SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 42
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VASILIKI VARDOUNIOTIS

Plaintiff, DECISION AND ORDER

Index No. 152029/2019

- v -

PFIZER, INC., MOT SEQ 001

Defendant.
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NANCY M. BANNON, J.:

I. INTRODUCTION

In this product liability action brought by the plaintiff, Vasiliki Vardouniotis alleging injuries resulting from her use of Chantix, a smoking cessation medication manufactured by defendant Pfizer, Inc. (Pfizer), Pfizer moves, pursuant to CPLR 3211(a)(7), to dismiss the verified complaint in its entirety.

II. BACKGROUND

The plaintiff was prescribed and began taking Chantix in May 2016. Chantix, known generically as varenicline, is indicated for use as an aid to quit smoking. According to the complaint, Chantix was approved for use in May 2006. The plaintiff alleges that, at some point after she began taking Chantix, she experienced a number of injuries, including chronic pain in her spine, abdomen, and hips; dystonia and muscular

spasms; persistent dystonic tic; spinal disk bulges; arthritic changes in her neck; cervical spinal stenosis; abnormal straightening of the cervical spinal canal; limping upon ambulation; difficulty lifting items; persistent exhaustion; labored breathing; depression; and anxiety. The plaintiff alleges that the warning label for Chantix contains no warning or an inadequate warning for risks of movement disorders such as dystonia, serious injury or death.[1] According to plaintiff, "[p]rior to the injuries caused by Chantix, the Defendant was aware of published medical literature which demonstrated an association and/or causal relationship between Chantix and such serious injuries and death". She further alleges that her healthcare providers were not aware of the risk of serious injury or death from taking Chantix, and had they known about such risks, they would not have prescribed Chantix, and plaintiff would not have purchased or used Chantix.

The verified complaint asserts the following nine causes of action: (1) negligence; (2) breach of express warranty; (3) breach of implied warranty; (4) fraudulent misrepresentation; (5) fraudulent concealment; (6) reckless and/or negligent misrepresentation and concealment; (7) gross negligence; (8) willful, wanton, and malicious conduct; and (9) unjust enrichment. The plaintiff seeks compensatory damages for past and future medical expenses, past and lost wages and loss of

earning capacity, past and future pain and suffering, past and future emotional distress, and past and future loss of enjoyment of life. In addition, plaintiff requests punitive damages, disgorgement of profits, restitution, costs and fees, including reasonable attorney's fees, and interest.

III. DISCUSSION

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction." Leon v Martinez, 84 NY2d 83, 87 (1994). On a motion to dismiss pursuant to CPLR 3211 (a)(7), the court must "'accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory.'" Cortlandt St. Recovery Corp. v Bonderman, 31 NY3d 30, 46-47 (2018), quoting Leon v Martinez, supra. At the same time, "however, allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration." Maas v Cornell Univ., 94 NY2d 87, 91 (1999).

A. Preemption of Plaintiff's Failure to Warn Claims

The first cause of action, labeled negligence, alleges, *inter alia*, that Pfizer was negligent in "designing, manufacturing, marketing, advertising, distributing, and selling

CHANTIX to consumers, including Plaintiff, without an adequate warning of the significant and dangerous risks of CHANTIX and without proper instructions to avoid the harm which could foreseeably occur as a result of using the drug," and "fail[ed] to accompany CHANTIX with proper warnings regarding all possible side effects, including serious injury . . ." The seventh and eighth causes of action assert similar allegations that Pfizer sold Chantix "without an adequate warning of the significant and dangerous risks of Chantix."

Pfizer argues that plaintiff's failure to warn claims are preempted by the Food, Drug, and Cosmetic Act of 1938 (FDCA).

Article VI of the United States Constitution provides that "the Laws of the United States. . . shall be the supreme Law of the Land" (US Const art VI, cl 2). Federal law preempts state law where it is 'impossible for a private party to comply with both state and federal requirements.'" PLIVA, Inc. v Mensing, 564 US 604, 618 (2011), quoting Freightliner Corp. v Myrick, 514 US 280, 287 (1995). "The question for 'impossibility' is whether the private party could independently do under federal law what state law requires of it." Id. "[W]hen a party cannot satisfy its state duties without the Federal Government's special permission and assistance, which is dependent on the exercise of judgment by a federal agency, that party cannot independently

satisfy those state duties for pre-emption purposes." Id. at 623-624.

The FDCA "is 'a Federal law which regulates the manufacture, use, or sale of drugs.'" Merck KGaA v Integra Lifesciences I, Ltd., 545 US 193, 196 (2005) quoting 21 USC § 355 (a). Under the FDCA, "a manufacturer seeking federal approval to market a new drug must prove that it is safe and effective and that the proposed label is accurate and adequate." PLIVA, Inc. v Mensing, supra at 612. "Meeting those requirements involves costly and lengthy clinical testing." Id.

To grant initial market approval, the Food and Drug Administration (FDA) must determine "based on a fair evaluation of all material facts," that the proposed label is not "false or misleading in any particular." 21 USC § 355(d)(7); 21 CFR § 314.125(b)(6). "The FDA's premarket approval of a new drug application includes the approval of the exact text in the proposed label." Wyeth v Levine, 555 US 555, 568 (2009). "Generally speaking, a manufacturer may only change a drug label after the FDA approves a supplemental application." Id.

To update a label without prior FDA approval, a manufacturer must comply with the "changes being effected" (CBE) regulation. Id.; see also 21 CFR § 314.70(c)(6)(iii). The CBE

regulation "allows drug manufacturers to change [a label] without the FDA's preapproval if the changes 'add or strengthen a contraindication, warning, precaution, or adverse reaction,' or 'add or strengthen an instruction about dosing and administration that is intended to increase the safe usage of the drug product,' in order to 'reflect newly acquired information." Id. The CBE regulation defines "newly acquired information" as:

> "data, analyses, or other information not previously submitted to the Agency, which may include (but is not limited to) data derived from new clinical studies, reports of adverse events, or new analyses of previously submitted data (e.g., meta-analyses) if the studies, events or analyses reveal risks of a different type or greater severity or frequency than previously included in submissions to FDA." 21 CFR § 314.3 (b).

"[T]o state a claim for failure-to-warn that is not preempted by the FDCA, a plaintiff must plead 'a labeling deficiency that [defendant manufacturer] could have corrected using the CBE regulation.'" Gibbons v Bristol-Myers Squibb Co., 919 F3d 699, 708 (2nd Cir. 2019), quoting In re Celexa & Lexapro Mktg. & Sales Practices Litig., 779 F3d 34, 41 (1st Cir. 2015). "If the plaintiff meets that standard, the burden shifts to the party asserting a preemption defense to demonstrate that there is clear evidence that the FDA would not have approved a change' to the [prescription drug's] label." Id.

"In sum, if the plaintiff can point to the existence of 'newly acquired information' to support a labeling change under the CBE regulation, the burden then shifts to the manufacturer to show by 'clear evidence' that the FDA would not have approved the labeling change made on the basis of this newly acquired information." Utts v Bristol-Myers Squibb Co., 251 F Supp3d 644, 661 (SDNY 2017), aff'd sub nom Gibbons v Bristol-Myers Squibb Co., 919 F3d 699 (2nd Cir. 2019).

Pfizer contends that plaintiff does not allege that it had information that (1) revealed risks of a different type or severity or frequency than warned of in the Chantix label; and (2) Pfizer had not previously submitted to the FDA.

The plaintiff counters that her claims are not preempted. The plaintiff argues that the label for Chantix does not include warnings for dystonia, muscular spasm, movement disorders and abnormal posture, typically due to neurological disease or a side effect of drug therapy. According to the plaintiff, Pfizer knew or should have known of these side effects, citing newspaper articles and scientific journal publications identifying adverse effects, especially those experienced by the plaintiff, not identified in the Chantix label. The plaintiff further asserts that she does not know, prior to discovery, whether these side effects were disclosed to

the FDA as part of the application for the label. The plaintiff maintains that Pfizer could have strengthened the label at any time without the approval of the FDA, pursuant to the CBE regulation.

Here, the complaint alleges that "[p]rior to the Plaintiff's injuries caused by Chantix, the Defendant was aware of published medical literature which demonstrated an association and/or causal relationship between such serious injuries and/or death." Nevertheless, the complaint fails to allege facts indicating that this "published medical literature" "reveal[ed] risks of a different type or greater severity or frequency than previously included in submissions to FDA." 21 CFR § 314.3(b); see also Gibbons v Bristol-Myers Squibb Co., supra; In re Celexa & Lexapro Mktg. & Sales Practices Litig., supra.

Although plaintiff cites newspaper articles and journal articles in her memorandum of law, these articles were not annexed to the complaint or her opposition to Pfizer's motion to dismiss. Additionally, the plaintiff does not argue that these articles are based on new data. Moreover, to the extent that it appears that the plaintiff is requesting that the court take judicial notice of material derived from a Federal Aviation Administration website or a Wall Street Journal article, the

court declines to do so. Judicial notice of facts is reserved for "matter[s] of common and general knowledge, well-established and authoritatively settled." Prince, Richardson on Evidence § 2-201 (Farrell 11th ed). There has been no showing that these websites are "of sufficient authenticity and reliability." Kingsbrook Jewish Med. Ctr. v Allstate Ins. Co., 61 AD3d 13, 20 (2nd Dept. 2009); see also NYC Med. & Neurodiagnostic, P.C. v Republic W. Ins. Co., 8 Misc 33 (App Term, 2nd, 9th & 10th Jud Dists Dept. 2004). Additionally, the First Department has held that "[j]udicial notice of a fact . . . may not properly be based upon a factual assertion simply because the assertion is contained in a newspaper article." TOA Constr. Co., Inc. v Tsitsires, 54 AD3d 109, 115 (1st Dept. 2008). Thus, the plaintiff has not identified any newly acquired information that could have justified Pfizer's revising the Chantix label unilaterally through the CBE regulation without FDA approval.

The plaintiff further suggests that she needs discovery in order to establish that her claims are not preempted. CPLR 3211 (d) provides that where it appears "that facts essential to justify opposition [to a motion pursuant to CPLR 3211] may exist but cannot then be stated, the court may deny the motion . . . or may order a continuance to permit . . . disclosure to be had and may make such other order as may be just." However, the "mere hope that discovery may reveal" facts essential to justify

opposition "does not warrant denial of the motion." Cracolici v Shah, 127 AD3d 413, 413 (1st Dept 2015). As the plaintiff has failed to make a sufficient showing that such facts could be obtained in discovery, the plaintiff's failure to warn claims are dismissed.

In light of the above, the court need not consider Pfizer's contention that plaintiff's failure to warn claims are barred by the informed intermediary doctrine.

B. Negligence (First Cause of Action)

The first cause of action alleges, among other things, that Pfizer was negligent in "failing to test CHANTIX properly and thoroughly before releasing the drug to the market," "failing to conduct adequate post-market monitoring and surveillance of CHANTIX," and "failing to conduct adequate analysis [of] adverse event reports." The seventh cause of action for gross negligence makes similar allegations.

Pfizer argues that the plaintiff's negligence claims based on Pfizer's failure to test properly, failure to conduct adequate post-market monitoring and surveillance, and failure to conduct analysis of adverse reports, are devoid of any factual support.

The plaintiff contends, in response, that Pfizer attempts to hold its negligence claims to an improper heightened pleading standard, and that its claims are adequately pleaded.

"In order to establish negligence, [a] plaintiff is required to prove the existence of a duty, that is, a standard of reasonable conduct in relation to the risk of reasonably foreseeable harm; a breach of that duty and that such breach was a substantial cause of the resulting injury." Baptiste v New York City Tr. Auth., 28 AD3d 385, 386 (1st Dept. 2006) citing Palsgraf v Long Is. R.R. Co., 248 NY 339 (1928). CPLR 3013 provides that "[s]tatements in a pleading shall be sufficiently particular to give the court and the parties notice of the transaction, occurrences, or series of occurrences, intended to be proved and the material elements of each cause of action." Notice pleading is satisfied as long as the pleading gives notice to an adversary of the transactions or occurrences giving rise to a claim. See Colleran v Rockman, 232 AD2d 322 (1st Dept. 1996); Foley v D'Agostino, 21 AD2d 60 (1st Dept. 1964).

Here, the complaint adequately gives Pfizer notice of the occurrences intended to be proved. Indeed, the plaintiff alleges that she was injured as a result of Pfizer's failure to adequately test Chantix and failure to conduct post-marketing

surveillance. Therefore, the branch of Pfizer's motion seeking dismissal of these claims is denied.

C. Breach of Express and Implied Warranties (Second and Third Causes of Action)

In the second cause of action, the plaintiff alleges that Pfizer made express warranties as to the safety of Chantix. In the third cause of action, the plaintiff alleges that Pfizer impliedly warranted that Chantix was "of merchantable quality, safe and fit for the use for which Pfizer intended it," that she used Chantix as prescribed, and that it was not of merchantable quality, safe and fit for its intended use, or adequately tested.

Pfizer argues that the plaintiff has failed to plead any express warranty, or that she relied on any express warranty. In addition, Pfizer contends, with respect to her implied warranty claims, that the plaintiff has failed to identify any specific inadequacy in the Chantix label. Further, Pfizer asserts that the plaintiff has failed to allege any facts indicating that Chantix was not safe or fit for its intended use.

The plaintiff maintains, in opposition to Pfizer's motion, that she has adequately alleged express warranties and breaches.

The plaintiff also contends that she has sufficiently pleaded breaches of implied warranties.

The Uniform Commercial Code (UCC), as adopted in New York, provides that "[a]ny affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise." UCC 2-313 (1)(a). To state a claim for breach of an express warranty under New York law, the plaintiff must allege that there was an "affirmation of fact or promise by the seller, the natural tendency of which [was] to induce the buyer to purchase,' and that the warranty was relied upon." Schimmenti v Ply Gem Indus., 156 AD2d 658, 659 (2nd Dept. 1989) quoting Friedman v Medtronic, Inc., 42 AD2d 185, 190 (2nd Dept. 1973).

In this case, the complaint alleges that "Defendant expressly represented to Plaintiff (and to other consumers and the medical community) that CHANTIX was safe, efficacious, and fit for its intended purposes, that it was of merchantable quality, that it did not produce any unwarned-of side effects, and that it was adequately tested." However, the complaint fails to allege any express warranties made by Pfizer. See Basko v Sterling Drug, Inc., 416 F2d 417, 422 (2nd Cir. 1969) (refusal to charge jury on breach of express warranty was not error where

"defendant did not represent either (1) that its drugs were free from all harmful side effects or (2) that its drugs were absolutely harmless"); Gogo v Ortho Diagnostics, 90 AD2d 874, 874 (3rd Dept. 1982) (no express warranty where defendant's "pamphlet state[d] that the drug 'provides virtually complete protection' against hemolytic disease"). Moreover, the plaintiff has failed to "set forth the terms of the warranty upon which [she] relied." Copeland v Weyerhaeuser Co., 124 AD2d 998, 998 (4th Dept. 1986). As the plaintiff did not annex any express warranty to the complaint, the breach of express warranty claim must also be dismissed.

UCC 2-314 provides that a warranty of merchantability is implied in a contract for the sale of goods if the seller is a merchant with respect to goods of that kind. To be merchantable, the goods must be, among other things, "fit for the ordinary purposes for which [such] goods are used." UCC 2-314 (2)(c). "To establish that a product is defective for purposes of a breach of implied warranty of merchantability claim, a plaintiff must show that the product was not reasonably fit for its intended purpose, an inquiry that 'focuses on the expectations for the performance of the product when used in the customary, usual and reasonably foreseeable manners.'" Wojcik v Empire Forklift, Inc., 14 AD3d 63, 66 (3rd Dept. 2004) quoting Denny v Ford Motor Co., 87 NY2d 248, 258-259 (1995).

UCC 2-315, "Implied Warranty: Fitness for Particular Purpose," provides that:

> "[w]here the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose."

"For an implied warranty of fitness for a particular purpose claim to arise, the buyer must establish that the seller had reason to know, at the time of contracting, the buyer's particular purpose for which the goods are required and that the buyer was justifiably relying upon the seller's skill and judgment to select and furnish suitable goods, and that the buyer did in fact rely on that skill." Saratoga Spa & Bath v Beeche Sys. Corp., 230 AD2d 326, 331 (3rd Dept. 1997).

Here, the plaintiff adequately alleges that Pfizer breached the implied warranties of merchantability and fitness by holding Chantix out as reasonably fit and suitable when it was allegedly unreasonably dangerous. See Wholey v Amgen, Inc., 165 AD3d 458, 459 (1st Dept 2018); Friedman v Medtronic, Inc., supra. The plaintiff alleges that Pfizer marketed, advertised, and promoted the sale of Chantix, while minimizing the serious risk of injury and death associated with the drug. Consequently, Pfizer is not entitled to dismissal of the breach of implied warranty claims.

D. Fraudulent Misrepresentation, Fraudulent Concealment, Reckless and/or Negligent Misrepresentation and Concealment, Gross Negligence, and Willful, Wanton and Malicious Conduct (Fourth, Fifth, Sixth, Seventh, and Eighth Causes of Action)

The fourth cause of action, labeled fraudulent misrepresentation, alleges that Pfizer fraudulently misrepresented, "through its labeling, advertising, marketing materials, detail persons, seminar presentations, publications, notice letters, and regulatory submissions that CHANTIX had been tested and found to be safe and effective as an aid to smoking cessation," and that Pfizer "represented that CHANTIX was as safe and/or safer and/or more efficacious than other alternative medications," knowing these representations to be false. According to the plaintiff, her doctors and others relied upon these representations to her detriment.

The fifth cause of action (fraudulent concealment) alleges that Pfizer fraudulently concealed information "about the substantial risk of serious injury and/or death associated with using CHANTIX," "information demonstrating CHANTIX was not safer than alternatives available on the market," and that "information regarding the true efficacy of the drug."

The sixth cause of action, labeled reckless, negligent misrepresentation and/or concealment, asserts similar allegations as the fourth and fifth causes of action. The seventh cause of action is for gross negligence. The eighth cause of action alleges that Pfizer was "wanton and malicious in its actions, misrepresentations, and omissions."

Pfizer argues that plaintiff's fraud and negligent misrepresentation claims should be dismissed because they are not pleaded with particularity.

The plaintiff contends that, when viewing the complaint in totality, it adequately pleads fraud.

In order to state a cause of action for fraud, the plaintiff must allege "misrepresentation or concealment of a material fact, falsity, scienter by the wrongdoer, justifiable reliance on the deception, and resulting injury." Zanett Lombardier, Ltd. v Maslow, 29 AD3d 495, 495 (1st Dept. 2006) citing Kaufman v Cohen, 307 AD2d 113, 119 (1st Dept. 2003). Moreover, CPLR 3016 (b) requires that "[w]here a cause of action or defense is based upon misrepresentation, fraud . . . , the circumstances constituting the wrong [] be stated in detail." Nevertheless, the Court of Appeals has held that "CPLR 3016 (b) should not be so strictly interpreted as to prevent an otherwise valid cause of action in situations where it may be impossible

to state in detail the circumstances constituting a fraud." Pludeman v Northern Leasing Sys., Inc., 10 NY3d 486, 491 (2008). CPLR 3016 (b) "should not be confused with unassailable proof of fraud." (Sargiss v Magarelli, 12 NY3d 527, 531 [2009], and "is satisfied when the facts suffice to permit a 'reasonable inference' of the alleged misconduct." Eurycleia Partners, LP v Seward & Kissel, LLP, 12 NY3d 553, 559 (2009).

To state a cause of action for negligent misrepresentation, the plaintiff must allege: "'(1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information."' CMMF, LLC v J.P. Morgan Inv. Mgt., Inc., 78 AD3d 562, 565 (1st Dept. 2010) quoting J.A.O. Acquisition Corp. v Stavitsky, 8 NY3d 144, 148 (2007). The claim must also be pleaded with particularity. See Gregor v Rossi, 120 AD3d 447(1st Dept. 2014).

The plaintiff alleges that Pfizer misrepresented that Chantix "was safe to ingest and that th[e] utility of the product outweighed any risk in use for their intended purposes." The complaint further alleges that "Defendant omitted, suppressed and/or concealed material facts concerning the dangers and risks of injuries associated with the use of

CHANTIX, including serious injury and/or death." According to the plaintiff, "Defendant knew or had reason to know that CHANTIX had defects and was unreasonably dangerous and was not what was represented to the medical community, the FDA and the consuming public, including plaintiff," and "Defendant's purpose was willfully blind to, ignored, downplayed, avoided, and/or otherwise understated the serious nature of the risks associated with the use of CHANTIX, in order to boost sales."

These bare assertions and suggestions fail to comply with CPLR 3016 (b). See Wholey v Amgen, Inc., supra; Devore v Pfizer Inc., 58 AD3d 138 (1st Dept. 2008) (consumers failed to state a claim for fraud against pharmaceutical company based upon assertions that company had engaged in deceptive marketing and other fraudulent conduct without disclosing health risks of Lipitor). The facts alleged by plaintiff fail to permit a reasonable inference of the alleged misconduct. See Eurycleia Partners, LP v Seward & Kissel, LLP, supra.

However, the court declines to dismiss the seventh and eighth causes of action in their entirety. The gravamen of these causes of action is that Pfizer failed to exercise due care, *i.e.*, failed to test Chantix, and failed to conduct adequate post-market surveillance of the drug, among other things.

Therefore, plaintiff's fourth, fifth, and sixth causes of action are dismissed.

E. Unjust Enrichment (Ninth Cause of Action)

Pfizer contends that plaintiff's unjust enrichment fails because: (1) there was no relationship between the parties that could have caused reliance or inducement; and (2) it is duplicative of plaintiff's other claims.

The plaintiff argues that there is a sufficient relationship between the parties, because Pfizer advertised Chantix to consumers.

"'The theory of unjust enrichment lies as a quasi-contract claim.'" IDT Corp. v Morgan Stanley Dean Witter & Co., 12 NY3d 132, 142 (2009) quoting Goldman v Metropolitan Life Ins. Co., 5 NY3d 561, 572 (2005). "The essential inquiry in any action for unjust enrichment or restitution is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered." Paramount Film Distrib. Corp. v State of New York, 30 NY2d 415, 421 (1972).

In order to adequately plead an unjust enrichment claim, the plaintiff must allege "that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered." Georgia Malone & Co.,

Inc. v Rieder, 19 NY3d 511, 516 (2012). "Although privity is not required for an unjust enrichment claim, a claim will not be supported if the connection between the parties is too attenuated." Mandarin Trading Ltd. v Wildenstein, 16 NY3d 173, 182 (2011).

Contrary to Pfizer's contention, the plaintiff has adequately pleaded an unjust enrichment claim. The plaintiff sufficiently alleges a relationship sufficient to create reliance or inducement. See Cox v Microsoft Corp., 8 AD3d 39 (1st Dept. 2004). She alleges that Pfizer advertised Chantix as a safe product, and that it knew or should have known of the dangers of the drug. She also alleges that Pfizer accepted payment from her, and that it would be unjust for Pfizer to retain this money because she did not receive the product that Pfizer represented Chantix to be. Moreover, the plaintiff's unjust enrichment claim is not duplicative of any other claim, given that she seeks disgorgement of Pfizer's profits and monetary benefits. See Matter of Opioid Litig., 2018 NY Slip Op 31228[U], **32 (Sup Ct, Suffolk County 2018).

F. Punitive Damages

Pfizer moves to dismiss plaintiff's request for punitive damages, arguing that the complaint fails to allege that it acted with wanton or reckless disregard of plaintiff's rights.

The plaintiff counters that her request for punitive damages is adequate at the pleading stage, since she alleges that Pfizer engaged in intentional or deliberate wrongdoing.

It is well-settled that conduct warranting an award of punitive damages "need not be intentionally harmful but may consist of actions which constitute willful or wanton negligence or recklessness." Home Ins. Co. v American Home Prods. Corp., 75 NY2d 196, 204 (1990). Here, the complaint fails to allege that Pfizer engaged in any morally culpable conduct. As such, the plaintiffs' request for punitive damages is denied.

IV. CONCLUSION

Accordingly, it is hereby,

ORDERED that the motion of defendant Pfizer, Inc. to dismiss the complaint is granted to the extent of dismissing the first cause of action (negligence), seventh cause of action (gross negligence), and eighth cause of action (willful, wanton and malicious conduct) insofar as those causes of action are based upon failure to warn allegations, as well as the second cause of action (breach of express warranty), the fourth cause of action (fraudulent misrepresentation), the fifth cause of action (fraudulent concealment), the sixth cause of action (reckless and/or negligent misrepresentation and concealment),

and the plaintiff's request for punitive damages, and the motion is otherwise denied; and it is further,

ORDERED that the parties are to contact the court on or before August 28, 2020 to schedule a telephonic preliminary conference.

This constitutes the Decision and Order of the court.

Dated: July 7, 2020 **ENTER:**

NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON