

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK; COMMERCIAL DIVISION**

CHEWY, INC. and CHEWY PHARMACY, LLC,

Plaintiffs,

v.

VETCOVE, INC., COVETRUS, INC. and DOES
1-100, inclusive,

Defendants.

Index No. 653326/2021
Commercial Part 54

Justice Jennifer G. Schechter

Motion Sequence No. 001

**MEMORANDUM OF LAW IN SUPPORT OF
COVETRUS, INC.'S MOTION TO DISMISS THE COMPLAINT**

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Defendant Covetrus, Inc. submits this Memorandum of Law in support of its Motion to Dismiss the Complaint under C.P.L.R. 3211(a)(1), (a)(7), (a)(8), and (a)(10) as to all causes of action that Plaintiffs Chewy, Inc. and Chewy Pharmacy, LLC have asserted against it.

PRELIMINARY STATEMENT

The relationship between veterinarians, pet owners, and patients is essential to the delivery of quality animal healthcare. Unlike human patients, pets cannot speak for themselves about health concerns. Veterinarians must examine the pets, learn about each animal's individual health needs, maintain appropriate records, be available for continuing treatment, and—through this ongoing relationship—provide informed and compassionate medical care. The critical importance of this relationship is why most states and the American Veterinary Medical Association insist that veterinary medical decisions be made in the context of a veterinarian-client-patient relationship.

For Plaintiff Chewy—which calls itself “the largest e-commerce pet pharmacy in the U.S.”¹—the vet-client-patient relationship is something else: an impediment to a sale. Through its website, Chewy sells hundreds of millions of dollars of

¹ Affirmation of Gregory Silbert, dated August 9, 2021 (“Silbert Aff.”), Ex. 11 (Caroline Jansen, *Chewy Reports Record Sales Over Black Friday, Cyber Week*, RETAIL DIVE (Dec. 9, 2020), <https://www.retaildive.com/news/chewy-reports-record-sales-over-black-friday-cyber-week/591891/>).

prescription medications and regulated pet foods each year. Chewy does not require its customers to consult a veterinarian or acquire a prescription before “ordering” prescription-only products. On the contrary, it tells would-be buyers: “It is not required to have a written prescription on hand when you place your order.”²

It would be unusual and concerning if a person visited an online pharmacy without speaking to a doctor and ordered herself, say, prescription antidepressant medication because she thought it would do her some good. But Chewy markets prescription pet antidepressant medications to customers who have no prescriptions, along with prescription medications for flea and tick infestations, digestive issues, and dozens of other health conditions.³ As Chewy acknowledges, it cannot legally sell these products without a prescription. But Chewy leads the customer through all the steps of an online sale, including taking the customer’s credit card information. Chewy then contacts the customer’s veterinarian—the doctor or practice with a pre-existing client-patient relationship—and solicits a prescription on the client’s behalf. Chewy also demands that veterinarians respond to these solicitations more or less immediately or else Chewy may tell the client the veterinarian is holding up the transaction, thus undermining the vets’ pre-existing client relationship.

² Silbert Aff. Ex. 12 (*Frequently Asked Questions*, CHEWY, <https://www.chewy.com/app/content/faq> (last visited Aug. 9, 2021) (cited at ¶ 1 n.2)).

³ Silbert Aff. Ex. 13 (*Chewy Pharmacy Pet Medications*, CHEWY, <https://www.chewy.com/b/pharmacy-2515> (last visited Aug. 9, 2021) (cited at ¶ 1 n.2)).

Not surprisingly, veterinarians sometimes communicate with their clients after receiving solicitations like this from Chewy. One thing they may wish to communicate, if they determine the requested medication is medically appropriate, is that clients can buy medications from the veterinarians' own clinics—often at better prices. Sales of medical products comprise a substantial portion of vet clinics' revenues and, for some, may be necessary to remain in business and continue providing quality healthcare. Purchasing from veterinary clinics is good for clients and their pets too because it increases communication between vets and clients. Communication ensures veterinarians will have accurate treatment records, gives clients more knowledge of medical options and issues, and results in better-informed and higher-quality care. A fully informed vet may determine, for example, that an over-the-counter medication would work just as well or better for a particular animal, or that the most appropriate prescription medication is not the one Chewy's website is promoting. Unlike veterinarians, Chewy does not provide animal care. Its goal is simply to sell as many prescription products as possible. By this lawsuit, Chewy attempts to prevent veterinarians from communicating with their own clients so the vets will be unable to compete with Chewy for sales.

Chewy claims that, when a client chooses to purchase from a veterinary clinic after a solicitation from Chewy, the "sale" to Chewy's "customer" has been diverted. But there was no sale in the first place. Chewy cannot sell prescription medications without a prescription. And Chewy's so-called "customers" in these "diversions" are the clinics' pre-existing clients, who, for good reason, may choose to purchase

medications at competitive prices from the veterinarians they know and trust. The glaring irony of this lawsuit is that Chewy claims to be defending “pet parents’ fundamental right to choose a pharmacy” when it is Chewy that is trying to deny them that very choice.

Chewy fails in all its efforts to allege causes of action based on this fictional “diversion” of “sales.” For starters, Chewy has not alleged that Covetrus, a non-domiciliary, has any contacts with New York, so Covetrus is not subject to personal jurisdiction. Chewy has also failed to join the indispensable parties who have the most to lose from this litigation—the veterinary clinics that, if Chewy prevails, would be precluded from competing with Chewy by selling medical products to their own clients and thereby deprived of substantial revenues. Beyond these threshold defects, the claims alleged in the complaint all fail as a matter of law. Tortious interference with business relations (Count One) requires independently tortious or malicious conduct, and Chewy does not allege any by Covetrus. The unfair competition claim (Count Two) is based on purportedly “confidential” information that obviously is not confidential—Chewy concededly provides that information to the veterinary clinics, and it concerns the clinics’ pre-existing clients. Unjust enrichment (Count Three), a quasi-contract claim, should be dismissed because Chewy has not alleged it has a close relationship with Covetrus or that it was acting for Covetrus’s benefit. Finally, Chewy is not entitled to an injunction (Count Four) because it has not alleged any substantive basis for relief.

The Court should dismiss the complaint against Covetrus in its entirety with prejudice.

STATEMENT OF FACTS⁴

A. Background

Defendant Covetrus, an animal-health company, provides products and services to veterinary practices that improve patient health and strengthen client relationships. ¶ 34.⁵ Among other benefits, Covetrus enables veterinary practices to offer prescription medications and regulated pet foods to their clients at competitive prices, with the convenience of online purchasing. ¶¶ 34, 51. Plaintiff Chewy is among the largest online retailers of pet products, including prescription medications, sold through its affiliated online pharmacy. ¶ 4. Unlike veterinary practices, Chewy does not have a veterinarian-client-patient relationship with pet owners and pets, and Chewy cannot prescribe medication or authorize the use of regulated pet food. ¶ 7. Chewy nonetheless offers to sell these regulated products to customers who have “no current prescription or authorization on file.” *Id.* Although

⁴ All facts in this motion are taken from Chewy’s complaint or the documents referenced therein and are accepted as true solely for purposes of this motion. *See Pullman Grp., LLC v. Prudential Ins. Co. of Am.*, 288 A.D.2d 2, 3 (1st Dep’t 2001) (affirming dismissal based on “the allegations of the complaint and the contents of the documents referenced therein”). All citations to “¶ _” refer to the complaint.

⁵ *See also* Silbert Aff. Ex. 14 (*Our Company*, COVETRUS, <https://ir.covetrus.com/about-us/our-corporate> (last visited June 15, 2021) (cited at ¶ 34 n.15)).

Chewy has sued Covetrus in New York, neither party is a New York domiciliary.⁶ ¶¶ 12, 15.

Prior to Chewy's emergence in the pet prescription market, pet owners primarily purchased pet medications and regulated pet food directly from their veterinarians, and suppliers like Covetrus filled those orders. *See* ¶¶ 2, 34-35. This allowed veterinarians to regularly examine pets in-person, make recommendations in real time for treatments based on pets' specific needs, and advise pet owners on how to appropriately administer treatments. Veterinarians are best positioned to provide this advice because of their close relationships with pets and pet owners and their expertise in animal physiology and pharmacology.

The rise of online retail giants like Chewy disrupted relationships between veterinarians, pet owners, and their pets. Customers without valid prescriptions now browse Chewy's website, where they encounter Chewy's marketing campaigns for prescription medications, and then order those products from Chewy online. *See* ¶¶ 7, 25-27. As the complaint explains, when Chewy "has no current prescription or authorization on file," Chewy sends the customer's veterinarian a Prescription or Authorization Form and demands that the veterinarian complete the form and return it to Chewy immediately. *See* ¶¶ 7, 26. This practice interferes with veterinarians' ability to examine pets and advise pet owners before the owners

⁶ Covetrus, Chewy, and Defendant Vetcove are all Delaware corporations; Covetrus's principal place of business is in Maine, and Chewy's is in Florida. ¶¶ 12, 15. Only Vetcove, an unaffiliated defendant, allegedly has its principal place of business in New York. ¶ 14.

order prescription medications, and undermines the relationship between vets and clients.

B. The Complaint's Bare-Bones Allegations Against Covetrus

The complaint has little to say about Covetrus. It primarily focuses on a separate, unaffiliated defendant: Vetcove, an e-commerce platform that allegedly offers practice management software to veterinary clinics and helps them manage prescription requests they receive from online pharmacies. ¶¶ 28, 30, 32. According to the complaint, Vetcove has engineered a purported “scheme” that enables pet owners to buy prescription medications and regulated pet food directly from their own veterinarians. ¶ 5. The “scheme” begins when a customer without a prescription on file orders prescription medication through Chewy’s website, and Chewy solicits a prescription from the customer’s veterinarian. ¶ 38. Vetcove then allegedly “intercept[s]” the request and sends the customer a text message offering the customer the option of ordering the product directly through the veterinarian at a discounted price. ¶¶ 38-42. Chewy points to only 890 instances in which customers have received these text messages. ¶ 53 n.20. If the customer clicks on the link in the text message, Vetcove’s software allegedly leads the customer through a series of web pages that allow the customer to compare prices and decide whether to buy the medication from the veterinarian or, alternatively, from Chewy. ¶¶ 44-50.

All that the complaint alleges about Covetrus is that it “steps in” to “fulfill the order” *after* the customer confirms *several times* that she would like to order directly from the veterinarian. ¶¶ 10, 51. “At this stage, Vetcove [allegedly] insert[s] Covetrus directly into the scheme,” when Covetrus purportedly sends the customer

an email on the veterinary practice's behalf containing a link that allows the customer to complete the transaction directly through the "practice's own online pharmacy." *Id.* The email also contains bold language clearly indicating that the customer can still receive the prescription from the "third-party pharmacy" (*i.e.*, Chewy). *Id.*; Silbert Aff. Ex. 6. Based solely on these allegations, Chewy brings claims against Covetrus for tortious interference with business relations, unfair competition, unjust enrichment, and a permanent injunction. ¶¶ 59-81.

ARGUMENT

In deciding a motion to dismiss, a court must accept well-pleaded factual allegations as true, but allegations "that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible ... are not entitled to such consideration." *Skillgames, LLC v. Brody*, 1 A.D.3d 247, 250 (1st Dep't 2003). All Chewy's claims suffer from incurable pleading deficiencies and are contradicted by the exhibits attached to the complaint. But the Court need not even reach whether the causes of action are adequately pleaded because, as a threshold matter, Chewy has failed to allege personal jurisdiction over Covetrus and failed to join necessary parties.

I. CHEWY HAS NOT ALLEGED PERSONAL JURISDICTION OVER COVETRUS

The complaint must be dismissed as against Covetrus under C.P.L.R. 3211(a)(8) because it does not allege personal jurisdiction. For Chewy, a non-domiciliary, to sue Covetrus, another non-domiciliary, in a New York court, Chewy must show that Covetrus has sufficient New York contacts to establish personal

jurisdiction under both New York’s long-arm statute, C.P.L.R. 302, and the Due Process Clause of the federal Constitution. The complaint fails both tests. It does not allege that Covetrus took *any* specific act at all in New York. Instead, it generically asserts, on information and belief, that Covetrus “aided and abetted” Vetcove “in New York” in some unspecified way—and leaves it at that. ¶ 15. That is not nearly enough to hale a foreign corporation into a New York court.

A. There Is No Jurisdiction Over Covetrus Under New York’s Long-Arm Statute

Both provisions of the New York long-arm statute that Chewy relies on for personal jurisdiction over Covetrus require conduct “*within the state*” of New York. C.P.L.R. 302(a)(1), (2) (emphasis added) (cited at ¶ 19).⁷ Chewy “bears the burden of showing jurisdiction upon a motion to dismiss pursuant to CPLR 3211(a)(8).” *Wang v. LSUC*, 137 A.D.3d 520, 521 (1st Dep’t 2016). But Chewy does not allege that Covetrus did anything in this state.

Only *Vetcove*—a separate, unaffiliated defendant—allegedly engaged in conduct within New York. According to Chewy, “Vetcove developed and runs” the so-called “Diversion Scheme” from “its New York offices.” ¶ 14. Chewy’s sole basis for asserting jurisdiction over *Covetrus* depends on holding Covetrus accountable for conduct allegedly undertaken by *Vetcove*. In other words, personal jurisdiction over Covetrus would exist *only* if Vetcove is Covetrus’s agent or co-conspirator, such

⁷ More specifically, section 301(a)(1) reaches a non-domiciliary that “transacts any business within the state,” and section 301(a)(2) reaches a non-domiciliary that “commits a tortious act within the state.”

that conduct by Vetcove could be attributed to Covetrus. And, of course, the attributable conduct must itself be sufficient to create long-arm jurisdiction over a non-domiciliary. Chewy cannot meet this burden because none of Vetcove's alleged conduct can be attributed to Covetrus.

“To be considered an agent for jurisdictional purposes, the local agent must have engaged in purposeful activities in the state in relation to a transaction for the benefit of and with the knowledge and consent of the defendant,” and the defendant must “exercise[] some control over the agent in the matter.” *Am./Int'l 1994 Venture v. Mau*, 146 A.D.3d 40, 54 (2d Dep't 2016) (alteration and citation omitted). “The critical factor is the degree of control the defendant principal exercises over the agent.” *Id.* (citation omitted). “To make a prima facie showing of control, a plaintiff's allegations must sufficiently detail the defendant's conduct so as to persuade a court that the defendant was a primary actor in the specific matter in question” *Coast to Coast Energy, Inc. v. Gasarch*, 149 A.D.3d 485, 487 (1st Dep't 2017) (alteration and citation omitted).

Chewy does not allege that Vetcove acted for *Covetrus's* benefit. On the contrary, the complaint clearly states that Vetcove acted to benefit *itself*. According to Chewy, “Vetcove developed and runs the Diversion Scheme” (¶ 14), the scheme uses “Vetcove's software” (¶ 27), and veterinarians “pay Vetcove for this Prescription Management System” (¶ 35). But even if Vetcove was acting for Covetrus's benefit, it still would not be Covetrus's agent because “the critical element of control is completely lacking.” *Am./Int'l*, 146 A.D.3d at 55. The complaint nowhere alleges

that Covetrus controlled Vetcove when Vetcove engaged in the alleged misconduct. Instead, Chewy just asserts—without providing any detail or specific facts—that Covetrus “aided and abetted” Vetcove, or was “complicit” in the purported scheme. ¶¶ 15, 36. “[V]ague, conclusory and unsubstantiated allegations do not suffice to establish long arm jurisdiction.” *Coast to Coast*, 149 A.D.3d at 487. Even more so here, because Chewy’s conclusory allegations are not on point. Chewy does not allege—even vaguely—that Covetrus controlled Vetcove as the “primary actor” in the purported scheme. Vetcove’s alleged conduct in New York therefore cannot establish personal jurisdiction over Covetrus. *See id.* at 486-88 (no long-arm jurisdiction where complaint does not allege control of agent); *Am./Int’l*, 146 A.D.3d at 54-56 (same); *OneBeacon Am. Ins. Co. v. Newmont Mining Corp.*, 82 A.D.3d 554, 555 (1st Dep’t 2011) (same).

For similar reasons, Chewy “does not meet the requirements for establishing conspiracy jurisdiction” over Covetrus. *Bluewaters Commc’ns Holdings, LLC v. Ecclestone*, 122 A.D.3d 426, 427 (1st Dep’t 2014). “To allege jurisdiction under a conspiracy theory, the plaintiff must establish (1) that the out-of-state co-conspirator had an awareness of the effects of his activity in New York, (2) that the New York co-conspirator’s activity was for the benefit of the out-of-state co-conspirator, and (3) that the New York co-conspirator acted at the behest of, on behalf of, or under the control of the out-of-state co-conspirator.” *Katherine Sales & Sourcing, Inc. v. Fiorella*, 2017 WL 4102303, at *3 (Sup. Ct., Suffolk Cnty. Sept. 8, 2017).

The complaint does not meet any of these requirements. Chewy does not allege that Covetrus's conduct even had any effect in New York—let alone that Covetrus knew of such effects. The only alleged New York connection to the entire case is that Vetcove, an unaffiliated defendant, is allegedly located here. ¶ 14. Likewise, as noted above, Chewy does not allege that Vetcove acted for Covetrus's benefit or that Vetcove's conduct within New York was subject to Covetrus's control or on Covetrus's behalf.

Lacking any substantive allegations of conspiracy, Chewy tries to compensate by sprinkling terms like “conspired” and “co-conspirator” throughout. ¶¶ 5, 10, 15, 17, 18. But “[t]he mere conclusory claim that an activity is a conspiracy does not make it so.” *Bluewaters*, 122 A.D.3d at 427 (citation omitted). And, “[a]bsent a valid conspiracy claim, no personal jurisdiction exists ... based on such a conspiracy.” *Mosaic Caribe, Ltd. v. AllSettled Group, Inc.*, 117 A.D.3d 421, 424 (1st Dep't 2014); *see also Wang*, 137 A.D.3d at 521 (no personal jurisdiction where complaint failed to allege conspiracy); *Tarsavage v. Citic Trust Co.*, 3 F. Supp. 3d 137, 147-48 (S.D.N.Y. 2014) (same).

B. The Due Process Clause Precludes the Assertion of Jurisdiction

“[E]ven if the elements of [the long-arm statute] have been met, asserting personal jurisdiction would not comport with due process.” *Deutsche Bank AG v. Vik*, 163 A.D.3d 414, 415 (1st Dep't 2018). “To comport with due process, there must also be proof that the out-of-state defendant has the requisite ‘minimum contacts’ with the forum state and that the prospect of defending a suit here comports with traditional notions of fair play and substantial justice. The ‘minimum contacts’

requirement is satisfied where a defendant's conduct and connection with the forum State are such that it should reasonably anticipate being haled into court there." *Id.* (alteration and citation omitted). And the lawsuit "must arise out of contacts that the defendant *himself* creates with the forum State." *Walden v. Fiore*, 571 U.S. 277, 284 (2014) (citation omitted). It cannot be based on "contacts between ... third parties[] and the forum State." *Id.*; *Williams v. Beemiller, Inc.*, 33 N.Y.3d 523, 529 (2019) (same).

Chewy has not alleged any conduct by or attributable to Covetrus in New York, such that Covetrus could reasonably expect to be sued here. According to Chewy, "Vetcove [first] insert[s] Covetrus directly into the scheme" only to send customers an email and allow them to buy medications from their veterinary practices. ¶ 51. None of that conduct allegedly occurs in New York. And, until that point, the alleged "scheme" is carried out solely by veterinarians using Vetcove's proprietary software, for which Vetcove (not Covetrus) allegedly receives payment from veterinarians. ¶¶ 8-9, 31, 42-50, 53-54. Because this lawsuit does not arise from alleged contacts between Covetrus (as opposed to third-parties) and New York, the assertion of personal jurisdiction over Covetrus would violate due process.

II. THE COMPLAINT FAILS TO NAME INDISPENSABLE PARTIES

The entire complaint must be dismissed for another independent reason: it omits necessary defendants. The real targets of this litigation are not Covetrus but the veterinary practices that compete with Chewy for sales of prescription medications. The judgment Chewy seeks would cause substantial financial harm to veterinarians and would impair their relationships with clients. Because veterinary

practices that contract with Vetcove or Covetrus are indispensable parties and Chewy has not included them in the litigation, the complaint must be dismissed. *See* C.P.L.R. 3211(a)(10).

A. Veterinary Practices Are Necessary Parties

“[P]harmacy sales on average make up about a third of a [veterinary] practice’s revenue,” and the vets find themselves in a “David and Goliath battle” against “online giants” like Chewy for those sales.⁸ Covetrus allows the practices to fight back, enabling them to “give[] clients online convenience, timely reminders and ... competitive prices.” *Id.*

Chewy wants that competition to stop. It aggressively markets pharmaceuticals to customers who do not have valid prescriptions. *See* ¶¶ 4, 7. After those customers attempt to buy medications from Chewy, Chewy solicits the missing prescriptions from veterinarians who have pre-existing relationships with the clients. *Id.* When given the option, many clients prefer to purchase from the veterinarians they know and trust rather than from Chewy—especially when they can make the purchases online, at competitive prices, with other benefits Chewy cannot provide. By this lawsuit, Chewy is attempting to stop veterinary practices from giving their clients that choice. If Chewy prevails, veterinary practices will be

⁸ *See* Silbert Aff. Ex. 15 (Manas Mishra & Tamara Mathias, *U.S. Pet Doctors Steel Themselves for Online Pharmacy Challenge*, REUTERS (June 12, 2019), <https://www.reuters.com/article/us-usa-healthcare-pets/u-s-pet-doctors-steel-themselves-for-online-pharmacychallenge-idUSKCN1TD151> (cited at ¶ 34 n.16)).

unable to compete effectively, and Chewy will capture even more of their revenues, potentially putting some out of business.

The impacted veterinary practices, who Chewy refers to as “Participating Vets” (¶ 33 n.13), are indispensable parties because they “might be inequitably affected by a judgment in the action.” C.P.L.R. 1001(a). “[T]he primary reason for compulsory joinder of parties is to avoid multiplicity of actions and to protect nonparties whose rights should not be jeopardized if they have a material interest in the subject matter.” *Calderone v. Wiemeier*, 77 A.D.3d 1232, 1233 (3d Dep’t 2010) (citation omitted). The “possibility that a judgment rendered without the omitted party could have an adverse practical effect on that party is enough to indicate joinder.” *27th St. Block Ass’n. v. Dormitory Auth. of State of N.Y.*, 302 A.D.2d 155, 160 (1st Dep’t 2002) (alteration and citation omitted). The “inequitably affected” test has a “flexible nature” and is not limited to only “vested rights or interests.” *Id.* at 160-61.

Participating Vets clearly would be inequitably affected if Chewy obtains the judgment it seeks. The “scheme” that Chewy attacks is a means by which Participating Vets compete with Chewy for sales to the vets’ pre-existing clients. Chewy is trying to stop Participating Vets from making those sales and bringing in revenues that some practices may need to stay afloat.

B. Chewy Must Sue Participating Vets or the Complaint Should Be Dismissed

When a plaintiff fails to include necessary parties, as Chewy has done here, the “court shall order [the parties] summoned” if they are “subject to the jurisdiction

of the court.” C.P.L.R. 1001(b). Covetrus believes non-domiciliary Participating Vets are *not* subject to personal jurisdiction in New York and therefore cannot be summoned (just as Covetrus itself cannot).⁹ But if Chewy’s broader view of personal jurisdiction were to prevail, such that the complaint sufficiently alleges jurisdiction over Covetrus, then it necessarily alleges jurisdiction over Participating Vets as well. Veterinary practices allegedly pay Vetcove to use its practice management software system. ¶ 34. A text message allegedly sent by that system to the veterinarian’s pre-existing client “purport[s] to be with or on behalf of the Participating Vet.” ¶ 40. The “Participating Vet is prominently referenced in bold text” on the web page linked to the text message. ¶ 44. The client is then shown the “Participating Vet’s purported price” for the product, which may be lower than Chewy’s. ¶ 47. And if the client chooses to “[b]uy direct from us” (*i.e.*, from the Participating Vet), “an email that appears to be coming from the veterinary clinic is sent,” which allows the client to fill the prescription through the “practice’s own online pharmacy.” ¶ 51. And it is the Participating Vet who must review Chewy’s solicitation and determine whether to write a prescription. So either Covetrus must be dismissed for lack of personal jurisdiction or Chewy must issue summonses to Participating Vets.

Alternatively, if the Court does not have jurisdiction over Participating Vets, it should dismiss the complaint without prejudice under C.P.L.R. 1003. Although

⁹ All the veterinary practices referenced in the documentary evidence attached to the complaint are located outside New York. *See* Silbert Aff. Exs. 2-10.

dismissal is discretionary when indispensable parties cannot be joined without their consent, it is the appropriate remedy here. C.P.L.R. 1001(b) identifies five factors to guide the Court's discretion in determining whether to dismiss actions for failure to include indispensable parties who are not subject to personal jurisdiction. Those factors address who will be most prejudiced if the action proceeds or is dismissed, and who is responsible for the prejudice.¹⁰ The Participating Vets have the most at stake in this litigation. Chewy aims to prevent them from competing for business that makes up a substantial share of their revenues, yet Chewy has denied them any voice in the proceedings. *See Hitchcock v. Boyack*, 256 A.D.2d 842, 844 (3d Dep't 1998) ("Inasmuch as other property owners not currently named in the action may be either beneficially or adversely affected by the outcome of litigation ..., we conclude that Supreme Court properly dismissed the supplemental complaint for failure to name all necessary parties.").

¹⁰ The C.P.L.R. 1001(b) factors are "(1) whether the plaintiff has another effective remedy in case the action is dismissed on account of the nonjoinder; (2) the prejudice which may accrue from the nonjoinder to the defendant or to the person not joined; (3) whether and by whom prejudice might have been avoided or may in the future be avoided; (4) the feasibility of a protective provision by order of the court or in the judgment; and (5) whether an effective judgment may be rendered in the absence of the person who is not joined."

III. THE COMPLAINT FAILS TO STATE A CLAIM AGAINST COVETRUS

Along with its other defects, the complaint fails to allege a viable cause of action against Covetrus, so it must be dismissed under C.P.L.R. 3211(a)(1) and (a)(7).¹¹

A. **Chewy Does Not Allege Any Basis to Attribute Vetcove's Conduct to Covetrus**

None of the claims alleged in the complaint are centered on *Covetrus's* alleged conduct—*i.e.*, sending an email to a customer after the customer decides to buy from the veterinary clinic instead of Chewy. ¶ 51. Rather, the complaint alleges almost exclusively conduct by Vetcove and associated Participating Vets. Chewy apparently attempts to hold Covetrus accountable for that conduct on the theory that Vetcove and Covetrus are part of a conspiracy. But the complaint does not allege any facts that purport to establish this supposed conspiracy. Instead, it rests on bare allegations of conspiracy, pleaded on information and belief and contained solely in the complaint's general description of the parties. ¶¶ 15, 17. That is not sufficient to hold one defendant liable for another defendant's conduct. *See Kovkov v. Law Firm of Dayrel Sewell, PLLC*, 182 A.D.3d 418, 419 (1st Dep't 2020) ("Bare, conclusory allegations of conspiracy are insufficient."); *Schwartz v. Soc'y of N.Y. Hosp.*, 199 A.D.2d 129, 130 (1st Dep't 1993) ("more than a conclusory allegation of

¹¹ The complaint does not specify which state's laws govern its claims against Covetrus. But because the complaint alleges that Vetcove developed and operated the Diversion Scheme out of its New York offices, Covetrus will apply New York law for purposes of this motion. *See, e.g., Schultz v. Boy Scouts of Am., Inc.*, 65 N.Y.2d 189 (1985) (discussing New York's choice-of-law analysis).

conspiracy ... is required”). And because Vetcove’s alleged conduct cannot make out liability against Covetrus, none of the claims against Covetrus ever gets out of the starting gate. In any event, as discussed below, all the claims would fail even if all the alleged conduct was by Covetrus itself.

B. Chewy Fails to State a Claim for Tortious Interference with Business Relations

The tort of interference with business relations applies to “situations where [a] third party would have entered into or extended a contractual relationship with plaintiff but for the intentional and wrongful acts of the defendant.” *WFB Telecomms., Inc. v. NYNEX Corp.*, 188 A.D.2d 257, 257 (1st Dep’t 1992). To state a cause of action for tortious interference under New York law, a plaintiff must allege that “the defendant interfered with the plaintiff’s business relationships” and “was motivated solely by malice or intended to inflict injury by unlawful means.” *Tri-Star Lighting Corp. v. Goldstein*, 151 A.D.3d 1102, 1106 (2d Dep’t 2017) (citations omitted); accord *Shared Commc’ns Servs. of ESR, Inc. v. Goldman Sachs & Co.*, 23 A.D.3d 162, 163 (1st Dep’t 2005). “[A]s a general rule, the defendant’s conduct must amount to a crime or an independent tort.” *Carvel Corp. v. Noonan*, 3 N.Y.3d 182, 190 (2004). Otherwise, the conduct is “insufficiently ‘culpable’ to create liability for interference with prospective contracts or other nonbinding economic relations.” *Id.*

Chewy does not allege that Covetrus has engaged in any culpable conduct. The so-called diversion of customers away from Chewy is allegedly carried out by Vetcove and the veterinarians, and customers confirm *multiple times* that they would like to order from their veterinarians *before* Covetrus takes any action. ¶¶ 37-

50, 63. Filling a prescription that a customer has already chosen to order directly through the veterinary practice cannot plausibly constitute conduct that is malicious, independently tortious, or illegal.

Chewy also alleges that Covetrus “question[s] the efficacy or authenticity” of Chewy’s products and states that “the prescription will be filled ‘locally’ when in fact it is filled hundreds of miles away.” ¶ 63. But these allegations are contradicted by the documentary evidence attached to the complaint. The email that Covetrus allegedly sends on the veterinarian’s behalf simply states that the veterinarian “cannot guarantee the efficacy or authenticity of products purchased from a third party pharmacy.” Silbert Aff. Ex. 6. That statement is self-evidently true—a veterinarian cannot make guarantees about other retailers’ products. The email also indicates that the prescription will be filled through “our practice’s own *online* pharmacy.” *Id.* (emphasis added). It gives no indication that the prescription will be filled “locally.” Similarly, Covetrus’s alleged failures “to disclose contractual relationships and financial benefits” in its emails to customers (¶ 63) are not malicious or unlawful. A business is not required to disclose all its contractual and financial arrangements whenever it contacts a prospective customer. *See Golub v. Tanenbaum-Harber Co.*, 88 A.D.3d 622, 622 (1st Dep’t 2011) (“an omission does not constitute fraud unless there is a fiduciary or ‘special’ relationship between the parties”).

Even if Covetrus could be held responsible for Vetcove’s conduct, Chewy’s conclusory allegations still would not be enough to establish tortious interference

with business relations. All Chewy alleges is that veterinarians are using Vetcove and Covetrus's services to compete for business in the pet prescription market by "steering" customers away from Chewy" and "diverting ... orders for Regulated Pet Products" to veterinary practices. ¶ 62. But "[a]ctions intended to solicit business, which are motivated by economic self-interest, cannot be characterized as malicious." *Tri-Star Lighting Corp.*, 151 A.D.3d at 1107 (no tortious interference where competitor "diverted sales from the plaintiff to itself and caused the plaintiff's customers to terminate their relationship with the plaintiff"); *Slice Bus. Mktg., Inc. v. Kipp*, 2020 WL 6047836, at *5 (Sup. Ct., N.Y. Cnty. Oct. 13, 2020) (no tortious interference where defendants "attempt[ed] to convert Plaintiff's customers to their own through the use of Plaintiff's illegally obtained confidential and proprietary information").

Finally, Chewy alleges that the defendants are "violat[ing] state laws" that protect customers' "right to choose" who fills their prescriptions, but Chewy never specifies which laws Covetrus is supposedly violating or how it is violating them. ¶ 64. This "vague and conclusory" allegation is insufficient to state a cause of action for tortious interference. *See Carlyle, LLC v. Quik Park 1633 Garage LLC*, 160 A.D.3d 476, 477 (1st Dep't 2018); *accord Steiner Sports Mktg., Inc. v. Weinreb*, 88 A.D.3d 482, 482-83 (1st Dep't 2011) (no tortious interference where allegations were "conclusory and unsupported by specific facts"). Moreover, there is no allegation that Vetcove (let alone Covetrus) is preventing customers from ordering prescription products from pharmacies of their choosing—the complaint suggests that Vetcove's

software is giving customers *more choice*, not less. *See* ¶¶ 42-50. And there is nothing “unlawful,” “deceptive,” or “unprofessional” in the email cited in the complaint. *See* ¶ 64. The email clearly states—in bold text—that the customer can “still ... proceed with [the] original request from a third-party pharmacy” (*i.e.*, Chewy) if the customer so chooses. Silbert Aff. Ex. 6.

For all these reasons, Chewy has failed to state a claim against Covetrus for tortious interference with business relations.

C. Chewy Fails to State a Claim for Unfair Competition

The “essence” of an unfair competition claim “is not just that the defendant has reap[ed] where it has not sown, but that it has done so in an unethical way and thereby unfairly neutralized a commercial advantage that the plaintiff achieved through honest labor.” *E.J. Brooks Co. v. Cambridge Sec. Seals*, 31 N.Y.3d 441, 449 (2018) (citation omitted). To state an unfair competition claim, “a plaintiff must allege that a defendant misappropriated plaintiff’s labor, skills, expenditures or good will, and displayed some element of bad faith in doing so.” *Schroeder v. Pinterest Inc.*, 133 A.D.3d 12, 30 (1st Dep’t 2015). “A plaintiff must also sufficiently identify the innovations or developments allegedly misappropriated to allow the reader to understand what specifically was misappropriated and to evaluate [the] plaintiff’s property rights in it.” *Ferring B.V. v. Allergan, Inc.*, 4 F. Supp. 3d 612, 629-30 (S.D.N.Y. 2014) (citation omitted) (interpreting New York law).

Chewy does not allege facts demonstrating that Covetrus misappropriated Chewy’s labors, skills, expenditures, or goodwill, let alone displayed bad faith in doing so. First, there is no allegation that Covetrus has misappropriated anything

owing to Chewy. Covetrus allegedly “steps in” just to “fulfill the order” a customer has already decided to place directly through the veterinary practice. ¶¶ 10, 51.

Second, the complaint does not identify any specific innovations or trade secrets that Covetrus could have misappropriated. Instead, Chewy vaguely claims that “Defendants have used Chewy’s confidential and proprietary information, including ... information concerning Chewy’s customers,” to divert business away from Chewy. ¶ 71. Chewy also alleges that “*Vetcove* has access to certain confidential data concerning Chewy’s customers,” but never alleges that *Covetrus* accesses any supposedly confidential information or uses it in any way. ¶ 39 (emphasis added). These allegations fail to identify what information was purportedly misappropriated or specify how Covetrus has misappropriated it.

Krinos Foods, Inc. v. Vintage Food Corp., 30 A.D.3d 332, 333-34 (1st Dep’t 2006) (no unfair competition where “plaintiff conclusorily allege[d]” bad faith conduct); *NBTY, Inc. v. Vigilante*, 2015 WL 7694865, at *4 (Sup. Ct., Suffolk Cnty. Nov. 24, 2015) (similar); *Aetna Cas. & Sur. Co. v. Merchants Mut. Ins.*, 84 A.D.2d 736, 736 (1st Dep’t 1981) (dismissing claims “pleaded against all defendants collectively without any specification as to the precise tortious conduct charged to a particular defendant”). “Vague statements that fail to articulate specific acts of misappropriation do not satisfy the pleading standards, and conclusory statements cannot substitute for minimally sufficient factual allegations.” *NBTY*, 2015 WL 7694865, at *5 (citation omitted); *see also Ferring*, 4 F. Supp. 3d at 629-30.

Third, Chewy's vague allegations that Covetrus's activities have been "confus[ed] with" or "mistaken for" Chewy's activities (¶ 74) fail to state a claim for unfair competition because Chewy never explains how customers are purportedly "confused" or what *Covetrus* does to cause the alleged confusion. *See Bubble Genius LLC v. Smith*, 239 F. Supp. 3d 586, 602 (E.D.N.Y. 2017) (dismissing unfair competition claims brought under New York law where plaintiff alleged "in a conclusory manner that defendant acted ... with the intent to cause confusion"); *Allied Interstate LLC v. Kimmel & Silverman P.C.*, 2013 WL 4245987, at *6 (S.D.N.Y. Aug. 12, 2013) (dismissing unfair competition claims based on "generalized, conclusory assertions that Defendants' conduct ... is likely to confuse consumers"). Further, the documentary evidence attached to the complaint disproves the allegation that Covetrus's activities cause confusion. ¶ 74. The email that Covetrus allegedly sends to customers clearly displays the veterinary practice's name and logo at the top, shows Covetrus's logo at the bottom, and indicates that the order will be processed through the "practice's own online pharmacy." Silbert Aff. Ex. 6. Thus, it is apparent from its four corners that the email is sent on behalf of the veterinary practice and its affiliated pharmacy, and not Chewy. And, on its face, the email gives no indication that the senders are affiliated with Chewy, or that the "online pharmacy" at issue is somehow "local." *Id.* None of the complaint's conclusory allegations plausibly allege that customers are confused by these communications.

Finally, the complaint does not contain any facts showing that Covetrus (or Vetcove, for that matter) has “used Chewy’s confidential and proprietary information.” ¶ 71. For one, there is no reason to believe that Vetcove or Covetrus need to access Chewy’s customer information to contact the veterinarians’ clients—the vets can provide that information to Vetcove and Covetrus themselves. The complaint also does not indicate how customer information that Chewy has *disclosed to veterinary practices* is confidential or proprietary. Chewy acknowledges that it provides the “data concerning Chewy’s customers” to the veterinary practices “for the purpose of approving the fulfillment by Chewy of Regulated Pet Products.” ¶ 39. “A customer list is not protectable as a trade secret ... unless it is sufficiently valuable and *secret* to afford an economic advantage to a person who has access to the list.” Restatement (Third) of Unfair Competition § 42 cmt. f (1995) (emphasis added); *see also Leo Silfen, Inc. v. Cream*, 29 N.Y.2d 387, 393 (1972) (explaining that “trade secret protection will not attach” if “the customers are readily ascertainable”). Once Chewy provides customer information to the veterinary practices, that information is no longer “secret” and thus cannot be considered confidential or proprietary. That is especially true here because the information concerns the vet’s own client and Chewy provides the information to solicit a prescription only the vet can provide.

Because Chewy has not alleged that Covetrus wrongfully misappropriated Chewy’s labors, skills, expenditures, or goodwill, Chewy’s unfair competition claim against Covetrus should be dismissed.

D. Chewy Fails to State a Claim for Unjust Enrichment

“An unjust enrichment claim is rooted in the equitable principle that a person shall not be allowed to enrich himself unjustly at the expense of another.” *Georgia Malone & Co. v. Rieder*, 19 N.Y.3d 511, 516 (2012) (citation omitted). Because “[t]he theory of unjust enrichment lies as a quasi-contract claim,” “a plaintiff cannot succeed” on such a claim “unless it has a sufficiently close relationship with the other party.” *Id.* (citation omitted). “[W]hile a plaintiff need not be in privity with the defendant to state a claim for unjust enrichment, there must exist a relationship or connection between the parties that is not too attenuated” and that “could have caused reliance or inducement.” *Id.* at 517 (citation omitted).

“Here, the complaint contains no facts showing that [Chewy] had any relationship or connection to [Covetrus or Vetcove], let alone the sufficiently close relationship necessary to sustain this claim.” *Schroeder*, 133 A.D.3d at 27 (citation omitted); *see also Miller v. Walters*, 997 N.Y.S.2d 237, 245 (Sup. Ct., N.Y. Cnty. 2014) (no unjust enrichment where plaintiffs had “no direct relationship with Defendants” and “the parties [were] instead ‘business competitors’”). Chewy does not allege that it has any contact with Covetrus regarding the sale of prescription medications or regulated pet food. *See* ¶¶ 10, 51. In fact, Chewy and Covetrus have “no dealings with each other” whatsoever. *Georgia Malone*, 19 N.Y.3d at 518. Nor does Chewy allege any close relationship with Vetcove, so even if Vetcove’s conduct could somehow be attributed to Covetrus, that would not establish the “close relationship” required for an unfair competition claim. The complaint alleges only a relationship between Chewy and the customer who places the order through

Chewy's website, and it alleges a *separate relationship* between the customer and Covetrus after the customer decides to place the order directly through the veterinary practice. ¶¶ 38, 51. That "separate relationship" between the customer and Covetrus is "too attenuated and insufficient to have caused reliance or inducement" by Chewy. *Schroeder*, 133 A.D.3d at 27 (citation omitted). Thus, Chewy has failed to state a claim for unjust enrichment.

In addition, Chewy has not alleged that it took any actions for the purpose of benefiting Covetrus or Vetcove. A claim for unjust enrichment must "plead[] and prove[] that *the benefit conferring services were performed for the defendant*, thereby resulting in defendant's unjust enrichment." *Miller*, 997 N.Y.S.2d at 245 (citation omitted) (emphasis in original); accord *Kagan v. K-Tel Entm't, Inc.*, 172 A.D.2d 375, 376 (1st Dep't 1991). "It is not enough that the defendant received a benefit from the activities of the plaintiff; if services were performed at the behest of someone other than the defendant, the plaintiff must look to that person for recovery." *Kagan*, 172 A.D.2d at 376 (citation omitted). Because the complaint alleges only that Chewy performs services at the behest of customers, and does not perform any services in order to benefit Covetrus, the unjust enrichment claim fails on this basis as well.

E. A Permanent Injunction Is Not an Independent Cause of Action

Chewy's final cause of action seeks a permanent injunction, including against Covetrus. ¶ 87. But "[a]n injunction is a remedy, a form of relief that may be granted against a defendant when its proponent establishes the merits of its substantive cause of action against that defendant." *Weinreb v. 37 Apartments Corp.*, 97 A.D.3d

54, 59 (1st Dep't 2012). "Although it is permissible to plead a cause of action for a permanent injunction, ... permanent injunctive relief is, at its core, a remedy that is dependent on the merits of the substantive claims asserted." *Id.* (citation omitted); accord *Talking Cap. LLC v. Omanoff*, 169 A.D.3d 423, 424 (1st Dep't 2019) (explaining that a permanent injunction "is a remedy for an underlying wrong, not a cause of action"). Chewy's request for a permanent injunction "cannot stand" when all of "the substantive causes of action underlying the claims for injunctive relief have been dismissed." *Schindler v. Rothfeld*, 153 A.D.3d 436, 437 (1st Dep't 2017).

CONCLUSION

For the foregoing reasons, this Court should dismiss the complaint against Covetrus in its entirety with prejudice.

Dated: August 9, 2021
New York, New York

Respectfully submitted,

By: /s/ Diane P. Sullivan
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