IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MARINA SCOTT, individually and on behalf of all others similarly situated, Plaintiff, v. JOHNSON & JOHNSON CONSUMER INC., VOGUE INTERNATIONAL LLC, Defendants.	Case No. 22-cv-07069 (JRB) Judge John Robert Blakey Magistrate Judge Jeffrey Cole

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

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Defendants Johnson & Johnson Consumer Inc. and Vogue International LLC respectfully move to dismiss the Complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).

PRELIMINARY STATEMENT

Last October, a private laboratory named Valisure filed a petition with the United States Food and Drug Administration ("FDA") claiming to have detected benzene, a potential carcinogen, in a number of different manufacturers' dry shampoo products. Defendants' OGX brand dry shampoo products were among those that Valisure tested. Based entirely on Valisure's results, Plaintiff Marina Scott brings this putative class action, alleging that she suffered economic injury by purchasing OGX dry shampoo products that "contained or risked containing benzene." Both FDA and several federal courts have issued scathing critiques of Valisure's test methods. But this Court need not engage with those critiques at this juncture, because even taking Valisure's findings at face value, Scott lacks Article III standing and fails to state a claim for relief.

For starters, Scott fails to plausibly plead any injury-in-fact. She does not assert any personal injury; instead, she claims to have been deprived of the "benefit of her bargain." But Valisure purported to find benzene in only a subset of the OGX products it tested. Scott pleads no facts suggesting that *she* was among those whose products contained benzene. As such, her assertion that she received something other than the precise product she bargained for is sheer speculation.

Moreover, even assuming Scott purchased canisters of dry shampoo that contained a measurable amount of benzene, she fails plausibly to plead that this qualifies as an actual benefit-of-bargain injury. Defendants did not promise that their dry shampoo would be 100% benzene free. And for good reason: benzene is omnipresent in trace amounts, including in the air we breathe and the water we drink. At most, Defendants implicitly promised that their OGX products would not contain benzene at levels that pose an actual danger to human health. But the Complaint fails to

plead beyond the conclusory level that benzene is an actual health risk when found in dry shampoo at any of the levels mentioned in Valisure's test results.

Because Scott fails plausibly to plead that the OGX products she received were actually unsafe, she fails to satisfy Article III's standing requirement for a damages claim. And because Scott fails to plead that she intends to purchase OGX products in the future, she lacks standing to seek injunctive relief. Courts have already dismissed several consumer class actions arising out of Valisure's suspect testing on the grounds just described. This Court should do the same.

BACKGROUND

A. Valisure and Its Testing of OGX Dry Shampoo

Valisure LLC is a private company that purports to use "proprietary analytical technologies … to test medications and consumer products." Ex. 1 at 3.[1] On a number of occasions, Valisure has filed "citizen petitions" with FDA that have given rise to substantial media coverage and litigation. But Valisure's test methods have been heavily criticized. *See* Ex. 2 at 3-6 (FDA letter identifying "methodological deficiencies" in Valisure's laboratory, including "fail[ure] to establish ... the accuracy, sensitivity, specificity, and reproducibility of [its] test methods"); *In re Zantac (Ranitidine) Prod. Liab. Litig*., 2022 WL 17480906, at *2 (S.D. Fla. Dec. 6, 2022) (noting that Valisure's methods actually *created* the very contaminants they purported to detect). Indeed, a federal court recently dismissed an entire multi-district litigation containing 2,450 lawsuits that "relied heavily on Valisure's science." *Id.*

[1] The Court properly may consider evidence outside the pleadings, like the exhibits annexed to the Declaration of Steven A. Zalesin, on a Rule 12(b)(1) motion. *See infra* at 4. With respect to Defendants' Rule 12(b)(6) motion, the Court may consider Ex. 1, the Valisure Petition, because it is "incorporated by reference to the pleadings," *Milwaukee Police Ass'n v. Flynn*, 863 F.3d 636, 640 (7th Cir. 2017), and it may take judicial notice of Ex. 2, a letter from the FDA to Valisure. *Stuve v. Kraft Heinz Co.*, 2023 WL 184235, at *5 (N.D. Ill. Jan. 12, 2023) (taking judicial notice of an FDA whitepaper).

Valisure submitted the petition at issue here (the "Valisure Petition") (Ex. 1) to FDA in October 2022. The Valisure Petition summarized the results of tests that Valisure had performed on 148 unique batches of dry shampoo products manufactured and sold under 34 different brands. Ex. 1 at 12. Notably, Valisure reported "significant variability [in test results] from batch to batch, even within a single brand" of dry shampoo. *Id.* at 7. Indeed, Valisure detected "significant variability" in benzene levels even in "sprays from a single bottle." *Id.* About a third of the batches that Valisure tested (45 of 148) contained no detectible benzene at all. *Id.*, Tbl. 5.

Six of the batches that Valisure tested were OGX brand products sold by Defendants.[2] *See id.*, Tbls. 3a, 4a, 4b, & 5. As shown in the table below, two of the six contained no detectible benzene. Two purportedly contained benzene at levels below one part per million ("ppm"). The last two purportedly contained benzene at levels between 1.07 and 3.98 ppm.

Brand	Batch #	Product Name	Benzene Concentration (ppm)			
			1st Spray	2nd Spray	3rd Spray	4th Spray
OGX	1461D07	Extra Strength Dry Shampoo Coconut Miracle Oil - 5 oz	3.98	3.85	3.43	3.80
OGX	1181D06	Extra Strength Dry Shampoo Coconut Miracle Oil - 5 oz	2.56	1.07	1.15	1.63
OGX	1331D06	Extra Strength Dry Shampoo Argan Oil of Morocco - 5 oz	0.80	0.77	0.79	0.47
OGX	0751D04	Extra Strength Dry Shampoo Coconut Miracle Oil - 5 oz	0.41* ** just one spray tested*	n/a	n/a	n/a
OGX	2171D08	Extra Strength Dry Shampoo Coconut Miracle Oil - 5 oz	None detected	None detected	None detected	None detected
OGX	2781D09	Extra Strength Dry Shampoo Argan Oil of Morocco - 5 oz	None detected	None detected	None detected	None detected

[2] The Complaint misleadingly refers only to the two OGX batches for which Valisure found the "worst" results. The Court may consider the entirety of the Valisure Petition and is not limited to the cherry-picked portions that Scott cites in her Complaint. *See supra* n.1.

B. Scott's Complaint

Marina Scott, the sole named plaintiff, is an Illinois resident who "purchased multiple canisters of Defendants' OGX Extra Strength Dry Shampoo Coconut Miracle Oil products" from a Walgreens in Chicago. Compl. ¶ 38. Scott does not allege that she purchased any other OGX dry shampoo product, how much she paid for the products, or how much competing products cost.

At one point in the Complaint, Scott asserts that the canisters of dry shampoo she bought "were contaminated with benzene." *Id.* Elsewhere, however, she alleges that the OGX shampoo she purchased merely "*risked* containing benzene." *Id.* ¶¶ 3, 31, 35, 52(a), 70, 74, 84, 103 (emphasis added). Other than the Valisure Petition, Scott offers no support for this allegation.

Scott asserts claims for violation of the Illinois Consumer Fraud and Deceptive Trade Practices Act ("ICFA"), Fraud, Unjust Enrichment, and "Violation of [Other] State Consumer Fraud Acts." Compl. ¶¶ 56-107. She seeks to represent a class consisting of "all persons in the United States who purchased the Products ... within any applicable limitations period," as well as an "Illinois Subclass" and "Consumer Fraud Multi-State Subclass." Compl. ¶¶ 44-46.

LEGAL STANDARDS

To survive a Rule 12(b)(1) motion to dismiss, a complaint "must *clearly* ... *allege* facts demonstrating each element" of standing. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016) (cleaned up) (emphasis added). "[N]o presumptive truthfulness attaches to [the] plaintiff's allegations." *Apex Digital, Inc. v. Sears, Roebuck & Co.*, 572 F.3d 440, 444 (7th Cir. 2009). Rather, a court "may consider and weigh evidence outside the pleadings to determine whether it has power to adjudicate the action." *Bazile v. Fin. Sys. of Green Bay, Inc.*, 983 F.3d 274, 279 (7th Cir. 2020).

To survive a Rule 12(b)(6) motion to dismiss, "a complaint must contain sufficient factual matter ... to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662,

678 (2009). A court must "reject sheer speculation, bald assertions, and unsupported statements." *Taha v. Int'l Bhd. of Teamsters, Local 781*, 947 F.3d 464, 469 (7th Cir. 2020).

ARGUMENT

I. SCOTT LACKS ARTICLE III STANDING

Standing must be analyzed separately "for each form of relief sought." *Simic v. City of Chicago*, 851 F.3d 734, 738 (7th Cir. 2017). "To establish injury in fact," the core requirement of Article III standing, "a plaintiff must [plead] ... 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Spokeo*, 578 U.S. at 339. In a putative class action, the named plaintiff must allege injury-in-fact as to herself and "cannot rely on" injuries suffered by "putative class members." *In re Herbal Supplements Mktg. & Sales Pracs. Litig.*, 2017 WL 2215025, at *7 (N.D. Ill. May 19, 2017).

The Complaint fails to plead injury-in-fact under these standards. Scott does not allege that she has suffered, or will imminently suffer, any *physical* injury. Instead, her claimed injury is economic. But the Complaint fails to plausibly plead that Scott suffered any concrete, particularized economic injury in the past, or that she will suffer such injury in the imminent future. Accordingly, Scott lacks standing to seek either damages or injunctive relief.

A. Scott Fails to Plausibly Plead Past Economic Injury

Scott asserts that she was "deprived [sic] the basis of [her] bargain." Compl. ¶¶ 34-35. But "[a] plaintiff alleging an economic injury as a result of a purchasing decision must do more" than make a conclusory assertion to that effect. *In re Johnson & Johnson Talcum Powder Prods. Mktg., Sales Practices & Liab. Litig.*, 903 F.3d 278, 280-81 (3d Cir. 2018). She "must allege facts that would permit a factfinder to determine, without relying on mere conjecture, that [she actually] failed to receive the economic benefit of her bargain." *Id.* at 281, 285. Scott fails to plead such facts here. First, she does not allege, beyond the speculative level, that any of the shampoo

canisters she purchased contained benzene at all. And second, she fails to plausibly allege that the levels of benzene purportedly at issue posed any non-speculative risk to her health or safety.

1. Scott Fails to Sufficiently Allege that the Units She Purchased Actually Contained Benzene

Scott does not plausibly plead that any unit of OGX dry shampoo *she* purchased contained benzene in *any* amount. The Complaint concedes that the units she purchased may not actually have contained benzene, but were merely "at risk" of containing it. Compl. ¶¶ 3, 31, 35, 52(a), 70, 74, 84, 103. The Valisure Petition shows why Scott is forced to hedge in this manner. As noted above, two of the six OGX batches Valisure tested contained *no* detectible benzene. *Supra* at 3. The Valisure Petition also emphasized "the importance of batch-level chemical analysis" in determining whether a particular unit of dry shampoo contains benzene, given the "significant variability" in results between batches and even successive sprays from the same canister. *Id.*

Thus, even taken as true, Valisure's test results provide no plausible basis to allege that the units of shampoo that Scott purchased contained any benzene. Again, Scott does not allege that any of her canisters came from lots in which Valisure detected benzene. She does not allege that she performed any tests of her own. She does not allege that she smelled or otherwise sensed benzene first-hand. And she does not allege that she experienced any symptoms consistent with benzene exposure. Thus, any suggestion that *she* purchased OGX products "contaminated with benzene" (Compl. ¶ 38) is a "bald assertion[]" that cannot be taken as true. *Taha*, 947 F.3d at 469.

"Without any particularized reason to think [Scott's] own [canisters] … actually exhibited the [alleged] defect," it is "pure speculation to say" that Scott failed to receive the benefit of her bargain. *Wallace v. ConAgra Foods, Inc.*, 747 F.3d 1025, 1030-31 (8th Cir. 2014). The purchase of a product that was merely "*at risk* of contamination" is not an injury-in-fact, because any benefit-of-bargain injury in such a case is "too speculative for Article III purposes." *Renfro v.*

Champion Petfoods USA, Inc., 25 F.4th 1293, 1305 (10th Cir. 2022); *see also Doss v. Gen. Mills, Inc.*, 2019 WL 7946028, at *2-3 (S.D. Fla. June 14, 2019) (no standing where plaintiff "hedge[d] her bets, saying that the Cheerios she herself purchased either 'contained or *could* contain glyphosate'" (emphasis in original)), *aff'd*, 816 F. App'x 312 (11th Cir. 2020).

Other recent decisions spawned by Valisure's tests are instructive. In *Rooney v. Procter & Gamble Co.*, 2022 WL 17092124 (E.D. La. Nov. 21, 2022), the plaintiff alleged that Valisure "ran tests on a number of ... antiperspirant products, including Secret," and detected benzene in some batches. *Id.* at *1. The plaintiff filed a complaint piggybacking on Valisure's tests, alleging that "benzene in the Secret antiperspirants that [she] used [had] caused her cancer." *Id.* at *1-2. The court dismissed the complaint. Although she had alleged "in conclusory fashion ... that the cans of Secret [she] used contained benzene," in reality, "Valisure's citizen's petition d[id] not state that every single sample of secret that Valisure tested contained benzene." *Id.* at *3. Instead, "the petition state[d] that of the 108 unique batches of products Valisure tested, only 59 had detectable levels of benzene." As such, the plaintiff's allegation that *she* had purchased Secret containing benzene was impermissibly speculative. *Id.* at *3. Here, Scott's allegations of contamination are even more speculative, because unlike the *Rooney* plaintiff, Scott does not allege that she developed any physical symptoms after using OGX dry shampoo.

A similarly deficient pleading was dismissed in *Schloegel v. Edgewell Personal Care Co.*, 2022 WL 808694 (W.D. Mo. Mar. 16, 2022). There, the plaintiff pointed to Valisure findings that certain lots of Banana Boat sunscreen "contain[ed] benzene." *Scholegel*, Compl. ¶¶ 9-10, No. 4:21-cv-00631 (W.D. Mo. filed Sept. 1, 2021). Based on those tests, she alleged that she had "suffered economic damages" by purchasing sunscreen that had "a risk [of] contain[ing] benzene." *Id.* ¶¶ 1, 5, 48. The court dismissed the complaint, holding that the plaintiff did not plausibly

"allege that the specific product *she* purchased was adulterated." *Id.* at *1 (emphasis added). "[I]t is not enough," the court explained, "for a plaintiff to allege that a product line contains a defect or that a product is at risk for manifesting this defect; rather, the plaintiffs must allege that *their* product *actually exhibited* the alleged defect." *Id.* at *2 (quoting *Wallace*, 747 F.3d at 1030).

So too here. The Valisure Petition does not support Scott's conclusory claim that *she* purchased OGX dry shampoo containing benzene, and Scott alleges nothing else to support her conclusory claim. That alone requires dismissal.

2. Even Assuming the Units Scott Purchased Contained Benzene, Scott Still Fails to Plead Plausible Economic Injury

Even if Scott could meet her pleading burden merely by speculating that she may have purchased units of shampoo containing benzene (and she cannot), the Complaint still would not suffice to establish that she failed to receive the benefit of her bargain. Scott does not point to any promise by Defendants that OGX dry shampoos were completely free of benzene. Indeed, no manufacturer could make such a promise, as "benzene is omnipresent in small quantities" throughout our environment. *Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 626 (1980). Absent such a promise, the complete absence of benzene is not something that Scott plausibly "bargained" for. By contrast, sales of goods ordinarily *do* entail an implicit warranty that the product is not unreasonably dangerous. The question, then, is whether the Complaint plausibly pleads that the benzene levels in Scott's shampoo canisters posed a meaningful, non-speculative threat to her safety. The answer to that question is no.

The Complaint's generic allegation that benzene is harmful is not sufficient. What matters is whether benzene is harmful at the particular level that was allegedly present in the units of shampoo Scott purchased. *See Ibarolla v. Nutrex Research, Inc.*, 2013 WL 672508, at *5 (N.D. Ill. Feb. 25, 2013) (where complaint alleges that substances "can be dangerous in unspecified

quantities," it "does not follow that [the] particular product [Plaintiff purchased] is dangerous"). The Complaint points to no facts that plausibly suggest that the levels of benzene cited in the Valisure Petition pose a realistic threat to health when found in a dry shampoo. *See Doss v. Gen. Mills, Inc.*, 816 F. App'x 312, 314 (11th Cir. 2020) (dismissing economic-loss claims for lack of standing because plaintiff did not plausibly allege that the boxes of Cheerios she purchased contained "a level of glyphosate that is so harmful the Cheerios are 'presumptively unsafe'").

To be sure, the Complaint asserts in conclusory fashion that *no* level of benzene is ever safe. But that unsupported assertion is implausible and cannot be taken as true. Courts "universally reject … the idea that any amount of a carcinogen, no matter how small, is actionable"; at the very least, a "threshold" amount or range must be asserted. *In re Zantac*, 2022 WL 17480906, at *17; *see also Krik v. Exxon Mobil Corp.*, 870 F.3d 669, 672-76 (7th Cir. 2017) (plaintiff's assertion "that any exposure to asbestos fibers whatsoever [was harmful], regardless of the amount" "ignored fundamental principles of toxicology"). Again, benzene is "omnipresent." *Indus. Union*, 448 U.S. at 626. If any detectible level of benzene qualified as an injury-in-fact, then "consumers would have [standing] to sue the manufacturer of nearly every product in a typical grocery store." *Weaver v. Champion Petfoods USA Inc.*, 2019 WL 2774139, at *3 (E.D. Wis. July 1, 2019). Courts have rightly dismissed this theory as "preposterous." *Id.*; *see, e.g.*, *Kimca v. Sprout Foods, Inc.*, 2022 WL 1213488, at *6 & n.8 (D.N.J. Apr. 25, 2022) (dismissing complaint for lack of standing because plaintiffs "fail[ed] to plausibly allege … that the levels of heavy metals [at issue were] unsafe," despite conclusory assertion that "there is no safe level of exposure").

Scott also attempts to establish that the benzene levels at issue are unsafe by pointing to FDA's purported 2 ppm "limit" for benzene in "drug products." Compl. ¶¶ 15, 28, 32. But this does not help her. For starters, Scott does not allege—even in conclusory fashion—that any of the

OGX canisters *she* purchased contained more than 2 ppm of benzene. Nor could she. Only one of the six OGX lots tested by Valisure consistently showed benzene at those levels. Another lot tested slightly above 2 ppm on just one of four "sprays." The other four lots came nowhere close to the purported 2 ppm threshold. *Supra* at 3. Even if the Court indulged Scott's assumption that she purchased OGX units containing benzene, it would be rank speculation, bereft of any factual support, to conclude that those units contained benzene at levels above 2 ppm.

In addition, the ostensible 2 ppm "limit" on which Scott relies is not a binding statement with the force of law. *See Pharm. Mfg. Rsch. Servs., Inc. v. FDA*, 957 F.3d 254, 265 (D.C. Cir. 2020) ("[O]nly 'legislative rules' promulgated [by FDA] through public notice and comment have the force and effect of law." (quotes omitted)). It is merely a statement in an informal FDA "alert"[3]—a source even less authoritative than non-binding FDA "guidance" documents that courts regularly deem to have no legal effect. *See United States v. Caputo*, 382 F. Supp. 2d 1045, 1054 (N.D. Ill. 2005) (agreeing with proposed testimony that "FDA guidance documents are advisory, are not binding on manufacturers, and cannot be used as the basis for an enforcement action against a manufacturer"). And in any event, as Scott concedes, dry shampoo is a cosmetic, "not [a] drug[.]" Compl. ¶ 15. Scott cannot "borrow [purported] standards promulgated in [the] different context[]" of drugs, without showing that "these are apt comparisons for use in the context of" dry shampoo. *Kimca*, 2022 WL 1213488, at *6 (refusing to consider FDA limits on heavy metals in water when evaluating claims regarding heavy metals in baby foods).

Scott also tries to side-step the safety question by asserting that a product containing benzene is automatically "adulterated and misbranded" under the federal Food, Drug, and Cosmetic

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[3] *FDA alerts drug manufacturers to the risk of benzene contamination in certain drugs*, Dec. 23, 2022, https://tinyurl.com/2p8t7c45.

Act ("FDCA"), and therefore inherently "worthless." Compl. ¶¶ 2, 17, 22, 34, 38. But her claim that a dry shampoo containing any amount of benzene is "adulterated and misbranded" is a legal conclusion not entitled to a presumption of truth. Again, Scott cites to no binding statutory or regulatory provision supporting this assertion. What is more, courts routinely hold that "[w]ithout the factual support of adverse health consequences or plausible allegations of future risk, Plaintiffs cannot assert that [a] product[] [is] valueless" merely because it is purportedly noncompliant with a regulatory standard. *In re Plum Baby Food Litig.*, 2022 WL 16552786, at *7-8 (D.N.J. Oct. 31, 2022); *see Huertas v. Bayer U.S., LLC*, 2022 WL 3572818, at *5-6 (D.N.J. Aug. 19, 2022) (rejecting plaintiff's "general[ized]" and "conclusory" allegation that products containing trace levels of benzene were "worthless" absent "a particularized account of the actual harm caused"); *Kimca*, 2022 WL 1213488, at *9 ("[W]ithout any plausible allegations of [a] risk [to health], the allegation that the Baby Food Products were worthless ... falls apart.").

The cases Scott cites in her complaint are not to the contrary. Only one of them actually held that a product allegedly "adulterated" in violation of the FDCA was *ipso facto* "valueless" or "worthless"—but that case is easily distinguished. *See Debernardis v. IQ Formulations, LLC*, 942 F.3d 1076 (11th Cir. 2019). *Debernardis* involved dietary supplements intentionally formulated with DMBA, a stimulant that the FDA had not approved for human consumption. The Eleventh Circuit noted that, under federal dietary supplement regulations, unapproved "new dietary ingredients" are "presumed to be unsafe for human consumption" and "cannot lawfully be sold." *Id.* at 1081-82, 1084-85 (noting that "Congress [had] judged [such ingredients] insufficiently safe for human ingestion"). The Eleventh Circuit "caution[ed]" that its decision was "limited to the specific facts alleged in th[at] case." *Id.* at 1088. Courts, including the Eleventh Circuit itself, have refused to follow *Debernardis* outside of this unique factual scenario. *See Marrache v. Bacardi*

U.S.A., Inc., 17 F.4th 1084, 1100-01 (11th Cir. 2021) ("declin[ing] to extend *Debernardis*' limited holding" to a product that Congress had not affirmatively "bann[ed]"); *Malgeri v. Vitamins Because LLC*, 2022 WL 16635274, at *10 (S.D. Fla. Sept. 30, 2022) (same).

In sum, Defendants did not promise to meet Scott's subjective desire for a product that was 100% benzene-free. At most, they implicitly promised a product that would safely do its job. Absent any plausible allegation that benzene in dry shampoo is actually unsafe at the levels at issue, Scott has failed to plead that she received anything less than the full benefit of her bargain.

B. Scott Lacks Standing to Seek Injunctive Relief

In addition to damages, Scott seeks unspecified "injunctive relief." Compl. ¶ 36 & Prayer for Relief. "Unlike with damages, a past injury alone is insufficient to establish standing for purposes of prospective injunctive relief." *Simic*, 851 F.3d at 738. Rather, "a plaintiff must face a 'real or immediate' threat of future injury." *Id.* The Complaint lacks any allegation that Scott ever intends to purchase OGX dry shampoo again. Absent such intent, she cannot possibly be deceived in the future, and a plaintiff who has "not alleged any likelihood of being deceived in the future ... do[es] not have standing to seek an injunction." *Geske v. PNY Techs., Inc.*, 503 F. Supp. 3d 687, 703 (N.D. Ill. 2020). Nor could Scott cure this deficiency by repleading: a plaintiff who is "now aware of [the challenged] sales practices ... is not likely to be [deceived] by the practices in the future," since she would go into any future transaction fully aware of the relevant facts. *Camasta v. Jos. A. Bank Clothiers, Inc.*, 761 F.3d 732, 741 (7th Cir. 2014); *see also Johnson v. Wal-Mart Stores Inc.,* 2016 WL 3753663, at *3 (S.D. Ill. July 14, 2016) ("That knowledge, standing alone, allows plaintiffs to avoid future harm[.]"). "[T]he prospect that *other* consumers may be deceived" absent an injunction is immaterial, since injury to third parties cannot confer standing on a named plaintiff who lacks it. *Ulrich v. Probalance, Inc.*, 2017 WL 3581183, at *7 (N.D. Ill. Aug. 18, 2017).

II. SCOTT FAILS TO STATE A CLAIM UNDER ANY CAUSE OF ACTION

A. Plaintiff Fails to State a Claim Under the ICFA

Scott fails to state an ICFA claim for at least three reasons. *First*, she fails to satisfy Rule 9(b)'s heightened pleading standard, which applies to ICFA claims "grounded in fraud." *Camasta*, 761 F.3d at 736-37; *see* Compl. ¶¶ 70-77 (alleging "misrepresentations, concealment, omissions, and other deceptive conduct"). To meet this standard, the Complaint must, at a minimum, specify "the time, place and content of the misrepresentation." *Windy City Metal Fabricators & Supply, Inc. v. CIT Tech. Fin. Servs., Inc.*, 536 F.3d 663, 668 (7th Cir. 2008). Moreover, "[e]ach instance of fraud must be alleged with 'precision and some measure of substantiation.'" *W. Palm Beach Firefighters' Pension Fund v. ConAgra Brands, Inc.*, 495 F. Supp. 3d 622, 634 (N.D. Ill. 2020). Scott fails to plead the "time, place, and content" of any alleged misrepresentations, and she fails to "substantiate" her allegations of fraudulent or deceptive conduct—*e.g.*, by pleading that the OGX canisters she purchased came from a lot in which Valisure detected benzene, or by providing any other support for her allegation that she purchased a contaminated unit of product.

Second, Scott fails to plead that Defendants made any statement or omission that would mislead a reasonable consumer in her position. *See Mashallah, Inc. v. W. Bend Mut. Ins. Co.*, 20 F.4th 311, 322 (7th Cir. 2021). "[A] reasonable consumer would not be so absolutist" as to assume that "there is no [benzene], even an accidental and innocuous amount," in any product they purchase. *Parks v. Ainsworth Pet Nutrition, LLC*, 377 F. Supp. 3d 241, 247 (S.D.N.Y. 2019); *see also Axon v. Florida's Natural Growers, Inc.*, 813 F. App'x 701, 705 (2d Cir. 2020) ("[A] reasonable consumer … would not make assumptions regarding the presence or absence of trace amounts of [an accidental contaminant]."). Unless benzene is actually "dangerous" at the levels "contained in [Scott's] specific" units of dry shampoo, which Scott has failed to plead, Defendants' failure to disclose its presence to her "would not be deceptive." *Ibarolla*, 2013 WL 672508, at *5.

Third, Scott fails to plead damages under the ICFA. "In a private ICFA action, the element of 'actual damages' requires that the plaintiff suffer *actual* pecuniary loss." *Camasta*, 761 F.3d at 739 (emphasis added). "[I]t is not enough" simply to claim that a defendant "deceived the plaintiff[] and induced [her] to buy" the products at issue. *Kim v. Carter's Inc.*, 598 F.3d 362, 365-66 (7th Cir. 2010). Instead, Plaintiff must show that she "pa[id] more than the actual value" of the products, or could have "obtained a better price in the marketplace." *Id.* Because Scott has not plausibly alleged that she purchased a product containing benzene—let alone in a material amount—she has not alleged facts showing actual pecuniary loss.

B. Plaintiff Fails to State a Claim for Fraud

Scott's fraud claim fails for at least three reasons. *First*, it does not satisfy Rule 9(b) for the same reasons that her ICFA claim fails to do so.

Second, Scott fails plausibly to plead the knowledge and intent elements of fraud. *See Lewis v. Lead Indus. Ass'n*, 178 N.E.3d 1046, 1055-56 (Ill. 2020) (plaintiff must plead that defendant "kn[ew]" of the statement's falsity "or believed [it] to be false" and "inten[ded to] induce" reliance on the statement). The Complaint contains no support for its conclusory assertion that Defendants "knew" their dry shampoo products contained, or even risked containing, an unsafe level of benzene. Compl. ¶ 86; *see Chicago Male Med. Clinic, LLC v. Ultimate Mgmt., Inc.*, 2012 WL 6755104, at *4 (N.D. Ill. Dec. 28, 2012) (conclusory assertion that a defendant "knew or should have known" insufficient to plead fraud). *A fortiori*, the Complaint fails to plausibly allege that Defendants intended that Scott rely on any misrepresentation or omission. *See Kinman v. Kroger Co.*, 2022 WL 1720589, at *7 (N.D. Ill. May 27, 2022) (conclusory allegation regarding intent insufficient to plead intent to induce reliance).

Third, for the reasons discussed above, Scott fails to allege that she suffered actual harm as a result of any misrepresentation or omission. *See supra* at 5-12, 14.

C. Scott's Unjust Enrichment Claim Fails

Under Illinois law, unjust enrichment is not a standalone claim. *Benson v. Fannie May Confections Brands, Inc.*, 944 F.3d 639, 648 (7th Cir. 2019). Thus, "if an unjust enrichment claim rests on the same improper conduct alleged in another claim, then the unjust enrichment claim will be tied to this related claim—and, of course, unjust enrichment will stand or fall with the related claim." *Cleary v. Philip Morris, Inc.*, 656 F.3d 511, 517 (7th Cir. 2011).

D. Scott Fails to State a Claim Under Other States' Consumer Protection Acts

Finally, Scott purports to assert claims under the consumer protection statutes of nine states where she does not reside and never purchased any OGX product. *See* Compl. ¶¶ 98-107. Just as the ICFA applies only when "the disputed transaction occur[red] ... in Illinois," *Morrison v. YTB Int'l, Inc.*, 649 F.3d 533, 536 (7th Cir. 2011), other consumer protection statutes require a sufficient nexus between the disputed transaction and the relevant state.[4] Here, Scott alleges no facts that supply any connection with these nine states. "Courts in this District routinely dismiss or strike" out-of-state consumer protection claims in these circumstances. *Brown v. Auto-Owners Ins. Co.*, 2022 WL 2442548, at *2 (N.D. Ill. June 1, 2022); *see, e.g.*, *Smith-Brown v. Ulta Beauty, Inc.*, 2019 WL 932022, at *6 (N.D. Ill. Feb. 26, 2019) (dismissing "claims on behalf of class members in states where they do not reside and were not injured").

CONCLUSION

For the reasons above, the Complaint should be dismissed in its entirety.

[4] *See Norwest Mortg., Inc. v. Superior Court*, 85 Cal. Rptr. 2d. 18, 25 (Cal. Ct. App. 1999); *Millennium Commc'ns & Fulfilment, Inc. v. Office of Attorney General*, 761 So. 2d 1256, 1262 (Fla. Dist. Ct. App. 2000); Mass. Gen. Laws ch. 93A, § 11; *Sexton v. Ryder Truck Rental, Inc.*, 320 N.W.2d 843, 854 (Mich. 1982); *Johannessohn v. Polaris Indus. Inc.*, 450 F.Supp.3d 931, 962 (D. Minn. 2020); *State ex rel. Nixon v. Estes*, 108 S.W.3d 795, 800–01 (Mo. Ct. App. 2003); *Blackhall v. Access Group*, 2010 WL 3810864, at *5 (D.N.J. Sept. 22, 2010); *Goshen v. Mut. Life Ins. Co.*, 98 N.Y.2d 314, 325 (N.Y. 2002); *Thornell v. Seattle Serv. Bureau, Inc.*, 363 P.3d 587, 592 (Wash. 2015).

Dated: February 8, 2023

By: /s/ Steven A. Zalesin

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CERTIFICATE OF SERVICE

I, Steven A. Zalesin, hereby certify that this document filed through the ECF system on February 8, 2023 will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF).

/s/ Steven A. Zalesin