UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

TODD CONSOLAZIO, individually and on behalf of all others similarly situated,	:	No.: 1:20-cv-03477-LLS
Plaintiff,	:	Hon. Louis L. Stanton
v.	:	
AC2T, INC., BONNER ANALYTICAL TESTING CO., and JEREMY HIRSCH.	:	
Defendants.	:	

MEMORANDUM OF LAW OF AC2T, INC. AND JEREMY HIRSCH IN SUPPORT OF MOTION TO DISMISS COMPLAINT

Edward P. Boyle
Anna G. Dimon
VENABLE LLP
Rockefeller Center
1270 Avenue of the Americas, 24th Floor
New York, NY 10020
Tel: (212) 808-5675
epboyle@venable.com
agdimon@venable.com

Attorneys for Defendants AC2T, Inc. and Jeremy Hirsch

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Pursuant to Rules 12(b)(2) and 12(b)(6) of the Federal Rules of Civil Procedure, Defendants AC2T, Inc. d/b/a Spartan Mosquito ("Spartan") and Jeremy Hirsch ("Hirsch") (and together with Spartan, the "Spartan Defendants") respectfully submit this memorandum of law in support of their motion to dismiss Plaintiff Todd Consolazio's ("Plaintiff") Class Action Complaint filed on May 4, 2020 (the "Complaint"), for lack of personal jurisdiction over Hirsch and failure to state a claim.

PRELIMINARY STATEMENT

Spartan manufactures and sells Spartan Mosquito Eradicator (the "Product"), a device that consumers can hang in their yards to decrease the mosquito population. The Product contains a unique formulation of sugar, salt, and yeast, and its instructions direct consumers to activate the Product by adding warm water, which naturally evaporates over time. As the Product package states, when used as directed, the Product "[e]radicates your mosquito population for up to 90 days" and serves as "do-it-yourself mosquito control."

All of Plaintiff's claims depend on the theory that the representations on the package are false because the Product supposedly does not work. This theory is not supported by any allegation of fact, however, and the Complaint thus fails to state any claim for which Plaintiff could obtain relief.

The Complaint does not allege that the Product has been tested to determine its efficacy when used as directed—let alone that any such study concluded that the Product does not kill mosquitoes. Instead, the Complaint pieces together references to various textbooks and articles, in an attempt to create the illusion of scientific support for Plaintiff's theory. Critically, *none* of the cited textbooks or articles mentions the Product, let alone addresses how well it kills mosquitoes. None of the sources cited in the Complaint relate to, let alone contradict, the

statements at issue on the Product label: that the Product "[e]radicates your mosquito population for up to 90 days" and provides "do-it-yourself mosquito control" when used as directed. In fact, none of the sources cited in the Complaint relates to the efficacy of any mosquito repellant. Instead, these sources discuss unconnected topics such as artificial diets for mosquitoes, mosquitoes' consumption of plants, and the interactions between bumblebees and nectar-inhabiting yeast. This mismatch between Plaintiff's scientific support and the statements at issue is fatal to his claims, as there is no plausible factual basis alleged to support Plaintiff's claims.

Nor do any of the cited articles demonstrate that the individual ingredients in the Product are ineffective to kill mosquitoes. The Product's advertising claims are based on its overall formulation and device structure, and use in accordance with directions. For example, the Complaint cites two textbooks to allege that certain levels of salinity in water do not kill mosquitoes. The cited texts do not address the level of salinity in the Product. Nor do they address the combination of salt with the other ingredients in the Product, and how that combination of ingredients works over time as the water evaporates. Because none of the cited texts or articles examine the overall formulation of ingredients in the Product that supports the statements on the Product label, these allegations do not plausibly support Plaintiff's claims.

Apart from these textbooks and articles, the Complaint's other factual allegations also fail to state a claim. Plaintiff alleges that the testing behind Spartan's label claims is inadequate. These allegations are not true; but even if they were, they would demonstrate at most a lack of substantiation behind the advertising statements at issue, not falsity. Without factual allegations affirmatively explaining that the Product does not "eradicate[] your mosquito population for up to 90 days" when used as directed, Plaintiff has failed to support his claim. As a matter of law,

anecdotal allegations that the Product did not work for Plaintiff does not, standing alone, state a false advertising claim.

These deficiencies in the Complaint warrant dismissal of all of Plaintiff's claims. In addition, there are independent reasons to dismiss particular parties and claims in this action.

First, as a threshold matter for Defendant Hirsch, he is not subject to personal jurisdiction in New York, and all claims against him should be dismissed under Rule 12(b)(2). Hirsch is a Mississippi resident. The Complaint does not allege that he has had any contacts with the State of New York at all, let alone contacts relating to Plaintiff's claims. The mere allegation that Hirsch is a "spokesman" for Spartan does not allow Plaintiff to sue Hirsch in New York, as there is no connection between this "spokesman" allegation and Plaintiff's claims. Plaintiff alleges he purchased the product after reviewing the Product's label; he does not allege that anything Hirsch said as "spokesman" had any impact on Plaintiff's purchasing decision. Indeed, Plaintiff's failure to allege that Hirsch caused him any injury is an additional reason to dismiss all claims against Hirsch under Rule 12(b)(6) as well.

Second, Plaintiff lacks standing to seek injunctive relief because he alleges that he would not have purchased the Product or would have paid a substantially reduced price had he known of its allegedly false advertising. Therefore, Plaintiff has admitted that he could not be "deceived" again and so faces no possibility of future injury.

Third, Plaintiff's unjust enrichment claim should be dismissed because it is duplicative of his other deficient claims and because Plaintiff has not pleaded any additional allegations to explain why "equity and good conscience" require restitution, an equitable remedy.

ALLEGATIONS AND RELEVANT FACTS INCORPORATED IN COMPLAINT BY REFERENCE[1]

I. The Product

The Product provides a "uniquely effective, long-lasting, continuous mosquito control system." *See* Declaration of Edward P. Boyle, dated August 27, 2020 ("Boyle Decl.") ¶ 2 & Ex. 1. According to the Product package, which is incorporated by reference in the Complaint, the Product is a tube-shape device with access holes for mosquitoes; the active ingredient is 11.48% sodium chloride and the inert ingredients are 88.34% and 0.18% of sucrose and yeast, respectively. *Id*. One box per acre is to be used at the start of mosquito season to achieve desired results, and if deployed later, then the number of tubes should be doubled. *Id*. The Product also contains detailed instructions on how to prepare and hang the Product, including instructions to "remove the temporary white cap and fill with WARM water to the fill line indicated on the back of the tube." *Id*. at ¶ 3 & Ex. 2. The same instruction sheet that is included inside the Product package provides guidance on when to replace the Product, noting to "Ensure the water level remains above the WATER LEVEL LOW line for optimal performance." *Id*. The Product's website also directs the user to "replace [the Spartan Mosquito Eradicator] at least every 90 days." Compl. ¶ 3. Further, purchase is not necessary to read the full instructions, as the Product package clearly states: "SEE OUR INSTRUCTIONS ONLINE AT WWW.SPARTANMOSQUITO.COM." *Id*. at ¶ 2 & Ex. 1.

[1] There are numerous inaccurate, misleading, and incomplete allegations in the Complaint. This Rule 12(b)(6) motion is not the appropriate vehicle to address those allegations: Even with these inaccurate allegations, the Complaint fails to plead a viable cause of action and should be dismissed. Accordingly, the Spartan Defendants reserve their rights to correct Plaintiff's misstatements at a later time.

II. Allegations in the Complaint

The Complaint alleges that the Product represents that it "eradicate[s] your mosquito population for up to 90 days," provides "do-it-yourself mosquito control," "[s]ignificantly decreases population within 15 days," and "[p]rovides up to 95% mosquito control for up to 90 days." Compl. ¶¶ 2-3. The Complaint further alleges that these representations were false, based on the conclusory assertion that the Product "is ineffective for mosquito control because it does not kill mosquitoes or decrease mosquito populations." *Id.* ¶ 4. The Complaint also alleges that a graph on the back of the Product's packaging is false because it is supposedly based on a "scientifically invalid" test performed by defendant Bonner Analytical. *Id.* ¶¶ 20-23.

Plaintiff claims to reside in New York County. *Id.* ¶ 27. He alleges that he purchased the Product from a Lowe's store in Manhattan for approximately $20 in the summer of 2018. *Id.* Plaintiff claims that he carefully reviewed the Product's labeling, including its statements that it "eradicate[s] your mosquito population for up to 90 days" and that it provides "do-it-yourself mosquito control," and he believed that "the Product would effectively eliminate mosquitoes." *Id.* Plaintiff alleges that he relied on these representations to purchase the Product; he does not allege that he relied on—or even saw—any advertising or marketing for the Product. *See id.* He claims that he used the Product according to its directions but that it "did not provide effective mosquito control as advertised." *Id.*

Based on these allegations, Plaintiff seeks to represent a class of all people in the United States and New York who have purchased the Product. *Id.* ¶¶ 34-35. The Complaint asserts causes of action against all Defendants for (i) violations of New York General Business Law §§ 349 and 350 (Counts I and II), *see id.* ¶¶ 41-54; (ii) unjust enrichment (Count III), *see id.* ¶¶ 55-60; (iii) breach of express warranty (Count IV), *see id.* ¶¶ 61-66; (iv) Magnuson-Moss Warranty

Act (Count V), *see id.* ¶¶ 67-75; and (v) fraud (Count VI). *See id.* ¶¶ 76-81. Plaintiff seeks injunctive relief, compensatory, statutory, and punitive damages, including treble damages, restitution, reasonable attorneys' fees, and costs and expenses. *Id.* ¶¶ 47, 54, 60, & 82.

III. Plaintiff's Alleged "Scientific Support"

Plaintiff's core contention is that the Product's combination of ingredients—sugar, salt, and yeast—cannot kill mosquitoes. *See* Compl. ¶¶ 5, 8, 13. The Complaint asserts in conclusory fashion that the Product's salt content is "remarkably close to the salt content in human blood—1% of the Product solution vs. .9% observed in human blood," without addressing how natural evaporation affects that salt content in the tubes over time when the Product is used in accordance with the directions. *See id.* at ¶ 8.

The Complaint cites to several scientific authorities, none of which says anything about the Product, or the combination of ingredients in the Product. Nor do any of these sources analyze whether the combination of ingredients in the Product is effective to kill mosquitoes. The sources identified in the Complaint are described below:

- Plaintiff cites the textbook "The Biology of Mosquitoes" by Clements (the "Clements Textbook"), published in 2000, as support for its allegation that "mosquitoes simply urinate [] salt out." Compl. ¶ 9. Chapter 16 of the Clements textbook provides that a mosquito's urine has a higher concentration of sodium after a blood meal; it does not suggest that mosquitoes urinate out all salt that is ingested. *See* Boyle Decl. ¶ 4, Ex. 3. The chapter does not say whether salt content at higher levels is toxic for mosquitoes when ingested. *See id.* Plaintiff does not allege what the salt concentration is in the Product after the added water evaporates. *See* Compl. ¶¶ 8, 9.
- Plaintiff cites a 1960 textbook titled "Aedes aegypti. The yellow fever mosquito: Its

life history, bionomics and structure" by Christophers (the "Christophers Textbook"), to allege that "mosquitoes have taste receptors and are capable of detecting a food's salt content" and that "[i]f a food or liquid is too salty, mosquitoes will not consume it and will not lay eggs there." Compl. ¶ 10. This description of the Christopher Textbook is inaccurate, as the text does not address whether excessive salt will dissuade mosquitoes from consuming food or laying eggs. *See* Boyle Decl. ¶ 5, Ex. 4. Rather, it cites numerous other studies that indicate mosquitoes will lay their eggs in water with varying ranges of salt content. *See id.*

- Plaintiff cites a 2016 article titled "Artificial diets for mosquitoes" by Gonzales (the "Gonzales Article") to support its allegation that the "consumption of salt content in mosquitoes causes them to consume *more* blood than they otherwise would have." Compl. ¶ 11 (emphasis in original). The Gonzales Article reviews "older and recent studies that were aimed at the development of artificial diets for mosquitoes in order to replace vertebrate blood." *See* Boyle Decl. ¶ 6, Ex. 5. Specifically regarding salt, the Gonzales Article cites: (i) a 1959 study that found "sodium chloride at 150 mM acted as a phagostimulant for *Culex pipiens* mosquitoes;" (ii) a 1967 study that found "[e]ngorgement rates of about 70% were observed while there was no feeding on distilled water," and (iii) a 1985 study "on anopheline mosquitoes [that] found that *An. stephensi*, *An. freeborni*, and *An. dirus* imbibed artificial meals containing sodium chloride and sodium bicarbonate, indicating that these chemicals are phagostimulatory." *Id.* at 8. At most, the dated sources described in the Gonzales Article support the proposition that mosquitoes are attracted to salt content. This source does not address whether there is a level of salinity that mosquitoes will

consume which is toxic to their systems. *See id.*

- Plaintiff alleges that an unspecified "large, ongoing study . . . examined the effect of consumption of solutions with 1.03% salt and 8% sugar . . . ." Compl. ¶ 12 (the "Unspecified Study"). These allegations are immaterial because Plaintiff does not allege that the Unspecified Study tested the Product, or that the solutions examined in the Unspecified Study are the same as the solutions in the Product. Indeed, the Complaint does not allege what the salt content of the Product is when used as directed—a process which necessarily involves a change in salinity as the added water evaporates. *See id.* Further, the Complaint does not allege that the Unspecified Study used the Product as directed in its study. *See id.*
- Plaintiff alleges that an article titled "Mosquito Phytophagy—Sources Exploited, Ecological Function and Evolutionary Transition to Haematophagy" by Peach (the "Peach Article") states that "[w]ild yeast is ubiquitous in nature and it causes fermentation of rotting (sugary) fruit, which is a preferred food for mosquitoes." Compl. ¶ 13. That article merely "summarize[s] the current knowledge about mosquito phytophagy and outline[s] future research needs." *See* Boyle Decl. ¶ 7, Ex. 6. And in any case, the proposition that yeast is found in "preferred food for mosquitoes" is consistent with the Product attracting mosquitoes; it certainly does not suggest the Product is ineffective.
- Plaintiff cites the study "Consequences of a nectar yeast pollinator preference and performance" by Schaeffer (the "Schaeffer Study") to allege that "wild yeasts are also regularly found in nectar, another preferred mosquito food." Compl. ¶ 13. That study examines "the behavioural and reproductive consequences of interactions between the

bumblebee *B. impatiens* and the nectar-inhabiting yeast *Metschnikowia reukaufii* (Metschnikowiaceae)." *See* Boyle Decl. ¶ 8, Ex. 7. Again, this article is consistent with the Product being effective.

- Plaintiff cites the article "The Plasmodium bottleneck: malaria parasite losses in the mosquito vector" by Smith (the "Smith Article") to allege that yeast is "already present in mosquitoes' intestinal microbiota." Compl. ¶ 14. The Smith Article "discuss[es] the multiple mechanisms that limit [malaria] survival in the mosquito," "describe[s] mechanisms that the parasite has evolved to evade some of these antiplasmodial responses," and "addresss[es] strategies that are under consideration to target *Plasmodium* development in the mosquito and discuss[es] future challenges that need to be overcome in order to succeed in any malaria transmission-blocking (TB) strategy." *See* Boyle Decl. ¶ 9, Ex. 8. Again, none of this is relevant to whether the Product is effective at killing mosquitoes.
- Plaintiff cites the article "Mosquitoes can harbor yeasts of clinical significance and contribute to their environmental dissemination" by Bozic (the "Bozic Study") to allege that "[y]east is an important and necessary part of mosquito microbiota, just as sugary objects are a natural food source for mosquitoes." Comp. ¶ 14. The Bozic Study "report[s] the results of an investigation of the fungal community in different mosquito species of public health significance." Boyle Decl. ¶ 10, Ex. 9. Again, this is not material to whether the Product is effective. *See id.*
- Plaintiff cites an article titled, "Mosquito-Fungus Interactions and Antifungal Immunity, Insect Biochemistry and Molecular Biology" by Tawidian (the "Tawidian Article") to allege that "yeast and sugar are also found in human blood." Compl. ¶

14. The Tawidian Article is a review that "summarize[s] the potential environmental and molecular interactions of mosquito adults and larvae with fungi and water molds." *See* Boyle Decl. ¶ 11, Ex. 10. Again, this has no bearing on whether the Product is effective.

- Plaintiff provides a link to a website for the "Mosquito Illness Alliance," which lists the Product under "Myths/Scams (Products that do not work)." Compl. ¶ 15. The Mosquito Illness Alliance website claims that the Product is "'based on a 'yeast trap design' and its claims of efficacy 'have been debunked repeatedly by independent research.'" *See* Boyle Decl. ¶ 12, Ex. 11. The Mosquito Illness Alliance website does not cite any research, independent or otherwise, to support its assertions. *See id.* Indeed, other texts cited in the Complaint support the proposition that the yeast in the Product is attractive to mosquitoes.

IV. Plaintiff's Allegations Concerning Hirsch

The Complaint asserts claims against Hirsch in his individual capacity. Plaintiff alleges that Hirsch is the President of Spartan, and "acts as Spartan's spokesperson, regularly promoting the Product on television and other media." *Id.* ¶ 30. Plaintiff does not allege that he ever saw or heard any statement by Hirsch promoting the Product, or that any such statement led him to buy the Product. *See id.* ¶ 27. Instead, Plaintiff alleges that he bought the Product in reliance on the statements on the Product label—and nothing more. *Id.*

Plaintiff alleges that Hirsch "has personally participated in [a] campaign of intimidation and concealment." *Id.* ¶ 30. There are no allegations that any of this supposed conduct took place in New York, caused harm to anyone in New York, or has any relationship to Plaintiff's claims.

STANDARDS FOR MOTION TO DISMISS

Rule 12(b)(2)

On a Rule 12(b)(2) motion, the plaintiff bears the burden of establishing personal jurisdiction over each defendant by a preponderance of the evidence. *Karabu Corp. v. Gitner*, 16 F. Supp. 2d 319, 322 (S.D.N.Y. 1998). The Court may consider materials outside the pleadings on a Rule 12(b)(2) motion, including "affidavits and other written materials." *MMA Fighter Mgmt., Inc. v. Ballengee Grp., LLC*, No. 19-11276, 2020 WL 3000401, at *2 (S.D.N.Y. June 4, 2020) (citation omitted); *see also Vista Food Exch., Inc. v. Champion Foodservice, LLC*, 124 F. Supp. 3d 301, 307 (S.D.N.Y. 2015)

In a diversity action such as this one, the Court must determine whether the defendant is "amenable to service of process under" New York law and whether it would "comport[] with the requirements of due process" for the Court to assert jurisdiction over him under that law. *MMA Fighter Mgmt., Inc.*, 2020 WL 3000401, at *2. In New York, a defendant may be subject to personal jurisdiction based on general jurisdiction pursuant to N.Y. C.P.L.R. 301 or specific jurisdiction pursuant to N.Y. C.P.L.R. 302. *Id.*

Rule 12(b)(6)

A motion to dismiss under Rule 12(b)(6) will be granted unless the complaint contains "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Geffner v Coca-Cola Co.*, 928 F.3d 198, 199 (2d Cir. 2019) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)) (quotations omitted). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged," a standard which "demands more than a sheer possibility that a defendant has acted unlawfully." *Fink v. Time Warner Cable*, 714 F.3d 739, 741 (2d Cir. 2013)

(quoting *Iqbal*, 556 U.S. at 678).

In a false advertising case, the "primary evidence" is "the advertising itself." *Id.* at 742. Therefore, "[i]n a case alleging deceptive advertising, a court may consider the full content of the relevant advertisement even if not contained in" the Complaint. *Boshnack v. Widow Jane Distilleries LLC*, No. 19-8812, 2020 WL 3000358, at *2 (S.D.N.Y. June 4, 2020) (citing *Fink*, 714 F.3d at 741); *see also Bowring v. Sapporo U.S.A., Inc.*, 234 F. Supp. 3d 386, 389 (E.D.N.Y. 2017) (taking judicial notice of "complete labels for each variety of Sapporo beer" challenged by plaintiff); *Davis v. Hain Celestial Grp., Inc.*, 297 F. Supp. 3d 327, 332 n.3 (E.D.N.Y. 2018) ("When a plaintiff relies on a document (or, as here, a label) in drafting his complaint, it is appropriate for the court to consider that document in deciding a motion to dismiss.").

The Court can also take judicial notice of the textbooks, articles, and studies cited by Plaintiff as documents incorporated by reference into the Complaint. *See, e.g., Kalyanaram v. Am. Ass'n of Univ. Professors at N.Y. Inst. of Tech., Inc.*, 742 F.3d 42, 44 n.1 (2d Cir. 2014) ("In ruling on a 12(b)(6) motion . . . a court may consider the complaint as well as any written instrument attached to [the complaint] as an exhibit or any statements or documents incorporated in it by reference.") (citation and internal quotation marks omitted).

ARGUMENT

I. The Claims Against Hirsch Should Be Dismissed Under Rule 12(b)(2) Because He Is Not Subject to Personal Jurisdiction in New York.

As a preliminary matter, Hirsch should be dismissed from this case because he is not subject to either general or specific jurisdiction under New York law. *See MMA Fighter Mgmt., Inc.*, 2020 WL 3000401, at *2 (a court sitting in diversity in New York must determine whether the plaintiff has shown that a non-resident defendant is subject to general jurisdiction under N.Y. C.P.L.R. 301 or specific jurisdiction under N.Y. C.P.L.R. 302).

As Plaintiff concedes, Hirsch is a Mississippi resident. Compl. ¶ 30; Declaration of Jeremy Hirsch, dated August 26, 2020 ("Hirsch Decl.") ¶ 1. Hirsch does not reside, own property, hold bank accounts, or conduct personal business in New York. Hirsch Decl. ¶ 2. He does not regularly travel to New York. *Id.* ¶ 3. The last time Hirsch was in New York was a two-day trip to Plattsburgh in the summer of 2005, for personal reasons. *Id.* Hirsch is no longer the President of Spartan; that position is held by Anthony Brett Conerly. *Id.* ¶ 5. Moreover, Hirsch does not direct Spartan's marketing strategy with respect to New York; in fact, Spartan does not have a New York-specific marketing strategy. *Id.* ¶ 6.

Therefore, the Court does not have general jurisdiction over Hirsch because he is not "domiciled in New York," has not been "served with process in New York," and does not "continuously or systematically do business in New York" in his individual capacity. *Giuliano v. Barch*, No. 16-0859, 2017 WL 1234042, at *4 (S.D.N.Y. Mar. 31, 2017); *see also Bustamante v. Atrium Med. Corp.*, No. 18-08395, 2020 WL 583745, at *2 (S.D.N.Y. Feb. 6, 2020) (noting that since the Supreme Court's guidance in *Daimler AG v. Bauman*, 571 U.S. 117 (2014), New York "exercises general personal jurisdiction *only* if the [party's] affiliations with the state are so continuous and systemic as to render them essentially at home in [New York]") (emphasis added) (internal quotations omitted).

Hirsch's alleged work for Spartan does not give rise to jurisdiction. "Where an individual defendant is acting on behalf of a corporation, he does not subject himself to personal jurisdiction under § 301." *MMA Fighter Mgmt., Inc.*, 2020 WL 3000401, at *3 ("All of Pierson's alleged New York activity was conducted on behalf of Ballengee, not in an individual capacity. Thus, it is not a basis for jurisdiction under C.P.L.R. 301.") (citation omitted); *see also Giuliano*, 2017 WL 1234042, at *5 ("[I]ndividuals acting on a corporation's behalf are not

subject to general personal jurisdiction under Section 301"). Further, "a general allegation that an officer controls a corporation is not sufficient to establish jurisdiction." *Pilates, Inc. v. Current Concepts Kenneth Endelman*, No. 96-0043, 1996 WL 599654, at *3 (S.D.N.Y. Oct. 18, 1996).

The Complaint also fails to establish that Hirsch "transacted business in New York within the meaning of" N.Y. C.P.L.R. 302(a) to create specific jurisdiction." *See Giuliano*, 2017 WL 1234042, at *7. Under New York law, specific jurisdiction "requires a finding that the non-domiciliary's activities were purposeful and established a substantial relationship between the transaction and the claim asserted." *Id.* (citation omitted). Plaintiff must show "[m]ore than limited contacts," and "New York case law makes clear that it is the quality of the defendant['s] New York contacts that is the primary consideration in a 302(a)(1) analysis." *Id.* (citations and internal quotation marks omitted).

Plaintiff has not pled *any* facts connecting Hirsch to New York. *See Ballard v. Walker*, No. 11-5874, 2013 WL 6501234, at *1-2 (S.D.N.Y. Dec. 11, 2013) (Stanton, J.) (dismissing complaint on the grounds that it did "not even mention that anyone did any of the alleged acts in New York"). Plaintiff merely alleges that Hirsch "acts as Spartan's spokesperson, regularly promoting the Product on television and other media" and that he "personally participated in the campaign of intimidation and concealment . . . ." Compl. ¶ 30. None of those allegations relates to conduct specifically directed to or conducted within New York. Nor does the Complaint allege that any action by Hirsch as "spokesperson" had any relation to Plaintiff's claims: Plaintiff does not allege that he purchased the product based on any statements by Hirsch, and instead only alleges that he relied on the statements on the Product's label. Plaintiff bears the burden of establishing personal jurisdiction over Hirsch, and fails to do so. *See, e.g.*, *Ball v.*

Metallurgie Hoboken-Overpelt, S.A., 902 F.2d 194, 196 (2d Cir. 1990). Having failed to make anything close to a prima facie case of personal jurisdiction, the claims against Hirsch must be dismissed. *See, e.g.*, *Karabu Corp.*, 16 F. Supp. 2d at 326.

The *Karabu Corp. v. Gitner* decision from this District is instructive. *Karabu* addressed the circumstances where "the senior officers of a large national corporation, who themselves do not live in New York, work in New York, or have personal dealings in New York, can nevertheless be subject to personal jurisdiction in [New York] based upon their corporate employer's activities in [New York.]" 16 F. Supp. 2d at 320. The court found that the officers were not subject to personal jurisdiction in New York and dismissed the complaint against them. *Id*. at 326. Particularly relevant here, *Karabu* held that "[s]uing the out-of-state officers of a . . . corporation based only upon their title, and absent any good faith basis for believing that they personally participated in the conduct underlying plaintiffs' lawsuit, will not confer jurisdiction under a theory of agency." *Id*. at 325. By this same reasoning, the claims against Hirsch should be dismissed, as he is also an out-of-state defendant and there is no allegation that he personally participated in any conduct underlying Plaintiff's claims.

II. All Claims in the Complaint Should Be Dismissed Under Rule 12(b)(6) Because There Are No Factual Allegations that the Product's Advertising Is False.

Under Rule 12(b)(6), the entire Complaint should be dismissed for failure to allege facts that could plausibly lead to a conclusion that the representations on the Product label are false.

All Plaintiff's claims are based on the unsupported conclusion that the Product is a "scam" and "does not kill mosquitoes or decrease mosquito populations." Compl. ¶ 4. The only supposed facts offered for this conclusion are snippets from various scientific articles and textbooks that, on their own and taken together, have no relevance to the Product, its efficacy, or Plaintiff's alleged injury. Plaintiff has "chosen to use scientific studies in an effort to raise

plausible inferences" that the Product's advertising claims "are simply not true." *Kardovich v. Pfizer, Inc.*, 97 F. Supp. 3d 131, 141 (E.D.N.Y. 2015). "Because the studies cited do not do so, . . . all of plaintiff['s] claims fail to meet the standards under" Rule 12(b)(6). *Id.*

A. None of Plaintiff's Scientific Support Studied the Product.

On a Rule 12(b)(6) motion, the Court may read the scientific sources cited in the Complaint to consider whether it supports Plaintiff's claims. "[W]here scientific studies are cited and thus incorporated into the complaint, and where those studies simply do not support the allegations, the Court may find that the deficiencies go to the very heart of the plausibility standard under *Iqbal*." *Sabol v. Bayer Healthcare Pharm., Inc.*, 439 F. Supp. 3d 131, 148 (S.D.N.Y. 2020) (citation and internal quotation marks omitted); *see also Kardovich*, 97 F. Supp. 3d at 140-41 (analyzing plaintiffs' studies on a motion to dismiss because "where a conclusory allegation in the complaint is contradicted by a document attached to the complaint, the document controls and the allegation is not accepted as true") (quoting *Amidax Trading Grp. v. S.W.I.F.T. SCRL*, 671 F.3d 140, 146–47 (2d Cir. 2011)) (quotation marks omitted); *Eckler v. Wal-Mart Stores, Inc.*, No. 12-727, 2012 WL 5382218, at *6 (S.D. Cal. Nov. 1, 2012) (stating that "it's not really arguing the merits to claim . . . that the studies on which Eckler relies didn't even test the actual formulation of Equate. If that's true, the studies simply wouldn't show what Eckler claims they do, and the Court would be left with no facts from which to infer that Wal–Mart is liable for false advertising").

Numerous courts have held that scientific studies and articles that do not examine the product at issue cannot show the falsity of its advertising. *See, e.g., Aloudi v. Intramedic Research Grp., LLC*, 729 F. App'x 514, 516 (9th Cir. 2017) ("Aloudi's complaint also refers to a mouse study allegedly showing that chlorogenic acid contributes to increased insulin resistance and fatty liver disease. None of these allegations involves scientific testing of the actual

JavaSLIM product or a product with the same active ingredients as JavaSLIM, in a dose similar to that in JavaSLIM."); *Tomasino v. Estee Lauder Cos. Inc.*, 44 F. Supp. 3d 251, 258 (E.D.N.Y. 2014) (granting motion to dismiss because, among other reasons, plaintiff "points to nothing, in the form of scientific evidence or otherwise, that could discredit Estee Lauder's statements about the ANR products' skin benefits); *Tubbs v. AdvoCare Int'l, LP*, No. 17–4454, 2017 WL 4022397, at *6 (C.D. Cal. Sept. 12, 2017) (granting motion to dismiss; finding that "studies that did not involve the products at issue [are] insufficient" in demonstrating falsity); *Eckler*, 2012 WL 5382218, at *6 (granting motion to dismiss, noting that "[t]he first problem for Eckler, as Wal–Mart points out, is that none of these studies actually involved Equate."); *see also Spector v. Mondelez Int'l, Inc.*, No. 15-4298, 2017 WL 4283711, at *4 (N.D. Ill. Sept. 27, 2017) (granting motion to dismiss because, among other things, plaintiff did not allege the existence of any testing or studies regarding the product that directly contradicted the defendant's claim about the product's efficacy). These courts have recognized that, when products "contain[] a number of ingredients," it is the "overall formulation that's behind the representations at issue." *Eckler*, 2012 WL 5382218, at *6; *see also Spector*, 2017 WL 4283711, at *5; *Hodges v. Vitamin Shoppe, Inc.*, No. 13–3381, 2014 WL 200270, at *4 (D. N.J. Jan. 15, 2014) (finding that the "assertion that the Product is ineffective appears, however, to be based on Plaintiff's own conclusion as to the inability of the Product's four active ingredients … to deliver the promised benefits.").

Here, the Complaint does not cite any articles or studies that examined the actual Product or its unique formulation. In fact, none of Plaintiff's scientific support relates to the efficacy of any mosquito repellant product. Instead, Plaintiff relies on: (i) the Clements Textbook, a 20-year-old text textbook regarding mosquitoes generally, *see* Compl. ¶ 9 & Boyle Decl. Ex. 3; (ii) the Christophers Textbook, a 60-year-old textbook also regarding mosquitoes generally that

indicates mosquitoes will lay their eggs in water containing varying levels of salt, *see* Compl. ¶ 10 & Boyle Decl. Ex. 4; (iii) the Gonzales Article, which collects and reviews other studies regarding the development of artificial diets for mosquitoes, *see* Compl. ¶ 11 & Boyle Decl. Ex. 5; (iv) the Peach Article, which reviews and summarizes others' research regarding mosquitoes' phytophagy (*i.e.*, their consumption of plants), *see* Compl. ¶ 13 & Boyle Decl. Ex. 6; (v) the Schaeffer Study, which examines "interactions between" bumblebees and nectar-inhabiting yeast, *see* Compl. ¶ 13 & Boyle Decl. Ex. 7; (vi) the Smith Article, which addresses mechanisms to limit malaria transmission through mosquitoes, *see* Compl. ¶ 14 & Boyle Decl. Ex. 8; (vii) the Bozic Article, which investigates "the fungal community in different mosquito species," *see* Compl. ¶ 14 & Boyle Decl. Ex. 9; and (viii) the Tawidian Article, which merely reviews other research about interactions between mosquito adults and larvae with fungi and water molds. *See* Compl. ¶ 14; Boyle Decl. Ex. 10.

None of these sources analyzes, cites to, or even mentions the Product, its formulation, or its particular approach to killing mosquitoes. Plaintiff cites each source to make a point about a single ingredient in the Product, without regard to that particular ingredient's concentration or function in the Product in combination with the other ingredients. For example, the Complaint cites the Clements and Christophers Textbooks to make allegations about mosquitoes' consumption of salt. *See* Compl. ¶¶ 9-10. But the Product is not just salt; it is a particular blend of specific amounts of salt, yeast, and sugar, in a specially-designed device, to which a specific amount of warm water is added by the user. *See* Compl. ¶ 5; Boyle Decl. Exs. 1 & 2. That is the "overall formulation that's behind the representations at issue." *Eckler*, 2012 WL 5382218, at *6. Plaintiff's attempt to isolate each ingredient does not show anything about the falsity of the Product's advertising.

Plaintiff's reliance on the Unspecified Study fails for the same reason. *See* Compl. ¶ 12. The Complaint concedes that this alleged study tested "solutions" containing only salt and sugar, not the formulation of the Product in its device with warm water added. *See id.* Moreover, Plaintiff pleads that the solutions used in the study contained only "approximately" the same concentrations of salt and sugar used in the Product. *Id.* Therefore, the Unspecified Study does not support an allegation that the Product's advertising is false.

Finally, Plaintiff acknowledges that water is added to the device to create a "four-ingredient solution." Compl. ¶ 5. None of Plaintiff's studies addresses the toxicity of the concentration of ingredients in the Product that would result when the Product is used as directed—meaning, the toxicity of the ingredients in the Product when water is added, the device is placed in the field, and the concentration levels change as the water evaporates. That is essential to any analysis of the efficacy of the Product, and without it, Plaintiff cannot show the falsity of the Product's efficacy claims.

B. None of Plaintiff's Scientific Support Analyzes the Product's Advertising Claims.

"In the false advertising context, an advertising claim is false if it has actually been disproved, that is, if the plaintiff can point to evidence that directly conflicts with the claim." *Kwan v. SanMedica Int'l, LLC*, No. 14-03287, 2015 WL 848868, at *4 (N.D. Cal. Feb. 25, 2015), *aff'd sub nom. Kwan v. SanMedica Int'l*, 854 F.3d 1088 (9th Cir. 2017) (citation and internal quotation marks omitted); *see also Engel v. Novex Biotech LLC*, No. 14–03457, 2015 WL 846777, at *5 (N.D. Cal. Feb. 25, 2015) (dismissing plaintiff's false advertising claim for, in part, failure to allege that defendants' claims could be scientifically disproven). Thus, courts have found scientific studies cannot show falsity if they do not examine the actual advertising claims at issue. *See, e.g.*, *Eckler*, 2012 WL 5382218, at *7 ("[T]he Court cannot accept that the studies Eckler cites lend 'facial plausibility' to her claims that the Equate representations are

false or misleading" because plaintiff's studies about a degenerative joint disease did not "address the far more general claim—which is made by the Equate representations—that glucosamine is good for the body's joints."). In other words, "[w]hen false advertising claims do survive a motion to dismiss, . . . there is not this kind of mismatch between the representations at issue and the evidence that allegedly debunks them." *Id.*

The Eastern District of New York's 2015 *Kardovich* decision is instructive. Like Plaintiff here, the *Kardovich* plaintiffs based their claims on studies that were not relevant to the advertising claims at issue. *Kardovich*, 97 F. Supp. 3d at 138. There, plaintiffs alleged that Centrum-brand vitamins falsely advertise their ability to benefit "the normal function of the immune system," "free radical damage caused by environmental stress," "the metabolism of fats, carbohydrates and proteins," "vitality" and "energy support," and "the effects of physical stress." *Id*. (quotations omitted). The *Kardovich* plaintiffs cited "a number of scientific studies and other materials" to allegedly show the "false, misleading and deceptive nature of Centrum's promises to provide positive health benefits." *Id*. at 133 (quotations omitted). The *Kardovich* court found that plaintiffs' scientific materials addressed medical conditions such as cancer and cardiovascular problems that Centrum made no claim to treat. *Id*. at 137-38. The court concluded that plaintiffs' studies "in no way correlate to, let alone contradict as plaintiffs allege, the unrelated claims made by Centrum about its health benefits." *Id*. The court also rejected plaintiffs' attempts to rely on a demand letter from a consumer advocacy group because, without the underlying scientific studies, those "unsupported statements d[id] nothing to support the plausibility of plaintiffs' claim . . . ." *Id*. at 140.

Based on the "mismatches" between the plaintiffs' studies and Centrum's advertising claims, the *Kardovich* court held that plaintiffs failed to state a claim that Centrum's advertising

was false because "the science d[id] not undercut Centrum's statements regarding its health benefits." *Id.* at 138. It found that "[a]s here, where plaintiffs point to scientific studies that they allege actually disprove a product's claims, such a stark disconnect between the scientific studies and the claims made about Centrum's benefits is fatal to plaintiffs' complaint." *Id.* (citing *Hughes v. Ester C Co.*, 930 F. Supp. 2d 439, 457–58 (E.D.N.Y. 2013), and *Eckler*, 2012 WL 5382218, at *3).

Like in *Kardovich*, there is a "stark disconnect" in this case between Plaintiff's scientific support and the Product's advertising claims. None of Plaintiff's cited textbooks, articles, or studies says anything about advertising claims for any mosquito repellant product, let alone the specific advertising claims made by Spartan's Product. *See supra* at Point III. Plaintiff's reliance on the Mosquito Illness Alliance website is also misplaced. That website provides no support for its conclusory assertions that the Product does not work, and does not identify the purported "independent research" upon which its conclusions apparently rest. *Id.*; *see* also Boyle Decl. Ex. 11. These "unsupported statements do nothing to support the plausibility of [P]laintiff['s] claim." *Kardovich*, 97 F. Supp. 3d at 140.

The Unspecified Study also does not analyze a claim relevant to the Product's advertising. Plaintiff alleges it concluded that "the addition of salt to the diets of treatment groups did *not* cause mosquitoes to die at a faster rate than the control groups" given "solutions with 8% sugar but no salt." Compl. ¶ 12 (emphasis in original). The Product does not make any claims about killing mosquitoes "at a faster rate than" mosquitoes given a solution containing 8% sugar. *See* Boyle Decl. Exs. 1 & 2. Simply put, the Unspecified Study, and Plaintiff's other textbooks and articles, are irrelevant to the advertising claims made by the Product. For this reason, the Complaint should be dismissed.

C. The Complaint's Remaining Allegations Do Not Plausibly Plead that the Product's Advertising Is False.

Plaintiff's remaining allegations also fail to plead that the Product's advertising is false.

First, Plaintiff's allegations regarding a graph on the back of the Product's packaging do not plausibly plead falsity. *See* Compl. ¶¶ 20-23. The package does not claim this graph is based on a "test," as Plaintiff alleges. *See id.* Plaintiff's allegations, at most, amount to a claim that Spartan's testing was inadequate and that the graph lacks substantiation. As a matter of law, that is an insufficient basis to plead falsity. *See Kwan*, 2015 WL 848868, at *7 ("If Plaintiff wishes to bring claims alleging that Defendant's advertisements are false or misleading, then she must do so based on actual facts showing this, not simply an assertion that Defendant's substantiation is inadequate."); *Eckler*, 2012 WL 5382218, at *3 ("There is a difference, intuitively, between a claim that has no evidentiary support one way or the other and a claim that's actually been disproved. In common usage, we might say that both are 'unsubstantiated,' but the caselaw (and common sense) imply that in the context of a false advertising lawsuit an 'unsubstantiated' claim is only the former."); *Hughes*, 930 F. Supp. 2d at 456–57 ("[B]ecause there is no private remedy for 'unsubstantiated advertising,' private litigants are limited to claims for false or misleading advertising, which require supporting factual bases for such allegations.").

Second, Plaintiff's sparse anecdotal allegations do not plausibly plead that the Product's advertising is false. Plaintiff alleges that he "used the Product according to the Product's directions, but it did not provide effective mosquito control as advertised." Compl. ¶ 27. "Plaintiff['s] anecdotal evidence, standing alone, is insufficient to create an inference of falsity." *Tubbs*, 785 F. App'x at 396 ("The experiences of only two persons are unlikely to raise an inference of falsity because reasonable consumers generally do not understand marketing

statements as promises of perfection."); *accord. Hughes v. Ester C Co.*, 330 F. Supp. 3d 862, 872 (E.D.N.Y. 2018) (noting that in the summary judgment context, anecdotal evidence is insufficient to create a genuine issue of material fact).

Third, Plaintiff makes vague allegations against Hirsch and Spartan that are immaterial to the claims that the Product's advertising is false. Allegations that Spartan has "suppressed" its own studies using nondisclosure agreements, or that Hirsch "has made personal threats to at least one scientist," or that Hirsch "left menacing communications to Colin Purrington" and "wrote a public response" on Amazon regarding Purrington's wife, may be sensational, but are substantively meaningless in the analysis of Plaintiff's claims. *See* Compl. ¶¶ 16-18. None of these allegations nudge Plaintiff's "across the line from conceivable to plausible." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

III. Additional Grounds for Dismissing Plaintiff's Claims.

While Plaintiff's failure to plead facts to support an inference that the Product's advertising is false requires dismissal of all of his claims, certain of Plaintiff's claims should be dismissed for additional reasons.

A. The Complaint Fails to Allege Any Conduct by Hirsch Caused Plaintiff Harm.

In addition to lack of personal jurisdiction, *see* pp. 12-15, the claims against Hirsch fail because Plaintiff does not allege that Hirsch caused him any harm. Plaintiff alleges that he bought the Product in reliance on its labeling, not any statements made by Hirsch. *See* Compl. ¶ 27. Each of the Complaint's enumerated counts alleges that Plaintiff and putative class members were injured because they relied on the Product label's representations that it "'eradicate[s] your mosquito population for up to 90 days,' and that it provides 'do-it-yourself mosquito control." *See id.* ¶¶ 46, 53, 59, 63, 65, 72, 75, & 78. The Complaint does not allege that Plaintiff or any putative class member bought the Product based on any statements made by Hirsch. Therefore,

the Complaint fails to plead that Hirsch "is liable for the misconduct alleged," and the claims against him should be dismissed in their entirety. *Fink*, 714 F.3d at 741 (citation omitted).

B. Plaintiff Lacks Standing to Seek Injunctive Relief.

Plaintiff lacks standing to seek injunctive relief because there is no possibility that he will suffer future harm or continuing injury.[2] The Complaint alleges that the Plaintiff "would not have purchased the Product at all, or would have only been willing to pay a substantially reduced price for the Product, had he known that [the Product's] representations were false and misleading." Compl. ¶ 27.

"A plaintiff seeking to represent a class must personally have standing to pursue each form of relief sought," and "[a] plaintiff lacks standing to pursue injunctive relief if he is unable to establish a real or immediate threat of injury." *Kommer v. Bayer Consumer Health*, 710 Fed. App'x 43, 44 (2d Cir. 2018) (citations and internal quotation marks omitted). In *Kommer*, the Second Circuit held that a plaintiff who failed to allege he would buy the product again had "no standing under Article III to enjoin the defendants' sales practices." *Id.*

Because Plaintiff alleges he would not have purchased the Product, or would have paid less for it, he effectively admits that he could not be "deceived" by the Product's advertising again. Thus, he lacks standing to seek injunctive relief. *See, e.g.*, *Izquierdo v. Panera Bread Co.*, No. 18-12127, 2020 WL 1503557, at *4 (S.D.N.Y. Mar. 30, 2020) ("On the face of Plaintiff's own allegations, he would not have bought the Bagel if he had known its composition; one may reasonably infer that now that he is aware of the Bagel's ingredients, he will not

[2] Federal Rule 12(b)(1) requires dismissal for lack of subject matter jurisdiction "when the court lacks the statutory or constitutional power to adjudicate" the matter. *Atik v. Welch Foods, Inc.*, No. 15-5405, 2016 WL 5678474, at *3 (E.D.N.Y. Sept. 30, 2016) (internal quotation marks and citations omitted); *see also Shain v. Ellison*, 356 F.3d 211, 215 (2d Cir. 2004) ("If [plaintiff] lacks standing, we lack subject matter jurisdiction to entertain a request for such relief.").

purchase it again. Therefore, Plaintiff lacks standing to seek injunctive relief.").

C. Plaintiff's Unjust Enrichment Claim Should Be Dismissed Because It Is Duplicative.

Plaintiff's claim for unjust enrichment should also be dismissed because it "simply duplicates" Plaintiff's other deficient claims. *Corsello v. Verizon N.Y., Inc.*, 18 N.Y.3d 777, 790-91 (2012) (dismissing plaintiffs' unjust enrichment claim because "the unjust enrichment claim is duplicative; if plaintiffs' other claims are defective, an unjust enrichment claim cannot remedy the defects"); *see also Melendez v. ONE Brands, LLC*, No. 18-0665, 2020 WL 1283793, at *8 (E.D.N.Y. Mar. 16, 2020) ("Because Melendez's unjust enrichment claim is based on the same allegations as his other claims, and because Melendez has not shown how it differs from these other claims, his unjust enrichment claim is duplicative and must therefore be dismissed."). Moreover, unjust enrichment is an equitable claim, and Plaintiff has not pleaded any facts beyond the allegations supporting his other claims to explain why "equity and good conscience" would require restitution here. *See Melendez*, 2020 WL 1283793 at *8. Therefore, Plaintiff's unjust enrichment claim should be dismissed.

CONCLUSION

For the reasons set forth above, the claims against Hirsch should be dismissed for lack of personal jurisdiction under Rule 12(b)(2) of the Federal Rules of Civil Procedure, and the entire Complaint should be dismissed pursuant to Rule 12(b)(6).

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VENABLE LLP

By: */s/ Edward P. Boyle*
Edward P. Boyle
Anna G. Dimon

Rockefeller Center
1270 Avenue of the Americas
New York, NY 10020
Tel: (212) 808-5675
epboyle@venable.com
agdimon@venable.com

Attorneys for Defendants AC2T, Inc. and Jeremy Hirsch