue that plaintiffs' claim is barred by the three-year statute of limitations, that plaintiffs may not seek to recover treble damages in a class action and that plaintiffs may not assert a claim under GBL § 349 on behalf of a nationwide class. However, because plaintiffs' claim under GBL § 349 fails for the abovementioned reasons, there is no need to address these arguments.

B. Motion to Certify Class

Because plaintiffs may not maintain their claims under GBL § 340 as a class action, and the remaining claim under GBL § 349 fails, plaintiffs' motion to certify the proposed class is denied.

III Conclusion

Plaintiffs may not maintain class action claims under GBL § 340. Plaintiffs also fail to state a claim under GBL § 349. Plaintiffs maintain that the Legislature intended to include "unfair practices" within the scope of section 349 even though the language, "unfair practices," is omitted from the provision. This court concludes that, "unfair practices,'' without more, do not fall under the scope of acts prohibited under GBL § 349. Because plaintiffs fail to allege any consumer-oriented deceptive acts by defendants, plaintiffs' claim fails. Defendants' motion to

dismiss is granted and plaintiffs' motion to certify the class is denied.

Accordingly, it is hereby

ORDERED that the motion by defendants Bayer AG, Bayer Corporation, Barr Laboratories, Inc., Hoechst Marion Roussel, Inc., Watson Pharmaceuticals, Inc. and The Rugby Group, Inc. is granted, and the complaint is dismissed; and it is further

ORDERED that plaintiffs are granted leave to serve an amended complaint so as to replead their first and second causes of action as individual claims within 20 days after service on plaintiffs' attomey of a copy of this order with notice of entry. In the event that plaintiffs fail to serve an amended complaint within such time, leave to replead shall be deemed denied and the action shall be deemed dismissed with prejudice; and it is further

ORDERED that the motion by plaintiffs Anne Cunningham and Norman Mermelstein for an order certifying this action as a class action and designating the law firms of Milberg Weiss Bershad Hynes & Lerach LLP and Lieff Cabraser Heimann & Bemstein LLP as counsel for the class is denied; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: October 15,2003

ENTER:

RICHARD B. LOWE III