THE HONORABLE RICARDO S. MARTINEZ

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MARY L. JOHNSON, individually and on behalf of all others similarly situated, Plaintiff, vs. MGM HOLDINGS INC.; METRO-GOLDWYN-MAYER STUDIOS INC.; TWENTIETH CENTURY FOX HOME ENTERTAINMENT LLC; and TWENTY-FIRST CENTURY FOX, INC., DOES 1-10, inclusive, Defendants.	Case No. 2:17-cv-00541-RSM DEFENDANTS' MOTION TO DISMISS THE COMPLAINT PURSUANT TO FRCP 12(B)(6) OR IN THE ALTERNATIVE TO STRIKE THE CLASS ALLEGATIONS PURSUANT TO FRCP 12(F) AND 23(D)(1)(D) NOTE ON MOTION CALENDAR: FRIDAY, MAY 12, 2017 ORAL ARGUMENT REQUESTED

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I. INTRODUCTION

Plaintiff's claim that she was deceived about exactly which films were contained in a box set of James Bond Blu-ray discs fails as a matter of law because she cannot allege deception where, as here, the packaging expressly states which films are inside and she "physically handled and inspected" the packaging before purchase. Compl. ¶¶ 31, 52. Plaintiff attempts to bring a nationwide class action complaining that three home video box sets of James Bond films do not contain the 1967 Bond spoof, *Casino Royale*, or the 1983 non-franchise film, *Never Say Never Again*, neither of which were listed on the packaging as included. No reasonable purchaser would expect that a box set would contain films that are not included on the list of titles clearly printed on its packaging and therefore neither Plaintiff nor any other putative class member can claim deception as a matter of law. Moreover, the class allegations do not comport with Rule 23 of the Federal Rules of Civil Procedure and, at a minimum, must be stricken if not dismissed entirely.

Motion to Dismiss. Plaintiff asserts three claims for relief: Violation of the Washington Consumer Protection Act ("CPA"); Breach of Express Warranty; and Breach of Implied Warranty of Merchantability. The first two claims fail on similar grounds. A claim for violation of the CPA requires a misleading or deceptive act. A breach of express warranty claim requires an affirmative misstatement. Product packaging does not meet either standard if the packaging, taken as a whole, makes the contents of the purchase apparent to the reasonable consumer. In particular, where (as here) an allegedly misleading statement is combined with clarifying wording, the packaging is not deceptive and does not create an affirmative misstatement. Nor can statements of artistic judgment form the basis of a CPA or breach of express warranty claim.

Plaintiff tries to get around these fatal defects by pointing to a single sentence on the packaging stating that the box sets contained "all" of the James Bond

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films and "every" Bond girl, villain, and star. This argument fails for two reasons. First, the language that Plaintiff points to is fully clarified by the complete listing of the films on the packaging. In other words, the packaging itself makes clear which films were "all" the films included in the box set. Second, the statement is not actionable as a matter of law because the particular James Bond films suitable for inclusion in such a collection is a matter of artistic judgment. *See Metro-Goldwyn-Mayer, Inc. v. Am. Honda Motor Co., Inc.*, 900 F. Supp. 1287, 1294 (C.D. Cal. 1995) (discussing attributes of a James Bond movie identified by various experts). Without allegations of deceptive conduct or cognizable misstatements, the CPA and express warranty claims must be dismissed.

The breach of implied warranty claim fails as a matter of law because representations between a manufacturer and a remote consumer are not actionable as an implied warranty absent contractual privity. *Tex Enters., Inc. v. Brockway Standard, Inc.*, 149 Wash. 2d 204, 214, 66 P.3d 625, 630 (2003). Plaintiff alleges that she bought the box set from Amazon, not from any Defendant. Compl. ¶ 49. Thus, Plaintiff does not and cannot allege privity between herself and any Defendant, and, thus, the implied warranty claim must be dismissed.

Motion to Strike. This suit should be dismissed but, at a minimum, the Court must strike the class allegations on at least two grounds. First, the Complaint alleges three claims under Washington law but the nationwide class allegations require the application of 50 different state laws. There is no basis for applying Washington law to purchasers in 49 other states. A nationwide class, therefore, would require application of consumer protection laws from every state with their differing statutes of limitations, causation and reliance requirements, and remedies, along with other variations. Where it is apparent on the face of the complaint that individual issues predominate over common issues, the class allegations should be stricken. *See Pilgrim v. Universal Health Card, LLC*, 660 F.3d 943, 949 (6th Cir. 2011); *Grundmeyer v.*

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Allstate Prop. & Cas. Ins. Co., No. C15-0464RSL, 2015 WL 9487928, at *4 (W.D. Wash. Sept. 29, 2015).

Second, Plaintiff's class definition is impermissibly overbroad. Class allegations must be stricken if they cover significant numbers of individuals who could not be harmed. *See Sanders v. Apple Inc.*, 672 F. Supp. 2d 978, 991 (N.D. Cal. 2009). Plaintiff's class allegations include *everyone* who purchased one of the three James Bond box sets. But, a putative class of "all purchasers" includes many who could not have been harmed by the box sets' packaging. *E.g.*: (1) purchasers who read the list of films on the packaging and understood the set did not contain the 1967 *Casino Royale* or *Never Say Never Again*; (2) James Bond aficionados who would never expect the 1967 *Casino Royale* spoof and the 1983 non-franchise *Never Say Never Again* to be included in an official collection of James Bond films; (3) purchasers who already owned those two films before they bought a set; (4) purchasers who only intended to purchase the official Eon Productions franchise films; (5) purchasers who bought a box set primarily to obtain the additional materials and special features it contained; (6) purchasers who returned a set for a full refund when they learned it did not include the two films; (7) purchasers who learned that a set did not contain the two films and could have returned it for a full refund but chose not to do so; (8) purchasers who bought a set because it contained a large number of movies for a relatively low price; and (9) purchasers who did not read the "[a]ll the Bond films" description before they purchased a set. None of these many purchasers could be harmed by Defendants' packaging. Plaintiff's attempt to represent an overbroad class is facially improper and must be stricken.

In short, if Plaintiff's individual claims somehow survive, the class allegations should be stricken now, before the parties and the judicial system incur the substantial costs associated with litigating a putative class action. *See Stearns v. Select Comfort Retail Corp.*, No. 08-2746 JF (PVT), 2009 WL 4723366, at*14 (N.D. Cal. Dec.

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4, 2009) ("it is procedurally proper to strike futile class claims at the outset of litigation to preserve time and resources").

II. SUMMARY OF ALLEGATIONS

Plaintiff allegedly purchased a box set of 23 James Bond films on Blu-Ray entitled the "James Bond Collection."[1] Compl. ¶ 49.[2] The box stated: "All the Bond films are gathered together in this one-of-a-kind box set—every gorgeous girl, nefarious villain and charismatic star from Sean Connery to Daniel Craig." This language is repeated on the back of the "Ultimate James Bond Collection" and similar language is used on the back of the "Bond 50" set.[3] A complete list of the 23 films included inside the box set is printed on the packaging. *Id*. ¶¶ 22, 27, 30-33, 35, 53. The list and the box set did not include the 1967 send-up *Casino Royale*[4] or *Never Say Never Again*, neither of which are part of the James Bond film canon produced by Eon Productions, the producer of the James Bond franchise. *Id.* ¶¶ 19-22, 35. Plaintiff

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[1] All three box sets have been provided to the Court for its review and copies of relevant portions of their packaging are attached to the Declaration of Samuel T. Boyd filed concurrently herewith. In ruling on a motion to dismiss, a court may consider "documents that were not physically attached to the complaint where the documents' authenticity is not contested, and the plaintiff's complaint necessarily relies on them." *See Sams v. Yahoo! Inc*., 713 F.3d 1175, 1179 (9th Cir. 2013). Courts regularly consider product packaging where that packaging is incorporated by reference in plaintiffs' complaints. *See, e.g., Gustavson v. Wrigley Sales Co*., No. 12-CV-01861-LHK, 2014 WL 60197, at *3 n.2 (N.D. Cal. Jan. 7, 2014) (considering images of product packaging submitted by defendants where plaintiff included illegible images in its complaint); *Maple v. Costco Wholesale Corp*., No. 12-CV-5166, 2013 WL 11842009, at *2 (E.D. Wash. Aug. 1, 2013) (product packaging was incorporated by reference in complaint).

[2] Defendants accept the allegations in the Complaint only for purposes of this Motion.

[3] The "Bond 50" set says: "All the Bond films are gathered together for the first time in this one-of-a-kind boxed set—every gorgeous girl, nefarious villain and charismatic star from Sean Connery, the legendary actor who started it all, to Daniel Craig." Compl. ¶ 24.

[4] Eon Productions produced a film entitled *Casino Royale* that was released in 2006 and is included in all of the box sets.

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alleges that she would not have purchased the box set had she known that it did not contain the 1967 *Casino Royale* or *Never Say Never Again*. *Id.* ¶¶ 53-54. The Complaint asserts three claims: (1) violation of the CPA, RCW 19.86; (2) Breach of Express Warranty; and (3) Breach of Implied Warranty of Merchantability, RCW 62A.2-314. Compl. ¶¶ 78-92.

Plaintiff seeks to represent a putative nationwide class of: "[a]ll persons who purchased, since March 6, 2013, one or more DVD/Blu-ray box sets entitled Bond 50: Celebrating Five Decades of Bond 007, the James Bond Collection, and/or the Ultimate James Bond Collection, in the United States, for their own or household use rather than for resale or distribution." *Id.* ¶ 66. Alternatively, Plaintiff seeks to represent the same class of purchasers from 10 states: California, Florida, Illinois, Massachusetts, Michigan, Minnesota, Missouri, New Jersey, New York, and Washington. *Id.*

Plaintiff alleges that Defendant Metro-Goldwyn-Mayer Studios Inc. ("MGM Studios") owns the distribution rights for the James Bond movies and that Defendant Twentieth Century Fox Home Entertainment LLC ("Twentieth Century Fox") handles Home Video marketing and distribution services on MGM Studios' behalf. *Id.* ¶¶ 14, 17. Defendants MGM Holdings Inc. ("MGM Holdings") and Twenty-First Century Fox, Inc. ("Twenty-First Century Fox") are the corporate parents of MGM Studios and Twentieth Century Fox, respectively. *Id.* ¶¶ 13, 15; *see also* Corporate Disclosures, ECF Nos. 4-7. Plaintiff makes no allegations regarding conduct by the parent company Defendants, MGM Holdings and Twenty-First Century Fox.

III. PLAINTIFF'S COMPLAINT SHOULD BE DISMISSED

A. Standard for Motion to Dismiss

A motion to dismiss under Rule 12(b)(6) should be granted if a complaint does not state a cognizable legal theory or fails to allege sufficient facts to support a claim. *Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 534 (9th Cir.

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1984). A court must "take all of the factual allegations in the complaint as true," but it is "'not bound to accept as true a legal conclusion couched as a factual allegation.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). In deciding a motion to dismiss, a court may consider "documents attached to the complaint, documents incorporated by reference in the complaint, or matters of judicial notice." *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003).

B. Plaintiff Has Not Pled a Cognizable Claim Under the Washington Consumer Protection Act

1. The Packaging Must Be Viewed as a Whole Under the Reasonable Person Standard

A valid CPA claim requires "unfair or deceptive acts or practices in the conduct of any trade or commerce." RCW § 19.86.020. A practice is deceptive if it "is likely to mislead a reasonable consumer." *Panag v. Farmers Ins. Co. of Wash.*, 166 Wash. 2d 27, 50, 204 P.3d 885, 895 (2009).

Plaintiff's Complaint acknowledges that the product packaging states truthfully and accurately the total number and titles of the films included in each set. Compl. ¶ 33. Plaintiff alleges that she physically handled and inspected the James Bond Collection in person before she purchased it. *Id.* ¶ 52. A reasonable consumer would not have believed that movies that were not listed on the packaging would be included in the box set.

Plaintiff's entire claim rests on the single sentence on the back of each box referencing "all" Bond movies and "every" Bond girl and villain. But, whether product packaging is deceptive depends on what the packaging states as a whole—not what isolated parts say. *See Freeman v. Time, Inc.*, 68 F.3d 285, 289 (9th Cir. 1995) (applying "reasonable consumer" standard under California law). Where allegedly misleading language is accompanied by clarifying language that is not "hidden or unreadably small," there is no deception. *Id.*

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In *Freeman*, the plaintiff received a mailer that stated in large type: "[i]f you return the grand prize winning number, we'll officially announce that MICHAEL FREEMAN HAS WON $1,666,675.00 AND PAYMENT IS SCHEDULED TO BEGIN." *Id.* at 287. In fact, Freeman had not won anything. *Id.* The Ninth Circuit affirmed dismissal of Freeman's consumer protection claims because the mailer included text with "qualifying language" in smaller type on the same mailer as the representations he claimed were misleading making clear he had not won. *Id.* at 289. Similarly, in *Bobo v. Optimum Nutrition, Inc.*, No. 14CV2408 BEN (KSC), 2015 WL 13102417, at *1 (S.D. Cal. Sept. 11, 2015), the court dismissed allegations that the packaging of protein powder labeled in large letters "100% Whey" was misleading even though the product in fact contained artificial flavorings because the product disclosed that it contained artificial flavorings, albeit in small text, elsewhere on the package. Taken as a whole, the package disclosed the contents of the product, and thus there was no deception.

Numerous other courts have reached the same conclusion and dismissed consumer protection claims on the pleadings where the alleged packaging, taken as a whole, was not deceptive. *See, e.g., Girard v. Toyota Motor Sales, U.S.A., Inc.*, 316 F. App'x 561, 563 (9th Cir. 2008) (plaintiffs failed to state a claim based on misleading advertisements where the truth was included in disclaimers); *Castagnola v. Hewlett-Packard Co.*, No. C 11-05772 JSW, 2012 WL 2159385, at *9 (N.D. Cal. June 13, 2012) (dismissing false advertising claims where allegedly misleading impression "is dispelled by the [webpage] as a whole") (citation omitted); *Hairston v. S. Beach Beverage Co.*, No. CV 12-1429-JFW (DTBx), 2012 WL 1893818, at *5 (C.D. Cal. May 18, 2012) (dismissing false advertising claims on product packaging because a product ingredient label clarified possible ambiguity elsewhere on packaging); *McKinniss v. Sunny Delight Beverages Co.*, No. CV 07-02034-RGK (JCx), 2007 WL 4766525, at *4 (C.D. Cal. Sept. 4, 2007) (reasonable consumer would not believe that images of fruits

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on Sunny Delight beverage meant that it contained significant amounts of fruit juice when reviewing the product's label as a whole); *Sugawara v. Pepsico, I*nc., No. 2:08–cv–01335–MCE–JFM, 2009 WL 1439115, at *5 (E.D. Cal. May 21, 2009) (reasonable consumer would have understood that "crunchberries" in Cap'n Crunch cereal were not in fact fruits but instead pieces of cereal); *McKinnis v. Kellogg USA*, No. CV 07–2611 ABC (RCx), 2007 WL 4766060, at *4 (C.D. Cal. Sept. 19, 2007) (similar ruling for "Froot Loops" cereal).

The same result is required here. The phrase "[a]ll the Bond films" was qualified by a complete listing of all the films included in the box set. A reasonable consumer would expect to find the movies listed on the packaging inside the box—no more and no less.

Plaintiff's assertion that the titles were hard to read has no merit. Tellingly, Plaintiff does not allege that she did not or could not read the list of films printed on the packaging. Plaintiff includes fuzzy, black and white photo-copies of the packaging in the text of her Complaint. Compl. ¶ 31. But, a review of the packaging reveals that the names of the films are fully legible to an ordinary consumer. Physical copies of the box sets have been submitted to the Court for its review. *See also* Exhibits 1-3 to the Declaration of Samuel T. Boyd.

2. The Information Inside the Box Sets Further Defeats the Claims

In addition to the list of films on the outside, the box sets contained prominent lists of their contents within the outer packaging. Each set contains either two or three individual sleeves, labeled by years. Each sleeve lists on its cover the films contained inside. The James Bond Collection and The Ultimate James Bond Collection also contain a listing of films in large print on a detachable paper card wrapped around each set. And, the names of the films are printed on each disc.

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Courts have repeatedly barred claims by plaintiffs based on the exterior packaging where truthful information is contained inside. In *In re Samsung Elecs. Am., Inc. Blu-Ray Class Action Litig.*, No. CIV.A. 08-0663 (JAG), 2008 WL 5451024, at *2-6 (D.N.J. Dec. 31, 2008), plaintiffs brought a putative class action claiming that defendant's Blu-ray players did not play certain types of discs. The court dismissed their New Jersey Consumer Fraud Act and express and implied warranty claims because written materials located inside the product packaging made this clear. Similarly, in *Berenblat v. Apple, Inc*., No. 08-4969 JF (PVT), 2010 WL 1460297, at *2-9 (N.D. Cal. Apr. 9, 2010), the court denied breach of implied warranty of merchantability and unfair competition claims brought by plaintiffs alleging their laptops contained defective memory expansion slots not covered by warranty where this was disclosed inside the products' packaging. The listing of films in multiple locations inside the packaging of the James Bond box sets further eliminates any claim here.

3. The Statements Regarding "All" and "Every" are Not Actionable Statements

The CPA claim must also be dismissed because the statements at issue are not actionable as a matter of law. Plaintiff complains that the box sets refer to "all" Bond films and "every" Bond girl and villain. The use of the terms "all" and "every" on the packaging is not actionable language. This language reflects a judgment about which James Bond films should be included in these curated collections based on various factors, including the film's content and production history. There is detailed scholarship on the artistic elements of a James Bond film. *See Metro-Goldwyn-Mayer*, 900 F. Supp. at 1294 (discussing attributes of a James Bond movie and identifying Bond experts that had analyzed the artistic elements of the films). Likewise, the unauthorized production history of *Never Say Never Again* is widely known. *See Danjaq LLC v. Sony Corp.*, 263 F.3d 942, 947-949 (9th Cir. 2001) (recounting the history of disputes over James Bond rights that resulted in the production of *Never Say*

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Never Again without the authorization of Eon Productions or the estate of Ian Fleming, the author of the underlying novels).

Subjective judgments do not give rise to an unfair or deceptive act. *Babb v. Regal Marine Indus., Inc.*, 179 Wash. App. 1036 (2014), *review granted, cause remanded on other grounds*, 180 Wash. 2d 1021, 329 P.3d 67 (2014); s*ee also Hayes v. Rule*, No. 1:03 CV 1196, 2005 WL 2136946, at *13 (M.D.N.C. Aug. 19, 2005) (CDs labeled as "revolutionary," with references to historical figures such as "George Jackson, Marcus Garvey, and Nat Turner" did not give rise to a false advertising claim where the content of the album was not political); *Groden v. Random House, Inc.*, 61 F.3d 1045, 1052 (2d Cir. 1995) (judgments about the Kennedy assassination used to market a book could not give rise to false advertising claim).

Plaintiff's claim is analogous to claiming that the 1970s animated adaptation of the Lord of Rings Trilogy should be considered part of a curated collection of "all" the *Lord of the Rings* films or that the 1970s Star Wars Christmas movie is a *Star Wars* production that should be included in a collection of "every" *Star Wars* film. Artistic judgments to the contrary are not actionable.

In sum, Plaintiff cannot state a cognizable CPA claim because the packaging states accurately what films the set includes, taken as a whole it is not deceptive, and the artistic judgment involved in curating a definitive collection of James Bond films is not actionable.

C. Plaintiff Fails to State a Claim for Breach of Express Warranty

Plaintiff's second count for breach of express warranty under Washington law fails because no express warranty was created here. An express warranty is an "affirmation of fact . . . made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain." RCW § 62A.2-313. An express warranty is not created if the buyer has "actual or imputed knowledge of the true condition of the good." *Fed. Signal Corp. v. Safety Factors, Inc.*, 125 Wash. 2d

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413, 424, 886 P.2d 172, 179 (1994). Here, no warranty was created by the "[a]ll Bond films" description because a buyer of the box set at issue knew or could have known precisely which Bond films the set contained by viewing the list of films presented on the bottom of the box.

The "[a]ll the Bond films" statement is also not a warranty because, as with the CPA, it is not an actionable assertion. Whether a particular film is part of the canon of definitive "Bond films" is a matter of opinion, and hence not an affirmation of fact that can create a warranty. RCW § 62A.2-313 ("a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty"); *see also Bryant v. Wyeth*, 879 F. Supp. 2d 1214, 1227 (W.D. Wash. 2012) (statement on packaging of medication about the believed risks of taking it did not create an express warranty).

D. Plaintiff Fails to State a Claim for Breach of Implied Warranty of Merchantability

Plaintiff's third claim for breach of the implied warranty of merchantability fails because there is no privity of contract between Plaintiff and Defendants. RCW § 62A.2-314. Under Washington law, implied warranty claims cannot be based on express statements by a manufacturer to a remote commercial purchaser unless they are in privity of contract. *Tex Enterprises, Inc.*, 149 Wash. 2d at 214 ("implied warranties do not arise out of express representations made by a manufacturer to a remote commercial purchaser absent privity or reliance on some underlying contract"). Here, Plaintiff purchased the product from Amazon and therefore no contract or privity exists with Defendants. Compl. ¶ 49. The requisite elements of the implied warranty of merchantability cannot be alleged and the claim must be dismissed.

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E. Plaintiff Has No Claim Against MGM Holdings or Twenty-First Century Fox

Finally, the claims against the Defendant parent companies must be dismissed because no alleged theory of liability implicates them. Defendants MGM Holdings and Twenty-First Century Fox are the indirect corporate parents of Defendants MGM Studios and Twentieth Century Fox. Compl. ¶¶ 13, 15. Plaintiff has not alleged that either Twenty-First Century Fox or MGM Holdings played any role in the production or sale of the box set at issue and therefore has not stated a claim against either entity. Nor can they be held liable simply because they are the corporate parents of MGM Studios and Twentieth Century Fox, respectively. Under the law of California, where MGM Holdings has its principal place of business, a parent company is not liable for the acts of its subsidiary—including through a subsidiary's agent—except in "narrowly defined circumstances and only when the ends of justice so require." *Mesler v. Bragg Mgmt. Co.*, 39 Cal. 3d 290, 301, 702 P.2d 601, 607 (1985) (en banc). Under New York law, where Twenty-First Century Fox has its principal place of business,[5] the general rule is that "a parent corporation is not liable for the acts of a subsidiary." *Dempsey v. Intercontinental Hotel Corp.*, 511 N.Y.S. 2d 10, 11, 126 A.D.2d 477, 478 (1987) (citation omitted). Under Delaware law, where both entities are incorporated, "a subsidiary corporation may be deemed the alter ego of the parent corporation" only "where a corporate parent exercises complete domination and control over the subsidiary" and "[g]enerally, a corporate parent will only be held liable for the obligations of its subsidiaries upon a showing of fraud or some inequity." *State ex rel. Higgins v. SourceGas, LLC*, No. CIVA N11C-07-193 MMJ CCLD, 2012 WL 1721783, at *5 (Del. Super. Ct. May 15, 2012) (citations omitted).

[5] Though it is not relevant to this motion, Defendants note that Plaintiff's allegation that Twenty-First Century Fox has its principal place of business in California, Compl. ¶ 8, is inaccurate—it is headquartered in New York, which is its principal place of business.

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Plaintiff has not and cannot allege facts that would create a basis for liability for MGM Holdings and Twenty-First Century Fox in this suit and so all claims against them should be dismissed.

IV. PLAINTIFF'S CLASS ALLEGATIONS SHOULD BE STRICKEN

Although Plaintiff's entire complaint should be dismissed, in the alternative and at a minimum, the Complaint's class allegations must be stricken on two separate grounds. First, it is apparent from the face of the Complaint that individual issues predominate over common ones, precluding class treatment. Fed. R. Civ. Pro. 23(b)(3). Most significantly, Plaintiff's nationwide class allegations, and even her alternative 10-state class allegations, require the application of multiple conflicting state laws that are not appropriate for adjudication on a class-wide basis. Second, Plaintiff's class allegations should be stricken because the class definition is impermissibly overbroad. A putative class is too broad for class treatment and should be stricken where it includes "a great number of members who for some reason could not have been harmed by the defendant's allegedly unlawful conduct." *Messner v. Northshore Univ. Health System*, 669 F. 3d 802, 824 (7th Cir. 2012).

Federal Rule of Civil Procedure 23(c)(1) requires that "the court [] determine, as early in the proceedings as may be practicable, whether an action brought as a class action is to be so maintained." Fed. R. Civ. P. 23(3), Advisory Committee Notes. Moreover, "[i]n conducting an action under [Rule 23], the court may issue orders that . . . require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly." Fed. R. Civ. P. 23(d)(1)(D); *see also Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 160 (1982) ("[s]ometimes the issues are plain enough from the pleadings to determine whether the interests of the absent parties are fairly encompassed within the named plaintiff's claim").

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Based on the foregoing requirements, courts have stricken class allegations where it is apparent from the pleadings that no class claims can be maintained. *See Pilgrim*, 660 F.3d 943 at 949 (affirming grant of motion to strike class allegations where the deficiencies in class treatment would not be addressed by "discovery" or "more time"); *John v. Nat'l Sec. Fire & Cas. Co.*, 501 F.3d 443, 445 (5th Cir. 2007) (eliminating class allegations at the pleading stage "[w]here it is facially apparent from the pleadings that there is no ascertainable class"); *Grundmeyer v. Allstate Prop. & Cas. Ins. Co.*, No. C15-0464RSL, 2015 WL 9487928, at *4 (W.D. Wash. Sept. 29, 2015) (striking class allegations where it was apparent from the face of the complaint that class treatment was inappropriate); *Sanders*, 672 F. Supp. 2d at 991 (striking class allegations on breach of warranty and fraud claims for same reasons); *Edwards v. Zenimax Media Inc.*, No. 12-CV-00411-WYD-KLM, 2012 WL 4378219, at *6 (D. Colo. Sept. 25, 2012) (same).

A. Plaintiff's Nationwide Class Allegations Should be Stricken Because There is No Basis to Apply Washington Law and Applying the Laws of 50 States is Unworkable

Plaintiff seeks to represent a class of purchasers in all 50 states or, in the alternative, purchasers in 10 states with purportedly similar consumer protection laws. Compl. ¶ 66. There is no basis whatsoever to apply Washington law to purchasers outside the state bringing claims against Defendants who are outside the state. Compl. ¶¶ 3-10; *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 822 (1985) (application of state law to claims with which a state does not have "significant contacts" is "sufficiently arbitrary and unfair as to exceed constitutional limits"). Thus, the Complaint's class allegations require application of the laws of at least 10 and as many as 50 different states.

Courts regularly reject class treatment of state consumer protection claims requiring the application of multiple states' laws. "[A] nationwide class is not the superior method for adjudicating the false advertising claims because they are

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subject to 50 different laws, under 50 different evidence standards, with 50 different remedy schemes." *Schwartz v. Lights of Am.*, No. CV 11- 1712-JVS (MLGx), 2012 WL 4497398, at *9 (C.D. Cal. Aug. 31, 2012); *see also Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1189-90 (9th Cir. 2001), *opinion amended on denial of reh'g*, 273 F.3d 1266 (9th Cir. 2001) (the "'proliferation of disparate factual and legal issues is compounded exponentially' when law of multiple jurisdictions apply") (quoting *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 741 (5th Cir. 1996)); *Franklin v. Gov't Emp. Ins. Co.*, No. C10-5183BHS, 2011 WL 5166458, at *7 (W.D. Wash. Oct. 31, 2011) (rejecting class that would require application of the law of 17 states); *Hovenkotter v. SAFECO Ins. Co. of Ill.*, No. C09-0218JLR, 2010 WL 3984828, at *8 (W.D. Wash. Oct. 11, 2010) (rejecting class requiring the interpretation of the laws of 28 states).

Nationwide classes that are not governed by one state's laws are unworkable because '"[i]f more than a few of the laws of the fifty states differ . . . the district judge would face an impossible task of instructing a jury on the relevant law.'" *Pilgrim*, 660 F.3d at 948 (citation omitted); *see also In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1015 (7th Cir. 2002) ("No class action is proper unless all litigants are governed by the same legal rules.").

Plaintiff has essentially conceded that the there are differences between Washington law and that of 40 out of 50 states, identifying 10 fallback states with purportedly "similar consumer fraud laws." Compl. ¶ 66 n.4.[6] Yet even the laws of the remaining ten states contain critical differences from Washington law. For example, the statute of limitations is four years under the CPA, RCW §19.86.120; California's Unfair Competition Law, Cal. Bus. & Prof. Code § 17208; and Florida's Deceptive and Unfair Trade Practice Act, Fla. Stat. Ch. 501.207. It is three years under Illinois' Consumer

[6] California, Florida, Illinois, Massachusetts, Michigan, Minnesota, Missouri, New Jersey, New York, and Washington. Compl. ¶ 66.

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Fraud and Deceptive Business Practices Act, 815 Ill. Comp. Stat. 505/10a, and California's Consumer Legal Remedies Act,[7] Cal. Civ. Code §1783. It is six years under Michigan's Consumer Protection Act, Mich. Stat. Ann. §§445.910—445.911. For the remaining five states, the statute of limitations is unstated in the text of the statute, presumably requiring analogy to other state claims or reference to other statutes in those states.

Similarly these state laws have a wide variety of tests and other requirements for causation. The CPA requires a "but-for" causal link between a defendant's challenged acts and harm suffered by the plaintiff. *Indoor Billboard/Washington, Inc. v. Integra Telecom of Wash., Inc*., 162 Wash. 2d 59, 83, 170 P.3d 10, 22 (2007). The same is true in Illinois. *Avery v. State Farm Mut. Auto. Ins.* Co., 216 Ill. 2d 100, 199, 835 N.E. 2d 801, 860-61 (2005). California law allows causation to be inferred from the misrepresentation of a material fact. *Chapman v. Skype Inc.*, 220 Cal. App. 4th 217, 229 (2013). Florida does the same. *Latman v. Costa Cruise Lines, N.V.*, 758 So. 2d 699, 703 (Fla. Dist. Ct. App. 2000). Michigan requires simple "causation" which is a "less demanding" standard than proximate causation. *Estate of Sdao ex rel. Sdao v. Makki & Abdallah Invs.*, No. 322646, 2016 WL 279635, at *7 (Mich. Ct. App. Jan. 21, 2016). New Jersey requires "proof of a causal nexus" between the alleged deceptive conduct and the loss. *Varacallo v. Mass. Mut. Life Ins. Co.*, 332 N.J. Super. 31, 43, 752 A. 2d 807, 813-14 (App. Div. 2000). Minnesota, similarly, requires "some 'legal nexus' between the injury and the defendants' wrongful conduct." *Grp. Health Plan, Inc. v. Philip Morris Inc*., 621 N.W.2d 2, 14 (Minn. 2001). In Massachusetts, "[c]ausation is established if the deception 'could reasonably be

[7] Plaintiff cites two separate statues in California, that are supposedly "similar" to Washington's CPA, the California Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200—17210, §§17500—17581, and the California Consumer Legal Remedies Act, Cal. Civil Code §§ 1750—1784, ¶10,510. These two statutes differ significantly from each other, let alone from the CPA. *Id.*

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found to have caused a person to act differently from the way he [or she] otherwise would have acted.'" *Casavant v. Norwegian Cruise Line*, Ltd., 76 Mass. App. Ct. 73, 77, 919 N.E. 2d 165, 169 (2009), *aff'd*, 460 Mass. 500, 952 N.E.2d 908 (2011). In New York, "the proof must show that each plaintiff was reasonably deceived by the defendant's misrepresentations or omissions and was injured by reason thereof." *Cox v. Microsoft Corp.*, No. 105193/2000, 2005 WL 3288130, at *4 (N.Y. Sup. Ct. 2005) (citation omitted). Finally, in Missouri a plaintiff must show that he or she "suffered an ascertainable loss of money or property. . . as a result of an act declared unlawful under" the Missouri Merchandising Practice Act. *Edmonds v. Hough*, 344 S.W.3d 219, 223 (Mo. Ct. App. 2011) (citation omitted).

State laws also differ significantly when it comes to recovery. The CPA allows actual damages, gives courts discretion to award treble damages, and allows for attorneys' fees. RCW §19.86.090. California's Unfair Competition law allows restitution but limits money damages to actual losses and does not provide for attorneys' fees. *Korea Supply Co. v. Lockheed Martin Corp*., 29 Cal. 4th 1134, 1148 (2003). The California Consumer Legal Remedies Act, in contrast, allows both actual and punitive damages and permits attorneys' fees to be awarded either to the plaintiff or the defendant. Cal. Civ. Code § 1780. Florida allows actual damages and reasonable attorneys' fees for the prevailing party, and a court may require a plaintiff to post a bond at the outset to cover the defendant's fees in the event it prevails. Fla. Stat. Ann. § 501.211. Illinois allows a plaintiff to recover actual damages, attorneys' fees or "or any other relief which the court deems proper," which includes punitive damages. 815 Ill. Comp. Stat. 505/10a; *Price v. Philip Morris, Inc*., 219 Ill. 2d 182, 232, 848 N.E. 2d 1, 31-32 (2005). Massachusetts allows actual damages, and treble damages in the event the violation was "willful or knowing." Mass. Gen. Laws Ann. ch. 93A, § 11. Attorneys' fees are also available, but not for expenses incurred after the receipt of a reasonable settlement offer. *Id*. Michigan allows only actual damages in class actions.

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Mich. Comp. Ann. §445.911(b)(2). Minnesota allows actual damages, attorneys' fees, and "other equitable relief as determined by the court." Minn. Stat. Ann. § 8.31. Missouri allows actual damages and gives courts discretion to award punitive damages and attorneys' fees. Mo. Ann. Stat. §407.025. New Jersey provides for actual damages, and mandatory attorneys' fees and treble damages. N.J. Stat. Ann. §56:8-19; *Garcia v. Gen. Motors Corp.*, 910 F. Supp. 160, 166 (D.N.J. 1995). Finally, in New York a plaintiff may recover the greater of his actual damages or $50 and, in the court's discretion, treble damages and attorneys' fees. N.Y. Gen. Bus. Law §§ 349(h), 350-d.

Other issues that could arise in this litigation include: what state of mind, if any, need be shown on the part of defendants; whether a defendant may raise as a defense a good-faith belief that the statement was not misleading; whether reliance is required and, if so how it may be shown; whether an opportunity to return a box that was not exercised shows lack of causation; whether actual damages include the cost of returning a product; and what standard should be used to award damages or other relief where such an award is within the court's discretion. The elements listed above are only a sampling of the ways in which state laws may differ. Inquiring into each state's law on each of these questions, let alone instructing a jury, would be impracticable and would frustrate the purpose of the class action system—to allow the class-wide determination of claims in which common issues predominate over individual ones. Plaintiff's class allegations must therefore be stricken.[8]

[8] The conflict among applicable laws is just one of many factors by which individual issues predominate. Courts routinely reject class treatment in consumer protection cases because of the predominance of individual issues that they often raise. *See, e.g., Grundmeyer v. Allstate Prop. & Cas. Ins. Co.*, No. C15-0464RSL, 2015 WL 9487928, at *4 (W.D. Wash. Sept. 29, 2015) (striking class allegations, in complaint bringing CPA and other claims, where it was apparent from the face of the complaint that class treatment was inappropriate because individual issues of causation predominated); *Weidenhamer v. Expedia, Inc.*, No. C14-1239RAJ, 2015 WL 7157282, at *12 (W.D. Wash. Nov. 13, 2015), (rejecting class treatment of a CPA claim and stating: "the CPA

B. Plaintiff's Proposed Class Definition Is Overbroad

Plaintiff's class allegations must also be stricken because the class definition is impermissibly overbroad. Plaintiff defines the Class as "[a]ll persons who purchased" one of the three box sets after March 6, 2013 in the United States. Compl. ¶ 66. A class many not be certified if it is "defined so broadly as to include a great number of members who for some reason could not have been harmed by the defendant's allegedly unlawful conduct." *Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1138 (9th Cir. 2016) (quoting *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 824 (7th Cir. 2012)). For example, in *Sanders v. Apple Inc.*, 672 F. Supp. 2d 978 (N.D. Cal. 2009), the plaintiff brought unfair competition and warranty claims on behalf of a class of purchasers of 20-inch iMacs that allegedly were marketed with the representation that their displays could show "millions of colors" when in fact they could show only 262,144. *Id.* at 988. The court struck the proposed class on multiple grounds, including that the proposed class was overbroad and included "individuals who either did not see or were not deceived by advertisements and individuals who suffered no damages." *Id.* at 991.

The class allegations here are similarly overbroad and must be stricken. The types of purchasers in the alleged class who could not be harmed include, at a minimum: (1) purchasers who read the list of films and understood the set did not contain the 1967 *Casino Royale* or the 1983 *Never Say Never Again*; (2) James Bond aficionados who would never expect the 1967 *Casino Royale* spoof and the 1983 non-

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require[s] that the plaintiff show that the defendant's conduct caused her injury" and "a deception based theory of causation would likely cause individualized issues to predominate over any common class"); *Oshana v. Coca-Cola Co.*, 472 F.3d 506, 510 (7th Cir. 2006) (affirming denial of certification of class of purchasers of Diet Coke based on alleged deception about which artificial sweetener it contained because "Coke's marketing may have been only a minor factor in the purchasing decisions of other class members . . . [and] some putative class members may have known [the truth] and bought fountain Diet Coke anyway").

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franchise *Never Say Never Again* to be included in an official collection of James Bond films; (3) purchasers who already owned those two films before they bought one of the box sets; (4) purchasers who only intended to purchase the official Eon Productions franchise films; (5) purchasers who bought a box set primarily to obtain the additional materials and special features it contained; (6) purchasers who returned the sets for a full refund when they learned they did not include the two films; (7) purchasers who learned that a set did not contain the two films and could have returned the set for a full refund but chose not to do so; (8) purchasers who bought the set because of the large number of movies for a relatively low price; and (9) purchasers who did not read the "[a]ll the Bond films" description before they purchased a set. Any purchaser in one or more of these categories and others was not harmed by the alleged conduct.

Here, the various categories of uninjured class members would swallow up much of the class. The Court should strike the overbroad class allegations.

V. CONLUSION

Based on the forgoing Defendants respectfully request that Plaintiff's claims be dismissed with prejudice or, in the alternative, that her class allegations be stricken.

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DATED: April 14, 2017

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CERTIFICATE OF SERVICE

I certify that on the date indicated below I caused a copy of the foregoing document to be filed with the Clerk of the Court via the CM/ECF system. In accordance with their ECF registration agreement and the Court's rules, the Clerk of the Court will send e-mail notification of such filing to the attorneys of record.

I affirm under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct to the best of my knowledge.

SIGNED April 14, 2017, at Seattle, Washington.

s/ Leah Burrus
Leah Burrus

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